ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2026-29

September 14, 2026

ENVIRONMENT AND PROTECTED AREAS

Case File Number 028212

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Summary: An Applicant made a request to Alberta Environment and Parks (now Environment and Protected Areas) (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), for communications and related records between the Public Body and the Alberta Energy Regulator regarding Benga Mining or the Grassy Mountain Coal Project.

The Public Body responded to the Applicant, granting access to part of the requested records with information withheld under sections 17(1), 21(1)(a), 24(1)(a) and (b), and 27(1)(a) and (b) of the FOIP Act. The Public Body also removed some information as non-responsive.

The Applicant requested a review of the Public Body's decisions. During the review, the Public Body made new decisions regarding access, including providing some additional information to the Applicant and applying sections 20(1)(m) and 25(1)(b) to information.

An inquiry into the Public Body's decision to withhold information under sections 24(1)(a) and (b), and sections 27(1)(a) and (b); the Public Body's decision to withhold information as non-

responsive; and the Public Body's search for records. The Commissioner agreed to hold an inquiry into these issues.

The Adjudicator found that the Public Body did not provide sufficient evidence to show that it conducted an adequate search for records, and ordered the Public Body to conduct a new search.

The Adjudicator found that section 24(1)(b) applied to the information withheld under that provision but ordered the Public Body to re-exercise its discretion with respect to the application of that provision

The Adjudicator found that sections 27(1)(a) and (2) do not apply to the information withheld under those provisions. As the Public Body has also applied section 27(1)(b) to that information, the Adjudicator retained jurisdiction to review the Public Body's application of that provision.

The Adjudicator found that some of the information withheld by the Public Body as non-responsive was not responsive to the Applicant's request and some was. The Adjudicator ordered the Public Body to disclose the responsive information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 17, 24, 27, 71, 72, *Access to Information Act*, S.A. 2024, c. A-1.4

Authorities Cited: AB: Decision F2014-D-01, Orders 96-012, 2000-020, F2004-026, F2007-013, F2009-025, F2010-036, F2012-06, F2013-13, F2015-29, F2018-75, F2021-12, F2022-20, F2024-32, F2024-34, FOIP2025-22

Cases Cited: *Alberta Energy v Alberta (Information and Privacy Commissioner),* 2025 ABCA 163, *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *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), *Solosky v. The Queen*, 1979 CanLII 9 [1980] 1 S.C.R. 821

I. BACKGROUND

[para 1] An Applicant made a request to Alberta Environment and Parks (now Environment and Protected Areas) (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), for:

> *All communications, and internal records related to such communications, between the Ministry and the Alberta Energy Regulator (AER)) regarding Benga Mining or the Grassy Mountain Coal Project from May 15, 2020 to present.*

- *For all searches, include the following key terms in your search for records: Australia, Benga, Blairmore, Crowsnest, Eastern Slopes, Rinehart, Grassy Mountain, Joint Review Panel, JRP, Livingstone, MD Ranchland, open-pit, Rinehart, Riversdale, Hancock, HPPL, Westslope cutthroat trout.*

- *For all searches, relevant recordholders include: [64 listed names].*

- *For all searches, include the following records: social media platform messages, including Signal, Telegram, WhatsApp, Facebook and Instagram on mobile devices, text messages on mobile devices, physical or electronic calendar appointments, call logs, chats, video or audio recordings or other records from any video calling or office messaging platforms (including but not limited to Microsoft Teams, Skype and Zoom), voicemail messages from phone, outlook, or video calling applications, physical mail or records, electronic mail and attachments, or electronic records in any form (pdfs, excel sheets, word documents, zip folders, etc)*.

  Timeframe: May 15, 2020 to January 21, 2022.

[para 2] On June 23, 2022, the Public Body responded to the Applicant's access request. It released 62 pages of records with information withheld under sections 17, 21(1)(a), 24(1)(a), 24(1)(b)(i), and 27(1)(a) and 27(1)(b)(iii). Some information was also determined to be non-responsive to the access request.

[para 3] The Applicant requested a review of the Public Body's decisions to withhold information, as well as the adequacy of the Public Body's search for records.

[para 4] During the settlement phase of the review, the Public Body provided a new response letter to the Applicant, disclosing 17 pages of records located after conducting a new search (the "new records" package). It redacted some of the information in the new records package under sections 17(1), 20(1)(m) and 25(1)(b). It further removed some of the information as non-responsive to the access request. The Public Body also provided the Applicant with a new copy of 49 pages of the original records in which it disclosed additional information (the "reprocessed records" package). It continued to withhold some information on those pages under sections 24(1)(a) and (b).

[para 5] The Applicant confirmed the issues left unsettled are: the Public Body's application of sections 24(1)(a) and (b), and 27(1)(a) and (b); the Public Body's decision to withhold information as non-responsive; and the adequacy of the Public Body's search for records. The specific pages at issue are set out below.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of the information removed from the records at issue as non-responsive to the Applicant's request, or under sections 24(1)(a) and (b) and sections 27(1)(a) and (b), on pages 4, 35, 36 and 48-50 of the reprocessed records package; pages 53-57 and 58-62 of the original records package; and pages 9, 11, 12 of the new records package.

III. ISSUES

[para 7] The issues for this inquiry were set out in the Notice of Inquiry dated May 19, 2026, as follows:

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

2. Does section 24(1)(a) of the Act (advice from officials) authorize the head of the Public Body to refuse access to pages 35 and 48-50 of the reprocessed records package?

3. Does section 24(1)(b) of the Act (advice from officials) authorize the head of the Public Body to refuse access to pages 4, 35, 36 and 48-50 of the reprocessed records package?

4. Does section 27(1)(a) of the Act (privileged information) authorize the head of the Public Body to refuse access to pages 58–62 of the original records package?

5. Does section 27(1)(b)(iii) of the Act (privileged information) authorize the head of the Public Body to refuse access to pages 58-62 of the original records package?

6. Is the information on pages 53-57 of the original records package and pages 9, 11, 12 of the of the new records package responsive to the Applicant's request? If so, does the Applicant have a right of access under section 6(2) to the information in these pages withheld as non-responsive?

IV. DISCUSSION OF ISSUES

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

[para 8] With respect to this issue, the Notice of Inquiry states:

> In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.
>
> *When the issues at inquiry include adequacy of search, it is helpful for the Public Body to include in its initial submission, direct evidence such as an affidavit regarding the search conducted for*

records responsive to the Applicant's access request. In preparing the evidence, the Public Body may wish to consider addressing the following:

> - 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, such as physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search? (Note: that person or persons is the best person to provide the direct evidence).
> - Why the Public Body believes no more responsive records exist other than what has been found or produced.
> - Any other relevant information.

[para 9] The Public Body states that searches were initiated on January 4, 2022 and the following program areas conducted a search for records:

> Air and Climate Policy Branch, Airshed and Watershed Stewardship Branch, Climate Regulatory Implementation Branch, Communications, Lands Division Assistant Deputy Minister's Office, Office of the Chief Scientist, Policy and Climate Systems Branch, Policy Assistant Deputy Minister's Office, Regulatory Assurance Assistant Deputy Minister's Office, Regulatory Assurance (South), Resource Stewardship Assistant Deputy Minister's Office, Deputy Minister's Office, and Minister's Office.

[para 10] The Public Body states that these areas cover all parts of the Ministry that could reasonably be expected to have responsive records.

[para 11] The Public Body states that for each area, a designated employee coordinated and distributed the search parameters to all individuals who may have held responsive records. All such individuals were instructed to search email accounts, shared drives, and electronic and paper filing systems as applicable.

[para 12] The Public Body further states (at page 5):

> Each contact completed and returned a form documenting the scope and results of their search. The program area contacts who received the search for records were all familiar with searching and retrieving records responsive to FOIP requests and they all knew and understood their obligation to conduct adequate searches for records.
>
> …
>
> The search parameters are clearly set out in the scope of the request, and it is reasonable to conclude that these parameters, including the identified search terms, were applied. Given the

> breadth of the search, which involved numerous individuals across the public body, it is not feasible to confirm keywords used on an individual basis. In light of the number of staff involved and the time that has elapsed, contacting each individual who conducted searches to verify the specific search terms used would not be reasonable or practicable.

[para 13] The Public Body states that on April 23, 2024, another search request was sent to

> Air and Climate Policy, Airshed and Watershed Stewardship, Climate Regulation and Carbon Markets, Communications, Lands Division Assistant Deputy Minister's Office, Ministerial Correspondence Unit, Minister's Office, Deputy Minister's Office, Office of the Chief Scientist, Policy Assistant Deputy Minister's Office, Regulatory Assurance Assistant Deputy Minister's Office, Regulatory Assurance (South), Resource Stewardship Assistant Deputy Minister's Office.

[para 14] Some of these program areas were involved in the first search, and some were not. This second search was conducted in the same manner as the first, and resulted in an additional 17 pages of records. The Public Body concludes (at page 5):

> Two comprehensive searches have been conducted, and only a limited number of additional responsive records were identified during the second search. In these circumstances, it is reasonable to conclude that all responsive records have been located. There is no evidence to suggest that a further search would yield additional responsive records.

[para 15] The Applicant argues that the Public Body's inability to confirm which keywords were used by each employee involved in the search suggests that the Public Body did not maintain adequate records of the search process. The Applicant points to Order FOIP2025-22, in which the public body provided the adjudicator with information such as "who was tasked with conducting the search, the manner in which the search was conducted, the keywords used to search email subject lines and message bodies, and the directions provided to those conducting the search".

[para 16] The Applicant also argues that the scope of the request ought to have elicited a larger number of responsive records.

Analysis

[para 17] The standard for conducting an adequate search is not perfection, but what is reasonable (Order 2000-020, at para. 17).

