ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2023-D-01

August 8, 2023

ALBERTA HEALTH SERVICES

Case File Number 009619

Office URL: www.oipc.ab.ca

Summary: On March 12, 2018, the Applicant, a former employee of Alberta Health Services (the Public Body) requested records regarding his employment.

The Public Body responded to the Applicant, but severed information from the records under section 27(1)(a) (privileged information). The Applicant requested review.

The Adjudicator issued Order F2022-28 on June 8, 2022. This order directed the Public Body either to give the Applicant access to the information in the records or to provide detailed submissions for the inquiry covering the points in the Privilege Practice Note, and to meet its duty under section 56(3) of the FOIP Act by providing the records described by the Public Body as having been sent to or sent by the Applicant for my review.

The Public Body elected to provide detailed submissions for the inquiry covering the points in the Privilege Practice Note and to meet its duty under section 56(3) by providing records sent to or from the Applicant for the Adjudicator's review.

The inquiry reconvened. The parties provided both initial and reply submissions.

The Adjudicator sent a letter to the parties requesting further submissions regarding the Public Body's application of settlement privilege and the fact that it had not provided copies of records over which settlement privilege was claimed.

The Public Body requested a three-month extension to provide the requested submissions. The Adjudicator denied the requested extension with reasons.

The Public Body alleged bias by the adjudicator and denial of procedural fairness. The Public Body raised five issues of bias:

> 1. Did the framing by the Adjudicator, in her letter of May 31, 2023, of the issue of the application of section 56(3) of the FOIP Act to the records over which the Public Body claims settlement privilege effectively render a decision prior to the submissions of the parties, resulting in a reasonable apprehension of bias or a lack of procedural fairness, or both, in this Inquiry?
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> 2. Did the Adjudicator's request for submissions from the Public Body on the application of section 56(3) of the FOIP Act to the records over which the Public Body claims settlement privilege, prior to framing the issue and adding it as an issue in this Inquiry, result in a lack of procedural fairness in this Inquiry?
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> 3. Did the Adjudicator's rendering of a decision on the Public Body's extension request dated June 12, 2023, prior to the expiry of the Applicant's deadline to respond to such extension request, result in a reasonable apprehension of bias in this Inquiry?
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> 4. Did the Adjudicator's denial of the Public Body's request for an extension to the June 21, 2023 deadline result in a lack of procedural fairness in this Inquiry?
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> 5. Did the procedure directed by the Adjudicator for the Public Body to respond to the Adjudicator's May 31, 2023 correspondence absent an extension result in a lack of procedural fairness in this Inquiry?

The Adjudicator answered all five questions in the negative and determined that the Public Body had not established that it had been denied procedural fairness or that it had a reasonable apprehension of bias. The Adjudicator determined that the inquiry would proceed on the issues of whether section 56(3) of the FOIP Act required the Public Body to provide the records over which it claimed settlement privilege and whether the Public Body properly applied section 27(1)(a) to the information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, s. 56

Authorities Cited: AB: Order F2022-28 **ON:** PO-2899-R

Cases Cited: *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*, 2011 ABCA 108; *Lavesta Area Group Inc. v Alberta (Energy and Utilities Board)*, 2012 ABCA 84 (CanLII); (CanLII); *Summerside v. Maritime Electric et al*., 2015 PECA 1 (CanLII); *Big Loop Cattle Co. Ltd. v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302

I. BACKGROUND

[para 1] On March 12, 2018, the Applicant, a former employee of Alberta Health Services (the Public Body), made the following request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act):

> I am requesting all documents, notes and emails, where I am referred to by name or by initials for the
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> > 1) period of my employment starting with just before my employer's decision to place me on a performance improvement plan until and ending with AHS's decision to terminate my employment. The documents, notes and emails I am requesting will include all those relating to my employment, my health and private life. I have included the names of individual employees below who would have the information I am seeking, in addition to other individuals, at all levels of management who may have this information as well and;
> >
> > 2) period starting after my termination of employment pertaining to AHS attempts to make a severance payment to me and settle a settlement to avert any potential complaints or law suits I may have against them. I am particularly requesting information on all factors and individuals at all level of management who had any input into this matter.

[para 2] The Public Body located records, but severed information from them under sections 17 (disclosure harmful to personal privacy), 24 (advice from officials), and 27 (privileged information).

[para 3] On August 17, 2018, the Applicant requested review of the Public Body's decisions to sever information from the records at issue. The Commissioner agreed to conduct an inquiry.

[para 4] As the Public Body indicated that some of the records to which it had applied section 27(1)(a) were subject to solicitor-client privilege, the inquiry proceeded on the issue of section 27 as a preliminary issue.

[para 5] During the inquiry, the Public Body referred to two bundles of records labelled A and B, which it withheld from my review. Bundle A contained records over which it claimed both settlement privilege and litigation privilege. Bundle B was described as containing records over which it claimed both solicitor-client privilege and litigation privilege. The Public Body included communications to and from the Applicant in both Bundle A and Bundle B.

[para 6] I determined that there was inadequate evidence to support the Public Body's application of section 27(1)(a) to any of the information in the records and issued Order F2022-28 on June 8, 2022. In that order, I ordered the Public Body *either* to give the Applicant access to the information in the records *or* to provide detailed submissions for the inquiry covering the points in the Privilege Practice Note, and to meet its duty under section 56(3) of the FOIP Act by providing the records described by the Public Body as having been sent to or sent by the Applicant for my review.

[para 7] The Public Body informed me that it would comply with the option to provide more detailed submissions for the inquiry covering the points in the Privilege Practice Note and to meet its duty under section 56(3); however, in its initial submissions it stated:

> As part of its effort to fulfill its duty to accommodate and act in the most transparent way possible, AHS re-reviewed the records withheld from the Applicant and undertook a very liberal approach to disclosure. As a result, on July 20, 2022, AHS disclosed a further 175 records to the Applicant and another 5 records were disclosed to the Applicant on December 5, 2022. The Index of Records attached as Exhibit "A" to the

> affidavit of [an employee of the Public Body] does not include any of the records disclosed to the Applicant.

According to the description of records it provided for the inquiry, the Public Body withheld records numbered "14", "16", "21", "28", and "40" from my review for the second part of the inquiry, although the Applicant is listed as having either authored or received emails described as appearing on these records.

[para 8] The Public Body and the Applicant provided submissions for the inquiry.

[para 9] In its initial submissions for the inquiry, the Public Body argued that the "Privilege Practice Note" was not binding.

[para 10] The Public Body described four bundles of records in its submissions. "Bundle A" was described as containing records over which settlement privilege was claimed. "Bundle B" was described as containing records over which solicitor-client privilege was claimed. "Bundle C" was described as containing records over which section 19 of the FOIP Act was claimed. "Bundle D" was described as containing records severed under sections 24 and 25 of the FOIP Act. The Public Body made submissions regarding its application of these provisions to the bundles but did not provide the bundles for the inquiry.

[para 11] After I reviewed the submissions of the parties I wrote the parties and said:

> I have reviewed the submissions of Alberta Health Services. It states that the records in Bundle A are subject to "settlement privilege". It has declined to provide these records for my review on the basis that settlement privilege is now considered a "case privilege" (1). In other words, once the factors giving rise to the existence of this privilege are shown to be present, the records are presumptively privileged. Alberta Health Services also states that the "Privilege Practice Note" of this office is not binding, as is legislation.
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> I agree with Alberta Health Services that the "Privilege Practice Note" is not binding. The Privilege Practice Note is intended to interpret the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) as it relates to inquiries, in view of present case law, in order to assist parties to make their cases. The duty for a Public Body to produce records subject to privilege to the Commissioner arises from section 56 of the FOIP Act, which states:
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> > 56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act and the powers given by subsection (2) of this section.
> >
> > (2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

(1)This is a typographical error. The Court determined that settlement privilege is a "class" privilege rather than a "case" privilege.

> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).
>
> (4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, the head of that public body may require the Commissioner to examine the original at its site.
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> (5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.

In *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII), [2016] 2 SCR 521, the Supreme Court of Canada said the following regarding settlement privilege:

> Although solicitor client privilege and litigation privilege must be viewed as being conceptually distinct, the Court of Appeal noted that in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, this Court had written that the two rules "serve a common cause: The secure and effective administration of justice according to law" (para. 25, quoting Blank, at para. 31). As well, the Federal Court, the Ontario Court of Appeal and the Alberta Court of Appeal had held that litigation and/or settlement privilege cannot be abrogated without clear and explicit language (paras. 31-32). In the Court of Appeal's view, the same reasoning applies to the instant case.

