ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-34

August 9, 2023

ALBERTA HEALTH SERVICES

Case File Number 009619

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Summary: On March 12, 2018, the Applicant, a former employee of Alberta Health Services (the Public Body) requested records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) 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 the Adjudicator's 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 Public Body refused to provide records over which it claimed settlement privilege. The Adjudicator added the issue of whether the Public Body was under a duty to provide

records over which it claimed settlement privilege to the Commissioner under section 56(3) of the FOIP Act.

The Public Body made allegations of bias and that it had been denied procedural fairness. In Decision F2023-D-01, the Adjudicator determined that the Public Body had not been denied procedural fairness and had not established that it had a reasonable apprehension of bias. She determined that the inquiry would proceed.

The Adjudicator determined that settlement privilege is a privilege of the law of evidence within the terms of section 56(3) and ordered the Public Body to provide the records over which it claimed settlement privilege, but not solicitor-client privilege, for the Adjudicator's review in the inquiry, pursuant to section 56(3).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act* R.S.A. 2000, c. F-25, ss. 17, 19, 24, 25, 27, 56, 72; **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 19

Authorities Cited: AB: Order F2022-28; Decision F2023-D-01 **PQ**: *Belzile c. Ministère de la Sécurité publique (Sûreté du Québec)*, 2020 QCCAI 115 (CanLII)

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555; *Communities Economic Development Fund v. Canadian Pickles Corp*., 1991 CanLII 48 (SCC), [1991] 3 SCR 388; *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 (CanLII), [2014] 1 SCR 800; *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII); *Daniels v. Wolfville (Town),* 2023 NSSC 126; *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd*., 2013 ABCA 10 (CanLII)

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
>
> > 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 provided disclosure of some 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 its application 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 that were being withheld from my review in the inquiry. 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 an email in the email chain described.

[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] I requested that the Public Body either provide the records over which it claimed settlement privilege, or provide submissions as to why it did not believe it was under an obligation to do so.

[para 12] The Public Body argued that it was not under a duty to provide records over which it claimed settlement privilege for the Commissioner's review. The Public Body also raised the issue of bias.

[para 13] In Decision F2023-D-01, I determined that the Public Body did not have a reasonable apprehension of bias and had not been denied procedural fairness. I confirmed that the inquiry would proceed on the issue of whether section 56(3) created a duty in the Public Body to provide the records for the Commissioner's review in the inquiry, and whether it had properly applied section 27(1)(a).

II. ISSUES

ISSUE A: Has the Public Body met its duty under section 56(3) to provide records for the Commissioner's review in the inquiry?

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

III. DISCUSSION OF ISSUES

ISSUE A: Has the Public Body met its duty under section 56(3) to provide records for the Commissioner's review in the inquiry?

[para 14] Section 56(3) of the FOIP Act requires public bodies to provide records for the Commissioner's review in an inquiry. Section 56 states:

> *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.

(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.

(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.

[para 15] Section 56(3) requires a public body to provide records for the Commissioner's review in an inquiry "despite any privilege of the law of evidence". In other words, even though a privilege of the law of evidence is claimed over, or applies to, the record, the Public Body must provide the record to the Commissioner for the inquiry.

[para 16] The Notice of Inquiry dated October 6, 2022 states:

> The Public Body is to provide an updated index of records that reflects its decisions following Order F2022-28.
>
> Records at Issue
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> As well, together with its initial submission, the Respondent is to provide the Commissioner's Office with one copy of the records at issue; where practicable, the Respondent is encouraged to provide this copy in electronic form (by way of secure email, maximum 20MB, or provision of a CD or USB device). Additional information about the form these records are to take is set out in the attachment Inquiry: Preparing Records at Issue.
>
> These copies of the records at issue should be separated from the initial submission, as they are for the Commissioner's use only and are not to be provided to the other parties.
>
> Records Redacted or Withheld as Privileged
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> The Respondent is not under an obligation to provide the information/records over which it is asserting solicitor-client privilege or litigation privilege.
>
> Where it is not providing such records/information, and the information is redacted on a page, the Respondent should provide one [copy] of such pages (where practicable, the Respondent is encouraged to provide this copy in electronic form (by way of secure email, maximum 20 MB, or provision of a CD or USB device). The Respondent must also note on the page, adjacent to the redacted information, that it is applying section 27(1)(a) or section 27(2).
>
> Blank pages of records withheld in their entirety as privileged need not be provided where there are large numbers of such pages, or where all the records are withheld as privileged, but it must be made clear in the Index of Records how many such pages there are, and which subsection of section 27 is being applied to each such page.

[para 17] Public bodies are required to provide the records at issue for the inquiry to assist the Commissioner in determining whether the public interest – reflected in the provisions of the FOIP Act -- is served by releasing the information in the records to an applicant or by authorizing or requiring the public body to withhold the information in the records.

[para 18] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555, (*University of Calgary*) the Supreme Court of Canada 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".

[para 19] As a consequence of this decision, the Commissioner is no longer able to review records over which public bodies claim solicitor-client privilege when determining whether the public interest requires public bodies to withhold or release information in records; however, the Commissioner continues to require records over which settlement privilege is claimed.

[para 20] The Public Body takes the position that it will not provide records over which it claims settlement privilege to the Commissioner for the inquiry, in addition to records over which it claims solicitor-client privilege.

[para 21] I note that there is case law in addition to *University of Calgary* addressing the question of whether settlement privilege is a privilege of the law of evidence. Again, section 56(3) applies to privileges of the law of evidence.

[para 22] In *Daniels v. Wolfville (Town),* 2023 NSSC 126, the Court determined that records over which a municipality claimed settlement privilege should be disclosed. The Court said:

> After the hearing, I asked the parties to provide further written submissions addressing whether common law settlement privilege is even available in the context of a statutory access to information regime, given that settlement privilege has been described as a rule of evidence that only operates in the evidentiary context of a court proceeding: see *Alberta v. University of Calgary*, 2016 SCC 53 at para.44. However, it is not necessary for me to address this issue, in light my conclusion that Part XX of the Act operates as an exception to settlement privilege.

[para 23] The Court in that case also rejected the argument that settlement privilege is based in, or part of, solicitor-client privilege, stating:

> Section 476 of the *Act* provides that the Town "may refuse to disclose to an applicant information that is subject to solicitor-client privilege."
>
> Similar language in other access to information statutes has been found to include litigation privilege: see *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para.4.
>
> The Town did not provide the Court with any authority for the proposition that the reference to solicitor-client privilege in s.476 also includes settlement privilege.
>
> The Town is incorrect when it asserts that "[s]ettlement privilege arises and follows from the provision of legal advice privilege and litigation privilege." Settlement privilege applies when the three-part test for settlement privilege is met, whether a party is represented by a lawyer or not.
>
> Solicitor-client privilege and settlement privilege are distinct concepts. Section 476 of the *Act* does not include settlement privilege.

[para 24] In *Belzile c. Ministère de la Sécurité publique (Sûreté du Québec)*, 2020 QCCAI 115 (CanLII) the Commission d'accès à l'information du Québec relied on *University for Calgary* as standing for the proposition that settlement privilege is not a substantive right:

> Appelée à trancher la question à savoir si le secret professionnel constitue un « privilège que reconnaît le droit de la preuve » au sens du Freedom of Information and Protection of Privacy Act, la Cour suprême du Canada a conclu que le secret professionnel est devenu une règle de fond, tout en précisant que d'autres catégories de privilèges, dont le privilège relatif aux échanges préalables à un règlement, ne s'appliquent que dans le cadre de la preuve dans une instance judiciaire :
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> > Étant donné que, maintes fois et avec constance, la Cour a considéré le secret professionnel de l'avocat plus comme une règle de fond qu'une simple règle de preuve, j'estime que l'expression [traduction « privilège que reconnaît le droit de la preuve » n'identifie pas comme elle le devrait les intérêts substantiels larges protégés par le secret professionnel de l'avocat. Cette expression n'est donc pas suffisamment claire, explicite et non équivoque pour traduire l'intention du législateur d'écarter le secret professionnel de l'avocat. À l'opposé, certaines catégories de privilèges, notamment le privilège relatif aux communications entre époux, celui qui intervient dans un contexte religieux et le privilège relatif aux échanges préalables à un règlement, ne s'appliquent que dans le cadre de la preuve dans une instance judiciaire. De tels privilèges sont assurément visés par l'expression « privilège que reconnaît le droit de la preuve ».
>
> La Commission s'est déjà prononcée à trois reprises sur l'application du privilège relatif aux règlements dans le cadre des demandes d'accès. Dans ses trois décisions[15], la Commission a conclu que le privilège relatif aux règlements n'empêchait pas l'exercice du droit d'accès prévu à l'article 9 de la Loi sur l'accès.

