ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-49

October 4, 2022

ENVIRONMENT AND PARKS

Case File Number 003112

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to Environment and Parks (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "information related to flooding issues at my property and the information regarding the illegal and reported "activities" of my 2 downstream neighbors". The Applicant included a related incident file number, as well as the names of the two neighbors referenced in the request.

The Public Body provided responsive records but withheld some information under sections 17(1), 18, and 27(1).

The Applicant requested an inquiry into the Public Body's decision to withhold information.

The Adjudicator found that the Public Body properly withheld personal information under section 17(1).

The Adjudicator found that section 18(3) applied to the information withheld under that provision. However, the Public Body did not give sufficient explanation regarding how it exercised its discretion to withhold this information and was ordered to re-exercise its discretion to apply that provision.

The Adjudicator accepted the Public Body's claim of privilege under section 27(1)(a).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.17, 18, 27, 71, 72

Authorities Cited: AB: Orders F2007-014, F2010-007, F2010-036, F2012-08, F2013-51, F2015-22, F2017-58

Cases Cited: *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] An individual made an access request dated November 1, 2014, to Environment and Parks (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "information related to flooding issues at my property and the information regarding the illegal and reported "activities" of my 2 downstream neighbors". The Applicant included a related incident file number, as well as the names of the two neighbors referenced in the request.

[para 2] The Public Body responded to the request, providing records with information withheld under sections 17(1), 18, and 27(1).

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

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the portion of the 141 records that have not been provided to the Applicant. Most of the records are comprised of five or fewer pages; some records are comprised of as many as a few dozen pages.

III. ISSUES

[para 5] The issues for this inquiry were set out in the Notice of Inquiry, dated October 7, 2019, as follows:

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records?

2. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual safety) to the information in the records?

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

IV. DISCUSSION OF ISSUES

Preliminary issue – scope of this inquiry

[para 6] The Applicant's initial submission begins:

> This Inquiry to me the complainant, is about Alberta Environment's failure to enforce the Water Act, failure to properly administer the Permitting and Approvals processes, issuing false and misleading information and statements, failing to collect and retain records required under Records Management needed for approvals, withholding information required to be released to me under the Water Act and destruction or loss of information regardless of retention periods required. All of which have negatively affected me, my pets and my property and my retirement and endangered me for over 21 years.
>
> My goal is to get this drainage disaster illegally facilitated by A.E. fixed. The BERMS and RAISED ROAD must be removed, also my mid property drainage into the Oxbow has been blocked and must be opened as per the Water Act, my rights under the Water Act have been denied and my safety and ability to access my property other than by boat have been compromised for 21 years, this must be corrected. It almost cost me my life in 2005 and sadly did cost my cats their lives.

[para 7] The Applicant then asks:

> The question is, does the Commissioner have the authority to Order A.E. to abide by and enforce the Water Act, or appoint a third party to oversee the restoration work required…

[para 8] I understand from the Applicant's submissions that his property has experienced severe damage due to flooding. I also understand that he believes the actions of his neighbours are a significant cause of the flooding and damage, and that the Public Body is responsible for taking steps to address the neighbours' actions.

[para 9] However, the answer to the question above, posed by the Applicant, is 'no'. The Commissioner's jurisdiction extends to reviewing the Public Body's decisions to withhold information in response to the Applicant's access request. The Commissioner has no jurisdiction to order the Public Body or any other body with respect to obligations under the *Water Act*.

[para 10] The Applicant provided 393 pages of written documents in his initial and rebuttal submissions, much of which was comprised of copies of correspondence or other documents with handwritten notes written over and around the text. The handwritten notes are often difficult to decipher. The Applicant also provided 15 photos of his property and/or land around his property, as well as a link to a CTV news story.

[para 11] On August 3, 2020, eight months after the submission schedule had closed for the inquiry, the Applicant requested permission to provide an additional submission.

Specifically, the Applicant asked to provide additional photos of land affected by flood waters. The Public Body objected to this request, arguing that it is not relevant to the issues for the inquiry. The adjudicator previously assigned to this file declined to accept this additional information, stating (letter dated August 20, 2020):

> The information the Applicant seeks to submit in the Request Form is not relevant to the issues set out above that will be decided in this inquiry. The information has no bearing on whether the Public Body properly applied [sections 17, 18 or 27] to withhold information responsive to the Applicant's access request.
>
> The information the Applicant seeks to submit in the Request Form suggests to me that he believes this inquiry will address his concerns and complaints about actions either taken or not taken by the Public Body to address the flooding concerns he has about his property. Those issues are outside the scope of the jurisdiction of this Office, and this inquiry.

[para 12] I have reviewed the Applicant's request to provide an additional submission and agree with the previous adjudicator's decision.

[para 13] As was the case with the additional material the Applicant sought to add to the inquiry, much of the Applicant's initial submission, comprising 387 pages as well as the 15 photos, is largely irrelevant to the issues for this inquiry. It largely deals with the Applicant's concerns about flooding, rather than the Public Body's application of exceptions to withhold information in the records at issue. I have reviewed all of the materials, and will address only that which is relevant to the issues in this inquiry.

Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 14] The Public Body withheld discrete items of information on pages 10, 12, 16, 17, 21, 22, 33, 28, 29, 40, 50, 52, 55, 57, 58, 66, 67, 75, and 77-80 under section 17(1).

[para 15] Section 17 states in part:

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

[para 16] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

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

[para 18] Section 1(n) defines personal information under the Act:

1 In this Act,

...

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 19] The information withheld under section 17(1) includes names of third party individuals, contact information, comments of third party's about their personal schedules (e.g. holiday plans), comments about third party individuals made by Public Body employees, and comments made by third party individuals about others. Often the same information appears in multiple records.

[para 20] Opinions about an individual are that individual's personal information under section 1(viii) of the Act. However, as stated by the Director of Adjudication in Order F2013-51, the fact that an individual expressed an opinion can be *that* individual's personal information as well.

[para 21] All of the information withheld under section 17(1) is personal information of third party individuals.

Application of sections 17(2) – 17(5)

[para 22] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. None of the parties have argued that any provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 23] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued section 17(4)(g) applies to all of the information withheld under section 17(1). This provision states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(g) the personal information consists of the their party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party*

[para 24] This provision applies to all of the personal information to which section 17(1) may apply.

[para 25] Section 17(5) is a non-exhaustive list of factors to consider in determining whether disclosing personal information would be an unreasonable invasion of privacy.

[para 26] Under section 71 of the act, the Applicant bears the burden of showing that the personal information to which section 17(1) applies should be disclosed. The Applicant did not provide arguments specific to the Public Body's application of section 17(1) or third party personal information in the records.

[para 27] The Applicant has argued that the Public Body has mishandled complaints he made about flooding on his property. This argument may indicate that he believes disclosure is desirable to subject the Public Body's activities to public scrutiny (section 17(5)(a)) or that this information is relevant to a fair determination of his rights (section 17(5)(c)).

[para 28] However, nothing in the Applicant's submissions or the records themselves indicate why disclosure of the third party personal information in the records, as described in paragraph 19 above, is relevant to the question of public scrutiny or a fair determination of his rights.

[para 29] Given the above, there are no factors weighing in favour of disclosing information to which section 17(1) applies. As at least one presumption applies to weigh against disclosure, I find that the Public Body is required to continue to withhold that information. I do not need to consider whether the other factors discussed in the Public Body's submissions apply.

Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual safety) to the information in the records?

[para 30] The Public Body withheld discrete items of information on pages 55, 57, 58, 66, 67, 77, 78, 79 and 80, under sections 18(1)(a) and 18(3). These sections state:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health*
>
> *...*
>
> *(3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health.*

[para 31] I cannot discuss the information withheld under these provisions in detail without disclosing the very information the Public Body has withheld. I can say that having reviewed the information, and following the Court of Queen's Bench decision in *Governors of the University of Alberta v Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316, I agree that section 18(3) applies to the information withheld in the records. While the Public Body withheld more than identifiers under this provision, I find on a balance of probabilities that disclosing any information withheld under these provisions could serve to identify the individual who provided the information to the Public Body.

[para 32] As I have found that the Public Body properly applied section 18(3), I do not need to consider its application of section 18(1)(a).

Exercise of discretion

[para 33] Section 18(3) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 34] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

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

[para 35] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

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

[para 36] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

[para 37] The Court said (at para. 416)

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

[para 38] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 39] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The

> public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 40] The Public Body has not specifically described how it exercised discretion to withhold information under section 18. The Public Body's initial submission states that the Applicant has been confrontational with Public Body staff regarding the flooding issues on his property, and that there is a reasonable expectation of reprisals. I agree that these are relevant factors in exercising discretion.

[para 41] However, the case law is clear that the Public Body must consider all relevant factors, including factors weighing in favour of disclosure. Given the passage of time, it is possible that the risks associated with disclosure may be reduced, such that factors in favour of disclosing the information outweigh those against. The final decision whether to disclose information when a discretionary exception applies is assigned to the Public Body under the Act. However, in making that decision, the Public Body must exercise its discretion fairly, and in consideration of all (and only) the appropriate factors, in every instance in which it is applying section 18.

[para 42] I will order the Public Body to re-exercise its discretion to withhold information under section 18(3), having regards to the comments above.

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

[para 43] The Public Body applied section 27(1)(a), (b) and (c) to information in pages 60, 65, 81-88 and 90-98. The Public Body did not provide an unredacted copy of these pages for the inquiry, as it claimed solicitor-client privilege over the withheld information. Therefore, I can only consider the Public Body's claim of privilege over this information at this time. I will not consider the application of section 27(1)(b) or (c).

[para 44] Section 27(1)(a) of the Act states:

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

[para 45] Section 71(1) of the Act states:

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

[para 46] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

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

[para 47] 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 48] 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 49] Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 50] In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

[para 51] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 52] The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *EPS*, cited above, the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 53] In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "… the IPC cannot "properly determine" whether solicitor-client privilege exists: *2018 CPS (CA)* at para 3. The scope of the IPC's review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

[para 54] The Court describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

> The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary…
>
> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?

> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

[para 55] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 56] In this case, the Public Body states that the information withheld under solicitor-client privilege was exchanged in the context of a solicitor-client relationship and can therefore be presumed to have been intended to be kept confidential by the parties.

[para 57] With its initial submission, the Public Body provided an affidavit sworn by an employee of Service Alberta's Access and Privacy area, who supervised the processing of the Applicant's access request. The affiant states that all of the records consist of either

> communications
>
> (a) between a lawyer and the Public Body;
>
> (b) made in confidence; and
>
> (c) in the course of seeking or providing legal advice; or
>
> communications made within the framework of the solicitor-client relationship and forming part of the continuum of communication in the provision of legal advice, that were intended to be confidential; or
>
> records reflecting internal discussions about legal advice that were intended to be confidential.

[para 58] The affiant states that "[a]ll of the lawyers referenced in the Records are employed as barristers and solicitors and serve as lawyers for the Public Body" and "[a]ll of the lawyers referenced were acting in their capacity as legal advisors in relation to creation of the Records" (affidavit at Tab 7 of initial submission).

[para 59] The affiant further states that the advice in the records relates to legal advice, rather than business, policy or other non-legal advice.

[para 60] The schedule attached to the affidavit states that the information withheld as privileged on pages 60 and 65 is "[c]orrespondence made within the framework of the solicitor-client relationship; correspondence between legal counsel and Public Body seeking or giving legal advice."

[para 61] Pages 60 and 65 have been provided to me, with the information over which privilege has been claimed redacted. It is clear from the context of the remaining information in the records that the Public Body sought legal advice from a government lawyer on two particular matters. It is reasonable to conclude, on a balance of probabilities, that the redacted portion of the records reveals the lawyer's response in both cases. Therefore, I find that the Public Body properly applied section 27(1)(a) on pages 60 and 65.

[para 62] The schedule attached to the affidavit states that the information withheld as privileged on pages 81-88 and 90-98 is "[c]orrespondence made within the framework of the solicitor-client relationship; document reveals the substance of legal advice sought by or given to the Public Body; correspondence between legal counsel and Public Body seeking or giving legal advice." This essentially amounts to a reiteration of the test for solicitor-client privilege. Unlike the information on pages 60 and 65, no part of pages 81-88 or 90-98 were provided to me for the inquiry and as such, there is no surrounding context to help assess the claim of privilege.

[para 63] By letter dated September 7, 2022, I asked the Public Body to provide a brief description of pages 81-88 and 90-98 sufficient to meet the requirements set out by the Court of Appeal in *ShawCor*, at para. 36, which states:

> For records that a party claims are privileged, the party must, in accordance with Rule 5.8, identify the particular grounds of the objection to production for each record in order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege.

[para 64] The Public Body provided a supplemental affidavit of records on September 30, 2022. This affidavit is sworn by a Senior FOIP Advisor with Service Alberta, who supervises the processing of access requests. The affiant states that they reviewed the records, and provided additional detail regarding the content of the records. The affiant states that the records relate to a confidential request for legal advice made by the Public Body to its corporate counsel, via email.

[para 65] More specifically, the affiant states that pages 81-84 are comprised of an email from the Public Body to corporate counsel requesting legal advice. Pages 85-88 are comprised of an email between the Public Body and counsel, relating to the initial request for advice at pages 81-84. Pages 90-98 are described in the same manner as pages 85-88.

[para 66] I have stated above that there is evidence in the records that Public Body employees sought advice from counsel. As it is clear that advice was sought on a matter to which the records relate, the brief descriptions provided by the Public Body are sufficient to meet the requirements set out in *ShawCor* and are consistent with the test for finding solicitor-client privilege applies.

[para 67] The affidavit evidence stating that the records were intended to be confidential, and that the Public Body has maintained the confidentiality of these records, is sufficient to meet that element of the *Solosky* test (see *Governors of the University of Alberta v Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316, at para. 41).

[para 68] I find that the Public Body has established its claim of privilege.

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

[para 69] 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*, cited above.

[para 70] This approach was discussed with approval in *EPS*, cited above.

[para 71] As I have found that the Public Body properly claimed solicitor-client privilege, its exercise of discretion to withhold that information can be presumed to be appropriate.

V. ORDER

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

[para 73] I find that the Public Body properly withheld personal information under section 17(1).

[para 74] I find that section 18(3) applies to the information withheld under that provision. However, I order the Public Body to re-exercise its discretion to apply that provision, in accordance with the guidance in this Order.

[para 75] I uphold the Public Body's application of section 27(1)(a) to information in the records.

[para 76] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator