ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-84

December 6, 2017

UNIVERSITY OF CALGARY

Case File Number F4833

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to her former employer, the University of Calgary, for information about herself during a specified time period. The matter proceeded to inquiry and during the course of the inquiry the previous adjudicator issued a Notice to Produce with respect to records over which solicitor-client privilege had been asserted. The University's application for judicial review of this order for production was ultimately resolved by the Supreme Court of Canada, which determined the Commissioner and her delegated adjudicator do not have power to compel records for which solicitor-client privilege had been claimed.

The matter was delegated to a new adjudicator for a final decision. In interim decision F2017-D-01, the new adjudicator addressed the University's position that the Supreme Court had already made a final decision as to whether the records were subject to solicitor-client privilege. She held that the Supreme Court of Canada had not already made a final decision about this, and that she was required to make it. She also held that she was bound by the comments of the Supreme Court to find that the University had presented sufficient evidence, relative to records over which privilege had been claimed but respecting which the Applicant had not made arguments or evidence contradicting the claim of privilege, that the records are subject to solicitor-client privilege.

However, the Applicant had raised arguments and pointed to evidence contradicting the claim with respect to communications between the University and its in-house counsel, if

any existed, that took place before litigation had been anticipated. (These arguments and evidence had not been brought to the attention of the Supreme Court.) For these records, if any, the adjudicator asked the University to provide further information to establish that they consisted of legal advice.

As the University did not provide any further information, the adjudicator held that she could not make a finding on a balance of probabilities that any such records were subject to solicitor-client privilege. She ordered the University to disclose such records, if any existed, to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27(1)(a), 65, 69, 71, 72(1).

Orders Cited: AB: Order F2013-13; Decision F2017-D-01 **BC:** 2013 BCIPC 38; 2014 BCIPC 58; 2016 BCIPC 42.

Court Cases Cited: *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *Dorchak v. Krupka* 1997 ABCA 89; *University of Calgary v JR*, 2015 ABCA 118; *NOV Enerflow ULC (NOV Pressure Pumping ULC) v Enerflow Industries Inc***,** 2017 ABQB 334.

I. BACKGROUND

[para 1] The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act) to her former employer, the University of Calgary, for information about herself created during a specified time period. The University located records but withheld some of them in reliance on a number of exceptions to disclosure in the Act, including (for approximately 100 pages) on section 27(1)(a) (records subject to legal privilege). When the matter proceeded to inquiry, the adjudicator formerly hearing this matter decided he was unable to determine whether these records were covered by solicitor-client privilege without reviewing them, and he issued a Notice to Produce Records to the University.

[para 2] The University brought an application for judicial review of the previous adjudicator's decision to issue this Notice, on the basis the FOIP Act does not confer power on the Commissioner or delegated adjudicators to compel records over which solicitor-client privilege has been claimed. The issue was ultimately resolved by the Supreme Court of Canada, which held, in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, that the legislation was not sufficiently specific to give the Commissioner (and delegated adjudicators) the power to compel such records.

[para 3] As the inquiry in this matter had not been completed, the Commissioner delegated her powers to decide the issue in the inquiry to me.

[para 4] In an earlier stage of this proceeding I issued decision F2017-D-01, in which I addressed the position of the University of Calgary that the question of whether records had been properly withheld from an applicant in reliance on section 27(1)(a) had already been decided by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary* 2016 SCC 53. I held that the Supreme Court had not already made a decision about whether privilege had been properly claimed over all the records at issue, and that this was a decision I was still required to make.

[para 5] However, I noted in decision F2017-D-01 that the Supreme Court had expressed its view in *Alberta (Information and Privacy Commissioner) v. University of Calgary* that even had the previous adjudicator had the power to compel records, given the materials the University had provided to him, and in the absence of evidence or argument to contradict the claim of privilege, he should not have required production of the records. I regarded this statement as an expression of the Court's view that in these circumstances the records should be found to be subject to solicitor-client privilege. Accordingly, as the Applicant had presented no evidence or argument to contradict the claim of privilege for records consisting of communications between counsel (both in-house and external) and the University which related to a lawsuit or anticipated lawsuit that had been brought against the University by the Applicant, I concluded, in accordance with the Supreme Court's comments, that records meeting this description must be found to be privileged.

[para 6] However, as the Applicant had argued in her submissions before the former adjudicator as well as before me, there may have been communications between the University and its in-house counsel that were made before the Applicant's lawsuit had been anticipated, and could have related to matters involving policy or other aspects of the University's business rather than legal advice. (It had not been drawn to the Supreme Court's attention that the Applicant had made such an argument to the former adjudicator. The University's factum stated that the Applicant had "provided no evidence or submissions to the delegate that cast any doubt on the veracity of the University's assertion of privilege"; possibly it was this statement that led the Court to believe that no arguments to contradict the claim of privilege had been made.)[1] It was thus possible there were records among those withheld as privileged, respecting which evidence and arguments had been presented by the Applicant to contradict the privilege claim. I concluded that the Supreme Court's comments described in the preceding paragraph would not apply to any such records.

[para 7] Therefore, with respect to any communications between the University and its in-house counsel that had been made before the lawsuit had been anticipated, I provided the University with a further opportunity to provide information, including information in

[1] The Commissioner did not address the University's contention in its rebuttal by pointing out the submission the Applicant had made to the adjudicator; it was not open to the Commissioner to enter evidence at that stage.

relation to the considerations the Supreme Court of Canada had set out for records involving in-house counsel in *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 SCR 809.

[para 8] The University did not apply for judicial review of my decision that I was still required to make a decision as to whether the withheld records were privileged. Rather, it provided me with another submission arguing again that the decision had already been made, that I may not make it, and that it would be an abuse of process for me to make it.