In the foregoing case, the Commission determined that the right of access applies to records over which settlement privilege is claimed.

[para 25] In *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 (CanLII), [2014] 1 SCR 800, the Supreme Court of Canada described settlement privilege in the following terms:

> Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. [My emphasis] Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

[para 26] The Public Body argues that the statement of the Supreme Court of Canada in *University of Calgary* regarding settlement privilege was not intended to be binding:

> The comments of the majority in *University of Calgary*, referred to by the Adjudicator regarding settlement privilege, were *obiter*. That is, the Supreme Court of Canada was not asked to determine the issue of the applicability of section 56(3) of FOIP to settlement privilege. Rather, the issue before the Court in that proceeding related to the applicability of section 56(3) to records over which solicitor-client privilege is claimed.

[para 27] I am unable to agree with the Public Body's characterization of the Supreme Court of Canada's decision in *University of Calgary*. The Court in that case was tasked with interpreting section 56(3) in accordance with the principles of statutory interpretation. One such principle is the presumption that the Legislature avoids superfluous provisions.

[para 28] In *Communities Economic Development Fund v. Canadian Pickles Corp*., 1991 CanLII 48 (SCC), [1991] 3 SCR 388 the Supreme Court of Canada explained this principle, stating:

> Section 9(7) prohibits, using mandatory language, the making of loans in contravention of the Act. In my opinion, the section can only be interpreted as evidence of the intention of the legislature to limit the wide grant of powers made in s. 26(2) of the Act. I am bolstered in my conclusion by the fact that the Act provides no sanction or remedy for a loan made in contravention of the Act and in violation of s. 9(7). If section 9(7) were interpreted to mean only that the appellant should not make loans in contravention of the Act, the section would be superfluous: the conclusion that the appellant should not make loans in contravention of the Act follows from the most basic of interpretive law principles. It is a principle of statutory interpretation that every word of a statute must be given meaning: "A construction which would leave without effect any part of the language of a statute will normally be rejected" (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 36). Accordingly, the prohibition in s. 9(7) of the Act should be interpreted so as to create a limit on the powers of the appellant. [my emphasis]

[para 29] If there are no "privileges of the law of evidence" that could apply in proceedings before the Commissioner, the Supreme Court of Canada's interpretation would not comply with this principle. If there are privileges of the law of evidence that

could be claimed over records in the custody or control of a public body, once solicitor-client privilege is removed from the scope of section 56(3), then the provision is not superfluous.

[para 30] If settlement privilege is not a privilege of the law of evidence, it is unclear that the phrase "any privilege of the law of evidence" in section 56(3) would serve any purpose. The duty in section 56(3) applies only to public bodies as defined in the FOIP Act. As public bodies are not individuals, they are unable to claim the protection of privileges regarding spousal communications or religious communications. Spousal and religious communications are the two other examples the Court provided of "privileges of the law of evidence."

[para 31] In *University of Calgary*, the Court determined that section 56(3) applies to records over which settlement privilege is claimed, but not records over which solicitor-client privilege is claimed. In my view, the decision of the Supreme Court of Canada regarding the correct interpretation of section 56(3) is binding on this office. In addition, this statement is consistent with the characterization of settlement privilege in *Union Carbide*, *supra*, which also holds that settlement privilege is a privilege "of the law of evidence".

[para 32] The Public Body's primary objection to producing records over which it has claimed settlement privilege is that it has also claimed solicitor-client privilege over some, but not all, of the same records. This was made clear in its submissions of June 21, 2023. The Public Body has withheld records 193 – 195, 731-733, 736, 746 – 747, 759 – 760, 769 – 770, 776 – 778, 781 – 782, 785 – 790, 793 – 797, 799, 1354 – 1367, 1370 – 1375, 1383, 1387 – 1388, 1389, 1397, 1400 – 1401, 1403 – 1405, and 1414 under both settlement privilege and solicitor-client privilege. Records 198 – 202, 203 – 207, 462 – 464, 579 – 583, 584 – 588, 592 – 595, 616 – 620, 621, 622 – 625, 626, 951 – 955, 1315 – 1325, 1345 – 1351, 1421 – 1424 are described as having been withheld on the basis of settlement privilege, but not solicitor-client privilege.

