

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER FOIP2026-31

October 9, 2026

ENVIRONMENT AND PROTECTED AREAS

Case File Number 023748

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to Environment and Parks (now Environment and Protected Areas, the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for “Correspondence between Alberta Environment and Parks and [a named individual] relating to the Dam Safety Assessment and Risk Mitigation study relating to induced seismicity for the Brazeau Dam established in 2020.”

The Public Body responded to the request, informing the Applicant that it was withholding 443 pages of responsive records in their entirety under section 27(1)(a) (legal privilege).

The Applicant requested a review of this response. During the settlement phase of the review, the Public Body agreed to provide pages 7-443 of the records to the Applicant. No settlement was reached regarding pages 1-6, and the Commissioner agreed to conduct an inquiry into the Public Body’s continued application of section 27(1)(a) to the information in these pages.

The Adjudicator found that the Public Body had not met its burden of showing that section 27(1)(a) applies to the records at issue and ordered the Public Body to disclose the information in pages 1-6 of the records to the Applicant.

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 F2015-22, F2016-63, F2017-28, F2017-58, F2017-67, F2018-14, F2022-28, F2022-45, F2024-29 BC Order F19-38

Cases Cited: *British Columbia (Ministry of Finance) v. BC (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII), *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII)

I. BACKGROUND

[para 1] On June 8, 2021, Environment and Parks (now Environment and Protected Areas, the Public Body) received an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for “Correspondence between Alberta Environment and Parks and [a named individual] relating to the Dam Safety Assessment and Risk Mitigation study relating to induced seismicity for the Brazeau Dam established in 2020.”

[para 2] On September 30, 2021, the Public Body responded to the access request, informing the Applicant that it was withholding 443 pages of responsive records in their entirety under section 27(1)(a) (legal privilege).

[para 3] The Applicant requested a review of this response. During the settlement phase of the review, the Public Body agreed to provide pages 7-443 of the records to the Applicant. No settlement was reached regarding pages 1-6, and the Commissioner agreed to conduct an inquiry into the Public Body’s continued application of section 27(1)(a) to the information in these pages.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of pages 1-6 of the 443 pages of responsive records.

III. ISSUES

[para 5] The issues for this inquiry were set out in the Notice of Inquiry, dated May 12, 2026, as follows:

Did the Public Body properly apply section 27(1) (privileged information) to pages 1 to 6 of the records package?

IV. DISCUSSION OF ISSUES

[para 6] The Public Body did not provide an unredacted copy of pages 1-6 for the inquiry, as it claimed solicitor-client privilege over the withheld information. After it withdrew the claim of privilege over pages 7-443, a copy of those records was provided to this office, which I have reviewed.

[para 7] Section 27(1)(a) 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,*

[para 8] 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 9] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue, on a balance of probabilities.

[para 10] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [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 11] 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 12] Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):

Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 13] In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

[para 14] 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 15] The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 16] In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "... the IPC cannot "properly determine" whether solicitor-client privilege exists: 2018 *CPS (CA)* at para 3. The scope of the IPC's review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

[para 17] The Court describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary...

Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?

In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

[para 18] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 19] In their request for review, the Applicant argued that it was unlikely that the entire 443 pages of records was unlikely to be subject to solicitor-client privilege. This request for review was made before the Public Body provided pages 7-443 to the Applicant. With respect to pages 1-6 at issue in this inquiry, the Applicant's submission states that as they do not have copies of the records, they are unable to make specific submissions regarding the Public Body's claim of privilege.

[para 20] In its submission, the Public Body states that the records contain legal advice provided by counsel to the Public Body as part of the solicitor-client relationship.

[para 21] With its submission, the Public Body provided an affidavit sworn by a Senior FOIP Advisor for Service Alberta and Red Tape Reduction. The affiant states:

7. I have reviewed the Records and believe that they meet the criteria required to claim solicitor-client privilege.

8. All of the Records consist of either

(a) communications:

(i) between a lawyer and the Public Body;

(ii) made in confidence; and

(iii) in the course of seeking or providing legal advice;

(b) communications made within the framework of the solicitor-client relationship and forming part of the continuum of communication in the provision of legal advice, that were intended to be confidential; or

(c) records reflecting internal discussions about legal advice that were intended to be confidential.

9. All of the lawyers referenced in the Records are employed by the Public Body as barristers and solicitors.

10. I believe that all of the lawyers referenced were acting in their capacity as legal advisors in relation to creation of the Records.

11. I believe that the communications contained in the Records occurred within the context of the solicitor-client relationship and is not business, policy or other non-legal advice.

[para 22] The affiant further states that pages 1-3 and 5-6 of the records consist of email correspondence from corporate counsel to the client providing legal advice. Page 4 is described as email correspondence from the client to corporate counsel requesting legal advice. In each case, the affiant states that the email correspondence "involved no external parties and was intended by the parties to be confidential."

[para 23] The affiant has not explained why they believe that the records contain legal advice. I accept that the affiant believes the records contain information subject to solicitor-client privilege but I do not know what the affiant based this belief on.

[para 24] By letter dated July 15, 2026, I asked the Public Body for additional evidence to support its claim of privilege. I said:

The affiant has not provided reasons for concluding that the emails relate to legal advice. In its submission, the Public Body states that it had initially claimed solicitor-client privilege over all of the 443 pages of responsive records. Following the settlement phase of the review, the Public Body states that it provided pages 7-443 of the records to the Applicant.

The Public Body did not explain why it initially claimed privilege over all 443 pages of the records, or why the Public Body appears to have later determined that none of the information in pages 7-443 is subject to privilege.

In some cases, records surrounding the records over which solicitor-client privilege is claimed can provide context for the claim of privilege; for example, surrounding records might reference legal advice having been sought or given. This is not the case here; having reviewed the information in pages 7-443, the information appears to consist entirely of scientific or technical information. These records do not provide any indication that the preceding pages (i.e. pages 1-6) would contain information subject to solicitor-client privilege.

The *Practice Note – Providing Affidavits and Other Evidence* publication provided to the parties with the Notice of Inquiry refers parties to *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 SCR 809, in which the SCC determined that more evidence to support the application of solicitor-client privilege is required when advice sought from or given by an in-house or government lawyer is at issue. This is because such lawyers may be called upon to give policy advice, which is not legal advice. The Court said:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

The Practice Note further states:

Therefore, a respondent that is claiming solicitor-client privilege over the advice of an in-house or government lawyer must provide sufficient information about the relationship between the lawyer and the respondent and about the circumstances in which the advice is being requested and provided, to establish that the subject-matter is legal advice rather than policy or other advice.

In the Public Body's affidavit, the affiant has stated that they "... believe that the communications contained in the Records occurred within the context of the solicitor-client relationship and is not business, policy or other non-legal advice."

The affiant has essentially sworn that they believe the information in pages 1-6 of the records meets the test for solicitor-client privilege. However, I do not have information regarding the foundation for the affiant's belief.

I am asking the Public Body for an additional affidavit that provides additional information about the records, described in *Pritchard*, above. The Public Body should include information regarding the relationship between the parties to the emails in pages 1-6, such as the position titles and program areas. If several people were recipients of the emails, the Public Body should clarify why those individuals would all be appropriate recipients of the legal advice, which speaks to the confidentiality of the information.

Lastly, without disclosing the legal advice, I am asking the Public Body to provide information regarding the circumstances of the legal advice that it states was sought and received. For example, it would be helpful to have a general description of the nature of the issue for which legal counsel was consulted.

[para 25] The Public Body responded on August 6, 2026. The Public Body's submission states that it cannot provide the information I requested:

You requested further information regarding the relationship between the lawyers and the recipients of the legal advice. The Affidavit confirms that the lawyers providing the legal advice in the records at issue (i.e. the six pages) were legal counsel for the Public Body and were Barristers and Solicitors. It also confirms that the recipients of the legal advice were employed by the Public Body at the time of the communications and were authorized to seek and receive legal advice. In our view, this information is sufficient to establish the relationship between the parties for the purpose of assessing the claim of solicitor-client privilege.

Disclosing further information about either the lawyers or the recipients of the advice, including their position titles, program areas, or other identifying details, is not relevant to determining whether solicitor-client privilege applies to these records. Moreover, providing such information could disclose the nature of the communications and risk waiving privilege.

You have also requested information regarding the circumstances in which the legal advice was sought, including a general description of the issues for which legal counsel was consulted. Providing this information would disclose the substance, context, or subject matter of the legal advice and could result in a waiver of solicitor-client privilege. The Public Body is not prepared to waive privilege in respect of these records.

[para 26] The Public Body also provided a new affidavit, sworn by an Assistant Deputy Minister for Strategic and Integrated Services for the Public Body (ADM); this ADM states that

they are also the delegated head of the Public Body for the purposes of responding to access requests under the FOIP Act.

[para 27] The content of the ADM's affidavit is substantially the same as the content of the previous affidavit sworn by the FOIP Advisor. The new affidavit adds only that the Public Body employees who sought the legal advice were authorized to do so.

[para 28] Like the previous affidavit, the ADM's affidavit states that the ADM believes the information consists of the seeking and provision of legal advice. The ADM does not provide any reasons for having formed this belief.

[para 29] The gaps identified in my letter to the Public Body have not been filled; I understand that the Public Body's counsel was involved in the correspondence at issue and that the affiants believe that the information relates to legal advice rather than policy or other types of advice. However, I do not know why the affiants have this belief as the affiants have provided no factual basis or other reasons upon which they formed this belief.

[para 30] As stated in my letter to the Public Body, in some cases the other records at issue provide context for the claim of privilege. For example, in Order F2022-45, the records at issue over which privilege was not claimed provided support for the public body's claim of solicitor-client privilege (at para. 123).

[para 31] In other cases, the scope of the access request itself provides an indication of the context for the privilege claim; for example, records relating to an employee's employment and termination (Order F2017-28), records relating to a Whistleblower Report (Order F2018-14), records relating to a public body investigation (Order F2016-63), records relating to a legal proceeding initiated by the public body (Order F2017-67).

[para 32] In these cases above, the access request and/or the other records over which privilege is not claimed point to a general legal issue that provides context for the privilege claim. The same can be said for court decisions, such as *ShawCor*, that set out what must be provided in an affidavit when claiming privilege – the court proceeding itself provides context for that the legal issue about which the privilege claim is made. The case at hand is unusual insofar as there is nothing before me that hints at a legal issue or question that could help to ground the Public Body's claim of privilege.

[para 33] In this case, 437 of the 443 total pages of records were provided to the Applicant during the settlement phase of the review, after the Public Body withdrew its claim of solicitor-client privilege over them. Nothing in these 437 pages hints at circumstances in which legal advice may have been sought or received. As stated above, these records consist entirely of numerical data without narrative or other explanatory text. I do not know how this data relates to the 6 pages of records at issue. As the access request is for communications between the

Public Body and a named individual regarding a specific study, this data may have been attached to an email that is contained in the 6 pages of records at issue; however, the data may also be unrelated to those communications.

[para 34] The access request itself also does not provide me with context for the privilege claim. The Public Body has not told me who the individual named in the request is, but an internet search of that name leads me to a publication relating to Alberta dam safety regulations, with that individual listed as manager of dam safety. In other words, there is no indication that the individual named in the access request is (or was at the relevant time) counsel for the Public Body. Therefore, nothing in the access request itself gives me any additional context for the privilege claim.

[para 35] The only information I have to make my decision is that two affiants believe the contents of the records to contain legal advice and to be subject to solicitor-client privilege, without setting out any factual bases for their beliefs.

[para 36] Neither affiant claims to have specific knowledge of these records or to have knowledge of the program area that would have created or maintained these records.

[para 37] Neither affiant explained how they determined the communications related to legal advice rather than policy or business advice. Neither affiant has stated that they have familiarity with the scope of solicitor-client privilege generally, or more specifically the scope as it relates to in-house or government counsel and the contrast with policy or business advice as discussed in *Pritchard*.

[para 38] Both affidavits state that the records consist of

- communications between a lawyer and the Public Body;
- communications forming the continuum of communications; or
- records *reflecting* internal discussions about legal advice.

[para 39] The first two bullets echo the test for solicitor-client privilege set out in *Solosky* and *Blood Tribe*, as discussed above. With respect to the third bullet, it is not clear what the affiants mean by “records reflecting internal discussions about legal advice.” Possibly the affiants are referring to internal discussions about the legal advice that was obtained; I agree that the privilege extends to discussions among Public Body employees about the legal advice (see *EPS*, cited above, at para. 271). The affidavits are not clear on this point though, as they state that the records *reflect* internal discussions of legal advice, not that they *consist of or reveal* internal discussions of legal advice. As an example, a public body might seek legal advice before issuing a public statement on a matter. The public statement might be said to *reflect* the legal advice but is not thereby privileged itself.

