**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER**

# ORDER P2023-09

October 20, 2023

**ASSOCIATION OF ACADEMIC STAFF OF THE UNIVERSITY OF ALBERTA**

Case File Number P2840

**Office URL:** www.oipc.ab.ca

**Summary:** Pursuant to the *Personal Information Protection Act* (PIPA or the Act), an individual (the Applicant) requested a copy of his entire file from the Association of Academic Staff of the University of Alberta (the Organization).

The Organization responded to the Applicant's request and provided him with some responsive records and withheld other information on the basis that one or more of sections 24(2)(a), 24(2)(c), 24(2)(d), 24(3)(b), and 24(3)(c) applied, or that the information was non-responsive as it was not his personal information.

The Applicant requested a review and subsequently an inquiry into the Organization's response, as well as whether the Organization had responded within the time limit set out in section 28(1) of the Act, and whether its response met the requirements set out in section 29(1) of the Act.

During the course of the inquiry, the Organization modified the privileges on which it had withheld some of the information under section 24(2)(a), applied section 4(3)(k) to some of the information it had withheld under section 24(2)(a), and determined that information in one record which it had initially withheld with reference to litigation privilege under section 24(2)(a), was actually non-responsive as it did not contain the Applicant's personal information.

The Adjudicator found that with the exception of the Applicant's name, the information in the one record the Organization initially withheld under litigation privilege and subsequently determined was non-responsive, was non-responsive. The Adjudicator determined it would not be reasonable to require the Organization to redact the non-responsive information solely to provide the Applicant with his name where it appeared in the record.

The Adjudicator found that the Organization had properly applied section 4(3)(k) to the four records previously withheld under litigation privilege.

The Adjudicator found that the Organization had established on a balance of probabilities that solicitor-client privilege applied to the Applicant's personal information in the records it withheld on this basis under section 24(2)(a) of the Act.

The Adjudicator found that the Organization had established on a balance of probabilities that litigation privilege applied to some but not all of the records over which it had asserted litigation privilege pursuant to section 24(2)(a) of the Act. The Adjudicator found that section 24(2)(c) of the Act applied and permitted the Organization to withhold those records for which its assertion of litigation privilege failed.

The Adjudicator found that the Organization had established on a balance of probabilities that settlement privilege applied to the Applicant's personal information in the records it withheld on this basis under section 24(2)(a) of the Act.

The Adjudicator found that the Organization had properly applied section 24(2)(c) to withhold the Applicant's personal information in the records in the First Group of Records provided to the Adjudicator for review, and that section 24(3)(c) applied to permit the Organization to withhold the Applicant's personal information in the records in the Second Group of Records provided to the Adjudicator for review.

The Adjudicator found that the Organization had not complied with the time deadline for providing a response to the Applicant under section 28 of the Act, and had not included all of the information required under section 29(1) of the Act in its response; however, as the Organization had already responded, there was nothing further for the Adjudicator to order.

**Statutes Cited: AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 4, 24, 28, 29, 31, 49, 51, 52 and 59; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4; *Alberta Rules of Court* (AR 124/2010), s. 5.8; and *Alberta Rules of Court Amendment Regulation* (AR 36/2020), s. 6.

**Statutes Cited: BC:** *Personal Information Protection Act*, SBC 2003, c 63, ss. 1, and 23(3).

**Orders Cited: AB:** Orders P2006-004, P2006-005**,** P2007-002**,** F2007-021, P2010-017, P2012-09, P2015-05, P2016-01, P2016-03, P2022-06, F2004-026, and F2014-49.

**Decisions Cited: AB:** Decision P2011-D-003.

**Orders Cited: BC:** Order P10-02.

**Cases Cited:** *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Leonardis v. Leonardis*, 2003 ABQB 577, *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37*, Bellatrix Exploration Ltd v Penn West Petroleum Ltd.*, 2013 ABCA 10, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, *Canadian Natural Resources Limited v. ShawCor Ltd.,* 2014 ABCA 289, *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, *Alberta v. Suncor Energy Inc*., 2017 ABCA 221, and *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10.

## I. BACKGROUND

[para 1] The Applicant was a member of the academic staff of the University of Alberta (the University) until January of 2014. As a member of the academic staff, he belonged to the Association of Academic Staff of the University of Alberta (the Organization or the AASUA). His employment relationship with the University was governed by a collective agreement between the University and the Organization.

[para 2] On March 20, 2014**,** the Applicant requested a copy of his entire AASUA file from the Organization.[1]

[para 3] On April 17, 2014, the Organization asked the Applicant to clarify his request. In particular, it stated:

> Section 26 of PIPA indicates that the request for information is to set out sufficient detail to enable an organization with a reasonable effort to identify the information for which the written request is made. As you are aware, you have regularly been provided with copies of materials. In addition, AASUA has a file that dates back many years with respect to yourself. We query whether you want any and all documents or specific documents to specific issues. The effort to review the files to ensure that personal information about others is not disclosed will require substantial effort by AASUA. Further, the AASUA will need to determine whether the "records" meets one of the exceptions to disclosure that are contained in sections 24(2) and 24(3) of PIPA…
>
> You have been provided with relevant documentation throughout our representation of you on various matters over numerous years. Asking for the "entire AASUA file" is an unreasonable request and an unreasonable interference with AASUA operations.
>
> I ask that you provide me with sufficient detail to enable to identify what documents you are requesting.

[para 4] On May 13, 2014, the Applicant advised the Organization that he wanted his entire file but no duplicate records needed to be produced. He stated, in part:

[1] Applicant's access request dated March 20, 2014 (the access request).

> As you are aware, the University revoked my CCID and I am being denied access to years of email, the mail servers and computers. I have repeatedly asked AASUA to address this matter.

[para 5] On May 16, 2014, the Organization asked the Applicant to provide more detail about the information he wanted to receive. On May 16, 2014, the Applicant replied, stating in part:

> I have repeatedly advised you in writing that I need the entire file because the AASUA has done nothing about getting my access to my email and my electronic files restored, and done nothing about retrieving the files which were confiscated from my university offices.
>
> Your email is misleading because you do not respond to these points. I have asked AASUA for many months now to get my access to this material and you did nothing except convey to me the university's refusal to give me access to my files. This is all documented.
>
> Once again, I am asking for my rightful and lawful access to my AASUA file.

[para 6] On May 21, 2014, the Organization wrote to the Applicant and stated in part:

> As you have chosen not to provide any specificity in your request, I am advising you of a 30 day extension that is now in place.
>
> This is a result of receiving:
>
> - Insufficient detail in your request;
> - The large amount of information that now must be searched, procured, copied and placed in chronological order (which is underway);
> - There is a need to further consult with our counsel in relation to adhering to the PIPA guidelines.

[para 7] On June 21, 2014, the Organization informed the Applicant that it would be providing him with a copy of the file from March 2010 to present (June 20, 2014) and stated:

> All exclusions under PIPA are noted on the file copy. The number of pages and the date of the document severed is provided for each individual exclusion.

[para 8] The Organization advised the Applicant it would ship the file on Monday (June 23, 2014) and asked the Applicant where he would like it shipped to. The Applicant provided an address for shipping. On June 23, 2014, the Organization advised it would ship the file to the address provided by the Applicant.

[para 9] The Organization withheld some information pursuant to sections 24(2)(a) (legal privilege), 24(2)(c) (information collected for an investigation or legal proceeding), 24(2)(d) (will result in information no longer being provided), 24(3)(b) (information revealing personal information about another individual), 24(3)(c) (information revealing the identity of a person who provided an opinion in confidence), and because some information was not the Applicant's personal information and therefore the Act did not apply to it.

[para 10] On August 7, 2014, the Applicant requested a review by this Office of the Organization's response to his access request. The Commissioner authorized mediation and investigation.

[para 11] On May 25, 2015, the Organization disclosed further records to the Applicant.

[para 12] The Applicant was not satisfied with the Organization's response and, on March 10, 2016, this Office received the Applicant's Request for Inquiry.

[para 13] The Commissioner decided to conduct an inquiry and delegated her authority to an adjudicator to conduct the inquiry. Subsequently, the Commissioner re-delegated her authority to me to conduct the inquiry.

## II. RECORDS AT ISSUE

[para 14] The Organization originally withheld 525 records, comprised of 5900 pages, under section 24(2)(a), asserting various forms of privilege applied to these records.[2] The Organization did not provide these records to me for review on the basis that they were subject to privilege.

[para 15] During the inquiry, the Organization advised that it was changing its reasons for withholding some of the records it had withheld under section 24(2)(a), but was still withholding these records from the Applicant. Specifically, in its letter dated September 24, 2020 addressed to me and to the Applicant, the Organization stated, in part:

- The AASUA no longer asserts litigation privilege over records (1 record consisting of 3 pages) in Bundle 1 which contain information it received from the University. The records will not be disclosed to you because upon re-review, the records do not contain your personal information and so are not responsive. (Re: page 4, paragraph 6 of the AASUA's March 11, 2020 letter);

. . .

- AASUA no longer asserts litigation privilege over documents in Bundle 9 that were contained in a court file (4 records consisting of 167 pages). The records will not be disclosed to you because the Personal Information Protection Act does not apply to personal information in a court file (s 4(k)). (Re: page 7, paragraph 6, of the AASUA's March 11, 2020 letter).[3]

[para 16] I do not have the power to make decisions respecting access to records subject to section 4(3)(k), and records that do not consist of the Applicant's personal information would not be subject to the Act. Therefore, by way of a letter dated December 23, 2021 I asked the Organization to provide me with the records described in paragraph 15 for my review and informed the parties that I was adding the following two issues to the inquiry:

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[2] General Counsel's Exchanged Affidavit at paras. 43 and 44.

[3] I assume the Organization meant to cite section 4(3)(k) as that is the section of the Act which states that the Act does not apply to personal information contained in a court file.

- Did the Organization properly withhold as non-responsive one record (consisting of three pages), which it originally asserted was subject to litigation privilege and then withdrew this exception?

- Does section 4(3)(k) (information in a court file) of the Act apply to the four records (consisting of 167 pages), relative to which the Organization has now withdrawn its earlier claim of litigation privilege?

[para 17] On January 21, 2022 the Organization provided me with the aforementioned records as I had requested. It provided the following clarification in its cover letter, which was copied to the Applicant, with respect to the one record from Bundle 1:

> a. From Bundle 1, one record consisting of 2 pages that do not contain the Applicant's personal information, over which litigation privilege was initially asserted. In our letter to you of March 11, 2020, and our letter to the Applicant September 24, 2020, we misidentified this as a record consisting of 3 pages that had been received from the University. You will see that it is actually a record consisting of 2 pages, addressed to the University. We apologize for the error.

[para 18] I have added the issues identified in paragraph 16 above as issue numbers 5 and 6 in this inquiry.

[para 19] In addition to the aforementioned records, the Organization withheld 47 records, comprised of 140 pages from the Applicant. The Organization asserted that section 24(2)(c) applied to all of the records and, in some cases that sections 24(2)(d), 24(3)(b) and/or 24(3)(c) also applied to these records. It identified these records in its Index of Records which was exchanged with the Applicant, and provided these records to me for my review (The First Group of Records Provided for my Review).

[para 20] Subsequently, in response to my enquiry as to whether the Organization had provided me with copies of all of the records it had withheld from the Applicant (that it had not claimed privilege over), the Organization provided me an additional 24 records comprised of 66 pages which it had withheld from the Applicant, citing the application of one or more of sections 24(2)(d), 24(3)(b), and 24(3)(c).[4]

[para 21] In light of the foregoing, the records at issue in this inquiry are the portion of the records containing the Applicant's personal information which were withheld by reference to section 24 of the Act, the one record withheld on the basis that it does not contain the Applicant's personal information and is therefore non-responsive, and the four records which the Organization asserted were outside of the scope of the Act pursuant to section 4(3)(k) of the Act.

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[4] Letter to Parties dated September 26, 2022 and Organization's Letter to Applicant and me dated October 14, 2022. While the Organization indicated it had provided me with 23 records comprised of 55 pages, by my count, the Organization provided me with 24 records comprised of 66 pages.

[para 22] I note that while the Organization seemed to treat the entirety of the records at issue as responsive, the only information that can be responsive to an access request under PIPA is the Applicant's personal information. I have no authority under the Act to order the Organization to disclose any information that is not personal information about the Applicant.

## III. ISSUES

[para 23] The issues for this inquiry as set out in the Notice of Inquiry issued by the former adjudicator dated April 10, 2017, and amended by me, are as follows:

1. Is the information the Applicant requested his personal information to which he may request access under section 24(1)(a) of PIPA?

2. If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,

    a. Did the Organization properly apply section 24(2)(a) (legal privilege) to any of the withheld information?

    b. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to any of the withheld information?

    c. Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to any of the withheld information?

    d. Does section 24(3)(b) (information revealing personal information about another individual) apply to any of the withheld information?

    e. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to any of the withheld information?

3. Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

4. Did the Organization comply with section 29(1) of the Act (contents of the response)?

5. Did the Organization properly withhold as non-responsive one record (consisting of three pages), which it originally asserted was subject to litigation privilege and then withdrew this exception?

6. Does section 4(3)(k) (information in a court file) of the Act apply to the four records (consisting of 167 pages), relative to which the Organization has now withdrawn its earlier claim of litigation privilege?

## IV. PRELIMINARY MATTERS

*Scope of Inquiry*

[para 24] For clarity, the Applicant made an access request for his personal information to the AASUA. The AASUA is the only respondent in this inquiry. The University is not a respondent in this inquiry. Further, any complaints the Applicant made to the AASUA regarding the University revoking his CCID and denying him access to his email, the mail servers and computers, and his allegation that the AASUA had "done nothing about getting my access to my email and my electronic files restored, and done nothing about retrieving the files which were confiscated from my university offices" are outside the scope of this inquiry and my jurisdiction.

*Inquiry is de novo*

[para 25] Along with his Request for Inquiry, the Applicant provided a letter which he sent to the Senior Information and Privacy Manager (the SIPM) assigned to investigate and mediate this file.[5] In the letter, he referred to the recommendations made by the SIPM during the investigation and mediation stage of this file. He referred to the recommendations of the SIPM again in his submission in this inquiry dated July 9, 2020.

[para 26] Previous Orders of this Office have confirmed that an inquiry is a *de novo* process. Therefore, I will not be considering the SIPM's findings or recommendations in reaching my conclusions on the issues in this inquiry.[6] I would note, however, that SIPMs are authorized by the Commissioner under section 49 of the Act "to investigate and attempt to mediate and, where possible, to mediate a settlement of any matter under review or relating to a complaint"; they are not, as the Applicant appears to believe, authorized to issue a directive to, or to order, an organization to comply with any recommendation they make.

## V. DISCUSSION OF ISSUES

### 1. Is the information the Applicant requested his personal information to which he may request access under section 24(1)(a) of PIPA?

[para 27] Personal information is defined in section 1(1)(k) of the Act as "information about an identifiable individual.

[para 28] Section 24(1)(a) of the Act states:

> *24(1) An individual may, in accordance with section 26, request an organization*
>
> *(a) to provide the individual with access to personal information about the individual, or*

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[5] Applicant's letter dated March 7, 2016 attached to his Request for Inquiry.

[6] See, for example, Orders P2010-017 at para. 7 and P2015-05 at para. 20.

. . .

[para 29] On March 20, 2014, the Applicant wrote an email to an employee of the Organization stating:

> I am directing you to give me a copy of my entire AASUA file BEFORE the MAC meeting. Please let me know when I can send someone to pick it up.

[para 30] As noted above, the Applicant was a member of the Organization. The Organization administers the rights of staff members (including the Applicant) under the Faculty Agreement. In its submissions, the Organization notes that it had a long and involved relationship with the Applicant due to various complaints or grievances made by and about him. As such, the Applicant's "entire AASUA file" would contain his personal information, such as his name and employment history as well as other personal information about him.

[para 31] Therefore, when the Applicant requested his "entire AASUA file", it is reasonable to conclude that this file would include his personal information which he may request under section 24(1)(a) of the Act. As will be discussed below, it is also possible that his "entire AASUA file" contained some and possibly a considerable amount of information which is not his personal information, and which he is not entitled to under the Act.

[para 32] The Organization submitted that the Applicant requested more information than he was entitled to when he requested a copy of his "entire AASUA file". It stated that under PIPA, the Applicant's right of access was limited to his personal information and was further limited by the exceptions set out in section 24, and by what is reasonable.[7]

[para 33] The Organization is correct in this regard. Previous Orders of this Office have confirmed that the Act only permits an individual to request that an organization provide the individual with *their own* personal information.[8]

[para 34] The Act does not give an individual any right to ask for someone else's personal information. Nor does the Act give an individual the right to ask an organization for information that is simply not personal information.

[para 35] Further, section 24(2) of the Act sets out the situations in which an organization *may choose* to withhold an applicant's personal information, and section 24(3) sets out the situations in which an organization *must* withhold an applicant's personal information.

[para 36] Additionally, section 24(1.1) provides that an organization is to take into consideration what is reasonable when providing an applicant with their personal information.

[para 37] The Organization noted that "personal information" is defined as "information <u>about</u> an identifiable individual".

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[7] Organization's initial submission dated July 10, 2017 at paras. 19 & 20.
[8] See, for example, Order P2022-06 at para. 22.

[para 38] Citing the decision of former Commissioner Work in Order P2006-004 at paragraph 12, the Organization stated:

> 22. The Commission has repeatedly stated that the term "about" as used in the definition [this definition] is a "highly significant restrictive modifier" in that "about" [the Applicant] is a much narrower idea than "related" to [the Applicant]. Information generated or collected in consequence of some action on the part of, or associated with, [the Applicant] and is connected to him in some was is not necessarily "about" [the Applicant].

[para 39] The Organization stated that much of the information at issue was information collected as a consequence of the Applicant's complaints or complaints made by others about the Applicant. [9] The Organization argued that this information would not be the Applicant's personal information under the Act as it was related to him, but not about him.

[para 40] In Order P2006-004 former Commissioner Work found that information collected by the Law Society in response to a complaint made by an applicant was not the applicant's personal information as it was "related" to the applicant but not "about" the applicant. At paragraphs 10 - 12 he stated (emphasis in original):

> [para 10] I do not regard those of the A/C's information requests that are the subject of this order as requests for his personal information under PIPA. Though at some stages the A/C's information requests used the language of PIPA, the information he sought and received was not for his "personal information" as I interpret the scope of that term in the context of the Act. Rather, it was for more general information – the complaint files and appeals binders pertaining to his complaints under the *Legal Profession Act.* Though these documents included some of the A/C's personal information, they also included much information that was not his personal information. In my view, the information exchange that was done was pursuant to the Law Society's own legislation and rules, and as a function of its duty to be fair to the parties, rather than under PIPA. I do not have jurisdiction over what the Law Society decided to provide to the A/C or to withhold from him under its own processes. Although in severing or withholding certain information, the Law Society also used the language of PIPA, it did not need to do this. It had authority under the *Legal Profession Act* and its own rules enacted thereunder, to both disclose and withhold information. It does not follow from the fact that it cited the PIPA exceptions that the Law Society was bound to observe the PIPA rules in choosing what information it was necessary to provide and what it could withhold under its own processes. Therefore, I have no jurisdiction to review its decision. Any review of that decision could only be done by the courts.
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> [para 11] My jurisdiction over information requests under the *Personal Information Protection Act* is limited to access requests *for personal information*. Sections 24 and 46(1) of the Act combine to confer my jurisdiction. They provide:
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> > *24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:*

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[9] Organization's initial submission at para. 26.

> *(a)* ***the individual's personal information*** *where that information is contained in a record that is in the custody or under the control of the organization;*
>
> *46(1) An individual who makes a request to an organization* ***respecting personal information about that individual*** *may ask the Commissioner to review any decision, act or failure to act of the organization.* [emphasis added]
>
> [para 12] The Act defines "personal information" as "information about an identifiable individual". In my view "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily "about" that person. In this case, only a part of the information that the A/C asked for was information "about" him. Had he relied on PIPA to obtain information, he would not have received much of the information that was made available to him under the *Legal Profession Ac*t and the Rules created thereunder, or pursuant to the requirements of fairness.

[para 41] The facts in this case are distinguishable from that case in that the Law Society was the arbitrator of the complaint and not the applicant's representative which, at least to some extent, is the role of the Organization in this case.

[para 42] That being said, much of the information generated or created by the Organization in the course of investigating the Applicant's concerns, including, for example whether the University had breached the Faculty Agreement, the complaints others had made against him, or when the Organization was assessing whether it had a duty to represent him, would not be his "personal information" within the terms of the definition in the Act, and the rationale in Order P2006-004 is on point.

[para 43] At paragraphs 24 and 25 of its initial submission, the Organization further stated:

> 24. As discussed above, the AASUA represented [the Applicant] with respect to issues arising in the course of his employment at the University, and more specifically, with respect to his complaint, and complaints made about him.
>
> 25. Since information about employees acting in the course of their job duties is normally not considered information about those individuals unless circumstances give that information a "personal dimension", most of the information in the File is not [the Applicant's] personal information. For information to be [the Applicant's] "personal" information, it must be directly related to him, as opposed to indirect or collateral information.
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> Order P2012-09 (Pro-Western Plastics Ltd) at para 33 [TAB 8]

[para 44] I agree that unless there is a personal dimension to information about how an individual performs his or her work duties, that information is not an individual's "personal information". As the Director of Adjudication stated in Order P2007-002 at paragraph 50:

. . . I adopt the reasoning in Order F2004-026, at paras 109-113, which held that "a record of what a public body employee has done in their professional or official capacities is not personal or about the person, unless that information is evaluative or is otherwise of a "human resources" nature, or there is some other factor which gives it a personal dimension. That case was decided under the *Freedom of Information and Protection of Privacy Act*, but in this case, this reasoning applies as well to a person in private enterprise acting in a professional capacity.

[para 45] To the extent that there is information in the Applicant's AASUA file that is evaluative or is otherwise of a "human resources" nature, it may constitute the Applicant's personal information.

[para 46] At paragraph 27 of its initial submission, the Organization also cited former Commissioner Work's decision in P2011-D-003, which further defined the scope of what constituted "personal information" under the Act. The Organization stated:

27. The AASUA repeatedly sought and received legal advice during the course of its representation of [the Applicant], with the intention that the advice it sought and received in this respect was confidential, and solicitor-client privileged. Of particular relevance to this Inquiry is Decision P2011-D-003, in which the Commissioner held that the majority of information in a lawyer's file relating to an applicant will not be the personal information of the applicant, which obviously includes legal opinions given to a client as to how to deal with a matter or with associated legal matters. Even though such legal advice may affect an applicant, it is not "about" the applicant in the sense meant by the definition of personal information. This information is also privileged. Information in the documents was generated in consequence of an applicant's complaints may include:

- information about the persons about whom he complained and their dealings with the applicant;
- information about other third parties and their dealings with an applicant;
- descriptions of various events and transactions; and,
- correspondence and memos related to the handling of the complaints and other aspects of the complaint process.

P2006-004 (Law Society of Alberta) [TAB 6]

Decision P2011-D-003 (Davidson and Williams LLP) at para 29 [TAB 9]

[para 47] Subject to the exceptions set out in the Act, and taking into consideration what is reasonable, an organization is required to provide an individual with their own personal information. Any information in the records over which the Organization has asserted privilege that is not "about" the Applicant but only "related" to the Applicant due to the fact that it was generated or collected as a consequence of the Applicant's complaints or complaints against the Applicant, is not the Applicant's personal information and is not subject to the Act. I understand that to the extent that there is personal information about the Applicant, as opposed to related to him, in the records, the Organization has withheld this information on the basis that it is subject

to solicitor-client privilege, litigation privilege or settlement privilege, under section 24(2)(a) of the Act.

[para 48] The Organization also relied on the findings of the Director of Adjudication in Order P2015-05. At paragraph 28, the Organization stated:

> 28. Another Order of the Commission with particular applicability to this inquiry is Order P2015-05, in which the Commission stated that an individual's version of events, or the particular things the individual observed in a particular situation is the personal information of the observer, though the event may have involved an applicant, since choosing what to recount implicitly expresses an opinion as to what it is important to convey. Accounts such as those captured in meeting notes may contain purely factual items of information about an applicant, as well as information that is not an applicant's personal information such as opinion or value-laden observations of the writer, as well [as] those of other present in the meeting. In the course of its representation of [the Applicant], the AASUA attended countless meeting concerning [the Applicant] that were related to complaints arising from his employment at the University.

[para 49] Additionally, the Organization stated that the Applicant was closely involved in all aspects of his representation and corresponded regularly and at length with the AASUA staff. It submitted that, as noted by former Commissioner Work in Order P2006-004, even the fact that an applicant is the author of documents does not necessarily mean that the documents so authored were the applicant's personal information.[10]

[para 50] I note as well the conclusion of the adjudicator in Order P2012-09 that simply because documents are located on an applicant's personnel file, does not necessarily mean that they contain the applicant's personal information. Even if the records contain the applicant's name, unless there is a personal dimension to the information, it is not personal information under the Act:

> [para 15] As noted, some of the records provided to the Applicant contain no information at all about her; the fact that these records may have been located in the Applicant's personnel file does not necessarily mean that they contain her personal information under PIPA. Even the records that contain the Applicant's name are not subject to an access request under PIPA where they contain no "personal dimension." For example, as the Applicant's position with the Organization required certain safety training, some of the records provided to the Applicant by the Organization were training materials (for example, pages 622-649 consist of an operator training manual). The Organization's training manuals cannot be characterized as the Applicant's personal information. This is the case even in the instances wherein the training materials included quizzes with the Applicant's answers, as well as her signature affirming that she had read the materials, as there is no personal dimension to the information in these records. I make the same finding with respect to copies of organization-wide policy memos and records of work-related meetings and attendance at those meetings.

[10] Paragraph 29 of the Organization's initial submission. At paragraph 18 of Order P2006-004 former Commissioner Work stated ". . . the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information".

[para 51] This conclusion would similarly apply to records located on the Applicant's AASUA file.

[para 52] The Organization also referred to the decision of this Office in Order P2016-01, which further clarified what constituted "personal information" under the Act. At paragraph 30 of its initial submission, the Organization stated:

> 30. Also of significance to this Inquiry is the Commission's finding that information about an organization's decisions to handle complaints relating to an applicant in a particular way may have affected an applicant, or may be related to an applicant, but does not constitute information "about" an applicant. Specifically, the Commission has held that information contained in minutes from a meeting of a decision-maker as to whether facts found by the investigator mean that a complaint was founded would not be "about" an applicant, although there may be references to him within the minutes:
>
> > . . . witness statements, the respondent's statement, an investigator's notes, minutes, emails between management and human resources regarding the Applicant's performance, a proposed performance plan and emails containing references to the Applicant and meeting minutes documenting the Organization's decision to terminate the Applicant, do not constitute his personal information as the information is not "about the Applicant" but is about problems that had arisen in the Organization and the solutions the Organization was considering, and did consider, to address them.
> >
> > > Order P2016-01 (Gibbs Gage Architects) at para 14 [TAB 11]
> > >
> > > See also: Order P2015-05 (Fairmont Hotels and Resorts Inc) at para 34 [TAB 10]: "positions others were taking and explanations they were giving for decisions that had been " made is not the Applicant's personal information.

[para 53] I also note that in Order P10-02, the Office of the Information and Privacy Commissioner for British Columbia (the BC OIPC) considered what constituted personal information under the *Personal Information Protection Act*, SBC 2003, c 63 (the BC PIPA) where a union member involved in a grievance requested access to his own personal information from the union.

