# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2022-28

June 8, 2022

## ALBERTA HEALTH SERVICES

Case File Number 009619

**Office URL:** www.oipc.ab.ca

**Summary:** The Applicant, a former employee of Alberta Health Services (the Public Body), requested access to the following records:

> I am requesting all records, notes and emails, where I am referred to by name or by initials for the
>
> 1) period of my employment starting with just before my employer's decision to place me on a performance improvement plan until and ending with AHS's decision to terminate my employment. The documents, notes and emails I am requesting will include all those relating to my employment, my health and private life. I have included the names of individual employees below who would have the information I am seeking, in addition to other individuals, at all levels of management who may have this information as well and;
>
> 2) period starting after my termination of employment pertaining to AHS attempts to make a severance payment to me and settle a settlement to avert any potential complaints or law suits I may have against them. I am particularly requesting information on all factors and individuals at all level of management who had any input into this matter.

The Public Body provided disclosure of some records, but severed information under sections 17 (disclosure harmful to personal privacy), 19 (confidential evaluations), 24 (advice from officials), and 27 (privileged information).

The Applicant requested review of the Public Body's decisions to sever information from the records at issue. The Commissioner agreed to conduct an inquiry.

As the Public Body indicated that some of the records to which it had applied section 27(1)(a) were subject to solicitor-client privilege, the inquiry proceeded on the issue of section 27 as a preliminary issue.

The Public Body provided two bundles of records labelled A and B. Bundle A contained records over which it claimed both settlement privilege and litigation privilege. Bundle B contained records over which it claimed both solicitor-client privilege and litigation privilege. The Public Body chose not to provide either bundle for review in the inquiry.

The Public Body submitted *University of Calgary v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 795 (CanLII) in response to the Adjudicator's request that it provide the records to which it had applied a privilege of the law of evidence and not solicitor-client privilege. In that case, the Court of Queen's Bench ordered the Commissioner to pay costs to another public body, the University of Calgary[1].

The Public Body included communications to and from the Applicant in its claims of solicitor-client privilege and litigation privilege.

The Adjudicator determined that there was inadequate evidence to support the Public Body's application of section 27(1)(a) to any of the information in the records. The Adjudicator also determined that the Public Body was required under the FOIP Act to provide records for the Commissioner's review that cannot be subject to solicitor-client privilege or litigation privilege.

The Adjudicator ordered the Public Body to give the Applicant access to the information in the records unless it provided submissions and evidence to meet its case and provided the records sent by or sent to the Applicant for the Adjudicator's review in the inquiry.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 19, 24, 27, 56, 71, 72; *Regional Health Authorities Act*, c. R-10, s.14; *Government Organization Act*, R.S.A. 2000, c. G-10, s.2

**Authorities Cited: AB:** Orders F2003-010, F2018-15

**Cases Cited:** *University of Calgary v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 795 (CanLII); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319; *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 *Alberta College of Pharmacists v Sobeys West Inc.,* 2017 ABCA 306; *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207; *Hansraj v. Ao*, 2002 ABQB 385 (CanLII), [2002] A.J. No. 594); *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980]

[1] See *University of Calgary v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 795 (CanLII) at paragraphs 83 – 84.

1 SCR 821); *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403; *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289 (CanLII)

## 1. BACKGROUND

[para 1] The Applicant, a former employee of Alberta Health Services (the Public Body), requested access to records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He stated:

> I am requesting all documents, notes and emails where I am referred to by my name or initials for the
>
> 1) period of my employment starting with just before my employer's decision to place me on a performance Improvement plan until and ending with AHS's decision to terminate my employment. The documents, notes and emails I am requesting will include all those relating to my employment, my health and private life. I have included the names of individual employees below who would have the information I am seeking, in addition to other individuals, at all levels of management who may have this information as well and;
>
> 2) period starting after my termination of employment pertaining to AHS attempts to make a severance payment to me and settle a settlement to avert any potential complaints or law suits I may have against them. I am particularly requesting information on all factors and individuals at all level of management who had any input into this matter.