[para 40] Without some information about how the affiants came to their beliefs regarding the nature of the information in the records or the application of solicitor-client privilege, I cannot conclude on a balance of probabilities that what the affiants' mean by "records reflecting internal discussions about legal advice" is something that properly falls within the scope of solicitor-client privilege.

[para 41] I understand that the Public Body must be careful with any information it provides, to avoid revealing privileged information. The information I requested from the Public Body follows the language of *Pritchard*, cited above but reproduced again for ease:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

[para 42] If the claim of privilege depends on the nature of the relationship, subject matter of the advice, and the circumstances of the advice, then information regarding those factors is relevant and material to my determination in this inquiry. As I have said, in some cases, surrounding records or the subject of the access request provides some information about these factors, but that it not the case here.

[para 43] The courts have found that in some circumstances, something more than a brief description of the record may be required. The Court in *ShawCor* explained:

[42] This being so, even if we are wrong in concluding that relevant and material records a party objects to produce must, short of disclosing privileged information, be briefly described by that party in accordance with Rule 5.7, the same result would follow given the requirements under Rule 5.8. Why? Identifying "the grounds" for claiming privilege in relation to each record obliges a party to do two things. First, it must state the actual privilege being relied upon with respect to a particular record (e.g. litigation privilege). Second, it must provide a sufficient description about that record to assist other parties in assessing the validity of the claimed privilege. An objection does not exist in a factual vacuum. It is tied to a specific record. Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.

...

[46] In summary, the *Rules* read together indicate that a party must provide more information in describing a record subject to a privilege claim than merely parroting the nature of

the various privileges listed in Schedule 2 of Form 26 in an abstract, incomplete manner, untethered to any specific record. It would be ironic, indeed, if the *Rules* were interpreted so as to allow a party not to provide at least a brief description of records where that description is most required. After all, these are the records that another party is not entitled to examine unless it successfully challenges the privilege claim.

[para 44] In *British Columbia (Ministry of Finance) v. BC (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII), the BC Supreme Court provided guidance regarding how the BC Information and Privacy Commissioner (IPC) can review claims of solicitor-client privilege under BC's *Freedom of Information and Protection of Privacy Act* (FIPPA). In that case, a public body had sought judicial review of IPC Order F19-38, in which the adjudicator found that the public body's affidavit evidence was not sufficient to uphold some of the public body's claims of solicitor-client privilege.

[para 45] The discussion in that case, at paragraphs 76 – 94, is helpful in its level of detail regarding the content of affidavit evidence. The discussion starts by noting that the parties agree that something akin to the civil litigation approach is to be used when there is a claim of solicitor-client privilege before the IPC, but that there is disagreement as to the level of detail required to support that claim.

[para 46] The Court reviewed precedents that found that generally, the relevant dates of the documents and names of the authors may be provided without revealing privilege, even if that is not always the case. The Court also discussed the value of affidavits sworn by counsel:

[81] In my view, it would be an unusual situation where the date of the document and the names of the sender and recipient are not disclosed for each document. It seems to me that some information is required to understand the document. It also seems to me that indicating whether the sender or the recipient is a lawyer could be helpful and even necessary. Certainly an explanation would be required if this information cannot be provided. Security or privacy concerns can be dealt with by other means such as sealed files.

[82] The IPC has adopted a very similar approach (*Order F20-16, British Columbia (Ministry of Attorney General) (Re)*, 2020 BCIPC 18):

[10] In addition to a proper description of the records, public bodies must provide evidence to substantiate the privilege claim. It is not enough to merely assert that privilege applies. The evidence may include the very records in dispute, with or without affidavit evidence, or it may be that only affidavit evidence is provided. It is also open to the parties to seek the OIPC's consent to submit evidence *in camera*. While the OIPC has a broad discretion to accept hearsay evidence, ideally, evidence about the communications should come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication, as well as the intentions of the parties to the communication. This makes the evidence more reliable. In addition, it is helpful to have evidence from a

lawyer, who as an officer of the court, has a professional duty to ensure that privilege is properly claimed.

[83] I am unable to find a decision where it has been stated categorically, but the preference and the practice in civil litigation appears to be to use affidavits to make a claim of privilege, preferably from counsel. There is an older case where McEachern C.J.B.C. stated that what is required is an oral or written statement of counsel asserting privilege, but oral statements would not normally arise with the IPC (*Delgamuukw v. British Columbia* (1988), 1988 CanLII 3195 (BC SC), 32 B.C.L.R. (2d) 156) (B.C.S.C.); cited in *Keefer Laundry*, at para. 66). An affidavit from the instructing client focusing on the privilege issue (as opposed to the merits of the underlying application) may be a suitable alternative in a minority of cases.

[para 47] The Court noted the difficulty in creating a rule or roadmap regarding the level of detail required in an affidavit:

[87] As to what is required in the affidavit, that is more complicated. It is clear enough that “absolutely no evidence” will not establish a claim for privilege (*Nanaimo Shipyard Ltd. v. Keith*, 2007 BCSC 9, at para. 15). Beyond that, every case is different and within each case different documents may require different explanations and different levels of explanation. An additional complicating factor is that a claim for solicitor-client privilege may require more protection and, therefore, require the disclosure of less information to demonstrate that privilege than one for litigation privilege (*Stone*, at para. 27; citing *Hetherington*, at paras. 8-10). One case has cautioned that the test for legal advice privilege, litigation privilege and solicitor-client (or “legal advice”) privilege are different and can lead to confusion (*Keefer Laundry*, at para. 59).

[88] It follows from the above that, if the parties are expecting a specific road-map about how to make and how to decide a claim of solicitor-client privilege, that is not possible. Each case and perhaps each document will require different levels of disclosure by public bodies and different degrees of intervention by the IPC.

[para 48] The Court also addressed an argument regarding the authority of the IPC upon receipt of an affidavit in support of privilege, to ask for further information:

[92] The petitioner also says that once counsel has filed an affidavit supporting the claim for solicitor-client privilege it is not for the IPC to go further and request more information. According to the petitioner that is the effect of the presumption described in *Blood Tribe*. In my view, that may be true when counsel’s affidavit adequately sets out the particulars of the claim for the specific document. However, it likely would not be the case where the affidavit is inadequate. It is for the IPC to decide whether the affidavit is adequate (not counsel for the applicant), subject to judicial review on a correctness standard. I add that I do not agree with the petitioner that in all cases simply providing the date of the record and the names of sender and recipient is enough to create a presumption in every case.

[93] I emphasize that the length of the affidavit is not necessarily determinative (the adjudicator in the subject petition at one point raised the number of pages as relevant to the

claim for privilege). An affidavit that briefly explains that a specific document contains counsel's opinion to the client about the merits of the underlying action would require very careful consideration by the IPC (and the courts) before deciding it did not support a claim of privilege. Affidavits about claims over other documents will require more explanation. Moreover, a global claim of privilege over a number of documents may justify a claim of solicitor-client privilege for all of the documents. But something more is required than the assertion that the fact of one privileged attachment in a group of attachments means that all the attachments in the group are privileged. Documents about specific issues require specific claims of privilege. This may be onerous in document-heavy cases but, in my view, solicitor-client privilege is that important.

[para 49] The Court then conducts a detailed review of the public body's affidavits in support of its claims of solicitor client privilege over various records at issue; the Court concluded that the affidavit evidence was sufficient in some cases but not in others (at paras. 95-158).

[para 50] The discussion in this BC decision is consistent with the other case law cited above.

[para 51] As stated above, the Public Body must be careful when providing detail in support of its claim of solicitor-client privilege, so as not to reveal the privilege itself. Having no information about the information over which privilege is claimed, I am not in a position to set out for the Public Body precisely what information it needs to provide to me to support its claim. As noted in the decision above, each case is different and will require a different level of detail. The Public Body must decide what information it is able to provide in support of its privilege claim.

[para 52] The Public Body has the burden of showing that it properly claimed solicitor-client privilege, on a balance of probabilities. The Public Body is asking me to accept the beliefs of affiants, without knowing *any* of the information discussed in *Pritchard* and without *any* of the facts the affiants' relied on to ground their beliefs. The Public Body is asking me to essentially defer to the affiants' assessments rather than making an independent determination as I am tasked with under the Act. In other words, I would be accepting the claim of privilege based only on the fact that the Public Body provided affidavits that correctly set out the test for solicitor-client privilege and that the affiants swore to their belief that the test is met. This seems to amount to a "rubber-stamp" of the Public Body's assessment, rather than an independent assessment that the Act tasks me with making.

