ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-39

November 22, 2024

UNIVERSITY OF CALGARY

Case File Number 017947

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), the Applicant made an access to information request to the University of Calgary (the Public Body), seeking records related to receipt and handling of a registered letter. The Applicant sought review of the Public Body's response to the request, and whether it met its duties under section 10(1) of the FOIP Act, and properly withheld information as subject to solicitor-client privilege under section 27(1)(a) of the FOIP Act.

The Adjudicator found that the Public Body met its duties under section 10(1).

The Adjudicator found that, contrary to earlier decisions of the Office of the Information and Privacy Commissioner, recent decisions of the Alberta Court of King's Bench and Alberta Court of Appeal indicated that the duty to sever under section 6(2) of the FOIP Act applied to information in records over which solicitor-client privilege was asserted. The Adjudicator found that the Public Body had not demonstrated that it properly turned its mind toward the duty to sever when withholding information under section 27(1)(a).

The Adjudicator ordered the Public Body to reconsider its decision to withhold information subject to solicitor-client privilege, and to disclose to the Applicant any information it found was not privileged, and was also reasonably severable from information that was privileged.

With respect to specific information sought by the Applicant — dates, time, senders, recipients, and subject lines of e-mails — the Adjudicator ordered the Public Body to explain how it determined such information was subject to solicitor-client privilege if it was not disclosed upon reconsideration.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 6(2), 10(1), 25(1)(b), 27(1)(a), 38, 69(3), 69(4), 72. *Rules of Court*, Alberta Regulation 124/2010 Rules 5.7(2), 5.8.

Authorities Cited: AB: Orders 96-015, 97-006, 96-017, 2000-030, F2004-008, F2004-017, F2007-029, F2017-43, F2018-15, F2022-18, F2022-49, F2023-16; **BC:** Orders F24-59, P24-06

Cases Cited: *632738 Alberta Ltd v Canada*, 2023 TCC 117; *Alberta (Minister of Municipal Affairs) v Alberta (Information and Privacy Commissioner),* 2019 ABQB 274; *Calgary (City) Police Service v Alberta (Information and Privacy Commissioner*), 2018 ABCA 114; *Calgary (City) Police Service v Alberta (Information and Privacy Commissioner),* 2019 ABQB 109; *CNOOC Petroleum North America ULC v ITP SA,* 2022 ABKB 683; *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10; *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207; *Hirch v Lethbridge,* 2024 ABCA 170; *MBH v CKI*, 2023 ABKB 284; *Power v Richardson GMP Ltd*, 2021 ABQB 877; *Starratt v Chandran,* 2023 ABKB 609; *TransAlta Corp v Alberta (Minister of Environment and Parks)*, 2024 ABCA 127; *University of Calgary v Alberta (Information and Privacy Commissioner),* 2019 ABQB 950

I. BACKGROUND

[para 1] On December 13, 2020, the Applicant was ordered to pay costs to the University of Calgary (the Public Body) as a result of the decision in *University of Calgary v Alberta (Information and Privacy Commissioner),* 2019 ABQB 950. That decision was a judicial review of Order F2018-15. On January 23, 2020, the Applicant mailed a cheque to the Public Body in payment of the costs, via registered letter. The envelope containing the cheque was addressed to the Public Body's Vice-President (Finance & Services).

[para 2] While it is clear that the Public Body ultimately received the cheque there was initially some question among the parties as to whether that was the case. To determine the fate of the cheque, the Applicant contacted Canada Post, which investigated the matter and informed him that, as of March 19, 2020, it had never been delivered. On March 20, 2020, Canada Post paid the Applicant $100.00 as compensation for the "lost" first cheque. Believing that the cheque was not delivered, the Applicant sent a second cheque to the Public Body on March 11, 2020. The parties exchanged e-mails about the matter, and in an e-mail from the Public Body to the Applicant dated March 18, 2020, the Public Body confirmed that it had received the first cheque, and would return the second. The same message states that the cheque was sent to the Public Body's finance

department for processing on March 13, 2020. In its submissions the Public Body states that it received the first cheque on January 29, 2020. What happened to the first cheque between the time it was sent and the time it was forwarded to the finance department is unclear.

[para 3] In an effort to gain an understanding of what had happened, on March 20, 2020 the Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act), seeking the following:

> Records pertaining to the handling of the registered letter tracking number RN473040236CA and its contents (cheque 030 for the bill of costs with respect to court file No [file number]) sent to the U of Calgary Vice-President (Finance and Services) on January 23, 2020, including the correspondence from/to Canada Post representatives during their attempts to track the delivery of the said registered letter.

[para 4] The date range specified in the access request is January 23 to March 20, 2020.

[para 5] The Public Body responded to the access request on May 4, 2020, withholding some information under sections 25(1)(b) and 27(1)(a) of the FOIP Act. Information withheld under section 27(1)(a) was withheld on the basis that it is subject to solicitor-client privilege.

[para 6] On May 26, 2020, the Applicant filed a request for review of the Public Body's response to the access request. In the request for review, the Applicant notes that the Public Body did not provide any records documenting communication with Canada Post, and did not provide "metadata" related to records over which solicitor-client privilege was claimed. Investigation and mediation were authorized to attempt to resolve the issues, but did not completely do so, and the Applicant sought an inquiry into the manner in which in the Public Body searched for responsive records, and its application of section 27(1)(a). Section 25(1)(b) was not raised as an issue.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of those that the Public Body withheld on the basis that they are subject to solicitor-client privilege. The Public Body did not provide them to me for review, instead describing them in a pair of affidavits.

III. ISSUES

A. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

B. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?

IV. DISCUSSION OF ISSUES

Preliminary matter – issues outside scope of inquiry

[para 8] The Applicant's concern about the handling of the cheque stems from another decision of the Office of the Information and Privacy Commissioner, Order F2017-43. In brief, in that Order the adjudicator ordered the Public Body to implement policies to manage risks of disclosing personal information when addressing mail as required under section 38 of the FOIP Act. The Applicant suggests the handling of the cheque indicates that proper processes for handling mail either were not implemented despite Order F2017-43, or were not followed.