[para 2] The Public Body provided disclosure of some records, but severed information under sections 17 (disclosure harmful to personal privacy), 19 (confidential evaluations), 24 (advice from officials), and 27 (privileged information).

[para 3] The Applicant requested review of the Public Body's decisions to sever information from the records at issue. The Commissioner agreed to conduct an inquiry.

[para 4] As the Public Body indicated that some of the records to which it had applied section 27(1)(a) were subject to solicitor-client privilege, the inquiry proceeded on this issue initially.

[para 5] In its reply submissions, the Public Body indicated that it believed litigation privilege applied to all the records, in addition to settlement privilege and litigation privilege. The Public Body provided descriptions of two bundles of records labelled A and B. Bundle A contains descriptions of records over which it claims settlement privilege and litigation privilege. Bundle B contains descriptions of records over which it claims solicitor-client privilege and litigation privilege. The Public Body did not provide either bundle for the inquiry.

## II. ISSUE

**ISSUE A: Did the Public Body properly apply section 27(1)(a) of the FOIP Act ?**

[para 6] Section 27(1)(a) of the FOIP Act permits a public body to sever information that is subject to privilege. It states:

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

[para 7] The Public Body has not provided the records at issue for my review. Its submissions do not reveal the role of the individuals involved in the communications or provide any context for the information it severed from the records. Given that the Applicant and the Public Body are involved in a litigious dispute regarding the termination of his employment, I anticipate that were I to see the records, I would find at least some of the records are subject to the privileges the Public Body has cited. As it stands, based on the Public Body's submissions and evidence, I am unable to say that any particular information to which the Public Body applied section 27(1)(a) is likely subject to this provision. With regard to the communications the Public Body has withheld under litigation privilege and solicitor-client privilege that apparently involved the Applicant, I am able to state positively that these communications are unlikely to be subject to solicitor-client privilege or litigation privilege.

[para 8] Section 56 of the FOIP Act requires public bodies to provide records to the Commissioner in an inquiry. It states:

> *56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act and the powers given by subsection (2) of this section.*
>
> *(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.*
>
> *(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).*
>
> *(4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, the head of that public body may require the Commissioner to examine the original at its site.*
>
> *(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.*

[para 9] Section 71 of the FOIP Act sets out the burden of proof in inquiries regarding access decisions. It 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.*
>
> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*
>
> *(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> >
> > *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 10] Decisions to apply provisions of section 27 fall within the terms of section 71(1). Previous decisions of this office have held that the standard of proof is the balance of probabilities, rather than the more onerous burden of proof beyond a reasonable doubt. (See, for example, Order F2003-010.) A public body must prove that the information to which it applied section 27(1)(a) is more likely than not subject to a privilege. The records at issue often constitute sufficient evidence to meet the burden of establishing that an exception applies.

[para 11] While the foregoing provisions and the review process set out in the FOIP Act were taken as clear for 20 years, the processes to be followed when adjudicating section 27(1)(a) have had to be changed following decisions of the Alberta Court of Appeal and the Supreme Court of Canada. As this change would not be apparent to the Applicant, or to others who may rely on the FOIP Act, I have decided to provide an overview of these changes and explain the new process and the reasons for it.

[para 12] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 the Supreme Court of Canada quashed a notice to produce issued by this office for records to which the University of Calgary had applied section 27(1)(a), as it determined that the Commissioner lacks the power to demand records from a public body when the public body decides the records are subject to solicitor-client privilege and applies section 27(1)(a) for that reason. The Court held that the Commissioner has the power under section 56 to demand records subject to privileges of the law of evidence, but not records over which a public body claims solicitor-client privilege, as the Court reasoned that the phrase "privilege of the

law of evidence" was not sufficiently clear to enable the Court to interpret the phrase as encompassing solicitor-client privilege, given the importance of this privilege.

[para 13] The Court held that because solicitor-client privilege is important, the phrase "privilege of the law of evidence" does not necessarily encompass it. The Court said:

> Solicitor-client privilege is clearly a "legal privilege" under s. 27(1), but not clearly a "privilege of the law of evidence" under s. 56(3). As discussed, the expression "privilege of the law of evidence" is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

[para 14] Following the Supreme Court of Canada's decision, the Commissioner has issued orders in relation to solicitor-client privilege without requiring records from public bodies. If the evidence of public bodies is sufficient to establish that the information severed by the public body is subject to section 27(1)(a) on the basis of solicitor-client privilege, then the Commissioner confirms the public body's decision. If the public body's evidence is not persuasive, then the Commissioner will order disclosure, as section 72 requires the Commissioner to order disclosure when a public body's evidence does not establish that an exception to disclosure applies under section 71.

[para 15] In *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 the Alberta Court of Appeal determined that the Court of Queen's Bench has the power to demand records from public bodies when hearing judicial review applications regarding a public body's claim of solicitor-client privilege, even though the records were not in evidence before the Commissioner. The Court held that it had jurisdiction to demand records from public bodies in the course of judicial review proceedings, stating:

> We are satisfied that on a judicial review application where the dispute centres on whether the documents in question are subject to solicitor client privilege, those documents should be put before the reviewing Court. It is this simple. The issue—whether solicitor client privilege exists with respect to the disputed documents—cannot be properly determined in these circumstances without examining the documents themselves. This approach is consistent with the supervisory role of the Court.

[para 16] In the foregoing decision, the Court determined that the Commissioner was unable to properly determine whether solicitor-client privilege applies, as the Commissioner could no longer review the records. The inference may be drawn from this decision that the purpose of judicial review when a public body has applied section 27 on the basis of solicitor-client privilege is to determine whether public records are subject to solicitor-client privilege.

[para 17] Prior to the Court of Appeal's decision in *Calgary Police Service*, the Court limited the ability of parties to introduce evidence that was not before the decision

maker whose decision is the subject of judicial review. This point was made by the Alberta Court of Appeal in *Alberta College of Pharmacists v Sobeys West Inc.,* 2017 ABCA 306 (CanLII), where it stated:

> In its oral submissions before this Court, counsel for the College conceded that there are at law three exceptions to allow new evidence on a judicial review hearing, those being:
>
> i. evidence to establish a breach of natural justice not apparent on the face;
>
> ii. some background information mainly to establish standing; and
>
> iii. where no transcript was made of a quasi-judicial proceeding.
>
> However, he asserted that these three exceptions did not apply in this case.
>
> […]
>
> We will, however, address this issue. We agree with and adopt the comments of Slatter J (as he then was) in *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission*) at para 42, where he stated:
>
> > As a general rule, however, evidence that was not before the tribunal and that relates to the merits of the decision is not permitted on judicial review. The law is summarized in S. Blake, *Administrative Law in Canada*, (4th ed.), at pg. 198:
> >
> > > Only material that was considered by the tribunal in coming to its decision is relevant on judicial review. It is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible. The tribunal's findings of fact may not be challenged with evidence that was not put before the tribunal. Fresh evidence, discovered since the tribunal made its decision, is not admissible on judicial review. . . . (footnotes omitted).
> >
> > Attempting to introduce fresh evidence respecting the merits of the challenged decision on an application for judicial review misapprehends the nature of judicial review.
>
> Slatter J also went on to indicate that the test set out in *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, is not applicable in an application for judicial review.
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> To allow fresh evidence on judicial review on the basis of evolving research has the potential to extend the review process indefinitely and is simply unworkable: *Silverman v Alberta (Human Rights Commission)*, 2012 ABQB 152 at para 14 (per Veldhuis J (as she then was)).
>
> We also agree with the decision of the British Columbia Court of Appeal in *Sobeys West Inc v College of Pharmacists of British Columbia* at para 55, where the Court stated "[t]o the extent, then, that the chambers judge in this case may have admitted evidence that was not directly or indirectly before the Council, I believe he was in error".

> The reviewing judge erred in allowing this additional evidence to be adduced by Sobeys and erred in relying upon this evidence to the extent he may have.

[para 18] Following the *Calgary Police Service* decision, once the Commissioner directs a public body to disclose records over which it is claiming solicitor-client privilege, in most cases, both the public body asserting solicitor-client privilege and the Commissioner spend public money to participate in judicial review proceedings so that the issue of solicitor-client privilege may be adjudicated by the Court.

[para 19] At present, settlement privilege continues to be a "privilege of the law of evidence" and section 56 of the FOIP Act therefore requires records over which a public body claims this privilege to be given to the Commissioner for review in an inquiry.

[para 20] The Privilege Practice Note of this office informs public bodies that they are not required to provide records over which they are claiming solicitor-client privilege or litigation privilege. It states, in part:

> The practice note also applies to litigation privilege on the basis of the significance attributed to that privilege by the SCC in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52.

[para 21] In *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, the Supreme Court of Canada determined that where a statute provides an investigative body power to demand documents, the enacting legislature cannot be understood to have provided that body with the power to demand records over which a party claims litigation privilege. The Court said:

> There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct. Nonetheless, like solicitor-client privilege, litigation privilege is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). It is central to the adversarial system that Quebec shares with the other provinces. As a number of courts have already pointed out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: *Penetanguishene Mental Health Centre v. Ontario*, 2010 ONCA 197, 260 O.A.C. 125, at para. 39; *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift

[para 22] In the foregoing case, the Court viewed solicitor-client privilege and litigation privilege to be "fundamental to the proper functioning of our legal system" and "of fundamental importance". For this reason it determined that Parliament and the Legislatures must name litigation and solicitor-client privilege expressly when drafting legislation in order for the Court to give effect to legislative intent to abrogate these privileges.

[para 23] Given that the Court in *Lizotte* attached similar import to litigation privilege as did the Court to solicitor-client privilege in *University of Calgary*, this office determined that it would not demand records from a public body when it withholds information in records from an applicant under section 27(1)(a) because it believes they are subject to litigation privilege. Instead, the public body is to provide an affidavit of records that contains the following:

> For claims of solicitor-client privilege, the Respondent should provide:
>
> • Information about the relationship between the Respondent and the lawyer in the context of the relevant communication
>
> • Information about the circumstances to establish that the record was created in the course of requesting or providing legal advice or is a record revealing such a request or advice
>
> • Information about the confidentiality of the communication
>
> For claims of litigation privilege, the Respondent should provide:
>
> • Information establishing that the record was created for the dominant purpose of litigation
>
> • Information establishing that the litigation has not ended

[para 24] If the evidence of a public body satisfies the Commissioner's delegated adjudicator that the public body has properly applied section 27(1)(a) to the records, then the adjudicator will confirm the decision. If the public body's evidence does not adequately address the points in the Privilege Practice Note with the result that the adjudicator is unable to confirm the public body's decision, the adjudicator will direct the public body to disclose the records to the applicant. Doing so enables the public body to request the Court of Queen's Bench to decide the issue of the application of section 27(1)(a) through the judicial review process.

[para 25] Under the process approved by the Court of Appeal in *Calgary (Police Service)*, the Court of Queen's Bench will decide the issue of whether records are subject to solicitor-client privilege *de novo* when a public body seeks judicial review of a decision of the Commissioner regarding records to which the public body applied section 27(1)(a) on the basis of solicitor-client privilege.

[para 26] The Courts grant full standing to public bodies, or entities considered to be the heads of public bodies, and the Court then determines whether the records are privileged or not.

[para 27] The Court will quash the Commissioner's order as incorrect if the Court decides that records are subject to solicitor-client privilege after the Court has reviewed the records that were unavailable to the Commissioner. Court costs may be awarded against the applicant if the Commissioner's decision is quashed and the applicant participates in the judicial review application. For example, the Court ordered an individual who made a request for access and then participated at the judicial review

hearing of Order F2018-15 to pay $1238.75 in party-and-party costs to the University of Calgary[2].

[para 28] A difficulty with the process that the Court of the Appeal approved arises when public bodies claim a privilege of the law of evidence over records to which solicitor-client privilege has also been claimed. If the records are not subject to solicitor-client privilege, then the Court has demanded records for the purposes of judicial review that were within the Commissioner's authority to demand under section 56 and could have been put before the Commissioner by the public body. In the case before me, the Public Body has applied a privilege of the law of evidence to half the records, solicitor-client privilege to the other half, and litigation privilege to all of them.

[para 29] The Public Body provided the affidavit of its solicitor in its initial submissions to support its claim of solicitor-client privilege. This affidavit states:

> […] I have reviewed the Records as set out in the Index of Records to this Inquiry in which a claim of solicitor-client privilege and/or settlement privilege and therefore privileged, have been asserted by AHS. The records consist of correspondence and documentation in which legal counsel has given legal advice and communications by AHS staff providing information to inform the legal advice or alternatively correspondence reflecting settlement and legal advice on the issue of settlement. It is my opinion based on a review of the records that they properly fall under legal privilege, either solicitor-client privilege or settlement privilege.

[para 30] The Public Body did not provide the records for my review, but included a table of records that consisted of numbers and blank lines. Subsequently, on my request, it provided descriptions of two bundles or records – A and B. Bundle A indicates that the records it contains are being withheld in their entirety on the basis of litigation privilege and settlement privilege. Bundle B indicates that the records it contains are being withheld in their entirety on the basis of solicitor-client privilege and litigation privilege. The Public Body did not address the points in the Privilege Practice Note.

[para 31] The Public Body included the names of the employees who participated in the email exchanges or correspondence in the records making up Bundles A and B. It did not include the occupation or job titles of these employees. I note that the Applicant's name appears several times in the description of records in both bundles, as if he is the author of some of the communications, or was included in some of the communications, or was a recipient of the communications.

[para 32] Settlement privilege, litigation privilege, and solicitor-client privilege are not the same. Settlement privilege applies to communications between parties made for the purpose of attempting to effect settlement of a litigious dispute (*Hansraj v. Ao*, 2002 ABQB 385 (CanLII), [2002] A.J. No. 594). Settlement privilege belongs to both parties to the settlement communication. Litigation privilege applies to records created for the dominant purpose of use in litigation (*Blank v. Canada (Minister of Justice),* 2006 SCC

[2] Order dated December 13, 2020, Court Action No. 1801-07259

39 (CanLII), [2006] 2 SCR 319). Solicitor-client privilege applies to confidential communications between a solicitor and a client in relation to the giving or seeking of legal advice. (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821).

[para 33] It is unclear to me how each record in Bundle A could be subject to both settlement privilege and litigation privilege. Litigation privilege applies to communications made for the dominant purpose of use in litigation. Litigation privilege provides a "zone of privacy" for a litigant to prepare their case. Settlement privilege applies to communications between opposing litigants made for the purpose of settling litigious disputes, with the understanding that the communication will not be put before the Court. Settlement communications take place *outside* the zone of privacy protected by litigation privilege.

[para 34] As it was unclear from the Public Body's evidence that the privileges it claimed apply to all the information it severed, I asked the Public Body to provide records subject to privileges of the law of evidence for my review, and for a description of the records that would support its application of section 27 to the records at issue. I noted:

> Although the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 determined that the language employed by the Legislature in the FOIP Act did not give the Commissioner the power to demand records subject to solicitor-client privilege, it did consider the language adequate in relation to other privileges of the law of evidence. Settlement privilege is an example of such a privilege. If there are records to which the Public Body has not applied solicitor-client privilege, but another privilege of the law of evidence, I ask that it provide these records for my review so that I may evaluate its application of section 27 to these records

[para 35] The Public Body provided descriptions of the records that indicate the names of individuals who participated in the communications to which it had applied section 27, but provided no records. It did not indicate employees' job titles, whether they are employees, or indicate whether anyone involved in the communication was a lawyer, or the capacity in which they acted, or any contextual information that would assist in determining whether the communication was subject to any of the privileges it has claimed. The Public Body's submissions for the inquiry indicate that it has applied litigation privilege on the basis that its counsel learned that the Public Body is in litigation with the Applicant. There is no indication that as determination was made that the records at issue were created for the dominant purpose of the Public Body's use in litigation. The Public Body has not provided sufficient context to establish that its claims of privilege were properly made over communications in which the Applicant participated.

[para 36] The Public Body did not consider litigation privilege to apply initially, but only argued that either settlement privilege or solicitor-client privilege applied. Once it learned that it was involved in litigation with the Applicant, the Public Body determined that litigation privilege applied to all the records. While I accept that some of the records may well have been prepared for the dominant purpose of use in litigation, I am unable to

accept this to be true of all the records, particularly those in which the Applicant is a sender or recipient. Litigation privilege does not apply to all records relating to litigation. Again, litigation privilege applies to records prepared for the dominant purpose of a party's use in litigation.

[para 37] As the Public Body has provided insufficient evidence to establish that section 27(1)(a) applies to the information it severed from the records, I am unable to confirm its application of section 27(1)(a). The descriptions of records it provided do not indicate that any of the Public Body's employees involved in the communications were lawyers or clients. As noted above, some of the communications to which it applied solicitor-client privilege indicate that the Applicant was one of the persons involved in the exchange of communications over which it is claiming solicitor-client privilege. Given that solicitor-client privilege typically applies to confidential communications between a solicitor and client, which in this case, would be representatives of the Public Body as employer, and the Public Body's lawyers, the Public Body's reasons for applying this privilege to communications apparently involving the Applicant are opaque. Similarly, litigation privilege is intended to create a zone of privacy around records created for use in Court – it is unclear how records sent to or created by the Applicant could be protected by the zone of privacy afforded by litigation privilege.

[para 38] I have considered whether the records the Public Body asserts were created or sent to the Applicant were created or sent as part of his employment duties and related to the giving or seeking legal advice. However, the Public Body has not said so, and the scope of the access request would preclude such information from being responsive in any event.

[para 39] Rather than answer my questions regarding its application of privileges, or providing the records to which it had applied a privilege of the law of evidence, the Public Body provided a copy of *University of Calgary v Alberta (Information and Privacy Commissioner)*, 2021 ABQB, in which Horner J. awarded costs against the Office of the Information and Privacy Commissioner, payable to a public body, the University of Calgary, for "continuing to review the issue of solicitor-client privilege" which, in the Court's view, the Supreme Court of Canada had already decided. The Public Body did not explain the relevance of the decision for the inquiry.

**Access to Information statutes generally**

[para 40] Historically, freedom of information legislation was thought to be an important tool for citizens and members of the Legislature to participate meaningfully in democracy. For example, in *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403, La forest J. stated:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

> Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
>
> See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.
>
> Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:
>
> > There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.[3]

[para 41] Access to information and protection of privacy statutes, such as the FOIP Act, are intended to promote the accountability of governments, enable citizens and the Legislature to participate meaningfully in democracy, and enable citizens to access personal information about themselves in the custody or control of the state. In addition, access to information statutes contain mechanisms to address maladministration both in access decisions and in the handling of personal information.

**What is a public body?**

[para 42] Under the FOIP Act, various public entities such as branches of the Government of Alberta, municipalities, educational bodies, and health bodies fall within the definition of "public body" set out in section 1(p). Essentially, public bodies are entities that derive their existences and authority from grants of power by the Legislature to carry out policies enacted by the Legislature. Moreover, they receive public money to carry out their statutory functions, including the administration of the FOIP Act. Collectively, public bodies, like the Commissioner, are emanations of the state constituting the "executive branch" of government.

**What is the role of a public body in relation to records?**

[3] While Laforest J. was speaking in dissent, the majority agreed with his approach to interpreting access to information legislation.

[para 43] Under the FOIP Act, a public body has custody or control over records; however, each individual public body does not "own" the records in its custody or control or have personal interests in them. A public body has duties to protect the personal information that records contain and to collect, use, or disclose personal information only in accordance with the FOIP Act. The records and information in the custody or control of public bodies are created or collected in the course of carrying out statutory duties for which the Legislature provides public funds. It is for this reason that the Legislature enacts freedom of information legislation regarding records to help ensure that public bodies are accountable for the manner in which they spend public money and carry out public duties.

[para 44] If the public body is a department of the Government of Alberta within the terms of section 2 of the *Government Organization Act*, the public body must also comply with the Records Management Regulation.

[para 45] Public bodies that are not government departments may act under the direction of a Minister, and records may be subject to demands by the Minister. For example, section 14 of the *Regional Health Authorities Act* requires the Public Body to forward records to the Minister on the Minister's request.

[para 46] To summarize, a public body has obligations in relation to records in its custody or under its control imposed by the statutes under which the public body operates; however, it is not free to dispose of them as it will, as would a private citizen or business, but may be required to preserve them, produce them to a Minister, or to the Commissioner, or to treat them in accordance with legislative schemes such as the FOIP Act. At the same time, as noted above, the Courts have determined that public bodies have the right to have section 27(1)(a) adjudicated by the Courts when they believe solicitor-client privilege applies to records, and that right must be respected in this inquiry.

**Conclusion**

[para 47] I have a duty under section 72 of the FOIP Act to issue an order in relation to the records the Public Body has withheld from the Applicant on the basis of section 27(1)(a). I must carry out this duty even though the Public Body may seek judicial review of my decision and seek costs against the Commissioner. The evidence of the Public Body fails to provide a basis for its application of section 27(1)(a) to the records and I must order the Public Body to give the Applicant access to the records.

[para 48] Given the termination of the Applicant's employment and the commencement of legal proceedings, I anticipate that at least some of the records, if not many of them, contain privileged communications. On the descriptions provided by the Public Body, I am unable to determine which records are privileged or to which privilege they may be subject. Ordering disclosure because the Public Body has not met its case might harm the Public Body's position in litigation, which would not necessarily serve the public interest. On the other hand, it may be that the Public Body prefers to have the

issue of the application of section 27(1)(a) adjudicated by the Court of Queen's Bench, in which case, an order under section 72 will be necessary.

[para 49] A difficulty with the approach above, is the fact, discussed above, that the Public Body asserts that much of the information in the records was sent by, or sent to, the Applicant. If so, then litigation privilege and solicitor-client privilege cannot apply to that information. I find that such information remains within my jurisdiction to demand under section 56, as the only privilege that could apply is settlement privilege, which is a privilege of the law of evidence.

[para 50] I note, too, that judicial review results in the expenditure of judicial resources and also requires the expenditure of public resources provided by the Legislature to both the Public Body and the Commissioner to carry out their statutory duties, such as administering the FOIP Act.

[para 51] I have decided to order the Public Body to give the Applicant access to the records to which it applied section 27(1)(a) as this will enable it to seek judicial review; however, I will also give it the option of providing better submissions to make its case and to provide the records sent to or by the Applicant for my review.

[para 52] I draw support for the requirement that the Public Body provide better evidence and submissions, and provide records that appear not to be privileged from *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207 (CanLII). In that case, Renke J. confirmed that the Commissioner has the authority to question claims of privilege where, as here, the standards in *Canadian Natural Resources Limited v ShawCor Ltd*., 2014 ABCA 289 (CanLII) are not met. He said:

> 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 53] As noted above, I find that the reference to the Applicant as being the author or recipient of many of the records is evidence that solicitor-client privilege or litigation privilege does not apply to them. In such circumstances, the foregoing case contemplates that the Commissioner may require further information.

## III. ORDER

[para 54] I make this order under section 72 of the FOIP Act.

[para 55] I order the Public Body to either:

1) give the Applicant access to the information in the records to which it applied section 27(1)(a) or

2) provide detailed submissions for the inquiry covering the points in the Privilege Practice Note cited above, and to meet its duty under section 56(3) of the FOIP Act by providing the records described by the Public Body as having been sent to or sent by the Applicant for my review.

[para 56] If the Public Body elects choice 2, then I will reconvene the inquiry to address its new evidence and submissions as well as the records it chooses to provide.

[para 57] In either case, I order the Public Body to inform me and the Applicant within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator
/bah