As the Court considers that statutes cannot be interpreted as abrogating settlement privilege without clear and explicit language, the question becomes whether section 56(3) contains such language.

In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555, which was released on the same day as *Lizotte*, supra, the Court determined that solicitor-client privilege is not a "privilege of the law of evidence" within the terms of section 56(3) as it applies outside the evidentiary context of a court proceeding. The Court distinguished solicitor-client privilege from "settlement privilege", which operates only in the context of a court proceeding. The Court said:

> Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege of the law of evidence".

While the Court determined that solicitor-client privilege is not encompassed by the scope of section 56(3), it confirmed that records over which a public body claims settlement privilege clearly fall within its scope. In other words, Public Bodies continue to have a duty to provide records to which they have applied section 27(1) on the basis of settlement privilege or without prejudice privilege for the Commissioner's use in an inquiry. As the Supreme Court of Canada has directly commented on the scope of section 56(3), and found that it is sufficiently express for settlement privilege to fall within its terms, it is unclear that I have jurisdiction to find otherwise.

Despite the fact that section 56(3) of the FOIP Act applies to records over which a public body claims settlement privilege, Alberta Health Services has not yet met its duty to provide records over which it claims settlement privilege to the Commissioner. Again, the Supreme Court of Canada was clear in the University of Calgary case that settlement privilege is a "privilege of the law of evidence" and is an example of a privilege to which section 56(3) applies.

I note, too, that the records, as described, with the exception of a few records, are not obviously settlement communications. Rather, some of the records appear to be purely internal discussions of Alberta Health Services representatives.

In *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 (CanLII), [2013] 2 SCR 623 the Supreme Court of Canada clarified that settlement privilege applies to settlement agreements; however, it did not depart from the idea that settlement privilege applies to settlement negotiations. The Court said:

> Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:
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> . . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.
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> What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

The Court did not expand settlement privilege beyond settlement negotiations or the settlement agreement concluding the negotiations.

In addition, I note that the Alberta Court of Appeal has also restricted the application of settlement privilege to settlement communications between parties. In *Phoa v Ley*, 2020 ABCA 195 (CanLII), it held:

> Settlement privilege prevents communications being admissible where: (1) there is a litigious dispute in existence or within contemplation; (2) the communication is made with the express or implied intention that it would not be disclosed to the court in the event negotiations fail; and (3) the purpose of the communication is an attempt to effect a settlement: Calgary (City) v Costello, 1997 ABCA 281 at para 60.

The rationale underlying settlement privilege was explained 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.

Settlement privilege prevents a party from entering another party's settlement communications into evidence in Court. In this way, this privilege may be viewed as encouraging settlement.

It is unclear, based on Alberta Health Services' submissions and evidence, that the communications over which it is claiming settlement privilege, are, in fact, settlement negotiations, or were provided to another party as part of settlement negotiations. It is also unknown whether any of the communications were made with an understanding that they would not be put before the Court, assuming they are settlement negotiations.

I ask that Alberta Health Services provide Bundle A for my review in the inquiry. If it does not, I ask that it provide more fulsome argument as to why it does not have a duty to provide the records in Bundle A for my review. I will add the questions of whether Alberta Health Services has a duty to provide the records in Bundle A for my review in the inquiry and whether it has complied with it to the issues for inquiry.

I also ask that Alberta Health Services provide more fulsome submissions as to why it believes the records over which it is claiming settlement privilege, also known as "without prejudice privilege", are subject to this privilege. I ask that it also provide case law to support its claim.

In addition, I note that the Public Body described the contents of Bundles C and D, which it indicates have been withheld under section 19 (confidential evaluations) and sections 24 (advice from officials) and 25 (information harmful to economic and other interests of a public body). Those issues were not originally added to the inquiry. As it appears that the Public Body has not claimed privilege over bundles C and D, there does not appear to be any reason why the application of sections 19, 24, and 25 could not be decided in this inquiry so that the Applicant's requests for review and inquiry may be decided more expeditiously.

I ask that the Applicant and the Public Body indicate whether they are prepared to have the issues of whether the Public Body properly applied sections 19, 24, and 25 added to the inquiry. If so, I will add the issues to the inquiry and provide the parties the opportunity to make submissions. I would also ask that the Public Body provide those records to me for my review.

To summarize,

1. I ask that the Public Body provide Bundle A for my review, or provide submissions to explain why it is not under a duty to do so. If it elects to provide submissions, rather than the records, I will add the issue of whether section 56(3) requires it to provide the records to the inquiry.

2. I ask that the Public Body provide more detailed submissions as to why it believes the records over which it has claimed settlement privilege are subject to this privilege.

3. I ask that the parties inform me whether they wish to proceed with the issues related to Bundles C and D – that is, whether the Public Body has properly applied sections 19, 24, and 25 to the information in the records.

I ask that the parties provide the requested information no later than June 21, 2023. If the parties are in agreement that the inquiry should address Bundles C and D, I will update the Notice of Inquiry to include the new issues.

[para 12] On June 12, 2023 the Public Body requested an extension until September 22, 2023 to address the questions posed in my letter of May 31, 2023. It stated:

1. Legal counsel who now has conduct of this matter on behalf of the Public Body is newly employed by the Public Body and is entirely unfamiliar with this matter, including but not limited to the history of this matter at inquiry.
2. Legal counsel who previously had conduct of this inquiry on behalf of the Public Body is currently unreachable for an unknown duration for personal reasons.
3. Access to other individuals with whom incoming legal counsel will or may need to consult in order to familiarize herself with the file will be challenging given summer schedules.
4. Incoming legal counsel's ability to obtain instructions is or may also be curtailed by summer absences.
5. The history of this inquiry is lengthy and, in the overall context, the requested delay is not significant.
6. The number of records at issue in Bundle A is large and will require incoming legal counsel to dedicate a significant amount of time in order to become acquainted with them, conduct internal inquiries, conduct legal research and prepare submissions.

7. It is to the benefit of, and in the best interests of, not only the Public Body, but also the Applicant and the Commissioner, that the Public Body be in a position to provide a well-conceived response. Incoming legal counsel requires sufficient time in order to prepare such response.
8. Notwithstanding the requested extension, incoming legal counsel for the Public Body will endeavour to provide a response as soon as possible.

[para 13] On June 14, 2023, I denied the requested three-month extension. I said:

> In my view, the length of time requested is not supported by the application. While I am prepared to grant the Public Body some additional time if there is a concrete basis for doing so, it has not provided an adequate basis for receiving a three-month extension.
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> […]
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> I am not convinced that the requested extension would result in an insignificant delay or that it is in the best interests of the inquiry or the Applicant for the Public Body to receive a three month extension to provide answers to my questions. I find that the reasons provided for requesting the extension are speculative; that is, it is unknown, based on the application, whether the Public Body would actually require more time to answer the questions I posed in my letter.
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> I ask that the Public Body begin the process of answering my questions. For example, it may be able to answer the third question regarding sections 19, 24, and 25, without further consultation, given that it has already provided submissions and evidence regarding its application of these exceptions.
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> If the Public Body determines that it is necessary to interview individuals involved in the records to address my first two questions, it may then determine their availability and whether the information they can provide would assist it to address my questions. Once it has gathered information about the availability of employees with relevant information, and it believes it requires an extension, it may use that information to ground its extension request.
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> To summarize, I am denying the Public Body's extension request at this time. The Public Body is not precluded from requesting a shorter extension if it is able to establish that it reasonably requires more time.

[para 14] On June 21, 2023, the Public Body responded to my questions; however, in doing so, the Public Body alleged that I am biased and that it had been denied procedural fairness. It stated:

> Given the short timeframe to respond to the Adjudicator's letter, AHS has not provide instructions to legal counsel in respect of the Adjudicator's request for production of the Bundle A records over which AHS claims settlement privilege but does not claim solicitor client privilege. To be abundantly clear, it remains AHS' position that it will not produce to the Commissioner or the Adjudicator any of those records over which it claims solicitor client privilege, regardless of whether settlement privilege or any other exception to disclosure is also claimed. AHS cannot make submissions on the application of section 56(3) to records over which settlement privilege is claimed in a short timeframe and without the certainty of having the precise issue clearly stated in a formal update to the Notice of Inquiry.
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> […]
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> AHS respectfully raises concerns about a reasonable apprehension of bias on the part of the Adjudicator and about procedural fairness in this inquiry.
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> Given short timelines and the denial of AHS' extension request (discussed below), legal counsel for AHS has been unable to obtain instructions in respect of the production to the Adjudicator, or the withholding from her, of the records in Bundle A, being records over which AHS claims settlement privilege.