[para 9] Whether the Public Body complied with Order F2017-43 is outside the scope of this inquiry. The Applicant filed a request for review of the Public Body's handling of his access request rather than any complaint about the Public Body's security arrangements, and only referred to that matter in his initial submission in the inquiry. As such, I do not consider it further.

[para 10] I also note that this is not an inquiry into how the Public Body handled the first cheque; the issues only concern how it responded to the access request.

Preliminary matter – Applicant's concerns regarding the circumstances of this inquiry

[para 11] The Applicant questions whether this inquiry should proceed prior to the completion of the reconsideration of Order F2018-15 ordered in *University of Calgary v Alberta (Information and Privacy Commissioner),* 2019 ABQB 950. The Applicant's argument appears to be that since the Court ordered the OIPC to reconsider the Public Body's application of section 27(1)(a) to withhold information subject to solicitor-client privilege, that reconsideration should occur first since it may address the matter of metadata related to solicitor-client privileged records, which is an issue in this inquiry.

[para 12] The pending reconsideration of Order F2018-15 is not a reason this inquiry should not proceed. I may consider the issue of metadata here and have the benefit of the Court's discussion of solicitor-client privilege and access requests in *University of Calgary v Alberta (Information and Privacy Commissioner),* 2019 ABQB 950 to inform my decision.

[para 13] Lastly, the Applicant notes that he presently has sought judicial review of a decision of mine regarding another of his access requests and questions whether this inquiry should be conducted by another adjudicator in light of that. I note that the Applicant makes no assertion of bias on my part, and appears to speculating that in the event the Court ordered a reconsideration of my decision it may stipulate that the reconsideration should be done by another adjudicator. The Applicant appears to be suggesting that if that were the case, it may be not proper for me to carry out this inquiry. None of those concerns amount to a reason why I should not conduct this inquiry. I am a neutral decision maker in this matter.

Preliminary Matter – Applicant's request to cross examine

[para 14] The Applicant requested the opportunity to cross-examine the Public Body's Coordinator of the FOIP Department (the Coordinator) on the affidavits she swore for the purposes of this inquiry. The Applicant argues that cross examination is necessary to assess the credibility and reliability of her sworn statements.

[para 15] In Order F2022-18 at para. 14, I concluded, based on the wording of section 69(3), that there is no right of cross examination under the FOIP Act. More recently, in Order F2023-16 at para. 30, the adjudicator noted that while there is no right of cross examination, the FOIP Act does not prohibit cross examination either.

[para 16] I did not permit cross examination in this inquiry.

[para 17] Under section 69(4) of the Act, I may decide whether representations in an inquiry are to be made orally, or in writing. As set out in the Notice of Inquiry, submissions in the matter were to be made in writing. I gave no indication that any sort of oral representations would be permitted, including either examination or cross examination. Further, the written submission process permitted both initial and rebuttal submissions, which provided the Applicant a fair opportunity to review the Coordinator's affidavit and argue that its contents indicate issues of credibility and reliability, which he has done, and which I assess below. Absent some greater need for cross examination in order to ensure fairness, there is no reason to put the parties to the inconvenience and delay of convening an in-person procedure, in the middle of a written inquiry.

A. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 18] Section 10(1) states,

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 19] The two parts of the duty to assist in section 10(1) were set out in Order F2004-008 at para 32:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?

- Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?

[para 20] The burden of proof falls on the Public Body to demonstrate that it met its duty under section 10(1). (See Order 97-006). A public body must provide the

Commissioner with sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request. (See Order 2000-030). Former Commissioner Work described the general points that a public body's evidence should cover in Order F2007-029 at para. 66:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

[para 21] The Applicant suggested that the Public Body may have failed to locate all responsive records on the basis that none of the records he received indicated that Canada Post had spoken to the Public Body. The Applicant believes such records would have been generated in the course of Canada Post's investigation. I observe that there is nothing in the evidence before me that indicates that Canada Post actually spoke to the Public Body. The Applicant's assertions that there should be such records assumes that such contact would have taken place, and further, that the Public Body would have documented it. In any case, since such records were specifically sought in the access request, the Public Body inquired after them with several of its employees.

[para 22] The Public Body provided an affidavit detailing its search for records in response to the access request. The affidavit was sworn on May 4, 2023, by the Coordinator. She conducted the Public Body's search for records. Her title at the time when the Applicant made the access request was "FOIP Coordinator."

[para 23] The Coordinator asked eight people to search for records, including the Manager of University Distribution Services, which includes the Public Body's mailroom, as well as an employee from the University Central Receiving. The Manager of Distribution Services confirmed receipt of the cheque and provided the Coordinator a screen shot confirming delivery to the VP of Finance on January 29, 2020, and confirmed that he found no other records. The employee from Central Receiving informed the Coordinator that there was no contact with Canada Post about the cheque, other than delivery to the mail room.

[para 24] The Coordinator also asked the Executive Director, Office of the Vice-President, Finance and Services to search for records from that office; the Coordinator

was informed that none were found. The Coordinator states in her affidavit that the Executive Director oversees the Office of the Vice-President, Finance and Services, and could knowledgeably reply on behalf of that Office.

[para 25] I note that the Coordinator did not ask the Vice-President, Finance and Services, herself to search for records. I address this in my analysis below.

[para 26] The other five people asked to search for records were those involved in handling the legal affairs of the Public Body. They consist of two external Legal Counsel who represented the Public Body in *University of Calgary v Alberta (Information and Privacy Commissioner),* 2019 ABQB 950; the Public Body's General Counsel, University Legal Services, as well as the Office Supervisor and Executive Assistant for University Legal Services. They were asked to search for records based upon the wording of the access request. All of them searched for responsive records and provided them to the Coordinator where found.

[para 27] Considering the above, I find that the Public Body met its duty under section 10(1). The search for records included the people and offices involved in handling mail sent to the Public Body, the Office of the person to whom the envelope containing the cheque was sent, as well as those involved in the Public Body's legal affairs with the Applicant from which the order for the Applicant to pay costs to the Public Body arose. While the search might reasonably have included the Vice-President, Finance and Services, herself, I do not find her exclusion to be unreasonable. It seems to me that by recruiting the Executive Director of that office to carry out a search within that office, reasonable efforts were made to search for records there.

[para 28] As to the lack of records documenting communication between the Public Body and Canada Post, I find that the Coordinator's queries to University Distribution Services and Central Receiving explains this absence. The Coordinator was informed that there had been no contact with Canada Post, and despite a search that included those who would have handled the mail, none turned up. As already noted, there is no evidence that any such contact even took place.

[para 29] As to the facts that Canada Post informed the Applicant that the cheque was not delivered, and issued him compensation, I do not find that these facts indicate that the Public Body's search was inadequate. Given that the Public Body was able to locate confirmation that the cheque was delivered on January 29, 2020, those facts more likely indicate that the investigation by Canada Post was not as thorough as it might have been, rather than suggesting that there would have been documented communication with the Public Body.

[para 30] As to the Applicant's concern about the credibility and reliability of the Coordinator's affidavit, I do not share such concerns. The Applicant argues that since the employee from Central Receiving confirmed that the cheque was delivered to the Vice-President, the Coordinator could not have accepted the claim from the Executive Director of the Vice-President's Office that there were no records from that office. The Applicant

suggests that receipt of the cheque in the Vice-President's Office must have resulted in the creation of some records in that Office. As with the Applicant's assertion that the search was unreasonable because it produced no communications between the Public Body and Canada Post, his argument here also relies on an assumption: that because the cheque arrived in the Vice-President's Office, there must be written records about it. I see no basis for that assumption, and no reason to doubt the Coordinator's affidavit.

[para 31] In closing on this issue, I observe that the Applicant has also argued that he did not seek access to "legal documents", and therefore questions whether External Legal Counsel is somehow involved in the Public Body's Distribution Services and Central Receiving, and also why the Coordinator did not explain External Counsel's role in handling mail, or whether or not handling mail is somehow a legal issue.

[para 32] I take the central thrust of the Applicant's argument above to be that the Public Body ought not to have involved External Legal Counsel in its search for records, unless External Counsel is somehow involved in handling its mail. The notion that External Legal counsel is involved in handling the Public Body's mail is unsupported by any evidence. I mention the argument to note that it appears to be an argument that the Public Body's search for records was over-inclusive, rather than one that failed to make all reasonable efforts to locate responsive records, as is required by section 10(1). An over-inclusive search meets the requirement to make all reasonable efforts as required by section 10(1).

B. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?

[para 33] The Public Body did not provide records over which it asserts solicitor-client privilege for me to review. The approach to determining whether the privilege applies to the records in these circumstances was set out in Order F2022-49 at paras. 47 – 55:

> The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821. The Court said:
>
> > … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.
>
> The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.
> Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

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

In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "… the IPC cannot "properly determine" whether solicitor-client privilege exists: *2018 CPS (CA)* at para 3. The scope of the IPC's review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

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

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

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

[para 34] I agree with Order F2022-49 and take the same approach here, where the Public Body has described privileged records in two affidavits.

[para 35] I also note the decision in *Power v Richardson GMP Ltd*, 2021 ABQB 877 (*Power*). In *Power*, Justice Grosse addressed a challenge to an assertion of solicitor-client privilege over certain communications. She made clear that descriptions of such records should address all elements of the test of privilege at para. 25:

> There are a number of the disputed records in the Production Application that are, on the face of the description in the Chart, communications between CanAm representatives and CanAm counsel only. The Affidavits of Records of the applicable CanAm Defendants do not fully establish the privilege in that they only refer to "communications and copies of

> communications between solicitor and client", without mention of the communications entailing giving or receiving legal advice, or being confidential. The description should address all elements of the test of privilege, but the Power Plaintiffs do not make their challenge based on this gap in the Affidavit of Records….

[para 36] I now consider the descriptions in the Public Body's affidavits.

[para 37] The Public Body initially described the records over which it asserted solicitor-client privilege in the aggregate; that description is found in the affidavit of the Coordinator, sworn May 4, 2023. I wrote to the Public Body seeking a further affidavit describing the records either individually or in proper bundles as is required in Rule 5.8 of the *Rules of Court*, Alberta Regulation 124/2010, which is the standard the Public Body must meet, as discussed in the passage from Order F2022-49 above. The Public Body provided a second affidavit sworn by the Coordinator on July 6, 2023, describing two bundles of documents provided to the Applicant, and indicating which pages of each bundle were withheld on the basis of solicitor-client privilege.

[para 38] Attached as "Exhibit 'A'" to the July 6, 2023 affidavit is a copy of the records provided to the Applicant in response to the access request which includes all pages not withheld from the Applicant, and pages marked "27(1)(a)" for pages withheld on the basis of solicitor-client privilege. As described below, these records provided helpful context when considering the Public Body's assertion of solicitor-client privilege over the withheld records.

[para 39] The Coordinator describes the privileged records from each bundle as consisting of e-mail communications between one or more lawyers and the Public Body that were made in confidence in the course of seeking or providing legal advice. The Coordinator further states that at the time of the communications, all of the lawyers involved were in good standing and served, or served at the relevant time, as lawyers for the Public Body. The Coordinator further swears that the information in the withheld records have not been made public, and were only ever shared with those who needed that information as a function of their employment with the University.

[para 40] The Coordinator swears that the lawyers who participated in the communications gave legal advice in the communications, and not business, policy, or other non-legal advice.