II. ISSUE

[para 9] As noted above, I concluded in decision F2017-D-01 that the Supreme Court's comments require me to be satisfied from the University's materials that withheld records consisting of communications, *other than* where in-house counsel was involved in matters predating and not related to the lawsuit, were for the purpose of providing or receiving legal advice. Accordingly, I so find with respect to all such records.

[para 10] The remaining issue in this inquiry is:

> **Did the University properly apply section 27(1)(a) to records it withheld, if any, consisting of communications between the University and its in-house counsel concerning the Applicant that predated the anticipation of the lawsuit?**

[para 11] I have also noted that in its letter to me of September 21, 2017, the University presented a new argument that I cannot decide the foregoing question because the Supreme Court of Canada has said that "the claim for production is moot at this time", and the Court of Appeal also made findings about mootness. I will address these submissions before concluding this order.

III. DISCUSSION OF ISSUES

[para 12] The University has not told me whether any records among those that were withheld under section 27(1)(a) consist of communications between the internal legal counsel and the University that predate anticipation of the lawsuit. If they do, I believe they are covered by the Supreme Court's comments in *Pritchard v. Ontario (Human Rights Commission)*. In that case, the Court recognized that when the question arises of whether solicitor-client privilege covers advice sought from or given by an in-house or government lawyer, it is necessary to consider whether the advice being given was legal advice or some other kind of advice, and this question may need to be informed by evidence regarding the circumstances and subject matter of the advice. This is because in-house lawyers may be called upon to give policy or business advice, which is not legal advice. The Court said:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the

> privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

[para 13] The *Solosky* test for solicitor-client privilege requires that the following criteria be met to establish claims of solicitor-client privilege: the document consists of

(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.[2]

The Applicant's submissions about the claim of privilege

[para 14] The Applicant has pointed to some evidence that the nature of the University's legal counsel's advice relative to her may not all have involved legal issues. As set out in decision F2017-D-01, in her rebuttal submission to the previous adjudicator of August 16, 2010, which he received before ordering the production of the records, the Applicant had said:

> With respect to the exceptions made under Section 27, it is important to note that these records all pertain to the year prior to the launch of the lawsuit. [The dates for the requested information specified in the Access Request were from August 1, 2007 to the date of the request, October 20, 2008.] The suit was not contemplated until October of 2008, and the final decision made shortly after the launch of the FOIP request. The University cannot withhold documents on the basis that "privilege" applies because they anticipated a lawsuit, since none was contemplated when the document was written.

[para 15] The affidavit the University submitted to the Court of Queen's Bench during the first stage of the judicial review proceedings[3] indicated that the University anticipated the lawsuit in August (rather than in October). This still leaves 12-months of the 14-month period of access request before the University anticipated the lawsuit.

[para 16] In the Applicant's submissions at this present stage of the inquiry (dated March 15, 2017), she also states her belief that the University's in-house legal counsel performed many functions besides providing legal advice, and suggests this could have been this counsel's role with respect to some of the requested documents with which the counsel was involved.[4]

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[2] *Solosky v. The Queen*, [1980] 1 S.C.R. 821

[3] The University referred me to this affidavit in its submission of March 15, 2017, which it made for the stage of the inquiry culminating in decision F2017-D-01.

[4] These submissions, which were quoted at page 16 of decision F2017-D-01, are as follow:

> The University of Calgary's in-house counsel wears several hats - as is probably the case with many public institutions covered by FOIP. In this instance, the University's lawyer was involved in functionary policy and procedures that went beyond the scope of the definition of counsel activities: she was sporadically cc'd on regular correspondence; she was a voting member of the Joint Oversight Board of the Qatar project on behalf of the University; she was providing oversight to the FOIP Officer at the University throughout this process; she was also acting as the named "head" of the University through the FOIP process (she held this role until the Provost sent

[para 17] In view of these submissions, in decision F2017-D-01, I asked the University to confirm, if such was the case, that *all* of the communications contained in the withheld records that took place *between the University and its in-house counsel* consisted of legal advice rather than merely policy advice. I had explained in decision F2017-D-01, at para 67 and the accompanying footnote, that none of the University's submissions to the previous adjudicator makes a direct assertion that every record being withheld actually involved the seeking or giving of legal advice (whether in relation to the lawsuit, to other legal disputes commenced by the Applicant, or to employment issues concerning her). I also noted in my decision that for advice, if any, which pre-dated the anticipation of the lawsuit, some information suggesting the circumstances called for legal advice in contrast to policy advice or other kinds of advice would also be helpful, to the extent such information could be given without revealing the advice.

The University's response to my request for more evidence

[para 18] The University did not provide any additional evidence. Nor did it suggest there were no records falling into the category about which I had asked for more evidence. The key points of its submission are summarized in the following comments at page 5 of its response to my request for further evidence of September 21, 2017:

> 5. Abuse of Process
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> In light of the O.I.P.C.'s defeat at the Alberta Court of Appeal and the Supreme Court of Canada, it is remarkable that you require further verification. In effect, you are saying: *"the evidence may have been sufficient for the Supreme Court of Canada to establish solicitor-client privilege, but not for me..."*
>
> It is an abuse of process to continue with this inquiry. The Supreme Court of Canada has reviewed this matter and has concluded that the Privacy Commissioner's request to review the records was unreasonable. The matter is *res judicata* and you are *functus officio.* The inquiry is also moot. [The Applicant] failed to provide any evidence to refute the University's evidence with respect to its claim of solicitor client privilege and is raising concerns after the Supreme Court has ruled on this point. [The Applicant] does so on the basis of speculation and conjecture.

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a letter stating that he was "head" of the University - which wasn't factually true); as well as providing ongoing perfunctory policy advice for the University and its staff on a myriad of issues.

Not all of these activities are covered by solicitor/client privilege. Given her involvement in my personal issues, and given her role on the Board of Directors in Qatar, and given the sequence of events, there should have been a significant body of documents returned through the FOIP process that would show her listed her as a recipient or a contributor. There wasn't. Additionally, it seems odd that *none* of the 100+ pages of documents being withheld were the product of the University's counsel wearing one of her 'other hats'.

The appropriate process for deciding the question

[para 19] The only substantive issue that remains in the present part of this inquiry is whether withheld records, if any exist, that consist of communications between the University and its in-house counsel that do not involve external counsel, and that took place during the approximately 12-month period of the access request (August 1, 2007 to August 2008) [5] before the Applicant's lawsuit was anticipated by the University in August 2008, are covered by solicitor-client privilege.

[para 20] The University is advocating for a process in this case that decides this question on the merits without taking into account the evidence and arguments of one of the parties. I do not believe the courts would endorse such a process. Judicial review was brought to decide the interim matter of *how* the decision about the merits of the University's claim of privilege was to be made – that is, whether the records themselves could be compelled as evidence in this inquiry. I do not believe the Court would wish to be taken as directing the merits be decided a particular way for records relative to which there was contradictory evidence and submissions of which it was not aware.

[para 21] I believe that the parallel that the Supreme Court drew between civil litigation and the FOIP process recognizes that in each of these situations the party seeking the records must be given an opportunity to make submissions about them. In civil litigation, the Rules of Court create the standard which permits the court to accept that records are privileged in situations in which there is no contradictory evidence. However, where there is evidence reasonably contradicting the claim, I understand that then, notwithstanding that the claim meets the requirements of the Rule, the Court will review it (whether by looking at the records, or by considering other forms of evidence that are provided about them).

[para 22] Likewise in the FOIP context, if there is evidence that reasonably contradicts the claim of privilege, the Commissioner must consider it. I believe this was the reason why the majority of the Court emphasized that "[n]o evidence or argument was made to suggest that solicitor client privilege had been falsely claimed by the University" in its judgment.[6]

[para 23] Justice Cromwell's reference to the words of Justice Binnie in the *Blood Tribe* case where the latter noted that "[e]ven courts will decline to review solicitor-client documents to adjudicate the existence of privilege *unless evidence or argument*

[5] The entire period of the access request was August 1, 2007 to October 31, 2008.

[6] It has now been made clear that the Commissioner is restricted to considering the evidence the parties provide. However, because the FOIP Act places a statutory burden on the public body to show the privilege is properly claimed, the issue for the Commissioner is whether or not the burden has been met, taking into account the submissions and evidence of the public body and any contradictory submissions and evidence of the access requestor.

establishes the necessity of doing so to fairly decide the issue" reflects that he also would see it necessary to take contradictory evidence into account.[7]

[para 24] (As well, Justice Cromwell's views regarding whether the University's submissions met the requirements of the *Solosky* test make it clear that he was referring only to the communications between in-house counsel and the external counsel that had been retained to deal with the Applicant's lawsuit, rather than to any communications between the in-house counsel and the University that may have taken place before the lawsuit was anticipated.[8])

[para 25] I do not believe the Supreme Court should be taken as saying that unlike the Court in the civil litigation context, which would consider all the evidence respecting privilege that is placed before it, the Commissioner must take as conclusive the submissions and evidence regarding the privilege claim of only one side, just because the Rule of Court has been met. This would create a far more one-sided process for the Commissioner than that which obtains in the Court system.

[para 26] Indeed, the legislated process that is set out under the FOIP Act for the Commissioner to follow in determining the application of exceptions to access, including the exception for privileged records, takes into account the need to hear from both sides. This process is as follows: Section 27(1) creates the exception for privileged records that a public body may apply, and section 65(1) permits the person making the request to ask the Commissioner to review the public body's decision (its application of an exception). Section 71 places the burden on the party that is withholding the records on the basis of a claimed exception (the public body) to satisfy the Commissioner that the exception applies.[9] Section 69(3) of the Act requires that the person making the access request be

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[7] Justice Abella's judgment does not mention this point, but in expressing her view that the University of Calgary had provided sufficient justification for solicitor-client privilege, she indicated her agreement with Justices Coté and Cromwell, and I presume she would equally agree that contrary arguments and evidence presented by the party seeking access to the records need to be considered before deciding whether they are privileged.

[8] Justice Cromwell said: "… the evidence filed with the Commissioner met the three-part test set out in *Solosky v. The Queen,* [1980] 1 S.C.R. 821. The evidence – in particular the letter by the University's external legal counsel – clearly asserts that the documents are communications between solicitor (the University's external legal counsel) and client (the University's General Counsel, on behalf of the University)".

[9] The standard of proof is proof on a balance of probabilities. This standard of proof for showing records are subject to the exception associated with solicitor-client privilege in particular has not been thoroughly discussed in earlier decisions of this office. (Order F2013-13 (paras 189, 193) assumes that "balance of probabilities" is the appropriate standard, but does not discuss the basis of that assumption.) However, the standard for proving privilege on a balance of probabilities, including solicitor-client privilege, in the access to information context has been canvassed in a number of orders of the Office of the Information and Privacy Commissioner of British Columbia: 2014 BCIPC 58; 2013 BCIPC 38, 2016 BCIPC 42. "Balance of probabilities" is also

given an opportunity to also make submissions. Section 69(1) requires the Commissioner to make the final decision as part of her power to review the actions of a public body and to make all related decisions of fact and law, and section 72 grants her power to order the public body to either withhold the records at issue or disclose them. By commenting as to the decision the previous adjudicator ought to have made, the Supreme Court of Canada acknowledged that the Commissioner and her delegates are the appropriate decision-makers for determining the application of the exception to disclosure for records over which solicitor-client privilege has been claimed.

[para 27] In view of the foregoing discussion, while I cannot presume to say what the Court would have made of the Applicant's points, I am confident that had the Court been aware that such contradictory arguments had in fact been presented and evidence identified, it would have considered them and would have decided what bearing they ought to have, before making its comments about what the previous adjudicator should have decided. However, the Court made it clear that it was under the impression there were no such submissions and no such evidence – as already noted, possibly on the basis of the University's statement in its factum that the Applicant had "provided no evidence or submissions to the delegate that cast any doubt on the veracity of the University's assertion of privilege".

The University's assertion that the Applicant did not present arguments or evidence to cast doubt on the claim

[para 28] In saying this, I note that the University states again in its most recent submission (its letter of September 21, 2017), as it had stated earlier to the Supreme Court, that the Applicant did not present evidence or arguments contradicting or refuting the claim of privilege.

[para 29] In decision F2017-D-01, I set out the submissions of the Applicant about the time period of her request relative to the timing of her lawsuit[10]. I explained why I thought these submissions, when taken together with other evidence that had been presented to the Adjudicator about University matters in which the Applicant had been involved that may have called for advice from in-house counsel that was not legal advice, raised the reasonable possibility that there were communications between the in-house counsel and the University that pre-dated the University's anticipation of the lawsuit.[11] I

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the appropriate standard in the litigation context. See, for example, *NOV Enerflow ULC (NOV Pressure Pumping ULC) v Enerflow Industries Inc***,** 2017 ABQB 334 at para 21.

[10] This submission is quoted above at para 14.

[11] At paras 31 and 32 of decision F2017-D-01 I said:

> As well, evidence submitted in earlier stages of this inquiry reveals that prior to the time the lawsuit was instigated or anticipated, the Applicant had been involved together with other employees in expressing her concerns about working conditions on the campus. [This evidence was in the Applicant's statement of claim in the lawsuit, which the University appended to its submission to the previous adjudicator.] Again, this raises the possibility that advice was given by in-house counsel about matters involving the Applicant which at the time were unconnected to her

said that I thought this fact triggered the issue of the role of in-house counsel discussed in the *Pritchard* case, and the question of whether advice given during the earlier period may have been policy or other advice rather than legal advice.

[para 30] The University may not regard the Applicant's submissions, or this point of view, as having merit. I disagree for the reasons just given, but whether they have merit or not, her submissions did consist of an argument contradicting the claim of privilege, and pointed to evidence in support of this argument (regarding the entire time period of her request relative to the timing of the lawsuit). As well, the Applicant's more recent submissions point out her belief that the University's in-house counsel had a variety of roles.

[para 31] The University reached its own conclusions about the merits of the Applicant's submissions and evidence, and, as noted, it informed the Supreme Court that the Applicant had provided no evidence or submissions to the previous adjudicator that "cast any doubt on the veracity of the University's assertion of privilege". It did this despite the fact that it had itself seen fit to respond to the Applicant's point about the timing of her lawsuit, when its external counsel submitted to the previous adjudicator, in reply to her point about timing, that "solicitor-client communication in anticipation of litigation is equally protected under the common law", and commented that privilege does not commence only after the lawsuit had been filed, because a suit can be anticipated before the claim is filed.[12] (As noted in decision F2017-D-01, however, this response to the Applicant's points about timing is not a complete answer to her suggestion that some of the records over which privilege is claimed may have related to matters other than the lawsuit. This is because her request also covered a period of 12

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lawsuit (which was for constructive dismissal and damages for alleged emotional injury from the way her employment issues had been dealt with). Given the potentially multi-faceted role of in-house counsel, it is conceivable some of the advice may have involved policy considerations or advice about non-legal questions relating to the University's affairs as they involved the Applicant and others, rather than legal ones.

Thus, the Applicant's point which focuses on the time-frame of her request, when taken together with

- the statement in the [Access and Privacy Coordinator's] affidavit about advice being given to various University officials by its internal counsel, and
- other evidence that was provided to the adjudicator about University matters in which the Applicant was involved that may not have related to the lawsuit

raises the reasonable possibility that some of the advice that was given by in-house counsel in relation to the Applicant and her concerns may have been about matters arising at an earlier stage, and concerning different subject matters, than the subject matter of the lawsuit, and may not all have been legal advice.

[12] Letter from McCarthy Tetrault dated October 12, 2010: This letter stated in part: "Privilege was not created on the day that one of [the Applicant's] lawyers filed a law suit at the court house."

months before the lawsuit was, according to the University's own evidence,[13] sufficiently anticipated by the University to call for legal advice about it.)

[para 32] In view of these considerations I do not understand the University's repeated assertions that the Applicant did not make submissions or present evidence that required consideration. Her submissions did and do raise the question of whether communications consisting of advice provided by in-house counsel, if any, with respect to matters preceding the anticipation of the lawsuit, consisted of other kinds of advice rather than legal advice.

[para 33] The University also describes the Applicant's points as 'speculative' and based on "mere conjecture". It also says the *Pritchard* decision is not a new decision, and that the Applicant cannot *now* raise speculative concerns based upon it. Since the Applicant has no access to the records and has not been told their dates, whatever she says about them must necessarily be speculative. Her submissions are no less, by virtue of this, submissions contradicting the claim of privilege. As to the *Pritchard* decision not being new, the Applicant's submission to the previous adjudicator about the time period of her access request (relative to the point at which her lawsuit was contemplated) raised the question of what role the in-house counsel was playing in any communications that pre-dated anticipation of the lawsuit. This is so regardless that the Applicant did not specifically mention this case.

Asserting privilege over records versus providing evidence they meet the Solosky test

[para 34] I turn to the University's argument in its letter of September 21, 2017, at page 3, that it had made the claim of privilege with respect to all the records it was withholding, including with respect to communications between itself and its in-house counsel, not only with respect to records created in anticipation of the lawsuit. The University says:

> ... the University of Calgary's External Counsel advised both [the Applicant] and the original Adjudicator in 2010 that all of the records at issue, and not only those created in anticipation of litigation, were subject to solicitor client privilege.

[para 35] I agree that this is the case. Some of the University's assertions that records are privileged relate to the lawsuit in particular, but others do not.

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[13] Such evidence is found in the affidavit of the University's Human Resources consultant (to which the University referred me in its March 15, 2017 submission for the stage of the inquiry culminating in decision F2017-D-01). The University submitted this affidavit in support of its claim of privilege to the Court of Queen's Bench in the first stage of the judicial review proceedings. It states (at para 10):

> By August, 2008, as [the Applicant's] workplace issues were better understood it became necessary for me and the members of the UCQ Human Resources Department to seek legal advice due to the complexity and the legalistic nature of the issues. By August 2008 [the Applicant] had threatened legal action against the University and her lawyers began writing to UCQ.

[para 36] However, I believe there is an important distinction between claiming or asserting that records are privileged, and asserting that they meet the elements of the *Solosky* test. The University's submissions do not seem to draw this important distinction.

[para 37] In its submission to this office of September 21, 2017, the University pointed to various parts of its factum for the Supreme Court of Canada. In reviewing these parts of the factum, and the factum more generally, I note that the University submitted to the Supreme Court not only that privilege had been asserted; it also said at para 4 that it had provided "uncontradicted evidence that *the records at issue related to the giving of legal advice*" [emphasis added). As well, it had said at para 18 that

> … each of the University's Access and Privacy Coordinator, its Provost, and its external counsel … asserted (or, in the case of the Access and Privacy Coordinator, swore under oath) that *all of the records in question involved solicitor-client communications for the purpose of giving or receiving legal advice*." [emphasis added]

[para 38] However, as was indicated from my review of these records in decision F2017-D-01, none of the documents that had been presented to the previous adjudicator in support of the claim of privilege asserted (hence they did not provide evidence) that all of the withheld records consisted of solicitor-client communications made for the purpose of giving or receiving legal advice.

[para 39] With respect to the affidavit of the Access and Privacy Coordinator under the heading "Solicitor Client Privilege", after noting the statements of claim and defence in the Applicant's lawsuit are being appended, the Coordinator says only the following:

> University Legal Services and external legal counsel have advised various University officials about the Applicant's employment with the University. I am advised by the University's General Counsel and do verily believe that solicitor/client privilege has been asserted over the communications given and received by the University's lawyers in respect of this matter.

This makes mention of advice about employment but does not specify that it was legal advice. The advice given by external legal counsel on this topic (who I believe was retained after the lawsuit was anticipated) would likely have been in relation to the lawsuit or other legal disputes, and so would likely have been legal advice. However, that is not necessarily the case with advice about the Applicant's employment given by in-house counsel. For example, any advice given before the lawsuit was anticipated could have been business advice as to how to best structure reporting relationships, or about non-legal human resources issues, or could have involved matters of University policy that did not have legal implications. As set out in footnote 4 above, the Applicant listed other duties of the in-house counsel not directly related to her role as legal adviser, some of which may have been performed relative to the Applicant and her employment, and the University did not contradict this evidence as to the counsel's role.

[para 40] Neither do the first two sentences in the paragraph make clear that all the records withheld on the basis of privilege fall within the scope of the sentence.

[para 41] The sentence that follows says nothing about advice but speaks only of the assertion of privilege. As well, again, there is no way to know that the communications over which solicitor-client privilege "has been asserted" are coextensive with the records at issue in this inquiry. This is because it is unclear to what "this matter" refers. It seems quite possible that it refers to the lawsuit, and the assertion of privilege that is being referred to was in the context of the lawsuit, in which case communications that took place before the lawsuit was anticipated, if any, may not fall within the scope of the statement.

[para 42] The next document relied on by the University is the Provost's letter. This letter contains three assertions which do not appear to have any necessary relation to one another. [14] The first states that the lawsuit is being vigorously defended. The second says that "the communication between the University of Calgary and its legal advisers is the subject matter of solicitor-client privilege". (Even though this statement does not use the expression 'legal advice', I believe the reference to "legal advisers" can be interpreted as referring to lawyers giving legal as opposed to policy or business advice.) The third sentence adds that the University "will not waive the privilege on the records identified [for the access request]".

[para 43] The second statement is either entirely abstract, or it is to be taken as referring to communications in the lawsuit. I believe the latter is the more reasonable interpretation. Together, the first two statements say no more than that legal advice given in the defence of the lawsuit is covered by privilege. The third statement might be taken to implicitly tie the withheld records to the "communication between the University and its legal advisers" (even though it is not so tied expressly). In other words, the three statements taken together might be thought to comprise an assertion that *all the withheld records* are privileged legal advice given for defending the lawsuit. However, other documents relied on by the University say that legal advice was also given about other legal disputes. This means that not all the withheld records consist of advice about the lawsuit. Therefore it is not possible to infer that the Provost's three statements, taken as a whole, constitute an assertion that all the withheld records for which privilege is being claimed consist of communications between the University and its legal counsel acting as legal advisers.

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[14] The text of the relevant parts of the letter are as follow:

> As you know from reviewing [the APC's] affidavit, [the Applicant] had commenced a multi-million dollar law suit against the University of Calgary. This law suit is being vigorously defended.
>
> The communication between the University of Calgary and its legal advisers is the subject-matter of solicitor-client privilege as recognized in the common law for centuries, by the Supreme Court of Canada in the Blood Indian Tribe decision [2008] S.C.R. 574 and also in Section 27 of the FOIP Act.
>
> The University of Calgary will not waive the privilege on the records identified in [the APC's] affidavit.

[para 44] I turn to the relevant assertions about privilege in the letter from the external counsel. These consist of the following:

> The University must defend itself against the multiple legal matters commenced by [the Applicant] and in so doing, must rely on solicitor-client privilege to ensure that communications involving the University General Counsel and its external counsel, for the purposes of giving advice and understanding the issues, remain confidential.
> …
> Because [the Applicant] has a $2 million lawsuit against the University and has initiated numerous other legal disputes, it is not surprising that a chief operating officer would exercise the right to invoke solicitor-client privilege."
> …
> There can be no clearer case where solicitor-client privilege needs to be fiercely invoked and defended, in light of [the Applicant's] $2 million plus lawsuit and her other multiple legal issues which she has raised against the University.

[para 45] I believe I may assume from the context that the reference to "advice" in the first paragraph is to legal advice. However, none of these assertions make any claim with respect to the totality of the records that remain at issue in the access request. The question in this inquiry is not whether some or most of the records are covered by privilege, but whether all of them are.

[para 46] Further, the advice being given is specifically in relation to the "multiple legal matters commenced by" the Applicant, and, according to para 7-9 of the University's factum for the Supreme Court, all of these legal matters were commenced in or after October, 2008. As well, the factum also suggests that legal advice was sought only after the University anticipated a lawsuit. It says at para 9 that:

> JR had threatened legal action against the University since August 2008. *In response*, the University had sought legal advice from its in-house counsel as well as its external counsel. [emphasis added]

[para 47] This statement seems to indicate that communications between the University and its in-house counsel that predated anticipation of the lawsuit and commencement of the other legal disputes, if such communications exist, would not be covered by these assertions by the external legal counsel that solicitor-client privilege applies.

[para 48] A similar conclusion can be drawn from para 10 of the affidavit of the University's Human Resources Consultant that the University submitted for the first time to the Court of Queen's Bench during the first stage of the judicial review proceedings. This paragraph states:

> By August, 2008, as [the Applicant's] workplace issues were better understood it became necessary for me and the members of the UCQ Human Resources Department to seek legal advice due to the complexity and the legalistic nature of the issues. By August 2008

> [the Applicant] had threatened legal action against the University and her lawyers began writing to UCQ.

While it is possible that other University officials besides the Human Resources department members sought legal advice relative to the Applicant, the fact the University chose this affiant to speak to the judicial review proceeding suggests her statements apply to the University's interactions with its counsel more generally.[15]

[para 49] In sum, therefore, while the University is claiming privilege over all the records withheld from the Applicant, the documents it provided in support of the claim do not constitute a clear assertion that all of the withheld records consist of solicitor-client communications made for the purpose of giving or receiving legal advice. Some of the statements the University presents can be taken as assertions that communications between it and its counsel (both in-house and external) that related to the lawsuit and other legal disputes, consisted of requests for and provision of legal advice; however, none of them constitute such an assertion for communications, if any exist, between the University and its in-house counsel that pre-dated the anticipation of the lawsuit and the inception of other legal disputes.

[para 50] Even the former Rules of Court, as interpreted by the Alberta Court of Appeal, required a sworn statement that the communications were for the purpose of getting legal advice.[16] Thus, the fact that the University did, as it says it did, *assert* privilege over *all* the withheld records, is not necessarily evidence (of the type the Rules

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[15] This affidavit also asserts, at para 23, that the records in the lawsuit over which a privilege claim had been made are "the very same records" that are at issue in her access request. This is possibly an indication that all the records withheld from the Applicant by reference to privilege were associated with the lawsuit to a sufficient degree that they were included in the Affidavit of Records.

Even if this is the case, however, it does not preclude the possibility that some of these records, though listed in the Affidavit, were communications taking place between the University and its in-house counsel before the lawsuit was anticipated. For any that were, the Applicant's arguments respecting the non-legal aspects of the in-house counsel's role would apply, and it would be necessary to identify and assess those records separately to determine if they consisted of information or advice that was not legal advice.

As well, para 23 of this affidavit does not entirely preclude the possibility that while there was an overlap, there were also other records withheld as privileged in response to the access request that were not included in the Affidavit of Records in the lawsuit.

[16] *Dorchak v. Krupka* 1997 ABCA 89 held that records for which privilege is claimed could be numbered in bundles, and that the precise privilege being claimed had to be named for each distinct bundle. The Court of Appeal also said that while the records do not need to be individually described, "[t]he affidavit ... shall state ... [which documents] the party objects to produce and the grounds for any such objection", and "the reasons must be fairly precise, and must recite enough facts to trigger privilege". The Court illustrated these points by noting that the specific kind of privilege must be indicated for each bundle. It also said: "Nor is it enough to speak of communications with a solicitor; one must swear that they were for the purpose of getting advice." [Given the context, this reference must be understood to be to "legal advice".]

require) that the records are privileged. As well, swearing that privilege had "been asserted" over them or some of them in some other context (such as the lawsuit) is not conclusive evidence that the records are privileged, because the person (in this case, unidentified) who asserted the privilege in that context may have been mistaken. It is for this reason that I asked the University to confirm that communications between in-house counsel and the University in the earlier period covered by the access request, if any exist, all consist of legal advice, in contrast to asking it to confirm as it had already done, which was not sufficient, that it was claiming privilege over all such records.

[para 51] Because the University declined my request, I still have no sworn evidence, nor even any direct assertion, that any communications between in-house counsel and the University that took place prior to anticipation of the lawsuit all consisted of legal advice. Nor do I have any additional information such as might make it clear that matters had arisen during that period that would have required the provision of legal rather than policy or business advice.

[para 52] In saying this, I note that in the course of providing the previous adjudicator with substantiation of its privilege claim, the University had also referred to the Applicant's having commenced or raised "other legal disputes" with the University, without specifying in its submissions when this happened.[17] This raised the possibility that these other legal disputes were raised before the lawsuit was anticipated, and the advice given by in-house legal counsel was legal advice with respect to such legal disputes.

[para 53] However, as already noted above, the factum the University submitted to the Supreme Court of Canada specified particular other legal disputes commenced by the Applicant in October of 2008, including the present access request, a human rights complaint, and a complaint under the FOIP Act alleging improper dealings with her personal information, in addition to the lawsuit that was concluded. I presume these were the disputes to which it referred in its earlier submissions to this office. If that were not the case, and there were earlier legal disputes, an assertion by the University to this effect might have satisfactorily countered the Applicant's argument that communications involving legal advice would not have arisen during the 12-month period before the lawsuit was anticipated. However, the University provided no further information beyond pointing to what it had already provided. Therefore, I have no basis on which to conclude that any communications containing legal advice about other legal disputes commenced by the Applicant were made during the period to which the Applicant's submissions (about the role of in-house counsel) applied.

[para 54] I also recognize that it is possible that the in-house counsel gave legal advice relative to matters concerning the Applicant prior to the point in time at which the lawsuit

[17] The letter from McCarthy Tetrault dated October 12, 2010 states: "Because [the Applicant] has a $2 million lawsuit against the University and has initiated numerous other legal disputes, it is not surprising that a chief operating officer would exercise the right to invoke solicitor-client privilege."

was anticipated, which did ultimately become issues in the lawsuit. Advice given in the hope or expectation that the issues can be resolved without resort to litigation may still be legal advice. The Applicant's statement of claim which the University appended to its initial submission does indicate that the issues in the litigation began to arise during the earlier period of the access request. However, it does not follow that the University's legal counsel was called upon during this period to actually give such legal advice about these matters. And, while the University's submissions to the previous adjudicator *asserted* privilege over records created in this time period (as part of the overall period of the access request), as discussed above, the *evidence* it provided did not constitute evidence that all of the records consisted of giving or receiving legal advice; hence the evidence did not establish that communications between in-house counsel and the University that took place during the period before litigation was anticipated, if there were any, actually consisted of legal advice. Further, as noted above at paras 45 to 47, the University in its factum, and the Human Resources Consultant in her affidavit, both suggested that legal advice relative to the lawsuit was not given until after the suit was anticipated.

[para 55] When I asked it to provide evidence that such legal advice had been given in the earlier period, if it could do so, in order to answer the Applicant's contention that records created prior to anticipation of the lawsuit could have been policy or other non-legal advice, the University responded by saying that its claim of privilege had been sufficiently established in what it had already provided.

Conclusion re whether the University has met its burden regarding any communications in the pre-lawsuit period of the request

[para 56] To summarize, the Applicant has raised the reasonable possibility through argument and evidence that communications between the University and its in-house counsel respecting the Applicant and her employment that took place before the Applicant's lawsuit was anticipated may have consisted of information, for example policy or business advice, that was not legal advice. The Supreme Court's comments that the evidence presented by the University to establish its claim of privilege were sufficient, there being no evidence or argument suggesting the claim was falsely made, do not apply to such communications. The comments of the Supreme Court in the *Pritchard* case requiring consideration of whether advice given might be other than legal advice do apply to such communications. The University did not provide evidence to establish that such communications, if any exist, consist of legal advice about legal matters.

[para 57] In view of the foregoing considerations, I cannot conclude on a balance of probabilities that the records, if any, consisting of communications between the University and its in-house counsel, which predated the anticipation of the lawsuit the Applicant brought against it, and did not involve the external counsel, consist of legal advice meeting the criteria in the *Solosky* test. Therefore, I find that the University has failed to discharge its burden of showing that such records, if there are any, fall within the exception under section 27(1)(a).

[para 58] Therefore, if any records exist that

- consist of communications between the University and its in-house counsel
- do not involve the University's external counsel, and
- predate the University's anticipation in August 2008 of the lawsuit the Applicant brought against it

I will order the University to disclose these records to the Applicant.

Mootness

[para 59] In its most recent submission of September 21, 2017, the University argued that both the Court of Appeal and the Supreme Court of Canada held that the matter in this inquiry is moot. This was presented as a further argument that I may not make a decision whether the withheld records in this case are privileged. Whether I may make this decision is a question which I have already decided in F2017-D-01. However for the sake of completeness, I will address the question of mootness below.[18]

[para 60] I do not fully grasp the University's use of the term "moot" in support of its position that I may not now make a decision about whether the records are privileged. The University says, first, that because the matter has already been decided by the Supreme Court, the Applicant's claim is now moot. If by "the matter" the University means the Applicant's access request (or conversely refusal of the request by reference to the privilege claim), this matter does not become moot (a term which in legal contexts typically refers to a matter's hypothetical or abstract quality[19]) because it has already been decided.[20] In any event, for the reasons set out above, I do not accept that the access

[18] In its recent submission, the University also referred me to parts of its factum to the Supreme Court of Canada, as well as the Commissioner's factum, to show that the questions of whether the matter is moot and whether the records are privileged were raised before the Supreme Court. This was done to support the University's point that that the Supreme Court had finally decided these issues. I have reviewed these portions of the factums. They do not change my interpretation as set out in decision F2017-D-01 as to what the Supreme Court decided in its judgment about whether the records at issue are subject to privilege; nor do they affect my interpretation, as set out under the present heading, as to what the Supreme Court decided about mootness.

[19] In *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, Justice Sopinka stated:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[20] The term can conceivably also be used to mean that something is already decided in effect because of some other decision made in some other context; however, the term does not aptly describe the same decision in the same context.

request has already been decided or effectively decided relative to the particular category of records which, as I have explained above, is still at issue.

[para 61] Further with respect to the findings of the Court of Appeal, the University quoted the following paragraphs from the Court's decision:

> [17] The second ground – that the Judge erred in holding that the University refused to provide information to the delegate substantiating its assertion of solicitor client privilege – is, on my disposition of the first ground – moot, and I decline to decide it.
>
> [53] This ignores that the dispute between the University and J.R., so far as the process under *FOIPPA* is concerned, has long been moot, their litigation having concluded three years ago. Indeed, the entire process under *FOIPPA* in this case was, from a practical standpoint, wholly unnecessary, since this dispute was also litigated under Alberta's civil procedure. … While recognizing that FOIPPA's process is independent of the litigation process, I would have thought that, where the propriety of an assertion of solicitor-client privilege by a public body litigant is to be reviewed, the better practice would generally be to have that review performed by a judge or master of the court in the course of that litigation, rather than by engaging a collateral process.

[para 62] With respect to para 17 of the Court of Appeal's decision, the Court's reference to its "disposition on the first ground" was to its finding that the previous adjudicator had no power to order the records. Because the records could not be compelled even if the University had failed to substantiate its claim of privilege, whether the University had or had not done this was merely an abstract question. In other words, I believe the Court used the term moot in its usual sense to mean there was no reason to decide whether a failure to substantiate meant the records could be compelled in a case that at the same time decided the Commissioner had no power to compel records regardless. That is not the same thing as saying the question of whether the records are privileged is moot in the context of this inquiry. If it is possible to decide whether the records are privileged without compelling them, the fact the records cannot be compelled does not make this question moot.

[para 63] With respect to para 53, which arose in the context of whether to assign costs to the Commissioner, the Court stated its preference as to how the matter should have been dealt with (that is, during the court proceeding). In the course of saying this, the Court commented that because the civil litigation had concluded, the dispute (I believe it meant the dispute over the records) in that litigation context was "moot" in the sense of no longer having any practical significance. However, the Court explicitly recognized that the process under the FOIP Act is an independent one; it did not make a finding that the *access request* was moot.

[para 64] In any event, the University's primary point is that I may not decide the merits of the privilege claim because the Supreme Court has already decided it. That position cannot be reconciled with the idea that the question does not need to be decided because the Court of Appeal held that it was moot.

[para 65] With respect to the Supreme Court's comments on mootness, the Supreme Court said:

> [The Applicant's] litigation against the University concluded in 2012 and she has had no involvement in the matter since then (2012 ABQB 342, 545 A.R. 110). Therefore, the claim for production is moot at this time.

[para 66] Since it follows immediately on a reference to the civil action, and because "production" is a term used in civil litigation proceedings but not in proceedings under the FOIP Act, I believe this statement must be taken as referring to mootness of the "claim for production" in the context of the Applicant's civil litigation. Further, it is clear the Supreme Court did not regard the question of whether the records were privileged, and the associated question of whether the Applicant should be granted access to them, as being moot at the time the case reached the Court, because that is the very subject matter of the Court's pronouncements described at para 5 above. (As discussed above, I accept I am bound by the Court's comments that the evidence presented by the University was sufficient to find the records are privileged in the absence of any contrary evidence or argument, and I have applied these comments to the records to which the comments are applicable by their terms.)

[para 67] Finally as to mootness, it is possible the University is arguing, or formerly argued, that the matter is moot on the theory the Applicant no longer has any interest in the records. (I note that in its factum to the Supreme Court the University had stated at para 4 that "the underlying *access request* had long since been notional". [emphasis added]) However, the Applicant had remained interested as a matter of fact by reference to the submissions she has provided in this inquiry, and, as the University is aware, she continues to be a participant.

[para 68] In conclusion, I do not accept that either the findings of the Court of Appeal with respect to mootness, or the findings of the Supreme Court, prevent me from deciding the substantive question of whether the records at issue are subject to solicitor-client privilege.

Evidence in this case

[para 69] I note finally that the University expressed concern that I had received submissions – its factum that it had put before the Supreme Court of Canada – that were not part of the parties' submissions before me, and relied on them for the purposes of preparing decision F2017-D-01.[21]

[para 70] The Commissioner was served with these submissions in a matter to which this inquiry closely relates in the sense that the Court's ruling in its proceeding

[21] While expressing this concern, the University also said that if I was going to consider the factum, I should also consider the parts it regarded as relevant to this inquiry, and pointed out those portions of the factum. As noted above at footnote 18, I reviewed these portions of the factum.

determined what may happen in this inquiry. Possibly it was open to me to review the submissions received by the Commissioner for this reason.

[para 71] However, I did not receive those submissions, but rather located them on the Supreme Court of Canada's website, where they exist as a matter of public record. I believe they are placed there in part to provide context for the Court's decisions and to enable a more thorough understanding of the Court's reasoning.

[para 72] As well, I do not believe it was necessary to give notice and an opportunity to comment to the University that I intended to rely on a document, closely tied to the issues the University has raised in this inquiry, that it created itself and placed before the Court and into the public realm.

IV. ORDER

[para 73] I make this order under section 72 of the Act.

[para 74] I find that records that were withheld on the basis of solicitor-client privilege, *other than* those, if any, in which in-house counsel was communicating with the University with respect to matters predating anticipation of the lawsuit, were for the purpose of providing or receiving legal advice, and were properly withheld.

[para 75] I find that the University has failed to discharge its burden of showing on a balance of probabilities that records of the following category, if there are any, fall within the exception under section 27(1)(a): records that

- consist of communications between the University and its in-house counsel
- do not involve the University's external counsel, and
- predate the University's anticipation in August 2008 of the lawsuit the Applicant brought against it.

Therefore, if any such records exist, I order the University to disclose them to the Applicant subject to any applicable exceptions to disclosure. If such records do not exist, I order it to advise me and the Applicant that they do not.

[para 76] I further order the University to notify me and the Applicant in writing, within 50 days of being given a copy of this order, that it has complied with the order.

Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication