

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-24

May 3, 2022

CALGARY POLICE SERVICE

Case File Number 012292

Office URL: www.oipc.ab.ca

Summary: The Applicant is an employee of the Calgary Police Service (the Public Body). The Applicant made an access request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for information related to the Applicant's professional performance and applications for promotion.

The Public Body provided responsive records with information withheld under sections 17(1), 19, 24 and 27(1)(a).

The Applicant requested an inquiry into the Public Body's application of section 27(1)(a).

The Adjudicator found that the evidence provided by the Public Body met the requirements set out in *ShawCor* and was consistent with the test for finding solicitor-client privilege applies.

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

Authorities Cited: **AB:** Orders F2007-014, F2010-007, F2010-036, F2012-08, F2017-58

Cases Cited: *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta*

(Information and Privacy Commissioner), 2020 ABQB 10, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

I. BACKGROUND

[para 1] The Applicant is an employee of the Calgary Police Service (the Public Body). The Applicant made an access request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to his professional performance and applications for promotion.

[para 2] The Public Body responded and disclosed a total of 1409 pages, in three consecutive disclosure packages. The Public Body withheld some information in the records, relying on sections 17, 19, 24 and 27.

[para 3] The Applicant requested a review of the Public Body's search for responsive records, as well as the exceptions applied by the Public Body. Subsequent to the review, the Applicant requested an inquiry into the Public Body's application of section 27(1)(a), citing solicitor-client privilege. The Applicant requested that the records be reviewed to ascertain whether the privilege was properly claimed.

[para 4] In her letter of February 23, 2021 agreeing to conduct an inquiry, the Commissioner addressed the Applicant's request that the records over which privilege has been claimed be reviewed. She informed the parties:

The Applicant has requested an inquiry into the Public Body's application of section 27(1)(a) to information in the responsive records, citing solicitor-client privilege. The records over which the Public Body claimed privilege were not provided to the Senior Information and Privacy Manager for his review. The Applicant requests an inquiry so that these records can be reviewed.

Following *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), the Public Body is not required to provide records over which solicitor-client privilege has been claimed to the adjudicator. If these records are not provided for an inquiry, the adjudicator will make a determination on the basis of the arguments and evidence provided by the Public Body in support of its claim of privilege. Records over which solicitor-client privilege is claimed need be provided only to the court, at the court's discretion, should it be called upon by one of the parties to review the adjudicator's decision.

[para 5] The Public Body did not provide the records over which it claims solicitor-client privilege for my review in this inquiry. The Public Body provided an affidavit in support of its claim.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of 4 pages of records over which the Public Body claims privilege.

III. ISSUES

[para 7] The issues as set out in the Notice of Inquiry, dated February 9, 2022, is as follows:

1. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/records?

IV. DISCUSSION OF ISSUES

[para 8] The Public Body withheld 4 pages of records under section 27(1)(a), citing solicitor-client privilege.

[para 9] Section 27 of the Act states:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General,

*(ii) an agent or lawyer of the Minister of Justice and Solicitor General,
or*

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

[para 10] 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 11] 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 12] 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 13] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

[para 14] 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 15] 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 16] 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 17] 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 18] 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 19] In this case, the Public Body provided an affidavit sworn by the Acting Director of its Access and Privacy area, who has reviewed the records over which solicitor-client privilege is claimed. The affiant describes the withheld records as follows:

- One page of records consists of an email from the Public Body's HR legal counsel, containing legal advice from counsel regarding the interpretation of a collective bargaining agreement;
- One page of records consists of an email exchange between the HR legal counsel and the Superintendent of the Employee Services Division within the Public Body. The affiant states that "the email seeks a legal review relating to a potential dispute between the CPS and a member";
- Two pages of records relate to legal advice sought and given between the HR legal counsel and the Superintendent of the Employee Services Division, relating to a particular legal precedent.

[para 20] The Applicant states in his request for review that he has applied for promotions with the Public Body but has not yet been successful. He states that he requested the then Chief to review his file. He further states:

The Chief obtained the services of an outside agency to review my file and interview all board members and the background review officers. The report generated from this was very generic and highlighted some issues. When I spoke with the author of the document they were very open about there being two reports one that I was allowed to see and the other that I was not allowed to see by order of the Chief.

[para 21] The Applicant states that he continued to interview for promotions. In May 2018 he made his access request. He indicates that he is seeking the information for a grievance process.

[para 22] From the information before me, I am satisfied that it would have been reasonable for the Public Body's HR legal counsel to provide legal advice regarding the interpretation of a collective bargaining agreement, and legal advice to the Superintendent of the Employee Services Division. The Public Body's affidavit adequately addresses the first two elements of the *Solosky* test.

[para 23] The Public Body's affidavit did not address the third part of the *Solosky* test regarding confidentiality. By letter dated April 1, 2022, I asked the Public Body to provide further information on this point. The Public Body provided an updated affidavit, which clarifies that the legal advice and legal reviews described in the above bullet points were confidential.

[para 24] The Applicant did not provide a rebuttal submission in response to the affidavit evidence in the Public Body's initial submission.

[para 25] 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.

Exercise of discretion

[para 26] Section 27(1)(a) is a discretionary exception. 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).

[para 27] This approach was discussed with approval in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10.

[para 28] As I have found that the Public Body properly claimed privilege, its exercise of discretion to withhold that information can be presumed to be appropriate.

V. ORDER

[para 29] I make this Order under section 72 of the Act.

[para 30] I uphold the Public Body's application of section 27(1)(a) to the information in the records.

Amanda Swanek
Adjudicator