

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2020-14

June 4, 2020

CITY OF EDMONTON

Case File Number 003481

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Summary: An individual made a request to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the downtown arena development in Edmonton.

The Public Body located responsive records but withheld them in their entirety, citing sections 16(1) and 27(1)(a).

The Applicant requested an inquiry into the Public Body's response, including the time taken by the Public Body to respond to his request (section 11). This Order deals with the Public Body's compliance with section 11, as well as its claim of solicitor-client privilege under section 27(1)(a) of the Act to the responsive records, which were not provided to the Adjudicator for the inquiry.

The Adjudicator determined that the Public Body's claim of privilege met the standard for claiming privilege as set out in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), and was consistent with case law regarding solicitor-client privilege. Following the Court's direction in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, the Adjudicator found that the Public Body established its claim of privilege on a balance of probabilities.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 14, 27, 71, 72.

Authorities Cited: AB: Orders F2015-22, F2017-54, F2017-58

Cases Cited: *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274, *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455, *Barrick Gold Corporation v. Goldcorp Inc.*, 2011 ONSC 1325, *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, *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, *Fraser Milner Casgrain LLP v. Minister of National Revenue*, 2002 BCSC 1344, *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291, 45 O.R. (ed) 321 (Ont C.A.), *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2016 FC 1352 (CanLII), in *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51, *Maxim Ventures Inc. v. De Graaf*, 2007 BCCA 510 *Pinder v. Sproule*, [2003] A.J. No. 32, *Pitney Bowes of Canada Ltd. v Canada*, [2003] F.C.J. No. 311, *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, 2011 ABQB 339

I. BACKGROUND

[para 1] On August 12, 2015, the City of Edmonton (the Public Body) received an access request from the Applicant under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the downtown arena development in Edmonton. In October 2015, the request was narrowed to include:

- all records from the National Hockey League (NHL) relating to its position in the downtown Edmonton arena negotiations (timeframe from January 1, 2005 to March 4, 2015); and
- travel records related to an October 2011 trip taken by Edmonton's former Mayor and any other employee, to New York.

[para 2] The Public Body provided records responsive to the latter item (travel records), and those records are not at issue in this inquiry.

[para 3] Regarding the first item listed above, the Public Body located 1408 pages of responsive records but withheld all in their entirety, citing solicitor-client privilege under section 27(1)(a). The Public Body also applied section 16(1) to some information.

[para 4] The Applicant requested a review of the Public Body's response, including the time taken by the Public Body to respond. The Commissioner authorized an investigation to settle the matter. This was not successful and the Applicant requested an inquiry.

[para 5] While the Public Body has applied section 16(1) to some information in the records, no records were provided to me for this inquiry as all were withheld citing

privilege. As such, I decided to divide this inquiry into two parts: Part 1 – to which this Order relates – to address the Public Body’s claim of solicitor-client privilege over the records, as well as the Applicant’s concerns regarding the time taken to respond, and Part 2 to address the other exception, if necessary.

[para 6] As I have determined the Public Body’s claim of privilege has been established, there is no need to conduct a second part in this inquiry.

II. RECORDS AT ISSUE

[para 7] The records at issue for the first part of this inquiry consist of the records over which the Public Body has claimed solicitor-client privilege under section 27(1)(a) and which the Public Body has not provided to me for this inquiry.

III. ISSUES

[para 8] The issues as set out in the Notice of Inquiry dated January 4, 2019, are as follows:

1. Did the Public Body comply with section 11 of the Act (time limit for responding)?
2. Did the Public Body properly extend the time limit for responding to a request as authorized by section 14 of the Act?
3. Did the Public Body properly apply section 27(1)(a) (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

1. Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 9] Section 11 of the Act states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 10] The Applicant’s access request was received by the Public Body on August 12, 2015. The Public Body’s initial contact with the Applicant is dated August 17, 2015. The Public Body’s submissions state that the request was clarified in October 2015. The

Public Body responded to the Applicant by letter dated May 16, 2016; the Applicant states that he received this response on May 26, 2016.

[para 11] The Applicant points out that the response was received well outside the 30-day time limit in the Act.

[para 12] In its submission, the Public Body agrees that it did not meet the time limit in section 11 of the Act. It further states that it did not extend the 30-day limit provided in that provision. It notes that the request “captured an extensive number of records relating to a highly complex project, resulting in a significant amount of time being required to review the responsive records” (initial submission at para. 8). It states that it made every reasonable effort to keep the Applicant informed of the status of his request. It also returned his deposit once it determined that all responsive records would be withheld.

[para 13] The Public Body’s efforts to keep the Applicant updated on the status of his request are important steps in the duty to assist and applicant under section 10 of the Act, but they are not factors in determining whether a public body made every reasonable effort to meet the time limit in section 11 of the Act.

[para 14] Given the dates of the Applicant’s request and the Public Body’s response, as well as the Public Body’s admission, I find that the Public Body did not meet its duty under section 11.

2. Did the Public Body properly extend the time limit for responding to a request as authorized by section 14 of the Act?

[para 15] Section 14 permits a public body to extend its time to respond to an access request for 30 days, or longer with the permission of the Commissioner, in the circumstances provided in that provision.

[para 16] In this case, the Public Body states that it did not extend its time to respond under section 14. The correspondence between the Public Body and the Applicant does not include any indication that the Public Body extended its time under section 14.

[para 17] As the Public Body did not extend its time to respond to the Applicant under section 14, I do not need to consider whether it did so properly.

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

[para 18] The Public Body applied section 27(1)(a) (solicitor-client privilege) to all of the 1408 pages of the records at issue.

[para 19] Section 27(1)(a) states the following:

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 20] 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 21] The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 22] 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 23] It describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary...

Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?

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

[para 24] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*), and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 25] In this case, the affidavit of records and submission of the Public Body meet the requirements set out in *ShawCor*. The sole question is whether the communications between the Public Body, Katz Group and/or NHL are communications that fall within the scope of solicitor-client privilege.

[para 26] 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 27] 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 28] 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 29] 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 30] In this case, the Public Body has claimed solicitor-client privilege over all of the records at issue, under the following categories:

- Correspondence between City employees and City legal counsel (with and without attachments)
- Correspondence between City legal counsel and NHL legal counsel (with and without attachments)
- Correspondence between Katz Group legal counsel and City legal counsel (with and without attachments)
- Correspondence between City legal counsel, Katz Group legal counsel, and NHL legal counsel (with and without attachments)

[para 31] The records at issue in this inquiry are the records responsive to “all records from the National Hockey League pertaining to their position in the Downtown Arena negotiations.” 1408 pages of records were located.

[para 32] In its initial submission, the Public Body states that the final framework for the arena included a requirement that “the City of Edmonton and Edmonton Arena Corp. (EAC), a Katz Group entity, would enter into a location agreement as well as a cooperation agreement with the National Hockey League (NHL)” (at para. 9). Extensive negotiations took place between the three parties, with each represented by legal counsel.

[para 33] It further states (at para. 11):

The nature of the negotiations required the exchange of confidential information both between the three parties and between each party and their legal counsel for the purpose of providing legal advice and negotiating a fair and mutually acceptable cooperation agreement. These negotiations were intended to remain confidential to protect both privilege and proprietary information belonging to all parties. As a result, the records at

issue in this Inquiry consist of 1,408 pages of records comprised of electronic mail correspondence and attachments thereto exchanged as part of the negotiations. All of these records are contained in files created by legal counsel for the Public Body.

[para 34] As shown in the category of records listed above, some of the records are correspondence between Public Body employees and its legal counsel. The Public Body states that these records are communications between the Public Body and counsel “for the purpose of requesting and receiving legal advice in relation to the negotiation of the cooperation agreement” (initial submission at para. 13).

[para 35] As stated, the portion of the access request relevant to this inquiry is:

All records from the National Hockey League pertaining to their position in the Downtown Arena negotiations

[para 36] It is reasonable to expect that the Public Body would seek and obtain legal advice in the course of these negotiations. That advice meets the requirements of the *Solosky* test. As I have no reason to doubt the description provided by the Public Body regarding these records, I accept that the Public Body appropriately claimed privilege over these records, applying section 27(1)(a) of the Act. This finding applies to the records over which solicitor-client privilege alone was claimed, in the chart of records attached to the affidavit provided with the Public Body’s rebuttal submission (affidavit sworn on March 28, 2019).

[para 37] The Public Body has cited both solicitor-client privilege and common interest privilege over the remaining records. These records were shared between the Public Body, the Katz Group and/or the NHL. The Public Body states that these records were subject to solicitor-client privilege and that sharing the privileged records did not waive that existing privilege, “due to the application of both common interest privilege and deal-team privilege” (initial submission, at para. 14).

[para 38] With respect to common interest privilege, the Public Body argues that it applies where parties exchange privileged information to further a joint interest as against a third party. In this case, the Public Body states that it (the City) and the Katz Group had a joint interest in negotiating a cooperation agreement with the NHL. The Public Body and the Katz Group therefore shared privileged information for that purpose. Presumably then, the Public Body and Katz Group had a joint interest as against the NHL.

[para 39] With respect to deal-team privilege, the Public Body cites *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455 at para 24 and *Camp Development Corp v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (*Camp Development*) as the relevant authorities.

[para 40] It states (initial submission, at para. 17):

In order to successfully negotiate the required cooperation agreement on behalf of their respective clients, the City, the Katz Group, and the NHL were required to exchange

privileged and proprietary information regarding the downtown arena project and their respective business operations. All three parties intended for discussions to be confidential, and confirmed this explicitly through written notices on exchanged correspondence and by the involvement of their respective legal counsels. This confidentiality was essential to the finalization of the cooperation agreement, and for the 35-year relationship currently shared by the parties. Protecting the confidentiality of commercial negotiations so as to allow the sharing of each party's expertise and positions without the threat of disclosure or waiver of privilege is essential to commercial relationships, particularly one of the magnitude of the downtown arena project. Disclosure of records exchanged between the City, the Katz Group, and the NHL would result in significant harm to the parties and their ongoing commitments to keep the Edmonton Oilers in Edmonton for 35 years, as required by the approved framework.

[para 41] By letter dated July 18, 2019, I asked the Public Body to clarify its arguments regarding common interest privilege and deal-team privilege. It was not clear to me whether the Public Body was arguing:

- that the Public Body shared legal opinions with the Katz Group and/or NHL but that this did not constitute a waiver of privilege – this argument was indicated by the Public Body's submission referring to common interest privilege;
- that communications between the Public Body, Katz Group and/or NHL are privileged under an extension of solicitor-client privilege – this argument was indicated by the Public Body's submissions referring to deal-team privilege; or
- a combination of the above.

[para 42] The Public Body's response to my questions did not clarify the difference between its claim of common interest privilege and deal-team privilege. The Public Body did not provide additional support for its claim of common interest privilege, other than to state that it is a common mistake to “[treat] common interest privilege as a separate category of pre-existing privilege rather than as an exception to waiver” (at para. 24).

[para 43] It is therefore unclear why the Public Body has cited ‘deal-team’ privilege only with respect to communications involving it and the NHL (in all but two instances those communications also involve the Katz Group) but cited common interest privilege with respect to communications between it and the Katz Group wherever the NHL was not also involved.

[para 44] In my July 18, 2019 letter, I also noted that the negotiations between the parties in *Anderson Exploration* were different from the negotiations between the parties in this case. I asked the Public Body how this affects the application of *Anderson Exploration* to the facts here. The Public Body agreed that the negotiations are different, but “the nature of the relationship between the parties and the nature of the privileged information is the same. Further, in both cases, the complexity and impact of the commercial transaction at issue was significant, which is a crucial factor in determining whether privilege is established” (at para. 29).

[para 45] The Public Body did not explain how the “nature” of the relationships between the parties and the privilege claimed are the same in *Anderson Exploration* and the present case. *Anderson Exploration* involved a merger of two companies; during the negotiations, the companies exchanged ‘confidential’ information for the purpose of furthering the negotiations. The Court found that the information was protected by privilege, and that sharing the information between the two companies did not result in a waiver of that privilege. The Court stated (at para. 23, emphasis added):

Common interest privilege has been held to exist in a situation not involving actual or anticipated litigation in a decision of the Alberta Court of Queen's Bench, *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202, A.R. 198 (Q.B.). McMahon, J. considered common interest privilege in the context of legal opinions relating to a complex tax transaction given by the vendors to the purchaser in a sale transaction. The Minister argued that this constituted release of privileged information to a party adverse in interest, and that privilege had thus been waived. McMahon, J. found that waiver had not been established. He said at pages 203-204:

However, the parties to a commercial transaction are not adverse in interest in the same sense that parties to litigation are. In fact, parties to a commercial transaction have a common interest in seeing the deal done..It is a reasonable inference that Eagle instructed its solicitors to provide the opinion in order to further the reorganizations and not with the intent to waive privilege. The burden of proving waiver lies upon the party who alleges it."

[para 46] In its response to my questions, the Public Body indicates that it is not arguing that privileged records were shared between the parties; rather, it is arguing that the communications between the Public Body, Katz Group and NHL are subject to solicitor-client privilege. It states (at paras. 8-9):

The records requested by the Applicant all fall within the "continuum of communication" between solicitor and client in the context of negotiations. The Public Body, the Katz Group, and the NHL were involved in a complex commercial transaction involving the opinions of solicitors for all three parties. All three parties expected the contents of their negotiations to remain confidential and at no point waived privilege over the records relating to those negotiations...

The protection of privilege over the continuum of solicitor-client communications has been expanded to include those communications made during the course of negotiations between a deal-team.

[para 47] It further clarifies (at para. 22):

Given the continuum of communications involved in solicitor-client privilege and the deal-team privilege, there is no issue of waiver. Disclosure of solicitor-client communication to other members of the deal team cannot represent a waiver.

[para 48] *Anderson Exploration* seems to address whether sharing privileged information in the context of a complex commercial transaction constitutes a waiver of privilege. In the affidavit of records provided with its rebuttal submission, the Public

Body has cited ‘common interest privilege’ while in its response to my letter, the Public Body seems to characterize common interest privilege as an exception to waiver *and* that waiver is not an issue in this case. It is therefore not entirely clear what application the Public Body is arguing *Anderson Exploration* has in this case.

[para 49] In my letter, I also asked the Public Body to address the application of *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291, 45 O.R. (ed) 321 (Ont C.A.) (*Chrusz*). This case was cited in *Alberta (Municipal Affairs) v. Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274, a recent judicial review decision of Order F2017-54 of this Office, respecting the claim of solicitor-client privilege over third party communications.

[para 50] As noted in my letter, *Chrusz* is generally viewed as a leading case on this topic. The Court set out the following principles from case law on solicitor-client privilege (at para. 106):

- not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and
- where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.

[para 51] The Court further states (at paras. 120-122):

... I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

[para 52] The Public Body argued (August 29, 2019 response, at paras. 13-14):

The Katz Group and the NHL, through their solicitors, had functions that were essential to the maintenance and operation of the relationship between the Public Body and its solicitors in order to complete the downtown arena negotiations.

The documents provided by or on behalf of the Katz Group and the NHL were essential to the maintenance and operation of the relationship because decisions were made as to negotiation strategies and positions in direct response to legal advice provided by third party solicitors. Records reflecting those positions were exchanged with the deal-team in an effort to successfully resolve a complex commercial transaction, which may have involved concessions or strategic decisions that the parties never agreed to make public.

[para 53] The Public Body has argued that the nature of the relationship between the parties and the complexity of the negotiations are relevant considerations in this case. However, the Public Body did not provide me with any information regarding the roles of each party, nor did it provide me with copies of, or information about, the agreements and Final Framework that the negotiations were about.

[para 54] While the Public Body's submissions provided a helpful starting point, for the reasons above, they were not sufficient to permit a finding by themselves. As the Public Body had itself recommended, I considered inviting the Katz Group and NHL to participate in the inquiry, with the goal of obtaining factual context for the records at issue that I was missing from the Public Body's submissions.

[para 55] Before taking this step, I conducted additional research outside of the case law supplied by the Public Body. I also located a copy of the Arena Location Agreement (which included the NHL cooperation agreement) on the Public Body's website. As noted by the Court in *EPS*, the inquiry process under the FOIP Act is investigatory, and I am not bound by the authorities cited by the parties (at paras. 172-174).

[para 56] The Agreement provided context to the records, such as the roles of each party in the negotiations, and the interest of each party in the Agreement. It is now clearer to me why some of the records at issue are communications between the Public Body and Katz Group, while others involved all three parties. I can also accept that this Agreement required complex and nuanced negotiations between three parties.

[para 57] Regarding applicable case law, in *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, 2011 ABQB 339, the Alberta Court of Queen's Bench surveyed the law on common interest privilege and its application to solicitor-client privilege. The Court noted (at para. 27):

... Alberta Courts have also extended common interest privilege past the litigation context. It has been applied to parties that have 'a common interest in bringing a transaction to a successful completion... not dependent on an interest shared by the parties in ongoing or anticipated litigation': *Canmore Mountain Villas v. Alberta (Minister of Seniors and Community Supports)*, 2009 ABQB 348 at paras. 7-8 per Sanderman, J. See also *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455, 229 A.R. 191; *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202

A.R. 198 (Q.B.). The communication between the parties with a common interest must be made on a confidential basis.

[para 58] The Court also noted that this approach was criticized in *Pinder v. Sproule*, [2003] A.J. No. 32. The Federal Court in *Pitney Bowes of Canada Ltd. v Canada*, [2003] F.C.J. No. 311 (*Pitney Bowes*) reconciled that criticism as follows (at paras. 19-20):

However, the cases do not say, as I read them, that the mere existence of a commercial transaction is sufficient on its own to insulate all shared solicitor-client communications from attempts to gain access to them. There may well be cases where the parties to a commercial transaction disclose privileged documents in circumstances that suggest that there has indeed been a loss or waiver of privilege. As mentioned, in the commercial setting it is less clear than in Lord Denning's example which parties have common interests. Therefore, it is more difficult to make a hard and fast rule. I agree with the observation of Slatter J. in *Pinder v. Sproule*, [2003] A.J. No. 32 (Alta. Q.B.) that "[p]otential parties to a merger or other business transaction are in many ways adverse in interest, and it strains the common interest exception to try and fit disclosures between such parties within that exception" (at para. 62).

Still, in many commercial transactions, the parties will want to negotiate on the footing of a shared understanding of each other's legal position. They will seek legal advice from reputable solicitors whose opinions will be respected by the other parties. Indeed, the solicitors may represent more than one party to the deal. The sharing of legal opinions will ensure that each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way. The advice may be provided for one or more party on the understanding that others should be provided copies. The expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties to it. Such circumstances, in my view, create a presumption that the privilege attaching to the solicitor-client communications remains intact notwithstanding that they have been disclosed to other parties.

[para 59] More recently, in *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2016 FC 1352 (CanLII), the Federal Court refused to apply the finding in *Pitney Bowes*. The Court referred to the application of common interest privilege in the context of solicitor-client privilege as "advisory CIP". It noted that this application has general acceptance in Canada but has not been considered by higher courts (at para. 11). The Court distinguished the decision in *Pitney Bowes*, finding that the decision applied only where there was one counsel to two clients. The circumstances in *Iggillis Holdings* was different, as each party had its own counsel. The Court rejected the application of common interest privilege (advisory CIP) to solicitor-client privilege for nine listed reasons (see para. 298). Amongst these reasons, the Court concluded that common interest privilege is incompatible with the fundamental tenets of solicitor-client privilege, and indeed "guts [solicitor-client privilege] of its purpose and function" (para. 298, at point 4). It also concluded that the decision in *Pitney Bowes* "applied unsound jurisprudence from other Canadian and American courts that relied on the false external policy factor of advisory CIP fostering commercial transactions and unsupportable expectations of confidentiality" (para. 298, at point 9).

[para 60] This decision was overturned by the Federal Court of Appeal in *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51. The Court of Appeal specifically considered the application of common interest privilege in the solicitor-client context in BC and Alberta. The Court of Appeal reviewed two BC cases, *Maxim Ventures Inc. v. De Graaf*, 2007 BCCA 510, and *Fraser Milner Casgrain LLP v. Minister of National Revenue*, 2002 BCSC 1344; the latter of which cited two Alberta cases on that point, including *Anderson Exploration*. Both BC cases affirmed that solicitor-client privilege was not waived when records were provided to other parties in the interest of facilitating a business transaction.

[para 61] The Federal Court of Appeal concluded (at para. 41, emphasis omitted):

Based on the decisions of the courts in Alberta and British Columbia, solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.

[para 62] Where the Public Body, Katz Group and/or NHL communicated privileged information between themselves for the purpose of negotiating the arena agreement, I am satisfied that the case law in Alberta supports finding that privilege was not waived.

[para 63] This is somewhat different from saying that advice provided by each parties' counsel to all parties involved is protected by solicitor-client privilege as all parties are part of a deal-team. The case cited by the Public Body, *Camp Development*, deals with a situation in which counsel provided advice to various parties all working for the client. This is clear from the decision (at para. 64):

The nature of the interrelationship and of the dealings between [the client, the consultant and the lawyer] are a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. All functions are not performed under a single roof, and the solicitor, though retained by a single client, may be required to give advice to different members of the team who work for the client.

[para 64] The Public Body also cited *Barrick Gold Corporation v. Goldcorp Inc.*, 2011 ONSC 1325, as supporting its argument regarding deal-team privilege. However, in that decision, the Court found that common interest privilege applied to many records. It referenced and agreed with the principle cited above from *Camp Development*, without specifically commenting on how it applied to the case before it. Therefore, it is unclear if the Court in *Barrick Gold* found deal-team privilege to apply to any records, and if so, whether the "deal-team" included other parties and their counsel, or merely different parties working for one client of one counsel.

[para 65] In this case, I do not have to make conclusions regarding the scope of deal-team privilege. In my view, the Federal Court of Appeal decision in *Iggillis Holdings* applies not only to privileged records shared between the Public Body, Katz Group and NHL; it also applies to communications exchanged between those parties and their respective counsel.

[para 66] The Court specifically states that the principle (of non-waiver) applies “whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties” (at para. 41, cited above). In other words, counsel needn’t first provide an opinion to its own client and then to other parties; each party can be provided the communication simultaneously. This leads me to conclude that email communications between the Public Body, Katz Group and NHL, all of which the Public Body has stated included each parties’ counsel, are privileged.

[para 67] I noted earlier in this Order the unexplained distinction in the Public Body’s submissions regarding its claim of common interest privilege versus deal-team privilege. Based on the Public Body’s arguments and my review of the Agreement, I conclude that the Public Body cited common interest privilege with respect to aspects of the negotiations where the Public Body and Katz Group’s interests aligned more closely with each other, as against the NHL. All communications involving the Public Body and NHL (most of which also included the Katz Group) were cited as deal-team privilege.

[para 68] Nothing in the case law suggests that each of the multiple parties involved have to have the same or equal interests, or that interests between two parties cannot align against a third with respect to some aspects of the negotiations. Therefore, I do not find the unexplained distinction between the Public Body’s claim of common interest privilege and deal-team privilege to be material to my finding.

[para 69] I find that the Public Body’s claim of privilege meets the standard set out in *ShawCor*, and is consistent with case law regarding solicitor-client privilege. Following the Court’s direction in *EPS*, I find that the Public Body has thereby established its claim of privilege on a balance of probabilities.

[para 70] This finding is specific to the facts of this case, and is based largely on the complexity of the particular negotiations, and the particular relationships between the parties. It should not be applied broadly to any information exchanged during commercial transactions or commercial negotiations involving public bodies; the material facts in this case are uncommon.

V. ORDER

[para 71] I make this Order under section 72 of the Act.

[para 72] I find that the Public Body did not respond to the Applicant within the time limit set out in section 11 of the Act. As the Public Body has now responded to the

Applicant's access request, it is not necessary for me to order the Public Body to respond to the Applicant under the Act.

[para 73] I find that the Public Body properly claimed privilege over the records at issue.

Amanda Swanek
Adjudicator