ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2025-16

April 29, 2025

JUSTICE

Case File Number 022957

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Justice (formerly Justice and Solicitor General) (the Public Body) for "all records relating to the prosecution of Syncrude for the bird landings in a tailing pond in April 2008" with a time period of April 1st, 2008 to December 21st, 2010. The request was narrowed to "records showing how the sentence was determined (e.g. work done by the prosecutor to determine a fit and proper sentence and/or discussion between the prosecutor and defence counsel)". The time period was from August 1, 2010 to October 31st, 2010.

The Public Body responded by denying access to all of the information identified as responsive, under sections 27(1)(a) and 27(2) of the Act, citing solicitor-client privilege. The Applicant requested a review of the Public Body's decision. Following this review, the Applicant requested an inquiry.

In the course of the first inquiry, the Public Body acknowledged that the majority of the records identified by the Public Body were not actually responsive to the Applicant's request. The Public Body also added a claim of settlement privilege over the portion of the record that was responsive to the Applicant's request.

In Order F2023-37, resulting from that inquiry, the Adjudicator found that the Public Body's evidence was insufficient to find that it properly claimed solicitor-client privilege over the responsive portion of the records at issue. The Adjudicator also found that the Public Body's evidence was insufficient to find that the Public Body properly claimed

settlement privilege over the responsive portion of the records at issue. The Adjudicator ordered the Public Body to review those records and respond to the Applicant in accordance with directions in the Order. The Adjudicator further ordered the Public Body to provide a copy of the unredacted records at issue so that a final determination could be made regarding the Public Body's application of section 27.

The Public Body applied for a judicial review of Order F2023-37. Subsequently, the Public Body provided the Adjudicator with an unredacted copy of the records at issue, in compliance with the Order.

This Order addresses the Public Body's claim of settlement privilege over the information in the records, as well as its application of section 27(1)(b), which had been raised in the course of the first inquiry.

The Adjudicator found that some of the information in the records was protected by settlement privilege such that sections 27(1)(a) and 27(2) applied.

The Adjudicator found that the remaining information in the records was not protected by settlement privilege. The Adjudicator found that section 27(1)(b) applied to that information. As the Public Body did not consider all relevant factors in deciding to apply that provision, the Adjudicator ordered the Public Body to re-exercise its discretion.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 71, 72.

Authorities Cited: AB: Orders F2008-028, F2010-036, F2017-44, F2017-57, F2022-40, F2023-37, **BC**: Order F16-21

Cases Cited: *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] The Applicant made an access request to Justice (formerly Justice and Solicitor General) (the Public Body) for "all records relating to the prosecution of Syncrude for the bird landings in a tailing pond in April 2008" with a time period of April 1st, 2008 to December 21st, 2010. The request was narrowed to "records showing how the sentence was determined (e.g. work done by the prosecutor to determine a fit and proper sentence and/or discussion between the prosecutor and defence counsel)". The time period was from August 1, 2010 to October 31st, 2010.

[para 2] The Public Body responded by denying access to all of the information citing sections 27(1)(a) and 27(2) of the Act. The Applicant requested a review of the Public Body's decision. Following this review, the Applicant requested an inquiry.

[para 3] An inquiry was conducted, initially into the Public Body's claim of solicitor-client privilege. That inquiry resulted in Order F2023-37. As set out in that Order, late in the inquiry process, the Public Body clarified that of the ten records (comprising more than 350 pages) identified by the Public Body as responsive to the request, only a small portion of one record (Record 8) was actually responsive to the Applicant's request. The Public Body also stated that it was claiming settlement privilege over this portion of Record 8 in addition to solicitor-client privilege; the Public Body had not previously raised settlement privilege in its response to the Applicant or submissions to the inquiry.

[para 4] The issues in that inquiry were expanded to include the Public Body's duty to assist, and its claim of settlement privilege.

[para 5] In Order F2023-37, I found that the Public Body failed in its duty to assist the Applicant and ordered the Public Body to conduct a new search for records. The Public Body complied with that part of the Order.

[para 6] Regarding the Public Body's claims of privilege, I found that the Public Body's evidence failed to support its claim of solicitor-client privilege over the responsive portion of the records at issue. I also found that the Public Body's evidence was insufficient to find that the Public Body properly claimed settlement privilege over the responsive portion of the records at issue. I said (at paras. 107-111):

> It may be the case that the responsive portions of Record 8 contain information about settlement communications. However, the Public Body has not said that the entire responsive portion of Record 8 contain or would reveal settlement communications. The nature of the record – a status update – indicates that it could contain information other than information revealing any settlement communications. The Public Body has not provided details such as the number of pages comprising the responsive portion of Record 8, or provided any details of the communications that Record 8 might reveal (e.g. how many communications there might have been). Therefore, I have no way of ascertaining whether it is reasonable to conclude that the entire responsive portion would contain or otherwise reveal settlement communications.
>
> The Public Body has provided insufficient evidence to support its claim of settlement privilege over the responsive portion of Record 8 in its entirety. I will order the Public Body to review the responsive portion of Record 8 to determine whether it contains information not properly subject to a claim of settlement privilege.
>
> I will also order the Public Body to respond again to the Applicant regarding the responsive portion of Record 8, in compliance with its obligations under section 12(1)(c). A public body's obligations under this provision were set out by former Commissioner Work in Order F2011-003 (at para. 32):
>
> > According to earlier decisions of this office, to comply with section 12(1)(c) with respect to records it is withholding, a public body is obliged to indicate how many records (including numbers of pages) are being withheld, to describe or classify these records insofar as this is possible without revealing information that is to be or may be excepted, and to provide the reasons for withholding for each category. (See Order F2004-026 at

> paras 98 and 99. See also Order 2000-014, which held that public bodies should be as specific as possible about records to which they have decided to give access and not give access.) In failing to do this, the Public Body has failed to comply with the terms of section 12(1)(c). I will therefore direct it to comply with its duty to the extent that it earlier failed to do so by now providing to the Applicant the numbers and a general description of the records that it is withholding, and the reasons for withholding each record or part thereof.
>
> The Public Body also briefly referred to the applicability of section 27(1)(b) to the information at issue. The Public Body did not provide submissions on this point, as it is not an issue in this inquiry. If the Public Body has applied section 27(1)(b) to the relevant information, it is to include this in its response to the Applicant.
>
> The Public Body is to provide me with a copy of its new response to the Applicant. Given my findings above regarding the applicability of section 56(3) to information over which settlement privilege is claimed, I will also order the Public Body to provide me with an unredacted copy of the records at issue, showing the exceptions that have been applied, if any. I will then determine whether the Public Body has properly claimed settlement privilege and/or applied section 27(1)(b) as necessary.

[para 7] The Public Body applied for a judicial review of this part of Order F2023-37. On February 20, 2025, the Public Body emailed an affidavit/submission to this office, requesting that I "... affirm the [Public Body's] non-disclosure decision".

[para 8] By letter dated February 28, 2025, the Commissioner informed the Public Body that she was not accepting the affidavit/submission as compliance with my Order, as it did not include a copy of the unredacted records at issue.

[para 9] By email dated March 4, 2025, the Public Body provided me with an unredacted copy of the responsive record, comprised of two pages. Upon receipt of the records, I issued a Notice of Inquiry for Part 2 of the inquiry, which will address the Public Body's claim of settlement privilege under section 27(1)(a) over the information in the 2 pages of responsive records, as well as its application of section 27(1)(b), which was raised by the Public Body in the first inquiry but not addressed in Order F2023-37.

II. RECORDS AT ISSUE

[para 10] The records at issue consist of the two pages of records responsive to the Applicant's request. The Public Body describes these two pages as a "status update".

III. ISSUES

[para 11] The issue as set out in the Notice of Inquiry, dated March 6, 2025, is as follows:

1. Is the information protected by settlement privilege under sections 27(1)(a) and/or 27(2) of the FOIP Act?

2. Does section 27(1)(b) of the FOIP Act apply to the information?

Where the Public Body is applying a discretionary exception to access, the Public Body should address the basis for its exercise of discretion to withhold the information.

IV. DISCUSSION OF ISSUES

1. Is the information protected by settlement privilege under sections 27(1)(a) and/or 27(2) of the FOIP Act?

[para 12] The Public Body has claimed settlement privilege under sections 27(1)(a) and 27(2), over the two pages of records in their entirety.

[para 13] Section 27 of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice,*
>
> *(ii) an agent or lawyer of the Minister of Justice, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice,*
>
> *(ii) an agent or lawyer of the Minister of Justice, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*
>
> *(2) The head of a public body must refuse to disclose information describe in subsection (1)(a) that relates to a person other than a public body.*

[para 14] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 15] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) and/or 27(2) of the Act applies to the records at issue.

[para 16] In Order F2023-37, I found (at paras. 107-108):

> It may be the case that the responsive portions of Record 8 contain information about settlement communications. However, the Public Body has not said that the entire responsive portion of Record 8 contain or would reveal settlement communications. The nature of the record – a status update – indicates that it could contain information other than information revealing any settlement communications. The Public Body has not provided details such as the number of pages comprising the responsive portion of Record 8, or provided any details of the communications that Record 8 might reveal (e.g. how many communications there might have been). Therefore, I have no way of ascertaining whether it is reasonable to conclude that the entire responsive portion would contain or otherwise reveal settlement communications.
>
> The Public Body has provided insufficient evidence to support its claim of settlement privilege over the responsive portion of Record 8 in its entirety. I will order the Public Body to review the responsive portion of Record 8 to determine whether it contains information not properly subject to a claim of settlement privilege.

[para 17] The purpose of settlement privilege was discussed by the Alberta Court of Appeal in *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, at para. 21:

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

[para 18] The Court stated the "necessary elements that cloak a communication with settlement privilege" are (at para. 15):

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

[para 19] In its submission to this inquiry, the Public Body states that the two pages of responsive records consist of "a detailed summary prepared by the responsible prosecutor of their discussions with both the federal Crown and defence counsel." It further states:

> 9. The records at issue are not a communication between a lawyer for the Alberta Crown Prosecution Service (ACPS) and defence counsel. The records are several entries that contain a narrative account of settlement discussions between the Crown prosecutor, counsel for Syncrude, and counsel for the Federal Crown.
>
> 10. In this instance, the records would only be "one side" of the discussion, but, given the detailed nature of the summary, the effect of disclosing these records would be effectively a breach of settlement privilege.

[para 20] The Public Body states that at the time of the relevant discussion between the parties, the litigation had not ended. It argues that the information in the records includes negotiating positions of the parties, as well as "offers and compromises made." The Public Body further states that the records include the prosecutor's position on these negotiations. The Public Body also makes the point that settlement privilege cannot be waived by one party.

[para 21] In his submission to this part of the inquiry, the Applicant reiterates the arguments he made in the first part of the inquiry, that settlement privilege ends when the relevant litigation has ended. In Order F2023-37, I discussed the case law regarding whether settlement privilege ends (at paragraphs 94-102) and concluded that "the case law supports the Public Body's argument that it is not barred from claiming settlement privilege for the reason that the litigious dispute has ended" (at para. 102). The Applicant's submission to this part of the inquiry does not persuade me to revisit that conclusion.

Analysis

[para 22] Having the pages to review, I can confirm that some of the information in those two pages meets the test for settlement privilege. The Applicant's access request is for records relating to work done by the prosecutor in a particular prosecution, regarding sentencing, including discussions with defence counsel. The litigation had not ended at the time the records were created. From the nature of the communications, I accept that they were not intended to be disclosed to the court, and that they were made for the purpose of effecting a settlement regarding sentencing (or sentencing proposals).

[para 23] There are three bolded headings on the first page of the records. The first two paragraphs and the last paragraph under the first heading, and the second and third paragraphs under the third heading (including the bullet points under the third paragraph) clearly reveal the content of discussions between the parties. It is clear that settlement privilege applies.

[para 24] The second page of the records starts with a list, followed by five paragraphs. Of those five paragraphs, the second clearly reveals proposals of one of the parties other than the Public Body, such that settlement privilege applies.

[para 25] With respect to the remaining information in the two pages, I cannot conclude that it reveals settlement discussions. The Public Body has stated in its submission that the information in the records includes the prosecutor's position on the negotiations. I agree that the records included the prosecutor's thoughts about various points. However, it is not clear that such positions of the prosecutor were ever communicated to the other parties or were otherwise part of the settlement discussions. It is possible that some additional portions of the prosecutor's notes stem from settlement discussions; however, it is equally possible that the prosecutor was recording their

thoughts on various points, and that these thoughts were not intended to be shared with the other parties as part of settlement discussions.

[para 26] The Public Body employee who drafted the submission to this inquiry does not say whether the assertions in the submission are based on any personal knowledge of the settlement discussions. This person is not a prosecutor or employed in that area of the Public Body. There is no indication in the submission that the employee spoke to the prosecutor or any other person involved in the settlement discussions to determine whether all of the information in the two pages of records actually reveals those discussions. Given this, I cannot place much weight on the assertions in the submission where they are not supported by evidence or the records themselves.

[para 27] Further, some of the information in the two pages, all of which is asserted to be subject to settlement privilege, is clearly *not* subject to settlement privilege. This includes descriptions of actions taken and statements made to the Court, or by the Court. The Public Body's submission does not indicate how such information could be subject to settlement privilege.

[para 28] Given this, I cannot conclude that the information in the records, other than the paragraphs identified above, are subject to settlement privilege such that section 27(1)(a) applies. I will consider whether section 27(1)(b) applies to this information.

Section 27(2)

[para 29] Section 27(2) is a mandatory exception to access, which means that if the provision applies then the Public Body must withhold the relevant information.

[para 30] The application of section 27(2) is based on the claim of settlement privilege, discussed above. The information to which I found settlement privilege applies above, must be withheld under section 27(2). All of the information that clearly originated from other parties, or that clearly describes another party's negotiating position, is information to which I have found that section 27(1)(a) and 27(2) applies.

[para 31] For the same reasons that I cannot conclude section 27(1)(a) applies to the two pages of records in their entirety, I also find that section 27(2) does not apply to the two pages in their entirety.

2. Does section 27(1)(b) of the FOIP Act apply to the information?

[para 32] The Public Body has applied section 27(1)(b) to the two pages of records in their entirety. This provision is quoted above. Section 71(1) also applies to this provision, such that the burden of proof lies with the Public Body to prove that section 27(1)(b) of the Act applies to the records at issue.

[para 33] Section 27(1)(b) applies to information prepared by or for a person listed in that provision, about a matter involving the provision of a legal service, where "prepared"

means "made or got ready for use." The phrase "by or for" means "by or on behalf of" or "by or at the direction of" and not "by or for the benefit of". Where the relevant matter involves policy or business services or advice rather than legal services or advice, section 27(1)(b) does not apply (see *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), at paras. 433, 441, 445).

[para 34] The Court in *EPS* rejected the adjudicator's interpretation in Order F2017-57 and other past precedents of this office that section 27(1)(b) applies only to "substantive" information. The Court concluded that the distinction between substantive and non-substantive information is "not practically workable" (at para. 429).

[para 35] Given this direction from the court decisions cited above, I conclude that section 27(1)(b) is to be interpreted in the broad manner that a plain reading gives it.

[para 36] In its submission, the Public Body states that the author of the pages is a Crown prosecutor with the Public Body. It further states that these pages are "related to the conclusion of a prosecution, including settlement discussions…".

[para 37] The Applicant argues that the work of a prosecutor is not a "legal service" within the terms of section 27(1)(b):

> 17. First, the work of prosecutors is not 'in relation to a matter involving the provision of legal services" in an ordinary definition s.[sic] Prosecutor's work is legal, but does not involve the provision of services. 'Provision' is the action of providing or supplying something for use, and 'service' involves providing assistance of some kind to a person. A prosecutor is not engaged in the provision of service, since they are not providing another person with advice, information, or representation in the way that a typical lawyer is. The prosecutor's independence means their role is specialized and distinct.

[para 38] The Applicant further argues that section 27(1)(b) requires the legal service to be *provided to* the Government of Alberta or a public body; however, a prosecutor is not providing a service *to* anyone.

[para 39] The Applicant also argues that finding that section 27(1)(b) applies to the work of a prosecutor would make other provisions of the FOIP Act redundant, specifically sections 4(1)(k) and 20(1)(g).

Analysis

[para 40] Past Orders of this office have found that the work undertaken by Crown prosecutors in litigating a matter can be characterized as a "legal service" for the purposes of section 27(1)(b). In Order F2008-028, the adjudicator reviewed past orders of this office interpreting this phrase and concluded that "[t]he term 'legal services' includes any law-related service performed by a person licensed to practice law" (at para. 154).

[para 41] Order F2017-57 also found that section 27(1)(b) can apply to information prepared by Crown prosecutors. The adjudicator said (at para. 114):

> To put the point differently, section 27(1)(b) is intended to encompass information such as a Crown prosecutor's work product, although it is not necessarily restricted in its application to such information.

[para 42] This finding was discussed in *EPS*, wherein the Court reviewed the decision in Order F2017-57. The Court said:

> [432] Paragraph 27(1)(b) concerns "information" (a general term) "prepared" (in my opinion, a general term), "by or for" a listed entity, "in relation to" a "matter involving the provision of legal services." Information that conveys a decision not to proceed (whether for public policy reasons, economic reasons, a lack of likelihood of success, or the absence of evidence supporting a cause of action or going forward with a charge) would still concern a matter "involving the provision of legal services," even if the conclusion of the decision were that no further legal services in relation to that matter would occur. The paragraph does not refer to "the provision of ongoing/continuing/persisting legal services." Further, the term "prepared" does not in itself import reference to a particular purpose. One may "prepare" a memorandum respecting a course of action even if the memorandum recommends or decides against pursuing the course of action.

[para 43] This discussion seems to accept the adjudicator's conclusion that the work of Crown prosecutors is a legal service within the terms of section 27(1)(b), although the question of whether a Crown prosecutor provides a legal service does not appear to have been contested in either Order F2017-57 or the judicial review of that Order.

[para 44] Subsequently, Order F2022-40 also accepted that in conducting a prosecution, a Crown prosecutor is performing a legal service (at para. 116).

[para 45] The Applicant also argues that interpreting section 27(1)(b) to include prosecutions as a legal service would render other provisions of the Act redundant. Specifically, the Applicant points to section 4(1)(k) and section 20(1)(g), which state:

> *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:*
>
> *...*
>
> *(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;*

…

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *...*
>
> *(g) reveal any information relating to or used in the exercise of prosecutorial discretion,*
>
> *...*

[para 46] Section 4(1) of the Act performs a different function from the exceptions to access found in sections 16-29. Section 4(1) excludes certain categories of records from the application of the Act in its entirety. Section 4(1)(k) excludes records relating to a prosecution if all proceedings in respect of the prosecution have not been completed; this means that a public body does not have to provide access to such records in whole or in part, or follow the rules in Part 2 of the Act with respect to personal information contained in such records. A broad application of section 27(1)(b) does not render this provision redundant.

[para 47] With respect to section 20(1)(g), this provision permits a public body to withhold information that could reasonably be expected to reveal information used in the exercise of prosecutorial discretion.

[para 48] In Order F2017-44, I reviewed the case law regarding the exercise of prosecutorial discretion for the purposes of section 20(1)(g) (at paras. 25-27):

> To summarize the lengthy discussion above, a public body seeking to withhold information under section 20(1)(g) must establish:
>
> > 1. prosecutorial discretion was exercised in matters within the prosecutor's authority concerning the prosecution of offences,
> > 2. there is information that relates to or was used in this exercise of that discretion, and
> > 3. disclosure of the information could reasonably be expected to reveal this information.
>
> Regarding the first part of the test, prosecutorial discretion comprises "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it", including (but not limited to) decisions:
>
> - to negotiate or repudiate a plea agreement
> - to proceed summarily, by indictment or direct indictment
> - to charge multiple offences
> - to pursue a dangerous offender application
> - to initiate an appeal.
>
> Regarding the second part of the test, information in a Crown prosecution file is generally information available to the Crown prosecutor when making the decision to exercise prosecutorial discretion. However, information that is extraneous to the exercise of discretion cannot be withheld under this provision just because it is contained in a Crown prosecution file.

[para 49] Comparing the tests for section 27(1)(b), set out above, with the scope of section 20(1)(g) discussed in Order F2017-44, it is clear that the scope of section 27(1)(b) is broader than that of section 20(1)(g).

[para 50] The Applicant's point though, is that if section 27(1)(b) applies to the work conducted by a Crown prosecutor in prosecuting a file, what is the point of section 20(1)(g)? Moreover, section 20(2) states that section 20(1)(g) does not apply to information that has been in existence for 10 or more years. What is the point of limiting the application of section 20(1)(g), as section 20(2) does, if the information can simply be withheld under section 27(1)(b) without a time limit?

[para 51] Section 20(1)(g) has a different scope than section 27(1)(b), insofar as it would apply to information that was not prepared by a public body lawyer, if the information was used in the exercise of prosecutorial discretion. For example, an access request may be made to a police service for reports or other documents prepared by an officer that was later provided to a prosecutor for the prosecution. The copy of the report in the custody and control of the police service does not fall within the scope of section 27(1)(b) as it was not prepared "by or for" a public body lawyer, as those terms have been interpreted (discussed above). Nevertheless, it may be the case that disclosing such a report could reveal information used in the exercise of prosecutorial discretion. For example, in BC Order F16-21, the adjudicator found that records in a police file that were later used by a Crown prosecutor during the prosecution were properly withheld in response to an access request made to the police service, under section 15(1)(g) of BC's *Freedom of Information and Protection of Privacy Act*, which is identical to section 20(1)(g) of Alberta's FOIP Act.

[para 52] While I agree with the Applicant that there is overlap between sections 20(1)(g) and 27(1)(b) as they relate to work performed by Crown prosecutors, I am satisfied that interpreting section 27(1)(b) to include the work of Crown prosecutors as a "legal service" does not render section 20(1)(g) redundant.

[para 53] I am not persuaded that I should deviate from the findings in past Orders, that conducting a prosecution on behalf of the Attorney General is a legal service within the terms of section 27(1)(b). To say otherwise, on the basis that a Crown prosecutor does not have a client in the traditional sense, is to give "legal service" a narrow reading that is not consistent with the case law discussed above.

[para 54] Having reviewed the records at issue, it is clear that they were prepared by a prosecutor involved in the prosecution. It is also clear that all of the information in these two pages was created by the prosecutor to track the progress of the sentencing phase of the prosecution; therefore the information was created in relation to a matter involving the provision of legal services. There is nothing in these two pages that does not fall within the scope of section 27(1)(b).

[para 55] I find that section 27(1)(b) applies to the two pages of records in their entirety.

Exercise of discretion

[para 56] Section 27(1)(b) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a public body's exercise of discretion.

[para 57] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 58] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, and also considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 59] In *EPS*, the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 60] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 61] Lastly, the Court described the burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 62] The Public Body's submission regarding its exercise of discretion discusses the risks associated with disclosing the substance of settlement discussions. I have found that the Public Body must withhold the information in the records that reveals settlement discussions, under section 27(2).

[para 63] The Public Body also argues that the information in the records reveals prosecutorial discretion and that disclosure of this information "would unduly interfere with the prosecutorial independence of Crown prosecutors, which is constitutionally protected, a cornerstone of the criminal justice system, and in which all Albertans have an interest."

[para 64] Regarding the purpose of withholding information about the work of a prosecutor, the Applicant states:

> Prosecutorial independence requires prosecutors to act independently of the executive branch and of the police, but this does not require endless confidentiality. For the purposes of self-reflection, study, and design improvement of the legal system, legal historians and researchers require access to these records. FOIP section 20(2) indicates the legislature determined 10 years of confidentiality was sufficient to balance these two interests.

[para 65] The Applicant raises relevant factors about the age of the records, which are more than 10 years old. While section 20(2) is not applicable in this case, the age of the information being withheld is often a relevant factor in exercising discretion to withhold it.

[para 66] The Public Body has not addressed whether it identified or considered any other factors weighing in favour of disclosure of any information in the records. For example, the Public Body has not stated whether it considered any public interest in disclosure. As stated in Order F2023-37, the relevant prosecution relates to a conviction under Alberta's *Environmental Protection and Enhancement Act* and Canada's *Migratory Birds Convention Act*. This prosecution was discussed in the news at the time. Possibly some information in the records could help the public understand the sentence imposed for the convictions.

[para 67] As stated by the case law above, a public body must identify all relevant factors weighing for or against the disclosure of information, in order to properly exercise its discretion. I will order the Public Body to identify all relevant factors that weigh in favour of, or against, disclosure and re-exercise its discretion to apply section 27(1)(b) to information in the records. The Public Body should ensure it considers the fact that some of the information in the record appears to reveal statements made to or by the Court, that may essentially amount to public information.

V. ORDER

[para 68] I make this Order under section 72 of the Act.

[para 69] I find that sections 27(1)(a) and 27(2) apply to the information described at paragraphs 23 and 24 of this Order. The Public Body is required to continue withholding this information.

[para 70] I find that section 27(1)(b) applies to the remaining information to which sections 27(1)(a) and 27(2) do not apply. I order the Public Body to re-exercise its discretion to withhold information under this provision; if the Public Body decides to continue to apply that provision to some or all of the information in the records, the Public Body is to provide a detailed explanation to the Applicant as to its exercise of discretion.

[para 71] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator