ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-12

February 25, 2022

SUMMER VILLAGE OF SOUTH VIEW

Case File Number 008851

Office URL: www.oipc.ab.ca

Summary: An individual made a request to the Summer Village of South View (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to a particular residential property.

The Public Body provided some responsive records to the Applicant, and withheld others in part or in their entirety under sections 17(1), 24(1), and 27(1).

The Applicant requested an inquiry into the Public Body's response.

The Adjudicator determined that the Public Body properly applied section 17(1) to the third party personal information in the records.

The Adjudicator determined that the Public Body properly applied section 24(1) to most information in the records, but ordered the Public Body to disclose additional information to the Applicant. The Adjudicator also found that the Public Body established its claim of privilege under section 27(1)(a).

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

Authorities Cited: AB: Decision F2014-D-01, Orders 96-006, 96-012, 99-013, F2004-026, F2007-013, F2007-014, F2007-021, F2008-012, F2008-031, F2009-015, F2010-007, F2010-036, F2012-08, F2013-13, F2013-17, F2015-32, F2016-57, F2020-22

Cases Cited: *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23

I. BACKGROUND

[para 1] An individual made a request to the Summer Village of South View (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "[a]ll records pertaining to the property legally known as Plan 2647KS, Block 3, Lot 4 for the period from January 1, 1973 – Present." The Public Body clarified the request, and the Applicant subsequently narrowed the scope. The updated request is for all information regarding a retaining wall between two residential properties, including

- development permit applications and permits issued;
- all stop work orders or remedy orders issued;
- all correspondence between the owners and the village related to the retaining wall;
- all engineering reports; and
- all notes related to the retaining wall.

This request goes back to when the properties were first developed in 1973.

[para 2] Based on the records provided to this Office by the Public Body, the Public Body located approximately 170 pages of responsive records. It withheld some information in the records under sections 17(1), 24(1), and 27(1).

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This did not resolve the issues between the parties and the Commissioner agreed to conduct an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the responsive records withheld in part or in their entirety. At the start of the inquiry, 59 pages of records contained information withheld from the Applicant.

[para 5] In the course of the inquiry, the Public Body reconsidered its application of exceptions to pages 6, 20, 21 and 22. The Public Body provided unredacted copies of pages 6, 20 and 21 to the Applicant. It provided a copy of page 22 to the Applicant, with only the names of third parties redacted.

III. ISSUES

[para 6] The issues for this inquiry were set out in the Notice of Inquiry, dated June 10, 2019. Given the Public Body's new decisions regarding access, the issues have been amended; they are as follows:

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

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

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

IV. DISCUSSION OF ISSUES

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

[para 7] The Public Body has withheld pages 1-5, 15, and 16 in their entirety. Pages 1 and 4 are identical; pages 2-3 are identical to pages 15-16.

[para 8] The Public Body has also withheld names and contact information of third parties, on pages 7-14, and 22.

[para 9] Section 17 states in part:

> *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 10] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 11] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 12] Section 1(n) defines personal information under the Act:

> *1 In this 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 13] The Public Body describes the information withheld under section 17(1) as names, home addresses and "other recorded information" about third party individuals.

[para 14] Much of the information is about the individuals who own the residential property identified in the Applicant's access request (the Applicant's neighbours). Some of the information appears to relate to previous owners of the property.

[para 15] The Public Body has applied section 17(1) to withhold some pages in their entirety. In most instances, given the subject-matter of the request and the content of the records, I agree that the entire record serves to identify the third parties the information is about. Therefore, the personal information cannot be severed from the record to provide the remainder to the Applicant.

Sections 17(2)

[para 16] Section 17(2) lists circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. None of the circumstances appear to apply in this case.

Section 17(4)

[para 17] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. Section 17(4)(g) creates a presumption against disclosure of information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party.

[para 18] The Public Body has argued that section 17(4)(g) applies to all of the third party personal information. I agree.

[para 19] The Public Body has not argued that other provisions in section 17(4) apply, and no other provision appears to.

