ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-16

April 17, 2023

ALBERTA ENERGY

Case File Number 012773

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Summary: An individual made a request to Alberta Energy (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all notes, memos, emails, text messages, briefings, etc. regarding transition payments paid to generating unit operators under off-coal agreements in Alberta."

The Public Body responded, providing 170 pages of responsive records with information withheld under sections 16, 17, 20, 22, 24, 25 and 27. Some information was also withheld as non-responsive. The Applicant requested a review of the Public Body's decision to withhold information on specific pages. A Senior Information and Privacy Manager was assigned to investigate and attempt to settle the matter. Prior to the end of the Manager's review, the Commissioner decided that the issue of the Public Body's claim of privilege under section 27(1)(a) will proceed to inquiry. This inquiry addresses the Public Body's claim of privilege over records identified by the Applicant in their request for review.

The Adjudicator accepted the Public Body's claim of privilege under section 27(1)(a) with respect to most of the records, but found that the Public Body did not provide sufficient support for its claim of litigation privilege over several records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 27, 56, 71, 72, *Public Inquiries Act*, R.S.A. 2000, c. P-39, s. 12

Authorities Cited: AB: Orders F2004-026, F2007-014, F2010-007, F2010-036, F2012-08, F2015-22, F2017-58, F2021-24, F2022-18

Cases Cited: *Barclays Bank PLC v. Metcalfe and Mansfield*, 2010 ONSC 5519, *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *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, *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *Opron Construction Co. Ltd. v. Alberta*, 1989 ABCA 279, *Specialty Steels v. Suncor Inc.*, 1997 ABCA, *Walsh Construction Company Canada v. Toronto Transit Commission*, 2019 ONSC 5537

I. BACKGROUND

[para 1] An individual made an access request dated September 14, 2018, to Alberta Energy (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all notes, memos, emails, text messages, briefings, etc. regarding transition payments paid to generating unit operators under off-coal agreements in Alberta." The timeframe for the request is March 1, 2015 to September 26, 2018.

[para 2] The Public Body responded, providing 170 pages of responsive records with information withheld under sections 16, 17, 20, 22, 24, 25 and 27. Some information was also withheld as non-responsive. The Applicant requested a review of the Public Body's decision to withhold information on pages 1, 21-27, 29-31, 34-36, 40-41, 62-63, 68-84, 108, 110-116 and 122. A Senior Information and Privacy Manager was assigned to investigate and attempt to settle the matter.

[para 3] Prior to the end of the Manager's review, the Commissioner decided that the issue of the Public Body's claim of privilege under section 27(1)(a) will proceed to inquiry. The remaining issues were addressed by the Manager in her review. This inquiry addresses the Public Body's claim of privilege over records identified by the Applicant in their request for review: Pages 29-31, 63, 68-74, 81, and 122; it also addresses the content of the Public Body's response to the Applicant.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of pages 29-31, 63, 68-74, 81, and 122 of the responsive records.

[para 5] Following this Office's usual process, the Notice of Inquiry instructed the Public Body to provide copies of the records at issue with its initial submission. The Notice states that the Public Body is not obliged to provide records over which solicitor-client or litigation privilege is claimed.

[para 6] I did not receive any records from the Public Body; therefore, I understood that the records at issue were being withheld in their entirety under section 27(1)(a). However, the Applicant's rebuttal submission made it clear that the Applicant had redacted copies of at least some of the pages at issue in this inquiry. For example, in their submission, the Applicant referred to information provided to them on pages 30, 81 and 122.

[para 7] By letter dated January 23, 2023, I asked the Public Body to clarify whether and which records at issue were being withheld in their entirety, and to provide me with a copy of records that were only partially withheld.

[para 8] The Public Body clarified that pages 68-69, 71-73 and 74 have been withheld in their entirety; it provided me with redacted copies of pages 29-31, 63, 70, 81 and 122.

[para 9] It is not clear why the Public Body did not provide me with redacted copies of the records at issue with its initial submission, as instructed in the Notice of Inquiry; the Public Body did not include an explanation when it provided the records on January 27, 2023. I presume this was merely an oversight on the Public Body's part, possibly due to this inquiry being split off from the initial review. However, the Public Body should take steps to ensure a similar situation does not occur in the future.

[para 10] At my request, the Public Body also provided a copy of other records responsive to the Applicant's request. I asked for a copy of these records in order to provide context to the Public Body's claim of privilege. Those records are not at issue in this inquiry.

III. ISSUES

[para 11] The issues for this inquiry were set out in the Notice of Inquiry, dated August 11, 2022, as follows:

1. Did the Public Body comply with section 12 of the Act (contents of response)?

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

IV. DISCUSSION OF ISSUES

Preliminary issue – Scope of inquiry

[para 12] The Public Body withheld information in the records at issue under various exceptions. During the review of this file by a Senior Information and Privacy Manager (Manager), the Commissioner decided to move part of the file to inquiry, to address the Public Body's claim of privilege. The remaining exceptions were addressed in the review.

[para 13] When I received this file for inquiry, the documents before me consisted of the Applicant's access request, the Applicant's request for review, and a mediation overview letter written by the Manager who conducted the review of the file. This letter outlined the background facts, such as the scope of the request, the Public Body's response to the request, and how this part of the file came to be at inquiry.

[para 14] The Applicant's request for review specified the page numbers of the responsive records that they wished to be reviewed: pages 1, 21-27, 29-31, 34-36, 40-41, 62-63, 68-84, 108, 110-116, and 122. The request for review also included a copy of the Public Body's response to the access request (dated April 23, 2019). That response listed which exceptions were applied to redact information on which pages of the records. Section 27(1)(a) is the only exception at issue in this inquiry. According to the Public Body's response to the Applicant, section 27 was applied to pages 29-31, 63, 65-69, 70, 71-74, 81, 85, 90-106, 117-120, and 122. The records to which section 27 was applied by the Public Body that appear in the Applicant's list of records they wished to be reviewed are pages 29-31, 63, 68-74, 81, 122. The Notice of Inquiry said:

> Prior to the end of the Manager's review, the Commissioner decided that the issue of the Public Body's claim of privilege under section 27(1)(a) will proceed to inquiry. The remaining issues continued to be addressed by the Manager in her review. This inquiry addresses only the Public Body's claim of privilege over records identified by the Applicant in their request for review: Pages 29-31, 63, 68-74, 81, and 122.

[para 15] The Public Body did not provide copies of unredacted records for this inquiry. In the course of the inquiry, I asked the Public Body to provide me with an unredacted copy of all of the records responsive to the Applicant's request (with the exception of the records over which privilege had been claimed) for the purpose of providing context to the Public Body's claim of privilege. The Public Body complied, but omitted copies of pages I had expected to receive, as they were not included in the list of records over which section 27 was applied, as set out in the Public Body's response to the Applicant's request.

[para 16] By letter dated November 29, 2022, I asked the Public Body why certain pages of records had not been provided; the Public Body responded (December 20, 2022) that it was claiming privilege over the information in these pages and was not providing copies of them for that reason. Many of those pages (specifically, pages 65-67, 85, 90-106 and 117-120) are listed in the Public Body's April 2019 response to the Applicant as records over which privilege had been claimed. These pages were not included in the Applicant's list of pages they wished a review of and therefore, are not at issue in this inquiry.

[para 17] In contrast, pages 21-26 are included in the list of pages the Applicant asked to be reviewed. However, they were not included in the scope of this inquiry as set out in the Notice of Inquiry, because they are not listed in the Public Body's April 2019 response to the Applicant as records over which privilege was claimed. Rather, that response shows that the Public Body applied only section 24 to the information in those records.

[para 18] With its initial submission, the Public Body also provided a copy of the exemption list provided to the Applicant with its April 2019 response. It is identical to the copy provided to the Applicant. The Public Body also provided a copy of a subsequent response to the Applicant (dated May 14, 2019) with another list of exceptions applied to the records. Pages 21-26 are not included in the records withheld under section 27.

[para 19] It appears that the Public Body made a new decision with respect to its claim of privilege over these records; however, it did not deem it necessary to inform me of this change. I do not have a copy of any correspondence in which this decision was communicated to the Applicant. The Applicant did not raise a concern about the scope of the inquiry set out in the Notice; specifically, that the page numbers identified in the Notice did not include all of the pages they had indicated they were interested in having reviewed and over which the Public Body had claimed privilege.

[para 20] It seems possible that the Public Body did not inform the Applicant of its new decisions regarding its claim of privilege, such that the Applicant did not note the discrepancy in the page numbers. However, the Applicant was made aware of this at the same time I was: in the Public Body's December 20, 2022 submission. The Applicant had an opportunity to respond to that submission, but chose not to.

[para 21] As such, while it is disappointing that the Public Body did not bring to my attention that it had decided to apply section 27 to more records than indicated in its April 2019 response to the Applicant, which was the only response before me, I decided not to add pages 21-26 to the scope of the inquiry at this late stage. Doing so would extend the time required to complete this inquiry, and I have no reason to expect that the Applicant remains interested in the information in pages 21-26.

Preliminary issue – No right to cross examination in inquiry

[para 22] In their rebuttal submission, the Applicant argued the affidavit provided by the Public Body in support of its claim of privilege is inadmissible or should be provided no weight, for the reason that the Public Body failed to make the affiant available for cross-examination.

[para 23] The Applicant provided case law in support of the importance of cross-examination in adversarial proceedings. They state (at para. 15):

> While the aforementioned decisions were not rendered in the context of an inquiry under the *FOIPPA*, there is no apparent reason why the right of cross-examination should be curtailed where a public body has produced a sworn statement as part of its efforts to deny access to the records sought.

[para 24] As the Public Body points out and the Applicant acknowledged, the FOIP Act specifically states that the parties to an inquiry do not have a right to review or comment on the submissions made by other parties. The Public Body cites Order F2022-18, which states:

> In his submissions the Applicant also requested the opportunity to cross examine the Deputy Provost. Granting such a request is not practical, since the Applicant has been out of province for the entire Inquiry, which, at his request, had to be put into abeyance because of problems communicating over that distance caused by the covid-19 pandemic. Moreover, there is no right of cross examination in an inquiry. Section 69(3) of the Act states,
>
> > *(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

[para 25] The Applicant argues that this interpretation is incorrect, stating (at paras. 20-22, footnotes omitted):

> And while in *University of Calgary (Re)* the adjudicator concluded there was no right of cross-examination in an inquiry on his interpretation of section 69(3) of the *FOIPPA*, the Applicant suggests that interpretation is incorrect given section 69(3) does not even reference cross-examination, let alone prohibit it.
>
> Furthermore, *University of Calgary (Re)* is distinguishable as the public body in that case had not tendered an affidavit, and the applicant had been out of the province for the entirety of the inquiry which (in the adjudicator's view) made cross-examination impractical.
>
> Therefore, as a result of the Public Body's refusal to produce [the affiant] for cross-examination the Applicant's procedural rights have been infringed and the Spears Affidavit is either inadmissible or should be given no weight.

[para 26] I agree with the adjudicator in Order F2022-18, that section 69(3) means that there is no right of cross-examination. While that provision does not refer to cross-examination, it clearly states that a party has no right to review or comment on another party's submissions. A right to cross-examine presupposes a right to at least review the submission. Therefore, the interpretation of section 69(3) in Order F2022-18 is accurate.

[para 27] The Applicant argues that the FOIP Act does not prohibit cross-examining on an affidavit, and cites section 12 of the *Public Inquiries Act* R.S.A. 2000, c. P-39, which states:

> *12 Any witness who believes his or her interests may be adversely affected and any person who satisfies a commissioner or commissioners that any evidence given before a commissioner or commissioners may adversely affect the person's interests shall be given an opportunity during the inquiry to give evidence on the matter, and at the discretion of a commissioner or commissioners, to call and examine or cross-examine witnesses personally or by that person's counsel in respect of the matter.*

[para 28] Under the FOIP Act, the Commissioner, and I as her delegate, have the "powers, privileges and immunities of a commissioner under the *Public Inquiries Act* (section 56(1) of the FOIP Act). Notably, this provision of the FOIP Act does not grant a party in an inquiry under the FOIP Act any rights they may have in an inquiry under the *Public Inquiries Act*.

[para 29] Further, as discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, I have an 'investigatory role' in conducting an inquiry (at paras. 172-174, 179):

> A tribunal is not bound by the authorities cited by parties. By raising an issue, a party opens the door to the existing jurisprudence governing that issue. Put another way, a tribunal is not constrained by the parties' legal research. Tribunal (and judicial) economy extends latitude to decide based on the law rather than on the specific authorities invoked by the parties: ***Grenon v Canada Revenue Agency***, ABCA 96 at para 41. I agree with the IPC that an adjudicator is not obligated "to update or request submissions from the parties on every aspect of the Adjudicator's reasoning process, including references to case law:" IPC Brief at para 174.
>
> Moreover, the Adjudicator was not confined to resolving the solicitor-client privilege dispute on the basis of the issues as framed by the parties (unlike a trial or chambers judge, since, subject to rule 1.3(2),"[i]t is well-established that a trial or chambers judge should not decide a case on a matter not pleaded, and specifically should not grant remedies beyond the pleadings:" ***Mazepa v Embree***, 2014 ABCA 438 at para 8).
>
> Indeed, the IPC Orders issued from "Inquiries" conducted by the Adjudicator. That role gives an adjudicator greater scope for raising issues not raised by the parties than might be available to, say, a trial court: see David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) 297, fn. 170. For example, the Notice of Inquiry for Inquiry F7384 listed the issues in the inquiry, but prefaced the list with the words "[w]ithout limiting the Commissioner" and followed the list with the warning that "[t]he above does not prevent the Commissioner from raising any further issues during the inquiry that are deemed appropriate:" CRP 2, vol. 2, tab 11, Notice of Inquiry, p. 2; IPC Brief at para 171.
>
> …
>
> An adjudicator is not only an investigator. An adjudicator's decisions arise from a relatively formal process permitting parties to make submissions and to respond to matters raised by an adjudicator, as occurred in this case. The submission and counter-submission process drew the procedures into proximity with judicial procedures and raised legitimate expectations that the matter would be decided based on issues to which the parties had an opportunity to respond: ***Baker*** at paras 23 and 26.

[para 30] I agree that in an inquiry under the FOIP Act, cross-examination on an affidavit is not prohibited. However, the fact that the Public Body did not produce the affiant for cross-examination by the Applicant does not render the affidavit inadmissible. Nor do I agree that it should be given little weight for that reason.

[para 31] I note that the Applicant had an opportunity to respond to the Public Body's arguments regarding its claim of privilege in its initial submissions. The Applicant provided a thorough response. Following the parties' submissions, I asked the Public Body specific questions about its claim of litigation privilege and raised specific concerns about the Public Body's claims. The Applicant was given an opportunity to respond to my questions and the Public Body's answers to those questions. It opted not to do so. In my view, the Applicant has had ample opportunity to argue their position and comment on the Public Body's arguments.

1. Did the Public Body comply with section 12 of the Act (contents of response)?

[para 32] Section 12 of the FOIP Act sets out a public body's obligations as to what a response under the Act must contain. It states, in part:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 33] In Order F2004-026, former Commissioner Work decided that section 12 does not require detailed reasons for refusing access in addition to the provision on which a public body has relied in every case. He said:

> The Applicant says that naming a section number is not enough and that a reason or explanation must also be given.
>
> I do not accept this complaint. In my view, the language of section 12 does not imply that a reason must in every case be given *in addition to* the naming (or quoting or summarizing) of a particular statutory exception. There are some circumstances in which both parts of the requirement in subsection (i) can be fulfilled by naming the section number (or describing the provision). While in some circumstances more in the way of an explanation may be called for, in others there would be nothing more that could usefully be said by way of providing a reason than what the provision creating the exception says. I accept that this was so in this case.
>
> However, I do read into section 12(1)(c)(i) the requirement that in a response, responsive records that are being withheld be described or classified insofar as this is possible

without revealing information that is to be or may be excepted, and that the reasons be tied to particular records so described or classified.

[para 34] In Order F2021-24, I reviewed findings from past Orders of this Office regarding a public body's obligations under section 12(1)(c), concluding that the amount of information a public body must provide in its response to an applicant will depend on the circumstances. I said (at paras. 43-54):

> The Public Body argues that it provided the Applicant with sufficient detail to meet its obligation under section 12, by providing the number of pages withheld and citing section 27(1)(a) as the relevant provision. It cites Order F2008-028, which states (at para. 274):
>
> > Generally speaking, the language of section 12 does not imply that a reason for withholding the information must be provided *in addition to* the naming of a particular statutory exception (Order F2004-026 at para. 98). While there may be situations in which more explanation may be called for, I would not find, in this inquiry, that the Public Body was required to more fully explain why it applied section 27 to the information that it withheld under that section.
>
> From the past Orders of this Office, I conclude that section 12(1)(c)(i) sometimes requires an explanation of the reasons for withholding information, in addition to citing the relevant provision, depending on the circumstances.
>
> I acknowledge that in Order F2008-028 the adjudicator found it was sufficient to merely cite section 27 without providing additional explanation for applying that provision. However, I find the more recent Orders discussing when additional explanation is required, to be more persuasive. Specifically, I find the discussion in Order F2010-029, regarding the scope of an exception and the varied type of information to which the exception can be applied, to be helpful.
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> Some exceptions apply to very specific circumstances, such that citing the exception alone is sufficient. For example, section 19(1) states:
>
> > *19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.*
>
> In other cases, citing a specific subsection may be necessary to provide an applicant with detail about why it is being applied. For example, section 24(1) applies to "advice from officials" broadly, but citing the subsections would provide additional detail: section 24(1)(a) applies to "advice, proposals, recommendations, analyses or policy options"; section 24(1)(b) applies to "consultations and deliberations" between the listed persons; section 24(1)(c) applies to "positions, plans, procedures, criterial or instructions" given in the stated circumstances, etc. Where a public body applies section 24(1), citing the specific subsection would permit an applicant to understand the type of information being withheld.

> Order F2010-029, quoted above, points out that section 16 applies to a broad range of "business" information, and that citing the specific subsections or describing which applies to the information at issue, may be necessary in order to fulfil the obligation in section 12(1)(c)(i). These comments regarding the varied types of information encompassed by that provision can also be made about a claim of privilege, absent other contextual hints. As the Applicant has pointed out, there are many different types of privilege that could be claimed and there is no indication in the Public Body's response to the Applicant which privilege it was claiming.
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> Section 27(1)(a) applies to any legal privilege, which is a fairly broad category. Some privileges, such as litigation privilege, have an end. In that case, it may be helpful for an applicant to know that litigation privilege was being applied, such that they may argue, if such is the case, that the litigation has ended, or seek that information at a later date, when all related litigation has ended.
>
> In some cases, it may be clear from the access request, and/or other records that may have been provided to an applicant, which privilege a public body is claiming. In such a case, an additional explanation may not be required.
>
> In other cases, providing additional detail may reveal the content of the records or other information the public body is permitted to withhold under the Act. In such cases, the public bodies are limited in the explanation they can provide under section 12(1)(c)(i).
>
> Neither of these factors apply here. In this case, it was not clear what privilege was being claimed, whether several privileges were being claimed, etc. It was not until the Applicant requested a review by this Office that they learned the Public Body was claiming solicitor-client privilege, as the records relate to advice from the Public Body to the public body responsible for the *Stray Animals Act*. Given the function of the Public Body, it may have been obvious to it which privilege was relevant; however, it was not obvious to the Applicant.
>
> Further, the Public Body cited the applicable privilege and provided additional information about the claim of privilege in its exchanged submission. Therefore, I conclude that the Public Body [did not] have a concern about revealing the content of the records in its explanation.
>
> I find that in order to meet its obligations stated in section 12(1)(c)(i) – to provide reasons for withholding information from the Applicant – the Public Body ought to have cited which privilege it was claiming in its response to the Applicant. Absent this explanation, the Public Body's response did not provide sufficient reasons as to why it was withholding the information. As the Public Body has provided these reasons in its submissions, I do not need to order it to respond again to the Applicant.

[para 35] In this case, the Public Body states that it provided its initial response to the Applicant on April 23, 2019, with a second release of records provided on May 14, 2019. I have copies of those responses. In each case, the Public Body informed the Applicant of the number of responsive records located, and that "[s]ome of the records requested contain information that is exempted from disclosure under sections 16, 17, 20, 22, 24, 25, and 27 of the *Freedom of Information and Protection of Privacy Act*…".

[para 36] In its initial submission the Public Body states:

> In both responses to the Applicant, the Public Body advised the Applicant:
>
> - partial access was granted, thus fulfilling section 12(1)(a) on whether access to the record or part of it is granted or refused;
>
> - a copy of the records were enclosed and/or a subsequent release of records would be sent to the Applicant on May 14, 2019 if the third parties did not request a review from the OIPC, thus fulfilling section 12(1)(b) on providing information on where, when and how access will be given;
>
> - the specific provisions of the FOIP Act to which the refusal was based thus fulfilling section 12(1)(c)(i) on providing reasons for the refusal;
>
> - the previously assigned Advisor's contact information was provided to the Applicant, thus fulfilling section 12(1)(c)(ii) that contact information of an employee of the Public Body be provided who can answer the applicant's questions about the refusal; and
>
> - that they may ask for a review of the Public Body's decision by the Commissioner, thus fulfilling section 12(1)(c)(iii).

[para 37] This information is repeated in the Public Body's rebuttal submission. The Applicant did not address this issue in their submissions.

[para 38] Following the precedents cited above, I find that the Public Body's response to the Applicant was inadequate to meet the requirements of section 12(1)(c)(i). The Public Body states that it provided the Applicant with "specific provisions of the FOIP Act" that it applies to withhold information. On the basis of the Public Body's letters to the Applicant, I would disagree.

[para 39] The Public Body informed the Applicant that it was withholding information under sections 16, 17, 20, 22, 24, 25, and 27 of the Act. I agree with the reasons in past Orders discussed above, that certain provisions apply to a broad range of information such that citing particular subsections is required in order to fulfill the obligation in section 12(1)(c)(i).

[para 40] Section 20(1) contains fifteen different subsections, which apply to different types of information. Section 20(3) contains two more subsections that apply to different information. Section 20(4) is a mandatory exception. Sections 20(2), (5) and (6) list circumstances in which exceptions listed in section 20 cannot be applied or no longer apply. Following the analyses cited above, merely citing section 20 as the basis for refusing to provide information is insufficient to inform an applicant of the reasons for the refusal.

[para 41] Section 24 similarly contains eight different subsections, which apply to different types of information. Section 24(2) lists circumstances in which section 24 cannot, or can no longer apply. Section 24(2.1) is a mandatory exception for two types of information, while section 24(2.2) provides limits for the application of the exceptions in section 24(2.1).

[para 42] Regarding section 27, the analysis in Order F2021-24 is applicable here. I would further add that the Public Body's response letters to the Applicant cited only section 27, and did not specify whether it was citing legal privilege under section 27(1)(a), whether it was withholding non-privileged information under sections 27(1)(b) or (c), or whether the mandatory exception in section 27(2) was being applied.

[para 43] I acknowledge that the records provided to me by the Public Body identify the specific exceptions (including subsections) applied by the Public Body. However, the copy of records I have reveals the record in its entirety (except where privilege has been claimed), with a box drawn around the information to be redacted. The applicable exception being applied in each case appears inside the box, along with the information that is redacted in the Applicant's copy of records. I do not know whether the Applicant's version of records reveals the exception applied to the redacted information, or if that notation is hidden along with the redacted information. The Public Body has not argued that the exceptions (including subsections) were provided to the Applicant by way of the records.

[para 44] In addition to not noting a subsection of section 27 being applied in its response letters to the Applicant, the Public Body did not identify which privilege was being claimed. Therefore, the Applicant had no way of knowing whether the privilege was ongoing as in the case of solicitor-client privilege, or whether it could end, as in the case of litigation privilege. As discussed in Order F2021-24, knowing that the privilege being claimed has an end allows an applicant to request the information again at a later time.

[para 45] Lastly, as discussed above, I have no record of the Public Body informing the Applicant that section 27 was being applied to pages 21-26. The only record before me informing the Applicant which exceptions are applied to pages 21-26 is the Public Body's April 2019 response to the Applicant, which identifies only section 24 as being applied to pages 21-26. Therefore, there is no record before me showing that the Public Body informed the Applicant of new decisions made regarding exceptions applied to information in the records.

[para 46] Given this, I find that the Public Body did not provide sufficient detail in its response to the Applicant to satisfy its obligations under section 12(1)(c). As the Public Body's response has specified the subsection of section 27 being applied, and the specific privilege being claimed, I do not need to order the Public Body to provide that information to the Applicant.

[para 47] Presumably the review by the Manager of the other exceptions applied has also revealed the subsections applied by the Public Body. The Applicant has not addressed this issue in their submissions and so has not identified any application of exceptions that remains unspecified.

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

[para 48] The Public Body applied section 27(1)(a) and (c) to information in pages 68-69. The Public Body did not provide an unredacted copy of these pages for the inquiry, as it claimed solicitor-client privilege over the withheld information. Therefore, I can only consider the Public Body's claim of privilege over this information at this time. I will not consider the application of section 27(1)(c).

[para 49] Section 27(1)(a) of the Act states:

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

[para 50] 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 51] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

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

[para 52] The Public Body claims solicitor-client privilege over pages 68 and 69, as well as some information in page 30. Some information on page 30 has also been withheld citing litigation privilege.

[para 53] 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 54] 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 55] 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 56] 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 57] 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 58] The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *EPS*, cited above, the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 59] 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 60] The Court describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

> The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary…
>
> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>
> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

[para 61] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 62] In its affidavit of records, the Public Body describes the content of pages 68-69 as follows:

> In the email correspondence in this record, the client seeks legal advice form (sic) their corporate counsel and the corporate counsel provides legal advice to the client. The seeking and providing of legal advice in this record involved no external parties and was intended by the parties to be confidential.

[para 63] The affidavit evidence stating that the records were intended to be confidential, and that the Public Body has maintained the confidentiality of these records, is sufficient to meet that element of the *Solosky* test (see *Governors of the*

University of Alberta v Alberta (Information and Privacy Commissioner), 2022 ABQB 316, at para. 41).

[para 64] From the context of the records provided to me, I accept that there is a legal issue about which it would be reasonable to seek legal advice. There are also references in the records to legal questions that have arisen with respect to the matter to which the records relate.

[para 65] I find that the Public Body has established its claim of solicitor-client privilege over these pages.

[para 66] As will be discussed below, I found the affiant's evidence regarding litigation privilege to be insufficient, insofar as the affiant did not provide any foundation for her belief. The Applicant argued that the affiant did not provide any foundation for her belief with respect to all of the claims of privilege discussed in that affidavit, including regarding pages 68 and 69. As will be discussed in the next section, a claim of litigation privilege depends upon the intent of the author of a document, and therefore seems to require some personal knowledge of the document and the circumstances around its creation. In contrast, solicitor-client privilege can often (though not always) be identified by reviewing the information in the record. In this case, the affiant has reviewed the records and stated the appropriate test to be met. I find the affidavit to be sufficient to find that the Public Body's evidence meets the requirements set out in *ShawCor* and is consistent with the test for finding solicitor-client privilege applies.

[para 67] The Public Body has withheld portions of page 30 citing solicitor-client privilege, and portions citing litigation privilege. It disclosed about half of the page to the Applicant.

[para 68] In my letter dated January 23, 2023, in which I asked the Public Body for a copy of the records at issue that were not previously provided to me for this inquiry, I also asked the Public Body to delineate over which information it was claiming litigation privilege and over which information it was claiming solicitor-client privilege. The Public Body did not respond to this request. It is not clear to me what information on the page would reveal advice from Public Body's counsel.

[para 69] Page 30 is part of a 4-page briefing document comprising pages 28-31. I have accepted that the records at issue indicate the existence of a legal matter about which it would be reasonable to obtain legal advice. The records at issue all relate to the same matter; I have no reason to reject the Public Body's claim that legal advice obtained by the Public Body appears in page 30 of the briefing note.

[para 70] I note that the Public Body has claimed solicitor-client privilege over information in pages 21-26, which are not at issue in this inquiry. Those pages are described as email correspondence between the Public Body and counsel relating

to the Public Body's request for legal advice. It seems plausible that this advice may have been repeated in the briefing note at page 30.

[para 71] I find that the Public Body has established its claim of solicitor-client privilege over the portion of page 30 to which that claim relates.

Litigation privilege

[para 72] The Public Body claimed litigation privilege over six records comprising pages 29-31, 63, 70, 71-73, 81 and 122.

[para 73] The Public Body's initial submission states, with respect to its claim of litigation privilege:

> Additionally some of the records are subject to litigation privilege, as they were made for the dominant purpose of actual or contemplated litigation. The litigation contemplated was subsequently commenced. A statement of claim against the GoA was filed in regards to a reduction in transition payments. In the interests of being as transparent as possible, portions of records that were created for the dominant purpose of litigation were disclosed to the applicant. It should be noted that although portions of the records which are subject to litigation privilege were disclosed to the applicant, this was not intended to waive litigation privilege over the entire record.

[para 74] The Public Body has not provided much information about the circumstances surrounding the creation of the records at issue in its submissions. From the records (or portions of records) that have been disclosed to the Applicant I understand that the Government of Alberta came to an agreement ("off-coal agreements") with various companies in the province, in compensation for closing coal-fired power plants by 2030. Payments were to be made yearly, subject to certain requirements. Payments were calculated based on asset net book values provided by the companies. A third party audited the information provided by the companies, and the Government recalculated payment amounts based on this audit. The records relate to these off-coal payments. As stated by the Public Body, a disclosed portion of a record reveals that one company initiated legal action against the Government in relation to this matter.

[para 75] The purpose of litigation privilege was discussed in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII) (at paras. 27-28):

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
>
> R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> ("Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65)

[para 76] Litigation privilege was more recently discussed in the Supreme Court of Canada decision *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 77] In order for a record to be protected under litigation privilege, the dominant purpose for the creation of records must be for use in litigation that is ongoing or reasonably contemplated.

[para 78] Litigation privilege was discussed at length in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289. The Court cited the test as follow (at paras. 82-84):

… The dominant purpose test was explained in ***Moseley***, *supra* at para 24 as follows:

> The key is, and has been since this Court adopted the dominant purpose test in ***Nova***, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. [emphasis in original]

Accordingly, a record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created…
…

In addition, it must be remembered that under the dominant purpose test, the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained: ***Ventouris v Mountain***, [1991] 1 WLR 607 at 620-622 (Eng CA); ***General Accident Assurance Company v Chrusz et al*** (1999), 1999 CanLII 7320 (ON CA), 45 OR (3d) 321 at 334 (CA). Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege: ***Bennett v State Farm Fire and Casualty Company***, 2013 NBCA 4 at paras 47-51, 358 DLR (4th) 229. Because the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling.

[para 79] In *ShawCor*, the issue was whether records created for an investigation were protected by litigation privilege. The Court found that while litigation has clearly been contemplated by a particular date, "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel". The Court stated (at paras. 86-89):

> We accept that when an investigation is ongoing, records may be created for the dominant purpose of litigation at any point after litigation is contemplated. And we recognize the case management judge effectively found that litigation would be pursued as of February 4, 2009. But the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her. Or even because a decision has been made to pursue litigation. One must always look to the particular record at issue and *determine* the dominant purpose behind its creation. After all, litigation privilege "must be established document by document": ***Gichuru v British Columbia (Information and Privacy Commissioner)***, 2014 BCCA 259 at para 32, citing ***Keefer Laundry Ltd. v Pellerin Milner Corp. et al.***, 2006 BCSC 1180 at para 96. An assertion that something was for the dominant purpose of litigation must always be examined in the context of all the facts, the nature of the records in question and all the real reasons that the records were created.
>
> Here, the case management judge found that even if the subject litigation had not occurred, CNRL would have conducted an investigation for some or all of the purposes he identified. Thus, without further information from CNRL as to precisely what records were created, and for what purpose, we are unable to understand how all these testing and investigation records, created for a variety of purposes, could be found, without further inquiry, to fall within solicitor-client privilege or litigation privilege. This is so even

> accepting that CNRL had decided to pursue litigation as of the critical date. The reasons of the case management judge also indicate that he concluded that any third-party expert retained might "generate a privileged analysis for litigation purposes": para 40. However, while the analysis would likely be privileged, it is not necessarily the case that the factual platform on which that analysis is built automatically shares that same status.

[para 80] The Court's conclusion above is relevant to the case at hand: even where litigation is reasonably contemplated at the time a document is created, and even if the document relates to the matter being litigated, the test for litigation is not met by virtue of these facts alone. This is especially so if there is another reasonable purpose for the creation of a document at issue, aside from the litigation. Further, it is not sufficient for one of the purposes for the creation of a record to be for litigation; litigation must be the dominant purpose. Lastly, the relevant purpose is the purpose for which the record was created, not later obtained.

[para 81] A number of other cases address when records can be characterized as having been created for the dominant purpose of litigation, when another process (such as a claims process or investigation) preceded the litigation. For example, in *Specialty Steels v. Suncor Inc.*, 1997 ABCA, the Alberta Court of Appeal concluded that the relevant time for assessing the dominant purpose of a record is at the time it was created (completed), rather than the time it was requested. A record may have been requested for one purpose (e.g. an investigation) but another purpose (e.g. for use in litigation) may become the dominant purpose prior to the creation/completion of that record (see paras. 8-9).

[para 82] The Public Body also cited *Opron Construction Co. Ltd. v. Alberta*, 1989 ABCA 279 (*Opron*), in support of its claim of litigation privilege. The Public Body cited this case in its *in camera* response to questions I had asked the parties to address, without explaining why this case law was provided *in camera*. In any event, I can discuss the case without revealing other information in the *in camera* response.

[para 83] In *Opron*, the Alberta Court of Appeal concluded that the test for litigation privilege is "the intent of the author or his superiors when he created the document" (at para. 17). That case relates to a contract for work between Opron Construction and the Government of Alberta, during which Opron had made claims for extra payments. The relevant issue decided by the Court was whether documents created by the Government to assess the claims made by Opron, were protected by litigation privilege. The Court of Queen's Bench (as it then was) found that litigation privilege did not apply, as the documents were created for the purpose of assessing the company's claims; the Court found that litigation had not been contemplated at that time. The Court of Appeal disagreed, stating (at para. 16):

> The learned chambers judge did not have the benefit of our decision in Ed Miller *Sales v. Caterpillar Tractor* (1989) 1988 ABCA 282 (CanLII), 61 Alta. L.R.(2d) 319 (C.A.), decided since. It also distinguishes starting a claim process from the mere existence of a cause of action. It holds that a person may contemplate litigation when a long formal process respecting that person starts. That is so even if it is only an investigation which may ultimately lead to a civil suit. This Ed Miller decision also points out the evils of denying privilege for papers created when the ultimate danger first appears (pp. 324-6).

> Trying to create privilege later when the confidences are all out of the stable door, is of little practical use.

[para 84] Presumably, the Public Body has provided this case law in support of its position that litigation can be reasonably contemplated at the time an amendment to a contract or agreement is made or requested, even if litigation has not been actually mentioned by any party. I agree that the principles in *Opron*, and other cases discussed above, are consistent with that position. This principle speaks to the first part of the test for litigation privilege – that litigation must be reasonably contemplated.

[para 85] Following the case law cited above, I accept that litigation was reasonably contemplated at the time the records at issue were created. The records relate to off-coal transition payments. The Public Body took certain steps in determining what payments should be made to the relevant companies; according to the Public Body's submissions, payment amounts were reduced, based on the Public Body's determinations. It is reasonable to expect that any or all of the companies could dispute the reduced payment amounts.

[para 86] Regarding the second part of the test for litigation privilege – that the creation of the record must be for the dominant purpose of litigation – while the Public Body's submissions state that the dominant purpose for the creation of the records was for litigation, it did not provide specific information about the circumstances of the creation of the various records in support of this assertion.

[para 87] As will be discussed in greater detail below, the context of the some of the records support the claim that the dominant purpose of their creation was for litigation. However, the information in other records that I am able to review does not support that finding.

[para 88] With respect to the 'dominant purpose' test, the Public Body's initial submission states that it applied section 27(1)(a) to information "involving litigation privilege". Pages 29-31, 70, 71-73, 81, and 122 of the records at issue are described in the Public Body's index of records as containing "information **gathered and drafted** for the dominant purpose of litigation…" Page 63 is described as containing "information **gathered** for the dominant purpose of litigation between the Public Body and a third party."

[para 89] By letter dated November 29, 2022, I provided the above-cited case law to the Public Body, stating:

> These descriptions do not satisfy the test for litigation privilege set out in *ShawCor*, as discussed above. Specifically, information that was created for one purpose and later gathered or compiled for the purpose of litigation does not meet the tests discussed above. I am asking the Public Body to explain how litigation privilege applies to these records, given the tests discussed above. It would be helpful for the Public Body to provide any relevant case law to support its position.

> I am also asking the Public Body to provide additional information about the relevant litigation. At this time, I have no information about the parties or issues involved. The Public Body has said that the litigation has commenced; it would be helpful if the Public Body could provide me with documentation, such as the relevant statement of claim, that sets out the issues in the litigation.

[para 90] In its response, the Public Body clarified that its index of records was incorrect insofar as it refers to records being *gathered* for the dominant purpose of litigation. It further clarified that the language used in the affidavit of records refers only to the relevant records being *created* for the dominant purpose of litigation (and not gathered). I accept this explanation.

[para 91] In my letter, I raised concerns about the Public Body's claim of litigation privilege over items of information contained in several briefing notes, which were withheld while the remainder of the documents were disclosed. I said:

> Pages 29-31 of the records at issue over which litigation privilege is claimed, are presumably a continuation of page 28, which has been partially disclosed to the Applicant. The disclosed portion of the record includes the title, "Advice to Deputy Minister". The disclosed portion of this page also indicates that it relates to payments to be made to various parties. Specifically, the purpose of this document appears to be to provide advice to the Deputy Minister regarding transition payments to be made. It is unclear how the remainder of this same record can be said to have been created for the dominant purpose of litigation, if the first page was not. Please clarify.
>
> Page 122 appears to consist of the middle page of a three-page briefing (at pages 121-123 of the records). Much of the information on pages 121 and 123 was disclosed to the Applicant. The disclosed portions of these records reveals that the briefing relates to transition payments to be made to several parties. Again, it is unclear how only the second of three pages of a briefing can meet the test for litigation privilege discussed above.
>
> Similar questions apply to page 81. This page also appears to be the first page of a three-page record, the entirety of which does not appear to have been created for the dominant purpose of litigation.

[para 92] The Public Body responded to these questions *in camera*. I will discuss the Public Body's response in a manner that does not reveal any information in the records that has not already been disclosed to the Applicant.

[para 93] The Public Body essentially argues that the fact that the records relate to companies other than (or including) one company with which the Public Body is currently in litigation does not mean that the dominant purpose for the creation of the record cannot be for litigation.

[para 94] I agree with this argument. As revealed in the records that have been disclosed to the Applicant, several companies were receiving off-coal transition payments that were subject to recalculations based on an audit conducted on behalf of the

Government. If litigation was in reasonable contemplation at the time of the recalculations with respect to one company (that ultimately initiated litigation) then it would be reasonably contemplated with respect to each of the companies. The Public Body is not, to my knowledge, claiming litigation privilege over any information that relates only to the companies that did not pursue litigation. It may be the case that some of the information withheld under litigation privilege applies to another company in addition to the company with which the Public Body is currently in litigation. This does not, by itself, undermine the Public Body's claim of litigation privilege over that information. In other words, if a record was created for the dominant purpose of litigation with several companies, and the matter was subsequently settled with all but one company, then litigation privilege would still apply to that record insofar as it related to the company with which litigation is ongoing or contemplated.

[para 95] While I agree with the Public Body's position on this point, this discussion didn't directly address the concerns I had raised in my letter about particular information in the records.

[para 96] The other argument put forward by the Public Body is essentially that litigation privilege can be applied to portions of a record, citing *Barclays Bank PLC v. Metcalfe and Mansfield*, 2010 ONSC 5519, and *Walsh Construction Company Canada v. Toronto Transit Commission*, 2019 ONSC 5537. The Public Body argues that litigation privilege can apply if the withheld portions of the record meet the dominant purpose test; the entire record needn't have been prepared for the dominant purpose of litigation.

[para 97] The Public Body cited the above cases without pinpoint citations or other explanation as to how they apply to the records at issue. If the cases were provided only in support of the argument that litigation privilege can apply to portions of a record, then I agree with that point.

[para 98] The facts and principles set out in *Walsh Construction* are similar to those discussed in *ShawCor*, cited above. As in *ShawCor*, the Court in *Walsh Construction* rejected the claim of litigation privilege, for similar reasons.

[para 99] The matter in *Walsh Construction* relates to a dispute between Walsh Construction, which was completing a project for the Toronto Transit Commission (TTC) that was subject to significant delays. During the course of the project, a Report was prepared on behalf of TTC to review the project. In subsequent litigation between the parties, TTC claimed litigation privilege over portions of the Report.

[para 100] The Court in *Walsh Construction* reiterated that the party claiming litigation privilege needn't establish that the documents were created for the *sole* purpose of litigation; more than one purpose is possible but the dominant purpose must be to assist in pending or anticipated litigation. It seems likely that this principle set out in the decision is the reason the Public Body brought this case to my attention. This principle is consistent with the discussion set out in *ShawCor*.

[para 101] However, the remainder of this decision is also relevant to the case at hand. The Court in *Walsh Construction* also reiterated that the party claiming privilege bears the onus of establishing an evidentiary basis or foundation for its claim. It said (at para. 43):

> Blanket claims and bald assertions of litigation privilege or merely asserting that the privilege attaches are insufficient (*SkySolar* at paras. 73-75; *Corner Brook Pulp & Paper Ltd.* v. *Geocon,* [2000] N.J. No. 446 at para. 46). Such bald assertions are particularly insufficient in the absence of firsthand evidence of a dominant litigation purpose from the creator of the documents in question (*Corner Brook* at para. 46).

[para 102] The Court accepted that the redacted portions of the Report were prepared in contemplation of litigation. However, the Court found that TTC failed to meet its evidentiary burden of establishing that the redacted portions were created for the dominant purpose of litigation. The unredacted portions of the Report indicated that the purpose of the Report was to assess the most expedient manner of completing the project. There was no indication that the Report was concerned with the investigation of claims or litigation. The Court noted that the Report referred to the claims made by Walsh in the course of the project, but found that the context of these references was to find an expedited route to finish the project, and not to assess the claims. It concluded that "[e]ven if these valuations were or may have been useful for claims determination or litigation, this is a dual, additional or alternate purpose and not a dominant one" (at para. 67).

[para 103] The Court's discussion of affidavit evidence in that case is also relevant to the case at hand. The Court in *Walsh Construction* found that the affidavit evidence from TTC in support of its claim of litigation privilege was insufficient, as the affiant had no direct knowledge of the creation of the Report. The affiant had sworn that TTC's general counsel informed him that TTC's CEO had retained the third party to create the Report given concerns about potential litigation at that time. On cross-examination, the affiant acknowledged that he was not involved in engaging the third party for the Report and that he did not have any discussions with the CEO who did engage the third party, before swearing the affidavit. The affiant also acknowledged that he did not know if the general counsel who advised him had direct knowledge of the purpose for which the Report was prepared or involvement with the preparation of the Report. For these reasons, the Court gave minimal weight to the evidence in the affidavit.

[para 104] The Court stated that TTC could have provided affidavit evidence from TTC's general counsel, or the third party that created the Report. The Court stated (at para. 73):

> … In this regard, I adopt Master MacLeod's (as he then was) comments in *Glassjam Investments Ltd.* v. *Freedman,* 2014 ONSC 3878 at para. 33 such that evidence from an uninformed witness swearing what they believe an assertion made by someone else is of little to no probative value. Accordingly, I reject TTC's assertion that paragraph 17 of the Baik Affidavit is evidence directly supporting the conclusion that the Redacted Portions

were prepared to defend, prepare for and assess risks associated with ongoing and anticipated litigation.

[para 105] This finding is instructive here. As noted above, some of the records containing information over which litigation privilege is claimed do not support that claim. This is so, even if I accept that litigation was reasonably contemplated, as the Court accepted in *Walsh Construction*. However, as the Court found in that case, the fact that litigation was contemplated is not sufficient to meet the test for finding that litigation privilege applies. The Public Body must also satisfy me that the information at issue was created for the dominant purpose of litigation. Again, this is consistent with the findings in *ShawCor*.

[para 106] As stated in the cases cited above, the Public Body must provide more than a blanket claim or assertion that privilege applies. Where the evidence before me – in this case, the redacted records – do not support a finding of litigation privilege, the Public Body must provide more specific arguments to support the claim. In this case, the Public Body has not explained how the principles set out in the case law provided apply to the specific information in the records over which litigation privilege is claimed. I am left to speculate as to the possible content of the withheld information, and how the principles in the cited case law could apply. In some instances, the surrounding records and the Public Body's explanations of those surrounding records provides sufficient context for the information at issue, such that the Public Body's claim of privilege is substantiated, on a balance of probabilities.

[para 107] However, with respect to other records there is no such supporting evidence or argument, and the records themselves do not support a finding of privilege. Rather, some records indicate that the purpose for the creation of the record was something unrelated to litigation. With respect to those records, I can conclude only that it is not impossible that litigation privilege applies; however, the evidence before me does not support it on a balance of probabilities.

[para 108] The Public Body has provided additional evidence in the form of an affidavit. The affiant states "I have reviewed the Records and believe that they meet the criteria required to claim solicitor-client privilege, litigation privilege, and settlement privilege" (at para. 7). However, as argued by the Applicant, it is not clear what this belief is based upon. The affidavit reads as follows:

1. I am employed as an Executive Director for Alberta Energy.
2. The Applicant made an access to information request to the Public Body that is now the subject of this Inquiry ("Applicant's Request").
3. As part of my employment, I assisted in the responding to the Applicant's Request *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").
4. The head of the Public Body has exercised their discretion to withhold the Records from disclosure to the Applicant. One of the exceptions relied upon by the head of the Public Body is section 27(1)(a) of the FOIP Act on the grounds that the Records are subject to solicitor-client privilege, litigation privilege and settlement privilege. In addition, section 27(2) of the FOIP Act were relied on.

5. Attached as Schedule 1 to this Affidavit is a list of several records that I believe are responsive to the request over which we have claimed legal privilege (the "Records").
6. As described in greater detail in Schedule 1 to this Affidavit:
    a. selected Records relate to a confidential request for legal advice made by the Public Body to its corporate counsel through email correspondence.
    b. selected Records are records or communication made for the dominant purpose of actual or contemplated litigation.
    c. selected Records are a "without prejudice" communication for the purpose of and that could reasonably lead to a compromise in a litigious dispute within contemplation.
7. I have reviewed the Records and believe that they meet the criteria required to claim solicitor-client privilege, litigation privilege, and settlement privilege.

[para 109] Under the heading “litigation privilege” the affiant states:

15. All of the Records described in paragraph 8(b) of this Affidavit:
    a. consist of records created for the dominant purpose of litigation;
    b. the litigation was reasonably contemplated; and
    c. the litigation has not yet been concluded.
16. I believe that none of the Records have been made public.
17. I believe that the Records have only been shared with those within the Public Body who require the Records in order to perform their employment responsibilities.
18. Any disclosure of portions of the records to which litigation privilege applies was not intended to waive litigation privilege of the entire record.

[para 110] In its rebuttal submission the Public Body states:

> [The affiant] reviewed the records at issue, knew the tests to be applied to meet solicitor-client, litigation, and settlement privilege and swore that was her opinion, for the reasons detailed in the schedule, that these records meet those tests. Nowhere in the OIPC’s procedure or in *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289 (ShawCor) is there a requirement that an affiant have a legal background or prove their ability to make a “legal analysis”.

[para 111] I understand that the affiant was involved in processing the access request and reviewed the records at issue, and I accept that she is familiar with the tests for litigation privilege. I do not know whether the affiant has any personal knowledge of the records or their creation.

[para 112] The case law cited above emphasizes the intent of the author at the time a document was created or completed. The affiant states that the dominant purpose for each record was for litigation, without stating whether and how she knew about the intentions of the creator, or about the circumstances that surrounded the creation of the records, such that she could form a foundation for her belief about this intention. As discussed in *Walsh Construction*, the Public Body could have provided an affidavit sworn by an employee with personal knowledge of the records (beyond merely reviewing them) and the purpose for which they were created, but did not.

[para 113] Given this, I cannot give the affidavit significant weight, where the Public Body's claims of privilege is otherwise unsubstantiated or undermined by the records themselves.

[para 114] Below I will discuss the Public Body's claim of litigation privilege for each record.

Discussion of the records at issue

[para 115] The Public Body withheld some information on pages 29-31, stating that the record is an internal document drafted for the dominant purpose of contemplated litigation.

[para 116] Pages 29-31 are part of a four-page briefing note that starts with page 28. The Public Body has provided me with a copy of page 28, much of which was disclosed to the Applicant with some information withheld under sections 16(1) and 24(1) (these exceptions are not at issue in this inquiry).

[para 117] The disclosed portion of page 28 shows that the document is titled "Advice to Deputy Minister For Decision about Off-Coal Transition Payments". The issue set out in the briefing note is the payments to be made to three companies that are entitled to yearly payments relating to off-coal transitions, subject to compliance with their agreements. The Government of Alberta has used a particular method for determining those payments, and hired a third party to audit those numbers. The audits now being complete, and the companies having submitted their required data, the briefing note states that "a decision is now required so that the first payments can be processed and companies advised accordingly." The briefing note recommends that the Government of Alberta acknowledge that the companies have met the obligations of their agreements; adjust the payments to reflect the findings of the audit; and remit the payments to the companies.

[para 118] Under the heading "Key Considerations" the disclosed portion of the briefing on pages 28-29 state that the auditors have completed their reports and provided them to the Government. The briefing states:

> … The reports outline several reconciling items that likely warrant payment adjustments, as these items are beyond the scope of what the transition payments were intended to cover as part of the off-coal agreements, including:
>
> [severed information]
>
> - See Attachment 7 for further details on the calculation of payments and liabilities and Attachment 8 for the breakdown of each of the companies recalculated payments.
>
> …

[para 119] Around half of the information on pages 30-31 has been disclosed to the Applicant, with information withheld under "Financial Impacts", "Stakeholder Impacts", "Challenges" and "Analysis".

[para 120] It is reasonable to conclude that the information severed from the excerpt on pages 28-29 provided above relates to the items for which payments were adjusted. The Public Body provided me with a copy of the statement of claim relating to the ongoing litigation with one of the parties discussed in the records. Although the statement of claim is a public document, the Public Body provided the copy in its *in camera* submission, without explaining why it needs to provide a public document *in camera*. I note that a disclosed portion of page 122 identifies the company that filed the statement of claim and the date upon which it was filed.

[para 121] In any event, it is clear that the items for which payments were adjusted are known to the company that initiated the litigation. This is not surprising, as the Public Body would presumably have had to explain to all of the relevant companies why the payments they received would not be for the amounts they expected. Given this, it is not clear how litigation privilege could apply.

[para 122] If the withheld information on page 29 is something other than what I have surmised, I do not know what it would be. I cannot accept the Public Body's mere assertion that it is protected by litigation privilege when the surrounding information in the record does not support that claim.

[para 123] Further, the information in pages 28-31 that I am able to review does not reference litigation or otherwise seem to have been created with litigation in mind. The subject matter of the briefing indicates that the briefing was prepared for the purpose of obtaining authorization to make the scheduled payments to three companies. There is no indication in this record that litigation was even one of the purposes for which the record (or portions of the record) was created. In addition, the Public Body has not provided any explanation or reason to believe that the withheld portions of these pages were created for the dominant purpose of litigation even though the remainder of the pages shows no such indication. While the record appears to relate to the matter now at litigation, this is not sufficient for litigation privilege to apply.

[para 124] Page 63 of the records is described in the Public Body's affidavit of records as "an internal document drafted for the dominant purpose of contemplated litigation between the Public Body and a third party." This page consists of an email chain between Public Body employees. None of the employees involved appear to be lawyers for the Public Body, although this is not determinative as litigation privilege can apply in the absence of any counsel. The subject line of one email has been disclosed to the Applicant, and reads "Attached Correspondence from [KC], Capital Power". There is no indication in the portion of the email provided to me that any part of the email was created for the dominant purpose of litigation. However, in response to my questions about the Public Body's claim of privilege, the Public Body provided additional information about pages 65-67, which are not at issue in this inquiry. The Public Body

applied section 27(1)(a) to those pages in their entirety. The Public Body has said that these pages are comprised of a letter from a third party to the Public Body marked "without prejudice – sent in contemplation of litigation", dated September 17, 2017. The Public Body states that the third party proposed a possible settlement or compromise in that letter.

[para 125] The email at page 63 of the records is dated September 27, 2017 and appears to relate to the Public Body's response to the third party. Given this additional context, I am satisfied on a balance of probabilities that the Public Body's claim of litigation privilege over the information withheld in page 63 is consistent with the test for finding that litigation privilege applies.

[para 126] Pages 68-69 were withheld under solicitor-client privilege, which I accepted above.

[para 127] Page 70 consists of an email between Public Body employees dated November 3, 2017, portions of which have been withheld citing litigation privilege. A small portion of the email has been disclosed to the Applicant. The Public Body's index of records states that this email is "regarding the potential of litigation between the Government of Alberta (GoA) and a third party." The subject line of the email, which was disclosed, indicates that the email relates to a letter being sent to the third party involved in the litigation. The disclosed portion of the email states "Please see the attached documents related to the letter to Capital Power briefing. Summary below." The name of one of the attachments to the email has been withheld as subject to litigation privilege, as has much of the remaining body of the email.

[para 128] Pages 71-73 have been withheld in their entirety. The records at pages 70 and 71-73 are each described in the affidavit of records as "an internal document drafted for the dominant purpose of contemplated litigation between the Public Body and a third party." The Public Body's index of records describes pages 71-73 as a "briefing note to the Deputy Minister in regards to responding to a third party's position."

[para 129] Page 74 has been withheld citing settlement privilege. It is described in the Public Body's index of records as a letter dated November 7, 2017 from the Public Body to the third party involved in the litigation, discussing a possible settlement or compromise.

[para 130] Given that the third party now involved in litigation with the Public Body sent a letter in September 2017 proposing a settlement, it is reasonable that the Public Body would have responded. In my view, documents drafted to respond to an offer of settlement to avoid litigation meet the test for litigation privilege. I am satisfied on a balance of probabilities that the Public Body's claim of litigation privilege over the information withheld in pages 70-73 is consistent with the test for finding that litigation privilege applies.

[para 131] Page 81 is the first page of a three-page briefing note dated November 30, 2017. Two bullet points on this page were withheld claiming litigation privilege. Some of the information on this page has been disclosed to the Applicant and approximately half was withheld as non-responsive to the Applicant's request. The Public Body's index of records states that this record is a briefing note to Executive Council regarding the business outlook of a third party. The affidavit states that it was prepared for the dominant purpose of litigation.

[para 132] The title of the briefing – "Capital Power Business Outlook" – was disclosed to the Applicant. The issue set out in the briefing note was also disclosed to the Applicant; it states: "Following briefings on ATCO and TransAlta, Energy has prepared a similar briefing on Capital Power for Executive Council". The information withheld as privileged falls under the "Analysis" heading; the first bullet point under that heading was disclosed to the Applicant and the last two bullet points were withheld as privileged.

[para 133] Again, the Public Body has not provided specific arguments regarding the information withheld citing litigation privilge on page 81. Absent arguments from the Public Body, I have reviewed other responsive records to glean any relevant information therein. Page 81 refers to "similar briefings" having been prepared regarding two other companies. In the records provided by the Public Body is a copy of a briefing relating to ATCO (pages 77-80 of the records), which appears to be one of the other briefings referenced in page 81. I have an unredacted copy of this briefing, but most of the briefing was withheld from the Applicant as non-responsive. However, the title, the paragraph under the "Issue" heading, and approximately half of the information under the "Analysis" heading was disclosed to the Applicant. This briefing is entitled "ATCO Business Outlook" and has similar headings to the briefing at pages 81-83, including the Analysis heading and information similar to the first bullet point under that heading (which was disclosed to the Applicant). As the ATCO briefing on pages 77-80 and the Capital Power briefing on pages 81-83 appear to have been prepared for similar purposes, and contain similar headings and information under the headings, it seems reasonable to surmise that the withheld information in the Analysis section of the Capital Power briefing is of a similar nature to that found in the ATCO briefing. I have reviewed the ATCO briefing and considered whether the information under the Analysis heading could be characterized as information prepared for the dominant purpose of litigation, had ATCO decided to bring litigation. I cannot conclude that the information in the Analysis section of the ATCO briefing would meet the test for litigation privilege. Much of the information in that record has been withheld from the Applicant so I cannot reveal that information. I can describe it only as stating background facts about ATCO and its relationship with the Public Body that cannot be characterized as having been "prepared" for litigation. One bullet point disclosed to the Applicant under the Analysis heading in this briefing states:

> - The Off-Coal Agreement contains a process through which such disputes are to be handled, with the Deputy Minister of Energy being Alberta's designated point of contact. ATCO has yet to raise concerns through this process.

[para 134] The withheld information in that record is of a similar nature, in terms of describing background facts.

[para 135] There is nothing in the briefing relating to Capital Power, or in the Public Body's submissions, that would indicate that the information withheld on page 81 was prepared for the dominant purpose of litigation. Nothing in the record or Public Body's submissions would indicate that the information withheld on page 81 is dissimilar to that appearing under the same heading in a similar briefing regarding another company. It is not impossible that the two bullets on page 81 were created for the dominant purpose of litigation; however, the Public Body has not provided sufficient information regarding the circumstances in which this briefing was prepared to make that finding. Therefore, I have only the information in the records upon which to make a finding, and that information does not support the Public Body's claim of litigation privilege. Given this, I cannot find that the Public Body has met is evidentiary burden regarding its claim of litigation privilege over the information on page 81.

[para 136] The Public Body withheld portions of page 122 citing litigation privilege. Page 122 is part of a three-page briefing note comprising pages 121-123, dated July 9, 2018. Most of page 121 has been disclosed to the Applicant. The briefing is titled "For Decision about Off-Coal Transition Payments 2018".

[para 137] The briefing is very similar to that found at pages 28-31, discussed above. The issue set out in the briefing note is the payments to be made to three companies that are entitled to yearly payments relating to off-coal transitions, subject to compliance with their agreements. The companies' submissions having been received, the briefing note states that "a decision is now required to release this year's payment to the companies." The briefing note recommends that the Government of Alberta acknowledge that the companies have met the obligations of their agreements and remit the payments to the companies.

[para 138] The information withheld as privileged is one of four bullet points under the heading "Background of Issue." Other information in the briefing was withheld from the Applicant under other exceptions and so I cannot describe all of the information therein. However, the information immediately preceding and immediately following the paragraph withheld as privileged indicates that the information claimed as privileged relates to concerns that the company in litigation with the Public Body raised in its statement of claim. As such, it is not clear how the Public Body can claim privilege over this information. The Public Body did not provide any information or arguments detailing how this information was prepared for the dominant purpose of litigation. Given this context, I cannot find that the Public Body has met is evidentiary burden regarding its claim of litigation privilege over the information on page 122.

Conclusions regarding litigation privilege

[para 139] The evidence provided by the Public Body regarding its claim of litigation privilege over information in pages 63, 70, 71, 72 and 73 meets the requirements set out in *ShawCor* and is consistent with the test for finding litigation privilege applies.

[para 140] The evidence provided by the Public Body regarding its claim of litigation privilege over information in pages 29-31, 81 and 122 is insufficient to meet its evidentiary burden on a balance of probabilities. Therefore, I find that litigation privilege does not apply to that information.

Settlement privilege

[para 141] The Public Body withheld page 74 in its entirety, citing settlement privilege.

[para 142] The purpose of settlement privilege was discussed by the Alberta Court of Appeal in *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, at para. 21:

> Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because an admission of liability is often implicit as part of settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.

[para 143] The Court stated the "necessary elements that cloak a communication with settlement privilege" as (at para. 15):

> (a) the existence, or contemplation, of a litigious dispute;
> (b) an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed; and
> (c) the purpose of the communication must be to attempt to effect a settlement.

[para 144] I have discussed above the context of page 74, namely that the third party now involved in litigation with the Public Body had sent the Public Body a letter proposing a settlement. Pages 71-73, which were withheld in their entirety under litigation privilege, are described as a "briefing note to the Deputy Minister in regards to responding to a third party's position." Page 74 is described in the Public Body's index of records as a letter dated November 7, 2017 from the Public Body to the third party involved in the litigation, discussing a possible settlement or compromise. The affidavit of records states that the letter is marked "without prejudice."

[para 145] Given the context that the third party now involved in litigation with the Public Body sent a letter in September 2017 proposing a settlement, and the Public Body's evidence that page 74 is similarly an offer of settlement, I accept that the Public

Body has properly claimed settlement privilege over this page, on a balance of probabilities.

Conclusions regarding section 27(1)(a)

[para 146] The concerns I have raised above apply to pages 29-31, 81 and 122. The Public Body's evidence is insufficient for me to find that the Public Body properly claimed litigation privilege over these pages.

[para 147] The Public Body has also applied sections 27(1)(b) and (c) to information in these pages. The records indicate that section 24(1) has also been applied to some information. Earlier in this Order I noted that the Public Body has apparently made decisions with respect to the application of exceptions to the information in the records that have not been provided to me. As such, I will not order the Public Body to disclose this information to the Applicant. Rather, I will order the Public Body to review this information and respond to the Applicant without relying on section 27(1)(a).

[para 148] The evidence provided by the Public Body with respect to the remaining records meets the requirements set out in *ShawCor* and is consistent with the test for finding the claimed privilege applies. For these records, I find that the Public Body has established its claim of privilege.

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

[para 149] 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 150] This approach was discussed with approval in *EPS*, cited above.

[para 151] As I have found that the Public Body properly claimed solicitor-client privilege, its exercise of discretion to withhold that information can be presumed to be appropriate.

[para 152] The Public Body has not provided submissions regarding its exercise of discretion to apply section 27(1)(a). However, it is clear from case law that settlement privilege belongs to both parties to the settlement and that it cannot be unilaterally waived by one party (*Bellatrix Exploration*, at para. 26). This means that the settlement privilege belongs also to another party, and the Public Body cannot unilaterally exercise its discretion to waive the privilege and provide the Agreement to the Applicant.

[para 153] Further, the record withheld under settlement privilege may arguably have been withheld under section 27(2) of the Act, cited above. This provision requires a public body to withhold privileged information where the privilege belongs to a third

party. If that provision applies, a public body cannot exercise its discretion to withhold or disclose the information.

[para 154] As such, I am satisfied that the Public Body's decision to continue to withhold the information over which solicitor-client and settlement privilege was claimed is an appropriate exercise of its discretion.

V. ORDER

[para 155] I make this Order under section 72 of the Act.

[para 156] I find that the Public Body did not provide sufficient detail about the responsive records in its response to the Applicant to meet its obligation under section 12(1)(c)(i). As the appropriate detail has been provided to the Applicant in the course of this inquiry, the Public Body needn't provide a new response to the Applicant.

[para 157] I uphold the Public Body's application of section 27(1)(a) to some information in the records.

[para 158] The Public Body's evidence is insufficient for me to find that the Public Body properly claimed litigation privilege over pages 29-31, 81 and 122. I order the Public Body to review these records and respond to the Applicant without relying on section 27(1)(a).

[para 159] I will retain jurisdiction to review the Public Body's new response to the Applicant, should the Applicant ask me to do so. If the Applicant wishes to seek a review, they must inform this office within 30 days of receiving the Public Body's new response.

[para 160] If the Applicant seeks another review, the Public Body is to provide me with a copy of the unredacted records at issue in accordance with the usual inquiry procedures.

[para 161] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____

Amanda Swanek
Adjudicator