[para 41] The Coordinator describes that Bundle 1 consists of 23 pages, numbered 1-001 to 1-023. Of those, pages 1-003, 1-004, 1-006, 1-007, 1-015 to 1-021, and 1-023 were withheld in their entirety as subject to solicitor-client privilege.

[para 42] The Coordinator describes that Bundle 2 consists of 91 pages numbered 2-001 to 2-091. Of those pages 2-042 to 2-091 were withheld in their entirety as subject to solicitor-client privilege.

[para 43] I note that the Coordinator's description of the Bundle 1 is inaccurate with regard to page numbering, at least so far as the copies of the pages attached to the

affidavit are concerned. None of the pages bear any page number. Counting each page in Bundle 1 in the order in which they appear in the affidavit and noting which ones are redacted and which are not, reveals a pattern consistent with the Coordinator's assertion of which pages were withheld as privileged. I consider this feature of the July 6, 2023 affidavit further below when considering the Applicant's arguments that the Public Body has failed to establish solicitor-client privilege. For now, I consider whether the Affidavit is sufficient to establish, in the absence of evidence to the contrary, that the records are privileged.

[para 44] I can see from other pages disclosed to the Applicant from Bundle 1 and Bundle 2 that the Applicant was communicating by email with the Coordinator about payment of costs and receipt of the cheque. The Coordinator copied External Legal Counsel on those e-mails, and the Applicant's replies include External Legal Counsel as well. I can also see that there was an e-mail exchange between the Applicant and External Legal Counsel wherein a dispute over the External Legal Counsel's draft bill of costs, and the circumstances which necessitated a 'without notice' application, are discussed between them. There is also some negotiation regarding the final amount of costs to be paid. On page 2-015, there is a message from the Applicant to External Legal Counsel wherein the Applicant announces that he sent the first cheque.

[para 45] From these documents I can see that External Legal Counsel was involved in e-mail communications concerning the cheque. It stands to reason that External Legal Counsel would e-mail the Public Body with legal advice concerning the situation, and that the withheld records are subject to solicitor-client privilege. In combination with the Coordinator's sworn statements from the July 6, 2023 affidavit about the records, I find that in the absence of evidence to the contrary, the records are subject to solicitor-client privilege.

[para 46] The Applicant makes several arguments that the records, or some information in them, are not subject to solicitor-client privilege, and should be disclosed.

[para 47] The first argument is that the Public Body has not explained how records concerning the handling of the cheque would involve legal advice. The Applicant is correct that the Public Body has not explained that precise issue. However, as discussed above, a review of the documents disclosed to the Applicant indicates that External Legal Counsel likely did provide legal advice to the Public Body regarding the cheque.

[para 48] The Applicant also notes, again correctly, that the Public Body has not explained how or why the records in each bundle were sorted into those bundles. I cannot see any difference between them. The descriptions for each bundle in the Coordinator's Affidavit of July 6, 2023 are identical in substance, and also identical in substance to the aggregate description of the records given in the Coordinator's affidavit of May 4, 2023. Even the disclosed documents in each bundle touch upon the same topics and e-mail chains.

[para 49] Rule 5.7(2) of the Rules of Court describes when records may be bundled; it states,

> *(2) A group of records may be bundled and treated as a single record if*
>
> *(a) the records are all of the same nature, and*
>
> *(b) the bundle is described in sufficient detail to enable another party to understand what it contains.*

[para 50] A thorough review of how records may be properly bundled is given by Justice Feasby in *Starratt v Chandran,* 2023 ABKB 609 (*Starratt*). After reviewing applicable decisions, he states at paras. 32 and 33,

> Though the disputed records may be bundled, that does not end the analysis. Rule 5.7(2)(b) imposes a duty on the disclosing party to describe the bundle "in sufficient detail to enable another party to understand what it contains." The approach to describing bundles must be adjusted depending on the context; the principle of proportionality that governs record production applies to the description of bundles. Where a bundle is comprised of homogeneous records (e.g. bank statements from a single account for a defined period) a terse description is all that is needed. The more heterogeneous the contents of a bundle, the more robust the description required. This is an example of what Justice Marion, writing about a different aspect of record production, called "common sense and proportionality": *MBH v CKI*, 2023 ABKB 284 at para 40.
>
> The bundles in the present case appear to contain a mix of different types of records, so the principle of proportionality requires a more thorough description. The descriptions in Schedule 1 to the Defendants' Affidavits of Records seem to acknowledge this reality by providing something more than terse descriptions of the source of each bundle. The problem, however, is that the descriptions stop short of providing sufficient detail to understand what each bundle contains. Descriptions like "and additional documents" are particularly problematic. I direct the Defendants to provide a further and better affidavit of records with bundle descriptions that provide sufficient detail to enable the Plaintiffs to understand what each bundle contains.

[para 51] The substantially similar descriptions for both bundles does not appear to offend rule 5.7(2), in light of the decision in *Starratt*. While the description for each bundle is the same, it appears that both bundles contain privileged records of the same nature, as they are described to contain e-mails between legal counsel and the Public Body. Further, in the context of this case, it also known that the records, having been identified as responsive to the Applicant's access request, would relate to the handling of the Applicant's letter and the cheque therein, and would concern e-mails generated from January 23 to March 20, 2020 as stipulated in the terms of the request. Taken all together the bundles appear to be of the same nature as contemplated in *Starratt*.

[para 52] Further, I find that little turns on the bundling in this case. The contextual information found in documents disclosed to the Applicant combined with the Coordinator's sworn statements in the affidavit of July 6, 2023 suffice to support a conclusion that the privileged records therein are presumptively solicitor-client

privileged. The Public Body's curious bundling of the records, while, perhaps, a defect of form in the affidavit, does not on its own lead to a conclusion that the Public Body has failed to establish that the records are subject to solicitor-client privilege.

[para 53] The Applicant further observes, as I have done above, that the pages in Bundle 1 are not numbered as the Coordinator has sworn they were in her affidavit of July 6, 2023. The Applicant argues that this feature indicates that the statements in the Affidavit are unreliable and/or not credible.

[para 54] I consider that the absence of page numbers on the records raises the possibility that the records attached to the affidavit are not those that the Coordinator reviewed in preparation of it. If that is the case, then my conclusion that External Legal Counsel likely advised the Public Body on the matter of the cheque based upon the information in the disclosed records would be faulty. Fortunately, this appears not to be the case since the Coordinator has also sworn in her affidavit of May 4, 2023, that she has reviewed the records that were identified as responsive to the access request, and in her affidavit of July 6, 2023 swears that she is providing additional information to the matters discussed in the May 4, 2023 affidavit, and also that the records attached as Exhibit A are a true copy of the responsive record sent to the Applicant. In light of the preceding, despite the absence of page numbers on the records included as Exhibit A in the Affidavit of July 6, 2023, I find the information therein is credible and reliable.

[para 55] The Applicant also argues that the Public Body should have provided "metadata" regarding the withheld records. The Applicant states that "metadata" includes the date and time on which an e-mail was sent, its senders and recipients, and subject line. The Applicant notes that in response to another access request made to the Public Body he received such information on records while other, more substantive portions were withheld as subject to solicitor-client privilege.

[para 56] Old orders of this Office took the approach that since solicitor-client privilege applies on a document by document basis, withholding solicitor-client information in response to an access request would also be done on that basis, without examination of the document to determine which parts contain solicitor-client privileged information, and which do not. In Order 96-015 former Commissioner Clark stated at paras. 90 and 91,

> I want to make it clear that my conclusion in this regard is based on the application of the second criterion set out in *Solosky v. The Queen*, and not on an application of the rules of discovery relating to what part of a document is factual, and therefore not privileged. As Commissioner, I believe that while I have jurisdiction to apply the *Solosky* criteria to a document to determine whether solicitor-client privilege applies to that document, I do not have jurisdiction to delve into any document to determine what part of a solicitor-client communication is legal advice and therefore privileged, and what part is factual and therefore not privileged.
>
> I am aware that there is a difference between applying *Solosky v. The Queen* to a document and applying the rules of discovery to a document: see Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner), [1997] O.J. No. 1465 (Div.

> Ct.). The difference is an application of the *Solosky* criteria in the first instance to determine whether solicitor-client privilege applies to the document and, consequently, whether all or none of the document can be disclosed, as opposed to an examination of a document, to which solicitor-client privilege already applies, to determine what part of the document is factual and must be disclosed. I have applied *Solosky v. The Queen*.

[para 57] Former Commissioner Clark also noted that partially releasing information on a document over which privilege has been claimed may amount to waiver of the privilege, and that therefore severing some information from solicitor-client documents was not proper. In Order 96-017 he stated at paras. 32 and 33,

> Pages 11 and 68 are facsimile cover sheets. The names and an Internet address have been severed on page 11, and one name has been severed on page 68, but the rest of the information on page 68 has been left intact. I do not see how the information on these two facsimile pages entails the giving or seeking of "legal advice", as previously defined (for a similar decision, see Ontario Order P-1241, [1996] O.I.P.C. No. 294).
>
> Even if page 68 could be considered "legal advice", I find that there is a deemed waiver of solicitor-client privilege for page 68 because the privilege has not been claimed for the entire communication on that page. The following two cases provided by the public body support this reasoning. In *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 1995 CanLII 634 (BC SC), 16 B.C.L.R. (3d) 64 (S.C.), the court said that severing is not a concept applicable to solicitor-client privilege. The privilege must be claimed for the entire document, or not at all. Furthermore, *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 2 All E.R. 485 (C.A.) supports the view that there is a deemed waiver of solicitor-client privilege when part of a document has been released.

[para 58] In Order F2004-017, former Commissioner Work followed the same approach. He stated at para. 9,

> With regard to the Applicant's request for a breakdown of the costs associated with the records, in Orders 96-015 and 98-004, the former Commissioner found that if solicitor-client privilege applies, it applies to the entire document and I have no jurisdiction either to determine the factual component of the document or to require that the Public Body sever that document. There is also no obligation under the Act to create such a record as a breakdown.

[para 59] Decisions of this Office regarding solicitor-client privilege have handled the claims in the way set out in the above orders. Once a document is found to be subject to solicitor-client privilege, there is no examination of its contents to separate privileged information from non-privileged information. The approach has been one that negates a public body's duty to sever that otherwise arises under section 6(2) of the FOIP Act; it states,

> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[para 60] Contrary to this Office's historical approach, recent decisions of the Court of King's Bench of Alberta indicate that the duty to sever remains applicable to records withheld as subject to solicitor-client privilege.

[para 61] In *Calgary (City) Police Service v Alberta (Information and Privacy Commissioner),* 2019 ABQB 109 (*CPS*), Justice Hall considered a public body's assertion of solicitor-client privilege in the context of withholding records in response to an access request. He set out a test to determine the privilege for each record at para. 6:

> Having heard counsel's submissions and reviewed relevant case law, I have determined, in this case, that the appropriate test for privilege in respect of each of the disputed records, is as follows:
>
> 1) Is there a communication between a solicitor and a client?
>
> 2) Does the communication entail the seeking, giving or receiving of legal advice?
>
> 3) Is the communication intended by the parties to be confidential?
>
> 4) Is the lawyer acting as a lawyer?
>
> 5) What was the purpose for which the record came into existence?
>
> 6) Is the particular communication part of a continuum in which legal advice is given?
>
> 7) Does the particular communication reveal that legal advice has been sought or given?
>
> 8) If there is any privileged information, can it be reasonably severed from the rest of the record, without revealing the privilege?

[para 62] The eighth branch of the test explicitly includes consideration of severing information from a record, just as section 6(2) of the FOIP Act states is to be done.

[para 63] In *Alberta (Minister of Municipal Affairs) v Alberta (Information and Privacy Commissioner),* 2019 ABQB 274, (*Municipal Affairs*), Justice Mandziuk considered a public body's assertion of solicitor-client privilege in the context of withholding records in response to an access request. After receiving the records under seal per the process prescribed by the Alberta Court of Appeal in *Calgary (City) Police Service v Alberta (Information and Privacy Commissioner*), 2018 ABCA 114 at para. 11 Justice Mandziuk adopted the same test set out by Justice Hall in *CPS*.

[para 64] The same test was endorsed by Justice Renke in *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 10 (*EPS*) at para. 228.

[para 65] Justice Gill applied the same test in *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207 at para. 29.

[para 66] In *MBH v CKI*, 2023 ABKB 284 at paras. 53 and 58, the Court ordered production of an entire document, save for sections that would reveal solicitor-client privileged information, thus demonstrating that documents can contain both privileged and unprivileged information, and that severing is possible without violating the privilege.

[para 67] As well, in *TransAlta Corp v Alberta (Minister of Environment and Parks)*, 2024 ABCA 127 (*TransAlta*) the Alberta Court of Appeal found that some sections of documents were subject to solicitor-client privilege, and should be redacted, while the rest of the document should be disclosed. (*TransAlta* at paras. 29 and 30.)

[para 68] In view of the above, it seems that all information in records withheld on the basis of solicitor-client privilege is not properly withheld simply by reason that the record in which it is included is subject to the privilege. There may be non-privileged information in such a record that a public body must disclose, if not withheld on some other basis under the Act.

[para 69] The above is not to say that I propose to review the portions of the records that, as e-mails, presumably contain the date, time, sender, recipient, and subject line that the Applicant argues are not privileged. The records have not been provided to me and, as stated in *EPS* at para. 85, I do not have the power to compel them for the purposes of such a review. Rather I must consider whether, on the basis of the evidence provided by the Public Body, such information is subject to solicitor-privilege, and if not, whether information that is subject to the privilege can be easily severed from it such that if the former is disclosed, the privilege is "not revealed", to use the term from the eighth part of the test set out by Justice Hall reviewed above.

[para 70] The Public Body did not address the Applicant's arguments that the date, time, senders, recipients, and subject lines are not privileged.

[para 71] As to the information that the Applicant argues is not privileged, it is possible that it is not.

[para 72] A helpful discussion of this issue appears in a decision of the Tax Court of Canada in *632738 Alberta Ltd v Canada*, 2023 TCC 117 (*632738 Alberta Ltd*). In that case, the Tax Court was considering a disputed undertaking requiring a party to provide a list of privileged documents. The Tax Court noted that the goal of the list was to provide "a sufficient description of each record for which privilege is claimed to assist other parties in assessing the validity of the claimed privilege…" (*632738 Alberta Ltd.* at para. 120). The privilege at issue was solicitor-client privilege. The Tax Court expressly considered the type of information that the Applicant argues is not subject to solicitor-client privilege at paras. 123 to 130:

> I have struggled with the question of whether the name of the lawyer who is participating in the privileged communication should be disclosed. In some situations, to disclose the name of the lawyer might also reveal the area in which that lawyer typically practises,

which could lead to a disclosure of privileged information. At the same time, the other party in the litigation (i.e., the party who is not claiming privilege) is entitled to have sufficient information to satisfy itself that the privilege is properly claimed.

Furthermore, in *Revcon*, which dealt with a claim of privilege over items that would identify a taxpayer's solicitors (referred to as "Law Firm X") and items which included "shorthand tax law language [or nomenclature] used by Law Firm X" to describe certain transactions, the Federal Court stated:

> The Respondent has provided me with no authority to support the proposition that the Law Firm X and Nomenclature claims are valid bases upon which to claim solicitor- client privilege. The idea that the identity of a law firm or lawyer retained by a client to provide tax planning advice is privileged finds no support in the law. It does not matter whether the law firm was retained "indirectly" by another firm directly retained by the client. A communication revealing the name of a law firm or lawyer - without anything else, such as actual legal advice - is not a confidential communication made for the purpose of receiving legal advice from a lawyer acting in a legal capacity. The name of a law firm, without more, is not protected by solicitor-client privilege. Nor is the revelation of shorthand tax language used by tax planning advisors.

In *Blank & Gateway Industries*, the Federal Court of Appeal dealt with an appeal from an order of a judge of the Federal Court, who had considered a claim for solicitor-client privilege (by the Minister of the Environment in respect of documents received from a lawyer in the Department of Justice), and who had required the disclosure of certain identifying parts of documents in two categories. Concerning the second category, the Federal Court of Appeal stated:

> In the second category are letters and memoranda in which disclosure was ordered of the part of the document showing what I would characterize as general identifying information: the description of the document (for example, the "memorandum" heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line, the generally innocuous opening words and closing words of the communication, and the signature block. The partial disclosures in this category enable the appellants to know that a communication occurred between certain persons at a certain time on a certain subject, but no more.
>
> There may be instances in which such general identifying information might be subject to solicitor-client privilege. However, the Minister has provided no evidence upon which I can conclude that this is such a case. Strictly speaking, therefore, the Judge could and should have ordered the disclosure of general identifying information for every letter or memorandum containing a privileged communication.

The Appellant's response to Disputed Undertaking 5 merely refers to emails between Mr. Sturt and legal counsel for the Thompson Bros. Group, which are covered by solicitor-client privilege. In keeping with the guidelines set out above, I think that the Appellant should also provide the following:

> (a) the name of counsel by, or to whom, the emails were sent;

(b) the date of each email, or if there is a large number of emails bundled together, the range of dates covered by the bundle of emails;

(c) if there is a large number of emails, and if the Appellant prefers to continue to refer to the emails as a bundled group, the number of emails in the bundle; and

(d) for each email, the subject line or caption, provided that it is innocuous and does not disclose privileged information.

2.Disputed Undertaking 16

While examining Mr. Thompson, counsel for the Respondent requested an undertaking to provide correspondence among Action, 2980622, Cavalon Capital Partners Incorporated ("Cavalon"), Mr. Thompson and entities in the Thompson Bros. Group relating to the Definitive Transaction Agreement, and a list of any such documents that are covered by solicitor-client privilege. Counsel for the Appellant agreed to the undertaking, including the provision of a list of privileged documents.

In response to the undertaking, the Appellant provided to the Respondent various items of correspondence. As well, the Appellant also said:

> In addition to the enclosed correspondence, there are approximately 20 emails between the parties and their respective counsel that are covered by Common Interest Privilege and are therefore not producible in this appeal.

The Respondent takes the position that the above response does not constitute a list of privileged documents, such that the response is incomplete. The Appellant, maintaining that it has provided a list, offers the following explanation:

> The Appellant has identified that there are a group of approximately 20 e-mails that have not been produced because, in counsel's opinion, they are covered by CIP. The list requested by counsel for the Respondent accordingly has 1 entry:
>
> *Group of approximately 20 e-mails potentially covered by CIP.
>
> If the Respondent wishes to challenge the privilege claim, the Appellant submits that the documents in question should be provided to the Court in a sealed envelope so that the Court can make a determination.

While courts are called upon, from time to time, to review documents to determine whether they are protected by privilege of one form or another, the objective, as explained in *CIBC* and *CNRL*, is to minimize the number of times that judicial intervention is required in such a situation. Therefore, as discussed above, in addition to the explanation that the Appellant has already provided, the Appellant should also provide the following in respect of the documents that are the subject of Disputed Undertaking 16:

(a) the names of the sender and the recipient of each email;

(b) the date of each email; and

(c) for each email, the subject line or caption, provided that it is innocuous and does not disclose privileged information.

[para 73] In view of the order made by the Tax Court that names of senders and recipients of e-mails, as well as date, and subject line (provided it is innocuous) may be disclosed in order to better describe documents over which solicitor-client is asserted, it appears that such information may not be subject to solicitor-client privilege in the absence of information explaining how it is.

[para 74] Following the reasoning in *632738 Alberta Ltd*, the Office of the Information and Privacy Commissioner of British Columbia has reached the same conclusion that such information ought to be disclosed in several recent decisions.

[para 75] The Adjudicator in BC Order F24-59 stated at paras. 72 – 73,

> The exception is in an email chain in which the Ministry withheld the Legal Counsel's email address and the name, email address, and other contact information of a Legal Assistant with the MAG. I will refer to this information, collectively, as the "MAG employee information". The MAG employee information is contained in the "To", "From", and "Cc" lines at the top of emails, salutations and signoffs in the body of the emails, and in the Legal Assistant's signature block. I find that this information is about the MAG employees and is not a communication that entails seeking or giving legal advice. As a result, I conclude the Ministry has not met its burden to prove s. 14 applies to this information.
>
> I acknowledge that courts have found that disclosing portions of otherwise privileged documents should only be considered when disclosure can be accomplished without any risk that the privileged legal advice in the document will be revealed or ascertained. Here, the Legal Counsel has already openly said that these emails involve herself and her legal assistant. I do not see how additional details about these MAG employees would assist an individual in ascertaining privileged communications. I am satisfied that the Ministry can disclose the MAG employee information without risk that it will reveal or allow someone to ascertain privileged communications.

[para 76] In BC Order P24-06, the Adjudicator stated at paras. 34 to 36,

> The information in dispute under s. 23(3)(a) is the Lawyer's name, title, email address and phone number, and some BGIS emails.
>
> I start with the Lawyer's name and contact details. The Lawyer's name appears at the top of various pages of emails, not in the emails themselves. With one exception, the Lawyer is not the sender or recipient of the emails. It seems that the Lawyer's name appears at the top of email chains because BGIS collected the responsive documents through the Lawyer's email when it was processing the access request. The Lawyer's name and contact details also appear in BGIS policy documents.
>
> The Lawyer's name and contact details are not confidential solicitor-client communications that entail legal advice. There may be circumstances in which the identity of a lawyer is privileged, but this is not one of them. The Lawyer's identity would not reveal any

> communications related to legal advice that BGIS sought or received. I also note that BGIS disclosed the Lawyer's name in its submissions, which undercuts BGIS's claim that the information is confidential. I am not persuaded that the information about the Lawyer is protected by legal advice privilege.
>
> [underlining added]

[para 77] I note that the adjudicator in BC Order P24-06 treats contact information of the lawyer the same regardless of whether or not it appears as sender/recipient information in an e-mail or appears in records otherwise as indicated by the underlined portions above.

[para 78] I also observe that the Court of King's Bench of Alberta has made a decision ordering a party to disclose the names of recipients, dates, and times of e-mails as part of records over which various privileges were asserted, including solicitor-client privilege.

[para 79] In *CNOOC Petroleum North America ULC v ITP SA,* 2022 ABKB 683 (*CNOOC*), the Court considered, among other matters, challenges to the sufficiency of the description of records over which privileged was asserted in Schedule 2 to four successive affidavits of records made by one party. (*CNOOC* at para. 156). The Court ordered preparation of a new affidavit of records that,

> …incorporates a further and better Schedule 2 to its AORs that sets out, at a minimum, the date of each record, the author and recipient of the record, the document type, and the nature of the privilege asserted by CNOOC.

(*CNOOC*) at para. 157.

[para 80] Since the order to set out the dates, authors and recipients made no exceptions for records over which solicitor-client privilege was asserted it seems that the Court in *CNOOC* did not view disclosure of that information as a violation of solicitor-client privilege.