Notwithstanding the foregoing, AHS will not produce to the Adjudicator any records over which AHS maintains solicitor-client privilege in addition to settlement privilege, being those records that are common to both Bundle A and Bundle B as identified in Exhibit "A" to the […] Affidavit and in the […]Affidavit. [*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 ("University of Calgary")]

AHS cannot be expected to make submission in respect of this issue absent a clear statement of such issue set out in an amendment to the Notice of Inquiry. Specifically, on page 4 of her letter of May 31, 2023, the Adjudicator informally frames the issue as having two parts: the duty to provide the Bundle A records for her review and whether AHS has complied with that duty (which itself assumes the existence of the duty at issue); conversely, point number 1 of the summary at page 5 of her letter is silent as to compliance.

AHS has a right to have a clear issue posed to it in respect of which to make submissions in this inquiry, particularly given the sacrosanct nature of privilege in our legal system and the potentially severe outcomes for AHS if such privilege is abrogated.

[…]

Notwithstanding the foregoing, and contrary to the Adjudicator's assertion at page 4 of her letter that AHS has not claimed privilege over Bundles C and D, it is apparent upon review of the index of records being Exhibit "A" to the […] Affidavit that: (a) Records 1, 2, 3 and 6 of Bundle C are concurrently listed in Bundle A as being records over which AHS asserts settlement privilege in addition to the application of section 19(1) of FOIP; and (b) Records 1 to 10 (inclusive) and Records 13 to 16 (inclusive) of Bundle D are concurrently listed in Bundle A as being records over which AHS asserts settlement privilege in addition to the application of sections 24(1)(c) and 25(1) of FOIP.

[…]

At the conclusion of her letter, the Adjudicator:

> (a) Asks AHS to produce Bundle A, being records over which AHS claims settlement privilege, to the Adjudicator for her review, or, alternatively, to provide submissions as to why AHS is not under a duty to do so, in which case she indicates her intention to add the issue of whether section 56(3) of FOIP requires AHS to produce the Bundle A records to her in the inquiry;
> (b) Asks AHS to provide more detailed submissions as to its claim of settlement privilege; and
> (c) Asks the parties to advise whether they wish to proceed with AHS' application of sections 19, 24 and 25 of FOIP to the information in the records labelled as Bundle C and Bundle D, in which case she will also add these issues to the inquiry.

It is evident from the Adjudicator's comments reproduced in paragraph 48 above that she has, in effect, already made her decision on the application of section 56(3) of FOIP to the records in Bundle A *prior* to requesting AHS' submissions on this question and in advance of adding this as an issue in the inquiry. This is not procedurally fair and raises a reasonable apprehension of bias on the part of the Adjudicator.

[para 15] On July 5, 2023, I wrote the Public Body for clarification:

As allegations of bias may affect the fairness of an inquiry, the issue is one that I must decide prior to deciding the issues for the inquiry. That being said, it is unclear that the allegations in the letter of June 21, 2023 reflect the position of AHS, given the reference to a lack of client instructions. As a result, I must ask AHS whether it wishes to raise the issues of bias referenced in the letter of June 21, 2023. If AHS confirms that it is alleging bias, and also provides a clear statement of the issues it believes give rise to a reasonable apprehension of bias, I will decide the issue of bias prior to deciding the issues in the inquiry.

[para 16] The Public Body confirmed that its counsel has instructions to pursue its allegations of bias. In its letter of July 14, 2023 AHS proposed the following questions for me to answer:

> 1. Did the framing by the Adjudicator, in her letter of May 31, 2023, of the issue of the application of section 56(3) of the FOIP Act to the records over which the Public Body claims settlement privilege effectively render a decision prior to the submissions of the parties, resulting in a reasonable apprehension of bias or a lack of procedural fairness, or both, in this Inquiry?
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> 2. Did the Adjudicator's request for submissions from the Public Body on the application of section 56(3) of the FOIP Act to the records over which the Public Body claims settlement privilege, prior to framing the issue and adding it as an issue in this Inquiry, result in a lack of procedural fairness in this Inquiry?
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> 3. Did the Adjudicator's rendering of a decision on the Public Body's extension request dated June 12, 2023, prior to the expiry of the Applicant's deadline to respond to such extension request, result in a reasonable apprehension of bias in this Inquiry?
>
> 4. Did the Adjudicator's denial of the Public Body's request for an extension to the June 21, 2023 deadline result in a lack of procedural fairness in this Inquiry?
>
> 5. Did the procedure directed by the Adjudicator for the Public Body to respond to the Adjudicator's May 31, 2023 correspondence absent an extension result in a lack of procedural fairness in this Inquiry?

II. ISSUE: Has the Public Body established it has a reasonable apprehension of bias in the inquiry?

[para 17] In Order PO-2899-R, an Adjudicator of the Ontario Information and Privacy Commissioner found that a Ministry had not been denied procedural fairness by not being given the opportunity to provide a rebuttal.

> In *Baker v. Canada (Minister of Citizenship and Immigration*, 1999 CanLII 699 (SCC), [1999] S.C.J. No. 39, the Supreme Court of Canada held that the duty of fairness will vary according to the circumstances, but that those affected by a decision should be afforded the opportunity to put forward their views and their evidence fully. Justice L'Heureux-Dubé stated in the *Baker* case that:
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> > …the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd*., 1990 CanLII 132 (S.C.C.), [1990] 1 S.C.R. 282, per Gonthier J.
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> In *Forest Industrial Relations Ltd. v. I.U.O.E., Local 882*, [1961] S.C.J. No. 65, the Supreme Court of Canada held that the duty of fairness is not violated if a decision maker, having heard all the evidence, decides that a debate has gone on long enough and denies a party the right to reply to a reply [see also *Canada Post Corporation v. Canadian Union of Postal Workers*, 2007 BCSC 1702].
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> I find that the Ministry was afforded the opportunity to put forward its views and evidence fully in this appeal. Therefore, I find that the Ministry was not entitled to provide representations in reply to the appellant's representations and I dismiss this ground for reconsideration.

[para 18] In the foregoing case, the Adjudicator determined that procedural fairness required a Ministry to be afforded the opportunity to put forward its views and evidence fully, but did not require more than that.

[para 19] In *Summerside v. Maritime Electric et al*., 2015 PECA 1 (CanLII) the Prince Edward Island Court of Appeal reviewed decisions on procedural fairness and provided a helpful summary:

> Procedural fairness is a common law concept. A breach of procedural fairness is an error of law. Consideration of procedural fairness does not require an assessment of the appropriate standard of review. As a general statement, in the exercise of public powers administrative decision makers should act fairly in coming to decisions that affect the interests of individuals (*Dunsmuir*, at para.98). Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, at para.74). In the context of Summerside's application for a permit, fairness requires that a party who will be affected by a decision have an opportunity to make representations. To do that, the party must first be informed of the case to be met; otherwise the right to be heard cannot be effectively exercised. A tribunal decision should not turn on a matter on which a party made no representations because the party was not aware that matter was in issue (Blake, Sara: *Administrative Law in Canada* - Fifth Edition, (LexisNexis 2011), pp.36-37).

[para 20] Procedural fairness requires that the parties know the case to be met and be given the opportunity to meet it.

[para 21] In *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*, 2011 ABCA 108 (CanLII), Rowbotham J.A. in deciding to grant leave to appeal, said the following at paragraphs 16 – 17 regarding establishing a reasonable apprehension of bias:

> A reasonable apprehension of bias captures the requirement that justice be seen to be done: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 67, [2003] 2 SCR 259. The question is whether a reasonable, informed, person viewing the matter realistically and practically and having thought the matter through, would think it was possible that, consciously or unconsciously, the adjudicator would decide unfairly: *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369 at 394*,* 1976 CanLII 2; *RDS* at para 11. Put another way, the test for reasonable apprehension of bias is "whether a reasonable and right-minded person, with full knowledge of the facts, would have a reasonable apprehension that the [adjudicator] was biased in relation to this case?": *R v LaFramboise*, 1997 ABCA 172 (CanLII), 200 AR 75 at para 10, 34 WCB (2d) 501.
>
> Included in the analysis of reasonable apprehension of bias is the presumption of impartiality. The applicant must rebut this and as the respondents correctly point out, mere suspicion of bias is insufficient: *Boardwalk REIT LLP v Edmonton (City)*, 2008 ABCA 176 at para 29, 437 AR 199; *Lavesta Area Group v Alberta (Energy and Utilities Board)*, 2009 ABCA 155. The respondents point to the several reasons which the Commission gave for concluding that there was no reasonable apprehension of bias. The Commission's decision of course hinged in part on its conclusion that there had been no contravention of the guidelines. In this case, McGee was involved in hearing panels related to the transmission line during the proceedings which resulted in the EUB's conduct considered in Decision 2007-075. I am persuaded that the applicant has raised a *prima facie* meritorious ground of appeal. The issue of whether this raises a reasonable apprehension of bias is of significance to this action, and to the practice.