Section 17(5)

[para 20] In his request for inquiry, the Applicant provided some arguments as to why he was seeking access to the requested records. The Applicant relied on his request for inquiry in lieu of providing an initial submission to the inquiry. The Applicant's arguments in his request for inquiry are as follows:

> The public body continues to delay and not provide the documentation that is applicable to substantiate their involvement in directing and holding the property owner accountable to the relevant codes and by-laws in-place. They will not even supply what was recommended in the recent FOIP review. I originally sent a request to the Summer Village of Southview development officer Aug. 11, 2015 for the order/letter that was sent to this property owner. I followed-up with the Summer Village of Southview CAO on August 19, 2015 for a FOIP redacted version. To date nothing has been provided.
>
> A retaining wall was removed and the Summer Village issued urgent orders to rectify a solution which were not followed. I'm attempting to push through with litigation and require copies of all direction issued to this land owner with regards to rectifying this issue. I have stated previously that all FOIP information could be redacted.
>
> The public body is withholding key documents that are required to substantiate a civil dispute between neighboring properties. The refusal to release these documents, as I'm self-representing, is not allowing effective mediation to take-place. Below is a picture of the property upon retaining wall removal.

[para 21] The Applicant's rebuttal submission includes additional information regarding the civil dispute between him and his neighbour. I will discuss those arguments under section 17(5)(c).

Section 17(5)(a)

[para 22] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 23] The Public Body argues that the Applicant's interest is a private one, between him and his neighbour. Therefore, there is no public interest in the records; nor is disclosure desirable for public scrutiny.

[para 24] The Public Body provided me with a copy of the Statement of Claim filed by the Applicant, in July 2017. I understand that the litigation is not active at this time, but the Applicant is considering continuing with it in the future. The Applicant's neighbours are listed as defendants in the Statement of Claim, as is the Public Body. However, in response to questions I had asked the Applicant, he responded that the parties to the litigation he was seeking to continue were him and his neighbours. He did not mention planned or ongoing litigation with the Public Body. If the Applicant planned to continue with the litigation against the Public Body, he hasn't said so.

[para 25] The Applicant's submissions refer to bylaws not being enforced by the Public Body. It is possible that the Applicant means to argue that the Public Body's decision not to apply a bylaw requires public scrutiny; however, without more detail on this point, I cannot conclude that they do.

[para 26] Given the above, I cannot find that section 17(5)(a) applies.

Section 17(5)(c)

[para 27] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 28] By letter dated October 6, 2021, I cited the above test and asked the Applicant to respond to the following questions in his rebuttal submission:

> I am asking for additional detail as to how the information you are seeking meets the test set out above for the application of section 17(5)(c). What litigation are you referring to in your Request for Inquiry? Who are the parties? Has the proceeding commenced? If not, does this passage of time create an obstacle to initiating a claim in the future (e.g. does the *Limitation Act* bar the bringing of a claim)?
>
> Why is the information you are seeking *required* to prepare for a proceeding and/or to ensure an impartial proceeding? I.e. why is this information required in order to initiate or continue a claim?

> Is the information available via an alternate process (such as discovery processes referred to by the Public Body)?
>
> You have referred to mediation; can you provide additional details about any relevant mediation process?

[para 29] The Applicant responded that he had commenced litigation but

> …was unable to continue due to the legal fees that continued to amount as we waited for [the Public Body] to provide the proper documentation. When I obtain the required documents I will move forward again with the litigation.

[para 30] The Applicant states that the parties to the litigation are his neighbours and him. As noted above, the Applicant's Statement of Claim lists the Public Body as a defendant; however, the Applicant did not mention the Public Body as a party against whom he might continue the proceedings.

[para 31] In response to my question about why the information in the records at issue is required to prepare for the proceeding and/or ensure an impartial proceeding, the Applicant states:

> Without a thorough review of the documents it is difficult to assume I could immediately continue with my claim; but should the damage continue I would like to have this available to immediately move forward.

[para 32] The Applicant's responses do not explain how the names or contact information of previous owners would be relevant to his litigation. I conclude that they are not.

[para 33] Regarding the personal information of his current neighbours, the Applicant has not specified what documents he is seeking or why they would be required to continue the litigation. The Applicant argues that the requested records substantiate the Public Body's "involvement in directing and holding the property owner accountable to the relevant codes and by-laws in-place." However, it is not clear how this information is relevant to a claim against the neighbour.

[para 34] The Applicant has referred to an order he believes was issued by the Public Body's Development Officer to the neighbours. It seems that the Applicant is seeking a copy of this order. I cannot reveal whether such an order exists in the records; however, the records do contain communications between the Public Body and the Applicant's neighbour.

[para 35] The Applicant has not explained why a copy of an order or similar communication would be required to continue the litigation. In the Statement of Claim provided by the Public Body, the Applicant alleges that the neighbours removed a retaining wall, which caused damage to the Applicant's property. The Statement of Claim

does not refer to any failure on the part of the neighbours to follow a direction or order issued by the Public Body; it mentions only the alleged failure on the part of the neighbours to obtain a necessary permit. It is possible that if the neighbour received a direction or order from the Public Body with respect to the property issue, and failed to heed that direction or order, this fact could be relevant to the Applicant's litigation. However, I do not know this to be the case, and the Applicant has not explained why this would be the case. The mere possibility that information might be relevant is not sufficient to meet the standard to find that section 17(5)(c) applies.

[para 36] In the records already provided to the Applicant by the Public Body is a letter, dated November 3, 2015, sent by the Public Body to the Applicant. This letter describes the history of the concerns raised by the Applicant to the Public Body regarding his neighbours' property. The letter refers to communications from the Development Officer to the neighbours, and the neighbours' response to that communication. The letter explains the Public Body's position with respect to applicable bylaws and other requirements; specifically, that no records indicate that there was a requirement for a retaining wall or related permit. The Public Body also noted that it was unclear that any bylaw had been contravened. The Public Body informed the Applicant that it considered the matter to be a dispute between landowners, and that the Public Body would not take any further action. It also informed the Applicant that it would be communicating this position to the Applicant's neighbours.

[para 37] In light of this, it is not clear why the Applicant believes that he requires a copy of an order or similar communication sent by the Public Body to his neighbours (or other documents), in order to continue his litigation.

[para 38] The Statement of Claim includes an allegation that the Public Body failed to enforce its bylaws (amongst other allegations). As stated, the Applicant did not include the Public Body as a party that would be involved in his continued litigation. It may be that the Applicant does intend to continue his litigation against the Public Body, and is seeking an order made against his neighbours by the Public Body (or other information) for that purpose. However, I specifically asked the Applicant what parties are or would be involved in the litigation and his response indicated only him and the neighbours. I cannot assume that the Applicant intends to continue his litigation against the Public Body when he had an opportunity to say so and did not.

[para 39] The Public Body argues that the discovery process set out in the Alberta Rules of Court provides an avenue for the Applicant to obtain the documents he seeks; as such, disclosure in response to an access request is not required for him to continue his litigation. Past Orders of this Office have noted that the existence of the discovery process can weigh both against, and in favour of disclosure, depending on the circumstances. On one hand, the existence of an alternate avenue for access indicates that the disclosure under the FOIP Act is not necessary to achieve the desired goal; on the other hand, if an applicant is likely to obtain the same information via another avenue, it is more difficult to argue that disclosing the information under the FOIP Act would be an unreasonable invasion of privacy (see Order F2009-015, at paras. 69-70).

[para 40] Given the discussion above, I do not need to determine whether the existence of the discovery process weighs in favour or against disclosure. I do not have sufficient reason to decide that the neighbours' personal information in the records at issue is required for the Applicant to continue his litigation. Therefore, section 17(5)(c) does not apply.

Section 17(5)(e)

[para 41] The Public Body argues that disclosing the neighbours' information may compromise their ability to defend allegations made in a civil proceeding.

[para 42] The Public Body also argues that the individuals other than the neighbours, whose information appears in the records, may also be unfairly exposed to financial or other harm if their information were disclosed. It states (affidavit of CAO, at para. 6.b.iv.2):

> These third parties are not parties to the Applicant's civil proceedings, but may find themselves embroiled in it if their names are released.

[para 43] Given my conclusion below, I do not need to consider whether this factor weighs against disclosure.

Conclusions regarding section 17(1)

[para 44] I agree with the Public Body that section 17(4)(g) applies to all of the personal information withheld under section 17(1), creating a presumption against disclosure. As no factors weigh in favour of disclosure, I find that the Public Body properly applied section 17(1).

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

[para 45] The Public Body applied section 24(1)(a) and (b) to information in the records at issue. These sections 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 46] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 47] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) 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)

[para 48] In Order F2013-13, the adjudicator stated that the third arm of the above test was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 49] In addition to the requirements in those tests, 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).

[para 50] The Public Body has argued that Order F2004-026 cannot be interpreted such that section 24(1) applies only to information underlying advice, recommendations, etc. The Public Body argues that this provision also applies to the advice, recommendations themselves. I agree; the plain meaning of section 24(1) clearly applies to advice, recommendations, and other similar information listed in that provision *as well as* substantive information underlying the advice, recommendations etc.

[para 51] 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, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 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 para. 31).

[para 52] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.",

section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

Application of sections 24(1)(a) to the records

[para 53] The Public Body's arguments include references to consultations within the Public Body. Consultations and deliberations fall within the scope of section 24(1)(b), not 24(1)(a). The Public Body's index of records and submissions refer only to section 24(1)(a) being applied. I will nevertheless consider the application of section 24(1)(b) to the extent that the submissions relate to it.

[para 54] The Public Body withheld information on pages 7, and 17-19 under section 24(1)(a).

[para 55] With respect to page 7, the Public Body withheld the body of an email under section 24(1)(a). It states that the email is from a Development Officer with the Public Body, and "was addressed to [the CAO and her staff] at the email address that we used for official communications involving this Public Body" (affidavit of the CAO attached to initial submission, at para. 7.b.)

[para 56] In its rebuttal submission, the Public Body further states that the email deals with the substance of a consultation between the Development Officer and CAO. The Public Body argues that advice, recommendations or consultations needn't be sought by the recipient in order for section 24(1)(a) to apply; it argues that advice can be given "proactively". It further states (at page 3):

> In this case, it is clear on the face of the record concerned that the purpose of the communication was to provide situational awareness to the CAO and allow her to contribute any comments of her own. This is in the nature of a consultation.

[para 57] I agree that advice needn't be expressly requested in order for section 24(1)(a) to apply. Phrases such as "what do you think of this plan?", "do you have any concerns with this course of action?", "I require your approval to proceed" can be implied.

[para 58] However, a communication "to provide situational awareness" is not the same as a communication intended to provide advice to a decision-maker (see Orders F2013-17, at para. 151; F2015-32, at para. 90).

[para 59] It is also not clear from the email exchange that the CAO was making a decision. The withheld email can be characterized as the Development Officer communicating her intended course of action. The email ends with a request from the Development Officer to the CAO for particular data required to undertake the steps outlined. A request for factual information does not fall within the scope of section 24(1) if it does not otherwise reveal the substance of advice, recommendations etc. (see Orders F2016-57, at para, 30; F2020-22, at para. 101).

[para 60] The response from the CAO, also on page 7, provides the data requested from the Development Officer without further comment on the matter. Nothing in this communication indicates that the Development Officer was providing advice to, or requesting advice from, the CAO.

[para 61] Regarding the Public Body's argument that providing "situational awareness" and allowing an opportunity to comment falls within the scope of a consultation under section 24(1)(b), a consultation requires an employee to seek views regarding the appropriateness of a particular proposal. Merely mentioning a plan, or providing an update on a situation, is not the same as a consultation. Any communication inherently invites a response; it is overly broad to interpret section 24(1)(b) as applying to any emails that communicated a plan simply because they may elicit a response.

[para 62] If it is the usual practice within the Public Body that the Development Officer must first consult with the CAO before undertaking any proposed plan, such that the email on page 7 is an implicit consultation, the Public Body has not said as much. Such a scenario cannot be presumed from the information in the records.

[para 63] The Public Body provided some additional arguments in its *in camera* rebuttal submission, but these arguments are not persuasive for the same reasons given above. Referring to an assessment or plan as "substantive" does not bring it within the scope of section 24(1) if the test cited at paragraph 47 is not met.

[para 64] Further, some of the information withheld in the email consists merely of background facts, which are known to the Applicant (based on the content of the records already provided to the Applicant). Section 24(1) does not apply to background information.

[para 65] I find that section 24(1) does not apply to the information withheld under that provision on page 7. However, some of that information is personal information of a third party, substantially similar to information I found to be properly withheld under section 17(1), discussed above. Section 17(1) is a mandatory provision, which means that the Public Body is required to withhold information to which that provision applies. I will therefore order the Public Body to disclose the content of the email *except* the fourth of five sentences in the main paragraph of the email. The fourth sentence of the main paragraph must be withheld for the same reasons discussed in the section of this Order dealing with section 17(1).

[para 66] Pages 17 and 18 are comprised of an email. Both pages were withheld in their entirety, including to whom the email was sent and from whom, as well as the date and subject line. As discussed above, section 24(1) does not apply to to/from/date information; this information must be disclosed to the Applicant. The Public Body argues that the subject line of the email reveals the content of the advice, recommendations etc.

[para 67] Information revealing only the topic of advice, recommendations etc. cannot be withheld under section 24(1). The Public Body's submissions on this point are brief;

however, reviewing the records it appears that the phrase used in subject line is a shorthand description of the reasons for the recommendations made in the email. Therefore, I agree that section 24(1) applies to the subject line.

[para 68] The remainder of pages 17 and 18 appear to consist of a course of action that is being proposed. From the records themselves and the Public Body's submissions, I accept that this information consists of recommendations for the CAO. It is clear that the CAO is the person tasked with making the decision, and that the sender of the email was tasked with making the recommendations. Therefore, section 24(1) applies.