[para 54] While the definition of "personal information" under the BC PIPA is not identical to the definition in the Alberta PIPA, it is similar, and in my view the following comments of the adjudicator are also relevant to the case before me:

> [9] **3.2 Is This Personal Information?** – CUPE's position is that not all of the information in the disputed documents is the applicant's personal information, so that any non-personal information should be removed if I find the records must be disclosed. Although it acknowledges that the applicant had an interest in the outcome of the grievance, CUPE argues that he was not a party to the grievance and that most of the information the applicant seeks relates, not to him, but to the interpretation of the Collective Agreement or to the possible settlement of the grievance.

> [10] Section 1 of PIPA defines "personal information" as follows:
>
> > "**personal information**" means information about an identifiable individual and includes employee personal information but does not include
> >
> > (a) contact information, or
> >
> > (b) work product information;
>
> . . .
>
> [12] CUPE identified some of the text in eight documents with either a line or a box, annotating each with the phrase "not personal information". I agree with CUPE that the identified portions deal with matters relating to the interpretation of the Collective Agreement or CUPE's strategy, ideas or arguments to be advanced at arbitration. Some portions merely refer to a Collective Agreement provision. These portions are not, in my view, the applicant's "personal information" and are therefore not accessible under PIPA.

[para 55] Given the role of the Organization and its relationship with the Applicant, and the types of documents the Organization said were located in the Applicant's AASUA file, I find that it is likely there is some information in the Applicant's AASUA file that is *about* the Applicant and therefore his personal information under the Act, as well as information that is only *related* to the Applicant and therefore not the Applicant's personal information under the Act, as well as personal information about other individuals, which is not the Applicant's personal information and cannot be requested by the Applicant (and which the Organization <u>must not</u> disclose under section 24(3)), as well as information that is simply not personal information at all and therefore not subject to the Act.

[para 56] Since PIPA only permits an individual to request their own personal information, and since information must be "about" an individual and not simply "related" to an individual in order to constitute "personal information" under PIPA, the only information to which the Applicant is entitled in this case (subject to the exceptions in the Act), is likely or largely to be information which is not of interest or utility to him because he already knows it or supplied it himself.

[para 57] If the Applicant is seeking information that involves or reflects the choices that the AASUA made and actions it took in representing him or dealing with his complaints and grievances, or the complaints that others made against him, this is not his personal information within the terms of PIPA, and he has no right of access to it.

[para 58] In summary, the Act permits the Applicant to ask the Organization only for personal information *about* him located in his AASUA file, and requires the Organization to provide the Applicant only with personal information *about* him located in his AASUA file, subject to any mandatory or discretionary exceptions under the Act, and, pursuant to section 24(1.1), taking into consideration what is reasonable.

[para 59] In Order P2006-004, former Commissioner Work stated:

> [para 14] I do not need to decide for the purpose of this inquiry precisely which parts of the information in the documents collected or created for the purpose of the complaint proceedings were "personal information" of the A/C, as that term is to be understood in PIPA. It is sufficient to say that there is a great deal of information in the documents that is not the A/C's personal information even though it was generated in consequence of his complaints. The latter includes information about the persons about whom he complained and their dealings with the A/C, information about other third parties and their dealings with the A/C, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process. As well, the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information.

[para 60] As the former Commissioner did in Order P2006-004, given my findings below, I also do not need to decide for the purposes of this inquiry precisely which parts of the records that were provided to me for review are the Applicant's personal information and so I will not do so.

[para 61] Before concluding this section of the Order, I believe it is useful to point out, as has been done in earlier orders of this Office decided under PIPA, that when an organization receives a broad access request for information from a requestor (i.e. "all information in my file"), such a request may include personal information about the requestor as well as non-personal information about the requestor. PIPA requires the organization to provide the individual with only their own personal information, as that term is defined in the Act and has been interpreted in the orders of this Office, taking into account what is reasonable, and subject to the mandatory and discretionary exceptions under the Act.

[para 62] As the Act does not apply to information that is not personal information, it is not necessary for an organization to cite exceptions under the Act to withhold information to which the Act does not apply, and in fact, if it does so, this has the potential to confuse the requestor about whether the Act applies to this information.

**2. If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)?**

**a. Did the Organization properly apply section 24(2)(a) (legal privilege) to any of the withheld information?**

[para 63] Section 24(2)(a) states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> *(a) the information is protected by any legal privilege*

[para 64] Initially, the Organization advised that it had withheld 525 records comprised of 5900 pages under section 24(2)(a). It submitted that these records contained the Applicant's personal information and were subject to solicitor-client privilege, litigation privilege, and/or settlement privilege.

[para 65] I have stated my view above that it is likely that some or perhaps much of the information the Organization has withheld from the Applicant on the basis of privilege does not consist of his personal information, and I have no power to make orders relative to such information. However, I will consider the Organization's assertion of legal privilege with respect to each bundle of records, even though I have decision-making power relative only to the parts of the bundles of records that contain the Applicant's personal information. I do so on the theory that if a claim of privilege would be valid for the records in the bundle, it is also valid for the parts of the records in the bundle that are "personal information" under the Act.

[para 66] Solicitor-client privilege protects confidential communications between a lawyer and their client in relation to the giving or seeking of legal advice (*Canada v. Solosky*, [1980] 1 S.C.R. 821). Litigation privilege protects records created for the dominant purpose of use in litigation (*Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319 and *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52). Settlement privilege protects communications between parties made for the purpose of attempting to settle a dispute (*Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35).

[para 67] The Organization did not provide the records over which it claimed privilege to this Office for review in this inquiry.[11]

[para 68] Pursuant to section 51 of PIPA, an organization has the burden of establishing to the satisfaction of the Commissioner that the individual has no right of access to the personal information requested by the individual. Where an organization has claimed a type of privilege applies under section 24(2)(a) to withhold responsive information, the organization must establish, on the balance of probabilities, that the type of privilege it has asserted over the information, applies.

[para 69] In Order P2022-06, the adjudicator set out what an organization is required to provide to this Office to support a claim of solicitor-client privilege or litigation privilege under PIPA where it chooses not to provide copies of the records for review. The adjudicator also set out the role of this Office in reviewing claims of privilege under PIPA. The adjudicator stated:

[11] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, the Supreme Court of Canada determined that the language under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) did not permit the Commissioner to order a public body to produce records over which it had claimed solicitor-client privilege, to the Commissioner. The decision would also extend to claims of solicitor-client privilege under PIPA. This Office has also determined that in light of the Supreme Court's decision in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, it likewise cannot compel a public body under the FOIP Act, or an organization under PIPA, to produce records over which a public body or an organization has asserted litigation privilege applies.

> [para 45] Where an organization elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body [sic] 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 46] The role of this Office in reviewing claims of privilege under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) was discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at paras 77 – 112. While this decision relates to the FOIP Act, the powers of the Commissioner under PIPA are substantially similar to those under the FOIP Act that it is reasonable to extend the discussion in *EPS* to reviewing claims of privilege under PIPA. I understand the Court to mean that my role in reviewing the Organization's claim of privilege is to ensure that the Organization'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 70] I also note the following comments of Justice Renke in the *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) with respect to assertions of solicitor-client privilege to withhold responsive information:

> [104] Does this 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?
>
> [105] 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 71] In this case, the Organization provided the former adjudicator with an affidavit of records sworn by its General Counsel (the Affidavit of Records).[12] The Affidavit of Records included a schedule in which the records withheld were grouped into 18 bundles. The schedule provided a description of the records in each bundle and identified the type or types of privileges that the Organization asserted applied to the records in the bundle.

[para 72] The Organization did not provide the Applicant with a copy of the Affidavit of Records on the basis that the Affidavit itself revealed information that was protected by legal privilege. The Affidavit of Records was accepted *in camera* by the former adjudicator.

[para 73] In support of its submissions, the Organization also provided the former adjudicator and the Applicant with an affidavit sworn by its General Counsel (the Exchanged Affidavit)

[12] General Counsel's Affidavit of Records sworn on August 22, 2017.

setting out the background and relationship between the parties and general information and arguments regarding the application of privilege to the records containing the Applicant's personal information.[13]

[para 74] In conclusion, at paragraph 44 of her Exchanged Affidavit, the General Counsel stated:

> 44. The AASUA has identified about 525 documents that it believes contains [the Applicant's] personal information, and is protected by legal privilege. A significant majority of those documents contain communications with external legal counsel that relate to the giving and receiving of legal advice. It would be difficult and extremely time-consuming for the AASUA to categorize and bundle those documents with any more detail [than] it has already provided.

[para 75] Subsequently, the Organization made a request to provide me with an *in camera* submission. In my letters to the parties dated May 12, 2020 and September 4, 2020, I informed the Organization that while I would accept some of its submission *in camera*, there were portions of its submission that I could not accept *in camera.* In particular, I stated in my September 4, 2020 letter:

> Where an organization asserts during an inquiry that it is applying a different type of privilege, in addition to or instead of the privilege claimed over a record or records, or determines that a record or records which was/were originally determined to be responsive are not responsive for a particular reason, or are not subject to the Act for a particular reason, for the purpose of procedural fairness, the organization must inform the applicant of the organization's change in position and whether, if the organization is no longer asserting privilege over a record or records, the organization will release any of the information it had previously determined to be privileged, to the Applicant, and if not, why not. Generally speaking, an applicant must be informed of any change in an organization's position during an inquiry and be given an opportunity to address the organization's change in position.

[para 76] I informed the Organization that in order for me to decide whether to permit the Organization's changes in position, I would require it to provide the Applicant and me with a version of the schedule attached to the General Counsel's *in camera* Affidavit of Records, which complied with the Alberta *Rules of Court* and the decision of the Alberta Court of Appeal in *ShawCor*, and which *did not disclose* information over which the Organization was claiming privilege. I further told the Organization that it needed to inform the Applicant of the changes it had made to its application of the types of privilege it was applying to the records, and the reasons under the Act that it was continuing to withhold information over which it no longer claimed privilege.[14]

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[13] General Counsel's Exchanged Affidavit sworn on August 22, 2017.

[14] *Alberta Rules of Court* (AR 124/2010), s. 5.8; *Alberta Rules of Court Amendment Regulation* (AR 36/2020), s. 6. As stated by Justice Renke in *EPS* at para. 96, "At para 56, the Court of Appeal emphasized that "the obligation to provide sufficient information to indicate how a record fits within the claimed privilege does not require a degree of particularity that would itself defeat the privilege." See also *Alberta v. Suncor Inc.*, 2017 ABCA at paras. 46-47."

[para 77] The purpose of this was one of procedural fairness: to enable the Applicant to know how the Organization's position had changed and to give the Applicant the opportunity to make submissions with respect to the Organization's assertions of privilege and its decision to change the type or types of privilege it was applying, and its reasons under the Act for continuing to withhold information over which it no longer was asserting privilege.[15]

[para 78] The Organization complied with this request. In its letter to the Applicant dated September 24, 2020, copied to me, the Organization stated:

> The AASUA informs you of the changes in its position as follows:
>
> - The AASUA now asserts litigation privilege over records in Bundle 16. The privilege is asserted over records the AASUA received to assist the AASUA's external legal counsel with the provision of legal advice. (Re: page 4, paragraph 5 of the AASUA's March 11, 2020);
>
> - The AASUA no longer asserts litigation privilege over records (1 record consisting of 3 pages) in Bundle 1 which contain information it received from the University. The records will not be disclosed to you because upon re-review, the records do not contain your personal information and so are not responsive. (Re: page 4, paragraph 6 of the AASUA's March 11, 2020 letter);
>
> - The AASUA now asserts settlement privilege over Bundles 4, 5, 11, 16 and 18. (Re: page 5, paragraph 3, of the AASUA's March 11, 2020 letter); and,
>
> - The AASUA no longer asserts litigation privilege over documents in Bundle 9 that were contained in a court file (4 records consisting of 167 pages). The records will not be disclosed to you because the Personal Information Protection Act does not apply to personal information in a court file [s 4(3)(k)]. (Re: page 7, paragraph 6, of the AASUA's March 11, 2020 letter).

[para 79] With its September 24, 2020 letter, the Organization also provided the Applicant (and me) with a modified version of the original schedule which had been attached to the General Counsel's Affidavit of Records, which provided a description of the records contained the Organization's original privilege claims for each bundle of records.

[para 80] The Organization asserted that: solicitor-client privilege applied to records in all of the bundles; litigation privilege also applied to records in some of the bundles, and; settlement privilege also applied to records in some of the bundles.[16]

[para 81] The Applicant provided his rebuttal submission on October 15, 2020, questioning the validity of the Organization's assertions of privilege.

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[15] In *Alberta v. Suncor*, 2017 ABCA 221 at para. 55, the Alberta Court of Appeal said "Whether or not legal privilege attaches to any particular material or bundle of like materials is a matter about which reasonable people can disagree; fairness requires that both parties have the opportunity to make submissions, whilst protecting legal privilege."

[16] Organization's letter to the Applicant dated September 24, 2020, copied to me, and attaching a modified version of the schedule originally provided with the General Counsel's Affidavit of Records sworn August 22, 2017.

[para 82] I decided to permit the Organization to change its position with respect to the types of privileges it was asserting to the records under section 24(2)(a), and to change its decision as to whether information it had withheld as privileged was non-responsive, or was excluded from the application of the Act.

[para 83] The Applicant was not prejudiced by this decision as he had the opportunity to make submissions regarding the Organization's privilege claims and changes in position. Furthermore, I have no jurisdiction to order the disclosure of a record if it is non-responsive, or outside of the scope of the Act pursuant to section 4(3)(k), so I must permit the Organization to change its position in regard to these records so that I can determine whether the Act applies to them or not.

[para 84] I also gave the Organization the opportunity to respond to the concerns raised by the Applicant in his rebuttal submission. The Organization provided me, and the Applicant, with its response on January 21, 2022.

[para 85] As noted above, I will consider the Organization's assertion of legal privilege with respect to each bundle of records, even though I have decision-making power relative only to the parts of the bundles of records that contain the Applicant's personal information, on the theory that if a claim of privilege would be valid for the records in the bundle, it is also valid for the parts of the records in the bundle that are "personal information" under the Act.

