

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2022-36**

August 25, 2022

**JUSTICE AND SOLICITOR GENERAL**

Case File Number 016566

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Justice and Solicitor General (the Public Body) for cover letters of an ASIRT Executive Director that accompanied three specified files sent to the Alberta Crown Prosecution Service.

The Public Body located responsive records relating to one of the specified files, but withheld the records relying on section 27(1)(a) (legal privilege).

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, F2013-13, F2017-57, 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, *Governors of the University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *R v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565

## **I. BACKGROUND**

[para 1] An Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Justice and Solicitor General (the Public Body) for access to the following:

ASIRT Executive Director's [...] cover letters to the Alberta Crown Prosecution Service that accompanied the forwarding/delivery of investigations in relation to the following ASIRT file numbers:

“2015-43(S) – [Name]”, “2015-19(S) – [Name]”, and “2016-02(S) - [Name]”.

for the time period of January 1, 2015 to November 25, 2019

[para 2] The Public Body informed the Applicant that it did not locate records related to two of the file numbers specified in the request, but did locate six pages of responsive records relating to one of the specified files. The Public Body withheld the responsive records relying on section 27(1)(a) (legal privilege).

[para 3] The Applicant requested a review of the Public Body’s response, and subsequently an inquiry.

[para 4] 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 5] The records at issue consist of 6 pages of records over which the Public Body claims privilege.

## **III. ISSUES**

[para 6] The issues as set out in the Notice of Inquiry, dated March 9, 2022, is as follows:

1. Did the Public Body correctly apply section 27(1)(a) of the Act (privileged information) to the records at issue?

## **IV. DISCUSSION OF ISSUES**

[para 7] The records consist of a one-page letter and a five-page letter from the Executive Director of the Alberta Serious Incident Response Team (ASIRT) to the Crown Prosecutor area within the Public Body.

[para 8] ASIRT is described as “an independent agency with civilian investigators and seconded police officers” on its website<sup>1</sup>. It is established under section 46.2 of the *Police Act*, and carries out investigations of serious incidents and complaints under section 46.1 of the *Police Act*. These sections state:

*46.1(1) The chief of police shall as soon as practicable notify the commission and the Minister where*

*(a) an incident occurs involving serious injury to or the death of any person that may have resulted from the actions of a police officer, or*

*(b) a complaint is made alleging that*

*(i) serious injury to or the death of any person may have resulted from the actions of a police officer, or*

*(ii) there is any matter of a serious or sensitive nature related to the actions of a police officer.*

*(2) The Minister, when notified under subsection (1) of an incident or complaint or on the Minister’s own initiative where the Minister becomes aware of an incident or complaint described in subsection (1), may do any one or more of the following:*

*(a) request or direct that another police service provide a police officer to assist and advise the police service investigating the incident or complaint;*

*(b) request or direct another police service to conduct an investigation into the incident or complaint, which may include taking over an ongoing investigation at any stage;*

*(c) appoint one or more members of the public as overseers to observe, monitor or review an investigation to ensure the integrity of the process of the investigation;*

*(d) in accordance with section 46.2, direct the head of an integrated investigative unit to conduct an investigation into the incident or complaint, which may include taking over an ongoing investigation at any stage.*

*(3) A chief of police or police officer acting under subsection (2)(a), (b) or (d) or a person appointed under subsection (2)(c) shall report as required to the Minister.*

*(4) If the chief of police or police officer in charge of the police service conducting an investigation under subsection (2)(b) or (d) is of the opinion that the actions of the police officer that are the subject of the investigation constitute*

*(a) an offence under an Act of the Parliament of Canada or the Legislature of Alberta, the chief or police officer shall*

*(i) refer the matter to the Minister of Justice and Solicitor General, and*

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<sup>1</sup> <https://www.alberta.ca/about-asirt.aspx>

*(ii) advise the commission and the chief of police of the police service under investigation of the chief's or police officer's findings, unless the Minister of Justice and Solicitor General otherwise directs,*

*(b) a contravention of the regulations governing the discipline or performance of duty of police officers, the chief or police officer shall refer the matter to the chief of the police service under investigation where it concerns the actions of a police officer, or to the commission where it concerns the actions of the chief of police, to be dealt with in accordance with this Part,*