[para 18] The Public Body has set out the program areas involved in the searches, how the search was conducted and who was involved. However, the Public Body is not able to tell me what search terms were used. It states that "it is reasonable to conclude" that the employees conducting the searches used the terms set out in the Applicant's request.

[para 19] I agree with the Public Body that if it can show that proper search terms were provided to program areas to conduct the search, it is not necessary that the Public Body verify with each employee that the instructions were followed unless there is some reason to expect that the search was not performed properly. In other words, it is reasonable for the Public Body to provide directions for conducting the search, and rely on each employee to conduct the search as directed.

[para 20] In this case, the Public Body has told me what locations the numerous employees conducting the search were told to include in the search (e.g. email accounts, shared drives, etc.) but has not told me what instructions were provided regarding the terms to be used in the search. It has told me only that it expects the search parameters set out in the request were used.

[para 21] The Public Body has said that different program areas had a contact to coordinate the search of their respective area and that these contacts completed and returned forms documenting the scope of their search. If the Public Body has forms documenting the scope of each search, it is unclear why it is unable to tell me what search terms were used; presumably these should have been documented.

[para 22] While the access request asked for particular search terms to be *included* in the search, the request was not *limited to* those search terms. The first part of the request reads:

> *All communications, and internal records related to such communications, between the Ministry and the Alberta Energy Regulator (AER)) regarding Benga Mining or the Grassy Mountain Coal Project from May 15, 2020 to present.*
>
> - *For all searches, include the following key terms in your search for records: Australia, Benga, Blairmore, Crowsnest, Eastern Slopes, Rinehart, Grassy Mountain, Joint Review Panel, JRP, Livingstone, MD Ranchland, open-pit, Rinehart, Riversdale, Hancock, HPPL, Westslope cutthroat trout.*

[para 23] The Applicant likely included suggested search terms because it may not have been clear to a person conducting a search for records that “Rinehart” and “Riversdale” might elicit records responsive to a request relating to Benga Mining or the Grassy Mountain Coal Project.

[para 24] Notably, the terms the Applicant requested be included did not include “Alberta Energy Regulator” or “AER”, though the request included communications with AER. If a person conducting a search used only the terms in the bullet point above, and not “Alberta Energy Regulator” or “AER”, they may have missed responsive records.

[para 25] The Public Body has stated that the program area contacts responsible for coordinating and distributing the search within their areas are familiar with searching for and

retrieving records, and understood their obligations. However, it is not only these contacts who conducted the searches; rather, individuals in each program area conducted searches and those individuals may not be as familiar with how to identify appropriate keywords to conduct a reliable search. It is therefore important to know what the individuals within the program areas were told to use as search terms.

[para 26] While the access request itself set out search terms the Applicant wanted *included* in the search, it is up to the Public Body to properly set out the parameters of the search. This is because the Public Body is in the best position to know how responsive records may be organized, and the keywords that might elicit responsive records.

[para 27] It may be the case that the two searches already conducted by the Public Body located all responsive records. From the information before me, it is also possible that different program areas used different search terms and that a consistent approach to search terms might elicit more records.

[para 28] I cannot conclude that the search was reasonable without information about something as fundamental as the search terms that were used by the numerous employees conducting the search. The Public Body's evidence is not sufficient to find that it conducted an adequate search for records.

[para 29] The Public Body has said that the program area contacts completed and returned forms documenting the scope of their search. If the Public Body has documentation that shows the various program areas used appropriate search terms in conducting those searches, including but not limited to the search terms identified in the request, the Public Body can provide that documentation to me and the Applicant.

[para 30] If the Public Body cannot provide such documentation, it will have to conduct a new search for records, with instructions provided to the various program areas regarding the search terms to be used. The search terms should *include* but not be *limited to* the terms the Applicant asked to be included. The Public Body should include any other search term reasonably likely to elicit responsive records.

2. **Does section 24(1)(a) of the Act (advice from officials) authorize the head of the Public Body to refuse access to pages 35 and 48-50 of the reprocessed records package?**
3. **Does section 24(1)(b) of the Act (advice from officials) authorize the head of the Public Body to refuse access to pages 4, 35, 36 and 48-50 of the reprocessed records package?**

[para 31] I will consider these issues together.

[para 32] Sections 24(1)(a) and (b) state:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

…

[para 33] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 24.

[para 34] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be created for the benefit of someone who can take or implement the action (see Order F2013-13).

[para 35] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply

> so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 36] Sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 37] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations, etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 38] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as “advice” (section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 39] The information on pages 4, 35, and 36 of the reprocessed records package all consist of email chains on the same topic. The Public Body states that these pages contain email chains containing consultation and deliberations between the parties to the emails, including high-ranking officials, as well as advice and recommendations on next steps. The Public Body states that the email participants were in a position to seek and give advice or to implement the relevant action.

[para 40] The Applicant argues that the Public Body did not provide details such as the specific advice provided, or the decision or course of action the advice was directed toward. The Applicant cites Order F2015-29, which found that general statements regarding the application of section 24(1) were not sufficient.

[para 41] Findings regarding whether section 24(1)(a) or (b) applies to specific information in records are generally findings of fact, which will depend in part on the content of the records at issue that the adjudicator and public body have before them, but the applicant does not. In Order F2015-29, the Director of Adjudication found that the public body’s general statements regarding section 24(1) did not match the content of the records at issue.

[para 42] That is not the case here. I cannot disclose the content of the withheld information; however, I agree that the withheld information consists of consultations and deliberations as described by the Public Body, and that section 24(1)(b) applies.

[para 43] Pages 48-50 consist of 6 emails in a chain. The Public Body states that these emails are between Public Body employees and AER employees, discussing the preparation of a response to a media inquiry. The Public Body has withheld only portions of these emails; the Public Body states that these portions contained information that ultimately was not included in the response.

[para 44] The Applicant states that the withheld information appears to consist of drafts. It cites Order F2012-06, which states that "section 24(1) does not apply to drafts, merely for the reason that they are drafts."

[para 45] I agree with the analysis in Order F2012-06. However, as stated in Order F2024-34 (at para. 37):

> Section 24(1) *may* apply to information in draft documents where advice is sought on the content of the draft or the content is being deliberated (see Order F2022-45, at para. 85). In other words, where the draft document *is the subject of the advice or consultation*, section 24(1) can apply.

[para 46] In this case, the information withheld on pages 48-50 is information that is the subject of the consultation. I find that section 24(1)(b) applies.

Exercise of discretion

[para 47] Section 24(1) 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 48] 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 49] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as 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 50] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*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 51] 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 52] 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 53] With respect to the information on page 35, the Public Body's submission states (at page 6):

> The use of section 24(1) is discretionary. The Public Body examined the information within the withheld records and confirmed that harm would result from the disclosure of deliberations, consultations and advice implicated in this discussion.

[para 54] With respect to the information on pages 48-50, the Public Body's submission explains why the Public Body employee who sought advice or input on creating a media response did so, stating:

> For complex topics, earlier versions of a media response often include errors or false starts before a final version is developed. Disclosure of this type of information would be likely to harm the Public Body's credibility and effectiveness.

[para 55] This is not sufficient to meet the standard set out above, which has been repeated in numerous Orders in the past several years. The head of the Public Body, or their delegate, must consider and weigh all relevant factors, including factors that favour disclosure. I will order the head of the Public Body (or their delegate) to exercise their discretion, and provide an explanation to me and the Applicant of the factors it considered and how it weighed those factors.

4. Does section 27(1)(a) of the Act (privileged information) authorize the head of the Public Body to refuse access to pages 58–62 of the original records package?

[para 56] In its submission, the Public Body also argued that section 27(2) applies. Sections 27(1) and (2) state:

> *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 and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(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 57] Page 58 of the records consists of an email that was partially withheld under section 27(1)(a) and (b). Specifically, the name of an attachment and part of one of three sentences was withheld. The disclosed portion of the page shows that the email is to various Public Body employees and at least one AER employee, and is from the Integrated Resource Management System (IRMS) Secretariat.

[para 58] Pages 59-62 were withheld in their entirety and were not described in the Public Body's index of records provided for the inquiry.

[para 59] In its initial submission, the Public Body states that the privileged information belongs to a third party and so section 27(2) also applies. Rather than providing any evidence or argument to support these claims, the Public Body asked that I obtain a submission from this third party.

[para 60] By letter dated June 18, 2026, I informed the Public Body that it has an obligation to support the exceptions it has applied to records in its custody and control. I said:

> Under section 71(1), the burden of proof to show that an applicant does not have a right of access lies on the Public Body. As yet, I have no arguments or evidence to support the application of sections 27(1)(a) or (b) or 27(2), nor do I have a copy of the information upon which I can base a decision.
>
> With respect to section 27(2), it is a mandatory exception, so I will consider it despite the Public Body's raising it extremely late in the process.
>
> Section 27(2) applies to information subject to legal privilege that relates to a person <u>other than *a* public body</u>". The Public Body has provided the name of the relevant body to me *in camera*. This body is a public body as defined in the FOIP Act. Therefore, it would appear that section 27(2) cannot apply. The Public Body must explain, in its exchanged response, how section 27(2) can apply where the body to whom the privilege belongs is a public body.
>
> If the Public Body continues to assert that section 27(2) applies, the Public Body nevertheless has the burden of showing that provision applies to the information as claimed, pursuant to section 71(1). The burden of proof shifts only when the information as issue is about a "third party", which is a defined term. The other body identified by the Public Body is not a third party as defined in section 1(r) of the Act. Therefore, section 71(1) remains applicable.
>
> Although the Public Body has asked that I invite this other public body to weigh in, this other public body does not have the burden of showing that *the Public Body* properly applied provisions of the FOIP Act in responding to the Applicant's request for records *in the Public Body's custody or control*. The Public Body must be prepared to support its application of exceptions. If the Public Body continues to apply these exceptions, it must be prepared to provide support for their application, including an affidavit regarding the claim of privilege. Further, as the Public Body has stated that the relevant privilege (which has yet to be identified) belongs to another public body yet appears in records in the custody or control of the Public Body, the Public Body should discuss how the privilege has not been waived.

[para 61] The Public Body provided an affidavit as requested, sworn by a Senior ATI Advisor for Service Alberta. The affidavit states:

1. I am employed as a Senior ATI Advisor for Service Alberta and Red Tape Reduction with the Government of Alberta.
2. The Applicant made an access to information request to the Public Body that is now the subject of this Inquiry ("Applicant's Request").
3. As part of my employment, I undertake the processing of access requests under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").
4. The head of the Public Body has withheld information on pages 58-62 of the original records package (the "Record") from disclosure to the Applicant pursuant to sections 27(1)(a), 27(1)(b)(iii) and 27(2) of the FOIP Act on the grounds that the Record was prepared by legal counsel of the Alberta Energy Regulator (the "AER") and contains legally privileged information of the AER.
5. On its face, the Record appears to have been prepared by the AER's legal counsel for the AER.
6. On April 6, 2022, June 3, 2026 and June 25, 2026, the Public Body consulted with the AER about the Record, and the AER confirmed that:
    a. the Record was prepared by the AER's legal counsel for the AER,
    b. the Record contains legally privileged information of the AER, and
    c. the AER has not waived their legal privilege claimed over the Record.
7. I believe that the Record was provided by the AER to the Public Body through the Integrated Resource Management System (IRMS) Secretariat, which is a common risk management framework where information is shared confidentially between the AER and certain departments of the Government of Alberta, including Environment and Protected Areas (formerly Environment and Parks).

[para 62] In its submission provided with the affidavit, the Public Body states that it has claimed section 27(1)(a) "based on the AER's assertion of solicitor-client privilege." Regarding the confidentiality of the information, the Public Body states:

> Further, the fact that the record was shared with the public body does not necessarily extinguish the AER's privilege over the record. The information was shared between the AER and the public body in furtherance of a common interest and in confidence under the IRMS Secretariat, which is a shared resource management framework between certain departments of the Government of Alberta and the AER.

[para 63] By letter dated June 26, 2026, I invited AER to provide a submission to the inquiry. In this letter, I said:

> The Public Body has applied section 27(1)(a) and (b), and section 27(2) over information in pages 58-62 of the records at issue in the inquiry, citing legal privilege. The Public Body states that this privilege belongs to the AER and that the relevant record was created by the AER.
>
> In an affidavit provided by the Public Body on June 25, 2026, the affiant states that the Public Body consulted with the AER about the relevant record on April 6, 2022, June 3, 2026 and June 25, 2026, and that AER confirmed that the record was prepared by AER's counsel; the record contains privileged information of the AER; and the privilege has not been waived by the AER.
>
> From this I understand that the AER is already familiar with the information in the records at issue over which the Public Body has claimed privilege.

[para 64] I informed AER that the Public Body's submission to the inquiry was not sufficient to meet its burden of showing that sections 27(1)(a) or (2) applied and AER was being given an opportunity to provide evidence to substantiate the privilege claim.

[para 65] AER did not respond to my letter.

[para 66] The Applicant argues that pages 58-62 of the records, over which solicitor-client privilege was claimed, are not communications between a solicitor and client. The Applicant notes that page 58, part of which was provided to the Applicant, is an email sent from the "IRMS Secretariat" to employees of the Public Body. The Applicant states that there is no indication that the IRMS Secretariat is a lawyer, that the record is protected by solicitor-client privilege, or that it was intended to be confidential.

[para 67] The Applicant further argues that from the disclosed portion of the email at page 58, which states "[t]he permission to hear the appeal applications are scheduled to be heard September 9", appears to be administrative in nature. The Applicant argues (at para. 28):

> Even accepting that not every communication between a solicitor and client must consist exclusively of legal advice, the Public Body does not demonstrate why solicitor-client privilege attaches to these communications, which appear to be administrative or logistical in nature.

[para 68] The Applicant states that there is no indication that the records at pages 58-62 of the records were intended to be confidential.

[para 69] The Applicant also argued that even if privilege had attached to these records, the AER waived that privilege by providing the records to the Public Body. They argue that there is no indication of an intention to maintain privilege. The Applicant notes the Public Body's statement in its last submission that the information was shared by AER with the Public Body "in furtherance of a common interest", but argues that the Public Body did not provide any information to show that it shared a common interest with AER that justified common interest privilege.

[para 70] Lastly, the Applicant argues the fact that AER was provided an opportunity to establish the claim of privilege but did not, indicates that it is not opposed to disclosure.

Analysis

[para 71] The Public Body states that AER informed it that the records were subject to solicitor-client privilege.

[para 72] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Solosky v. The Queen*, 1979 CanLII 9 [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.

[para 73] 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.

[para 74] The Court in *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 found (at paras. 17-18):

> There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
> Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": ***Calgary (Police Service)*** at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: ***Bank of Montreal v Tortora***, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[para 75] 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*).

[para 76] The role of this Office in reviewing claims of privilege was discussed in *EPS*, cited above, at paras. 77-112. In Order F2021-12, the adjudicator summarized the Court's conclusion as follows (at para. 210):

> My understanding, then, in light of *EPS*, *ShawCor*, and rule 5.8, is that I am to consider whether the description of a record enables me to recognize that the elements of solicitor-client privilege set out in *Solosky* are present. At that point, the Public Body will have satisfied the *ShawCor* standard and established a rebuttable presumption that the records are subject to solicitor-client privilege. Absent evidence to rebut the presumption, I must find that the records were properly withheld under section 27(1)(a). Where the standard is not met, in the absence of other evidence that would establish that the records are subject to solicitor-client privilege, I must find that the records were not properly withheld under section 27(1)(a).

[para 77] I agree with this summary.

[para 78] In this case, the Public Body did not provide an unredacted copy of records containing information over which solicitor-client privilege was claimed.

[para 79] For the reasons outlined in my letters to the Public Body and AER, reproduced above, the information before me is not sufficient to uphold a claim of privilege. Neither the Public Body nor the AER has explained how the test set out in *Solosky* is met. The Public Body's affidavit states that the record "appears to have been prepared by the AER's legal counsel" and that AER informed the Public Body that the record was prepared by AER counsel. The affiant states that the AER informed them that the record contains "legally privileged information of the AER."

[para 80] In short, I have affidavit evidence that the record "looks like" it was prepared by a lawyer and that someone at AER told the affiant that the record contains "legally privileged information." I do not know who at the AER made this statement to the affiant; for example, I do not know whether that person was the AER's lawyer, or someone else with personal knowledge of the records. I do not have any information about the grounds for that person's belief that the record contains "legally privileged information".

[para 81] Neither the Public Body's affidavit nor its other submissions assert that the record contains communications between a solicitor and client, entailing the giving or seeking of legal advice, which is the test set out in *Solosky*. Neither is there a statement that the record contains communications that form part of the continuum of communications in the provision of legal advice.

[para 82] For these reasons and the reasons already communicated to the Public Body and AER in my letters, the Public Body's submissions and affidavit do not provide sufficient information to meet the test for solicitor-client privilege. Therefore, I cannot find that solicitor-

client privilege applies to the information withheld under section 27(1)(a) on pages 58-62. As stated, the AER has provided no information at all.

[para 83] I had also asked the parties to provide submissions regarding whether any privilege may have been waived by AER given the fact that the records are in the custody and control of the Public Body. Given my finding that the claim of privilege has not been substantiated, I do not need to consider whether any privilege was waived.

[para 84] I cannot uphold the Public Body's application of section 27(1)(a). I find that this provision does not apply. The Public Body has also applied section 27(1)(b) to this information, which I will discuss below.

Section 27(2)

[para 85] The Public Body has argued that section 27(2) applies, as the privilege belongs to a "third party". The term "third party" is defined in section 1(r) of the FOIP Act, as "a person, a group of persons or an organization other than an applicant or a public body."

[para 86] In its affidavit, the Public Body identified the relevant third party as the AER. The AER is listed in Schedule 1 of the FOIP Act as a public body.

[para 87] In my letter of June 18, 2026, I asked the Public Body to explain how section 27(2) can apply. The Public Body responded that while the text of section 27(2) states that the head of a public body must refuse to disclose privileged information "that relates to a person other than *a* public body", it should be read as privileged information "that relates to a person other than *the* public body".

[para 88] Some provisions in the FOIP Act refer to "a public body" and others refer to "the public body". For example, section 27(1)(b) applies to information prepared by or for "an agent or lawyer of *a* public body"; to substitute "the public body" for "a public body" in that instance would unduly restrict the scope of that exception.

[para 89] The Public Body argues that given the importance of solicitor-client privilege, a public body should not have discretion to disclose privileged information belonging to another public body; therefore, the scope of section 27(2) should be expanded to include privileged information relating to any body other than the public body responding to the request.

[para 90] It seems clear that the Legislature opted to use the term "a public body" in section 27(2), as it could have instead used the term "the public body" – which appears elsewhere in the Act – but did not. It is not appropriate for me to significantly expand the scope of section 27(2) for the reason that one of the legal privileges it applies to is to be treated as near absolute, as the Courts have found. Public bodies remain authorized to refuse access to solicitor-client

privilege under section 27(1)(a), which applies to *any* legal privilege belonging to *any* public body.

[para 91] All of the above discussion is somewhat beside the point, as the Public Body and the AER have both failed to substantiate the claim of solicitor-client privilege. Given this, whether the Public Body would have been *authorized* to withhold the information under section 27(1)(a) or *required* to withhold it under section 27(2), is irrelevant.

[para 92] I find that section 27(2) does not apply.

5. Does section 27(1)(b)(iii) of the Act (privileged information) authorize the head of the Public Body to refuse access to pages 58-62 of the original records package?

[para 93] A public body is not required to provide this office with records over which solicitor-client or litigation privilege are claimed under section 27(1)(a). As I have found that section 27(1)(a) does not apply, I will consider the application of section 27(1)(b). However, a public body is required to provide the records over which this exception is claimed for review. Therefore, in order to properly decide this issue, I will require the Public Body to provide unredacted copies of these pages.

6. Is the information on pages 53-57 of the original records package and pages 9, 11, 12 of the of the new records package responsive to the Applicant's request? If so, does the Applicant have a right of access under section 6(2) to the information in these pages withheld as non-responsive?

[para 94] The Public Body is not required to provide access to records that have not been requested by the Applicant. However, 'non-responsiveness' is not an exception to the right of access created by section 6 of the Act (see Order F2009-025). Where a record is comprised of separate and distinct portions, it may be appropriate to withhold those portions that are not responsive to the applicant's request.

[para 95] Past Orders address how public bodies should properly characterize information in a record as non-responsive. Order F2018-75 states (at paras. 55-58):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record…
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant's personal

information *or* whether that portion provides context to the remainder of the record that *is* the Applicant's personal information.

> An example of 'separate and distinct' might be distinct emails in an email chain. Another example relates to police officers' notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.

[para 96] The Public Body states that the information withheld on pages 53-57 of the original records package consists of a draft agenda and draft Record of Discussion from a meeting in which multiple topics were addressed. The Public Body states that the redacted portions are not responsive to the Applicant's request and do not provide additional context for the disclosed information.

[para 97] Having reviewed these pages, I agree that the various topics discussed at the relevant meeting are distinct; most do not relate to the Grassy Mountain project or Benga Mining in any way. The Public Body has disclosed the meeting participants, and other information about the meeting, but has withheld those topics that are unrelated to Benga Mining or the Grassy Mountain project. I agree that these other topics are distinct, and can be separated in a manner akin to a police officer's notebook discussed in Order F2018-75, above. I find that the Public Body has properly identified the information in pages 53-57 as non-responsive.

[para 98] The information withheld as non-responsive on page 9 of the new package of records is an email that the Public Body points out is outside the timeframe of the request. I agree that this email is not responsive.

[para 99] Pages 11-12 of the new package of records consist of emails. The Public Body has withheld the name of attachments as non-responsive. The Public Body states that the attachments themselves (which are not part of the records) are not responsive to the Applicant's request as they are not communications between the Public Body and AER, nor are they related to such communications. The Public Body argues that as the attachments are not responsive, the names of the attachments are likewise not responsive; it states (at page 9):

> Application in this manner provides clarity, informing the Applicant that the attachment is not missing from the records package.

[para 100] The names of documents attached to responsive emails are not separate and distinct from the remainder of the email. I disagree that withholding the name of an attachment is a reasonable way to inform an applicant that the attachment is not missing from a records package. Specifically, it is unclear how an applicant would know that the attachment itself is missing if they have no way of knowing what that attachment is. I find that the names of the attachments appearing in the emails are responsive to the request.

Does the Applicant have a right of access under section 6(2) to the information in pages 1-13 and 15 withheld as non-responsive?

[para 101] This issue addresses whether the Public Body should be ordered to disclose the responsive information it withheld as non-responsive to the Applicant, or whether it should be given an opportunity to reprocess those records.

[para 102] The Public Body did not make a submission regarding this part of the issue.

[para 103] In Order F2024-32, the adjudicator considered when it may be appropriate to permit a public body to review responsive records or portions of responsive records that had been withheld as non-responsive, rather than ordering the public body to disclose those records to the applicant. In that case, the public body had withheld certain columns or rows of information in a spreadsheet that was otherwise responsive. The adjudicator found (at paras. 36-37):

> In cases where a public body has not reviewed records to determine whether exceptions apply, it may be appropriate to allow the public body the opportunity to review the records to determine whether there is a public interest in withholding information they contain. In this case, the Public Body clearly reviewed the information in the records to determine whether exceptions apply to it. Further, its submissions in relation to section 25 include the information it labelled as non-responsive. It has made arguments as to the potential consequences of disclosing the debts and outstanding balances owing to government by industry members. Again, debts owing by industry members is the substance of the information the Public Body labelled as "non-responsive".
>
> I conclude that the Public Body reviewed the records it labelled as "non-responsive" and made submissions regarding them in relation to its application of section 25 of the FOIP Act. It cannot be said in this case that the public interest requires giving the Public Body further opportunity to determine whether an exception to disclosure in the FOIP Act applies. For this reason, I have decided to order disclosure of the information the Public Body argued was nonresponsive.

[para 104] This issue was considered more recently by the Alberta courts, with respect to Order F2022-20. In that Order, the adjudicator considered whether records withheld as non-responsive were in fact responsive to the applicant's access request. In that case, the applicant had requested records that discuss the recission of the 1976 coal policy, or exceptions to the coal policy. The records and information withheld as non-responsive were of a similar nature to many of the records in this case. Specifically, the records in Order F2022-20 were multi-page documents with most of the information withheld as non-responsive, and only specific portions that mention the recission of the coal policy being processed as responsive. The adjudicator determined that the information withheld as non-responsive was responsive to the request, and ordered the public body to include those records in a new response to the applicant.

[para 105] This Order was subject to judicial review. In *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 the Court addressed the adjudicator's order with respect to the records that the adjudicator had determined were responsive to the request:

> [35] I am further asked to remit the records back to the Public Body for further processing if I order the production of the non-responsive portions. By this, I understand that having failed to establish that the records were non-responsive, they wish the opportunity to claim other statutory exceptions. I expressly decline this request. I will address this issue further, but I will not allow this Public Body the opportunity to compound the inordinate delay they have created.

[para 106] This portion of the Court's decision was appealed to the Alberta Court of Appeal. The Court of Appeal overturned this portion of the King's Bench decision in *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2025 ABCA 163, stating (at para. 5):

> …when redacted information is determined to be responsive or relevant to a FOIPP information request, those records should generally be remitted back to the public body involved for review to see if any statutory exceptions apply before being released to the public.

[para 107] In my view, this Court of Appeal decision can be read consistently with Order F2024-32. The records at issue in Order F2022-20, and therefore at issue in the Court of Appeal decision, were largely withheld as non-responsive. In such cases, a public body has likely not undertaken a line-by-line review of the records, or portions of the records, that were withheld as non-responsive. It is appropriate to permit the public body an opportunity to properly apply the Act to after conducting a line-by-line review of the records.

[para 108] However, Order F2024-32 also discusses another situation that was not before the Court of Appeal: records in which a public body has parsed sentences and paragraphs, and withheld discrete items of information in the sentences and paragraphs as non-responsive. The Court of Appeal discussed *documents* that were withheld as non-responsive, and the general approach of remitting those *records* back to a public body for review. The Court of Appeal did not discuss remitting discrete items of information, as this situation was not before it.

[para 109] In such situations, it is clear that the public body has already undertaken a line-by-line review of those records (or portions of records). In other words, the head of the public body or their delegate already closely reviewed the relevant information; and the head (or their delegate) had the opportunity to apply an exception to access found in sections 16-29 of the FOIP Act but did not. I agree with the adjudicator in Order F2024-32 that it is not in the public interest to permit the public body yet another opportunity to withhold information now.

[para 110] In this case, I have found that the names of the email attachments withheld as non-responsive on pages 11-12 of the new package of records are responsive to the Applicant's request. The Public Body has also withheld other discrete items of information in these emails under other exceptions; for example, a portion of a subject line was withheld under section 17(1) and a portion of the signature line was withheld from two emails. While the Public Body's decision to withhold this information is not at issue in this inquiry, it is clear that the Public Body already undertook a line-by-line review of the emails on pages 11-12, in order to identify these discrete items of information.

[para 111] As the Public Body has already reviewed the information on pages 11-12 in detail, and did not apply an exception to access to the names of the attachments, I will order the Public Body to disclose this information to the Applicant in accordance with the analyses above.

V. ORDER

[para 112] I make this Order under section 72 of the Act.

[para 113] The Public Body's evidence is not sufficient to find that it conducted an adequate search for records. As set out in paragraphs 29-30 above, I order the Public Body to either provide to me and the Applicant documentation from the Public Body's searches, showing that the various program areas used appropriate search terms in conducting the searches; or, if the Public Body does not have such documentation, to conduct a new search. If the Public Body conducts a new search, it must provide a new response under the Act to the Applicant with respect to any additional records located. The Public Body must also provide details of the search to me and the Applicant, including the search terms used. I retain jurisdiction to review either the documentation or the description of the new search, as appropriate, to determine whether the Public Body met its duty under section 10 of the Act.

[para 114] I find that section 24(1)(b) applies to the information withheld under that provision. However, I order the head of the Public Body, or the head's delegate, to re-exercise its discretion with respect to the application of that provision, as set out in paragraphs 47-55 of this Order. The Public Body is to provide an explanation to me and the Applicant setting out how the head (or their delegate) exercised their discretion.

[para 115] I find that section 27(1)(a) and (2) do not apply to the information withheld under those provisions on pages 58-62 of the original records package. As the Public Body has also applied section 27(1)(b) to that information, I retain jurisdiction to review the Public Body's application of that provision. In order that I may do so, the Public Body is to provide me with a copy of these unredacted records at issue.

[para 116] I find that the information withheld by the Public Body on pages 53-57 of the original records package, and page 9 of the new records package is not responsive to the Applicant's request.

[para 117] I find that the information withheld by the Public Body on pages 11-12 of the new records package is responsive. I order the Public Body to provide this information to the Applicant.

[para 118] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

____

Amanda Swanek
Adjudicator