*Analysis of Privilege Claims*

<u>Solicitor-Client Privilege</u>

[para 86] The test for determining whether communications are subject to solicitor-client privilege was set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821 as follows:

> . . . 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 87] The Organization asserted that solicitor-client privilege applied to records contained in all 18 bundles set out in the schedule to the General Counsel's Affidavit of Records. The description for the records in the modified version of the schedule provided to the Applicant and to me, indicated that every bundle contained records which were the Organization's communications with legal counsel.

[para 88] In its initial submission, the Organization stated:

> 37. [Name], as General Counsel, routinely provided legal advice to the AASUA's Membership Services Officers in communications that were intended to be confidential. The AASUA accepts that this does not mean that all communications in the File involving [Name of General Counsel] are protected by solicitor-client

privilege, but submits that it properly applied section 24(2)(a) to communications to and from [Name of General Counsel] that entailed the the [sic] seeking or giving of legal advice.

> 38. Additionally, throughout its representation of [the Applicant], the AASUA retained at least four external lawyers who regularly provided legal advice with respect to [the Applicant's] representation. These lawyers provided legal opinions that addressed the merits of [the Applicant's] complaints, proposed strategies, drafted grievance documents, advised on matters concerning confidentiality and negotiations, negotiated and drafted the Settlement Agreement, and advised on a number of other matters affecting the AASUA's obligations to [the Applicant]. Again, the AASUA submits that it properly applied section 24(2)(a) to communications to and from external legal counsel that entailed the [the] seeking or giving of legal advice.

[para 89] At paragraph 37 of her Exchanged Affidavit, the General Counsel identified the external legal counsel who provided legal advice to the Organization. At paragraph 38 of her Exchanged Affidavit, the General Counsel stated:

> 38. All communication between the AASUA staff and external legal counsel was intended to be confidential and solicitor-client privileged.

[para 90] In his rebuttal submission, the Applicant questioned the validity of the Organization's application of solicitor-client privilege. He stated:[17]

> I also note AASUA has claimed solicitor client privilege for many documents. I also question the validity of this claim. There were periods of time where a solicitor ([name] and later [name]) was hired by the AASUA to represent me in lieu of having an AASUA staff member involved in discussions with the University. Records pertaining to their representation role should be viewed in a different light than records containing legal advice or opinion the solicitor was giving AASUA.

[para 91] In response, the Organization stated:[18]

> The Applicant argues that solicitors were hired to represent him, and not the AASUA. Please see the AASUA's written submissions dated July 10, 2017, at para 15, and caselaw [sic] referred to therein: when a union retains external counsel, it does not do so on behalf of an individual member. See also AASUA's Policies and Procedures (Exhibit B to [General Counsel]'s affidavit, included with the July 2017 submissions), which outlines the AASUA's obligations to its members. The Policies do not provide for circumstances in which it will hire solicitors to represent members. The AASUA did not hire solicitors to represent the Applicant, and has never retained private legal counsel for any member nor would it approve it, since its Policies do not allow it.

[para 92] In Order P10-02, the BC OIPC addressed a similar argument made by an applicant with respect to records withheld by a union under solicitor-client privilege.

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[17] Applicant's rebuttal submission dated October 15, 2020.
[18] Organization's rebuttal submission dated January 21, 2022.

[para 93] As mentioned above, in that case, the applicant, a union member involved in a grievance, requested access to his own personal information from the union. The union withheld responsive information under sections 23(3)(a) and 23(3)(c) of the BC PIPA. At paragraph 20, the adjudicator noted the following:

> [20] The applicant's submissions were brief. He believes he is the client, not CUPE, that the withheld information relates to his interests and that it would not exist but for his grievance. He also makes the point that he was present at some meetings when the notes CUPE seeks to withhold were taken.

[para 94] At paragraph 22 of Order P10-02, the adjudicator reached the following conclusion (my emphasis):

> [22] <u>While it is perhaps understandable that the applicant believes he is the client of CUPE for solicitor-client privilege purposes, the case law is clear that CUPE, not the grievor, is the lawyer's client.</u> CUPE's affidavit evidence, and my review of the records, satisfy me that documents 2, 3 and 4 were each written by a CUPE representative to the CUPE lawyer for the purpose of obtaining a confidential legal opinion. Document 1 is that legal opinion. Applying the principles established in such orders as Order P06-02 and Order F06-16, I am satisfied that documents 1 through 4 are each covered by legal advice privilege and that the applicant's personal information in them can therefore be properly withheld by CUPE under s. 23(3)(a). Having concluded that legal advice privilege applies, it is not necessary for me to consider whether they can also properly be withheld under litigation privilege.

[para 95] In light of the aforementioned decision of the BC OIPC, and the case law and submissions provided by the Organization, I find that the Organization, and not the Applicant, is the client of the legal counsel the Organization sought advice from with respect to complaints and grievances made by the Applicant.

[para 96] As well, where the Organization sought legal advice with respect to possible actions by the Applicant against it, or in relation to complaints against the Applicant, the Organization and not the Applicant were/are the legal counsel's client.

[para 97] There is no evidence before me that the records withheld by the Organization under section 24(2)(a) on the basis of solicitor-client privilege were disclosed to the Applicant or anyone else.

[para 98] I accept the Organization's submission that where the withheld information was communications between the Organization and its General Counsel for the purpose of seeking and giving legal advice, the General Counsel was acting in her capacity as legal counsel to the Organization.

*Conclusion regarding the assertion of solicitor-client privilege*

[para 99] Having reviewed the General Counsel's Affidavit of Records and the original schedule attached to the Affidavit of Records and accepted *in camera*, and the modified version of the schedule to the General Counsel's Affidavit of Records which the Organization provided to the Applicant and to me, as well as all of the submissions of the Organization exchanged with

the Applicant and those accepted *in camera*, I find that the evidence provided by the Organization meets the requirements set out in *Canadian Natural Resources Limited v. ShawCor Ltd.,* 2014 ABCA 289 and Rule 5.8 of the Alberta Rules of Court, and is consistent with the test for finding solicitor-client privilege applies.

[para 100] I find that the Organization has established its claim of solicitor-client privilege on the balance of probabilities, under section 24(2)(a) of the Act, and has properly withheld the Applicant's personal information contained in the records over which it has asserted solicitor-client privilege.

[para 101] With respect to the exercise of discretion as to whether to withhold the records subject to privilege, as noted by the adjudicator in Order P2022-06 at paragraphs 61 – 62:

> [para 61] Section 24(2) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant.
>
> [para 62] However, past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)).

[para 102] Furthermore, in *EPS*, Justice Renke stated at paragraphs 74 and 118:

> [74] In my opinion, a public body like EPS is required to establish its claim of solicitor-client privilege, but only to the extent required by the Court of Appeal in *Canadian Natural Resources v ShawCor Ltd.*, 2014 ABCA 289 – and no farther, Satisfaction of the *CNRL v. ShawCor* standard suffices for civil litigation and no higher standard should be imposed in the *FOIPPA* context. Further, even if s. 27(2) does not apply and solicitor-client privilege remains discretionary, to establish the privilege is to establish the grounds for relying on the privilege. The existence of the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted.
>
> . . .
>
> [118] The Adjudicator, in my view, correctly approached this issue. The Adjudicator wrote in F2013-13 at para 238 as follows: "a public body need not explain why it has exercised discretion to withhold information once it has been established that information is subject to solicitor-client privilege, given the near absolute nature of this privilege . . ."

[para 103] The Court's comments regarding the enquiry by this Office into the exercise of discretion by a public body where solicitor-client privilege is asserted under the FOIP Act apply equally to the exercise of discretion by an organization where solicitor-client privilege is asserted under PIPA.

[para 104] Accordingly, as I have determined the Organization has established that solicitor-client privilege applies to the records over which it was asserted, no further scrutiny of discretion concerning the Organization's solicitor-client privilege claims is warranted.

*Litigation Privilege*

[para 105] As noted in paragraph 87 above, the Organization asserted solicitor-client privilege over records containing personal information about the Applicant in Bundles 1 – 18.

[para 106] I note that in the General Counsel's Exchanged Affidavit, the General Counsel stated at paragraph 44:

> 44. The AASUA has identified about 525 individual documents that it believes contains [the Applicant's] personal information, and is protected by legal privilege. A significant majority of those documents contain communications with external legal counsel that relate to the giving and receiving of legal advice. It would be difficult and extremely time-consuming for the AASUA to categorize and bundle those documents with any more detail [than] it has already provided.

[para 107] I accept the Organization's submission that a significant majority of the records it has withheld contain communications with external legal counsel. I have found that it properly asserted solicitor-client privilege over the Applicant's personal information contained therein. I will now consider whether, where it has asserted litigation privilege applies to the records that are not otherwise exempt pursuant to solicitor-client privilege, it has proven that the Applicant's personal information in these records is subject to litigation privilege on a balance of probabilities.

[para 108] Litigation privilege was considered by the Supreme Court of Canada in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (*Lizotte*). As stated in the case summary:

> Litigation privilege is a common law rule that gives rise to an immunity from disclosure of documents and communications whose dominant purpose is preparation for litigation. This privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law. However, since *Blank v. Canada (Minister of Justice)*, 2016 SCC 39, [2006] 2 S.C.R. 319, it has been settled law that solicitor-client privilege and litigation privilege are distinct: the purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process; solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends; and, finally, litigation privilege applies to unrepresented parties and to non-confidential documents, and is not directed at communications between solicitors and clients as such.

[para 109] At paragraph 23, the Supreme Court discussed the decision in *Blank v. Canada (Minister of Justice)*, 2016 SCC 39 (*Blank*) as follows:

> [23] The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not

those which litigation is a "substantial purpose") are covered by the privilege (para. 60). It noted the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38 – 41).

[para 110] The *Lizotte* decision was considered by the Alberta Court of Appeal in *Alberta v. Suncor Energy Inc*, 2017 ABCA 221 (*Suncor*). The following comments of the Court are relevant to the case before me (my emphasis):

> [36] Solicitor-client privilege attaches to confidential communications between a client and a legal advisor that are connected to seeking or giving legal advice: *Blood Tribe Department of Health v Canada (Privacy Commissioner)*, 2008 SCC 44 at para 10, [2008] 2 SCR 574; see also *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 26-38, [2006] 2 SCR 319 [*Blank*]. <u>The communication does not have to be in contemplation of litigation, and the privilege is of permanent duration</u>: *Blank* at paras 28, 50.
>
> [37] Litigation privilege attaches to documents created for the dominant purpose of litigation: *Blank* at paras 59-60. This includes any document created for the dominant purpose of preparing for related litigation that "remains pending or may reasonably be apprehended": *Blank* at para 38. <u>The object of this inquiry is the purpose for which the document was created, or came into existence, as distinct from the purpose for which it may have been collected or put to use</u>: *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2014 ABCA 244 at para 38, 577 AR 335.
>
> . . .
>
> [45] Suncor asserted both solicitor-client *and* litigation privilege over nearly all of the documents it refused to produce. Although documents may frequently be subject to both forms of privilege, Suncor must independently distinguish whether solicitor-client or litigation privilege applies, in order to permit a meaningful assessment and review of each bundle of documents. Making a blanket assertion that both forms of privilege apply, in instances where one or the other is clearly unavailable, is a litigation tactic that ought to be discouraged.
>
> [46] Parties must describe the documents in a way that indicates the basis for their claim: *ShawCor* at para 9. The grounds for claiming solicitor-client privilege and litigation privilege are distinct. A description that supports one class of privilege does not necessarily support the other.
>
> [47] To support a claim of solicitor-client privilege, Suncor must at least describe the documents in a manner that indicates communications between a client and a legal advisor related to seeking or receiving legal advice.
>
> [48] To support a claim of litigation privilege, Suncor must describe documents with enough particularity to indicate whether the dominant purpose for their *creation* was in contemplation of litigation.
>
> [49] In conclusion, we find that the chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims. The comments in *ShawCor* at para 63 apply equally to the OHS context: the claim of privilege is based on the

honour system, and reasonable people can disagree as to whether particular material is privileged. The eight categories of material claimed as privileged by Suncor are not particularized to identify whether and how it claims the material was created in contemplation of litigation. As noted above, material created in the ordinary course of business and later collected for the investigation file, may arguably not be covered by litigation privilege. Of course, this does not require Suncor to describe the document in a way that undermines the privilege claimed.

. . .

[54] However, the chambers judge erred in finding that the documents were sufficiently described to allow an assessment of the privilege claims. Suncor must independently distinguish the nature of the legal privilege claimed, and the evidentiary basis for the claim, in order to allow for a meaningful assessment. The eight categories of material Suncor claims as privileged are not sufficiently particularized to identify whether the material was *created* in contemplation of litigation, as opposed to merely gathered or collected for that purpose.

[para 111] In its letter dated March 11, 2020, a redacted version of which was provided to the Applicant, the Organization stated (the quoted portion was provided by the Organization to the Applicant):

> The Applicant was first disciplined by the University in February 2009. The AASUA grieved the discipline and [name of arbitrator] was appointed as arbitrator in the summer of 2009. Subsequently, six additional grievances were filed by the AASUA on the Applicant's behalf. The final grievance was filed in response to the Applicant's dismissal in January 2014. All seven grievances were withdrawn by the AASUA in March 2016.
>
> As emphasized in its initial submissions, the AASUA has carriage of all grievances with respect to its members' employment. As such, the AASUA was obligated by its duty of fair representation to conduct a full investigation into disputes concerning the Applicant's rights: it must consider the sequence of events, learn the Applicant's point of view, obtain information from potential witnesses, and offer the Applicant a chance to respond.
>
> To comply with this obligation, information was collected from the Applicant and his counsel for the dominant purpose of use in arbitration. The AASUA obtained information from the Applicant and his counsel to provide to the AASUA's counsel to obtain legal advice, and the counsel for the AASUA obtained information directly from the Applicant and his counsel. In these circumstances, the Applicant and his counsel were third parties.

[para 112] In Order P2016-03, the adjudicator considered a similar situation and argument. In that case, as here, the applicant, a union member, requested his entire personal file from the union. The union withheld responsive information on the basis that it was subject to litigation privilege.

[para 113] At paragraphs 54 – 68 of Order P2016-03, the adjudicator stated:

> [para 54] The Organization is asserting that litigation privilege attaches to the information at issue.

[para 55] The Organization submits:

> The Records at Issue were created in contemplation of litigation – either a grievance or a duty of fair representation complaint – and the dominant purpose of their creation was to aid the Organization in pursuing a grievance, and if necessary in defending a duty of fair representation complaint. As such, they are protected by litigation privilege and need not be disclosed pursuant to section 24(2)(a).

[para 56] The Organization did not tell me whether lawyers are necessarily involved in taking forward grievance proceedings, or whether this task is given to union representatives. In the event of the latter, an issue could arise whether litigation privilege can be claimed where an employee is represented by a union representative (in contrast to a situation in which the employee is represented by a lawyer or is self-represented). The Supreme Court said in *Blank v. Canada*, 2006 SCC 39: "Litigation privilege . . . contemplates . . . communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties", a statement which does not explicitly embrace a situation of union representation. I do not need to decide this question, however, because I find below that litigation privilege does not apply to the Applicant's personal information requested in this case.

[para 57] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para 27, Justice Binnie talks of the object and purpose of litigation privilege:

> 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.

[para 58] Litigation privilege applies to withhold the documents from an adversary. Since the litigation that is claimed to be contemplated is a grievance, the adversary is the employer, not the Applicant. Justice Slatter in *Hansraj v. Ao*, 2022 ABQB 385 (CanLII) and *Pinder v. Sproule*, 2003 ABQB 33 (CanLII) affirmed that the privilege belongs to the client. Asserting litigation privilege against the Applicant fails on this ground.

[para 59] This claim also fails on another ground.

[para 60] In *Blank*, Justice Fish wrote at para 36:

> I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege[:]

[para 61] The Organization has conceded that the time period to grieve under the Collective Agreement has ended. The claim for litigation privilege on that basis has therefore ended.

[para 62] The Organization may also be arguing that the Applicant's personal information, or some part of it, was collected for the dominant purpose of defending an unfair

representation claim. The Organization directed me to *Canadian Natural Resources Ltd. v. ShawCor Ltd.* (20140 ABCA 289. The Court at paras 82 – 84 states:

> The test for litigation privilege in Alberta is that of "dominant purpose" as described by this Court in *Nova, An Alberta Corporation v Guelph Engineering Co* (1984), 1984 ABCA 38 (CanLII), 50 AR 199 [*Nova*]. 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 document 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: *Dow Chemical, supra* at para 38. In *Blank, supra* at paras 59-60, the Supreme Court of Canada affirmed the dominant purpose test and emphasized its narrow nature at paras 60-61:
>
>> The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure . . .
>>
>> While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.
>
> 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 WLE 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: *Bennet v State Farm Fire and Casualty Company*, 2013 NBCA 4 (CanLII) at paras 47 – 51, 358 DLR ($4^{th}$) 229. <u>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</u>. (my emphasis)

[para 63] Further, at para 87, the Court states:

> 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.

> [para 64] The affidavit evidence of the MSO1 clearly indicates that the notes would be used as an evidentiary basis for the Organization's submissions in arbitration of the grievance (see para 33). She states further:
>
>> Additionally, if the Applicant is unhappy with his representation by the Organization, he has the right to bring a duty of fair representation complaint with the Labour Relations Board. Our investigation, including the Records at Issue, would form the basis on which the Organization would defend such a complaint. (my emphasis)
>
> [para 65] The affidavit evidence indicates that the records were not created primarily to defend an unfair representation complaint. While the records might have been used for that purpose had it become necessary, it was not the dominant purpose for their creation. I find, on the basis of MSO1's affidavit that the dominant purpose of the notetaking was to determine whether to pursue a grievance and not for the purpose of defending a fair representation complaint.
>
> [para 66] Further, for litigation privilege to apply, litigation must be reasonably in contemplation. I have no evidence that the Applicant is considering a complaint of unfair representation. Indeed, the Organization has told me that part of the purpose of the meetings at which the notes were taken was to determine whether the Applicant even wished to pursue the grievance.
>
> [para 67] I find the dominant purpose for creating the records at issue was to determine if a grievance should be pursued on behalf of the Applicant by the Organization. Therefore, the Organization cannot claim litigation privilege on the basis of a prospect of an unfair representation claim brought by the Applicant against it.
>
> [para 68] I find that section 24(2)(a) does not apply to the records at issue.

*Conclusion regarding litigation privilege*

[para 114] In light of the conclusion reached by the adjudicator in paragraph 58 of Order P2016-03, and the purpose and scope of litigation privilege described by the Supreme Court in *Blank* and *Lizotte*, I am not persuaded that in the context of a grievance, the Applicant is considered to be a third party such that a "zone of privacy" would apply to permit the Organization to refuse to provide the Applicant with his personal information - particularly information which he supplied to the Organization in the first instance - on the basis of litigation privilege.

[para 115] As well, I am unable to conclude from the Organization's submissions that where the Organization has asserted litigation applies, all of the records over which it has asserted litigation privilege were *created* (as opposed to collected) for the *dominant purpose* of the litigation (as opposed to created for a purpose other than for the dominant purpose of the litigation).

[para 116] Even if I were to assume this to be the case, and find that litigation privilege applied as against the Applicant in this context, as noted by the adjudicator in Order P2016-03,

the privilege comes to an end when the litigation for which the records were created comes to an end.

[para 117] The Organization advised that all seven grievances were withdrawn by the AASUA in March 2016. It does not appear from the Organization's submissions that there any grievances brought by or against the Applicant that have not been withdrawn or otherwise resolved. Accordingly, litigation privilege over records created for the dominant purpose of the grievances has ended.

[para 118] However, I understand the Organization is also asserting that litigation privilege applies to all of the records over which it has asserted the privilege, on the basis that it has collected them for the purpose of defending itself from an unfair representation claim by the Applicant.

[para 119] The General Counsel provided details in her Exchanged Affidavit about the grievances and complaints made by and against the Applicant. The General Counsel advised that beginning on or around June 2011, the Applicant personally retained his own legal counsel and began filing lawsuits and other actions against the University, his dean, and various department chairs, certain colleagues, a former colleague, and various administrators.[19]

[para 120] The General Counsel advised that between September 11, 2011 and March 5, 2014, [name of employee] recorded 10 statements in which the Applicant threatened to take action against the AASUA.[20] The General Counsel advised that on September 5, 2013, the Applicant expressly claimed that the AASUA had breached its duty of fair representation. At paragraph 40 of her Exchanged Affidavit, the General Counsel stated:

> 40. Because of [the Applicant's] hostility towards the AASUA, his retention of [name of legal counsel], and his general litigiousness, the AASUA collected or created a significant number of documents the dominant purpose of which was to submit them to legal counsel for advice and use in litigation it expected would occur between the AASUA and [the Applicant].

[para 121] I understand from the Organization's submissions in this inquiry that given the statements the Applicant made about suing the Organization, and the litigation he had commenced against other parties, the Organization anticipated he would bring an action against the Organization either in Court or at the Alberta Labour Relations Board pursuant to the *Labour Relations Code*. It created and collected records to defend itself in these potential actions. I understand that the records it collected for this purpose included the records which it had collected or created for the Applicant's grievances/complaints, and the grievances/complaints brought against him.

[para 122] In its letter dated December 7, 2017 to this Office and the Applicant, the Organization stated:

[19] General Counsel's Exchanged Affidavit at paragraph 29.
[20] General Counsel's Exchanged Affidavit at paragraph 39.

> In summary, the AASUA submits that the documents it obtained and created to defend itself against claims made by the Applicant, and that have not been provided to the Applicant, continue to be protected by litigation privilege, given the principle of discoverability that is incorporated into the limitations prescribed by the Code and the Limitations Act. The "expiration" of litigation privilege is contingent on the final determination of this matter.

[para 123] In its letter dated March 11, 2020, a redacted version of which was provided to the Applicant, the Organization stated (the quoted portion was provided by the Organization to the Applicant):

> The University and the AASUA are co-defendants in a claim brought by the Applicant. The AASUA notes that the claim filed by the Applicant against the AASUA and the University in QB Action [action number] includes allegations that the AASUA breached its duty of fair representation and was involved in a "concerted effort" with the University [to] cause harm to him. The Applicant also claims that "the AASUA has refused to produce the requested documentation", and that the AASUA's refusal to disclose documents exchanged between the AASUA and the University is for the purpose of preventing the Applicant "…from discovering particulars of the manner in which the Defendants conspired to harm [him]."

[para 124] In its letter dated January 21, 2020 to this Office and the Applicant, the Organization responded to the Applicant's rebuttal argument that it could not claim litigation privilege over the records on the basis that he had sued the Organization because he had not sued the Organization when he made his access request. The Organization stated:

> The Applicant argues that litigation privilege does not apply because his request was made in 2014 and his lawsuit was commenced in 2019. We note that the Applicant's statement of claim, previously provided to your office, was filed on March 21, 2018, and was not commenced in 2019. The fact that the Applicant eventually sued the AASUA demonstrates that the AASUA reasonably contemplated litigation throughout its representation of the Applicant, who, as the AASUA has repeatedly emphasized routinely threatened to sue the AASUA:
>
> - On December 7, 2017, at page 2, the AASUA described the Applicant's litigious behaviour. See page 3, where the AASUA notes that between September 11, 2011 and March 5, 2014, the AASUA recorded 10 statement [sic] in which the Applicant threatened to take action against the AASUA.
> - See also page 1 of the AASUA's February 27, 2018 letter, wherein the AASUA noted that the Applicant had previously initiated litigation against the University, his Dean, various department chairs, certain colleagues, and various administrators.

[para 125] As noted above, it is likely that some or perhaps much of the information the Organization has withheld from the Applicant on the basis of privilege does not consist of his personal information, and I have no power to make orders relative to any such information.

[para 126] Given the Organization's submissions and evidence, I find that the Organization has established on the balance of probabilities that litigation privilege applies to the Applicant's

personal information in the records which were created for the dominant purpose of the Organization defending itself from potential actions by the Applicant in these circumstances.

[para 127] The issue that remains is whether the Organization has properly asserted litigation privilege over the Applicant's personal information contained in the records that were either created for the dominant purpose of the Applicant's grievances/complaints and the grievances/complaints brought by others against him, or collected for such purposes, which records the Organization submitted it had also collected to defend itself in anticipated litigation by the Applicant.

[para 128] As I did with respect to the Organization's assertion of solicitor-client privilege, I will consider the Organization's claim of litigation privilege over records which were not created for the dominant purpose of defending itself from potential actions by the Applicant, even though I have decision making power relative only to the parts of the bundles of records that contain the Applicant's personal information. Again, I do so on the theory that if a claim of litigation privilege would be valid for the records in the bundle, it is also valid for the parts of the records in the bundle that are "personal information" under the Act.

[para 129] At paragraphs 62 – 67 of Order P2016-03, reproduced at paragraph 113 above, the adjudicator considered whether the organization in that case was possibly arguing that the applicant's personal information, or some part of it, was collected for the dominant purpose of defending an unfair representation claim. The adjudicator concluded:

> [para 66] Further, for litigation privilege to apply, litigation must be reasonably in contemplation. I have no evidence that the Applicant is considering a complaint of unfair representation. Indeed, the Organization has told me that part of the purpose of the meetings at which the notes were taken was to determine whether the Applicant even wished to pursue the grievance.
>
> [para 67] I find the dominant purpose for creating the records at issue was to determine if a grievance should be pursued on behalf of the Applicant by the Organization. Therefore, the Organization cannot claim litigation privilege on the basis of a prospect of an unfair representation claim brought by the Applicant against it.
>
> [para 68] I find that section 24(2)(a) does not apply to the records at issue.

[para 130] A similar argument was considered by the adjudicator in Order P10-02, a decision of the BC OIPC. At paragraphs 17 and 28 - 31, the adjudicator stated (footnotes omitted):

> [17] CUPE argues that litigation privilege extends to documents created in anticipation of litigation for the purpose of instructing counsel and that litigation privilege continues as long as there is a potential for related litigation to arise. Without referring to grounds for saying so, CUPE says a "real potential" exists that the applicant could apply to the Labour Relations Board under s. 12 of the *Labour Relations Code* for a finding that CUPE breached its duty of fair representation. CUPE denies that any such claim would have any merit, but argues that the allegedly "real" potential for this "related litigation" suffices to maintain its claim of litigation privilege.

. . .

> [28] The remaining question is whether documents 5 to 9, 11 to 13 and the remainder of document 10 are properly withheld under the litigation privilege branch of solicitor-client privilege. Litigation privilege protects from disclosure any record that has been created for the dominant purpose of preparing for, advising on or conducting litigation that was underway at the time the record was created or that was in reasonable prospect at that time. In *Blank v. Canada (Minister of Justice*), the Supreme Court of Canada explained the policy underlying this branch of solicitor-client privilege:
>
>> 27. Litigation privilege . . . 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.
>
> [29] Unlike legal advice privilege, litigation privilege is temporary – it "expires with the litigation of which it was born". The privilege therefore ends when the litigants or related parties are no longer "locked in what is essentially the same legal combat".
>
>> 36. . . . . common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege . . . .
>
> [30] As was the case in Order P06-02, I accept that grievance arbitration proceedings qualify as litigation for the purposes of this PIPA exemption. I also accept that documents 5 to 13 came into existence for the dominant purpose of that litigation or its conduct. However, the litigation itself came to an end long ago. Assuming, without deciding, that litigation privilege can be asserted by a non-lawyer, what CUPE is trying to do here is extend that privilege to a potential proceeding (a possible s. 12 *Labour Relations Code* complaint) between different adversaries (CUPE and the grievor), in which the information it seeks to withhold here would presumably be the very information it would need to rely on in order to defend itself and establish it had discharged its duty of fair representation. I have some doubt that a s. 12 complaint would constitute the type of "closely related proceeding" contemplated by the Supreme Court of Canada in *Blank*, particularly in light of the purpose of s. 12 of the *Labour Relations Code*.
>
> [31] In any event, there is no evidence before me to suggest that the applicant has any intention of making a complaint against CUPE under s. 12 of the Labour Relations Code. CUPE did not submit any evidence relating to the s. 12 complaints process, let alone evidence that would establish that the Labour Relations Board would entertain such complaints years after the fact. CUPE's speculation that the applicant might at some future point try to make such a complaint is not sufficient. To accept such speculation without any evidentiary basis would be tantamount to apply litigation privilege in such a way as to make it permanent.

[para 131] The case before me is different from the case before the adjudicator in Order P2016-03 and the case before the adjudicator in Order P10-02. In the case before me, the

Organization provided evidence that suggested the Applicant would commence an action against the Organization. It also advised that the Applicant did in fact commence an action against the Organization.

[para 132] Given these facts, one might enquire whether the proceeding brought by the Applicant against the Organization are a "closely related proceeding".

[para 133] Alternatively, one might consider whether, given the Applicant's early indications that he might commence proceedings against the Organization, the initial creation of records relative to the Applicant's grievances and complaints, and complaints against him had the dual (equally dominant) purpose of both preparing for those proceedings, *and* enabling the Organization to demonstrate it was acting appropriately should the Applicant bring proceedings challenging its decision-making.

[para 134] However, I find that I do not need to determine either of these questions so as to enable me to decide whether litigation privilege continues to apply to the records withheld on this basis. This is because as I will explain below, I find that section 24(2)(c) – "information collected for an investigation or legal proceeding" – permits the Organization to withhold the Applicant's personal information contained in the records over which it has claimed litigation privilege that do not otherwise satisfy the test for litigation privilege to apply.

*Collected for Investigation or Legal Proceeding (Section 24(2)(c))*

[para 135] In its submission dated February 27, 2018 to the former adjudicator, copied to the Applicant, the Organization stated in part:

> While the AASUA claims litigation privilege over many documents in accordance with section 24(2)(a), it also claimed in its initial submissions made in July 2017 that it had reasonably refused access to the Applicant under section 24(2)(c), on the basis that the records were "collected for an investigation or legal proceeding". In those submissions, the AASUA asserted that the investigations or legal proceedings concerned the Applicant's claims under the Faculty Agreement. However, the AASUA submits that section 24(2)(c) also applies to records collected for an investigation related to its own circumstances or conduct, or the conduct of its staff, that may result in a remedy or relief being available at law to the Applicant. As outlined in the AASUA's letter of December 7, 2017, and the Affidavit of [General Counsel], the Applicant has a substantial history of initiating litigation, and defendants have included the University, his Dean, various department chairs, certain colleagues, a former colleague, and various administrators. Between September 11, 2011 and March 5, 2014, the Applicant made at least 10 separate statements threatening to take legal action against the AASUA. In other words, the Applicant has repeatedly alleged that conduct has occurred that may result in a remedy or relief being available to him at law, and so it therefore is reasonable for the AASUA to conduct an investigation, and to refuse to disclose those records concerning the investigation to the Applicant.
>
> Additionally, as there is a reasonable likelihood that a legal proceeding against the AASUA will be initiated by the Applicant, relative to which such information will be relevant, and because of the principles of discoverability incorporated into the Labour Relations Code and

> the Limitations Act, the AASUA submits that section 24(2)(c) continues to apply to the records it has refused to disclose to the Applicant.[21]

[para 136] The Notice of Inquiry issued by the former adjudicator on April 10, 2017 indicated that one of the issues to be determined in this inquiry was whether the Organization properly applied section 24(2)(c) (information collected for an investigation or legal proceeding) to any of the withheld information.

[para 137] On February 27, 2018, the Organization clarified that it was also asserting that section 24(2)(c) applied to records collected for an investigation related to its own circumstances or conduct, or the conduct of its staff, that may result in a remedy or relief being available at law to the Applicant.

[para 138] As the Organization did not rely on section 24(2)(c) relative to records over which it had already claimed litigation privilege until its additional February 27, 2018 submission in this inquiry, the question arises whether it should be permitted to raise a discretionary exception at the inquiry stage. In this regard, earlier orders from this Office have permitted an exception to be raised late where there is no delay or prejudice to a party (see for example, Order F2014-49 at para. 28).

[para 139] It would not be reasonable, in my view, to deny the Organization the opportunity to rely on an additional exception to disclosure under section 24(2) where it raised the additional exception early in the inquiry process and the Applicant has had many opportunities to address this in his submissions throughout this inquiry, and has therefore been provided procedural fairness in this regard.

[para 140] Further, the late raising of exceptions by a respondent has been permitted by this Office where the exception that was raised late was grounded in the same policy considerations as other exceptions that were initially raised in response to an access request (see for example, Order F2004-026, at para. 52).[22]

[para 141] Similarly, in my view, where the underlying rationale for relying on either exception is the same – in this case of not being required to provide the Applicant opposed in interest to the Organization with information he is requesting for the purpose of bringing proceedings against the Organization – the failure to name the correct provision at a particular point in time should not preclude the ability to withhold documents in the final result.

[para 142] I will accordingly consider the Organization's application of section 24(2)(c) as an additional exception over the records for which it has not established on a balance of probabilities that litigation privilege applies.

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[21] The Organization subsequently advised that the Applicant has commenced legal action against the Organization which is continuing.

[22] Although Orders F2014-49 and F2004-26 were decided under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act), I see no reason why the same rationale would not apply to the late raising of exceptions under PIPA.

[para 143] Section 24(2)(c) states:

> *24(2) An organization may refuse to provide an applicant access to personal information under subsection (1) if*
>
> *. . .*
>
> *(c) the information was collected for an investigation or legal proceeding*
>
> *. . .*

[para 144] The terms "investigation" and "legal proceeding" are defined in sections 1(1)(f) and 1(1)(g) of the Act as follows:

> *1(1) In this Act,*
>
> *. . .*
>
> *(f) "investigation" means an investigation related to*
>
> *(i) a breach of agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) circumstances or conduct that may result in a remedy or relief being available at law,*
>
> *if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;*
>
> *(g) "legal proceeding" means a civil, criminal or administrative proceeding that is related to*
>
> *(i) a breach of an agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) a remedy available at law;*

[para 145] In Order P2016-03, the adjudicator found that the definition of legal proceedings in the Act includes an administrative proceeding that is related to a breach of an agreement (the Collective Agreement in that case).[23] I agree with this conclusion.

[para 146] The scope of section 24(2)(c) is much broader than the scope of litigation privilege.

[23] Order P2016-03 at para. 34.

[para 147] In contrast to litigation privilege, the exception to disclosure of responsive information available to an organization under section 24(2)(c) does not expire when the investigation or legal proceeding is complete. In any event, there is no evidence before me that the Applicant's civil proceeding against the Organization is complete.

[para 148] Nor is there any requirement under section 24(2)(c) for the information to have been *created* for the investigation or legal proceeding in order for the exception to apply. Nor is there any requirement for the information to have been created for the *dominant purpose* of the investigation or legal proceeding.

[para 149] I note that in its redacted letter dated May 27, 2020, to me and to the Applicant, the Organization submitted that section 24(2)(c) may also apply to records it had initially withheld as privileged under section 24(2)(a):

> ". . . it is evident by the very nature of the relationship between AASUA and the Applicant that a significant portion of the documents in the Applicant's file were either collected for and investigation or legal proceeding ((s 24(2)(c)) . . ."

[para 150] I agree that section 24(2)(c) would apply to records collected for the purpose of investigating grievances or complaints by the Applicant or made against the Applicant, and possible breaches of the Faculty Agreement. I find that section 24(2)(c) applies to the Applicant's personal information in those records over which the Organization claimed litigation privilege, but did not establish on a balance of probabilities that litigation privilege applied.

[para 151] I also accept the Organization's submission that once the Applicant began asserting that he was going to take legal action against the Organization, the Organization started to collect these records in order to defend itself should the Applicant bring proceedings against it with respect to its decision making relative to his grievances and complaints, and those made against him. I find that the collection of the Applicant's personal information for this other purpose also falls within section 24(2)(c).

[para 152] In summary, I find that section 24(2)(c) applies and permits the Organization to withhold the Applicant's personal information in the records that the Organization withheld by reference to litigation privilege, that do not meet the test for litigation privilege to apply.

[para 153] Section 24(2)(c) is a discretionary provision, meaning an organization may decide whether or not to disclose information that falls within the exception to an applicant.

[para 154] In Order P2022-06, the adjudicator made the following determinations regarding the organization's exercise of discretion in that case to withhold responsive information under section 24(2)(c). The adjudicator stated:

> [para 74] Section 24(2)(c) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant.

> [para 75] I asked the Organization to explain how it exercised its discretion to withhold information under section 24(2). The Organization responded with its May 27, 2022 submission. It provided its explanation of its exercise of discretion *in camera*. Given the content of the explanation and the ongoing proceeding between the parties, I accepted this part of the Organization's submission *in camera*.
>
> [para 76] The Organization explained that some of the records contain statements that were provided in confidence. The Organization also pointed to the ongoing litigation between the parties regarding the matter that is the subject of the records at issue. It noted that some records are likely to be used in the proceeding.
>
> [para 77] I accept that the Organization properly exercised its discretion to withhold information collected for an investigation in the context of a litigation involving the Applicant, which relates directly to the information in the records.

[para 155] In this case, in its letter dated March 11, 2020, a redacted version of which was provided to the Applicant, the Organization stated (the quoted portion below was included in the redacted version provided by the Organization to the Applicant):

> The University and the AASUA are co-defendants in a claim brought by the Applicant. The AASUA notes that the claim filed by the Applicant against the AASUA and the University in QB Action [action number] includes allegations that the AASUA breached its duty of fair representation and was involved in a "concerted effort" with the University [to] cause harm to him. The Applicant also claims that "the AASUA has refused to produce the requested documentation", and that the AASUA's refusal to disclose documents exchanged between the AASUA and the University is for the purpose of preventing the Applicant "…from discovering particulars of the manner in which the Defendants conspired to harm [him]."

[para 156] I understand the Organization to be saying that the litigation the Organization anticipated the Applicant was going to bring as a result of his numerous assertions to that effect, and which in fact he has commenced against the Organization, relates directly to the information in the records (including the parts consisting of the Applicant's personal information) that it has withheld from the Applicant in response to his access request under PIPA.

[para 157] I accept that a reasonable factor to take into account in the Organization's exercise of discretion relative to the Applicant's personal information as it appears in that context is that it forms part of the information the Applicant appears to be requesting in order to use to take action against the Organization.

[para 158] The Applicant is not in any event entitled under PIPA to such information that is not his personal information, but when information that is his personal information exists in that context of information he means to use to take issue with the Organization's actions, the fact that this is his intention is arguably a factor weighing in favour of permitting the Organization to withhold it as an element in its strategies and decision making relative to him which he intends to use for this purpose.

[para 159] A somewhat similar argument was made by the Organization where it said, relative to information it withheld from the inception on the basis of section 24(2)(c), that:[24]

> . . . AASUA's internal communications provide insight into its frank and confidential assessments of grievances, including issues of credibility, settlement, and likelihood of success. The AASUA must be able to assess grievances, and this would be diminished if its internal communications and related records were disclosed to its members or third parties . . .

[para 160] I agree that if such information could be obtained by way of access requests, this might inhibit the Organization's ability to perform these aspects of its functions effectively.

[para 161] Even if the Organization were not justified in withholding the Applicant's personal information falling under section 24(2)(c) for the kinds of reasons just discussed, I note again that section 24(1.1) of the Act only requires an organization to provide an applicant with responsive information, "taking into consideration what is reasonable".

[para 162] As already noted within, the portions of the information the Organization has withheld that actually consist of the Applicant's personal information (in contrast to information as to the Organization's strategies and decisions *relative* to this information), are likely to be of little utility to the Applicant because he already knows this information.

[para 163] In regards to what was reasonable in this case, the Organization submitted:[25]

> As stated in [the General Counsel]'s affidavit, the AASUA spent approximately 400 combined hours responding to the Applicant's request, and eventually disclosed over 6300 unredacted pages [to] the Applicant. The AASUA withheld about 5900 pages.
>
> The AASUA submits that it would not be reasonable to require it to review documents that are quite likely already in the possession of the Applicant (or of his lawyer), select out items of personal information that appear throughout those documents, redact those documents as required, and return the documents to the Applicant, given the volume of records the AASUA had in its possession. The AASUA submits that it acted reasonably with respect to records it received from the Applicant.

[para 164] I agree with the Organization's submission. Section 24(1.1) requires an organization to provide access only if it is reasonable to do so. In the circumstances of this case, and particularly considering the volume of records involved, I find it would not be reasonable to require the Organization to review the withheld records, select out items of personal information that appear throughout the documents, and then redact those documents and provide the redacted documents to the Applicant.

[para 165] Given the explanation provided by the Organization as to how it exercised its discretion, I find that the Organization properly exercised its discretion to withhold the Applicant's personal information pursuant to section 24(2)(c).

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[24] Organization's initial submission at para. 56.

[25] Letter dated February 27, 2018 from Organization to the former adjudicator, copied to the Applicant.

[para 166] I note once more that even if I had found that neither litigation privilege under section 24(2)(a) nor section 24(2)(c) (information collected for an investigation or legal proceeding) applied to the information that Organization had withheld, the Applicant would only be entitled to his own personal information in those records. Given the interpretation of this Office of what constitutes "personal information" under the Act, this information would not likely be what the Applicant is seeking.

*Settlement Privilege*

[para 167] The Organization asserted that settlement privilege applied to records in a number of bundles.[26]

[para 168] In its initial submission, the Organization stated:

> 50. The AASUA has the express and exclusive right to be a signatory on behalf of its members on any settlements or agreements negotiated with the University. Further, it may cease to represent a member who refuses to accept a settlement agreement. During its representation of [the Applicant], the AASUA expended considerable resources in securing a complicated settlement agreement, and continually attempted to negotiate the settlement of [the Applicant's] complaints, and therefore the AASUA submits it correctly applied section 24(2)(a) to a number of records on the basis that they were protected by settlement privilege.

[para 169] The purpose of settlement privilege was discussed by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp*, 2013 SCC 37. As stated in the summary of the case:

> The purpose of settlement privilege is to promote settlement. Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. Settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. The protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. Since the negotiated amount is a key component of the content of successful negotiations, reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege.

[para 170] At paragraph 15 of *Bellatrix Exploration Ltd v Penn West Petroleum Ltd.*, 2013 ABCA 10 (*Bellatrix*), the Alberta Court of Appeal identified the following test for determining whether settlement privilege applies:

(a) the existence, or contemplation, of a litigious dispute;

[26] Schedule 1 of the General Counsel's Affidavit of Records disclosed to the Applicant and to this Office with the Organization's letter to the Applicant dated September 24, 2020.

(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 171] As stated by the Alberta Court of Appeal in *Bellatrix*:

> [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 172] At paragraph 34 of *Union Carbide Canada Inc. v Bombardier Inc.*, 2014 SCC 35, the Supreme Court stated "Furthermore, the privilege applies even after a settlement is reached. The "content of successful negotiations" is therefore protected: *Sable Offshore,* at paras. 15-18."

[para 173] In *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, the Alberta Court of Appeal stated at paragraph 59 that "At common law mediations and the resulting settlements are privileged: *Union Carbide* at para. 34; *Brown v Cape Breton (Regional Municipality)* at para. 42."

[para 174] I further note that as stated by the Alberta Court of Queen's Bench at paragraph 5 of *Leonardis v. Leonardis*, 2003 ABQB 577, settlement privilege belongs to both parties and cannot be unilaterally waived by one of them.

*Conclusion regarding the assertion of settlement privilege*

[para 175] I have reviewed the submissions of the Organization in this inquiry, and the description of the records over which the Organization asserted settlement privilege applied in the *in camera* Affidavit of Records it provided to me and in Schedule 1 of the version of the Affidavit of Records provided to the Applicant and to me.

[para 176] Based on my review, I am satisfied that the test for settlement privilege set out in *Bellatrix* was met and that the Organization properly asserted settlement privilege over the personal information of the Applicant that it withheld under this type of privilege pursuant to section 24(2)(a) of the Act. Given the information the Organization provided about these records in its Affidavits and submissions, I determined it was not necessary for the Organization to produce these records to me in order for me to reach this conclusion.

**b. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to any of the withheld information?**

**c. Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to any of the withheld information?**

**d. Does section 24(3)(b) (information revealing personal information about another individual) apply to any of the withheld information?**

**e. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to any of the withheld information?**

[para 177] As noted above, the Organization provided me with copies of two groups of records which it had withheld from the Applicant.

[para 178] There were 47 records comprised of 140 pages in the First Group of Records Provided for my Review. The Organization withheld these records from the Applicant citing one or more of sections 24(2)(c), 24(2)(d), 24(3)(b) and 24(3)(c).

[para 179] There were 24 records comprised of 66 pages in the Second Group of Records Provided for my Review. The Organization withheld these records from the Applicant citing one or more of sections 24(2)(d), 24(3)(b) and 24(3)(c). It further advised that records in the Second Group of Records for Review may not even contain the Applicant's personal information.

[para 180] The Organization provided an updated Index of Records to me and to the Applicant which included brief descriptions of the records in the Second Group of Records Provided for my Review, and the section or sections applied to withhold the records.

[para 181] I will consider the sections the Organization asserted applied in each case to the records in the First Group of Records Provided for my Review and to the records in the Second Group of Records Provided for my Review.

*The First Group of Records Provided for my Review*

[para 182] As mentioned above, the Organization withheld 47 records, comprised of 140 pages from the Applicant. The Organization asserted that section 24(2)(c) applied to all of these records and, in some cases that sections 24(2)(d), 24(3)(b) and/or 24(3)(c) also applied to these records. It identified these records in its Index of Records which was exchanged with the Applicant, and provided these records to me for my review.

[para 183] The Organization made the following submissions in its initial submission regarding its application of section 24(2)(c) to withhold personal information about the Applicant in these records:

> . . .
>
> 54. As noted above, a primary responsibility of the AASUA is the representation of the interests of the members of the academic staff in disputes relating to the Faculty Agreement, and must be based on full investigation into disputes concerning its members' rights. Most, if not all of [the Applicant's] personal information in the File

> was collected for the purposes of investigating the merits of [the Applicant's] grievances, and assessing whether to advance those grievances to arbitration.
>
> 55. As noted above, the AASUA submitted numerous grievances and other complaints on [the Applicant's] behalf. The grievances and complaints necessarily concerned breaches of the Faculty Agreement; otherwise, the AASUA would have no authority to represent [the Applicant]. The Commission has held that an arbitration concerning a possible breach of a collective agreement meets the definition of "legal proceeding" in PIPA, and so section 24(2)(c) applies to file notes and grievance summaries collected during an organization's investigation into the breach:
>
>> The Applicant's information in these records was collected in the course of the Organization's investigation into the Applicant's complaint that his employer breached a collective agreement between the Organization and the Applicant's employer. The grievance summaries and file notes were then created, using the information collected during the investigation, for the purpose of determining whether to proceed with a legal proceeding (the arbitration process).
>>
>>> Order P2015-10 (Health Sciences Association of Alberta) at para 26 [TAB 21]
>
> 56. The confidentiality of records collected for the AASUA's investigations into [the Applicant's] complaints, and for ensuing arbitrations, is essential to the healthy maintenance of the AASUA's relationships with its members, and with the University. AASUA's internal communications provide insight into its frank and confidential assessments of grievances, including issues of credibility, settlement, and likelihood of success. The AASUA must be able to assess grievances, and this would be diminished if its internal communications and related records were disclosed to its members or third parties. Consequently, the AASUA is obligated to handle all cases with complete confidentiality, and matters are disclosed only as necessary for representation in a complaint resolution process or for seeking legal advice, in accordance [with] its Policies and Procedures.
>
> 57. It is also imperative that the AASUA's "without prejudice" or "off the record" communications remain confidential. Disclosure of such communications would inhibit or preclude future discussions. These discussions are a critical element of the AASUA's representation of its members.
>
> 58. The AASUA submits that it properly applied section 24(2)(c) to the File and withheld [the Applicant's] personal information that was collected for investigations and legal proceedings.

[para 184] As the Organization has noted, given its role and relationship to the Applicant, the Applicant's personal information on his AASUA file is there as a result of his grievances, or as a result of complaints against him, and the investigations the Organization conducted into such grievances and complaints.

[para 185] Having reviewed the records, I find that most of the information contained in the records is related to the Applicant but not about him, and therefore not his personal information.

[para 186] To the extent that there are snippets of information that are about him and are therefore his personal information, I find that this information was collected for the purpose of an investigation or legal proceeding and the Organization has properly applied section 24(2)(c) to withhold the personal information of the Applicant contained therein.

[para 187] For the same reasons set out in paragraphs 154 to 161 above, I confirm that the Organization properly exercised its discretion in deciding to withhold the Applicant's personal information in these records.

[para 188] As I have determined that the Organization properly applied section 24(2)(c) to the records it withheld from the Applicant, it is not necessary for me to also consider whether the Organization also properly applied section 24(2)(d) and/or section 24(3)(b) and/or section 24(3)(c) where it asserted these provisions also applied to information in the records.

*The Second Group of Records Provided for my Review*

[para 189] On October 14, 2022, the Organization provided me with an additional 24 records comprised of 66 pages, that it had withheld from the Applicant under one or more of sections 24(2)(d), 24(3)(b) and/or 24(3)(c).

[para 190] The Organization also submitted that all or some of the records in the Second Group of Records Provided for my Review may not, in fact, even contain personal information *about* the Applicant, and therefore may not be subject to the Act.

[para 191] Section 24(2)(d) states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> . . .
>
> *(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided.*

[para 192] Sections 24(3)(b) and (c) state:

> *24(3) An organization shall not provide access to personal information under subsection (1) if*
>
> . . .
>
> *(b) the information would reveal personal information about another individual;*
>
> *(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*

[para 193] Section 24(4) states:

> *24(4) If an organization is reasonably able to sever the information referred to in subsection 2(b) or 3(a), (b) or (c) from a copy of the record that contains personal information about the applicant, the organization must provide the applicant with access to the part of the record containing the personal information after the information referred to in subsections (2)(b) or 3(a), (b) or (c) has been severed.*

[para 194] I have reviewed the records. While I cannot disclose what is in them, I can say that they consist largely of the Organization's documented discussions, and various individuals' opinions, about how to deal with the Applicant's grievances and related matters, and observations of related events.

[para 195] In the General Counsel's Exchanged Affidavit, the General Counsel addressed the necessity of maintaining confidentiality in grievance proceedings. At paragraph 13, the General Counsel stated:

> 13. The protection of the confidentiality of grievance process discussions is essential to the healthy maintenance of the labour relationship. It is very important for the AASUA that its internal communications are not disclosed because they provide insight into its confidential assessments of grievances, including issues of credibility, settlement, and likelihood of success. If the University, for example, were to gain that information, it would prejudice the staff member, the AASUA's ability to properly represent the staff member and also other staff members who may have similar grievances. The AASUA must be able to frankly and confidentially assess grievances, and this would be diminished if its internal communications and related records were disclosed to members or other third parties. Consequently, the AASUA must handle all cases with complete confidentiality and matters are disclosed only as necessary for representation in a complaint resolution process or for seeking legal advice, in accordance with Appendix 3, attached as Exhibit B to this affidavit.

[para 196] In Order P2015-05 the Director of Adjudication made the following comments on what constitutes personal information about an individual under the Act, which provide guidance in this case:

> [para 31] The greatest part of the withheld information consists of discussions about the Applicant and his job-related issues amongst other employees of the Organization whose role it was to deal with these, as well as statements of other employees who recounted events involving the Applicant. To a large extent, these discussions include ideas or intentions as to how his employment issues should be dealt with. The records also include descriptions of how the Applicant behaved or reacted in certain situations, that are value-laden in that they reveal the speakers' opinions about the Applicant and the way these persons interpreted events concerning him. (Because the discussions are work-related rather than personal, most of the 'opinion' information in this category does not appear to be - - though some of it may be - - the personal information of the employees engaged in these discussions and making these statements.)
>
> [para 32] With respect to such information, I agree with the reasoning in the decision of Commissioner Work, cited above, as well as the reasoning of the Adjudicator in Order

> P2012-04. Insofar as this withheld information consists of the intentions, ideas and opinions of the other employees, it does not consist solely of the Applicant's personal information, nor does some of it consist of his personal information at all.
>
> [para 33] To illustrate the latter point, X's statement that "I believe we should take steps a, b and c to deal with Y's employment complaint" is not Y's personal information. While the fact Y has made an employment complaint is Y's personal information, the steps X believes should be taken to address it, though related to Y, are not. Ultimately, if the steps are taken and affect Y's situation, this may, at that point, be Y's personal information, for example, that Y accepted a new position. However, the intervening considerations or discussions by others about the merits of the complaint and how to resolve it, are not. Most certainly they are not if the suggested steps are never effected. Even if they are, only the way Y's situation is affected by the outcome, and not why and by whom this was effected, is personal information in the sense of being "about Y" within the terms of the Act.
>
> . . .
>
> [para 88] With respect to the interview notes about the incident with persons other than the Applicant, as was the case with records withheld under section 24(2)(a), I do not believe that any part of these records (other than minor, insignificant 'snippets') consists solely of the Applicant's personal information. Rather, such information is intertwined with the opinion information of identifiable others. Some of it does not consist of the Applicant's personal information at all. For these reasons, section 24(3)(c) (a mandatory exception) applies to as much of this information as is the Applicant's personal information. It is therefore not strictly necessary for me to consider whether section 24(2)(c) was properly applied.

[para 197] I find that where in these records there is any reference to what the Applicant said or did, it is in the context of employees of the Organization and others discussing their intentions, ideas and opinions as to how to address matters involving the Applicant. I accept the Organization's submission that this information was provided in confidence to the AASUA.

[para 198] In my view, the inclusion of what the Applicant said or did is inextricably intertwined with the opinion information of identifiable others. For these reasons section 24(3)(c) applies and requires all of the information to be withheld by the Organization.

[para 199] I further find that the Organization is not reasonably able to sever the information that is the subject of section 24(3)(c) from a copy of the record that contains personal information of the Applicant (what he said or did) in order to provide access to his personal information.

[para 200] I further find that although the Applicant's name is his personal information, it would not be reasonable pursuant to section 24(1.1) to require the Organization to redact the balance of the information to provide the Applicant solely with his name where it appears in the records.

[para 201] Given my conclusions above, it is not necessary for me to consider whether section 24(2)(d) and/or section 24(3)(b) apply to the records where they have been asserted.

### 3. Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

[para 202] Section 28 of the Act states:

*28(1) Subject to this section, an organization must respond to an applicant not later than*

*(a) 45 days from the day that the organization receives the applicant's written request referred to in section 26, or*

*(b) the end of an extended time period if the time period is extended under section 31.*

[para 203] Section 31 of the Act states:

*31(1) An organization may, with respect to a request made under section 24(1)(a) or (b), extend the time period for responding to the request by up to an additional 30 days or, with the Commissioner's permission, to a longer period, if*

*(a) the applicant does not give sufficient detail to enable the organization to identify the record containing the personal information,*

*(b) a large amount of personal information is requested or must be searched,*

*(c) meeting the time limit would unreasonably interfere with the operations of the organization, or*

*(d) more time is needed to consult with another organization, a public body or a government or an agency of a government of a jurisdiction in Canada before the organization is able to determine whether or not to give the applicant access to the requested personal information or to provide information about the use or disclosure of the personal information.*

*(2) If the time period is extended under subsection (1), the organization must inform the applicant of the following:*
*(a) the reason for the extension;*
*(b) the time when a response from the organization can be expected;*
*(c) that the applicant may ask for a review under section 46.*

[para 204] The Applicant's request for his entire AASUA file was received by the Organization on March 20, 2014.

[para 205] On May 21, 2014, which was beyond the 45 days for the Organization to provide its response to the Applicant as required under section 28(1)(a), the Organization advised the Applicant that it would be extending the time in which it needed to respond to the Applicant by 30 days. The Organization provided the following reasons for the extension:

> As you have chosen not to provide any specificity in your request, I am advising you of a 30 day extension that is now in place.

This is a result of receiving:

- Insufficient detail in your request;

- The large amount of information that now must be searched, procured, copied and placed in chronological order (which is underway);

- There is a need to further consult with our counsel in relation to adhering to the PIPA guidelines.

[para 206] On June 23, 2014, the Organization provided the Applicant with records responding to his request. The Organization withheld some responsive information on the basis that sections 24(2)(a), 24(2)(c), 24(2)(d), 24(3)(b), and 24(3)(c) applied, or on the basis that the information was non-responsive as it was not his personal information.

[para 207] In its initial submission, the Organization stated:[27]

> 66. Section 27 of PIPA creates a duty for an organization to make every reasonable effort to assist applicants, and to respond to an applicant as accurately and completely as reasonably possible. In accordance with section 28, this must be done no later than 45 days from the day it receives and applicant's written request.
>
> 67. In Order P2014-01 the Commission noted that ideally, an organization should seek clarification of the kinds of correspondence sought by an applicant. The AASUA took steps to have [the Applicant] clarify his request, but concedes that it did not reply within 45 days. However, it submits that the extra time taken it took was not egregious, and further, extra time was required to permit the AASUA to make every reasonable effort to assist [the Applicant].

[para 208] The Organization conceded that it did not provide a response to the Applicant within the 45 days required under section 28(1)(a) of the Act. I do not need to determine whether the Organization properly took a 30 day extension under section 31 of the Act since, even if the extension had been properly taken, the Organization failed to provide a response to the Applicant not later than 75 days (45 days under section 28(1)(a) and an additional 30 days under section 31) from receipt of his access request.

[para 209] The Organization submitted that the extra time it took to respond was not egregious, and further, that the extra time was required to permit it to make every reasonable effort to assist the Applicant. Regardless of its good intentions, the Organization missed the deadline in the Act for responding. Given the volume of records involved in this access request, the Organization might have considered making a request to the Commissioner under section 31 of the Act for permission to take a longer period to respond.

[para 210] As the Organization did not provide a response to the Applicant until June 23, 2014, I find that the Organization did not meet the deadline prescribed under section 28 of the

[27] Organization's initial submission dated July 10, 2017.

Act; however, as the Organization has responded to the Applicant there is nothing further for me to order in this regard.

### 4. Did the Organization comply with section 29(1) of the Act (contents of the response)?

[para 211] Section 29 of the Act sets out what an organization must include in its response to an applicant's access request. It states:

> *29(1) In a response to a request made under section 24(1)(a), the organization must inform the applicant*
>
> *(a) as to whether or not the applicant is entitled to or will be given access to all or part of his or her personal information,*
>
> *(b) if the applicant is entitled to or will be given access, when the access will be given and*
>
> *(c) if access to all or part of the applicant's personal information is refused,*
>
> *(i) of the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review under section 46.*

[para 212] As noted above, in its letter dated June 21, 2014, the Organization informed the Applicant that it would be providing him with a copy of the file from March 2010 to present (June 20, 2014) and that "All exclusions under PIPA are noted on the file copy. The number of pages and the date of the document severed is provided for each individual exclusion." On June 23, 2014, it informed the Applicant it would ship the records to the address he specified.

[para 213] In his letter dated August 5, 2014 attached to his Request for Review, the Applicant stated that there was no letter accompanying the records.

[para 214] In its initial submission, the Organization stated:

> 68. The AASUA responded to [the Applicant's] request on June 23, 2014 and further on May 25, 2015. The AASUA withheld certain information, indicating it was not the Applicant's personal information. The AASUA, in withholding certain information, relied on sections 24(2)(a), 24(2)(c), 24(2)(d), 24(3) [and] 24(3)(c).
>
> 69. The AASUA did not expressly inform [the Applicant] that [the General Counsel] could answer on behalf of the AASUA his questions about the refusal, but submits that [the Applicant] could have inferred this from [the General Counsel's] response, and further, was very familiar with the AASUA staff.

> 70. The AASUA concedes that it did not inform [the Applicant] that he may ask for a review of its decision under section 46 of PIPA.

[para 215] Where it is refusing access to all or part of an applicant's personal information, section 29(1)(c) requires an organization to inform an applicant in its response of the reasons for the refusal and the provision of the Act on which the refusal is based. The Organization's letter dated June 23, 2014 did not include this information.

[para 216] The Act further requires an organization to provide the name of the person who can answer the Applicant's questions about the refusal on behalf of the organization. There is no qualification to this requirement that permits an organization to exclude this information on the basis that it believes the applicant ought to know who to contact. The Organization's letter did not include this information.

[para 217] Finally, as it has acknowledged, the Organization did not inform the Applicant that he may ask for a review under section 46.

[para 218] In light of the foregoing, I find that the Organization did not comply with section 29; however, as the Applicant has availed himself of the review process and the inquiry process before this Office, and has been informed of the reasons the Organization refused him access to responsive information and the sections of the Act on which the refusal is based, there is nothing further for me to order in this regard.

**5. Did the Organization properly withhold as non-responsive one record (consisting of two pages), which it originally asserted was subject to litigation privilege and then withdrew this exception?**

[para 219] As previously stated, under the Act an organization is required to provide an applicant with personal information only about them. A record that does not contain an applicant's personal information is not a responsive record under the Act and the Act does not apply to it.

[para 220] Having reviewed the one record consisting of two pages, I find that even though it contains the Applicant's name, which is his personal information, the balance of the information is related to him, and not about him in the sense contemplated by the Act, and therefore not his personal information.

[para 221] As a result, I find that the Applicant's name is responsive to his access request, but the balance of the information in the record is not.

[para 222] Requiring the Organization to redact all of the information in the two pages in order to provide the Applicant solely with his name where it appears, would not be reasonable under section 24(1.1), and so I will not order the Organization to do so.

**6. Does section 4(3)(k) (information in a court file) of the Act apply to the four records (consisting of 167 pages), relative to which the Organization has now withdrawn its earlier claim of litigation privilege?**

[para 223] At the time that the Organization informed me that it had determined that four records over which it had previously asserted were subject to litigation privilege, were instead subject to section 4(3)(k) of the Act, section 4(3)(k) of the Act stated:[28]

> *4(3) This Act does not apply to the following:*
>
> . . .
>
> *(k) personal information contained in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master in chambers of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 224] Where information falls under section 4(3)(k), it is not subject to the Act and I do not have jurisdiction to review the Organization's decision to withhold the information from the Applicant.

[para 225] The language in section 4(3)(k) of the Act is very similar to the language in section 4(1)(a) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act), which, at the time, stated:[29]

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(a) information contained in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master in chambers of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 226] Given the similarity in the language between section 4(1)(a) of the FOIP Act and section 4(3)(k) of PIPA, the decisions made by this Office with regard to the application 4(1)(a) of the FOIP Act provide direction when making decisions regarding the application of section 4(3)(k) of PIPA.

[para 227] In Order F2007-021 the adjudicator considered the application of section 4(1)(a) of the FOIP Act. At paragraphs 25 and 28 he stated:

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[28] Section 4(3)(k) has since been amended to replace "the Court of Queen's Bench of Alberta" with "the Court of King's Bench of Alberta" and "The Provincial Court of Alberta" with "the Alberta Court of Justice".

[29] Section 4(1)(a) has since been amended to replace "the Court of Queen's Bench of Alberta" with "the Court of King's Bench of Alberta" and "The Provincial Court of Alberta" with "the Alberta Court of Justice".

> [para 25] When a party files documents with a court, the party usually takes in several copies, all of which are stamped as "filed" and certain of which are retained by the party for its own use and for service on other parties. A "filed" stamp essentially means that the document was notionally once on the court file and then immediately "taken back" by the party that filed it. To put the point another way, the records are exact versions of the records in the court file. Either way, I find that copies of court-filed documents emanate from a court file and are excluded from the application of the Act under section 4(1)(a).
>
> . . .
>
> [para 28] I conclude that a copy of a filed version of a court record is "information in a court file". Besides the records to which the Public Body specifically applied section 4(1)(a), I note copies of other filed versions of court records in the Crown prosecutor's file. While the Public Body did not apply section 4(1)(a) to those records, I must apply the section myself, as it addresses whether or not I have jurisdiction over the records (Order F2002-024 at para. 11).

[para 228] Three of the four documents the Organization has now withheld under section 4(3)(k) are stamped as filed by the Clerk of the Court in the Judicial District of Edmonton. I find that section 4(3)(k) applies to these records and they are excluded from the application of the Act. I do not have jurisdiction to review the Organization's decision to withhold these records.

[para 229] The fourth document withheld by the Organization under section 4(3)(k) is a transcript of a court proceeding.

[para 230] In Order F2007-021, the adjudicator considered whether transcripts of a court proceeding were excluded from the application of the FOIP Act under section 4(1)(a). At paragraph 23 he stated:

> [para 23] Copies of transcripts of court proceedings emanate from a court file, as they are prepared by or on behalf of the court and not the Public Body. I find that the court transcripts therefore constitute information in a court file and are excluded from the Act under section 4(1)(a). This is the case whether the transcript appears on its own in the Crown prosecutor's file, or is attached as an exhibit to an affidavit (e.g. pages 365-390). I also find excluded from the application of the Act copies of an informant's Information and Endorsements that are attached to one of the transcripts (page 134-137), as these court records also emanate from a court file.

[para 231] I agree with the conclusion of the adjudicator in Order F2007-021 and find that his reasoning also applies to transcripts of court proceedings withheld under section 4(3)(k) of PIPA.

[para 232] I find that the court transcript is "information in a court file" and is excluded from the application of the Act under section 4(3)(k) of PIPA. Accordingly, I do not have jurisdiction to review the Organization's decision to withhold this record.

*Applicant's Request for Sanctions Against the Organization*

[para 233] In his Request for Inquiry, the Applicant asked that "sanctions be taken against the Association of Academic Staff University of Alberta for their willful violation of the Personal Information and Protection of Privacy Act."[30]

[para 234] Section 59 sets out the circumstances which are considered to be an offence under the Act. While I have determined that the Organization failed to meet the timeline in section 28 to provide a response to the Applicant's access request, and did not include all of the information in the response as required under section 29, neither of these contraventions are identified as offences under section 59. Moreover, in Order P2006-005, former Commissioner Work stated:

> [para 100] Section 59 does not give me jurisdiction to make findings of guilt or innocence, to convict persons for offences under the Act, or to assess penalties. Instead, the *Provincial Offences Procedure Act* gives jurisdiction to the Provincial Court of Alberta to decide whether a person had committed an offence under section 59 of the *Personal Information Protection Act* and to assess an appropriate penalty.
>
> [para 101] For these reasons, I find that I have no jurisdiction to convict an organization for an offence under section 59 of the Act.

[para 235] Accordingly, there is no basis in, or authority under the Act for me to impose sanctions or penalties against the Organization for failing to meet the timeline under section 28 to provide a response, or to include in its response the information required under section 29 of the Act.

## VI. ORDER

[para 236] I make this Order under section 52 of the Act.

[para 237] I find that the Organization properly applied solicitor-client privilege to withhold the Applicant's personal information in the records over which it asserted solicitor-client privilege under section 24(2)(a) of the Act.

[para 238] I find that the Organization properly applied litigation privilege under section 24(2)(a) of the Act to some of the Applicant's personal information it withheld in the records on this basis.

[para 239] I find that where the Organization did not establish on the balance of probabilities that litigation privilege applied to the Applicant's personal information in the records, the Organization properly withheld the Applicant's personal information in these records under section 24(2)(c) of the Act. I further find that the Organization properly exercised its discretion in withholding the Applicant's personal information in these records.

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[30] Applicant's letter dated March 6, 2017 attached to Applicant's Request for Inquiry.

[para 240] I find that the Organization properly applied settlement privilege to the Applicant's personal information in the records over which it asserted this privilege under section 24(2)(a) of the Act.

[para 241] I find that the Organization properly applied section 24(2)(c) to withhold the Applicant's personal information in the First Group of Records Provided for my Review, and properly exercised its discretion to withhold the Applicant's personal information in these records.

[para 242] I find that the Organization properly withheld the Applicant's personal information under section 24(3)(c) in the Second Group of Records Provided for my Review, and that the Organization could not reasonably sever the Applicant's personal information from these records and provide the same to him under section 24(4). I further find that it is not reasonable to require the Organization to redact the information in these records in order to provide the Applicant solely with his name where it appears in these records.

[para 243] I find that with the exception of the Applicant's name in the two page record it provided to me for review, the information in the record is non-responsive to the Applicant's access request under the Act. I further find that it is not reasonable to require the Organization to redact the non-responsive information to provide the Applicant solely with his name where it appears on these two pages.

[para 244] I confirm that the four records the Organization withheld under section 4(3)(k) of the Act are "information in a court file" and are excluded from the application of the Act.

[para 245] I find that the Organization did not respond to the Applicant within the time frame required under section 28 of the Act, and did not include all of the information required to be included in its response under section 29 of the Act; however, as it has since responded, and the Applicant has been informed of the reasons it withheld responsive information and the sections of the Act it applied, there is nothing further for me to order in this regard.

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Carmen Mann
Adjudicator
/kh