

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2023-01

January 19, 2023

ACUREN GROUP INC.

Case File Number 013947

Office URL: www.oipc.ab.ca

Summary: The Applicant is a former employee of Acuren Group Inc. (the Organization). The Applicant made a request to the Organization for access to his own personal information under the *Personal Information Protection Act* (PIPA). The Organization withheld some of the Applicant's personal information under sections 24(3)(b) and (c) of PIPA and on the basis of litigation and solicitor-client privilege under section 24(2)(a) of PIPA. The Adjudicator also considered "work-product privilege" for some records identified as a solicitor's work product.

The Adjudicator found that the Organization properly withheld information under section 24(3)(b) and (c). The Adjudicator found that litigation privilege had ended before the access request was made since the Applicant had earlier executed a general release of liability in favour of the Organization. The Adjudicator found that one record was not protected by solicitor-client privilege, nor was subject to litigation/work-product privilege, since the record was described as a submission.

The Adjudicator ordered the Organization to disclose any of the Applicant's personal information found in records determined not to be protected by litigation, solicitor-client, or work-product privilege.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ss. 1(1)(k), 24(2)(a), 24(3)(b), 24(3)(c), 24(4), 52, 59(1)(c), 59(1)(d), 59(1)(e)

Authorities Cited: AB: Orders P2006-004, P2007-002, P2011-D-003

Cases Cited: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52; *R. v. Card*, 2002 ABQB 537; in *Solosky v. The Queen*, [1980] 1 SCR 821.

I. BACKGROUND

[para 1] On September 22, 2016, the Applicant's employment with Acuren Group Inc. (the Organization) came to an end. The circumstances under which the Applicant's employment ended are unclear.

[para 2] In the days leading to the end of his employment, the Applicant was offered new terms under which he might have continued employment, but he did not agree to them. In an email to the Organization's Chief Operating Officer (COO), dated September 22, 2016, the Applicant states that he arrived at work that day to discover that he had been terminated without cause. However, in a statutory declaration dated December 15, 2020, the Applicant states that he tendered his resignation. The Organization states that he was terminated.

[para 3] The Applicant also indicates that a few weeks prior to the end of his employment, he was informed by his former safety manager that another employee of the Organization had made a formal complaint about him. The Applicant believes that this complaint played a role in his termination. The Organization states that it has no record of such a complaint made during the Applicant's employment.

[para 4] On September 25, 2017, the Applicant made an access to information request under the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (PIPA) to the Organization. The Applicant sought the following information:

All emails/correspondence pertaining to myself from the following persons. [Names of eight employees of the Organization] and any other e-mails that have circulated throughout Acurent [sic] regarding myself. Any and all complaints received by Acuren staff or clients regarding myself are to be released. Particularly the complaints received from [Employee 1]. This is to include a copy of my personnel file and full disclosure regarding the release of my employ.

[para 5] The Organization estimated that there were over 1000 records containing or consisting of the information the Applicant had asked for, but determined that many of them did not contain the Applicant's personal information. Since the access right under PIPA only applies to personal information, many of these records were not provided to the Applicant.

[para 6] It appears that the access request, or some records related to it, was/were the subject of an earlier review by the Office of the Information and Privacy Commissioner, file #007855. It also appears as though the Applicant brought a civil claim in the Court of Queen's Bench (now King's Bench) attempting to force the Organization to release the information he sought in the access request. The Organization filed a statement of defence on September 21, 2018. In the statement of defence, the Organization states that

the Applicant executed a “full and final release of any and all claims in favour of the Defendant on or about September 23, 2016.” After reviewing the statement of defence, the Applicant withdrew his civil claim.

[para 7] The Applicant continued to dispute that the Organization had properly responded to the access request. On January 22, 2019 the Applicant informed the Organization by letter that he was still pursuing the information he requested. He wrote:

I continue to request the release of information pertaining to complaints and all allegations made by Acuren staff regarding myself. I am requesting copies of all e-mails, communications and investigations that are related to these allegations. I am also requesting a copy of my personnel file (which should include information regarding these allegations), and all communications, emails, records of discussions surrounding the release of my employ.

[para 8] In response to the Applicant’s continued pursuit of information, the organization processed the Applicant’s request for information under PIPA. The Organization broke down the Applicant’s request into three categories:

- (a) All emails, communications and investigations that are related to allegations made by Acuren staff against yourself;
- (b) A copy of your personnel file;
- (c) All emails, communications, emails [sic], records of discussions concerning the release of your employ.

[para 9] The Organization determined that much of the information requested was not the Applicant’s personnel information. It withheld other information under sections 24(3)(b) and 24(3)(c) of PIPA.

[para 10] On August 26, 2019, the Applicant filed a request for review of the Organization’s response to his access request, challenging its application of sections 24(3)(b) and (c). That request was accepted by the OIPC as file #013947. The OIPC authorized investigation and mediation to attempt to resolve the issues between the parties.

[para 11] Throughout the processes of addressing the earlier request for review (file #007855), the civil claim, and mediation/investigation of the present file (#013947), the Organization disclosed all but a small number of the records that the Applicant had requested. The remaining records are those withheld under sections 24(3)(b) and (c), and some others withheld under sections 24(2)(a) as subject to litigation privilege or solicitor-client privilege. Those matters were not resolved at investigation/mediation.

[para 12] On December 16, 2020, the Applicant filed a request for inquiry.

II. ISSUES

- A. Did the Organization properly apply section 24(3) (mandatory exceptions to disclosure) to the information/records?**
- B. Did the Organization properly apply section 24(2)(a) (information protected by any legal privilege, such as solicitor-client privilege) to the information/records?**

III. DISCUSSION OF ISSUES

Preliminary Matter – additional matters raised in the request for inquiry

[para 13] The Applicant raised a large number of issues in his request for inquiry that go beyond the review of the application of sections 24(3) and 24(2)(a) raised in his request for review. The Applicant alleges that the Organization is harbouring “unofficial background information” on its employees, and has destroyed requested documents or denied their existence. In light of these new allegations, the Applicant states that he is expanding his access request to include numerous further categories of information.

[para 14] The Applicant also makes new allegations that the Organization is misrepresenting the circumstances of the end of his employment, and demands that the Organization provide “evidence” supporting assertions about him that appear in records that he has already received.

[para 15] As these matters were not raised in the initial request for review, I do not consider them here. I also note that allegations that the Organization destroyed records in response to the access request, or has obstructed the delegates of the Information and Privacy Commissioner, including myself, who conducted the review and inquiry are allegations of offences under section 59(1)(c), (d), and (e) of PIPA. Offences are not properly the subject of an inquiry. My powers to make an order are listed in section 52 of PIPA and do not include the power to find that an offence has been committed. While I may refer evidence of an offence to the Minister of Justice, the Applicant has not provided any evidence to support his assertion.

Preliminary Matter – in camera submission

[para 16] The Organization’s submissions regarding records that it asserts contain information that must be withheld under section 24(3), or are subject to solicitor-client privilege, reveal significant information about the records themselves. Accordingly, I have accepted these submissions on an *in camera* basis.

- A. Did the Organization properly apply section 24(3) (mandatory exceptions to disclosure) to the information/records?**

[para 17] The Organization initially withheld 44 pages in their entirety under sections 24(3)(b) and (c). As noted below, information on some pages was later released to the Applicant with redactions. Sections 24(3)(b) and (c) state,

(3) *An organization shall not provide access to personal information under subsection (1) if*

...

(b) *the information would reveal personal information about another individual;*

(c) *the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*

[para 18] Since the access right under PIPA only applies to an applicant's personal information, the Organization has no obligation to provide information that is not the Applicant's personal information. "Personal information" was described as follows in Order P2006-004 at para. 12:

The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily "about" that person.

[para 19] In Order P2011-D-003 Former Commissioner Work elaborated on what sort of information constitutes personal information, stating at para. 30,

...What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information...

[para 20] Of the 44 pages, many do not contain the Applicant's personal information and are thus non-responsive. The Organization explains that some pages that do not contain the Applicant's personal information were provided to me during this Inquiry with responsive records since they provide context to the information on pages that do contain the Applicant's personal information.

[para 21] Since the access right only applies to an applicant's personal information, I do not need to consider any pages that do not contain the Applicant's personal information. The Organization was under no obligation to provide these records under PIPA.

[para 22] The pages withheld that do contain the Applicant's personal information are pages 3 – 4, 31 – 39, and 41 – 44.

Pages 3 - 4 April E-mail

[para 23] This e-mail was initially withheld from the Applicant entirely. Upon review following investigation and mediation, the Organization released a redacted version to the Applicant, with some information severed in reliance on section 24(4) of PIPA. Section 24(4) provides:

(4) If an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the applicant, the organization must provide the applicant with access to the part of the record containing the personal information after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

[para 24] The body of this e-mail spans two pages. The information severed from the e-mail consists of names of other individuals whose opinions are expressed in the e-mail.