*(c) a matter of the policies of or services provided by the police service under investigation, the chief or police officer shall refer the matter to the commission.*

*(5) The Minister may authorize and provide for the payment of remuneration and expenses to a person appointed under subsection (2)(c).*

*(6) A chief of police or police officer of another police service who is assisting with an investigation under subsection (2)(a) or conducting an investigation under subsection (2)(b) or (d) has, for the purposes of assisting with or conducting that investigation, the same powers and duties as a chief of police.*

*(7) A chief of police or police officer of another police service referred to in subsection (6) must advise a complainant, if any, in writing at least once every 45 days as to the status of the complaint.*

*(8) A copy of the document sent to a complainant under subsection (7) must be provided to the commission.*

*(9) Where a chief of police or police officer of another police service carries out any functions pursuant to a request or direction made under subsection (2), that police officer may also be requested to present the case or preside at the hearing of the complaint, and if so requested, that police officer has, for the purpose of carrying out those additional functions, the same powers as a chief of police.*

*(10) The Minister may delegate in writing the Minister's powers, functions and responsibilities under this section to the Director of Law Enforcement.*

*(11) The costs and expenses that result from*

*(a) a request or direction made by the Minister under subsection (2)(a), (b) or (d) shall be borne by the police service that is the subject of the investigation, unless otherwise directed by the Minister, and*

*(b) an appointment by the Minister under subsection (2)(c) shall be borne by the Government of Alberta.*

*46.2(1) The Minister may by order establish an integrated investigative unit and authorize it to act as another police service for the purposes of conducting an investigation under section 46.1.*

*(2) The Minister may*

*(a) designate a person as head of the integrated investigative unit, and*

*(b) appoint peace officers appointed under the Peace Officer Act as investigators under the authority of the head of the integrated investigative unit.*

*(3) Subject to the terms of the Minister's authorization under subsection (1), the head of the integrated investigative unit is deemed to be a chief of police, and any person acting*

*as an investigator is deemed to be a police officer, for the purposes of section 46.1(3), (4), (6), (7) and (8).*

*(4) Where the head of the integrated investigative unit is conducting an investigation under section 46.1(2)(d) and becomes aware of a further incident that warrants investigating, the head of the integrated investigative unit may, on his or her own initiative, conduct an investigation into that further incident, which may include taking over an ongoing investigation at any stage.*

*(5) Where the head of the integrated investigative unit intends to conduct an investigation into a further incident in accordance with subsection (4), the head of the integrated investigative unit shall notify the Director as soon as possible.*

[para 9] The Public Body withheld both letters in their entirety relying on section 27(1)(a), citing solicitor-client privilege.

[para 10] 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 11] 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 12] 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 13] 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 14] 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 15] 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 16] 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 17] 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 18] 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 19] 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.

*Parties' submissions*

[para 20] In their request for inquiry, the Applicant argues that there is no solicitor-client relationship between ASIRT and the Crown Prosecution Service, because communications sent to the Crown Prosecution Service are not communications between lawyer and client. They state:

The [records] are not communications sent for the purpose of giving or receiving legal advice. These communications likely relate to explaining the exercise of prosecutorial decision-making. Prosecutorial decisions must follow publicly accessible policies, and are made in the public interest, independent of external influence. There is no legal authority for the proposition that communications regarding these decisions constitute a form of solicitor-client privilege.

[para 21] In their initial submission, the Applicant refers to information from the ASIRT website, stating (initial submission, at paras. 16, 21, 23-25, 32):

ASIRT also publicly describes itself as “authoritative” and claims that it can lay criminal charges against a police officer if the executive director believes a criminal offence was committed. This description emphasizes the independence of ASIRT from other government bodies, including the Crown Prosecution Service.

...

No mention is made anywhere in ASIRT's publicly available materials of any solicitor-client relationship or duty of loyalty owed by ASIRT to any other government body, or vice versa. Indeed, the language used by ASIRT clearly attempts to establish the independence, impartiality, and objectivity of ASIRT. The website language also emphasizes that the Executive Director of ASIRT is the one who makes a decision to charge — not a recommendation.

...

ASIRT publicly identifies itself as an independent, objective, impartial investigative body empowered to investigate serious crimes. ASIRT portrays itself as though it acts in the public interest, not the interests of another entity. Nowhere in the publicly available materials defining the role of ASIRT or its functions is there any indication that ASIRT owes an undivided duty of loyalty to another government body, and that it acts only in the best interests of this other government body.

Indeed, if ASIRT was in fact a party to a solicitor-client relationship, all of ASIRT's stated mandates would be entirely undermined. ASIRT would be unable to act independently or impartially if it owed a fiduciary duty to another body, or was required

to follow instructions from an outside party or place the interests of an outside party ahead of its own mandate.

If in fact ASIRT is in some sort of solicitor-client relationship, and ASIRT is in fact only giving advice to or receiving legal advice from other agencies, its publicly available materials severely mislead the public. The Public Body needs to clearly articulate — both to the tribunal and the public — what exactly the relationship is between ASIRT and the ACPS.

There is no basis for a claim of solicitor-client privilege and the protection afforded by s. 27 of the Act in the absence of a solicitor-client relationship. The Applicant submits that, given the publicly defined role of ASIRT, such a relationship cannot exist between these two agencies, and that the claim of privilege should have failed on this basis alone.

...

The Applicant submits that ASIRT cover letters could not constitute the giving or receiving of legal advice. These letters would fall outside the scope of privilege because they likely outline conclusions and explain decisions. They probably do not make recommendations based on legal principles or provide advice regarding particular decisions.

[para 22] The Applicant cites the Supreme Court of Canada's decision in *R v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565 (*Campbell*), in which the Court determined that not everything done by a government lawyer attracts solicitor-client privilege, as government lawyers may also have duties outside of providing legal advice (such as policy or business advice). The Court said (at para. 50):

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[para 23] The Applicant argues (initial submission, at paras. 29-30):

The facts of *Campbell* are illustrative. A police officer who sought legal advice from a Department of Justice lawyer about the legality of a sting operation was found to have the right to claim solicitor-client privilege over those communications.

The facts of this review are very different. First, ASIRT is not a police agency. Second, the communications in question consisted of cover letters from ASIRT. They must be examined to ensure that the documents in fact relate to the rendering of any legal advice before privilege can apply to them.

[para 24] The Public Body cites *Edmonton (City) Police Services v Alberta (Information and Privacy Commissioner) 2020 ABQB 10*, (*EPS*), which addresses solicitor-client privilege with respect to communications between a municipal police force and Crown prosecutors. It states (initial submission, at para. 10, footnotes omitted):

The applicant submits at paras 27 – 35 that cover letters are highly unlikely to contain requests for legal advice. Justice Renke notes the following at paragraph 69 of *Edmonton (City) Police Services v Alberta (Information and Privacy Commissioner) 2020 ABQB 10* [*EPS*]:



[69] As Chief Justice Lamer said, the privilege applies to “all communications made within the framework of the solicitor-client relationship.” That framework, that context, sets the ambit of privilege. Privilege, then, should not be assessed by isolating particular communications or fragments of communications and scrutinizing them individually or atomistically for satisfaction of the privilege criteria without reference to the context that provides meaning and significance to those communications.

[para 25] The Public Body argues (at para. 12):

All records consist of: (1) communications between a lawyer of the public body and the writer (2) were made in confidence; and (3) in the course of seeking or providing legal advice. The records meet the three conditions necessary to satisfy solicitor-client privilege as set out in *R v Solosky*.

[para 26] It provided two affidavits in support of its privilege claims. The first affidavit relates to the one-page letter from ASIRT’s executive director. It is sworn by an employee in the area that processes access requests for the Public Body, RM. RM states that all lawyers referenced in the records are lawyers for the Public Body and were acting in their legal capacities.

[para 27] RM states in the schedule to the affidavit that the letter is to an Assistant Chief Crown Prosecutor and was “created for the purpose of requesting legal advice for ASIRT. This communication was intended to be kept confidential between the parties. The expectation of confidentiality is implicit given the nature of the records.”