[para 69] Page 19 was withheld in its entirety under section 24(1). It consists of an email, with handwritten notes. The Public Body states that the email "is the portion for which section 27(1) is separately and additionally claimed." The Public Body further states that because the handwritten portion of the page relates to the email, and because that portion was withheld under section 24(1), section 24(1) was applied to the whole page.

[para 70] I understand the Public Body to mean that it is claiming the email to be protected by privilege under section 27(1)(a), but since it was applying section 24(1) to the handwritten portion, and because both portions of the page relate to each other, it applied only section 24(1) to the whole page.

[para 71] I agree that section 24(1) applies to the handwritten portion of page 19, as the author is providing her own advice and input to a decision-maker on a matter falling within the scope of that provision.

[para 72] The email itself refers to a legal opinion that was attached to the email (I do not have a copy of the attachment). I agree with the Public Body that the email can be withheld under section 27(1)(a) for the reasons discussed in the next section of this Order. The Public Body ought to have applied section 27(1)(a) to the email, and section 24(1) to the handwritten portion, as these are distinct sections of the page. Sections 24(1) and 27(1)(a) do not apply in the same way, and section 24(1) would not apply to the email in its entirety, had section 27(1)(a) not applied.

[para 73] Nevertheless, as the Public Body clearly contemplated the application of section 27(1)(a) to the email, and given the importance of solicitor-client privilege, the Public Body can continue to withhold the email in its entirety under section 27(1)(a).

Exercise of discretion

[para 74] Section 24(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 75] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of 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 76] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 77] The Public Body's Chief Administrative Officer (CAO) explained the factors she considered in exercising discretion to withhold information in the records under section 24, in an affidavit attached to the Public Body's initial submission. She states that she considered the general right of access in the Act, as well as the Applicant's interest in obtaining access to possibly assist in his litigation. She also determined that there was no compelling public interest in disclosure, as the records relate to a private dispute between the Applicant and a neighbour. The CAO also indicates the possibility that the litigation could extend to include the Public Body, in which case disclosure could undermine the Public Body's position.

[para 78] I accept that the Public Body took into account relevant considerations in exercising its discretion with respect to section 24(1).

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

[para 79] The Public Body applied section 27(1)(a) to pages 23-59 in their entirety. The Public Body did not provide me with an unredacted copy of records over which privilege was claimed under section 27(1)(a).

[para 80] Section 27 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,*

Section 27(1)(a) – Solicitor-client privilege

[para 81] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

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

[para 82] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 83] Section 71(1) of the Act states:

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

[para 84] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

[para 85] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 86] The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 87] In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "… the IPC cannot "properly determine" whether solicitor-client privilege exists: *2018 CPS (CA)* at para 3. The scope of the IPC's

review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

[para 88] It describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

> The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary…
>
> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>
> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

[para 89] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*), and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 90] In this case, the Public Body provided an affidavit with its initial submission, sworn by its CAO. The affidavit includes a description of each records withheld under section 27(1)(a). The records include

- A letter from external counsel retained by the Public Body, responding to a request for legal advice made by the CAO;
- An invoice relating to the advice from external counsel;
- An email with attachments from external counsel, responding to a request for advice and recommendations made by the CAO; and
- An email from external counsel referring to advice provided in previous documents.

[para 91] The affidavit states that all of the above records were intended to remain confidential.

[para 92] Given the content of the records provided to me for this inquiry, as well as the subject-matter of the access request, I am satisfied, on a balance of probabilities, that a legal question existed about which the Public Body obtained advice. I note that the records provided by the Public Body mention obtaining advice from external counsel. Therefore, I find that the Public Body properly applied section 27(1)(a).

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

[para 93] Past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.

V. ORDER

[para 94] I make this Order under section 72 of the Act.

[para 95] I find that section 17(1) to the information withheld under that provision.

[para 96] I find that section 24(1) does not apply to the information on page 7 of the records. I order the Public Body to disclose that information to the Applicant, subject to the application of section 17(1), as discussed at paragraph 65 of this Order.

[para 97] I find that section 24(1) does not apply to the to/from/date information on pages 17-18 of the records. I order the Public Body to disclose that information to the Applicant, per paragraphs 66-68 of this Order.

[para 98] I find that section 24(1) applies to the remaining information to which the Public Body continues to apply that provision.

[para 99] I find that section 27(1)(a) applies to the information withheld under that provision.

[para 100] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator