ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2020-04

July 16, 2020

DAVIDSON & WILLIAMS LLP

Case File Numbers P1472 and P1473

Office URL: www.oipc.ab.ca

Summary: Two Applicants made access requests to a law firm for their personal information contained in a client file that had been created by the law firm in the course of representing a client who was opposed in interest to the Applicants during legal proceedings. Some of the information in the file was information that had been contained in correspondence between the law firm and the Applicants, or was information that the Applicants otherwise already knew the law firm possessed.

The Adjudicator held that some of the information was excluded from the Act by reference to section 4(3)(k) (information in court files) and some of it was subject to solicitor-client privilege (hence covered by the exception to disclosure for privileged information under section 24(2)(a)).

The Adjudicator held that she did not need to identify which information fell within these provisions. This was because all of the personal information of the Applicants had been collected for an investigation or legal proceeding within the terms of section 24(2)(c), which is a discretionary exception to the right to access one's own personal information of PIPA. She also held that the law firm had appropriately exercised its discretion to withhold all of the information, on the basis of the principle that generally it is unreasonable to require a law firm to provide information out of a file of its client to a party opposed in interest to the client. The fact some of the information was already known to the Applicants did not need to be considered as a factor for exercising discretion in this case, because the Applicants did not indicate they wished to have access to such information.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 1(1)(k), 1(1)f)(iii), 4(3)(k), 4(5), 24(1.1), 24(1.2)(a), 24(1.2)(b), 24(2)(a), 24(2)(c), 24(3)(b), 38(1), 38(2), 38(3), 52

Orders Cited: AB: Decision P2011-D-003; Orders F2013-32, F2013-33; **BC:** Order P05-01

Court Cases Cited: *Rodriguez v. Woloszyn,* 2013 ABQB 269 (CanLII); *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221 (CanLII); *Pederson v. Allstate Insurance*, 2019 ABQB 531 (CanLII); *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII)

I. BACKGROUND

[para 1] On October 31, 2009, two applicants each made access requests to a law firm (the "Law Firm" or the "Organization"), under the *Personal Information Protection Act* ("PIPA" or "the Act") for their personal information, contained in a client file created by the Law Firm in the course of representing a client who was opposed in interest to one of the Applicants during legal proceedings.

[para 2] The Law Firm withheld all responsive records, relying upon section 24(2)(a) (information protected by solicitor/client or litigation privilege) and 24(2)(c) (information collected for an investigation or legal proceeding) of the Act. The Applicants requested a review of the Law Firm's decision. When the matter came to inquiry, the Law Society of Alberta was invited to participate an intervenor.

[para 3] The Law Firm and Law Society made preliminary arguments that the Commissioner should not conduct an inquiry in this matter, on the basis of section 4(5) of the Act (Act not to be applied so as to affect any legal privilege, or to limit information available by law to a party to a legal proceeding), as well as their position that the applications were in themselves an abuse of process. As well, they took the position that the Commissioner does not have the power to order the production to him, for the purposes of determining the solicitor-client privilege claim, of records for which this claim had been made.

[para 4] In an interim Decision dated June 30, 2011, then-Commissioner Work found that he had the jurisdiction and the obligation to review the Law Firm's responses to the Applicants, including its responses relative to records over which it was claiming solicitor-client privilege.

[para 5] Commissioner Work also concluded that the wording of sections 38(1), (2), and (3) of the Act, which give him power to require production of records for his own review "notwithstanding any privilege of the law of evidence", permitted him to require production of solicitor-client privileged records. However, he stated his view that this must be done, in accordance with the substantive rule of confidentiality of solicitor-client communications that had been laid down by the Supreme Court of Canada, only in

circumstances in which this is absolutely essential for him to perform his statutory duty, and only to the extent absolutely necessary.

[para 6] Accordingly, Commissioner Work ordered the Law Firm to respond in accordance with this office's Solicitor Client Privilege Adjudication Protocol for any records over which it was claiming solicitor-client privilege, and to provide for his review any records responsive or potentially responsive to the requests for which it was not claiming solicitor-client privilege.

[para 7] The Law Firm's response included an affidavit, in which it attested that it had reviewed the entire file of Davidson & Williams' client (who was opposed in interest to the Applicant in the matter) and that it believed this file to be entirely subject to solicitor-client privilege as a matter of law.

[para 8] On October 12, 2011, the then-Commissioner wrote to the Law Firm concerning the Law Firm's affidavit of October 4, 2011. Commissioner Work's letter stated the following:

> I have a number of questions in relation to this attestation, which can readily be answered by you by your filling out the Solicitor-Client Adjudication Protocol Record Form. Pursuant to my power under the *Public Inquiries Act* section 4 and the *Personal Information Protection Act* section 38(1) to require parties to give evidence on oath, I direct you to fill out the form and attest to its truth for each individual record or part of a record in your possession that consists of or contains the Applicant's personal information, or to otherwise answer the questions by way of affidavit that are raised in the form for each of the records or parts of records.

[para 9] On October 23, 2011, the Law Firm applied for judicial review in relation to this letter, seeking the following remedies:

> (a) An Order in the nature of certiorari quashing the direction of the Commissioner to provide information about the contents of the client file.
>
> (b) An Order in the nature of prohibition prohibiting the Commissioner from requiring information about or disclosure of or access to the contents of the client file.
>
> (c) An Order declaring that the *Personal Information Protection Act* does not authorize the Commissioner to require the Applicant [in the judicial review] to provide the information in question or authorize the Commissioner to access the contents of the client file.

[para 10] On April 9, 2018, the Law Firm discontinued its judicial review application. Accordingly, as the delegated adjudicator, on May 9, 2018, I notified the Law Firm that the inquiry in this matter would proceed, and asked that it comply with the direction contained in Commissioner Work's letter, in particular, that it either:

- fill out the attached form (this form was formerly contained in this Office's Solicitor-Client Adjudication Protocol Record Form and is now contained in the Privilege Practice Note, available on the Office Website (*Resources>P>Privilege Practice Note*) and attest to the truth of the statements made therein, for each individual record or part of a record in its possession **that consists of the Applicants' personal information**, or, alternatively, [emphasis in original]

- answer the questions raised in the form for each of these records or parts of records by way of affidavit.

I also advised the Law Firm that it could respond to all of the issues that had been set out in the Notice of Inquiry dated December 13, 2010 (quoted below).

[para 11] The Law Firm responded on June 30, 2018. It provided its entire response *in camera.* It also asked that I provide it with copies of all correspondence between the Requestors (the Applicants) and the OIPC.

[para 12] On July 30, 2018 I wrote to the Law Firm to indicate that I accepted the parts of its response on an *in camera* basis that discussed the records at issue. However, other parts of its response did not reveal information about the records at issue, and I asked the Law Firm to consider which parts of its response to me could be shared with the Applicants on the basis that they did not reveal privileged information. I also asked some further questions about the Law Firm's response, and indicated that the Law Firm had received copies of all correspondence between the OIPC and the Applicants since the inquiry had recommenced.

[para 13] The Law Firm responded on September 20, 2018 by providing a redacted version of its response to the Applicants. It also provided the redacted version of the letter to me, and explained why in its view the redactions were necessary. It provided answers to some of my questions, and also requested that I answer a question regarding records which were being withheld under section 4(3)(k). As well, it indicated it wanted all correspondence between the Applicants and the OIPC, not just correspondence since the recommencement of the inquiry.

[para 14] Further correspondence ensued relating to aspects of the Law Firm's submissions, to the question of which parts of the Law Firm's submissions should be shared with the Applicants, and to the Law Firm's request for the OIPC's correspondence with the Applicants. On October 1, 2019 I wrote to the Law Firm explaining why I would not accede to its request to provide further correspondence between the OIPC and the Applicants beyond that which the Law Firm had already received, and asked that it answer the questions I had asked of it earlier, by a specified date. The Law Firm asked for an extension to that date, but did not respond by the extended date.

[para 15] On January 24, 2020 I wrote to the Law Firm setting out the information I believed was necessary for the Applicants to have in order to know the case they were to meet, which included particular portions of the Law Firm's submissions. The Law Firm

responded and did not indicate any objection to the information I proposed to share with the Applicants.

[para 16] Accordingly, I provided the information to the Applicants, and gave them an opportunity to respond. Because some of the withheld information was or had already been in the Applicants' possession or accessible to them, I also asked the Applicants to indicate whether they wanted the Law Firm to provide them with information in the records that had been or was already in their possession.

[para 17] On May 25, 2020, one of the Applicants provided a response, which was shared with the Law Firm. The Law Firm provided a response to this submission on June 4, 2020.

II. RECORDS AT ISSUE

[para 18] The records at issue are those withheld by the Law Firm that consist of the personal information of the Applicants.

III. ISSUES

[para 19] The issues stated in the Notice of Inquiry were as follow:

1. Was the information in the withheld records, or any of it, responsive to the Applicant's request for the Applicant's personal information having regard to the definition of personal information in section 1(1)(k) of the Act?

2. If yes, is the information or any of it excluded from the Act by the application of section 4(3)(k) of the Act (information in a court file)?

3. Is the Applicant's personal information in the Organization's custody or control?

4. If the Organization refused to provide access to the Applicant's personal information in its custody or control that is not excluded by section 4(3)(k), did it do so in accordance with section 24(2) (discretionary grounds for refusal)? In particular,

    a. Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the requested personal information or parts thereof?

    If "solicitor-client privilege" is asserted over any one or more of the records at issue please refer to the "Solicitor-Client Privilege Adjudication Protocol" available on our office's web site www.oipc.ab.ca .

b. Did the Organization properly apply section 24(2)(c) of the Act (information collected for an investigation or legal proceeding) to the requested personal information or parts thereof?

IV. DISCUSSION OF ISSUES

Issue 1. Was the information in the withheld records, or any of it, responsive to the Applicant's request for the Applicant's personal information having regard to the definition of personal information in section 1(1)(k) of the Act?

[para 20] In Decision P2011-D-003, an interim decision that was made by former Commissioner Work at an earlier stage of the inquiry, the Commissioner said (at paras 29 to 30):

> … under PIPA, an access request can only be for a person's own personal information, and in this and similar cases, what is properly regarded as the requestor's personal information does not by any means extend to what are likely to be the greatest parts of the file. I addressed a similar point in an earlier order, P2006-004. In that case, an individual had requested his own personal information from the Law Society. Much of the information in the Law Society's files consisted of its dealings with complaints the applicant had made against Law Society members. I said:
>
> > 11 My jurisdiction over information requests under the Personal Information Protection Act is limited to access requests for personal information. Sections 24 and 46(1) of the Act combine to confer my jurisdiction. They provide:
> >
> > > 24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:
> > >
> > > (a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization; … .
> > >
> > > 46(1) An individual who makes a request to an organization respecting personal information about that individual may ask the Commissioner to review any decision, act or failure to act of the organization. [emphasis added]
> >
> > 12 The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore connected to them in some way - is not necessarily "about" that person. In this case, only a part of the information that the A/C asked for was information "about" him. Had he relied on PIPA to obtain information, he would not have received much of the information that was made available to him under the Legal Profession Act and the Rules created thereunder, or pursuant to the requirements of fairness.
> >
> > **…**

> 18 I do not need to decide for the purpose of this inquiry precisely which parts of the information in the documents collected or created for the purpose of the complaint proceedings were "personal information" of the A/C, as that term is to be understood in PIPA. It is sufficient to say that there is a great deal of information in the documents that is not the A/C's personal information even though it was generated in consequence of his complaints. The latter includes information about the persons about whom he complained and their dealings with the A/C, information about other third parties and their dealings with the A/C, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process. As well, the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information.