[para 28] The second affidavit relates to the five-page letter. This affidavit is sworn by a different employee in the area that processes access requests for the Public Body, RB. RB states that all lawyers referenced in the records are lawyers for the Public Body and were acting in their legal capacities.

[para 29] RB states in the schedule to the affidavit that the letter is to the ADM, Alberta Crown Prosecution Service, and was “created for the purpose of requesting legal advice for ASIRT. This communication was intended to be kept confidential between the parties. The expectation of confidentiality is implicit given the nature of the records.”

[para 30] In their rebuttal submission, the Applicant argues that the detail provided in the Public Body’s affidavit is insufficient to meet the standard for asserting privilege, as set out in *ShawCor*. The Applicant further argues (at paras. 9-12, 16):

Regarding the requirement that the communication be between solicitor and client, the Public Body still provides no indication of what the actual relationship is between ASIRT and the Alberta Crown Prosecution Service, or why ASIRT is seeking legal advice from a very high-ranking civil servant — in this case, the Assistant Deputy Minister for the Alberta Crown Prosecution Service.

One immediately wonders why such a high ranking official — likely very far removed from the front lines of providing legal advice to investigative agencies — would be

solicited for a legal opinion. No context is provided to indicate why ASIRT would seek legal advice from an individual occupying this role. The onus is on the Public Body to explain this relationship and it has not done so.

We are provided no context to indicate why ASIRT — an agency staffed with senior and extremely experienced Crown Prosecutors who are striving to uphold the integrity of an agency *independent* from government — would be soliciting an Assistant Deputy Minister for a legal opinion.

This is particularly confusing when the scant evidence available also appears to indicate that ASIRT is apparently soliciting a legal opinion from another individual within the very same Crown Prosecution Service, albeit one far below the rank of Assistant Deputy Minister, at the same time.

...

Another fact that undermines the claims of the Public Body is the fact that the records were described as “cover letters to the Alberta Crown Prosecution Service that accompanied the forwarding/delivery of investigations[.]” It appears that the investigations had already been completed at the time these records were created. If indeed these letters consisted of solicitations for legal advice, the Public Body needs to provide a better explanation about what they contain, rather than simply stating that the records were created for the purpose of requesting legal advice.

[para 31] The Applicant also objects to the mere statement in the affidavits that the records were intended to be kept confidential, arguing these statements are insufficient.

[para 32] By letter dated July 5, 2022, I asked the Public Body for additional information regarding its claim of privilege. Specifically, I asked:

The Applicant requested cover letters from ASIRT’s executive director to the Alberta Crown Prosecution Service that accompanied investigation files sent by ASIRT to the Crown Prosecution Service. The Applicant identified three investigation files of interest. The Public Body located responsive records relating to only one of the investigation files.

The records at issue appear to be comprised of two separate records: a 1-page letter from ASIRT’s executive director to an Assistant Chief Crown Prosecutor, and a 5-page letter from ASIRT’s executive director to the ADM, Alberta Crown Prosecution Service.

Are both letters cover letters to the investigation file? If not, please explain. If so, do both letters relate to the contents of the investigation file? More specifically, does the legal advice sought by the executive director in the two letters relate to the contents of the investigation file?

[para 33] I also asked the Public Body to provide a copy of the Ministerial Order establishing ASIRT under section 46.2 of the *Police Act*. The Public Body provided a copy; it states only that the Minister establishes ASIRT, and authorizes it to act as a police service for the purposes of conducting investigations as directed under section 46.1(2) of the *Police Act*.

[para 34] In its rebuttal submission, the Public Body responded to my questions, stating:

The letter from the Executive Director of ASIRT to [...], Assistant Chief Crown Prosecutor and the letter to [...], Assistant Deputy Minister of the Alberta Crown Prosecution Service are both related to the contents of the investigation. The letters specifically ask for a review of the file and request a legal opinion.

[para 35] Regarding the Applicant's arguments, the Public Body states:

As shown in Ministerial Order 12/2008, ASIRT occupies the position of a police service in respect of its investigations. ASIRT's role is investigating events where serious injury or death may have been caused by police and, accordingly, is independent from police agencies.