[para 22] In *Lavesta Area Group Inc. v Alberta (Energy and Utilities Board)*, 2012 ABCA 84 (CanLII) the Court of Appeal determined that a finding of bias may require evidence of a "closed mind".

> In determining if there is a reasonable apprehension of bias, it is relevant to note the alleged source of bias. Here it does not relate in any way to the personal conduct of Mr. McGee. He was not on the panel conducting the failed facility hearing that was sitting contemporaneously with the activities of the private security consultant, nor is it shown that he had any involvement in those activities. There is no evidence on this record that he has a closed mind, and that he is not able to fairly consider the matters before him. It is not suggested that there is any animosity between him and the participants in the hearing, nor is there any suggestion of pre-judging. His disqualification must depend on an absolute rule that anybody associated with the prior hearings will be reasonably apprehended to be biased. That is contrary to *Wewaykum Indian Band.*

[para 23] From the foregoing cases I understand that there is a presumption that an adjudicator is impartial. To establish bias, an applicant must rebut this presumption, and establish that a reasonable, informed person, viewing the matter realistically and practically, and having thought the matter through, would think it possible that consciously, or unconsciously, the adjudicator would decide unfairly or with a closed mind.

[para 24] With the foregoing cases in mind, I turn now to the Public Body's allegations of bias.

1. Did the framing by the Adjudicator, in her letter of May 31, 2023, of the issue of the application of section 56(3) of the FOIP Act to the records over which the Public Body claims settlement privilege effectively render a decision prior to the submissions of the parties, resulting in a reasonable apprehension of bias or a lack of procedural fairness, or both, in this Inquiry?

[para 25] I understand the Public Body to object to the following statement in my letter of May 31, 2023:

> I ask that the Public Body provide Bundle A for my review, or provide submissions to explain why it is not under a duty to do so. If it elects to provide submissions, rather than the records, I will add the issue of whether section 56(3) requires it to provide the records to the inquiry.

[para 26] I am unable to agree that my question raises a reasonable apprehension of bias. The Public Body was asked either to provide the records, or to explain why it was not under a duty to provide them as set out in section 56(3). By asking the Public Body to explain why it was not under a duty to provide them, it was given the opportunity to know the case to be met and to make representations regarding it. I answer this question in the negative.

2. Did the Adjudicator's request for submissions from the Public Body on the application of section 56(3) of the FOIP Act to the records over which the Public Body claims settlement privilege, prior to framing the issue and adding it as an issue in this Inquiry, result in a lack of procedural fairness in this Inquiry?

[para 27] As I understand this ground, the Public Body believes I should have added the issue of whether it is under a duty to provide records under section 56(3) to the inquiry and then

ask it for submissions regarding this duty. At the time I wrote the Public Body regarding section 56(3), it was unclear whether it disputed that it had a duty under section 56(3) to provide the records. There would be no benefit to adding the issue of the Public Body's compliance with section 56(3) if it had failed to provide records for my review due to an oversight. By writing the Public Body and inviting its submissions, I have learned that it does not believe section 56(3) authorizes me to demand the records it claims are subject to settlement privilege and its reasons for that position. I am unable to say that this ground give rise to an apprehension of bias. I answer this question in the negative.

3. Did the Adjudicator's rendering of a decision on the Public Body's extension request dated June 12, 2023, prior to the expiry of the Applicant's deadline to respond to such extension request, result in a reasonable apprehension of bias in this Inquiry?

[para 28] My letter of June 14, 2023 regarding the extension request speaks for itself. It was open to the Public Body to request an extension for a period of less than three months; it elected not to do so, but provided submissions without requesting an extension. I am unable to agree that my decision to deny a three-month extension gives rise to a reasonable apprehension of bias. It is unclear why the Public Body believes not waiting for the Applicant's response to its request resulted in unfairness to itself. I answer this question in the negative.

4. Did the Adjudicator's denial of the Public Body's request for an extension to the June 21, 2023 deadline result in a lack of procedural fairness in this Inquiry?

[para 29] As discussed under point 3, above, the Public Body was denied a three-month extension to make submissions. It was provided the opportunity to request an extension of less than three-months. It elected not to do so but provided submissions. I am unable to say that my decision has resulted in a lack of procedural fairness. The Public Body was made aware of the case to be met and was given the opportunity to make submissions regarding it. The Public Body made submissions. I answer this question in the negative.