[para 81] In view of the decisions of the Alberta Court of King's Bench and Alberta Court of Appeal discussed above, which clearly indicate that the duty to sever applies to documents over which solicitor-client privilege is asserted, I see no reason why the same reasoning from *632738 Alberta Ltd*, and the Orders from the Office of the Information and Privacy Commissioner of British Columbia may not apply equally to the records at issue in this case. It is possible that the "metadata" sought by the Applicant is not privileged and should be disclosed. The Public Body has the burden of demonstrating that such information is privileged in order to withhold it, and if it is not privileged, to sever it from privileged information, and disclose it in response to the access request, as is its duty under section 6(2) of the FOIP Act.

[para 82] As to whether or not such information could be reasonably severed from information that is subject to solicitor-client privilege, I observe the comments from the

Alberta Court of Appeal in *Hirch v Lethbridge,* 2024 ABCA 170 (*Hirch*) regarding parsing such records.

[para 83] *Hirch* was an unusual case where two e-mails each contained the solicitor-client privileged information of separate, adverse parties in a dispute over an estate. In the course of filing the required affidavit of records, the e-mails were inadvertently disclosed without redaction. In the course of hearing an appeal of the decision of the Chambers Judge on the matter, the Alberta Court of Appeal took on the task of separating which information was subject to which party's privilege, and as a consequence, which portions should be produced. The majority stated at paras. 27 to 29,

> The First and Second Emails were communications "between solicitor and client", as Dorothy was a client of Mr. Smith. In both emails, Dorothy sought legal advice, asking Mr. Smith questions about her own legal interests, as distinct from those of her mother. Both emails were "intended to be confidential by the parties", as emails sent directly by a client to their lawyer are generally considered communications in confidence: Adam Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at 5.130 [*Solicitor-Client Privilege*]. Thus, the First and Second Emails are prima facie subject to a solicitor-client privilege belonging to Dorothy.
>
> Having rejected a "dominant purpose" analysis, the next question is whether it is possible to divide the emails, identifying parts that pertain to Dorothy's privilege and other parts that only pertain to Charlotte's privilege, in order to protect the former and order production of the latter.
>
> Courts must be cautious not to over-parse communications between a lawyer and client. Solicitor-client privilege exists to protect "full, free and frank communication between those who need legal advice and those who are best able to provide it": *Blank* at para 26. Adopting an unduly restrictive interpretation of the privilege risks undermining that objective.

[para 84] I do not believe that separating the sender, recipients, date, time, and subject line of the records at issue requires over-parsing of the records. While I do not have the benefit of reviewing the privileged records themselves, I do have copies of the e-mails disclosed to the Applicant in response to his access request. They are in the familiar format where the name of the sender, recipient, subject line, date and time are presented above and discrete from the main body of the messages wherein the sender composes their missive to the recipient. In e-mail chains with many replies, the same information appears in blocks of texts, again, discrete from the missives. The information is not entangled with the body of the e-mails and appears easily severed, without revealing the content of solicitor-client communications. Presumably, the e-mails over which the Public Body asserts solicitor-client privilege are in the same format.

[para 85] It bears mentioning that in addition to appearing discrete from the body of the e-mails as a matter of the layout of the text of the e-mails, any information disclosed a document containing solicitor-client privileged information must also be discreet in terms of content, and not violate the privilege via its disclosure. The importance of maintaining

the privilege was reiterated by Justice Ashcroft in *University of Calgary v Alberta (Information and Privacy Commissioner),* 2019 ABQB 950 at para. at 42,

> Solicitor and client privilege is all but absolute, in recognition of the high public interest in maintaining the confidentiality of the solicitor client relationship and the integrity of the administration of justice: *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at paragraphs 17-18; *Ontario (Public Safety and Security)* v *Criminal Lawyers' Association*), 2010 SCC 23 at para 53; *University of Calgary* at paras 34, 43…

[para 86] The high public interest served by solicitor-client privilege should not be disturbed in the course of severing non-privileged information from it. This point may be particularly relevant when considering whether the subject line of an e-mail is subject to solicitor-client privilege. Depending upon the wording of the subject line, much may be revealed, or nothing at all.

[para 87] As the Public Body has not provided evidence regarding whether it turned its mind to the duty to sever, and whether the "metadata" information sought by the Applicant is privileged or not, I will order it to reconsider its decision to withhold the entirety of the records under section 27(1)(a).

Exercise of Discretion

[para 88] Section 27(1)(a) is a discretionary exception to disclosure under the FOIP Act, and requires a public body to demonstrate that it properly exercised discretion to withhold information.

[para 89] In *EPS,* the Court found that establishing the existence of solicitor-client privilege constituted proper grounds for exercising discretion to withhold information subject to it. Justice Renke held at para. 74,

> In my opinion, a public body like EPS is required to establish its claim to solicitor-client privilege, but only to the extent required by the Court of Appeal in *Canadian Natural Resources Ltd 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 a solicitor-client privilege claim 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.

[para 90] Accordingly, as I have found that the Public Body has established the privilege, I find that the Public Body properly exercised discretion to withhold information under section 27(1)(a), with regard to information that is subject to the privilege. I note that the question as to whether or not the public body properly severed non-privileged information from privileged information, including the metadata sought by the Applicant, remains.

V. ORDER

[para 91] I make this Order under section 72 of the FOIP Act.

[para 92] I find that the Public Body met its duty under section 10(1) of the FOIP Act.

[para 93] With respect to records withheld as subject to solicitor-client privilege, I order the Public Body to do the following:

1) Reconsider its decision to withhold all information from these records and sever privileged information from non-privileged information where reasonable as required by section 6(2) of the FOIP Act.

2) Provide the Applicant with copies of the records which disclose non-privileged information, if any, where doing so will not reveal privileged information; and,

3) If any of the names of the senders, recipients, dates, times, and subject lines of the withheld e-mails are not disclosed, provide the Applicant an explanation of the basis on which the Public Body has determined that such information, specifically, is subject to solicitor-client privilege, apart from appearing in a document that is otherwise subject to the privilege.

[para 94] I order the Public Body to provide written confirmation that it has complied with this Order to me and the Applicant, with 50 days of receiving a copy of it.

John Gabriele
Adjudicator
/kh