[para 25] Whether or not an opinion about another person is the personal information of the subject of the opinion and/or the one giving the opinion was discussed in Order P2007-002. In that Order, the Director of Adjudication concluded that an opinion is about an individual is the individual's personal information. With respect to whether the opinion is also the personal information of the one expressing the opinion, the Director of Adjudication stated at para. 22,

That the fact a person holds or gives an opinion about another conveys something personal about the maker will not be true for all opinions. In some circumstances, an opinion held by a person may be abstracted from their personal life to such a degree that it does not seem to have the quality of personal information. An example is where the opinion is a professional one - for example, a psychologist's opinion from interpreting a psychological test that B has a particular personality disorder. However, for situations where the opinion that is held, or the fact it is given, does reflect something personal, and especially something sensitive, about the person making it, it is, in my view, commonly and quite properly regarded as also being information about that person. The fact A is able to give an opinion about B because they have a personal relationship may be an indicator that the opinion is also the personal information of A. The same may be true where the fact A gives a particular opinion about B has the potential to significantly affect A's personal relationship with B.

[para 26] Where an opinion is the personal information of the one holding it, in addition to that of an applicant, it must be withheld under section 24(3)(b).

[para 27] Regarding opinions that are not the personal information of the one making them, they must be withheld under section 24(3)(c) provided the consent and confidence requirements in it are met.

[para 28] Upon review of the opinions expressed in the e-mail, I find that the names associated with them must be withheld from disclosure under either section 24(3)(b) or 24(3)(c). With respect to 24(3)(c), I observe that the Organization has stated that the opinions were made in confidence, and that there is no evidence indicating that the holder of the opinions consents to disclosure.

Pages 31 – 39 Transcript

[para 29] The transcript contains personal information about the Applicant. I do not elaborate on the type or particulars of the personal information out of concern that doing so could possibly reveal the content of the transcript and with it, the identity of another individual. The Organization submits, and I agree, that the content of the transcript reveals the identity of an individual and the nature of individual's involvement with the Organization. I also consider the fact that the Organization has the information in the transcript suggests the context in which the transcript was generated, which relates to the other individual's personal circumstances; these circumstances are that individual's personal information. In sum, disclosing any significant portion of the transcript, or the Applicant's personal information therein, stands to reveal steps another individual took to address a matter of personal concern, and with it, the identity of the individual.

[para 30] Since revealing the Applicant's personal information in these pages will reveal personal information about another individual, the Organization properly withheld it under section 24(3)(b).

Pages 41 – 44 December E-mail

[para 31] The e-mail chain consists of an e-mail which appears entirely on one page, and three pages of attachments. The attachments are an exchange of messages. The Organization was required to withhold the Applicant's personal information in the December E-mail for the same reasons given in respect of pages 31 – 39.

[para 32] I find that the Organization properly withheld information under section 24(3).

B. Did the Organization properly apply section 24(2)(a) (information protected by any legal privilege, such as solicitor-client privilege) to the information/records?

[para 33] Section 24(2)(a) of PIPA states,

(2) *An organization may refuse to provide access to personal information under subsection (1) if*

(a) the information is protected by any legal privilege;

[para 34] The Organization has withheld information under section 24(2)(a) on the basis of litigation privilege and solicitor-client privilege. I address litigation privilege first.

Litigation Privilege

[para 35] I note that in the first affidavit regarding claims of privilege, sworn by counsel for the Organization, pages over which litigation is claimed are numbered 25 – 28. The index of records lists the pages as 26 – 29. I refer to them as pages 26 – 29.

[para 36] Each of pages 26 – 29 consists of a screenshot.

[para 37] The information in each screenshot describes the Applicant's actions. The Organization has other, contextual information that identifies the Applicant as the one associated with this information to the exclusion of anyone else. It is information about an identifiable individual, and thus personal information under PIPA.

[para 38] The Supreme Court of Canada described litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52. The Court said, at para. 19,

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

[para 39] The Supreme Court described when litigation privilege ends in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (*Blank*). The Court stated at para. 34,

The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[para 40] The Organization states that the records in pages 26 – 29 were created in anticipation that the Applicant might commence litigation concerning the end of his employment with the Organization. In an e-mail dated September 20, 2016, sent to the Organization's COO, the Applicant states, "This is not intended to be a threat, but I have been proactive and consulted my legal counsel and Acuren has created the ideal situation for a Constructive Dismissal claim. If we cannot come to agreeable terms, I will have no choice but to proceed with this..."

[para 41] In light of the Applicant's statements it is clear that the Organization reasonably apprehended that litigation could commence, and created the screenshots for the dominant purpose of the anticipated litigation. At the time when the records were created, they were protected by litigation privilege. However, for the following reasons, I find that litigation privilege had ended by the time the Applicant made his access request on September 25, 2017.

[para 42] Shortly after pages 26 – 29 were created, the Applicant executed a general release (the General Release) in favour of the Organization, in exchange for severance

pay. The terms of the General Release are comprehensive, releasing the Organization from any possible claims the Applicant may wish to bring, including, but not limited to, any claims arising out of his employment with the Organization. Given the comprehensive nature of the General Release, once it was executed any reasonable apprehension of litigation disappeared. The prospect that the Applicant could advance any claim was no longer extant.

[para 43] In reaching the above conclusion, I have considered that after executing the General Release, the Applicant attempted to bring an action against the Organization in Court of King's Bench (then Queen's Bench), which he later withdrew. It remains the case that the General Release should pre-empt any further litigation by the Applicant. Indeed, the Organization asserted as much is in its statement of defence, stating,

The Plaintiff executed a full and final release in favour of the Plaintiff [sic], which release captured the claims advanced and relief sought by the Plaintiff in this action. The Plaintiff is precluded from bringing the within action against the Defendant and this action is an abuse of process.

[para 44] Accordingly, since there was no reasonable apprehension of litigation following the execution of the General Release, pages 26 - 29 were not protected by litigation privilege, and cannot be withheld under section 24(2)(a) of PIPA. I also note that there is no reasonable apprehension of litigation presently. The terms of the General Release continue to preclude litigation by the Applicant, and there is no evidence of any ongoing litigation taken in spite of the General Release.

[para 45] I now consider the Organization's decision to withhold information under section 24(2)(a) on the basis of solicitor-client privilege.

Solicitor-client privilege

[para 46] The Organization provided two affidavits describing records withheld on the basis of solicitor-client privilege. Both affidavits were sworn by a partner at the law firm representing the Organization.

[para 47] The first affidavit did not provide individual descriptions of records withheld as subject to solicitor-client. It described such records in general as follows:

All notes, reports, records, memoranda, and correspondence between the Respondent and their counsel, including all communications with respect to [the Applicant's] access request(s), civil claim(s), threats of litigation and cessation of employment.

[para 48] I found that the above description left ambiguous whether "all notes, reports, records, memoranda" meant only those which formed part of communications with the Organization's legal counsel, or whether it included notes, reports, records, and memoranda (if any) that were prepared by the Organization alone, and perhaps only provided to legal counsel afterward. In the event that such records were not prepared by, for, or in conjunction with legal counsel, it seems far less likely that they would fall on a

continuum of communications to which solicitor-client privilege could apply. In order to clarify the scope of records withheld, I requested that the Organization provide a supplemental affidavit in respect of the application of solicitor-client privilege.

[para 49] The second affidavit clarified that the records withheld on the basis of solicitor-client privilege were communications between the Organization and its legal representatives or work-product produced by legal counsel for the Organization, and do not include records prepared by the Organization alone. The second affidavit also provided individual descriptions of the withheld records, which have been of great assistance to my review of solicitor-client privilege. I consider those descriptions in the context of this case below. There are 59 described records in total. The records are numbered 1 – 59 in the second affidavit. To distinguish references to these records from other records at issue which have, in some cases, been assigned the same number in the index of records I refer to records described in the second affidavit as “No. ## of the second affidavit.”

[para 50] With the exceptions, of No.’s 4, 15, 27, 31, and 54 of the second affidavit, the descriptions clearly indicate that the withheld records are communications between the Organization and its legal counsel regarding matters between the Organization and the Applicant. The descriptions identify the parties to each communication and their role as either client or counsel. Such records appear to fall on a continuum of communications to which solicitor-client privilege applies. I note that it would have been preferable had either affidavit sworn that the communications were confidential; however the clear identification of the parties to each communication in the context of a classic solicitor-client relationship where a private, corporate client hires external counsel to assist in legal matters provides a suitable basis to infer that such communications were intended to be confidential. I find on balance of probabilities that the Organization’s description of these records establishes that they are subject to solicitor-client privilege.

[para 51] No.’s 4, 15, 27, 31, and 54 of the second affidavit are not described as communications, but rather are categorized as work-product. I consider them below.

[para 52] No.’s 4, 15, and 54 of the second affidavit are described to be letters sent to the Applicant. As the letters were sent to the Applicant, they were obviously not intended to be confidential, and so are not subject to solicitor-client privilege. Since they were sent to the Applicant, I cannot see how they would be subject to litigation/work-product privilege either.

[para 53] The descriptions for No.’s 27 and 31 of the second affidavit were very brief. In order to make clearer whether these records were subject to solicitor-client privilege, I asked the Respondent to address how the circumstances surrounding these records touch on the three components of solicitor-client privilege set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837:

- (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.

I also asked the Organization to identify if other considerations in respect of solicitor-client privilege apply to the these records, such as extension of solicitor-client privilege as a result of a common interest, a particular understanding of a continuum of communications of which these records may be a part, or the prospect of revealing communicated legal advice in the event the records are disclosed.

[para 54] I now consider No.'s 27 and 31 of the second affidavit.

[para 55] In the second affidavit, No. 27 of the second affidavit is described only as a draft. Of what it is a draft is not specified. Alone, that description does not discharge the Organization's burden to establish that the record is subject to solicitor-client privilege. While given the context of this case, where it is clear that external legal counsel was performing legal services for the Organization, I can infer that a draft of anything was likely intended to be confidential since lawyers are not in the habit of disclosing draft work, I could not conclude, from the description alone, that the other requirements for solicitor-client privilege in *Solosky* are established. There are multitudes of sorts of records that might come into existence between a solicitor and client not all of which will fall under the rubric of solicitor-client privilege, even though they may be confidential.

[para 56] However, in response to my request for further information surrounding No. 27 of the second affidavit, the Organization stated that it was created in the context of the solicitor-client relationship which entails the giving and receiving of legal advice, and that the record contains legal advice. In light of this further clarification, I find that this record is subject to solicitor-client privilege.

[para 57] In the second affidavit, No. 31 of the second affidavit is described only as a submission. In what forum or to whom the record was submitted was not specified. I requested that the Organization indicate whether this record was part of a legal proceeding. The Organization did not state whether the record was part of a legal proceeding, stating its view that doing so would violate solicitor-client privilege, which it had not waived. The Organization also argued that whether the record was part of a legal proceeding was immaterial to the issue of solicitor-client privilege.

[para 58] I do not agree that the question of whether a record described as a submission was part of a legal proceeding is immaterial. If it was, and was submitted to someone or in some forum, then absent any circumstances that may preserve the privilege under such conditions, confidentiality in the record is lost. As well, the submitted record would presumably be a communication to a decision maker, rather than one between solicitor and client. If the record was not part of a legal proceeding, I cannot see how indicating the same would transgress solicitor-client privilege. It would reveal nothing of any legal advice, or any communication, and would indicate that confidentiality necessary to establishing privilege over the record, remains. As it is, I am left without the clarification I requested.

[para 59] As with No. 27 of the second affidavit, the Organization stated that No. 31 of the second affidavit was created in the context of the solicitor-client relationship which entails the giving and receiving of legal advice, and that the record contains legal advice.

[para 60] Considering all of the above, I find that the Organization has failed to establish that No. 31 of the second affidavit is subject to solicitor-client privilege. The description of the record as a submission indicates that it has been shared outside of the solicitor-client relationship, in some forum, or to some decision maker or other person. While the description of the record states that it contains legal advice, the evidence does not support a conclusion that it remained confidential. A similar conclusion applies in respect of consideration of whether the record may also be subject to litigation/ work-product privilege. *R. v. Card*, 2002 ABQB 537 at paras. 18-20. Once submitted, the record has escaped the zone of privacy that litigation/work-product privilege intends to afford to a solicitor.

IV. ORDER

[para 61] I make this Order under section 52 of PIPA.

[para 62] I confirm that the Organization properly withheld information under section 24(3).

[para 63] I order the Organization to disclose to the Applicant any personal information about the Applicant that appears in pages 26 - 29 and No. 31 of the second affidavit.

[para 64] I order the Organization to provide written confirmation that it has complied with this Order to me, and the Applicant within 50 days of receiving a copy of this Order.

John Gabriele
Adjudicator
/ah