[para 53] Given the above, I cannot uphold the Public Body's application of section 27(1)(a) based only on the beliefs of the Public Body affiants, without any understanding of the facts or other bases of those beliefs.

[para 54] In *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 the Alberta Court of Appeal determined that the Court of Queen's Bench has the power to demand records from public bodies when hearing judicial review applications regarding a public body's claim of solicitor-client privilege, even though the records were not in

evidence before the Commissioner. Order F2022-28, the adjudicator discussed the implications of a public body's failure to establish that it has properly claimed solicitor-client privilege in an inquiry; she said (at paras 46-51):

To summarize, a public body has obligations in relation to records in its custody or under its control imposed by the statutes under which the public body operates; however, it is not free to dispose of them as it will, as would a private citizen or business, but may be required to preserve them, produce them to a Minister, or to the Commissioner, or to treat them in accordance with legislative schemes such as the FOIP Act. At the same time, as noted above, the Courts have determined that public bodies have the right to have section 27(1)(a) adjudicated by the Courts when they believe solicitor-client privilege applies to records, and that right must be respected in this inquiry.

I have a duty under section 72 of the FOIP Act to issue an order in relation to the records the Public Body has withheld from the Applicant on the basis of section 27(1)(a). I must carry out this duty even though the Public Body may seek judicial review of my decision and seek costs against the Commissioner. The evidence of the Public Body fails to provide a basis for its application of section 27(1)(a) to the records and I must order the Public Body to give the Applicant access to the records.

Given the termination of the Applicant's employment and the commencement of legal proceedings, I anticipate that at least some of the records, if not many of them, contain privileged communications. On the descriptions provided by the Public Body, I am unable to determine which records are privileged or to which privilege they may be subject. Ordering disclosure because the Public Body has not met its case might harm the Public Body's position in litigation, which would not necessarily serve the public interest. On the other hand, it may be that the Public Body prefers to have the issue of the application of section 27(1)(a) adjudicated by the Court of Queen's Bench, in which case, an order under section 72 will be necessary.

A difficulty with the approach above, is the fact, discussed above, that the Public Body asserts that much of the information in the records was sent by, or sent to, the Applicant. If so, then litigation privilege and solicitor-client privilege cannot apply to that information. I find that such information remains within my jurisdiction to demand under section 56, as the only privilege that could apply is settlement privilege, which is a privilege of the law of evidence.

I note, too, that judicial review results in the expenditure of judicial resources and also requires the expenditure of public resources provided by the Legislature to both the Public Body and the Commissioner to carry out their statutory duties, such as administering the FOIP Act.

I have decided to order the Public Body to give the Applicant access to the records to which it applied section 27(1)(a) as this will enable it to seek judicial review; however, I will also give it the option of providing better submissions to make its case and to provide the records sent to or by the Applicant for my review.

[para 55] In this case, I find that the Public Body has not met its burden of showing that section 27(1)(a) applies to the records at issue. This is not the same as finding that the records are not privileged, as I am unable to review the records to make such a determination. Only a court can fulfill that role.

[para 56] I have considered whether it would be appropriate to follow the approach in Order F2022-28; this approach was also taken in Order F2024-29, which is currently before the courts on a judicial review application. While I understand the rationale for the approach in those cases, I have decided against that approach in this particular case. Here, the Public Body has expressly stated that it cannot provide any additional information to me in support of its claim of privilege. Given this, there is little to be gained from asking the Public Body to provide yet another submission or affidavit. Instead, I will issue an order, which permits the parties to take the next step should either choose to do so. As the Public Body has not applied any other exceptions to the information in the records, the relevant order-making power under section 72 of the Act is to order the Public Body to disclose the records to the Applicant.

V. ORDER

[para 57] I make this Order under section 72 of the Act.

[para 58] I find that the Public Body has not met its burden of showing that section 27(1)(a) applies to the records at issue. I order the Public Body to disclose the information in pages 1-6 of the records to the Applicant.

Amanda Swanek
Adjudicator