ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-45

November 30, 2021

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number 007391

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the Act), the Applicant made an access to information request to Alberta Justice and Solicitor General (the Public Body). The Applicant sought information about guidelines for creative sentencing under section 234(1) of the *Environmental Protection and Enhancement Act* (EPEA).

In response to the access request, the Public Body withheld information under sections 17(1), 20(1)(g), 24(1)(a) and (b), and 27(1)(a) and (b) of the Act. Information withheld under section 27(1)(a) was withheld on the basis that it was subject to solicitor-client privilege or work-product (litigation) privilege. The Applicant sought review of the application of those sections, and also argued that the Public Body was required to disclose information under section 32(1)(b) of the Act.

The Adjudicator confirmed that the Public Body properly withheld information under section 24(1)(b). The Adjudicator found that the Public Body was not required to disclose information under section 32(1)(b).

The Adjudicator found that the Public Body was not required to withhold employee mobile telephone numbers under section 17(1), and ordered the numbers disclosed to the Applicant.

The Adjudicator found that the Public Body improperly withheld information under section 20(1)(g) and failed to properly exercise its discretion to withhold information under section 27(1)(b). The Adjudicator ordered the Public Body to reconsider its exercise of discretion under section 27(1)(b).

The Adjudicator found that the Public Body failed to establish that all records withheld on the basis of solicitor-client privilege or work-product (litigation) privilege were subject to those privileges. The Adjudicator ordered the Public Body to provide records not subject to privilege to the Applicant, subject to any mandatory exceptions to disclosure under the Act.

Statutes Cited: AB: *Environmental Protection and Enhancement Act*, RSA 2000 c E-12 ss. 228; 230; 234. *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n); 17(1), 17(2)(f) and (h), 17(4)(g)(i), 17(5), 17(5)(f); 20(1), 20(1)(g); 24(1), 24(1)(a) and (b); 27(1)(a) and (b), 27(2); 32, 32(1)(b), 32(2); 72; *Rules of Court*, Alta Reg 124/2010, ss. 5.6-5.8.

Authorities Cited: AB: Orders 96-012, F2012-03, F2012-14, F2017-44, F2019-17, F2020-03, F2020-16, F2021-12, F2021-20.

Cases Cited: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Canada (Minister of National Revenue - MNR) v Iggillis Holdings Inc*, 2018 FCA 51; *Canada (National Revenue) v Iggillis Holdings Inc*, [2018] SCCA No 207; *Canadian Natural Resources Ltd v ShawCor Ltd*, 2014 ABCA 289; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *R. v. Anderson*, [2014] 2 SCR 167; *R. v Ahmad*, [2008] OJ No 5915; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. Canadian National Railway Company* (unreported), available at: https://www.alberta.ca/environmental-compliance-prosecutions-concluded-files.aspx; *R v Card*, 2002 ABQB 537

I. BACKGROUND

[para 1] On July 10, 2017, the Applicant made an access to information request to Alberta Justice and Solicitor General (the Public Body), under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25. The Applicant requested access to the following information:

> I am requesting records pertaining to guidelines, policies (formal or informal), directives, instructions, notices, or internal communication (including emails) which address the use, format, structure, and decision-making framework related to orders issued under section

234 of the Environmental Protection and Enhancement Act, RSA 2000 c E-12 (otherwise known as creative environmental sentences). These records would have informed the actions of the Crown Prosecutor in the matter of *R v Canadian National Railway Company* which saw the sentence order signed on June 2, 2017, for the time period of January 1, 2017 to current (July 12, 2017).

[para 2] For reference, section 234 of the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12 (the EPEA) states,

> *234(1) When a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:*
>
> *(a) prohibiting the offender from doing anything that may result in the continuation or repetition of the offence;*
>
> *(b) directing the offender to take any action the court considers appropriate to remedy or prevent any harm to the environment that results or may result from the act or omission that constituted the offence;*
>
> *(c) directing the offender to publish, in the prescribed manner and at the offender's cost, the facts relating to the conviction;*
>
> *(d) directing the offender to notify any person aggrieved or affected by the offender's conduct of the facts relating to the conviction, in the prescribed manner and at the offender's cost;*
>
> *(e) directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this section;*
>
> *(f) on application to the court by the Minister made within 3 years after the date of conviction, directing the offender to submit to the Minister any information with respect to the conduct of the offender that the court considers appropriate in the circumstances;*
>
> *(g) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission that constituted the offence;*
>
> *(h) directing the offender to perform community service;*
>
> *(i) requiring the offender to comply with any other conditions the court considers appropriate in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences.*

(2) Where an offender contravenes an order made under subsection (1)(c), the Minister may publish the facts in compliance with the order.

(3) Where the court makes an order under subsection (1)(g) or the Minister incurs publication costs under subsection (2), the costs constitute a debt due to the Government.

(4) An order made under subsection (1) comes into force on the day on which it is made or on any other day specified in the order and continues in force for the period specified in the order, not to exceed 3 years.

[para 3] The Applicant further describes the sentence order at the heart of the access request in his submissions at Inquiry. He states,

> The records in question pertain to a creative environmental sentence order issued by the Provincial Court on or about June 2, 2017 under section 234 of the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 (EPEA).
>
> * * *
>
> The sentence which is the subject of this request for records is the result of a guilty plea by the Canadian National Railway Company (CN Rail) with respect to a release of hydrocarbons into the North Saskatchewan river that occurred in April 2015. The penalty imposed on CN Rail under EPEA was a total of $125,000, consisting of $15,000 in fines and a creative funding order directing CN Rail to make a $110,000 payment to the Edmonton and Area Land Trust to support conservation in the Edmonton region with a focus on aquatic and riparian habitat. An unsigned agreement between the Crown and the Land Trust was appended to the sentencing order, with no specific terms on the project objective or details on how or why the Land Trust was chosen as the recipient for the fund and no third party monitoring or reporting requirements on how the funds are spent by the Land Trust. The final report on project outcomes is available on the AEP website, and the report discloses conservation work conducted with the sentencing funds however, of note, it appears from this final report that little or none of the funds were used for conservation in aquatic habitat.

[para 4] The Ministry of Environment and Parks (AEP) posts sentencing orders on-line. The sentencing order in this case (*R. v Canadian National Railway Company*) can be accessed at:

> https://www.alberta.ca/environmental-compliance-prosecutions-concluded-files.aspx

[para 5] After extending the time to respond to the access request, the Public Body responded to it on November 14, 2017. The Public Body identified 857 pages of responsive records, and provided access to 35 pages to the Applicant. The majority of the information was withheld on the basis that it is subject to solicitor-client privilege under

section 27(1)(a) of the Act. The Public Body also withheld information under sections 27(1)(b), 17, 20, and 24 of the Act.

[para 6] The Applicant requested that the Information and Privacy Commissioner review the Public Body's response to his access request. Mediation and Investigation were authorized to attempt to resolve the Applicant's concerns, but did not do so. This matter proceeded to inquiry.

[para 7] During this Inquiry, the Applicant argued that section 32 of the Act compels the Public Body to release the information he requested.

II. RECORDS AT ISSUE

[para 8] The records at issue are the 857 pages identified as responsive to the access request. Only the 35 pages provided to the Applicant have been provided to me to review in this Inquiry. The Public Body, as it may, has not provided records that it asserts are subject to solicitor-client privilege or litigation privilege to me for review.

III. ISSUES

[para 9] The issues set out in the Notice of Inquiry are as follows:

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

ISSUE B: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

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

ISSUE D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

ISSUE E: Does section 32 of the Act (information to be disclosed if in the public interest) require the Public Body to disclose the information in the records?

IV. DISCUSSION OF ISSUES

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

[para 10] The Public Body redacted information under section 17(1) from the following pages:

Pages: 358, 359, 365 – 367, 370, 372, 373, 789, and 804.

Applicable Law

[para 11] "Personal Information" is defined in section 1(n) of the Act:

> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> >
> > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
> >
> > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> >
> > *(viii) anyone else's opinions about the individual, and*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 12] Section 17(1) of the Act requires a public body to withhold third party personal information in response to an access request where disclosing it would be an unreasonable invasion of the third party's personal privacy. Section 17(1) states,

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

[para 13] The application of section 17(1) is informed by sections 17(4) and (5) which provide for presumptions that disclosure is an unreasonable invasion of third party personal privacy, and circumstances to consider in determining whether disclosure is an unreasonable invasion of third party personal privacy, respectively. Sections 17(4) and 17(5) state,

> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> >
> > *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
> >
> > *(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
> >
> > *(d) the personal information relates to employment or educational history,*
> >
> > *(e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,*
> >
> > *(e.1) the personal information consists of an individual's bank account information or credit card information,*
> >
> > *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party,*
> >
> > *or*
> >
> > *(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

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

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

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

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

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

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

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

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

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

[para 14] The list of circumstances in section 17(5) is not exhaustive. Any other relevant circumstances must also be considered when determining whether or not disclosure is an unreasonable invasion of third party personal privacy.

[para 15] Section 17(2) lists circumstances where disclosing personal information is not an unreasonable invasion of third party personal privacy. The Applicant argues that sections 17(2)(f) and (h) apply in this case. Those sections state,

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body

(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,

[para 16] After reviewing the information withheld under section 17(1), none of it would reveal the type of information contemplated in sections 17(2)(f) or (h). As such, I do not consider those sections any further.

Application of Applicable Law

Is the withheld information personal information under the Act?

[para 17] In the Applicant's rebuttal submission he indicates that he is not concerned with names, telephone numbers, and e-mail addresses or other information that identifies individuals representing the beneficiaries of the sentencing fund. I do not see that the information withheld under section 17(1) that I am considering in this Order contain any information about such individuals.

[para 18] The information withheld under section 17(1) falls under several categories:

- References to employee vacation plans, and well-wishes for a good vacation, along with names of the individuals making the plans, and expressing the well-wishes,

- Personal cellular numbers, along with name of the individual whose number it is,

- Mobile work numbers and names of the associated employee of the Public Body, and;

- Names of individuals (not the Public Body's employees) leading discussion in Plenary Sessions at a Creative Sentencing Workshop, identified on the Workshop Schedule.

[para 19] A personal cellular number is personal information and name of the person whose number it is, is personal information.

[para 20] Employee vacation plans are personal information, as are personal expressions of sentiments wishing someone a good vacation, along with the names of the individuals.

[para 21] Work contact information is, by definition, personal information, as are names of affiliated employees.

[para 22] Names of those leading plenary discussions are by definition, personal information as well.

Presumptions under section 17(4)

[para 23] All of the above personal information, both that of the Public Body's employees and the names of those leading discussion in plenary sessions, enjoys a presumption against disclosure under section 17(4)(g)(i), since it consists of a name, appearing in conjunction with other personal information.

Relevant Circumstances under section 17(5)

[para 24] The Public Body asserts that section 17(5)(f) (information supplied in confidence) is a relevant circumstance in this case, in respect of the names of individuals who are not Public Body employees. Here, I understand that the Public Body is referring to the names of those who led plenary discussions at the Creative Sentencing Workshop. All other redacted names appear to be names of Public Body employees, as indicated on the records from which they were redacted.

[para 25] I cannot conclude on the balance of probabilities that the evidence establishes that these names were provided in confidence. I have no statement from the individuals themselves to that effect, nor any other indication that the names were provided in confidence. To the contrary, the names appear on the schedule for the workshops and would have been known to anyone who attended.

[para 26] The Applicant did not argue that any circumstances under section 17(5) apply.

[para 27] Upon review, I do not see that any of the enumerated factors in section 17(5) apply to information withheld under section 17(1).

[para 28] Neither party argued that any other relevant circumstances arise under section 17(5). I do not find any other relevant circumstances under section 17(5).

Weighing the circumstances in section 17(5) against the presumptions against disclosure under section 17(4)

[para 29] There are no circumstances that weigh in favour of disclosing personal cellular numbers, vacation plans, or well-wishes. I find that the Public Body was required to withhold this information.

[para 30] Regarding employee contact information, I find that it should be disclosed. While there is a presumption against disclosure, as discussed in in Order F2020-03 at para. 37 this information is devoid of a personal dimension:

> Names of third parties are personal information under the FOIP Act. However, the disclosure of the names, contact information and job titles of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at para. 88, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 31] Since there is no indication that there is a personal dimension to those numbers, it is not an unreasonable invasion of third party personal privacy to disclose them. I find that the Public Body was not required to withhold this information.

[para 32] I find that the Public Body should have disclosed to the Applicant the mobile work numbers of its employee on pages 359, 366, 367, 370, 372, 373, and 375.

ISSUE B: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 33] The Public Body withheld pages 828 and 829 under section 20(1)(g).

[para 34] Section 20(1)(g) of the Act states,

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(g) reveal any information relating to or used in the exercise of prosecutorial discretion,*

[para 35] The Adjudicator in Order F2017-44 articulated a test for determining whether information is captured under section 20(1)(g). She stated at paras. 24 – 25,

> In its submission, the Public Body also cites a more recent Supreme Court of Canada decision, *R v. Anderson*, [2014] 2 SCR 167, 2014 SCC 41, which expanded on *Krieger*. In *Anderson*, the Court stated:
>
> > In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34 (CanLII), [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. (At para. 44)
>
> I agree with the analyses of both Orders F2007-021 and F2009-027, and that *Anderson* is instructive in this case. To summarize the lengthy discussion above, a public body seeking to withhold information under section 20(1)(g) must establish:

1. prosecutorial discretion was exercised in matters within the prosecutor's authority concerning the prosecution of offences,
2. there is information that relates to or was used in this exercise of that discretion, and
3. disclosure of the information could reasonably be expected to reveal this information.

[para 36] Prior to considering the above test, I note that while "sentencing" is not listed as a matter of prosecutorial discretion in *R v. Anderson*, [2014] 2 SCR 167 (*Anderson*), it seems to me that it is in this case. The EPEA contains creative sentencing provisions in section 234, and also other "regular" sentencing provisions in sections 228 and 230. Those sections prescribe common sentences such as fines and imprisonment. It is up to the Crown Prosecutor to decide which sentence it is appropriate to seek in a given case. The Crown Prosecutor has discretion to seek a sentence that, in its view, fits the crime. Such a decision would fall under the ambit of all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" quoted in the passage from *Anderson* in Order F2017-44 above.

[para 37] While sentencing is a matter of prosecutorial discretion, I find that the second step of the test is not satisfied for pages 828 and 829.

[para 38] The information on pages 828 and 829 consists of guidance on the parameters of creative sentences under the EPEA. However, while the subject of the guidance is about prosecutorial discretion, there is no evidence that the guidelines were related to or used in the any particular act of *exercising* of prosecutorial discretion in any particular case, including *R. v Canadian National Railway Company.* Rather, the guidelines appear to be suggestions or a broad, general policy which exists only in the background to the actual exercise of prosecutorial discretion in any given case. There is no evidence that revealing the information on pages 828 and 829 can be expected to reveal any information that relates to or was used in any prosecution.

Exercise of Discretion

[para 39] Merely determining that a discretionary exception to disclosure (such as section 20(1)) applies to certain information does not in itself establish that a public body may withhold information under it. A public body must also properly exercise its discretion to withhold information. However, since I have found that section 20(1) does not apply to the information on pages 828 and 829, I do not need to consider the Public Body's exercise of discretion to apply it.

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

[para 40] In this Order, I consider the application of section 24(1) to pages 839 and 840. The Public Body withheld information on those pages under sections 24(1)(a) and (b), together.

[para 41] Sections 24(1)(a) and (b) state,

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

[para 42] The scope of information captured under sections 24(1)(a) and (b) was summarized in Order F2019-17 at paras. 161-166,

> In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:
>
> 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> 2. be directed toward taking an action,
> 3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)
>
> In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).
>
> In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that
>
> > It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making. (At para. 115)

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

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision. (At para. 37)

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

Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposal, recommendations etc. such that they cannot be separated (Order 2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 43] I agree with the Adjudicator in Order F2019-17.

[para 44] The information withheld under section 24(1) is the body of an e-mail between lawyers working for the Public Body's Specialized Crown Prosecutions Services. The e-mail appears to be part of chain of e-mails generated in response to an earlier, informal request from the Applicant, for information about creative sentencing guidelines. The body of the e-mail lays out the rationale underpinning the author's decision not to provide the information requested by the Applicant. The author is clearly deliberating whether or not he has made the best decision. The concluding line of the e-mail, which has been disclosed to the Applicant, is, "let me know what you think", which indicates that the author of the e-mail seeks a consultation with its recipient. The withheld information consists of consultations and deliberations under section 24(1)(b).

Exercise of Discretion

[para 45] Since section 24(1) is a discretionary exception to disclosure, I must consider whether the Public Body properly exercised discretion to withhold information under it.

[para 46] Exercising discretion was considered in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Ontario Public Safety and Security*). Numerous orders of this office have confirmed that the reasoning therein is applicable to the exercise of discretion under the Act. At paragraph 71 of *Ontario Public Safety and Security,* the following factors were identified as relevant to the question of whether or not a public body has properly exercised its discretion:

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

[para 47] Justice Renke elaborated on what *Ontario Public Safety and Security* requires in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) at para. 416:

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

[para 48] With regard to consideration of harmful effects of disclosure, Justice Renke stated at para. 420 in *EPS*,

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

[para 49] When exercising discretion, public bodies should also consider the particular purpose of the exception to disclosure being considered. The purpose of section 24(1)(b) is, generally, to protect consultations made in the course of the decision-making process. (Order 96-012 at para. 31).

[para 50] The Public Body provides a very brief description of how it exercised discretion under section 24(1):

> The disclosure of the records in whole or in part, would mostly [sic] certainly make advice and deliberation less candid, comprehensive, and frank and would impair the Crown Prosecutor's ability to ensure excellent and independent decision-making process [sic].

[para 51] In general, a description as brief and general as the one provided by the Public Body falls short of demonstrating that it properly exercised discretion. In this case, however, the withheld information contains explicit deliberation about the possible negative affects of disclosing either the sort of information requested by the Applicant, or the rationale for not providing it. The content and reasons for not disclosing are interwoven with each other, and significantly overlap. After reviewing the withheld material, I agree with the Public Body that disclosing it stands to impair the Crown Prosecutor's decision-making process. In particular, disclosing the information may reasonably be seen to result in unrealistic or inappropriate expectations for the Crown Prosecutor's Office, when considering sentencing, which would outweigh any benefit to disclosure.

[para 52] I find that the Public Body properly exercised discretion to withhold information under section 24(1)(b), and that it properly withheld information under section 24(1)(b).

ISSUE D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 53] The Public Body withheld the majority of information under section 27(1)(a), and only two pages under section 27(1)(b). I consider the application of section 27(1)(a) first.

[para 54] Section 27(1)(a) of the Act states,

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

[para 55] The Public Body withheld the following pages entirely under section 27(1)(a) on the basis that they are subject to solicitor-client privilege:

Pages: 1 - 357, 360 - 364, 376 - 497, 515 - 787, 790, 793 - 803, 805 - 813, 830 - 838, 846 - 857.

[para 56] The Public Body did not apply section 27(1)(a) partially to any pages.

[para 57] The Public Body's description of pages 498 - 514 states that it asserts that those are pages "work product" under litigation privilege, rather than subject to solicitor-client privilege.

[para 58] I consider pages withheld on the basis that they are subject to solicitor-client privilege first.

Records Subject to Solicitor-Client Privilege

[para 59] As stated in *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner*, 2020 ABQB 10 (*EPS*) at para. 74, when a Public Body does not provide records that it asserts are subject to solicitor-client privilege for review, it may establish that such records were properly withheld by meeting the civil litigation standard for refusing to produce such records pursuant to the decision in *Canadian Natural Resources Ltd v ShawCor Ltd*, 2014 ABCA 289 (*ShawCor*). Per the decision in *ShawCor*, the appropriate civil litigation standard is that set in the Rules of Court, (Alta Reg 124/2010, ss. 5.6-5.8).

[para 60] The civil litigation standard requires that the Public Body provide an affidavit sufficiently describing the records to enable me to conclude that solicitor-client privilege is properly claimed.

[para 61] In *EPS*, Justice Renke described the criteria for recognizing solicitor-client privilege at para. 66:

> The criteria for recognizing solicitor-client privilege were confirmed by Justice Major in *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15:
>
> > 15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 837, as: "(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". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not ....

[para 62] The Public Body initially only provided an unsworn chart stating its privilege claims. At my request, after explaining that the civil litigation standard requires an affidavit, the Public Body provided two affidavits in respect of its privilege claims.

- The Public Body's Director, Freedom of Information and Protection of Privacy (the Director) swore an affidavit in respect of pages 1 - 154.

- An employee of the Public Body "in the processing of access requests under Freedom of Information and Protection of Privacy Act" (the Processing

Employee) swore an affidavit in respect of pages 155 -166, 167 - 185, 186 - 351, 352 – 353, 354 – 364, 376 - 422, 422 - 497, 499 - 514, 515 - 581, 582 - 600, 601 - 699, 700 - 721, 722 - 727, 728 - 755, 756 - 787, 790, 793 -803, 804 - 813, 830 - 838, and 846 - 857.

[para 63] In addition to the individual descriptions of records, both affiants describe the records subject to solicitor-client privilege generally as follows:

> All records consist of either
>
> (a) communications
>
> i between a lawyer and client
> ii. made in confidence;
> iii. in the course of seeking or providing legal advice; or
> iv. communications made within the framework of the solicitor-client relationship that were intended to be confidential; or
>
> (b) records reflecting internal discussion about legal advice that were intended to be confidential.

[para 64] The Applicant disputes that the Public Body's descriptions establish solicitor-client privilege over many of the records in several ways.

[para 65] The Applicant argues that the information he requested concerns the work of lawyers as they were developing policy, and not acting as legal advisors. Both affidavits regarding solicitor-client privileged records address this concern. Each affiant swears that the lawyers who created the records were acting in their capacities as legal advisors in relation to the creation of the records.

[para 66] The Applicant further argues that the records were not created within a solicitor-client relationship, since the records at issue were created by the Public Body's lawyers acting in a role as crown prosecutor, in the course of deciding what sentence to seek under section 234 of the EPEA.

[para 67] I note that only some of the records involve communication with Alberta Crown Prosecutor Service (ACPS). Strictly speaking, the Applicant's argument would only apply to records created by ACPS. That said, the issue of whether or not the records over which solicitor-client privilege is claimed were sent within the confines of a solicitor-client relationship is one that is relevant to all of the records withheld on the basis of solicitor-client privilege.

[para 68] The Public Body's descriptions of the records describe a web of communications between multiple entities: JSG Legal Counsel, ACPS, Alberta Environment and Parks (AEP), and Third Party Defense Counsel. The Public Body's

communications with ACPS were sent to the Crown Prosecutor handling the sentencing in *R. v. Canadian National Railway Company*. Third Party Defense Counsel was the lawyer representing Canadian National Railway Company (CNR) in that case.

[para 69] The communications over which solicitor-client is asserted involve different sets of the entities mentioned above:

- Communications between JSG Legal Counsel and AEP
- Communications between AEP and ACPS
- Communications between JSG Legal Counsel, AEP, and ACPS
- Communications between JSG Legal Counsel and ACPS
- Communications between ACPS and Third Party Defense Counsel

[para 70] If any of the communications fall outside of a solicitor-client relationship, then they will not be subject to solicitor-client privilege, unless those communications reveal the communications which are subject to solicitor-client privilege.

[para 71] Considering the context of the case, I find that most of the communications were made in the context of a solicitor-client relationship.

[para 72] First, I note that the issue of whether a government lawyer acting as a crown prosecutor precludes the formation of a solicitor-client relationship has been considered numerous times. The Courts have determined that acting as a Crown Prosecutor does not preclude the possibility that a solicitor-client relationship may form. See for example, *EPS*, *R v Ahmad*, [2008] O.J. No. 5915 and *R. v. Campbell*, [1999] 1 S.C.R. 565. So long as a crown prosecutor is providing legal advice to a client, a solicitor-client relationship may exist. Conversely, a Crown Prosecutor may seek legal advice from a lawyer, and take up the client side of the relationship. Indeed, while ACPS is a department within the Public Body, it appears to request legal advice from the Public Body. For example, the description of pages 25 to 49 is as follows,

> Follow-up e-mail from AB Crown Prosecution Services to client department [AEP] and their JSG legal counsel relating to Email dated April 20, 2017.
>
> The subject and context of the e-mail contains the seeking of legal advice as well as suggestions/edit on the draft attachments. There is an express statement of confidentiality on the records.

[para 73] The Public Body identifies AEP as a client. AEP (the Ministry of Environment and Parks) is the ministry responsible for the EPEA. The Public Body states

that its involvement with AEP regarding the EPEA is limited to acting as legal counsel and providing legal advice. In the Public Body's rebuttal submission, it clarifies that JSG Legal Counsel and ACPS were providing legal advice to the AEP as a client department. None of the other entities are identified as a client to any of the other entities. It stands to reason that ACPS would provide legal advice. While AEP is responsible for the EPEA, JSG Legal Counsel advises it with respect to EPEA and ACPS handles prosecutions. It seems that JSG Legal Counsel and ACPS act as legal advisors to AEP regarding prosecutions and sentencings under the EPEA. I find that solicitor-client relationships exist between JSG Legal Counsel and AEP, and ACPS and AEP.

[para 74] The Applicant argues that the involvement of ACPS in communications between AEP and JSG Legal Counsel constitute a waiver of solicitor-client privilege. I do not agree. The context indicates that AEP was receiving legal advice from JSG Legal Counsel and ACPS on the same matter. It stands to reason that JSG Legal Counsel, ACPS, and AEP would have communications between them in which legal advice is exchanged. I cannot find that AEP, as the client who enjoys the privilege, waived it by including both sources of legal advice in its communications.

[para 75] I also find that communications between JSG Legal Counsel and ACPS regarding matters concerning AEP's enforcement of the EPEA would not result in waiver of solicitor-client privilege. Since both were acting as legal advisors to AEP, discussion between them regarding matters concerning AEP would be captured on the continuum of communications to which solicitor-client privilege would apply.

[para 76] In contrast, there cannot be a solicitor-client relationship between Third Party Defense Counsel and any of AEP, JSG Legal Counsel, or ACPS. The oppositional nature and duty to CNR precludes Third Party Defense Counsel from forming such a relationship with them. However, below, I consider whether solicitor-client privilege attaches to communications between ACPS and Third Party Defense Counsel, as a matter of common interest privilege.

[para 77] I now consider whether communications involving only AEP, JSG Legal Counsel, and ACPS, or any combination of them, are subject to solicitor-client privilege, based upon the description provided by the Public Body.

Communications only between AEP and JSG Legal Counsel

[para 78] The descriptions of the records on the following pages indicate communications between AEP and JSG Legal Counsel, excluding the other entities:

Pages: 11 - 24, 67 - 71, 123 - 140, 141 - 154, and 155 - 166.

[para 79] With the exception of pages 123 - 140, and 141 - 154, for all of the above pages, I can see from the description of the records that they are subject to solicitor-client

privilege. Each record is described as a communication between AEP and JSG Legal Counsel, exclusive of other entities, for the purposes of seeking or providing legal advice. The records are described to contain either an express intention of confidentiality, or to be such that confidentiality may be inferred from the content of the legal advice therein.

[para 80] The descriptions for pages 123 - 140 is as follows:

> E-mail with attachments from client department [AEP] to their JSG legal counsel seeking legal advice JSG counsel. [sic]
>
> The subject and context of the e-mails contains the seeking of legal advice. The records were created in the course of providing legal advice.

[para 81] The description does not mention an expression or intention of confidentiality. The only reference to an intention of confidentiality for these records is the general assertion (at para. 63, above) that all records that the Public Body asserts are subject to solicitor-client privilege were intended to be confidential.

[para 82] I considered whether a general assertion of confidentiality would suffice to meet the civil litigation standard in Order F2021-12 at paras. 218 to 226. I found there, that given the requirement to consider whether the privilege applies to each record, or properly bundled records, individually, it did not. I reach the same conclusion here.

[para 83] In Order F2021-12 I also considered whether confidentiality could be presumed for any of the records, and I have considered the same for the records at pages 123 - 140. In this case, however, I cannot ignore that the Director's affidavit specifically mentions confidentiality regarding other records, but not for these pages. It seems to me that the Director is unable to swear that these records, when considered individually, were intended to be confidential. While, as suggested by the general assertion of confidentiality, the Public Body may not have intended the communications to be broadcast publically, it seems that an intention to hold them in confidence in the context of them to a solicitor-client relationship is absent. Therefore, I find that the Public Body has not established that pages 123 - 140 are subject to solicitor privilege.[1]

[para 84] The description for pages 141 – 154 suffers from the same issues as that for pages 123 – 140. I find that the Public Body has not established that they are subject to solicitor-client privilege for the same reasons as for pages 141 -154.

---

[1] In part orders, such as F2012-08 at paras. 70 and 71, a presumption of confidentiality sufficient to find that records are subject to solicitor-client has been found upon a review of the records themselves, and the nature of the information in them. As the records over which solicitor-client privilege have not been provided to me for review, I cannot make a similar presumption of confidentiality in this case. My review of the assertion of solicitor-client privilege in this case is necessarily limited to the Public Body's descriptions of the records, and whether the descriptions meet the *ShawCor* standard.

Communications between AEP and ACPS

[para 85] The descriptions of the records on the following pages indicate communications between AEP and JSG Legal Counsel, excluding the other entities:

Pages: 167 - 185, and 376 - 422.

[para 86] I find that the description of pages 376 - 422 establishes that they are subject to solicitor-client privilege. The description indicates communication for the purpose of seeking legal advice, which is intended to be confidential.

[para 87] I find that the description of pages 167 -185 do not establish that they are subject to solicitor-client privilege. The description does not mention confidentiality, and notes that the e-mail chain is a duplicate of pages 123 - 140, which were also not described as confidential.

Communications between AEP, JSG, and ACPS

[para 88] The descriptions of the records for the following pages indicate communications between AEP, JSG Legal Counsel, and ACPS exclusive of the other entities.

Pages: 25 - 49, 50 - 60, 61 - 66, 72 - 86, 96 - 119, 120 - 122, 352 - 353, 700 - 721, 722 - 727, 728 - 755, and 793 - 803.

[para 89] I find the descriptions for pages 25 - 49, 72 - 86, 96 - 119, 120 - 122, 352 - 353, 700 - 721, 722 - 727, 728 - 755, and 793 - 803 establish that the records are subject to solicitor-client privilege. The pages are described to be communications entailing the seeking or providing of legal advice, and are intended to confidential, or reflect confidential discussion falling on a continuum of communications related to legal advice.

[para 90] I find that the descriptions for pages 50 - 60 and 61 - 66 do not establish that these pages are subject to solicitor-client privilege. While the descriptions for these pages are very similar to those for pages 728 - 755 and 722 - 727, they do not state any intention of confidentiality or that confidentiality may be inferred from the content of the legal advice therein.

Communications between JSG Legal Counsel and ACPS

[para 91] The descriptions of the records for the following pages indicate communications between JSG Legal Counsel, and ACPS exclusive of the other entities.

Pages: 87 - 95, and 601 - 699.

[para 92] The evidence does not indicate a solicitor-client relationship between JSG Legal Counsel and ACPS. However the descriptions for pages 87 - 95 and 601 - 699 indicate that the communications concerned legal advice being provided to AEP, who was client to both ACPS and JSG Legal Counsel. The description of pages 601 - 699 indicates that JSG was making suggestions on a draft document to ACPS on behalf of AEP. The description of pages 87 - 85 contains duplicates of pages 72 - 86 which I found above are subject to solicitor-client privilege in favour of AEP. The communication on these pages entails the seeking or providing of legal advice and are described to be confidential. I find that the description of these pages establishes that they are subject to solicitor-client privilege.

Communications between ACPS and Third Party Defense Counsel

[para 93] The descriptions of the records for the following pages indicate communications between ACPS and Third Party Defense Counsel, exclusive of the other entities.

Pages: 186 - 351, 354 - 364, 422 - 497, 515 - 581, 582 - 600, and 756 - 787.

[para 94] Though not specifically argued by the Public Body, I have considered whether there is a common interest privilege among the entities such that solicitor-client privilege emanating from the relationship between AEP and JSG Legal Counsel and AEP and ACPS extends to communications between ACPS and Third Party Defense Counsel, regardless of whether the other entities are in a solicitor-client relationship.

[para 95] The fact that Third Party Defense Counsel was representing CNR in the prosecution does not entirely rule out the possibility that there may be a common interest between CNR and any of the other entities.

[para 96] In *Canada (Minister of National Revenue - MNR) v Iggillis Holdings Inc*, 2018 FCA 51 (*Iggillis*); leave to appeal to the Supreme Court of Canada denied in *Canada (National Revenue) v Iggillis Holdings Inc*, [2018] SCCA No 207; the Federal Court of Appeal considered whether under the laws of Alberta and British Columbia, common-interest privilege was an extension of solicitor-client privilege. The particular issue was whether solicitor-client privilege continues to apply to a legal opinion created within a solicitor-client relationship, after it is disclosed to a third party involved in a commercial transaction with the client. The third party in *Iggillis* was generally adverse in interest to the party disclosing the legal opinion, being on the opposite side of the commercial transaction. In finding that the privilege continued to apply, the Court stated at paras. 41 and 42:

> Based on the decisions of the courts in Alberta and British Columbia, solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same

> transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.
>
> As noted above, when dealing with complex statutes such as the Income Tax Act, sharing of opinions may well lead to efficiencies in completing the transactions and the clients may well be better served as the application of the Income Tax Act will be of interest to all of the parties to the series of transactions. In my view, in the circumstances of this case, Abacus and Gillis had sufficient common interest in the transactions to warrant a finding that, in Alberta or British Columbia, the Abacus memo is protected from disclosure by solicitor-client privilege.

[para 97] While the circumstances here are different from a commercial transaction, it is conceivable that a common interest may arise, though it seems unlikely. Given that parties generally adverse in interest may find a common interest on particular issues, it is not out of the realm of possibility that a common interest may arise between Third Party Defense Counsel and ACPS, and the other entities, on the issue of sentencing under the EPEA. CNR plead guilty to offenses under the EPEA; it may find that it is expedient to cooperate with the Crown on sentencing. However, I do not have sufficient details from the Public Body to determine that there is a common interest on the part CNR here.

[para 98] I find that none of the communications between ACPS and Third Party Defense Counsel are subject to solicitor-client privilege.

Other Pages over which solicitor-client privilege is asserted

The pages over which the Public Body asserts solicitor-client privilege that remain to be considered are:

Pages: 1 - 10, 790, 804 - 813, 830 - 838, and 846 - 857.

[para 99] None of the above pages are communications.

[para 100] The description for pages 1 - 10 is as follows:

> Draft document prepared by JSG legal counsel for the client department (AB Environment and Parks [AEP])
>
> The records were created in the course of providing legal advice. There is an express statement of an intention of confidentiality on the records.

[para 101] I consider that pages 1 - 10 do not appear to contain legal advice themselves, nor are they described to relate to, or reveal, legal advice given to AEP. They

are only described as being created "in the course of providing legal advice." The description falls short of indicating that the pages entail the seeking or giving of legal advice, or that they are communications or part of a continuum of communication to which solicitor-client privilege might apply.

[para 102] The description for pages 804 – 813 is as follows:

> Internal copy of documents originating from the Crown Prosecution Services. Crown Legal Counsel confirmed that this relates to proposed legal opinion/advice to the client department. The document is provided in confidence.

[para 103] While the description stated that the documents "originated from Crown Prosecution Services", and "is provided in confidence", there is no indication that prior to the access request, it was ever communicated to any party, or provided to anyone. It seems that this document was only "provided" in the sense that it was identified as responsive to the access request. As with pages 1 – 10, the description for these pages indicate that they do not appear to contain legal advice themselves, or reveal legal advice given to AEP. The description falls short of establishing that solicitor-client privilege applies.

[para 104] The descriptions for pages 830 - 838 and 846 - 857 are identical; they read:

> Research materials obtained by JSG Legal Counsel and is used in determining what legal advice to be provided to the client department. The nature of the material would reveal the type of legal advice provided to the client (AEP) [sic]

[para 105] The above description does not indicate that the e-mails were communications between a solicitor and client, or that they were intended to be confidential among the parties. While I understand that the Public Body is concerned that the nature of the materials would reveal the type of advice given (presumably in other communications) to its client, that concern does not bring research materials under the umbrella of solicitor-client privilege. The description does not provide any basis to conclude that mere revealing the "type" of advice given will reveal any solicitor-client privileged information.[2] It is also unclear what the word "type" means in this context; conceivably, it may refer to the quality, subject, scope, or some other aspect of the advice. The word "type" is too vague to permit me to conclude that revealing the type of advice given would compromise solicitor-client privilege.

---

[2] I note that in *EPS* at para. 244 - 248 Justice Renke found that a publically available decision was subject to solicitor-client privilege. The facts in *EPS* differ significantly from those here as Justice Renke was able to review records over which solicitor-client privilege was claimed. Justice Renke was able to see that the case was specifically referred to in, and attached to, a legal opinion. Further, the case was "an illustration of a legal conclusion found in the opinion." Disclosing the opinion would therefore have revealed information that is subject to solicitor-client privilege. In this Inquiry, I have only an assertion that the research materials would reveal the type of advice given.

[para 106] However, the descriptions for pages 830 - 838 and 846 - 857 suggest that they may be captured under another type of privilege, such as work-product privilege. The contrast between work product privilege and solicitor-client privilege was discussed in *R. v Card*, 2002 ABQB 537. The Court held at paras. 18 - 20:

> The key element in work product privilege is that it attaches to communications in the course of litigation or for the dominant purpose of litigation (Mosley v. Spray Lakes Sawmills (1980) Ltd. (1996), 184 A.R. 101 (C.A.). Work product generally includes such materials as Crown counsel's notes and memoranda on file, correspondence, Crown counsel's opinions, and trial strategy. Sulyma J. at para. 95 of Chan adopted the following definition of work product:
>
> > Work product is usually in the form of written notes or material that involves thought processes or considerations of Crown counsel in the preparation of its case. In other words the product is the result of an analysis of the mind.
>
> Work product, however, does not include factual information, and any new facts or facts inconsistent with previously disclosed facts must be disclosed (R. v. Stewart, [1997] O.J. No. 924 (Ont. Gen. Div); R. v. DeRose (2000), 81 Alta. L.R. (3d) 359 (Prov. Ct.); Martin Report; Chan, at para. 98).
>
> In my opinion, work product privilege is not a sub-set of solicitor-client privilege, and is closer in nature to litigation privilege in the civil context. The rationale underlying work product privilege is quite different than that associated with solicitor-client privilege; it is a privilege that provides the lawyer with a "zone of privacy" in preparing for litigation. It is tied to the litigation process, rather than directly to the administration of justice and access to legal advice.

[para 107] Since the descriptions for pages 830 - 838 and 846 - 857 do not indicate that the e-mails were communications between a solicitor and client, or that they were intended to be confidential among the parties, it does not establish that the pages are subject to solicitor-client privilege. I will consider whether the description establishes that they are subject to work-product privilege, below.

[para 108] Lastly, I consider page 790. The description for that page reads as follows:

> Internal Guidelines/Materials used by the AB Justice Lawyers for the dominant purpose of litigation. The information is intended to be confidential and can be shared only between AB Justice Lawyers.

[para 109] Though the Public Body does not expressly state so, it appears that it is arguing that page 790 is subject to litigation privilege, or work product privilege. The description does not establish that page 790 is subject to solicitor-client privilege. I will consider whether the page is subject to work-product privilege along with pages 499 to 514, which the Public Body expressly states are work product subject to litigation privilege.

Records subject to litigation or work product privilege

[para 110] Here, I consider whether pages 499 - 514, 790, 830 - 838, and 846 - 857 are subject to litigation or work-product privilege.

[para 111] As with solicitor-client privilege, where a Public Body does not provide records that it asserts are subject to litigation privilege, it must meet the civil litigation standard for refusing to produce such records. (Order F2020-16 at para. 93; Order F2021-20 at para. 85).

[para 112] The Supreme Court of Canada described litigation privilege in *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52. The Court said, at para. 19,

> Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, La preuve civile (4th ed. 2008), at pp. 1009-10.

[para 113] The Supreme Court described when litigation privilege ends in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (*Blank*). The Court stated at para. 34,

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[para 114] The description for pages 499 - 514 reads,

> Draft Document. Some pages are duplicates of pages 1 - 10.
>
> Draft document prepared by SJG Legal Counsel for the client department (AEP)
>
> The records is a work product under litigation privilege. [sic]

[para 115] I find that the description of pages 499 - 514 does not establish that the records are subject to litigation privilege. The description states that record was created for AEP, but thereafter makes a bald assertion that it is subject to litigation privilege, without stating its dominant purpose, or giving any indication of to what litigation it is relevant.

[para 116] I find the description of the record on page 790 establishes that it is subject to litigation privilege. The Crown appears to have established guidelines for litigating that relate to creative environmental sentencing, and use those guidelines for the dominant purpose of litigation. Since the Crown bears the responsibility for all prosecutions, the relevant litigation never truly comes to an end. There may always be the next case.

[para 117] I find that the description for pages 830 - 838, and 846 - 857 do not establish that it is subject to work product privilege. There is no mention in the description that it is tied to a litigation process in any way. Here I note that while the scope of the access request would encompass records directly related to the proceedings in *R. v. Canadian National Railway*, the scope of the access request is such it may encompass records not related to any particular proceeding. Thus it is unclear whether these, or any, records are related to any litigation or prosecution.

[para 118] In sum, I find that the descriptions of the following pages fail to establish that they are subject to solicitor-client privilege or litigation/work product privilege:

Pages: 1 - 10, 50 - 60, 61 - 66, 123 - 140, 141 - 154, 167 - 185, 186 - 351, 354 - 364, 422 - 497, 499 - 514, 515 - 581, 582 - 600, 756 - 787, 804 - 813, 830 - 838, and 846 - 857.

Records withheld under section 27(1)(b)

[para 119] Pages 828 and 829 were withheld under section 27(1)(b) of the Act. That sections states,

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*

[para 120] The meaning of "by or for" in section 27(1)(b) was considered in *EPS*; Justice Renke stated at para. 441,

> In my opinion, the Adjudicator correctly interpreted s. 27(1)(b) by not extending "by or for" to "by or for the benefit of" and by confining the meaning of "by or for" to "by or on behalf of" or "by or at the direction of."

[para 121] The information on pages 828 and 829 is particular to criteria for crafting environmental sentences. I can see that the information is both clearly useful to lawyers of the Public Body, and that it is intended to provide guidance to them as they enforce the EPEA. It is related to the provision of legal services.

[para 122] I note that the Public Body's submissions are silent on who prepared the information on pages 828 and 829 or at whose direction it was prepared. However these pages appear to be referenced in the withheld material on pages 839 and 840, which indicates that they were prepared by Special Crown Prosecution Services. They were created by or for a lawyer of the Public Body. I find that these pages are captured under section 27(1)(b).

Exercise of Discretion

Solicitor-client and litigation privileged records

[para 123] A public body does not have to demonstrate that it properly exercised discretion to withhold records subject to solicitor-client privilege or litigation privilege. See Order F2021-20 at paras. 90 - 92. The purpose of the privilege is enough to justify exercising discretion to withhold. Accordingly, I do not consider the exercise of discretion to withhold privileged documents any further.

Records withheld under section 27(1)(b)

[para 124] The Public Body did not describe what it considered when exercising discretion under section 27(1)(b). I cannot find that it properly exercised discretion. I will order the Public Body to reconsider discretion to withhold records under this section.

[para 125] Given that the information requested concerns sentencing in the justice system, among whatever other factors it finds are relevant, the Public Body should have considered whether disclosing the information on pages 828 and 829 will result in greater transparency and public trust in the justice system, and if so, if consideration of that benefit weighs in favour of disclosure.

ISSUE E: Does section 32 of the Act (information to be disclosed if in the public interest) require the Public Body to disclose the information in the records?

[para 126] The Applicant argues that section 32(1)(b) required the Public Body to disclose the information he seeks. Section 32(1)(b) states,

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

[para 127] Per section 32(2), section 32(1)(b) applies despite any other provision of the Act:

(2) Subsection (1) applies despite any other provision of this Act.

[para 128] The Applicant carries the burden of establishing that disclosure is clearly in the public interest. In Order F2012-03, the Adjudicator stated at para. 21:

> …With respect to section 32(1)(b), it is not enough for the Applicant to argue that the public has some interest in the information; the Applicant must show that there is compelling public interest (Order 97-018).

[para 129] The threshold to compel the release of information under section 32(1)(b) is high. The Adjudicator in Order F2012-14 stated, at para. 192,

> Still, there remains a high threshold in order to trigger section 32(1)(b). While the circumstances in question need not amount to an emergency – in the same sense as an emergency arising from a risk of significant harm to health, safety or the environment – the circumstances must be such that disclosure of information is "clearly" in the public interest. As I mentioned at the oral hearing, for section 32(1)(b) to apply, disclosure must be clearly in the public interest in that there must be circumstances "compelling" disclosure (Order F2004-024 at para. 57). As noted in Order 96-011 (at p. 16 or para. 48), the override provided by section 32 means that it must be interpreted narrowly. In my view, this is regardless of whether it is section 32(1)(a) or 32(1)(b) that is under discussion.

[para 130] The Applicant's arguments on section 32(1)(b) are brief, and do not demonstrate any circumstances compelling disclosure in this case. The Applicant merely asserts that the there is a "clear public interest in the development and implementation of a creative environmental sentence…"

[para 131] I find that the Public Body is not required to disclose any information under section 32(1)(b) in this case.

V. ORDER

[para 132] I make this order under section 72 of the Act.

[para 133] I confirm that the Public Body properly withheld information under section 24(1)(b).

[para 134] I confirm that the Public Body was not required to release information under section 32(1)(b).

[para 135] I order the Public Body to disclose to the Applicant the mobile work numbers of its employees withheld under section 17(1) on pages 359, 366, 367, 370, 372, 373, and 375.

[para 136] I find that the Public Body improperly withheld pages 828 and 829 under section 20(1)(g).

[para 137] I order the Public Body to reconsider exercising discretion under section 27(1)(b) to withhold pages 828 and 829. When reconsidering exercising discretion, the Public Body shall take into account the consideration in paragraph 125 of this Order.

[para 138] If the Public Body elects not to withhold pages 828 and 829, it shall provide them to the Applicant. If the Public Body continues to withhold pages 828 and 829, or any portion of them, it shall provide notice to the Applicant of the same.

[para 139] Subject to any applicable mandatory exceptions to disclosure under the Act, including but not limited to those in sections 16, 17, 20(4), and 27(2) of the Act, I order the Public Body to disclose to the Applicant all records that it incorrectly withheld as subject to privilege. Those records are:

Pages: 1 - 10, 50 - 60, 61 - 66, 123 - 140, 141 - 154, 167 - 185, 186 - 351, 354 - 364, 422 - 497, 499 - 514, 515 - 581, 582 - 600, 756 - 787, 804 - 813, 830 - 838, and 846 - 857.

[para 140] In the event that it applies any mandatory exception to disclosure to records incorrectly withheld as subject to privilege, I order the Public Body to provide notice to the Applicant detailing the application of those exceptions.

[para 141] If the Public Body continues to withhold pages 828 and 829 under section 27(1)(b), or applies any mandatory exception to disclosure to records incorrectly withheld as subject to privilege, I retain jurisdiction to review the application of those sections of the Act if the Applicant seeks such a review.

[para 142] If the Applicant wishes to seek review of the continued application of section 27(1)(b) to pages 828 and 829, or the application of any mandatory exception to disclosure applied to records incorrectly withheld as subject to privilege, the Applicant shall forward a request for review to me and the Public Body, within 60 days of receiving notice from the Public Body.

[para 143] I order the Public Body to confirm in writing, to me and the Applicant, that it has complied with this Order within 50 days of receiving it.

_____

John Gabriele
Adjudicator
/bah