ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2022-06

June 13, 2022

SHELL CANADA LTD.

Case File Number 010064

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to Shell Canada Ltd. (the Organization) requesting all of his personal information held by the Organization, including his personnel file, investigation file relating to his employment and dismissal, and correspondence between employees relating to his employment and dismissal.

The Organization located forty-two responsive records. Some information was provided to the Applicant while some information was withheld under sections 24(2)(a), (b) and (c), and section 24(3)(b).

The Applicant requested a review into the Organization's search for records, as well as its application of exceptions to access.

The Adjudicator found that the Organization conducted an adequate search for responsive records.

The Adjudicator found that the Organization properly claimed solicitor-client privilege under section 24(2)(a) over one record, and litigation privilege under section 24(2)(a) over one record. The Adjudicator did not accept the Organization's claim of litigation privilege over two records.

However, the Adjudicator found that the remaining records, including the two records for which the claim of litigation privilege was not accepted, were collected for an investigation and therefore properly withheld under section 24(2)(c).

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 52, *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8)

Authorities Cited: AB: Decision P2011-D-003, Orders F2004-003, F2007-008, F2010-007, F2010-036, F2007-014, F2012-08, F2020-16, P2006-004, P2006-005, P2006-012, P2007-002, P2008-007, P2009-005, P2012-09, P2013-13, P2015-05

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, *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).

I. BACKGROUND

[para 1] The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to Shell Canada Ltd (the Organization), which it received on February 5, 2018. The Applicant requested all of his personal information in the Organization's custody and control, in any format and location that included but was not limited to his personnel file, investigation file pertaining to his employment and dismissal, correspondence among other employees pertaining to his employment and dismissal.

[para 2] After receiving the request, the Organization asked for additional information that may assist with the search for records. The Applicant submitted a list of 21 names of people he thought might have responsive records.

[para 3] The Organization replied to the access request on July 24, 2018. Forty-two records were identified as responsive. Four pages were withheld under s. 24(2)(a) and (b) and the balance of the records disclosed.

[para 4] The Applicant requested a review of the search done for responsive records, and the Organization's decision to withhold information.

[para 5] In the course of the investigation conducted by this Office, the Organization conducted an additional search for attachments to the withheld records. The Organization located the attachments and provided them to the Applicant with information withheld under sections 24(2)(a) and (c), and section 24(3)(b).

[para 6] The Applicant subsequently requested an inquiry.

II. INFORMATION AT ISSUE

[para 7] The information at issue consists of the information withheld in the records at issue, comprised of records B-1 to B-5. The Organization did not provide records B-1, B-2, B-4 or B-5 for my review, citing solicitor-client and litigation privilege.

[para 8] Record B-3 was provided to the Applicant with some information severed. An unredacted copy of this record was provided for the inquiry.

III. ISSUES

[para 9] The Notice of Inquiry, dated January 14, 2022, states the issues for inquiry as the following:

1. Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

2. Is the access request for the Applicant's personal information? / Was the information the Organization withheld, or any of it, the Applicant's personal information?

3. If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,

    a. Did the Organization properly apply section 24(2)(a) (legal privilege)

    b. Did the Organization properly apply section 24(2)(b) (confidential information of a commercial nature) to certain requested records or parts thereof?

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

    d. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

5. If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b) or 24(3)(b) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

IV. DISCUSSION OF ISSUES

Preliminary Issue – Scope of inquiry

[para 10] The Applicant's submissions to the inquiry focused on the fairness or quality of an investigation conducted by the Organization into an incident involving the Applicant. The

Applicant also raised his employment performance history, noting that prior to his termination, he had received excellent performance evaluations. The Applicant also points out that a written warning letter provided to him by the Organization in response to his access request, was addressed to an employee other than the Applicant.

[para 11] How the Organization conducted an investigation into a workplace incident is not a matter I have jurisdiction over. Nor is whether the Organization was justified in terminating the Applicant's employment; I understand that this latter question may be before the courts.

[para 12] I do not know why the records provided to the Applicant by the Organization include a discipline letter from the Organization to an employee other than the Applicant. This employee shares the Applicant's first initial and last name; possibly, it was provided to the Applicant in error. Whether the Organization breached the privacy of this other employee is not a matter before me in this inquiry; as such, I do not have submissions from the Organization on this point and make no finding. However, if this letter was provided to the Applicant in error, the Organization should ensure it has proper processes in place to safeguard employee information as required under PIPA, and to ensure that such errors are not made in the future. This is especially so when the record relates to a matter as sensitive as a disciplinary letter.

1. Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

[para 13] Section 27(1)(a) of the Act states the following:

> *27(1) An organization must*
>
> *(a) make every reasonable effort*
>
> *(i) to assist applicants, and*
>
> *(ii) to respond to each applicant as accurately and completely as reasonably possible,*
>
> …

[para 14] The duty to assist includes conducting an adequate search for responsive records, as well as informing the applicant, in a timely manner, what steps have been taken to search for the requested records (Order P2009-005, at para. 47).

[para 15] The Notice of Inquiry states that this issue relates to whether the Organization conducted an adequate search for records, The Notice directs the Organization to provide its submission in the form of a sworn document describing the search it conducted in response to the Applicant's request. It directs the Organization to consider addressing the following:

- The specific steps taken by the Respondent to identify and locate records responsive to the Applicant's access request.
- The scope of the search conducted, such as physical sites, program areas, specific databases, off-site storage areas, etc.

- The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search? (Note: that person or persons is the best person to provide the direct evidence).
- Why the Respondent believes no more responsive records exist other than what has been found or produced. (In answering this question the Respondent should have regard to the reasons the Applicant gave for believing more records exist than were located/provided to him/her **or** in answering this question the Respondent should have regard to the Applicant's description of the records/kinds or records he/she believes should have been provided to him/her.)
- Any other relevant information.

[para 16] With respect to the burden of proof, an applicant must show some basis that an organization failed to locate or provide a record in its custody or control; the burden then shifts to the organization to show that it conducted an adequate search (Order P2006-012 at para. 12). The Notice directed the Applicant to specify precisely what records he believes are missing from the Public Body's response, and why he believes they exist. Rather than providing this information, the Applicant relied on his previously-provided request for review and request for inquiry as his initial submission. The Applicant's request for review referred to records of two named individuals concerning the Applicant's "character in any aspect". His request for inquiry did not refer to any particular records he was seeking; it referred only to the Organization's statement of defence – presumably relating to a legal proceeding between the parties – as containing false and defamatory statements about the Applicant.

[para 17] The Organization states that it conducted numerous searches for responsive records. The searches were managed by a legal analyst in the Organization's privacy office. The Organization searched the personnel database, its digital and paper repository for archived records, Albian Oil Sands historical HR digital records, Albian Oil Sands site access records, and the Organization's legal database.

[para 18] The Organization states that it searched the IT profiles of over 20 individuals identified by the Applicant. However, it was unable to search the IT profiles of the two individuals named in the Applicant's request for review, as those individuals' employment with the Organization ended over a year prior to the Applicant's access request. As such, their IT profiles had been deleted prior to the request.

[para 19] The initial review of this file was conducted by the Director of Mediation. After the Applicant requested an inquiry into the matter, the Director prepared a mediation overview letter, which was sent to both parties and provided to me for the inquiry. In that letter, the Director states that some responsive records referred to attachments, which were not included in the records. The Director recommended that the Organization search for those attachments. The Organization agreed, and located additional records, which it provided to the Applicant with some information withheld (Record B-3).

[para 20] That the Organization failed to locate these records in its initial search does not necessarily mean that its search was inadequate. The description provided by the Organization seems thorough, and the Applicant has not identified other records he expected in response to his request. As the Organization conducted an additional search and located attachments to records previously located, I am satisfied that the Organization corrected any oversight in its previous search.

[para 21] I find that the Organization conducted an adequate search for records, and fulfilled its duty under section 27.

2. Is the access request for the Applicant's personal information? / Was the information the Organization withheld, or any of it, the Applicant's personal information?

[para 22] Under PIPA, an applicant has a right of access only to their own personal information.

[para 23] Section 24(1) and (1.1) of the Act require an organization to provide access to an applicant's personal information; these provisions state:

> *24(1) An individual may, in accordance with section 26, request an organization*
>
> *(a) to provide the individual with access to personal information about the individual, or*
>
> *(b) to provide the individual with information about the use or disclosure of personal information about the individual.*
>
> *(1.1) Subject to subsections (2) to (4), on the request of an applicant made under subsection (1)(a) and taking into consideration what is reasonable, an organization must provide the applicant with access to the applicant's personal information where that information is contained in a record that is in the custody or under the control of the organization.*

[para 24] In Order P2006-005, former Commissioner Work stated (at paras. 46-47, 50).

> In Order P2006-004, I considered the meaning of "personal information about an individual" within the meaning of the Act:
>
> 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.
>
> This reasoning applies equally to an individual's work, which may be associated with an individual, but is not necessarily about the individual who performed the work.
>
> …
>
> I agree with the Organization's position that the "work product" or records produced by an employee in the course of employment is generally not the personal information of the employee. Pipeline reports, asset allocation reports, client agreements, tapes of calls, customer satisfaction and referrals are records created by employees as a part of their

> employment duties. These records are not about the employee as an individual, but about the task at hand.

[para 25] Order P2012-09 found that the fact that information is located in an employee's personnel file does not necessarily indicate that it contains the employee's personal information. Examples of records that were found not to contain an employee's personal information included training materials of the organization, including forms with the employee's signature indicating that the training had been completed; copies of office-wide memos; records of work-related meetings and attendance at meetings; and shift-related information.

[para 26] In Order P2006-004, former Commissioner Work considered whether information generated or collected to address a complaint was the personal information of the individual who made the complaint (the applicant). He found that information about the persons named in the complaint, information about other third parties and their dealings with the applicant, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process, were not personal information of the applicant. This was so, even though this information was generated as a result of the applicant's complaints (see para. 18).

[para 27] In Decision P2011-D-003, former Commissioner Work considered a similar matter: an access request made to a law firm for the applicants' personal information contained in a client file by the firm in the course of representing a party who was opposed in interest to the applicants. Commissioner Work said (at paras. 30, 32):

> 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. An obvious example would be legal opinions given to the law firm's client as to how to deal with the litigation with the Applicant or associated legal matters. The way in which the law firm was advising its client and dealing with the legal matters may have affected the Applicants, but it was not "about" them in the sense meant by the definition of personal information in the Act. (This information would also be privileged, but the point here is that much or most of it would likely not be the Applicant's personal information within the definition of the term contained in the Act.)
>
> …
>
> These observations are made to point out that if, which seems likely, there is information in the "client file" of the law firm's client that is not covered by solicitor-client privilege, or that is no longer covered by litigation privilege, it seems equally likely that much of it need not be disclosed to the Applicants in this access request because it is not their personal information. (I

say this despite the fact that the Law Society seems to concede the converse in its third bullet in para 19 of its submission.)

[para 28] In Order P2015-05, the Director of Adjudication considered the above decision in the context similar to the one at hand. A former employee had made an access request to an Organization for his personnel file. She found (at paras. 31-33):

> The greatest part of the withheld information consists of discussions about the Applicant and his job-related issues amongst other employees of the Organization whose role it was to deal with these issues, as well as statements of other employees who recounted events involving the Applicant. To a large extent, these discussions include ideas or intentions as to how his employment issues should be dealt with. The records also include descriptions of how the Applicant behaved or reacted in certain situations, that are value-laden in that they reveal the speakers' opinions about the Applicant and the way these persons interpreted events concerning him. (Because the discussions are work-related rather than personal, most of the 'opinion' information in this category does not appear to be – though some of it may be – the personal information of the employees engaged in these discussions and making these statements.)
>
> With respect to such information, I agree with the reasoning in the decision of Commissioner Work, cited above, as well as the reasoning of the Adjudicator in Order P2012-04. Insofar as this withheld information consists of the intentions, ideas and opinions of the other employees, it does not consist *solely* of the Applicant's personal information, nor does some of it consist of his personal information at all.
>
> To illustrate the latter point, X's statement that "I believe we should take steps a, b and c to deal with Y's employment complaint" is not Y's personal information. While the fact Y has made an employment complaint is Y's personal information, the steps X believes should be taken to address it, though related to Y, are not. Ultimately, if the steps are taken and affect Y's situation, this may, at that point, be Y's personal information, for example, that Y accepted a new position. However, the intervening considerations or discussions by others about the merits of the complaint and how to resolve it, are not. Most certainly they are not if the suggested steps are never effected. Even if they are, only the way Y's situation is affected by the outcome, and not why and by whom this was effected, is personal information in the sense of being "about Y" within the terms of the Act.

[para 29] Lastly, an organization's duty in section 24(1.1) to provide requested personal information is subject to considerations of what is reasonable. As stated in Order P2008-007, the phrase "taking into consideration what is reasonable" under section 24(1.1) of the Act is informed by section 2, which states:

> *2 Where in this Act anything or any matter*
>
> > *(a) is described, characterized or referred to as reasonable or unreasonable, or*
> >
> > *(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,*
>
> *the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a*

> *reasonable manner, is what a reasonable person would consider appropriate in the circumstances.*

[para 30] Former Commissioner Work discussed this limitation with respect to records containing only small 'snippets' of an applicant's personal information. He said (at para. 131):

> I note as well that on the basis of the ability of organizations to take into account what is reasonable in responding to access requests under section 24 of the Act, it is open to an organization to argue, in appropriate circumstances, that it is not reasonable to provide access to an applicant's personal information, or parts of this information. This may apply for information that consists of meaningless or insignificant snippets, particularly if it reveals nothing of substance to an applicant. It may also apply where providing information would require an organization to review a large volume of information only to provide an applicant with minor items of information of which he is already well aware, especially where there is an indication that the access request for such information is not being made for a *bona fide* purpose.

Application to the records at issue

[para 31] Record B-3 is described in the Organization's submissions as both an "Incident Report" and "Event Detail Report". Having reviewed this record, both characterizations are correct: generally it can be described as an incident report, with the specific title being "Event Detail Report".

[para 32] Based on the records, I conclude that this Report was created in response to an incident occurring at the Organization's work site, involving the Applicant. It contains the Applicant's personal information but is not comprised entirely of his personal information.

[para 33] The Report contains the Applicant's statement, made to an Organization employee regarding the incident. The record of the Applicant's statement was provided to him.

[para 34] The Report also contains other employees' versions of events, some of which includes opinions about the Applicant. This is his personal information.

[para 35] Other sections of the Report detail only the Organization's response to the incident, or the steps it takes to respond to such circumstances, which is not the Applicant's personal information. Some sections of the Report include personal information of individuals other than the Applicant. That is not his personal information.

[para 36] Regarding records not provided to me, the Organization states records B-4 and B-5 are comprised of witness statements of other individuals. The Organization clarifies that both statements are "included with the Event Detail Report (Doc B-3) but [are] subject to Litigation Privilege, so [have] been identified separately" (May 2022 submission, Appendix B). Given this description, it seems likely that these records contain the Applicant's personal information.

[para 37] The Organization states that record B-1 is comprised of emails between the Organization and legal counsel. The Organization's affidavit of records states that these emails

related to advice about a termination of employment. Presumably these emails relate to the Applicant's employment, in which case they likely contain his personal information.

[para 38] Record B-2 is described as an Investigation Report into the incident. This likely also contains the Applicant's personal information.

Conclusion regarding the responsiveness of information in the records

[para 39] The records located by the Organization contain the Applicant's personal information, but are not comprised entirely of his personal information. Record B-3, which is the only record provided to me for the inquiry, clearly contains the Applicant's personal information; however, it also contains much information that is not about the Applicant. Some information is about other individuals only, and other information is about how the Organization responded to the incident involving the Applicant. This latter information may *relate to* the Applicant but is not *about* him.

3. a. Did the Organization properly apply section 24(2)(a) (legal privilege)

[para 40] Section 24(2) sets out circumstances in which an organization may refuse to provide access to requested information. The Organization has applied section 24(2)(a) to information in records B-1, B-2, B-4 and B-5. I do not have copies of these records.

[para 41] Section 24(2)(a) states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> *(a) the information is protected by any legal privilege;*

[para 42] The Organization has cited both solicitor-client privilege and litigation privilege.

Solicitor-client privilege

[para 43] 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 44] 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 45] Where an organization 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 46] The role of this Office in reviewing claims of privilege under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) was discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at paras. 77-112. While this decision relates to the FOIP Act, the powers of the Commissioner under PIPA are substantially similar to those under the FOIP Act that it is reasonable to extend the discussion in *EPS* to reviewing claims of privilege under PIPA. I understand the Court to mean that my role in reviewing the Organization's claim of privilege is to ensure that the Organization's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 47] The Organization claimed solicitor-client privilege over record B-1. It provided an affidavit of records sworn by a litigation paralegal for the Organization. This affidavit states that the emails are marked as solicitor-client privileged, and that the subject matter relates to a termination of employment for cause. The advice was sought from the Organization's former in-house Senior Legal Counsel.

[para 48] Given the context of the records, including the records that have been provided to me, it seems reasonable to conclude that the termination of employment relates to the Applicant. As the responsive records related to an investigation into a physical assault involving the Applicant, it seems reasonable that the Organization would seek legal advice regarding the Applicant's employment following the incident.

[para 49] The Organization's affidavit of records did not address the third part of the *Solosky* test, which requires that the communications are intended to remain confidential. The confidentiality of documents over which privilege is claimed may be implicit from the nature of the documents themselves (Order F2007-008) or from the circumstances under and, purposes for which, the legal advice was being sought or given (Order F2004-003). In this case, marking emails as being subject to solicitor-client privilege implies that they were intended to be confidential. Further, the emails appear to relate to the wrongful dismissal claim the Applicant brought against the Organization, which is ongoing. This supports the likelihood that the emails were intended to remain confidential.

[para 50] The evidence provided by the Public Body meets the requirements set out in *ShawCor* and is consistent with the test for finding solicitor-client privilege applies. I find that the Public Body has established its claim of privilege.

Litigation privilege

[para 51] The Organization claimed litigation privilege over records B-2, B-4 and B-5. The Organization initially did not provide an affidavit of records to support its claim of privilege, as required when not providing records for an inquiry. Following its initial submission, I asked the Organization to provide an affidavit of records, and to provide additional information regarding its claim of litigation privilege. I said:

> Regarding the Organization's claim of litigation privilege, the Organization should explain how the "dominant purpose" part of the test is met. The discussion of litigation privilege in Order F2020-16 at paras. 103-130 might be relevant to this case. If so, the Organization should explain whether and how the principles discussed in that Order (and/or other relevant principles or case law as appropriate) apply in this case.

[para 52] Litigation privilege was discussed in the Supreme Court of Canada decision *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52. The Court said (at para. 19):

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

[para 53] In Order F2020-16, I reviewed the case law on litigation privilege (at paras. 109-112):

> It is not sufficient for litigation to be *one* of the purposes for the preparation of the record. Further, litigation must be the purpose for the *creation* of the record, not the purpose for which it was later obtained (*ShawCor*). In *ShawCor*, the Court of Appeal considered whether records created for the purpose of an investigation were protected by litigation privilege after litigation was contemplated. More specifically, the records were created for an investigation that would have been completed even if litigation had never been contemplated. The Court stated that "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel" (at para. 87). In other words, where a record is created for an investigation, and that record will be completed for the purpose of the investigation regardless of whether litigation is anticipated, the dominant purpose of that record might be for the investigation even if it is later used in the litigation.
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> In *Witwicky v. Seaboard Life Insurance Co.*, [1998] A.J. No. 1468, the Court found that the dominant purpose for a letter requested by an insurance claimant from his physician was to provide additional information to the insurance company about the claim, and not for the litigation that the claimant subsequently initiated (see esp. paras. 11-21).
>
> In *North American Road Ltd. v. Hitachi Construction Machinery Co.*, 2005 ABQB 847 (CanLII), the Court rejected the argument that records over which litigation privilege was being claimed by an insurance company were created for the purpose of determining an insurance claim, not the later litigation. The Court came to this conclusion based on the fact that the insurance company had retained an expert who would not have been retained for a claim where litigation had not been contemplated.

> In *Specialty Steels v. Suncor Inc.*, 1997 ABCA 338, the Alberta Court of Appeal concluded that the relevant time for assessing the dominant purpose of a record is at the time it was created (completed), rather than the time it was requested. A record may have been requested for one purpose (e.g. an investigation) but another purpose (e.g. for use in litigation) may become the dominant purpose prior to the creation/completion of that record (see paras. 8-9).

[para 54] Regarding record B-2, the Investigation Report, the Organization's affidavit states that the dominant purpose of the Report "was to compile facts and information setting out the legal basis for termination of the employee's employment in contemplation of litigation against Shell Canada Limited for wrongful dismissal." The affidavit further states that there is ongoing litigation relating to the subject matter of the Report (presumably, the Applicant's wrongful dismissal claim).

[para 55] I accept the Organization's affidavit on this point; I find that it meets the requirements set out in *ShawCor* and is consistent with the test for litigation privilege.

[para 56] Regarding records B-4 and B-5, the Organization states that they both consist of witness statements that were "included with the Event Detail Report (Doc B-3) but [are] subject to Litigation Privilege, so [have] been identified separately" (May 2022 submission, Appendix B).

[para 57] The Organization's affidavit of records states for these records that they are subject to litigation privilege "as there is current and ongoing litigation before the Alberta Courts directly related to the subject matter of the statement" and that "[t]he statement is by an individual who is likely to be called as a witness at the trial of this Action."

[para 58] As set out above, it is not sufficient to state that a record is likely to be relevant to, or used in, a contemplated or ongoing litigation in order for litigation privilege to be claimed. The Organization did not claim litigation privilege over record B-3, the Event Detail Report, which it states that these witness statements were a part of. As such, it is unclear how the witness statements but not the remainder of the record were created for the dominant purpose of litigation. Indeed, the Organization did not state in its affidavit of records that B-4 or B-5 were created for the dominant purpose of litigation, only that they are related to the litigation. This does not appear to meet the test for litigation privilege.

[para 59] I do not need to make a determination on this point. For the reasons discussed below, I am satisfied that these records were properly withheld under section 24(2)(c).

Conclusions regarding section 24(2)(a)

[para 60] I accept that the Organization properly claimed privilege under section 24(2)(a) for records B-1 and B-2.

Exercise of discretion

[para 61] Section 24(2)(a) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant.

[para 62] However, 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*, 2010 SCC 23 (CanLII)).

[para 63] I agree and given the Supreme Court of Canada's discussion of litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, I would extend this rationale to information protected by litigation privilege.

3. b. Did the Organization properly apply section 24(2)(b) (confidential information of a commercial nature) to certain requested records or parts thereof?

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> *...*
>
> *(b) the disclosure of the information would reveal confidential information that is of a commercial nature and it is note unreasonable to withhold that information;*
>
> *...*

[para 64] The Organization's initial submission states that it has applied this provision to information in the records, but did not specify which information or how this provision applies. The index of records provided with the Organization's rebuttal submission does not list section 24(2)(b) as an exception being applied by the Organization. The rebuttal submission merely refers to section 24(2)(b) as a basis for withholding information in the records but does not elaborate further.

[para 65] Without knowing what information this exception applies to, or how it applies, I cannot consider the application of that exception.

3. c. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

[para 66] The Organization has applied this provision to all of the information it withheld in the responsive records. This provision states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> *...*
>
> *(c) the information was collected for an investigation or legal proceeding;*

...

[para 67] Section 24(2)(c) of the Act permits an organization to withhold personal information that was collected for an investigation or legal proceeding. Section 1(1)(f) of PIPA defines "investigation", in part, as follows:

> *1(1)(f) "investigation" means an investigation related to*
>
> *(i) a breach of agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) circumstances or conduct that may result in a remedy or relief being available at law,*
>
> *if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;*

[para 68] "Legal proceeding" is defined at section 1(1)(g) of the Act as:

> *(g) "legal proceeding" means a civil, criminal or administrative proceeding that is related to*
>
> *(i) a breach of an agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) a remedy available at law;*

[para 69] Past Orders of this Office have found that an employer can conduct an investigation, within the definition in PIPA, of a possible breach of an employment agreement. Order P2013-13 discusses this point (at paras. 28, 42-43):

> An investigation can be an investigation of possible misconduct or non-compliance in relation to a rule or policy incorporated into an employment agreement (see, e.g., Order P2008-007 at para. 29). In this case, the Organization notes that the employment offer letter that it wrote to the Complainant expressly referred, albeit in general fashion, to the Organization's employment policies and procedures. As for the particular policy in question, the Organization says that it was investigating the Complainant's possible breach of its policy governing personal calls made on Blackberry devices, which policy it submits formed part of his employment agreement just like any of the Organization's other policies and procedures. It accordingly takes the position that it was investigating a breach of agreement, as contemplated by section 1(f)(i) above [which was renumbered 1(1)(f)(i), effective May 1, 2010]. The Organization does not argue that it was investigating any possible contravention of an enactment, or any possible circumstances or conduct that might otherwise result in a remedy or relief being available at law.
> …
> Alternatively, as also set out in the definition of "investigation" reproduced above, there may be a possible contravention of an enactment, but the personal calls made by the Complainant did not contravene any law. Still alternatively, there may be circumstances or conduct that may result in a remedy or relief being available at law, such as the ability to discipline or terminate an

> employee. For example, an employee's telephone calls may allegedly have harassed or threatened others, or tarnished the reputation of the employer. In such instances, it may not be necessary to have an express policy against such behaviour, either because the prohibition against such behaviour may be considered an implied term of the employment agreement, or the behaviour would otherwise warrant disciplining or terminating the employee. However, as noted earlier, the Organization bases its submissions on the existence of a policy and does not argue that the Complainant's use of the Blackberry device was so egregious that a policy was not required in order to permit its investigation of his call record. I would not find that his behaviour was so egregious, in any event.
>
> To summarize, I find that there was no policy that restricted or prohibited the ability of the Complainant to make personal calls using the Blackberry, and there was therefore no such policy incorporated into his employment agreement. This means, in turn, that there could be no possible breach of the Complainant's employment agreement, no investigation as that term is defined in PIPA, and no ability for the Organization to rely on section 14(d) and 17(d) in order to collect and use the Complainant's personal information. In this particular case, because there was no applicable policy, there was nothing to investigate.

[para 70] Other Orders, such as Order P2008-007, referred to in the quote above, relate to particular conduct, such as an allegation of harassment, being investigated as a possible breach of an employment agreement. In this case, the records before me clearly relate to a physical altercation involving the Applicant, which was investigated by the Organization. The records show that the Applicant's employment was terminated as a result of the incident.

[para 71] I have reviewed the Event Detail Report (record B-3). It details the incident involving the Applicant, from the point of the initial call made to the Organization's dispatch. It is clear that the Organization's security area responded to the call and spoke to those involved, as well as other witnesses. I am satisfied that the physical altercation being investigated could amount to a breach of the Applicant's employment contract, and that the Organization was conducting an investigation within the terms of section 1(1)(f)(i). In the alternative, given the resulting termination, section 1(1)(f)(iii) also seems applicable.

[para 72] Records B-4 and B-5 are described as witness statements included with the Event Detail Report. As such, I find that they were also collected for an investigation under section 24(2)(c).

Conclusions regarding section 24(2)(c)

[para 73] I find that section 24(2)(c) applies to the information withheld in records B-3, B-4 and B-5.

Exercise of discretion

[para 74] Section 24(2)(c) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant.

[para 75] I asked the Organization to explain how it exercised its discretion to withhold information under section 24(2). The Organization responded with its May 27, 2022 submission. It provided its explanation of its exercise of discretion *in camera*. Given the content of the explanation and the ongoing proceeding between the parties, I accepted this part of the Organization's submission *in camera*.

[para 76] The Organization explained that some of the records contain statements that were provided in confidence. The Organization also pointed to the ongoing litigation between the parties regarding the matter that is the subject of the records at issue. It noted that some records are likely to be used in the proceeding.

[para 77] I accept that the Organization properly exercised its discretion to withhold information collected for an investigation in the context of a litigation involving the Applicant, which relates directly to the information in the records.

3. d. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

[para 78] The Organization applied section 24(3)(b) to information in record B-3, which was provided to me. It also applied this provision to records B-2, B-4 and B-5, which were also withheld as privileged and not provided for the inquiry.

[para 79] I have accepted that section 24(2)(c) applies to this information; therefore, I do not need to consider whether this provision also applies.

4. If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b) or 24(3)(b) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 80] Section 24(4) states that if the third party personal information can reasonable be severed from the records, the Organization must provide access to the remainder:

> *24(4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.*

[para 81] The duty under this provision does not apply to information withheld under sections 24(2)(a) or (c). As I found that sections 24(2)(a) and (c) apply to the withheld information, I do not need to consider the application of section 24(4).

V. ORDER

[para 82] I make this Order under section 52 of the Act.

[para 83] I find that the Organization conducted an adequate search for records.

[para 84] I find that the Organization properly claimed privilege under section 24(2)(a) for records B-1 and B-2. I find that the Organization did not provide sufficient support for its claim of litigation privilege for records B-4 and B-5.

[para 85] I find that the information in records B-3, B-4 and B-5 was properly withheld under section 24(2)(c).

_____
Amanda Swanek
Adjudicator