ASIRT is, like any police service, able to request legal advice from the Alberta Crown Prosecution Service in the course of or following investigations. The specific individual receiving the request for legal advice within the Crown Prosecution Service is not relevant, and does not change the privileged nature of a communication made for the purposes of obtaining legal advice.

Paragraph 17 of the applicant's rebuttal suggests that there is nothing in the submission to suggest the letters were intended to be confidential. The public body submits that they were created for the specific and explicit purposes of requesting a legal opinion and has provided two sworn affidavits to this effect. Communication directly from a client area to a lawyer requesting legal advice carries a clear intention of confidentiality.

#### *Case law*

[para 36] In *EPS*, the Court reviewed orders of this office relating to the claim of solicitor-client privilege by a municipal police service over communications between it and Crown prosecutors (Orders F2013-13, F2017-57 and F2017-58). The records included opinions prepared by Crown prosecutors regarding whether to conduct a prosecution and on what charges, following a review of evidence provided to the Minister by the police service.

[para 37] In Order F2017-57, the adjudicator considered section 45(2) of the *Police Act*, which states:

*45(2) If, after causing the complaint to be investigated, the chief of police is of the opinion that the actions of a police officer may constitute*  
*(a) an offence under an Act of the Parliament of Canada or the Legislature of Alberta, the chief shall refer the matter to the Minister of Justice and Solicitor General, or*  
*(b) a contravention of the regulations governing the discipline or the performance of duty of police officers, the chief shall cause the matter to be proceeded with under subsection (3).*

[para 38] The adjudicator concluded (at para. 89):

From the evidence before me, I find that the Public Body submitted the results of its investigation to the Minister of Justice and Solicitor General under section 45(2), and that the Minister of Justice and Solicitor General, through the Crown prosecutors, made the decision to prosecute an offence.

and (at paras. 95-97, footnotes omitted):

When making prosecutorial decisions, the Attorney General, and her agents, the Crown prosecutors, must act independently of partisan concerns. Forming a solicitor-client relationship with a police service in the course of bringing a prosecution – with the effect that the Crown would be acting on the instructions of its client, the police service, in electing to prosecute – would be antithetical to the constitutional requirement of independence to which the Court in *Krieger* refers. In my view, the proper functioning of the administration of justice, to which *Campbell* refers, requires finding that the Crown prosecutor did *not* enter a solicitor-client relationship with the Public Body in making the decision to prosecute. In *Campbell*, the police officer and a government lawyer entered a solicitor-client relationship in the course of the investigation conducted by the police in which the police officer had no other means of accessing legal advice; in the case before me, I note that the Public Body had *completed* the investigation and referred the results of the investigation to the Minister of Justice and Solicitor General under section 45(2) of the *Police Act* for prosecution. As a result, the functional needs of the administration of justice in *Campbell* and the case before me are different.

Moreover, in *Davies, supra*, the British Columbia Court of Appeal held that solicitor-client privilege is inapplicable to the functions of Crown counsel in the charge approval process. The Court of Appeal held that solicitor-client privilege is designed primarily as a means to ensure that clients are not reluctant to obtain legal advice, or reticent in discussing their situations with their solicitors and is a means to foster the proper taking and giving of legal advice. The Court held that such considerations are “not germane to the situation of Crown counsel in charge approval decisions”. In my view, this case is persuasive authority that the charging decisions of Crown counsel are not subject to solicitor-client privilege.

As I find that the Public Body and the Crown prosecutors did not enter a solicitor-client relationship, it follows that I find that the correspondence of the Crown prosecutors present in the records is not subject to solicitor-client privilege.

[para 39] In reviewing this Order, the Court conducted a lengthy review of the relationship between a municipal police force and Crown prosecutors. The Court found that a referral by a police service to the Minister under section 45(2) can lead to several outcomes, and not only that the Minister has the officer charged. It said (at para. 215):

Alternatives [to charging the officer] are available. One option might be to provide legal advice to the Chief – as happened in this case. A direct indictment might be considered. Implications for ongoing prosecutions or past convictions might be considered: Alberta Brief at para 47. The Minister might consider broader governance responses, relating (e.g.) to recruit training, ongoing training and professional development, or the assessment of employment applications. The Minister might indeed direct that the officer be charged. That, however, did not occur in this case.

[para 40] The Court concluded (at para. 222):

Whatever may be the Minister's ultimate authority, there was no "direction" to the police to lay charges in this case. Instead an opinion was provided. Regardless of what could or should have been done under s. 2, on the evidence, there was no ouster of the ordinary police authority to lay charges.

[para 41] The Court concluded that a solicitor-client relationship can exist between Crown prosecutors and a municipal police force, for the purpose of providing legal advice with respect to whether to lay charges, without fettering the authority of the police service to make that determination.

### *Analysis*

[para 42] The Applicant argues that ASIRT is not a police service under the *Police Act*. That term is defined in section 1(1) as follows:

*"police service" means*

- (i) *a regional police service;*
- (ii) *a municipal police service;*
- (iii) *the provincial police service;*
- (iv) *a police service established under an agreement made pursuant to section 5;*
- (v) *a First Nation police service;*

[para 43] This definition does not include the integrated investigative unit (ASIRT) established under section 46.2(1) of the *Police Act*. Nevertheless, section 46.2 states that that such a unit may be authorized to 'act as another police service' for the purpose of conducting investigations into incidents involving serious injury or death under section 46.1.

[para 44] Whether or not ASIRT is a police service under the *Police Act*, or is merely authorized to act as 'another police service' for the purpose of specific investigations, is not material to the outcome here. The Applicant appears to offer this distinction in support of a finding that ASIRT is independent or arms-length of government and other police services. The Applicant also points out that the executive director can make the decision to lay charges against a police officer.

[para 45] These are the same factors considered in *EPS*. The Court found that a municipal police service makes the decision to lay charges, yet could obtain legal advice from Crown prosecutors in relation to that decision.

[para 46] A provision substantially similar to section 45(2)(a), considered by the Court in *EPS*, is found in section 46.1(4)(a), which requires ASIRT to refer matters to the Minister where the actions of the subject officer constitute an offence.

[para 47] If the executive director of ASIRT sought legal advice from the Assistant Crown Prosecutor and ADM, Alberta Crown Prosecution Service, in relation to a decision to lay charges under section 46.1(4)(a), then the analysis in *EPS* appears directly on point.

[para 48] In this case, the Public Body has not specified whether the executive director of ASIRT requested advice regarding whether to lay charges; it has said only that the letters requested a review of the investigation file and a legal opinion.

[para 49] Even so, the relationship between the executive director of ASIRT, as its head, and the Assistant Crown Prosecutor and ADM, Alberta Crown Prosecution Service, appear to be substantially similar to that of a municipal police service and Crown prosecutors, such that the analysis in *EPS* is applicable here. I am not satisfied that the relationship can be distinguished from that in *EPS* such that ASIRT cannot request and obtain legal advice from Crown prosecutors in the same manner discussed in *EPS*.

[para 50] As such, while I do not know the precise nature of the legal opinion sought, it clearly relates to an investigation into a serious incident, which could result in ASIRT laying charges. I accept that legal advice may be sought in such a situation. The Public Body has provided sworn statements that the communication entailed the seeking of legal advice. I have no reason to doubt these statements. As stated above, my review is limited to ensuring the Public Body meets the requirements of *ShawCor* in asserting that the records consist of legal advice, as it has done.

[para 51] Regarding the element of confidentiality, in *Governors of the University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316, the Court found that a statement that the records over which privilege is claimed were intended to be confidential is sufficient (at para. 41). The statements to this effect contained in the affidavits are therefore sufficient to meet the requirements of *ShawCor*.

[para 52] 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 53] 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 54] This approach was discussed with approval in *EPS*, cited above.

[para 55] 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 56] I make this Order under section 72 of the Act.

[para 57] I uphold the Public Body's application of section 27(1)(a) to the information in the records.

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Amanda Swanek  
Adjudicator