ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-02

February 8, 2021

TOWN OF ATHABASCA

Case File Number 007660

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the *FOIP Act*) to the Town of Athabasca (the Public Body) for a legal opinion that was given to the Town Council by a particular lawyer with a named law firm, about a specific matter (the Requested Record).

The Public Body denied the Applicant access to the Requested Record under section 27(1)(a) of the *FOIP Act* on the basis of solicitor-client privilege. The Applicant sought a review of that decision by this Office. Subsequently, the Applicant requested, and the Commissioner agreed to conduct, an inquiry into the Public Body's response.

The Adjudicator found that the Public Body had established on a balance of probabilities that solicitor-client privilege applied to the Requested Record. The Adjudicator further found that the disclosure of the Requested Record by the Public Body to the municipal inspector under the *Municipal Government Act*, was a limited waiver of solicitor-client privilege to the municipal inspector for a limited purpose and did not amount to a waiver of the privilege to the Applicant or to the world at large. The Adjudicator found that none of the other circumstances identified by the Applicant amounted to a waiver or loss of solicitor-client privilege by the Public Body. Finally, the Adjudicator found that if it was appropriate to review the Public Body's exercise of discretion in withholding the Requested Record, the Public Body had properly exercised its discretion in deciding to withhold the Requested Record.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 56, 71, 72; *Alberta Rules of Court* (AR 124/2010), s. 5.8; *Alberta Rules of Court Amendment Regulation* (AR 36/2020), s. 6; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 571; *Public Inquiries Act*, R.S.A. 2000, c. P-39; **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 19.

Authorities Cited: AB: Orders F2009-018, F2016-63, F2018-18, F2020-16.

Cases Cited: *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Interprovincial Pipe Line Inc. v M.N.R.*, [1996] 1 FC 367, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 207, *Alberta Health Services v. Farkus***,** 2020 ABQB 281.

Other Sources Cited: Adam M. Dodek, *Solicitor-Client Privilege* (Markham; Lexis Nexis Canada Inc. 2014).

I. BACKGROUND

[para 1] From the exchanged submissions and evidence of the parties, I understand that the relevant facts in this case are the following:

1. On November 29, 2017, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the *FOIP Act*) to the Town of Athabasca (the Public Body) for the following record:

   > A legal opinion given to Town Council by [name of lawyer] of [name of law firm] on the disqualification of [name of individual] and myself. It was presented to Council May 3, 2016.

   (the Requested Record).

2. Along with his access request, the Applicant provided a letter to the Public Body from [name of individual] supporting the release of the Requested Record.

3. By way of a letter dated December 12, 2017, the Public Body informed the Applicant that it was denying the Applicant access to the Requested Record under section 27(1)(a) of the *FOIP Act* on the basis of solicitor-client privilege.

4. The Applicant is a former member of the Public Body's Council.

5. During the course of the Applicant's time on Council, the Public Body sought legal advice and recommendations from the law firm [name of law firm], legal counsel for the Public Body, on issues related to the disqualification from Council of the Applicant and [name of individual].

6. The Applicant was not involved in any of the discussions between the Public Body and its legal counsel on these matters.

7. On February 8, 2016, while the Applicant was a member of the Public Body's Council, the Public Body's Council passed a resolution (which I will refer to as Resolution 1) providing that Council had found the Applicant and [name of individual] liable to the Public Body; disqualifying the Applicant and [name of individual] from Council; and directing administration to enforce liability under the *Municipal Government Act*, R.S.A. 2000, c M-26 (the *MGA*).

8. On February 16, 2016, the Public Body's Council passed another resolution (which I will refer to as Resolution 2) directing administration to take any necessary steps to prepare and execute an application to the Court of Queen's Bench for enforcement of the disqualification of the Applicant and [name of individual].

9. The Requested Record was presented to the Public Body's Council at an *in camera* session on May 3, 2016. This is the meeting referenced in the Applicant's original access request. The Applicant and [name of individual], both subject of the Requested Record, were not in attendance at the *in camera* session.

10. On July 19, 2016, the Public Body's Council passed a resolution (which I will refer to as Resolution 3), which rescinded Resolutions 1 and 2, respecting the disqualification of the Applicant and [name of individual].

11. In or about the Fall of 2016, the Public Body's Council requested that all legal opinions respecting the Public Body be provided to Council, as there were concerns that Council was not being kept apprised of and had not reviewed all legal opinions that the Public Body had been provided.

12. As a result, all of the legal opinions that had been provided to the Public Body in 2016, were provided to the Public Body's Council for review *in camera* at the October 18, 2016 Council meeting. This included the Requested Record. The Applicant and [name of individual] were present at this *in camera* meeting.

13. On October 18, 2016, the Public Body's Council passed a resolution directing Administration to put the *in camera* documents on the drop box (the Drop Box) for the duration of the *in camera* session.

14. At the October 18, 2016 Council meeting, arrangements were made to have the *in camera* documents, including the Requested Record, available to all members of Council in a room at the Public Body's office.

15. In this respect, on October 18, 2016, the Public Body's Council also passed a resolution directing Administration to have a sign off sheet which read that "[t]he information being reviewed is deemed to be *in camera* and that all documentation reviewed be treated as such".

16. Upon reviewing the *in camera* documents, which included the Requested Record, in the room at the Public Body's office, each member of Council was required to execute an agreement that provided:

> I, _____ understand and agree that the documents I am reviewing are subject to solicitor client privilege and I undertake not to redistribute or disclose the information to any third party.

(the Agreement).

17. On or about December 12, 2016, a Ministerial Order was approved, directing an inspection to be conducted of the management, administration and operations of the Public Body pursuant to section 571 of the *MGA*.

18. During the course of that inspection, the inspectors appointed to conduct the inspection of the Public Body requested all books and records of the Public Body.

19. The inspectors were provided with a copy of the Requested Record in accordance with the request.

20. On October 18, 2017, the Applicant signed the Agreement referenced in point 16 above and viewed the Requested Record in the room at the Public Body's office.

21. Subsequently, as noted above, the Applicant made a request to the Public Body for a copy of the Requested Record, and the Public Body denied the Applicant access under section 27(1)(a) of the *FOIP Act* on the basis that the Requested Record was subject to solicitor-client privilege.

22. The Applicant requested a review of the Public Body's decision by the Commissioner. The Commissioner appointed a Senior Information and Privacy Manager to review the Public Body's decision.

23. The Applicant then requested an inquiry. The Commissioner agreed to conduct an inquiry and delegated her authority to me.

II. RECORD AT ISSUE

[para 2] The record at issue is a legal opinion given to Town Council by [name of lawyer] of [name of law firm] on the disqualification of [name of individual] and the Applicant, which was presented to the Town Council on May 3, 2016.

III. ISSUE

[para 3] In this case, the Public Body withheld the Requested Record under section 27(1)(a) of the *FOIP Act* on the basis that it was subject to solicitor-client privilege. Therefore, the issue in this inquiry is:

> **Did the Public Body properly apply solicitor-client privilege under section 27(1)(a) of the Act (privileged information) to the Requested Record?**

[para 4] The Applicant made submissions that by taking certain actions, or failing to take certain actions, the Public Body had waived or lost privilege in the Requested Record. He also made submissions that it was in the public interest to release the Requested Record. I will consider these arguments in the context of the issue above.

[para 5] I note that the Applicant suggested that litigation privilege, not solicitor-client privilege, was the more appropriate privilege that applied to the Requested Record, and since litigation was not ultimately pursued by the Public Body, the Public Body could not rely on litigation privilege under section 27(1)(a) to withhold the Requested Record.[1]

[para 6] The Public Body did not assert that it had withheld the Requested Record under litigation privilege pursuant to section 27(1)(a).[2] Litigation privilege is not an issue in this inquiry.

[para 7] I further note that in his initial submission, the Applicant raised a number of issues and questions about the Public Body's decision to obtain the legal opinion, and its reasons and authority for passing various motions. Those issues and questions are outside the scope of my jurisdiction and this inquiry.

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[1] Applicant's rebuttal submission at page 4.
[2] Public Body's rebuttal submission at para. 17.

IV. DISCUSSION OF ISSUE

Did the Public Body properly apply solicitor-client privilege under section 27(1)(a) of the *FOIP Act* (privileged information) to the Requested Record?

Solicitor-Client Privilege

[para 8] Section 27(1)(a) states:

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

[para 9] In *Canada v. Solosky*, [1980] 1 S.C.R. 821, the Supreme Court of Canada set out the test to establish whether communications are subject to solicitor-client privilege. At page 837 the Court said:

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

[para 10] The test for solicitor-client privilege was summarized as follows by the adjudicator in Order F2020-16 at paragraph 90:[3]

> [90] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 11] As stated by the adjudicator in Order F2009-018 at paragraph 41:

> [para 41] . . . Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73). The test for legal advice is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to his or her legal advisor to determine what those implications might be; legal advice may be about what action to take in one's dealings with someone who is or may in the future be on the other side of a legal dispute (Order F2004-003 at para. 30).

[3] See also *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*Edmonton Police Service*) at para. 66.

[para 12] Section 71(1) of the Act states:

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

[para 13] Under section 71(1), the public body bears the burden of proving the applicant has no right of access to a record or part of a record.[4]

[para 14] The standard of proof the public body must meet is the balance of probabilities.[5]

[para 15] The Public Body did not provide me with the Requested Record over which it is asserting solicitor-client privilege.

[para 16] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (*University of Calgary*), the Supreme Court of Canada determined that section 56(3) of the *FOIP Act* does not require a public body to produce to the Information and Privacy Commissioner records over which solicitor-client privilege is claimed.[6]

[para 17] In Order F2020-16, the adjudicator described what a public body must provide in an inquiry in order to establish on the balance of probabilities that solicitor-client privilege applies to a record:

> [para 93] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 18] In its initial submission provided to the Applicant and to me, the Public Body stated:

> 31. It is submitted that the record to which s 27(1)(a) has been applied by the Public Body:
>
> a. is a communication between the Public Body's legal counsel and the Public Body;

[4] See Order F2020-16 at para. 92 and *Edmonton Police Service* at para. 79.
[5] *Edmonton Police Service* at para. 80.
[6] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras. 2, 37 and 71. See also *Edmonton Police Service* at para. 14.

b. is a communication pursuant to which the Public Body's legal counsel is providing legal advice; and

c. is intended to be and has been treated as confidential.

[para 19] The Public Body provided an affidavit sworn by the Interim Chief Administrative Officer and Freedom of Information and Privacy Coordinator for the Public Body (the FOIP Coordinator) to me and to the Applicant, in support of the Public Body's claim of solicitor-client privilege over the Requested Record (the First Affidavit).

[para 20] The Public Body also provided an affidavit sworn by the FOIP Coordinator, to me and to the Applicant that set out the facts leading up to the Applicant's access request, as well as the treatment of the Requested Record as confidential (the Second Affidavit).

[para 21] At paragraph 18 of its rebuttal submission, the Public Body stated "This is a request for a legal opinion that would directly reveal advice to the Public Body."

[para 22] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*Edmonton Police Service*), Justice Renke stated:

> [64] Not only individuals but corporations and public bodies such as policing agencies require legal advice to work within the thicket of rules governing their activities. In ***Stevens v. Canada***, Justice Linden wrote at para 22 that
>
> > [T]he identity of the client is irrelevant to the scope or content of the privilege. Whether the client is an individual, a corporation, or a government body there is no distinction in the degree of protection offered by the rule . . . . Furthermore, I can find no support for the proposition that a government is granted less protection by the law of solicitor-client privilege than would any other client. A government, being a public body, may have a greater incentive to waive the privilege, but the privilege is still its to waive.
>
> See also ***British Columbia (Attorney General) v Lee***, 2017 BCCA 219 at para 19.

[para 23] In *Alberta Health Services v. Farkus***,** 2020 ABQB 281, Justice deWit made the following comments regarding solicitor-client privilege, and its application by public bodies (emphasis in original):

> [20] The Supreme Court of Canada stated in ***Alberta (Information and Privacy Commissioner) v University of Calgary***, 2016 SCC 53 at paragraph 34, that solicitor-client privilege "is fundamental to the proper functioning of our legal system and a cornerstone of access to justice." Solicitor-client privilege must be "jealously guarded and should only be set aside in the most unusual circumstances" because "without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive." The court also stated at paragraph 43 that "as a

substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."

[21] Justice Fish, in ***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at paragraph 26, described solicitor-client privilege as "a necessary and essential condition of the effective administration of justice."

[22] Solicitor-client privilege covers a broad array of communications: all communications made with a view to obtaining legal advice will be privileged. The Supreme Court clearly enunciated this principle in ***Descôteaux et al v Mierzwinski***, 1982 CanLII 22 (SCC), [1982] 1 SCR 860 at 892-3:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. **This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps**, and consequently even before the formal retainer is established. [Emphasis added.]

[23] In discussing this continuum of communications, Justice Renke in ***Edmonton Police Service v Alberta (Information and Privacy Commissioner)***, 2020 ABQB 10 at para 69, explained that privilege "should not be assessed by isolating particular communications or fragments of communications and scrutinizing them individually or atomistically for satisfaction of the privilege criteria without reference to the context that provides meaning and significance to those communications."

[24] Many communications between a lawyer and client will include facts or history that in the end may not be relevant to the legal analysis, but a client must be able to provide all information to a lawyer so that the lawyer can determine what is relevant to the legal advice sought. It is for this reason that the entirety of the communication between solicitor and client are privileged.

[25] The identity of the client is irrelevant to the scope and content of this privilege. Government organizations or public bodies will often require legal advice and their right to solicitor-client privilege should not be viewed as being of lesser importance. In fact, solicitor-client privilege is of utmost importance to government and government bodies or agencies. Our legal system, and in this case the medical system, is dominated by complex rules and procedures and those involved in our medical system need the ability to consult with lawyers to properly perform their duties and inform their decisions.

[26] In ***R v Ahmad (2008)***, 2008 CanLII 27470 (ON SC), 59 CR (6th) 308 at para 78 (ONSC), Justice Dawson discussed the importance of legal advice and solicitor-client privilege in the government context and quoted from Brennan J's decision in ***Waterford v Australia*** (1987), 163 CLR 54 (HC) at pp. 74-75:

> …I should think that **the public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed**. If the repository of the power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimizing the risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. **In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance the application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration.** Provided the sole purpose for which the document is brought into existence is the seeking or giving of legal advice as to the performance of a statutory power or the performance of a statutory function or duty, there is no reason why it should not be the subject of legal professional privilege. [Emphasis added.]

[27] See also ***Edmonton (City) Police***, *supra*; ***Stevens v Canada (Prime Minister)***, 1998 CanLII 9075 (FCA), [1998] 4 FC 89 (CA); ***British Columbia (Attorney General) v Lee***, 2017 BCCA 219; and, ***Canada (Privacy Commissioner v Blood Tribe Department of Health***, 2008 SCC 44.

[28] It is against this backdrop regarding the fundamental importance of solicitor-client privilege and its near absolute status that this court must review the adjudicator's decision.

[para 24] I find that the First Affidavit of the FOIP Coordinator provides the information identified by the Alberta Court of Appeal in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289, and meets the requirements set out in Rule 5.8 of the *Alberta Rules of Court* (AR 124/2010), as amended by section 6 of the *Alberta Rules of Court Amendment Regulation* (AR 36/2020).

[para 25] Based on the submissions and evidence of the Public Body, I find that the Public Body has established, on a balance of probabilities, that the Requested Record was a communication between solicitor and client, which entailed the giving of legal advice, and was intended to be confidential by the parties. Accordingly, I find that solicitor-client privilege applies to the Requested Record.

Waiver of Privilege

[para 26] In *Solicitor-Client Privilege*, (Markham; LexisNexis Canada Inc. 2014) at page 189, Adam Dodek states:

> §7.1 The issue of waiver only arises in circumstances where communications are already determined to be privileged. Waiver involves situations where a lawyer or client has taken some subsequent action which calls into question the continuing intention to keep their communications confidential or is inconsistent with that intention. Waiver is the flip side of the "made in confidence" requirement for the privilege to attach in the first place. As discussed in Chapters 2 and 5, confidentiality is the *sine qua non* of privilege. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege.

[para 27] I have found above that the Requested Record was subject to solicitor-client privilege.

[para 28] I understand from the materials submitted by the Applicant in this inquiry that it is his position that the Public Body has either taken actions which amount to a waiver of solicitor-client privilege, or failed to maintain or ensure that the Requested Record was kept confidential and therefore, lost solicitor-client privilege in the Requested Record.

[para 29] I summarize the Applicant's submissions as follows:

1. The Applicant and [name of individual] were present when the Requested Record was provided to Council for review at the October 18, 2016 *in camera* Council meeting. By this time, the Public Body had rescinded Resolutions 1 and 2 respecting the disqualification of the Applicant and [name of individual].

   The Applicant submitted that the rescission of these Resolutions did not mean that he and [name of individual] were no longer adverse in interest with the Public Body.

   The Applicant argued that at the time of the October 18, 2016 *in camera* meeting neither he, nor [name of individual], had a common interest with the Public Body. He stated that "the potential of forthcoming actions by us at that time, did not place us into a common interest on this matter."[7]

   The Applicant further submitted that "If it [the Requested Record] truly was a privileged document, [name of individual] and myself should not have been allowed to see the document under any set of circumstances."[8]

[7] Applicant's rebuttal submission at page 1.
[8] Applicant's rebuttal submission at page 1.

The Applicant argued that he and [name of individual] were adverse in interest to the Public Body when they viewed the Requested Record at the *in camera* Council meeting on October 18, 2016, and therefore the Public Body waived its solicitor-client privilege in the Requested Record when it permitted the Applicant and [name of individual] to view it.

2. At the October 18, 2016 *in camera* meeting, the Public Body passed a resolution which provided that Council direct administration to put the *in camera* documents on the Drop Box for the duration of the *in camera* session.

   The Applicant submitted that placing the Requested Record on the Drop Box required the involvement of staff members, which demonstrated that the Public Body did not keep the Requested Record confidential.

   Additionally, the use of the Drop Box was not a secure way of handling the Requested Record and therefore the Public Body could not assure it was kept confidential.

3. At the October 18, 2016 Council meeting, arrangements were made to have the *in camera* documents, including the Requested Record, made available to all members of Council in a room at the Public Body's office. The Public Body's Council passed a resolution directing Administration to have a sign off sheet that read that the information being reviewed was deemed to be *in camera* and that all documentation reviewed be treated as such.

   The Applicant submitted that this resolution did not include a reference to "solicitor-client privilege", and there was no clarity in the resolution respecting who could view the *in camera* documents or how many times they could be viewed.

4. The Applicant stated "I do not know of who of all of the Town's staff were allowed to see the document in question within the confines of the work environment, nor how the Town kept or oversaw the document within the confines of the public body's office" and "it could be argued that the more people to have access could provide dilution of guaranteed confidentiality."[9]

5. All members of Council that reviewed the *in camera* documents were required to execute the Agreement confirming that they understood and agreed that the document they were reviewing was subject to solicitor-client privilege and undertook not to redistribute or disclose the information to any third party.

[9] Applicant's rebuttal submission at page 2.

The Applicant submitted that the Public Body could not guarantee that everyone who executed this Agreement complied with its terms.

6. The Applicant submitted that on the date he viewed the record (in October 2017), he "did not share any common interest on this specific matter that was different from the date of initial presentation to the Town of Athabasca of May 3, 2016."[10]

7. Municipal Affairs and inspectors acting for Municipal Affairs were given access to the Requested Record. The Applicant submitted that this constituted a waiver of privilege in the Requested Record by the Public Body.

[para 30] The Public Body provided submissions to address the Applicant's arguments that it had failed to keep the Requested Record confidential, or had otherwise taken actions that had resulted in a waiver of privilege.

[para 31] In response to the first allegation, the Public Body explained in its submissions that the Requested Record was reviewed at an *in camera* meeting on May 3, 2016. "That is," it stated, "the public was excluded from the meeting and it was reviewed only by the Public Body's Council, in the absence of the Applicant and [name of individual] (who were the subject of the Requested Record and did not share a common interest with the Public Body at the time)."[11]

[para 32] The Public Body submitted that this review of the Requested Record in a private meeting displayed the Public Body's intent to keep the record confidential, and out of public view.[12]

[para 33] The Public Body advised that the Requested Record was again referred to at the October 18, 2016 *in camera* meeting of the Public Body's Council. It stated "Again, as this meeting was *in camera*, the public was excluded."[13]

[para 34] The Public Body submitted that the review of the Requested Record at the October 18, 2016 *in camera* Council meeting, in the absence of the public, once again displayed the Public Body's intent to keep the record confidential, and out of public view.[14]

[para 35] The Public Body advised that at the October 18, 2016 *in camera* Council meeting, the Applicant and [name of individual] were present and reviewed the Requested Record.[15]

[10] Applicant's rebuttal submission at page 1.
[11] Public Body's initial submission at para. 38.
[12] Public Body's initial submission at para. 39.
[13] Public Body's initial submission at para. 40.
[14] Public Body's initial submission at para. 40.
[15] Public Body's initial submission at para. 41.

[para 36] At paragraph 42 of its initial submission, the Public Body submitted that:

> 42. While the Applicant and [name of individual] did not have a common interest with the Public Body at the time of creation of the Requested Record, the interests of the parties had changed by October 18, 2016.

[para 37] The Public Body relied on the decision of Justice Renke in *Edmonton Police Service* to support its position that the reviewing by the Applicant and [name of individual] (whom I will refer to as the "Other Individual") of the Requested Record at the October 18, 2016 *in camera* meeting did not amount to a waiver of privilege. At paragraphs 24 and 25 of its initial submission, the Public Body stated:

> *v. Waiver of Solicitor-Client Privilege*
>
> 24. In certain circumstances, the holder of solicitor-client privilege may be found to have waived that privilege. This issue was considered at length in *Edmonton Police Services*. In that case, the EPS had disclosed a memorandum from a Staff Sergeant addressed to an employee (i.e. police officer). Attached to that memorandum was another memorandum of a seconded Crown outlining whether the EPS should conduct disciplinary proceedings against the employee. That memorandum from the Crown included explicit reference to the contents of a legal opinion, including a direct quote from a passage of that opinion. The Adjudicator in that case had determined that this disclosure waived any privilege respecting all of these records.
>
> 25. Upon judicial review, the Court of Queen's Bench disagreed with the Adjudicator on a number of grounds. In particular, the Court found that there was no waiver of privilege over the legal opinion by disclosure to the employee. This was so even though the Court agreed that the employee and the EPS did not share a "common interest" at the time of preparation of the records. The Court's conclusion was based on the following:
>
> a. The memorandum from the Staff Sergeant to the employee, attaching the legal memorandum, provided that the legal memorandum "could not be disclosed for any purposes without the written consent" of the author. As such, all of the information remained in a "zone of confidentiality".
>
> b. As a result of the legal memorandum and the legal opinion, the EPS determined proceedings would not be commenced against the employee. The EPS disclosed the information to the employee not as a potential subject of criminal or disciplinary proceedings, but as an employee. The Court explained, "[t]he information was provided to inform a "learning moment" to enhance the employee's performance. While EPS and the employee did not share a common interest when the records (prior to [the Staff Sergeant memorandum]) were created, they shared a common interest when the records were disclosed to him. Both EPS and the employee shared an interest in the improvement of his performance

in his continuing work with EPS. The disclosure to the employee was a distribution of information within a public organization to an employee for public organization purposes". The privilege was not lost by circulation to the individual in their role as an employee.

c. Even if the employee was considered to have received the information in his personal capacity (i.e. as a third party) as opposed to as an employee, privilege would be protected through a form of limited waiver. "Disclosure of privileged information to a third party . . . does not, by itself, eliminate confidentiality and thereby privilege, opening the information to disclosure to other parties". The individual was an employee of the EPS, and the disclosure related to his employment performance. There was also no evidence that the employee had disclosed the privileged information any further. "It would be contrary to public policy for employers to be deterred from improving employee performance by the risk of loss of solicitor-client privilege.

[para 38] The Public Body submitted that similar to the scenario in *Edmonton Police Service*, by the time the Requested Record was shared with the Applicant and the Other Individual, the Public Body had revoked Resolutions 1 and 2 respecting the disqualification of the Applicant and the Other Individual and the direction for administration to take steps towards an application before the Court of Queen's Bench.[16]

[para 39] At paragraphs 44 and 45 of its initial submission, the Public Body submitted that:

44. Just as it was not a waiver of privilege for the EPS to provide an employee with legal advice respecting disciplinary measures that were not ultimately taken against the employee, it was not a waiver of privilege to provide the Applicant and [name of individual] with a legal opinion addressing the issue of their disqualification after a decision was made to revoke resolutions passed respecting their disqualification. Although the Applicant and [name of individual] were not employees of the Public Body, they were elected officials of the Public Body and had fiduciary duties to the Public Body analogous to the interest of an employee to the Public Body.

45. At the time the Applicant and [name of individual] were reviewing the Requested Record, neither were adverse in interest to the Public in respect of the contents of the Requested Record. Instead, both were provided with the Requested Record as members of the Public Body's Council in order to review legal advice that had been provided to the Public Body. It was reviewed in the context of the Applicant's and [name of individual]'s role as councillors for the Public Body, not parties adverse in interest to the Public Body. Again, this is akin to the disclosure in *Edmonton Police Services* which was considered disclosure "for public organization purposes". Privilege is not lost in such circumstances.

[16] Public Body's initial submission at para. 43.

[para 40] Additionally, in its rebuttal submission, the Public Body stated (emphasis in original):

> 5. Further, in considering the common interest between the parties, the subject matter of the Requested Record must be considered. The Requested Record was a legal opinion given to the Public Body on the disqualification of [name of individual] and the Applicant.
>
> 6. The "common interest" exception was developed for parties with a common interest in litigation. When there were outstanding resolutions respecting the disqualification of the Applicant and [name of individual], the parties clearly did not share a common interest in an opinion on that very issue. However, as soon as those resolutions were rescinded, the interests of the parties shifted.
>
> 7. This shift in interests occurred prior to the Requested Record being disclosed to the Applicant. The Applicant reviewed the Requested Record as a member of the Public Body's Council in response to concerns that Council was not kept apprised of and had not reviewed all legal opinions that the Public Body had been provided in 2016. At the time, the interests of the parties in the Requested Record and its subject matter were aligned – the Public Body was interested in providing its Council with copies of the legal opinions provided to the Public Body over the year, and the Applicant was receiving that information in his role as a member of Council. The possibility of the Applicant's disqualification was no longer an issue. As a result, just as was the case in *Edmonton Police Service*, disclosure of the Requested Record was not a waiver of privilege. This is not changed simply because the Applicant was allegedly still upset about the initial disqualification resolutions at the time he reviewed the Requested Record.

[para 41] With respect to the Applicant's statements regarding "forthcoming actions" by him and by the Other Individual, the Public Body stated at paragraph 4 of its rebuttal submission:

> 4. The Applicant makes these allegations about "forthcoming actions" in the absence of any sworn evidence. Specifically, the Applicant has not provided any evidence with respect to the nature of such forthcoming actions; the relationship between such actions and the contents of the Requested Record; and whether the Public Body was put on notice respecting such actions. This is a mere allegation and should not be given any weight on review of this matter.

[para 42] Resolutions 1 and 2, as well as Resolution 3, which rescinded Resolutions 1 and 2, were passed some time ago. The Applicant did not provide any evidence to me regarding: the nature of the "forthcoming actions" he mentioned in his rebuttal submission; the relationship between such actions and the contents of the Requested Record; whether the Public Body was ever put on notice respecting such actions prior to the time it disclosed the Requested Record to the Applicant and the Other Individual at

the October 18, 2016 *in camera* Council meeting or thereafter; or whether any actions were, in fact, ever taken by the Applicant or the Other Individual.

[para 43] In *Edmonton Police Service*, Justice Renke made the following findings at paragraphs 267 - 272:

> [267] The Adjudicator was correct that as regards the request for, preparation of, and review of the 2004 Legal Opinion and associated records, the Officer and EPS did not share a "common interest," as discussed in Order F2015-31 and ***Griffiths McBurney & Partners v Ernst & Young YBM Inc,*** 2000 ABCA 284 at para 18. As Justice Slatter (as he then was) observed in ***Pinder v Sproule***, 2003 ABQB 33 at para 62, "[t]he 'common interest' exception was developed for parties with a common interest in litigation …." The 2004 Legal Opinion related to possible proceedings against the Officer adverse to his interests, whether criminal or disciplinary. With respect to those proceedings, EPS and the Officer were opposed in interest.
>
> [268] Nevertheless, in my opinion, no privilege whatsoever was waived, respecting the EPS Legal Memorandum or the 2004 Legal Opinion, by the disclosure of the EPS Legal Memorandum to the Officer. In my opinion, disclosure to the Officer did not mean that access to any records was granted to the world through *FOIPPA*, for three reasons.
>
> [269] First, record 4 indicated that the EPS Legal Memorandum "could not be disclosed for any purposes without the written consent" of the author. All of the information provided to the Officer remained within a zone of confidentiality.
>
> [270] Second, as a result of the 2004 Legal Opinion and the EPS Legal Memorandum, EPS determined that proceedings would not be commenced against the Officer. Instead, EPS disclosed the information to the Officer not as a potential subject of criminal or disciplinary proceedings but as an employee. The information was provided to inform a "learning moment," to enhance the Officer's performance. While EPS and the Officer did not share a common interest when the records (prior to record 4) were created, they shared a common interest when the records were disclosed to him. Both EPS and the Officer shared an interest in the improvement of his performance in his continuing work with EPS. The disclosure to the Officer was a distribution of information within a public organization to an employee for public organization purposes.
>
> [271] In my opinion, the privilege was not lost by circulation of any part of the Crown Opinion Records to the Officer as an employee. See ***Bank of Montreal v Tortora*** at para 12: "The privilege will extend to documents between employees which transmit or comment on privileged communications with lawyers. The privilege will also extend to include communications between employees advising of communications from lawyer to client …." See ***Alberta Municipal Affairs*** at paras 18-19; ***Gardner v Viridis Energy Inc***, 2014 BCSC 204, Pearlman J at para 35 ("Legal advice provided by a solicitor to a client and protected by solicitor-client privilege does not lose that protection when one officer or employee of the client passes that advice on to another …."); Order F2015-32 at para 108 ("solicitor-client privilege applies to information in written communications between officials

> or employees of a public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor"); Order F2009-042 at para 58.
>
> [272] Third, even if the Officer were not considered to have received the otherwise privileged information as an employee but in his personal capacity, that is, as a sort of third party, privilege would be protected through a form of limited waiver.

[para 44] I agree with the Public Body's submission that the reasoning applied by Justice Renke in *Edmonton Police Service* applies in this case as well.

[para 45] I accept the Public Body's submission that when there were outstanding resolutions respecting the disqualification of the Applicant and the Other Individual, the parties clearly did not share a common interest in the Requested Record; however, when the Public Body rescinded Resolutions 1 and 2 on July 19, 2016, the interests of the parties shifted.

[para 46] The Applicant did not provide sufficient evidence for me to conclude that the Applicant and the Other Individual were adverse in interest to the Public Body after the Public Body passed Resolution 3 on July 19, 2016, rescinding Resolutions 1 and 2.

[para 47] Accordingly, I find the Applicant has not persuaded me that at the October 18, 2016 *in camera* Council meeting, the Applicant and the Other Individual did not have a common interest with the Public Body in reviewing the Requested Record, in their roles as a members of the Public Body's Council.

[para 48] In *Edmonton Police Service*, Justice Renke concluded that no privilege whatsoever was waived, respecting the EPS Legal Memorandum or the 2004 Legal Opinion, by the disclosure of the EPS Legal Memorandum to the Officer. Likewise, based on the evidence and arguments before me, I reach the same conclusion here. I find that no privilege was waived by the Public Body when it disclosed the Requested Record to the Applicant and the Other Individual at the *in camera* meeting on October 18, 2016, to enable them in their roles as members of the Public Body's Council to review legal advice that had been provided to the Public Body.

[para 49] With respect to the Applicant's second allegation, that placing the Requested Record on the Drop Box required the involvement of staff members, which demonstrated the Public Body did not keep the Requested Record confidential, the Public Body submitted that placing the Requested Record on the Drop Box did not amount to a waiver of privilege.

[para 50] The Public Body submitted that the Drop Box was password protected, limiting access to the Drop Box.[17]

[17] Public Body's Second Affidavit at para. 19.

[para 51] Further, it submitted, any review of the Requested Record was limited within the Public Body's office. Access to the Requested Record was never open to the public. Privilege, it argued, is not waived simply because, for the purposes of an administrative task, an individual within an organization has access to a document. Providing a document to an individual within an organization for purposes of scanning, copying or uploading the document does not constitute waiver of privilege. Access to the Requested Record remained limited within the Public Body, in recognition of the intent to keep the Requested Record confidential.

[para 52] I find that the placing of the Requested Record on the password protected Drop Box did not constitute a failure of the Public Body to maintain the confidentiality of the Requested Record resulting in a waiver of privilege. The Drop Box was password protected. The Applicant provided no evidence to support his allegation that the use of the Drop Box compromised the confidentiality of the Requested Record, or that the Requested Record was accessed by anyone outside of the Public Body while it was on the Drop Box.

[para 53] With respect to the Applicant's third argument, that the resolution passed at the October 18, 2016 Council meeting did not include a reference to "solicitor-client privilege", and there was no clarity in the resolution respecting who could view the "*in camera* documents" or how many times they could be viewed, the Public Body pointed to the language contained in the resolution, which said:[18]

> THAT COUNCIL DIRECT ADMINISTRATION TO HAVE A SIGN OFF SHEET THAT READS THE INFORMATION BEING REVIEWED IS DEEMED TO BE IN-CAMERA AND THAT ALL DOCUMENTATION REVIEWED BE TREATED AS SUCH.

[para 54] In its rebuttal submission, the Public Body submitted that:

> 9. The Applicant's submissions in this respect fail to recognize that there are limited grounds on which a matter can be reviewed *in camera* by a council. In general, councils must conduct their meetings in public unless a matter to be discussed is within one of the exceptions to disclosure in Division 2 of Part 1 of the *Freedom of Information and Protections of Privacy Act*". Section 27(1)(a) falls under Division 3 of Part 1 of the *FOIP Act*. In referencing the requirement that the Requested Record (and other *in camera* documents) be reviewed *in camera*, the Public Body's Council was acknowledging the privileged nature of these documents and the exception to disclosure under the *FOIP Act*.
>
> 10. Further, the privileged nature of the Requested Record was recognized in the agreement signed by the Applicant (as well as all other members of Council that reviewed the records):

[18] Public Body's rebuttal submission at para. 8.

> I, _____ understand and agree that the documents I am reviewing <u>are subject to solicitor client privilege</u> and I undertake not to redistribute or disclose the information to any third party.
>
> [emphasis added]

11. Clearly, the intent was to maintain privilege over the Requested Record.

[para 55] The Public Body also addressed the Applicant's third, fourth and fifth arguments in its rebuttal submission as follows:

12. With respect to who was able to review the record, the Resolution implies that in maintaining the *in camera* nature of the documents, only those individuals at the *in camera* meeting would have the opportunity to review the Requested Record (and other *in camera* documents) in this manner. In any event, the Affidavit of [the FOIP Coordinator] confirms that no one outside of Council reviewed the *in camera* documents, including the Requested Record, in this manner. Further, the number of times the same individuals review a privileged record does not affect the privileged nature of the documents. A lawyer's advice does not lose the protection of solicitor-client privilege simply because a client has reviewed it multiple times.

13. The Applicant further alleges that the Public Body cannot provide "guaranteed assurance" that individuals allowed to see the document did comply with the above noted agreement. Once again, this is a mere allegation made in the absence of any sworn evidence. The allegation also fails to recognize the statutory obligations councillors have with respect to maintaining confidentiality.

14. Section 153(e) of the *MGA* provides that Councillors have a duty:

> to keep in confidence matters discussed in private at a council meeting until discussed at a meeting held in public.

15. The requirement to comply with this statutory duty confirms that all councillors that reviewed the Requested Record in this manner would have been obligated to keep it in confidence. This obligation was also secured by the execution of the agreements executed by the Councillors (an example of which is provided in Exhibit E of the Affidavit of [the FOIP Coordinator], sworn March 17, 2020).

16. The Applicant makes further unsubstantiated allegations questioning how staff may have been interested in reviewing the Requested Record. Again, in the absence of any evidence, these are mere allegations by the Applicant that should not be given any weight. The Public Body has provided detailed evidence respecting the treatment of the Requested Record and its limited disclosure. There is no evidence of wide dissemination of the Requested Record within the Public Body as alleged.

[para 56] The information contained in the Second Affidavit sworn by the FOIP Coordinator, supports the Public Body's submissions above.

[para 57] The Applicant did not provide any evidence to support these particular allegations. I agree with the Public Body's submissions above and find that the Applicant's arguments do not establish that the Public Body lost, or waived privilege in the Requested Record in these circumstances.

[para 58] I find the steps taken by the Public Body evidenced its intention to keep the Requested Record confidential.

[para 59] The Applicant's sixth argument is that, just as he did not have a common interest with the Public Body when he reviewed the Requested Record at the *in camera* Council meeting on October 18, 2016, he did not share a common interest with the Public Body in the Requested Record when he subsequently viewed the Requested Record in the office at the Public Body on October 18, 2017.

[para 60] In response, the Public Body provided the following submissions:[19]

> 49. Just as the review of the Requested Record by the Applicant at the October 18, 2016 *in camera* meeting was not a waiver of privilege, neither was the review of the Requested Record on October 18, 2017, again, after the resolutions respecting the Applicant's disqualification were revoked.
>
> 50. Further, at the time of reviewing the Requested Record in October, 2017, the Applicant was required to specifically acknowledge the privileged nature of the Requested Record and undertake not to redistribute or disclose the information to any third party. There is no evidence to suggest that the Applicant failed to comply with this requirement of viewing the Requested Record on October 18, 2017.
>
> 51. Once again, the actions of the Public Body to require acknowledgement of the privileged nature of the Requested Record confirms the Public Body's intent to maintain confidentiality over the Requested Record.

[para 61] The evidence provided by the Public Body with the Second Affidavit of the FOIP Coordinator shows that the Applicant signed the Agreement and viewed the Requested Record on October 18, 2017. The Applicant does not dispute that he signed the Agreement.

[para 62] There is no evidence before me to suggest that the Applicant did not continue to have a common interest in the Requested Record at the time the Applicant executed the Agreement and viewed the Requested Record in the room at the Public Body's office on October 18, 2017, in his role as a member of Council.

[19] Public Body's initial submission.

[para 63] For the same reasons I determined that the viewing of the Requested Record by the Applicant at the *in camera* meeting on October 18, 2016 did not constitute a waiver of privilege by the Public Body, I find that the viewing of the Requested Record by the Applicant on October 18, 2017, in his role as a member of Council, in the room at the Public Body's office and upon execution of the Agreement, did not constitute a waiver of privilege by the Public Body in the Requested Record.

[para 64] Having determined that the Applicant and the Other Individual had a common interest with the Public Body in the Requested Record when the Public Body disclosed the Requested Record to them at the *in camera* meeting on October 18, 2016 for the purpose of reviewing it in their roles as members of the Public Body's Council, and that this common interest was still in place when the Applicant viewed the Requested Record after executing the Agreement on October 18, 2017, I am unable to accept the Applicant's argument that the disclosure of the Requested Record to the Applicant and the Other Individual in these situations constituted a waiver of solicitor-client privilege in the Requested Record by the Public Body.

[para 65] Were I to accept such an argument, it would follow that any council member could ask for access under the *FOIP Act*, either while they were still a member of council or after they ceased to be a member of council, to any legal opinion that had been disclosed to them by the public body while they were a member of council and had a common interest with the public body in the legal opinion, and the public body could not withhold the legal opinion under section 27(1)(a) on the grounds that it was subject to solicitor-client privilege. This would undercut the purpose of solicitor-client privilege and would be contrary to public policy. It would have a detrimental effect on a public body's ability to obtain and share legal advice with its members of council.

[para 66] The Applicant's seventh argument is that by disclosing the Requested Record to the inspectors for the purpose of an inspection under the *MGA*, the Public Body waived its solicitor-client privilege in the Requested Record.

[para 67] On this point, the Public Body made the following submissions (emphasis in submissions):[20]

> 28. A municipal inspection is conducted pursuant to s 571 of the *Municipal Government Act*, RSA 2000, C M-26 (the "*MGA*") which provides inspectors with wide authority as follows:
>
> **Inspection**
> 571 . . .
>
> (3) An inspector
>
> (a) may require the attendance of any officer of the municipality or of any other person whose presence the inspector considers necessary during the course of the inspection, and

[20] Public Body's initial submission.

(b) has the same powers, privileges and immunities as a commissioner under the *Public Inquiries Act*.

(4) When required to do so by an inspector, the chief administrative officer of the municipality must produce for examination and inspection all books and records of the municipality. . . .

[emphasis added]

29. Under the *Public Inquiries Act*, RSA 2000, c P-39, the powers of a commissioner (which are conferred on a municipal inspector pursuant to s 571(3)(b) of the *MGA*), are similarly broad. In particular:

Evidence

4. The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.

Attendance of witnesses

5. The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.

[para 68] At paragraphs 26 and 27 of its initial submission, the Public Body stated:

26. As limited waiver was recognized as still protected by solicitor-client privilege in *Edmonton Police Services* with respect to disclosure of privileged information to an employee, it has also been recognized in the context of limited disclosure of privileged information pursuant to statutory obligations. For example, in *Interprovincial Pipe Line Inc. v. MNR*, [1996] 1 FC 367, 1995 CanLII 3542, the Court found a limited waiver in disclosing legal opinions for purposes of an audit did not amount to full waiver of the privilege to the world at large:

> The foregoing passages can be adopted here by analogy. It was clearly the applicant's intent to disclose the legal opinions that it had received for a limited purpose only, namely to assist in the conduct of the audit and examination of its financial statements. It made the legal opinions available in accordance with its duty to assist that can be drawn from subsection 170(1) of the *Canada Business Corporations Act*. It would, in my view, be contrary to public policy if the applicant's action in making the legal opinions available for audit purposes had the effect of automatically removing the cloak of privilege which would otherwise be

> available to them on an audit by the respondent. This conclusion is, I am satisfied, consistent with the propositions quoted above that have been enunciated by the Supreme Court of Canada and consistent with a strict interpretation of the impact on solicitor-client privilege of subsection 170(1) of the *Canada Business Corporations Act* . . . [I]t would be in appropriate and, indeed, contrary to the principles enunciated in *Descôteaux*, to interpret subsection 170(1) more broadly than necessary to achieve the end clearly sought to be served.

27. Where disclosure is compelled by law, the Court will restrict the waiver to the particular context in order to achieve the minimal necessary impairment of the privilege. This reflects the requirement that privilege, which belongs to the client, can only be waived "through his or her informed consent". As such, compelled disclosure does not constitute a valid waiver.

[para 69] The Public Body made the following arguments regarding the disclosure of the Requested Record to the municipal inspector:[21]

> 52. The disclosure of the Requested Record to the municipal inspector was in the context of a municipal inspection under s 571 of the *MGA*. In that context, the inspector had the power to require the production of any documents, papers and things considered required, and the Public Body had a statutory duty to comply with such requests for production pursuant to s 571(4) of the *MGA*.
>
> 53. Just as was outlined in *Interprovincial Pipe Line Inc. v MNR*, it would be contrary to public policy for a decision to make the Requested Record available to an inspector during a municipal inspection to have the effect of removing the protection of solicitor-client privilege. Rather, this disclosure should be recognized as a disclosure for a limited purpose, in accordance with the Public Body's statutory duties under the *MGA*. The disclosure of the Requested Record to the municipal inspector was not a complete waiver of privilege and does not justify disclosure of the record to the public at large.

[para 70] In *Solicitor-Client Privilege*,[22] Adam Dodek made the following comments regarding the disclosure of information over which solicitor-client privilege has been claimed, in order to comply with statutory requirements:

> §7.96 When a party discloses privileged information required by statute, the privilege will not be waived. In *S. & K. Processors*, McLachlin J. (as she then was) held that litigation privilege was not waived over certain documents because their production was required by statute. She reasoned that the production of the privileged documents was therefore involuntary. Since it was involuntary, it could not constitute waiver. This concept of limited waiver was applied to the release of privileged information to a company's auditors under statutory compulsion in *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*. The Ontario Securities Commission had taken the position that the company voluntarily

[21] Public Body's initial submission.
[22] Adam Dodek, *Solicitor-Client Privilege* (Markham; LexisNexis Canada Inc. 2014) at pages 222 – 226.

providing a privileged document to the company's auditor constituted a complete waiver of the privilege. The court disagreed, concluding that the company had only waived the privilege for the limited purpose of allowing the auditors to fulfill their statutory duties and not for any wider purpose. The Federal Court had reached a similar conclusion in *Interprovincial Pipe Line Inc. v. M.N.R.*

§7.97 As Malcolm Mercer has rightly noted, Bauman C.J.S.C. of the British Columbia Supreme Court questioned *Philip Services* and *Interprovincial Pipeline* in *British Columbia (Auditor General) v. British Columbia (Attorney General)*. Chief Justice Bauman suggested that "the courts in these cases undertook no real analysis in suggesting that the statutes compelled production of the privileged documents. It was more or less assumed . . ." Chief Justice Bauman noted that both cases pre-dated the Supreme Court's decision in *Blood Tribe*, wherein the Supreme Court stated that statutory intrusions into the privilege must be explicit.

. . .

§7.101 Putting Bauman C.J.S.C.'s objections aside therefore, the rule of *Philip Services* and *Interprovincial Pipeline* is sound and should be followed. If a statute compels the disclosure of information covered by solicitor-client privilege, that compulsion should not result in a waiver over those communications. The rule of limited waiver is consistent with the Supreme Court's statements that the privilege should be "minimally impaired" and impairment of the privilege permitted only when "absolutely necessary". The rule of limited waiver "minimally impairs" the privilege.

§7.102 Statutory authorization to access privileged documents is a separate issue from what happens when privileged documents are disclosed. The first is an issue of statutory interpretation and the second is one of waiver.

§7.103 The rule of limited waiver has been expanded to other areas as well. Such expansions protect the privilege and are consistent with the rule of "minimal impairment". Thus, the Quebec Court of Appeal held that filing a proof of claim regarding reimbursement of legal fees under an insurance policy in bankruptcy proceedings of the insurance company implicitly waived privilege over documents. It did so to the extent necessary for reasonable verification of such claim by the liquidator. However, such waiver was limited to the liquidator and could not be invoked by third parties.

§7.104 The rule of limited waiver should be applied and expanded because it is consistent with minimally impairing the privilege. As the decision of the Quebec Court of Appeal shows, the rule of limited waiver can be applied in other circumstances where there is disclosure of privileged communications for a narrow and defined purpose. Limited waiver allows the preservation of the privilege for other purposes. As McLachlin J. identified in *S. & K. Processors Ltd.*, the touchstone should be "fairness and consistency".

[para 71] The Public Body submitted that it provided the Requested Record to the inspectors for review in accordance with its duty under section 571(4) of the *MGA*.

[para 72] I note that section 56(1) of the *FOIP Act* also gives the Commissioner all of the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39 (the *Public Inquiries Act*); however, in *University of Calgary* the Supreme Court determined that despite this, and the language in section 56(3) of the *FOIP Act* that provides "Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2)," the Commissioner did not have the authority to compel the production of records over which solicitor-client privilege was claimed.

[para 73] In light of this, it is not entirely clear to me that an inspector would have the authority under the *MGA* or the *Public Inquiries Act* to compel, or require the production of a legal opinion over which solicitor-client privilege was asserted; however, I find that this is not the question that is before me, or which is necessary for me to decide. As Adam Dodek noted above:

> §7.102 Statutory authorization to access privileged documents is a separate issue from what happens when privileged documents are disclosed. The first is an issue of statutory interpretation and the second is one of waiver.

[para 74] The issue before me is not whether the municipal inspector had the power to compel the production of the Requested Record, but rather, whether the disclosure of the Requested Record to the municipal inspector was a waiver of privilege.

[para 75] In light of the Public Body's submissions, and taking into account the Court's decision in *Interprovincial Pipe Line* and the comments of Adam Dodek above, in my view, where a public body has relied on a statutory provision to disclose a record over which solicitor-client privilege is asserted, any determination that the public body has waived privilege should be made so as to minimally impair the privilege.

[para 76] Accordingly, in this case, I find that the disclosure of the Requested Record by the Public Body to the municipal inspector under the *MGA* was a limited waiver of solicitor-client privilege to the municipal inspector for a limited purpose and did not amount to a waiver of the privilege to the Applicant or to the world at large.

[para 77] In summary, based on the submissions and evidence before me, I find that the Public Body demonstrated its intention to maintain solicitor-client privilege in the Requested Record; that the Public Body, the Applicant and the Other Individual had a common interest in the Requested Record when the Requested Record was disclosed *in camera* at the October 18, 2016 Council meeting; that the Applicant continued to have a common interest with the Public Body in the Requested Record when he executed the Agreement and viewed the Requested Record on October 18, 2017; and that the Public Body did not waive, or lose, privilege against the Applicant, or the Other Individual, or the world at large.

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

[para 78] Section 27(1)(a) is a discretionary exception to disclosure, meaning a public body may, but not must, refrain from disclosing information covered by solicitor-client privilege.[23]

[para 79] In this case, the Applicant made submissions that it was in the public interest for the Public Body to disclose the Requested Record. His submissions included a letter he had written to the Public Body in which he stated:

> In the interests of transparent government, I believe that it is important that the citizens and taxpayers of the Town of Athabasca be allowed to see this opinion that cost thousands of dollars, extensive time investments by various people and one so important that it was presented in person by a member of [name of law firm] at that Council meeting.
>
> As to precedence of release of legal opinions by the Town of Athabasca, this has occurred in the past with one of the more recent examples being that of the Union Hotel street repair this past summer.[24]

[para 80] In Order F2018-18, the adjudicator and Director of Adjudication stated:

> [11] I do, however, consider that the Public Body can exercise its discretion to withhold records/information under section 24(1) (which I have already held applies) on the basis that section 27(1)(a) is the provision it ought to have applied, and the policy reasons for withholding under section 27(1)(a), had it originally done so, are relevant in deciding to exercise discretion to withhold under the exceptions to disclosure (advice and consultations and deliberations) set out in the provision it did apply (section 24). The courts have held that because people seeking legal advice always need to be able to speak freely with their counsel, records subject to solicitor-client privilege must always be treated as having been properly withheld. It is therefore not necessary to further assess the exercise of discretion where solicitor-client privilege applies to records/information.

[para 81] In support of this conclusion, at Note 2 of the Order, the adjudicator and Director of Adjudication cited the comments of the adjudicator in Order F2016-63 as follows:

> [2] In Order F2016-63, the adjudicator stated:
>
> > With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario*

[23] See *Edmonton Police Service* at para. 54.
[24] Letter from Applicant to Public Body dated October 31, 2017.

(Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII)):

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

[para 82] In Order F2020-16, the adjudicator made this statement with respect to the review by this Office of a public body's exercise of discretion under section 27(1)(a) where solicitor-client privilege has been established:

> [138] Past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above, at para. 71).

[para 83] In *Edmonton Police Service*, Justice Renke made the following comments about whether an inquiry into a public body's exercise of discretion was required by this Office where records were found to be privileged under section 27(1)(a):

> [74] In my opinion, a public body like EPS is required to establish its claim to solicitor client privilege, but only to the extent required by the Court of Appeal in ***Canadian Natural Resources Ltd. v ShawCor Ltd.***, 2014 ABCA 289 – and no farther. Satisfaction of the ***CNRL v ShawCor*** standard suffices for civil litigation and no higher standard should be imposed in the *FOIPPA* context. Further, even if s. 27(2) does not apply and a solicitor-client privilege claim remains discretionary, to establish the privilege is to establish the grounds for relying on the privilege. The existence of the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted.
>
> . . .
>
> [113] The IPC Brief claimed that even if the conditions for solicitor-client privilege were established, *FOIPPA* "requires a review of the second decision of the EPS to exercise its discretion to refuse disclosure in this case:" at para 93.
>
> [114] Solicitor-client privilege under s. 27(1)(a) does establish a discretionary not a mandatory exception from disclosure. Must a public body then provide reasons to the IPC for refusing to disclose records subject to solicitor-client privilege?
>
> [115] In my opinion, the determination that records are covered by solicitor-client privilege is itself sufficient warrant for not disclosing the records. No further reasons for refusing disclosure need be provided by a public body, at least in the absence of compelling public interest. No such compelling public interest was detected by the Adjudicator in any of the IPC Orders.

[116] The Chief Justice and Justice Abella wrote as follows in ***Ontario Public Safety and Security*** at paras 43, 53-54, and 75:

> [43] In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the Act . . .
>
> [53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that a head "may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship . . . The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions . . .
>
> [54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word "may" would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

At para 75:

> [75] We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis . . . . [emphasis added]

> [117] In ***Stevens v. Canada***, Justice Linden did not depart from the conclusion of Justice Rothstein that there was no duty to give reasons for refusing to disclose records subject to solicitor-client privilege: at para 50. At paras 52-53, Justice Linden wrote
>
> > [52] . . . But it is the Government *qua* client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.
> >
> > [53] I am not persuaded that the discretion exercised under section 23 of the Act was exercised improperly. There is simply no evidence of this. Furthermore, the decision cannot be impeached merely because no reasons were given. No statute or regulation requires reasons to be given and there is no particular reason why reasons should be necessary in this case. [footnotes omitted]
>
> [118] The Adjudicator, in my view, correctly approached this issue. The Adjudicator wrote in F2013-13 at para 238 as follows: "a public body need not explain why it has exercised discretion to withhold information once it has been established that information is subject to solicitor-client privilege, given the near absolute nature of this privilege . . . ."

[para 84] In the majority of Justice Renke's comments above, he appears to take the position that once solicitor-client privilege is established, no reasons as to how a public body exercised its discretion in deciding to withhold the record are required. However, he also seems to suggest in paragraph 115 that if the adjudicator detects that there is a compelling public interest in the record, the adjudicator is to then enquire into the public body's exercise of discretion, at least as it relates to the public interest argument.

[para 85] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 207, (*Edmonton Police Service No. 2*) which referenced Justice Renke's earlier decision in *Edmonton Police Service*, Justice Gill came to the following conclusion:

> [22] In addition, I find that the detailed affidavits provided by the EPS were more than sufficient to establish their claim of solicitor-client privilege under s. 27(1)(a) of the *FIOPPA*, on a balance of probabilities. No additional scrutiny of discretion concerning the EPS's claim of solicitor-client privilege is warranted.

[para 86] If I understand Justice Gill's position correctly, even though section 27(1)(a) is a discretionary provision, solicitor-client privilege is of such fundamental importance that once a record is determined to be subject to solicitor-client privilege, that fact alone makes any decision to withhold it unassailably reasonable and therefore, no review by this Office of a public body's discretion in withholding the record is warranted.

[para 87] As mentioned above, previous Orders of this Office have interpreted the Supreme Court's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, (*Ontario (Public Safety and Security)*), as standing for the view that records subject to solicitor-client privilege must always be treated as having been properly withheld, and it is therefore not necessary to further assess the exercise of discretion where solicitor-client privilege applies to records/information.

[para 88] If I understand the decisions properly, this position also appears to be the position taken by Justice Renke, for the most part, in *Edmonton Police Service*, and Justice Gill, in *Edmonton Police Service No. 2*.

[para 89] Based on the previous Orders of this Office and the comments of Justice Renke in *Edmonton Police Service*, and Justice Gill in *Edmonton Police Service No. 2*, given that I have found the Public Body has established on a balance of probabilities that the Requested Record is subject to solicitor-client privilege, the decision of the Public Body to withhold the record on this basis alone is reasonable and no further enquiry into the Public Body's exercise of discretion is required or warranted.

[para 90] If I am incorrect, however, and I am to understand Justice Renke's comments in paragraph 115 of *Edmonton Police Service* as saying that case-by-case balancing still needs to be done when an applicant puts forward a public interest argument, then in the present case, as the Applicant has made submissions that the disclosure of the Requested Record is in the public interest, I am to review the Public Body's exercise of discretion under section 27(1)(a) as it relates to this argument.

[para 91] In its initial submission, the Public Body referenced paragraphs 74 and 115 of Justice Renke's decision in *Edmonton Police Service*, reproduced above, and stated:

> 54. In exercising its discretion, the Public Body submits that the protection of a solicitor-client privilege record in this case outweighs any right of access to the responsive records. The disclosure of the Requested Record would directly reveal the legal advice sought by the Public Body and the context of the communication between the Public Body and its legal counsel. In consideration of this, the Public Body exercised its discretion to refuse disclosure.

[para 92] The Public Body provided further submissions on how it exercised its discretion in relation to the Applicant's public interest argument at paragraphs 54 – 57 of its initial submission, and paragraph 18 of its rebuttal submission.

[para 93] In reviewing the exercise of discretion by the Public Body in withholding the Requested Record, which I have found to be subject to solicitor-client privilege, I am mindful of the Supreme Court's comments at paragraph 54 of *Ontario (Public Safety and Security)*:

> [54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word "may" would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

[para 94] The Supreme Court was referring to the discretionary language in section 19 of the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, which, like section 27(1)(a) of the *FOIP Act*, permits the head of a public body to withhold records that are subject to solicitor-client privilege. Accordingly, the Supreme Court's comments as they relate to section 19 are equally applicable in this case.

[para 95] I note that the only section of the *FOIP Act* before me in this inquiry is section 27(1)(a). This inquiry does not involve any other section of the *FOIP Act*.

[para 96] If it is appropriate for me to review the Public Body's exercise of discretion in withholding the Requested Record which I have found to be subject to solicitor-client privilege, then, given the comments of the Supreme Court in *Ontario (Public Safety and Security)*, such a review must be done while recognizing that solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance" and "will only yield in certain clearly defined circumstances".

[para 97] Having reviewed the Public Body submissions, and taken into account the importance of solicitor-client privilege as recognized by the courts, I uphold the Public Body's exercise of discretion.

[para 98] I find that the Public Body reasonably considered the public interest in reaching its decision to withhold the Requested Record, which is subject to solicitor-client privilege, under section 27(1)(a). I do not find that the Public Body's decision was made in bad faith or for an improper purpose; that the decision took into account irrelevant considerations; or, that the decision failed to take into account relevant considerations. Accordingly, I uphold the Public Body's decision to withhold the Requested Record under section 27(1)(a) of the *FOIP Act*.

V. ORDER

[para 99] I make this Order under section 72 of the Act.

[para 100] I find that the Public Body has established on a balance of probabilities that solicitor-client privilege applies to the Requested Record; that the Public Body did not waive, or lose, solicitor-client privilege in the Requested Record against the Applicant, or the Other Individual, or the world at large; and, if I am to review the Public Body's exercise of discretion in withholding the Requested Record, I find that the Public Body properly exercised its discretion under section 27(1)(a) of the *FOIP Act*.

_____

Carmen Mann
Adjudicator
/kh