> In my view, there is likely to be a close parallel between the type of information that is in the "client file" held by the law firm, and the type of information described in the paragraphs just quoted. The fact the file contains information related to one of the Applicants because he was the opposing party in the legal matters does not of itself make the information "about him". What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information, in contrast to information other than this type of information, that was generated or gathered by the law firm or its client for the purpose of pursuing the litigation. The point is that much or most of the latter may well not be the first Applicant's personal information even though it relates to a legal matter that involved him. …

[para 21] In spite of these comments by the former Commissioner, it does not appear that when the Law Firm listed the records that it was withholding, it included in that list only the information that meets the definition of "personal information" in section 1(1)(k), as interpreted in earlier decisions of this office. Rather, it appears it may have included in the list all the information in the file of the client who had been involved in legal proceedings with the Applicant. While there is undoubtedly some personal information of the Applicants in the listed documents, it seems unlikely given the way these documents are described that they consist *only of* the Applicants' personal information.

[para 22] Thus, while I believe that the listed documents are responsive to the access request in part, the parts of them that do not meet the terms of the definition of "personal information" (of the Applicants), as discussed above, are not responsive to the access request, and need not have been included in the list of records being withheld by the Law Firm. For the purposes of this order it is appropriate to consider only those parts of the records that do meet this definition.

Issue 2. Is the Applicant's personal information in the Organization's custody or control?

[para 23] The Law Firm did not make any submission about this issue. Since it did not dispute that it had custody of the file, I find that all the personal information that is included in the records listed by the Law Firm in the attachment to its affidavit and in the

schedules to its subsequent submissions is in its custody, including the personal information of the Applicants contained therein.

Issue 3. If yes, is the information or any of it excluded from the Act by the application of section 4(3)(k) of the Act (information in a court file)?

[para 24] Section 4(3)(k) of PIPA excepts from the Act personal information that is contained in a court file.

[para 25] I accept, as the Law Firm submits, that many of the records listed in its schedules are records contained in a court file, and thus the information in them, even if it is "personal information" of the Applicants, is outside my jurisdiction to consider by reference to this provision.

[para 26] However, I do not believe it is necessary for me to specifically identify which of the listed records for which the Law Firm has claimed this exception fall within section 4(3)(k). This is because I find that all the information in the listed records (that is "personal information" of the Applicants) either falls within section 4(3)(k) and is not subject to my review, or if it does not, then for the reasons given below, I accept that it was properly withheld under section 24(2)(c). Since the result is the same for all of the information (that is, it need not be disclosed to the Applicants), there is no reason to review each of the records to decide which records fall within which rationale for this conclusion. (As I will note below, the same is true with respect to the necessity for deciding which of the records are and are not subject to solicitor-client privilege.)

Issue 4. If the Organization refused to provide access to the Applicant's personal information in its custody or control that is not excluded by section 4(3)(k), did it do so in accordance with section 24(2) (discretionary grounds for refusal)? In particular,

a. Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the requested personal information or parts thereof?

b. Did the Organization properly apply section 24(2)(c) of the Act (information collected for an investigation or legal proceeding) to the requested personal information or parts thereof?

[para 27] As it explains in its affidavit, the Law Firm represented a client who was involved in legal proceedings which also involved or affected the Applicants. Other third parties mentioned in the records were also involved in related legal disputes. The exhibit describing the records that was attached to the affidavit, and the schedules attached to later submissions of the Law Firm, indicate that all of the records held by the Law Firm were created or collected for the purposes of the Law Firm's representation of its client.

[para 28] The Law Firm has said repeatedly that all of the information in its client file that would be responsive to the request is subject to legal privilege. Its present position is that all of it is subject to litigation privilege, and that some of it is also subject to solicitor-client privilege.

[para 29] In Decision P2011-D-003, an interim decision that was made by Commissioner Work at an earlier stage of the inquiry, the former Commissioner said (at paras 21 to 27):

> … it is by no means clear that all of the personal information of an access requestor that exists in the "client file" of a person whom a law firm has represented in some legal action or claim, in opposition to the requestor, is subject to legal privilege.
>
> It seems certain that some or much of it will be subject to solicitor-client privilege. Very likely much or all of the rest of it will at some time have been the subject of litigation privilege.
>
> At the same time, however, solicitor-client privilege covers only a very specific type of information, which was described by the Supreme Court of Canada in *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821. According to this decision, the evidence must establish, for each record, that:
>
> > (a) There is a communication between a lawyer and the lawyer's client; and
> > (b) The communication entails the giving or seeking of legal advice; and
> > (c) The communication was intended to be confidential.
>
> In Order 96-017, the former Commissioner defined "legal advice" to include "a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications". In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, the Supreme Court added that solicitor-client privilege is likely to cover any communications between a lawyer and a client where the lawyer is acting as a lawyer (see para 10).
>
> It seems unlikely that all the personal information of a requestor that exists in a client file would meet all the components of this test. To take an obvious example, it would not cover any correspondence from the access requestor or their counsel, sent during the course of litigation, to the law firm, among other reasons because this would not be a communication between a lawyer and a client, would not involve the seeking or giving of legal advice, and would not be provided in confidence.
>
> As for litigation privilege, this category covers information gathered by the law firm for the purposes of litigation, and is on this account likely to cover much or all of the information in a client file, including the personal information of the access requestor.[1] However, litigation privilege ceases when litigation concludes.[2]

[1] Footnote omitted.

[2] Footnote omitted.

> On this account, any information in the client file that is not subject to solicitor-client privilege or is no longer, at this stage, subject to "legal privilege" (even though it may have been so subject at an earlier time) cannot be withheld under section 24(2)(a) or by reference to section 4(5).

[para 30] I agree with this reasoning. With respect to the records over which solicitor-client privilege is currently still being claimed in this case, any information collected or created by a law firm for the purpose of advising its client, including personal information of the party opposed in interest to the client, falls within the exception for solicitor-client privilege under section 24(2)(a), as part of the continuum of communications relating to the seeking and giving of legal advice. Thus, other than information in the file that was not intended to be confidential as against the opposing party, such as communications with that party, I believe that solicitor-client privilege applies to much of the information in this case.

[para 31] However, I do not need to determine in this case precisely which parts of the information are subject to solicitor-client privilege, and which are not because they were not confidential as against the Applicants. This is because I find that all the responsive information in the listed records (that is, information that is "personal information" of the Applicants, not excluded under section 4(3)(k)) was properly withheld under section 24(2)(c)). Since the result is the same for all of the information (that is, it need not be disclosed to the Applicants), there is no reason to review each of the records to decide which records fall within which rationale for this conclusion.

[para 32] With respect to litigation privilege, which it claims over all the records in the file, I have noted that the Law Firm has argued that this privilege has not ceased to apply. In its affidavit it says the following

> I do verily believe that the documents listed under Exhibit A are entirely protected by litigation privilege as the records listed therein *were collected or generated or held* on the Davidson & Williams file for the dominant purpose of litigation. Further, I do verily believe that the litigation privilege has not ended as these proceedings before the OIPC are a closely related proceeding as the proceeding involves the same and related parties and arises from the same or related causes of action that Davidson & Williams were involved in on behalf of their Client. I further verily believe that litigation privilege continues to apply as it is reasonably within the contemplation of Davidson and Williams and [the Law Firm's client] that a closely related proceeding is anticipated as it appears very likely that should [the Applicants] gain access to any documents from the File they will commence a further action against [the client], Davidson & Williams or both. [emphasis added]

[para 33] I do not agree with the Law Firm that I can find that all the records are subject to litigation privilege.

[para 34] By reference to its affidavit (in which it used the connector "or" between "collected" and "generated") the Law Firm appeared to have made this claim not only for records that were created for the dominant purpose of litigation, but also for records that were collected for this purpose (see the emphasized portion of its affidavit quoted above).

As I pointed out in my correspondence to the Law Firm in July, 2018, the Alberta Court of Appeal has stated that the test for litigation privilege is not that the records have been *collected* for the dominant purpose of litigation, but that they *were created* for that purpose. (See *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221.)

[para 35] The Law Firm responded to my point by saying that records that were collected by it such as registry searches would be covered by litigation privilege (Possibly it reasoned that such registry search result documents are 'created for' the purpose of litigation). It went on to say that all the records had either been created by it for the dominant purpose of litigation, or had been created by its client for this purpose, or consisted of such searches. However, it also supplied a list consisting of records that were exceptions to this claim, which it said were either documents sent to the Law Firm by the Applicants or their counsel, or were subject to "without prejudice communication privilege".

[para 36] It is not clear to me based on the Law Firm's assertions that all of the records that it withheld were created for the dominant purpose of litigation. In my review of the records, there appear to be some that pre-existed, or were created independently of, litigation or anticipated litigation, such as, for example, record 000508 (an invoice), and records 000734 to 000739 (a real estate purchase contract). Further examples are record 000670, record 000689 and other related records, and record 000763. While there may be some further information relative to records such as these which might explain the claim that they were created for the dominant purpose of litigation, the Law Firm has not provided such information to me. (Possibly, some of these records were provided to the Law Firm by its client for the purpose of receiving advice about them, but while that might make them subject to solicitor-client privilege, that fact in itself would not make them subject to litigation privilege.)

[para 37] Further, in its response to my questions, the Law Firm continued to maintain litigation privilege over those of the records that it acknowledges are not confidential as against the Applicants (by listing them in its Schedule A as such). As the Law Firm itself pointed out, some of these records were provided to the Law Firm by the Applicants. I do not believe that material can be subject to litigation privilege which is outside the zone of privacy and confidentiality which underlies litigation privilege.

[para 38] In saying this, I recognize there are court rulings to the effect that litigation privilege does not depend on confidentiality in the same way that solicitor-client privilege does. However, these cases appear to relate to whether it is necessary in order for litigation privilege to apply to have confidentiality between the lawyer and *a third party* with whom the lawyer communicates, for example, to receive an investigation report, in order for the communicated information to be privileged (the cases say that confidentiality is not necessary). These cases do not stand for the idea that litigation privilege can apply to permit effective preparation for litigation against a party where the information is known to (and is therefore not confidential relative to) that party. While it is possible that some of the communications with third parties may have been subject to settlement negotiation privilege, I do not believe the communications that took place

directly between the Law Firm and the Applicants can be said to be subject to litigation privilege as against the Applicants.

[para 39] Further, there are many court decisions holding that litigation privilege can be waived although the documents in question otherwise meet the test for the privilege to apply. (See, for example, *Rodriguez v. Woloszyn*, 2013, ABQB 269 (CanLII) at paras 44-45, and the cases cited therein.) The Law Firm did not respond to my question as to whether litigation privilege can apply to information that is not confidential relative to the Applicants because it consists of direct communications from the Law Firm to the Applicants. I believe such communications would waive any privilege that might otherwise apply to such records.

[para 40] I turn finally to whether, even if the records or any of them had once been covered by litigation privilege, this privilege ceased with the conclusion of litigation. I have noted the Law Firm's position about this in para 32 above. The argument that litigation privilege, if it applied, would continue because disclosure of information to the Applicants would prompt them to instigate further proceedings is significantly diminished by the fact that under PIPA the Applicants are entitled only to their own personal information. "Personal information" in the records includes only information "about them", such as "what [an individual] has said or expressed as an opinion, the fact he[/she] has done certain things or taken certain steps, details of his[/her] personal history, and personal details about him[/her] such as his[/her] name and other associated information such as where he[/she] lives or his[/her] telephone number", and excludes information "related to" them, such as the strategies and advice provided to the parties opposed in interest to them. Such information would very likely already be known to the Applicants. I do not see that the Applicants might use such information, if it were disclosed to them, to initiate further related proceedings.[3]

[para 41] I note finally that I disagree with the Law Firm that proceedings before this office are "closely related proceedings" within the terms set out in the test for the continuation of litigation privilege. According to a recent decision of the Alberta Court of Queen's Bench, *Pederson v. Allstate Insurance*, 2019 ABQB 531 (CanLII), "the proper test for determining whether the litigation privilege continues after the conclusion of the action in which the privilege first arose, is whether the two actions are closely related proceedings that involve the same or related parties that arise from the same or related

[3] As discussed further below, in his recent submission, one of the Applicants discusses a disclosure of what may be his personal information, which he possibly believes contravened PIPA. However, even if records relating to this complained-of disclosure (beyond those the Applicant says he received during the discovery process) are in the possession of the Law Firm, this disclosure was according to the Applicant done by a third party, rather than by the Law Firm's client or by the Law Firm itself.

I have also noted that in Decision P2011-D-003, Commissioner Work said: "I have noted that the law firm provides evidence of a more current statement of claim by the second Applicant relating to an allegation of false misrepresentations during the initial proceedings, but it does not explain precisely how this might relate to any information that was collected for the purpose of litigation that has been concluded, or whether it meets the test for related litigation as set out in footnote 4". This litigation may or may not have concluded, but in any event, the Organization has provided no such further evidence or explanation in its recent submissions to me.

cause of action (or juridical source) or which raise common issues and share the same essential purpose". This set of requirements presumes that there is another "action". I do not believe that the review of a decision of a law firm made relative to an access request under PIPA is properly regarded as an "action" such as to make it "a closely related proceeding" in the sense discussed above.

[para 42] Having regard to the foregoing points about litigation privilege, I cannot find that any of the information is currently still subject to this privilege.

[para 43] I turn to the Law Firm's claim that all of the records it has withheld consist of the personal information of third parties (which is an exception to disclosure under section 24(3)(b) of PIPA). (This issue is not included in the list set out in the Notice of Inquiry, but in the exhibit describing the records that is attached to the Law Firm's affidavit, and in the schedules attached to its subsequent submissions; this claim appears to have been made for all of the records.)

[para 44] For the most part, the Law Firm's descriptions of the records give me no basis for determining whether or not this is the case. Typically when the Commissioner makes a determination based on this claim, the records have been provided for the adjudicator's review to enable such an assessment to be independently made. This has not happened in the present case because all the records were withheld from my review on the basis that they are privileged. I cannot make the assessment that they consist of the personal information of third parties based simply on the Law Firm's assertion that this is the case, since that would mean I would be permitting the Law Firm to perform my function.

[para 45] I acknowledge that the fact a particular lawyer is acting for a third party may be the third party's personal information, as is the fact the third party is involved in a legal proceeding. As well, correspondence written by a third party in their personal capacity is their personal information. While some of the records might contain or consist of such information, and in some cases I might be able to discern this, I cannot discern it for all the records withheld under this heading.

[para 46] Further, I do not believe I can accept this blanket assertion given the way the related provisions of PIPA have been interpreted. First, I must take into account that information about a person acting in their professional capacity is not the personal information of that person. Correspondence among legal professionals is not the personal information of those people. Second, I must take into account the narrow way in which the definition of personal information under PIPA has been interpreted by this office, as already discussed at para 20 above. While some of the information may reveal who the legal representatives of third parties were, and much of the information may reveal legal matters in which third parties were involved (and thus does reveal personal information "about" them), it does not seem likely that *all of it* has these characteristics. Rather, it seems likely that much of the information, though related to third parties, would not be "about" them in the limited sense adopted by earlier orders of this office.

[para 47] Finally in relation to section 24(3)(b), I note that other than statements made by third parties about the Applicants (which might in some cases be the personal information of the Applicants), or personal information of third parties that is in some other way intertwined with "personal information" of the Applicants, the information that is described by the Law Firm as consisting of third party personal information *would not be the personal information of the Applicants* even though it is connected with them in some way. Under PIPA, applicants can request only their own personal information. Therefore, other than to the extent it consists of the limited kinds of information about the Applicants just described, the personal information of third parties would not be responsive to the request, and need not have been included in the schedules that describe the records/information to begin with.

Section 24(2)(c)

[para 48] I turn to the Law Firm's submission that all the withheld records were subject to the exception that they were collected for an investigation or legal proceeding.

[para 49] I am unable to determine that *all of* the Applicants' personal information that the Law Firm collected was for a particular "legal proceeding" or proceedings. However, under section 1(1)(f)(iii) of PIPA, an "investigation" includes an investigation into "circumstances or conduct that may result in a remedy or relief being available at law". Therefore, in my view, any personal information collected by a law firm for the purpose of serving its client in relation to "circumstances or conduct that may result in a remedy or relief being available at law", as was the case here relative to the various proceedings in which the client and the Applicants were involved, falls within the discretionary exception to disclosure set out in section 24(2)(c) of PIPA (information collected for an investigation or legal proceeding).[4] This includes personal information of the party opposed in interest to the client.

[para 50] I have reviewed the most recent submission of the Applicant which he provided after being advised that the Law Firm was claiming this exception to disclosure under PIPA. The Applicant did not provide any contrary submissions, or persuasive evidence, that the personal information the Applicants requested does not fall within the exception in section 24(2)(c). Therefore, I conclude that all the personal information of the Applicants that is being withheld by the Law Firm falls within this exception, as information collected for an investigation or legal proceeding.

[4] Other than information that is not confidential relative to a party opposed in interest to the client, all personal information of another party that a client provides to the law firm for the purpose of obtaining legal advice, and the advice provided and information that discloses such advice, also falls within the exception under section 24(2)(a) (information protected by legal privilege), as part of the continuum of communications relating to the seeking and giving of legal advice.

[para 51] However, because this is a discretionary exception, I must consider whether the Law Firm properly exercised its discretion in deciding to withhold information responsive to the requests, even though it falls within the exception. This involves determining whether withholding it meets the purposes of the Act.

[para 52] In this regard, the Law Firm has pointed to the fact that the right to access information in PIPA is limited by "what is reasonable" (this requirement is found in the current version of PIPA in section 24(1.1)[5]). In its initial submission in the present stage of the inquiry it said the following:

> We would also submit to the OIPC that it should rule against the request to disclose documents as it violates the guiding principle in PIPA of reasonableness. It is not reasonable for one party to litigation to request disclosure of information in the opposing lawyer's file (whether or not privileged) and the OIPC should not permit such requests as they unreasonably place the rights of a requestor to personal information ahead of those who seek and use the services of a lawyer. A reasonable person would not consider it appropriate for another party to gain access to records in his or her legal file without his or her permission.

[para 53] As well, in its initial submission to Commissioner Work, the Law Firm stated that it regarded the Applicants' access requests to be an "abuse of process", which expresses a similar idea in a different way. (However, the Law Firm relied on this idea to argue that former Commissioner Work had no authority to review the Law Firm's decision to withhold the records.[6])

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[5] The requirement was contained in section 24(1) in the version of the Act in force at the time of the access requests.

[6] With regard to this assertion, while disagreeing that this suggestion meant that he did not have authority to review the Law Firm's decision, former Commissioner Work said the following (at para 39):

> I have, in addition, considered the idea that it is an abuse of process for a person who is opposed in interest to an organization in legal proceedings to make an access request to the organization. I can see that there is something wrong with the idea that one party to proceedings should be able to require the other party to give it information, beyond that which must be given for the sake of fairness in the course of the proceedings. It is doubtless in part for this reason that PIPA contains an exception to the duty to provide access to information under section 24(2)(c), for information "collected for an investigation or a legal proceeding". However, that is an exception to the duty to give access, not an exclusion from the Act. Thus, the organization who receives such a request must still respond to it, and in withholding information under section 24(2)(c), it must exercise its discretion taking into account the purposes of the Act and the particular provision on which it is relying. Furthermore, under PIPA, requestors are, again, entitled only to their own personal information, with the result that it may not be so much an "abuse of process" that the request is made, as a waste of time and effort for both sides. To the extent this is so, it is to be hoped that once requestors and respondents are aware of the limited extent of their rights and obligations in this context, it may become unnecessary, over time, to deal with access requests that do not serve any useful purpose for requestors.

[para 54] I agree with the Law Firm that generally, where a law firm is acting for a client, it seems unreasonable to require it to respond to access requests for information from the files of individuals opposed in interest to its client. This is quite apart from the fact that much or all of the information would be subject to solicitor-client privilege (as it is in this case) as well as, depending on the stage of any legal proceedings, to litigation privilege. I agree with former Commissioner Work that

> … there is something wrong with the idea that one party to proceedings should be able to require the other party to give it information, beyond that which must be given for the sake of fairness in the course of the proceedings. It is doubtless in part for this reason that PIPA contains an exception to the duty to provide access to information under section 24(2)(c), for information "collected for an investigation or a legal proceeding".

[para 55] In my view, requiring law firms to provide such information further to access requests would be contrary to the principle that individuals and entities should be able to seek legal advice in a zone of confidentiality, and that parties opposed in interest to such clients cannot seek to benefit by gaining access to information collected or generated within that zone, regardless of whether the information is or is no longer subject to privilege.[7] I agree with the Law Firm that the application of the "reasonableness" limitation in section 24(1.1) weighs strongly against disclosure of the personal information of the Applicants in the Law Firm's client's file that was not shared with or otherwise accessible to the Applicants. As well, I do not believe that reliance on this factor requires demonstration of actual harm to the client from disclosure, beyond the harm that would be caused by the inability to consult with lawyers in confidence as against opposing parties.[8]

[para 56] As well, a primary justification for granting access to individuals to their personal information that is in the possession of organizations under PIPA is that individuals should be enabled to ensure the accuracy of such information.[9] Presumably

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[7] For information not subject to privilege, however, this principle may not apply in every case. There may be particular circumstances in which, even though the personal information was supplied to a law firm for an investigation or legal proceeding, the purposes of the Act would not be fulfilled by withholding the information from the requestor. In exercising its discretion, a law firm should take any such factors into account.

I also note that there would be some cases in which a law firm's merely replying to an access request by a party opposed in interest to their client so as to claim exceptions would disclose privileged information (that the law firm is acting for the client). In such a case, the "reasonableness" limitation in section 24(1.1) might permit a law firm to refuse to reply to the Applicants altogether. This is not such a case, however. In this case the Applicants know the law firm is acting for its client, as they have corresponded with the Law Firm about the case.

[8] As the Alberta Court of Queen's Bench recently stated in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 with regard to the exercise of discretion,

> "… [t]here 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. … That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[9] See Alberta Orders F2013-32 & F2013-33 at para 26, which contains the following excerpt from a court decision:

this is important so that organizations can make decisions appropriately that relate to this information.

[para 57] However, in the case of information about third party individuals that is provided to law firms by clients to whom they are opposed in interest, it makes no sense to suggest that such third parties need such information to ensure that such personal information about them is accurate. It is simply out of the question that after receiving such information, a third party opposed in interest to a law firm's client could notify the law firm that, for example, the allegations being made against them by its client are inaccurate and should be corrected, or that the degree to which they are at fault or liable in some circumstance is wrong, or that they could make a request under PIPA to have the information corrected.[10] The legal process is designed in a way that when determinations about such facts and opinions are to be made, they are made in a judicial or quasi-judicial process, not by a law firm representing an opposing client. Therefore, it would not be reasonable to require the Law Firm to disclose the information in order to further this purpose.

[para 58] Similarly, generally speaking, it may be important for individuals to be able to determine what an organization is doing with information an organization has about them, and indeed, section 24(1.2)(a) and (b) require an organization to provide such information where it is reasonable to do so.[11] Again, however, it would not be reasonable to require a law firm to explain to a party opposed in interest to its client what the law firm is doing with the information about the party that it has in its possession. Therefore, it would not be reasonable to require the Law Firm in this case to disclose the information it has and the purposes for which it has been or is being used in order to provide this type of knowledge to the Applicant.

> Further, the Privacy Commissioner has noted the different purposes between *PIPA* and *FOIPP* in another decision - *Manulife (Re)*, [2005] A.I.P.C.D. No. 52, OIPC File Reference P0197 (at para. 25):
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> > While I have been assisted by previous decisions under section 55 of the *FOIPP* Act, I have nonetheless been guided by *PIPA*'s legislative purposes and intent, which are different from those set out in the *FOIPP* Act. The *FOIPP* Act applies to Alberta public bodies, and was intended to foster open and transparent government. Through the *FOIPP* Act, individuals are granted a right of access to records in the custody or under the control of a public body. The ability to gain access can be a means of subjecting public bodies to public scrutiny. The access provisions of *PIPA* allow individuals to know what personal information of theirs is in the custody or under the control of an organization, and to ensure it is accurate and complete.

See also and BC Order P05-01.

[10] The client's or the law firm's opinions about such things would not be subject to correction requests, but some of the information supplied by the client could be strictly factual and therefore subject to a correction request.

[11] At the time of the access requests, this requirement was contained in section 24(1) of an earlier version of PIPA. As noted in the interim decision P2011-D-003, the Applicants did in fact ask for such information.

[para 59] Another factor relevant to the exercise of discretion in cases such as the present relates to the definition of "personal information" under PIPA, and the limited way in which that phrase has been interpreted by this office. Given this interpretation (discussed above at para 20) much or all of the "personal information" of the Applicants understood in this limited sense is likely to already be known to them. As well, it is likely to comprise only snippets of information appearing occasionally among the many records that are listed in the schedules. Because such information is unlikely to be of significant utility to the Applicants, the rationale that disclosing such information would be contrary to its client's interests is unlikely to apply to such information. On the other hand, however, it may be unreasonable to require an organization to review a very large volume of records to identify and provide a proportionately small amount of information that is meaningless or of minimal or no utility to the Applicants. As former Commissioner Work said in Decision P2011-D-003, "[given that] requestors are … entitled only to their own personal information … it may not be so much an "abuse of process" that the request is made, as a waste of time and effort for both sides.

[para 60] Finally, I note that in his most recent submissions, the Applicant seems to be primarily or exclusively interested in only a very particular and limited category of information – that conveyed by a third party to the Law Firm's client during a telephone conversation (this information is discussed further below) – rather than information or other information contained in the many records in the possession of the Law Firm. The other Applicant did not respond to my questions. Again, it would be unreasonable to require the Law Firm to have to undertake this type of exercise with respect to information in which the Applicants no longer have any interest.

[para 61] In view of the foregoing considerations. I accept the Law Firm's exercise of discretion so as to withhold the information in its client's file that is unknown to the Applicant.

[para 62] However, it is not clear that the foregoing reasons not to disclose information apply with respect to information in a law firm's possession that a requestor already knows and knows that the law firm has. In the present case, a considerable proportion of the withheld records appear to have passed *directly* to the Law Firm from the Applicants or *directly* to the Applicants from the Law Firm, or the Applicants are aware that the Law Firm was in possession of information that is or has been available to them from other sources. The reasons just discussed for exercising discretion against disclosure would not apply to such records/information, since the Applicants would already know what such information about themselves the Law Firm had obtained and may have considered or used.

[para 63] At the same time, however, information the Applicants are already aware of might not assist them, so that unless they indicated they wanted to have it regardless, and explained why, it might be less important to exercise discretion so as to provide it.

[para 64] The Law Firm does not appear to have taken into account in exercising its discretion under section 24(2)(c) that many of the records in its client's file are already

known or available to the Applicants. (As just noted, this factor weighs to some degree both in favour of disclosure of their personal information contained therein, and against it.) For these reasons, before I received the most recent submissions of the parties, I considered that I might ask the Law Firm to re-exercise its discretion taking these factors into account. However, as I thought it would be useful to know whether the Applicants wished to have such information disclosed to them, in my recent letter to them, I asked them to indicate this, and if so, to provide an explanation.

[para 65] Only one of the Applicants responded to my recent correspondence. (I presume that either he was speaking for both of them, or that the other Applicant no longer has any interest in the matter.) In view of the most recent submission of one of the Applicants in response to my letter, and the Law Firm's reply, I do not believe it necessary ask the Law Firm to re-exercise its discretion.

[para 66] The Applicant did not respond in his submission to my specific question as to whether the Applicants wish to receive personal information about themselves in correspondence between themselves and the Law Firm, or information that is already available to them from other sources which they know the Law Firm has.

[para 67] Rather, the focus of his concerns related to information that he had gained during the discovery process in litigation. He says that this information indicates there was a phone call in which (unspecified) information, possibly having some relationship to a bankruptcy, had been given by a third party (a representative of the AMA insurance company) to the Law Firm's client, without the Applicant's consent. The Applicant also seems to suggest that his consent (possibly to disclosure of this unspecified information) may have been forged on a form, or that information was added to the form after he signed it. He seems to believe that the present process can uncover evidence or further evidence of this communication between the AMA and the Law Firm's client, as well as the form to which he refers. He also asks that the responsible parties be harshly penalized.

[para 68] The Law Firm's response to the Applicant's recent submission does not specifically address whether the information about which the Applicant expresses concerns, including the information the Applicant says was obtained through the discovery process, was among the withheld records. The Law Firm does point out that the Applicant's concern appears not to be about obtaining his personal information that is in the Law Firm's possession, but rather relates to communications that took place directly between the Applicant's insurance company (AMA) and the Law Firm's client. Possibly, this can be taken as an indication by the Law Firm that it does not have this or any related information in its possession. I cannot determine whether this is the case without reviewing the records (or without the Law Firm having done so and indicating whether any such records were found). I also cannot determine whether any such information would or would not be or include the Applicant's personal information, since his submission does not make clear what was conveyed in the telephone conversation. In any event, to the extent the Law Firm does have any such information which the Applicant does not already have, I believe it would fall within the exception under section 24(2)(c),

as information collected by the Law Firm for an investigation or legal proceeding, as well as under the "zone of confidentiality" principle described above.

[para 69] As already noted, the Applicant does appear to have some information relating to the telephone conversation that he refers to in his recent response (or it was available to him at one time). However, he does not appear to suggest that he is looking for the same information he already obtained through the discovery process; rather, he seems to be seeking further information about the communication in question that he does not have. The Applicant seems to believe that the role of this office in the present case is to investigate the details of the disclosure he describes, to determine if it was authorized, and to impose a penalty for wrongful disclosure of the information.

[para 70] However, this inquiry deals only with whether the Law Firm responded properly to the access request. It is not a complaint about unauthorized disclosure of personal information, and even if it were, the appropriate respondent to such a complaint would, according to the Applicant's own statements, be a third party, not the Law Firm. While the Applicant is entitled to make an access request to the Law Firm, and this office can ensure that the Law Firm provides access to information to which the Applicant is entitled (while upholding the proper application of exceptions), he cannot expect that this office will act as an investigator relative to his allegations against a third party.[12]

Conclusions regarding the Law Firm's exercise of discretion under section 24(2)(c)

Information possessed by the Law Firm of which the Applicant is unaware

[para 71] As discussed above, I agree with the Law Firm's exercise of discretion with respect to information in its possession that is confidential as against the Applicants. It is generally not reasonable to require a law firm to respond to an access request from a person who is opposed in interest to its client by providing that person's personal information in its client's file that it collected or created in confidence, to that person; this is so whether or not all of that information is or was subject to legal privilege. I am unaware of any other factors in this case that would favour exercising discretion to disclose this information rather than to withhold it.

Information possessed by the Law Firm of which the Applicant is aware

[para 72] The remaining information is "personal information" of the Applicants contained in the client's file that the Applicants already have or have had access to.

[para 73] Given the response of the Applicant to my question, I conclude that he is not interested in obtaining such information. Rather, as already noted, his primary concern

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[12] I also note that even if the Applicant had brought a complaint against the third party, and had established a wrongful disclosure, this office does not impose penalties for such unauthorized disclosures.

seems to be that a third party, not the Law Firm, disclosed some information about him or relating to him without his consent, and that this third party (not the Law Firm) should be penalized. While it appears the Applicant obtained some such information via the discovery process during litigation, the information he seeks seems to be information in addition to what he already has, that will help him establish his allegations against a third party. I recognize it is possible that, as the Applicant asserts, the communication to which he makes reference may have had seriously negative financial consequences for him. However, these are concerns that cannot be addressed in this inquiry.

[para 74] Had the Applicants expressed interest in obtaining their personal information in the file which they already have or had or was available to them, it would have been important for the Law Firm in exercising its discretion to take into account (among other factors) that providing such information would not contravene the "zone of confidentiality" principle discussed above. However, given the Applicant's response to my question, this is not a factor that the Law Firm would need to take into account.

[para 75] As well, I note that it would be an onerous exercise for the Law Firm to review large numbers of the records that are already known to the Applicants, so as to identify and provide relatively minor items of personal information (such as their names or data and facts which they know or with which they were directly involved) that would already be known to them in any event, so would yield little or no benefit to them. While the Law Firm does not appear to have taken this factor into account in exercising its discretion, it is a relevant factor that I would have pointed out had I thought it necessary for the Law Firm to re-exercise its discretion.

[para 76] To conclude with respect to the non-confidential records, the Applicant's response to my question indicates he does not wish to receive personal information in the records which was contained in his communications with the Law Firm, or other information in the Law Firm's possession that he knows it has and to which he already has or has had access. Therefore, I find that the Law Firm appropriately exercised its discretion to withhold such information on the basis of the general principle that it is not reasonable to require a law firm to respond to an access request from a third party opposed in interest to its client by providing details consisting of the third party's personal information from the client file. I do not see any additional factors in this case that the Law Firm failed to take into account.

Summary regarding exercise of discretion

[para 77] For the reasons given earlier in this order, I uphold the Law Firm's decision to withhold the personal information of the Applicants contained in the client file that was collected confidentially relative to the Applicants. As well, for the reasons just given, I uphold its decision not to disclose the Applicants' personal information in the file which they are already aware the Law Firm possesses.

V. ORDER

[para 78] I make this Order under section 52 of the Act.

[para 79] I uphold the decision of the Law Firm to refuse to disclose to the Applicants their personal information contained in the file of the Law Firm's client.

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