5. Did the procedure directed by the Adjudicator for the Public Body to respond to the Adjudicator's May 31, 2023 correspondence absent an extension result in a lack of procedural fairness in this Inquiry?

[para 30] This ground appears to be a restatement of the previous ground. As discussed under point 3, above, the Public Body was denied a three-month extension to make submissions. It was provided the opportunity to request a shorter extension. It elected not to do so but provided submissions to answer my questions. I am unable to say that my decision has resulted in a lack of procedural fairness. I answer this question in the negative.

III. DECISION

[para 31] The Public Body has not established that it was denied procedural fairness or that it has a reasonable apprehension of bias. The inquiry will proceed.

[para 32] In *Big Loop Cattle Co. Ltd. v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302, Paperny J.A. denied leave to appeal a tribunal's decision regarding bias. She said:

> The applicants seek leave to appeal an interim decision of the Energy Resources Conservation Board (the "Board") dated March 16, 2009 wherein the Board concluded that the hearing of the Sullivan Field Proceeding should continue. The Sullivan Field Proceeding concerns Petro-Canada's application to drill sour gas wells, construct a multi-well gas battery facility, and construct and operate two pipelines near Longview, Alberta. The proceeding has been controversial, lengthy and complex. There have been 21 hearing days to date.
>
> The proceeding stood adjourned in February 2009 when a concern arose about a potential reasonable apprehension of bias after a Board technical employee declared a personal relationship with a Petro-Canada employee. The proceeding was suspended pending an investigation by the Board.
>
> […]
>
> The Sullivan Field Proceeding was commenced by Petro-Canada more than two years ago. The applicants are one of a number of groups of interveners. When the bias decision was made in March 2009, the Board had several outstanding matters before it and final argument on the merits of the application had not yet begun. The decision was that the proceeding would continue, in other words, the panel would decide the outstanding matters before it, hear final argument and ultimately make its decision on the merits of Petro-Canada's applications to drill wells and construct facilities in the Longview area. Those matters remain outstanding.
>
> In my view, this leave application is premature. This Court has regularly denied leave to appeal interim decisions of the Board and its predecessors (See ***BP Canada Energy Company v. Alberta (Energy and Utilities Board)***, 2004 ABCA 75, 30 Alta. L.R.(4th) 248, and ***Devon Canada Corp. v. Alberta (Energy & Utilities Board)***, 2003 ABCA 167, 3 Admin. L.R. (4th) 154). The reasons for this are several. First, the legislation does not specifically grant jurisdiction to instruct the Board prior to or midway through its processes. Moreover, this Court does not encourage litigation by installments. In most circumstances it is preferable, indeed highly desirable, that the Board complete its process and render its determination on the merits prior to review by this Court. This approach promotes appropriate use of scarce judicial and legal resources, timeliness, and a full and comprehensive disposition of the issues between the parties by the Board before an appeal is warranted.
>
> Having so determined, it is equally premature for this Court to opine on the merits of the proposed leave application on these grounds. Leave is denied pending the rendering of a final decision by the Board. This application is dismissed without prejudice to the applicants to renew it once that decision has been rendered.

The foregoing case deals with a statutory appeal; however, it sets out the procedure to be followed when bias is alleged under a statutory scheme. As in the foregoing case, the FOIP Act does not contemplate direction by the Court prior to the issuance of the final order. A decision regarding bias is an interim decision. Having decided that the Public Body has not been denied procedural fairness and does not have a reasonable apprehension of bias, I have decided to proceed to dispose of the following issues in a final order under section 72:

ISSUE A: Does section 56(3) of the FOIP Act require the Public Body to produce records to the Commissioner over which it claims settlement privilege, but not solicitor-client privilege?

ISSUE B: Did the Public Body properly apply section 27(1)(a) to the records?

[para 33] In deciding to hear these issues, I note that I have received the submissions of the parties regarding them. As the Public Body has now explained that the records it described as being subject to sections 19, 24, and 25 are also records to which it has applied section 27(1)(a), I have decided to review its decisions in relation to these provisions, if it is necessary to do so, once its claims of privilege have been adjudicated.

[para 34] Submissions are now closed. The order will be issued in due course.

_____
Teresa Cunningham
Adjudicator