[para 33] I accept that I lack the authority to order production of records 193 – 195, 731-733, 736, 746 – 747, 759 – 760, 769 – 770, 776 – 778, 781 – 782, 785 – 790, 793 – 797, 799, 1354 – 1367, 1370 – 1375, 1383, 1387 – 1388, 1389, 1397, 1400 – 1401, 1403 – 1405, and 1414; however, the Public Body has not produced records 198 – 202, 203 – 207, 462 – 464, 579 – 583, 584 – 588, 592 – 595, 616 – 620, 621, 622 – 625, 626, 951 – 955, 1315 – 1325, 1345 – 1351, 1421 – 1424 despite the fact that it is claiming only a privilege of the law of evidence over them and not solicitor-client privilege.

[para 34] I find that section 56(3) requires the Public Body to provide records 198 – 202, 203 – 207, 462 – 464, 579 – 583, 584 – 588, 592 – 595, 616 – 620, 621, 622 – 625, 626, 951 – 955, 1315 – 1325, 1345 – 1351, 1421 – 1424 for the Commissioner's use in the inquiry, and it has not yet met this duty.

[para 35] As noted above, the Supreme Court of Canada was clear in *Union Carbide* that settlement privilege is intended to protect information *disclosed* in settlement negotiations so that it cannot be used against the disclosing party in litigation.

[para 36] If it is the case that the Commissioner must demonstrate that it is *necessary* to review records over which settlement privilege is claimed, prior to requiring them, for the following reasons I find that the Public Body's submissions, and its descriptions of the records in its affidavits, are not sufficient by themselves to support its claim of settlement privilege. Nevertheless, it remains possible that the public interest recognized by exceptions to disclosure would be served by withholding the records from the Applicant or that settlement privilege applies; however, I am unable to make such determinations without first reviewing the records. Again, the role of the Commissioner is to determine whether the public interest is served by disclosing or withholding records. It may be harmful to the public interest to do either without reviewing the records.

[para 37] The Public Body's descriptions of the records, and its submissions, indicate it has applied settlement privilege to records that do not contain communications between parties to litigation.

[para 38] The Public Body argues:

> It is generally accepted, and has been accepted by the Court of Appeal of Alberta, that a three-part test for settlement privilege must be met in order to prevent communications being admissible on that basis:
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> 1. A litigious dispute must be in existence or within contemplation;
> 2. The communication must be made with the intention, express or implied, that, in the event negotiations fail, it would not be disclosed to the Court; and
> 3. The purpose of the communication is to attempt to come to a settlement.
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> [Calgary (City) v. Costello, 1997 ABCA 281 at para. 60; cited with approval in *Phoa v. Ley*, 2020 ABCA 195 at para. 11, and in Bellatrix Exploration, supra at para. 15]
>
> Neither the presence nor the absence of the notation "without prejudice" is determinative in establishing the privilege. Rather, the communication must be in the furtherance of settlement for the privilege to attach. [Bellatrix Exploration, supra at para. 25]
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> Once the three-part test is met, the ambit of the privilege is broad and the exceptions narrow:
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> > As settlement privilege operates to preclude admission of evidence that might otherwise be relevant, it competes with the court's truth-seeking function. For that reason, courts must ensure the communications come within the tripartite test before applying the privilege.
> >
> > However, once that test is met, the privilege must be given broad scope and attach not only to communications involving offers of settlement but also to communications that are reasonably connected to the parties' negotiations. The privilege belongs to both parties and cannot be unilaterally waived or overridden by either of them: see Hansraj at para 13.
> >
> > …
> > In other words, the rule's protection is not meant to be limited to the prejudice that an admission may have at trial specifically, but on the potential impairment on settlement

> discussions as an important element of the litigation process generally. Accordingly, for the rule to operate properly, not only must the ambit of the settlement privilege be broad, but the exceptions to the exclusionary rule must be narrowly construed and only be given effect where another policy objective can be shown to outweigh any impact that may arise to the settlement objective.
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> [*Bellatrix Exploration*, supra at paras. 26, 28 (emphasis added)]
>
> The privilege "is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application...." [*Middelkamp v. Fraser Valley Real Estate Board* (1992), 1992 CanLII 4039 (BC CA), 96 DLR (4th) 227 (BCCA)]
>
> Documents prepared to assist with settlement discussions fall within the "zone of privacy" protected by settlement privilege. [Ontario (Liquor Control Board) v. Magnotta Winery Corp., 2010 ONCA 681 ("Magnotta") at para. 45]
>
> It is respectfully submitted that internal communications, discussions, deliberations, research, calculations and other preparations expansively characterized that are undertaken behind the scenes by representatives of one of the parties towards formulating or reaching that party's position, proposal, response, options, strategy, risk tolerance and ultimate communications to the opposing party in the pursuit of settlement fall within the "zone of privacy" identified by the Ontario Court of Appeal in *Magnotta* [supra at para. 45],and fall within the "broad scope" of the privilege as being "reasonably connected to the parties' negotiations" per the Alberta Court of Appeal in *Bellatrix Exploration* [*supra* at para. 26].
>
> The settlement privilege would be hollow if the communications themselves are privileged but the background internal discussions and work product created for and used in formulating the communications aimed at settlement are not privileged.

[para 39] The cases the Public Body points to as supporting its position that its own internal communications and calculations are subject to settlement privilege do not provide any such support.

[para 40] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII), to which the Public Body refers, addresses an access request for a mediated settlement. The Ontario Court of Appeal found that the mediated settlement agreement fell within the terms of section 19 of Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 19. which states:

> *19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.*

In the foregoing case, the Ontario Court of Appeal determined that materials prepared by Magnotta and delivered to Crown counsel for Crown counsel's use in settlement negotiations were "prepared by or for Crown counsel for use in litigation". The Ontario Court of Appeal determined that mediation is part of litigation. The Court of Appeal did not suggest that settlement privilege applies to communications not exchanged by parties. In addition, the Court of Appeal did not suggest that records over which settlement

privilege is claimed should not be provided to the Ontario Information and Privacy Commissioner.

[para 41] In *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd*., 2013 ABCA 10 (CanLII), in addition to the remarks cited by the Public Body, the Court of Appeal also said the following regarding the purpose and scope of settlement privilege:

> 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.(My emphasis)
>
> Other justifications for the rule have been offered, including the notion that an implied contract is created between negotiating parties, such that any admissions made in their discussions will be considered confidential. While this theory has often been rejected as being problematic and not well-founded, it has received some recent acceptance in the English case law, which was expanded upon by the Newfoundland Court of Appeal in ***Meyers***.
>
> Alberta courts have adopted the public policy rationale for the rule: see ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1990), 1990 CanLII 5494 (AB KB), 105 AR 4, 72 Alta LR (2d) 330, aff'd 1990 ABCA 189 (CanLII), 74 Alta LR (2d) 271, [1990] 5 WWR 377 (CA). See also ***Costello*** at para 94; ***Hansraj v Ao***, 2002 ABQB 385, 314 AR 262, rev'd on other grounds 2004 ABCA 223, 354 AR 91. This approach is consistent with the underlying objective that the parties should be permitted to freely "put all their cards on the table" without having to worry that they may be prejudiced should negotiations fail to resolve their dispute.

[para 42] I am unable to accept the Public Body's position that *Bellatrix* extends settlement privilege beyond settlement communications between the parties.

[para 43] It is not the role of the Commissioner to extend the application of privilege beyond that recognized by the Court. The role of the Commissioner is to determine whether section 27(1)(a) applies to information withheld from an applicant on the basis of a privilege recognized by the Court.

[para 44] The submissions of the Public Body are not sufficient for me to find that settlement privilege applies to the records as they have been described to me. It may be the case that the information in the records themselves supports the Public Body's claim. As I have found that section 56(3) applies to records over which settlement privilege is claimed, I have decided that I must require the Public Body to provide the records over which it has claimed settlement privilege, but not solicitor-client privilege, so that I may decide the issue of whether section 27(1)(a) applies to records 198 – 202, 203 – 207, 462 – 464, 579 – 583, 584 - 588, 592 – 595, 616 – 620, 621, 622 – 625, 626, 951 – 955, 1315 – 1325, 1345 – 1351, and 1421 – 1424.

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

[para 45] I have decided to reserve my decision regarding the Public Body's application of section 27(1)(a) until I have reviewed the records over which it has claimed settlement privilege, but not solicitor-client privilege. The evidence provided by the records will assist me to determine whether the Public Body has properly applied section 27(1)(a) to the records over which it has claimed settlement privilege.

IV. ORDER

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[para 46] I make this Order under section 72 of the Act.

[para 47] I order the Public Body to meet its duty under section 56(3) to produce records 198 – 202, 203 – 207, 462 – 464, 579 – 583, 584 - 588, 592 – 595, 616 – 620, 621, 622 – 625, 626, 951 – 955, 1315 – 1325, 1345 – 1351, 1421 – 1424 to the Commissioner.

[para 48] I order the Public Body to produce the foregoing records to the Commissioner within 50 days of receiving this order.

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Teresa Cunningham
Adjudicator
/bah