ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-37

August 24, 2023

JUSTICE

Case File Number 022957

Office URL: www.oipc.ab.ca

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

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

In the course of the inquiry the Public Body acknowledged that the majority of the records identified by the Public Body as responsive (and discussed in the Public Body's submissions to the inquiry) were not actually responsive to the Applicant's request. Based on the Public Body's submissions to the inquiry, the question of whether the Public Body met its duty to assist the applicant was added to the inquiry. The Public Body also added a claim of settlement privilege over the portion of the record that was responsive to the Applicant's narrowed request.

The Adjudicator found that the Public Body did not meet its duty to assist the Applicant, and ordered the Public Body to conduct a new search for responsive records.

The Adjudicator found that the Public Body's evidence was insufficient to find that it properly claimed solicitor-client privilege over the responsive portion of the records at issue.

The Adjudicator also found that the Public Body's evidence was insufficient to find that the Public Body properly claimed settlement privilege over the responsive portion of the records at issue. The Adjudicator ordered the Public Body to review those records and respond to the Applicant in accordance with directions in the Order. The Adjudicator further ordered the Public Body to provide the Adjudicator with a copy of its new response to the Applicant, along with a copy of the unredacted records at issue so that a final determination could be made regarding the Public Body's application of section 27.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 12, 27, 56, 71, 72.

Authorities Cited: AB: Orders 96-022, 97-003, 97-006, 2001-016, F2007-007, F2007-029, F2011-003, F2017-58, F2022-28, F2023-16, F2023-34

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555, *Barkwell v McDonald*, 2022 ABQB 208, *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Kaufmann v. Edmonton (City) Police Service*, 2019 ABCA 272, *Mahe v. Boulianne*, 2010 ABCA 74, *McDiarmaid Estate v. Alberta (Infrastructure)*, 2023 ABKB 14, *Phoa v Ley*, 2020 ABCA 19, *,R. v. Ahmad*, 2008 CanLII 27470 (ON SC), *R. v. Campbell*, 1999 CanLII 676 (SCC), *R. v. Syncrude Canada Ltd*., 2010 ABPC 229, *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, *Zahn v. Taubner*, 2012 ABQB 636

I. BACKGROUND

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

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

> The Public Body claimed solicitor-client privilege over an entire prosecutor's file, despite a prosecutor's file not being subject to solicitor-client privilege. The information was subject to 20(1)(g) of the Act which no longer applies because of 20(2). The public body's claim of informer privilege, while reasonable, would only cover a small number of pages in the entire record.

[para 3] The Public Body did not provide the records over which it claims solicitor-client privilege for my review in this inquiry. The Public Body provided an affidavit in support of its claim. In this affidavit, the Public Body identified 10 responsive records; seven records contain between 1-10 pages, and the other records contain 81, 96 and 155 pages.

[para 4] Following the Public Body's initial submission, as well as the Applicant's initial and rebuttal submissions, I asked the Public Body to address specific questions about its claim of solicitor-client privilege in its rebuttal submission (letter dated April 5, 2023). The questions, discussed in greater detail below, asked the Public Body to clarify to whom legal advice was being provided in the records at issue.

[para 5] After receiving the Public Body's rebuttal submission, I asked the Public Body additional questions regarding its claim of solicitor-client privilege (letter dated May 5, 2023). I said:

> The purpose of the questions posed in my April 5, 2023 letter was to help me evaluate the Public Body's claim of solicitor-client privilege, in the context of the Applicant's access request. Specifically, the Applicant is seeking records that show how a particular sentence was determined, which the Applicant appears to believe is a determination made by the prosecutor. Given this, it seems reasonable to expect that at least some records at issue relate to decisions that the prosecutor was assigned to make regarding sentencing, as opposed to the investigation that preceded the prosecution. Therefore, it is unclear why all responsive records would contain advice from the prosecutor to the investigators for the investigation that led to the prosecution (if that is what the Public Body was arguing in its rebuttal submission, which is not entirely clear).
>
> It may be the case that the records at issue do not contain the information the Applicant expects them to; however, the Public Body has not said as much. Therefore, I am working under the assumption that the records contain information about how the prosecutor came to a determination regarding sentencing. If this is not correct, please clarify.

[para 6] In its response, the Public Body clarified that of the ten records identified in its affidavit of records and discussed in its submissions, only a small portion of one record (Record 8) is actually responsive to the Applicant's request. The Public Body also stated that it was claiming settlement privilege over this portion of Record 8 in addition to solicitor-client privilege; the Public Body had not previously raised settlement privilege in its response to the Applicant or submissions to the inquiry.

[para 7] Following this admission, the Applicant asked permission to make an additional submission to the inquiry. The Applicant pointed out that he had not yet had an

opportunity to address a claim of settlement privilege, as this was a new claim made by the Public Body. The Applicant also raised a concern about the Public Body's search for responsive records, given the new information regarding the responsiveness of the records, provided in the Public Body's response.

[para 8] By letter dated June 6, 2023, I granted the Applicant's request to provide an additional submission, given the new information contained in the Public Body's latest response. I also added the following issue to the inquiry:

> Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 9] I informed the parties that I would consider both whether the Public Body's response to the Applicant was open, accurate and complete, and whether the Public Body conducted an adequate search for responsive records.

II. RECORDS AT ISSUE

[para 10] The records at issue consist of an undefined portion of Record 8, over which the Public Body claims solicitor-client and settlement privilege.

III. ISSUES

[para 11] The issue as set out in the Notice of Inquiry, dated February 2, 2023, is as follows:

> Did the Public Body properly apply section 27(1) and/or 27(2) of the Act (privileged information) to the information in the records?

The following issue was also added to the inquiry:

> Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

IV. DISCUSSION OF ISSUES

Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 12] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

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

[para 13] A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 14] The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

Did the Public Body conduct an adequate search for records?

[para 15] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 16] With its final response to this inquiry, the Public Body provided an affidavit sworn by its FOIP Coordinator. The Coordinator states that upon receiving the Applicant's access request, a request to search for records was sent to General Counsel, Strategic and Business Services Branch with the Alberta Crown Prosecution Service (ACPS) on October 28, 2020. This search was conducted under the original scope of the Applicant's access request.

[para 17] The affiant states that given the nature of the records, no other program area would have responsive records. The affiant states that the prosecutor who created the responsive records was no longer with the Public Body, but that staff familiar with the records helped to locate responsive records.

[para 18] The affiant states that an enormous volume of records was located (eleven boxes of records, one USB, four CDs).

[para 19] The affiant states that the Applicant's request was narrowed by the Applicant on January 8, 2021; the Applicant was then advised that approximately 3000 pages of records may be responsive to that narrowed request. The Public Body and Applicant continued to discuss the scope of the request, and the Applicant further narrowed and finalized the request in March 2021.

[para 20] The Applicant also provided an email chain between the Applicant and the Public Body's FOIP advisor, dated March 17, 2021. In the first email from the Public Body, the FOIP advisor informed the Applicant of the following:

> Quantum of sentence means the penalty that was imposed by the court. If you are requesting the court documents the FOIP Act does not apply to information in a court file as per the Act. Should you require this documentation, copies may be obtained directly from the relevant Alberta court.
>
> If you are requesting records showing how the sentence was determined (e.g. work done by the prosecutor to determine a fit and proper sentence and/or discussions between the prosecutor and defence counsel) we will withhold any responsive records.

[para 21] The Applicant responded, asking what provision would apply to the information. The advisor cited section 20(1)(g), which applies to information relating to or used in the exercise of prosecutorial discretion. The Applicant replied, noting that this provision cannot apply, as the information at issue is more than 10 years old. Section 20(2) states that section 20(1)(g) cannot be applied to information that has been in existence for 10 or more years. The advisor again responded, stating:

> Yes, you are right. But if the Crown Prosecutors Office (program area) is claiming privilege over the records you're requesting we would still be unable to release. There is no time period on privilege records.

[para 22] In his final submission, the Applicant states (June 10, 2023, submission, at para. 5):

> I suspect Alberta Justice had already decided not to release any records by 17 March 2021, and so performed a cursory search in bad faith.

[para 23] In his final submission, the Applicant provided a link to a news article from August 19, 2020, published in the Edmonton Journal entitled "Syncrude sentencing set for Oct. 22" [1]. In this article, counsel for Syncrude referred to discussions with the Crown regarding creative sentencing. The Applicant argues that this article indicates that records of conversations between the Public Body and Syncrude's counsel should exist.

Analysis

[1] https://edmontonjournal.com/news/syncrude-sentencing-set-for-oct-22

[para 24] The Public Body's explanation that responsive records were not likely to be located in a program area outside the ACPS is reasonable. However, the Public Body did not provide any further details about how it conducted its search, other than to say that staff familiar with the records helped to conduct the search.

[para 25] For example, the Public Body did not indicate what keywords it used to conduct the searches, or whether the searches included email accounts or notes of relevant employees. According to the Public Body's recent submissions, most of the 10 records initially identified by the Public Body as responsive relate to the investigation that preceded the sentencing, and not the determination regarding sentencing. This raises questions about the search terms used by the Public Body to locate responsive records.

[para 26] Further, the Public Body has stated that Record 8 consists of seven "status updates"; the portion that is responsive to the Applicant's narrowed request is part of the seventh update in Record 8. The Public Body did not further elaborate on what it means by "status updates"; however, I assume this refers to a document that provides an overview or summary of relevant events relating to a particular project. If a status update contains responsive information, it is reasonable to expect that there are other responsive records to which the status update is summarizing or referring. For example, if the status update refers to a sentencing recommendation having been determined, then it is reasonable to expect that there exists a document containing the sentencing recommendation. If the status update refers to a communication with defence counsel occurring in the relevant time period, then it is reasonable to expect there could be a record documenting that communication (a letter, email, or notes of a phone call). In its submission, the Public Body did not address why it believes no further records exist.

[para 27] The Public Body has also not addressed the Applicant's arguments regarding the news article indicating that discussions may have taken place between the Public Body and Syncrude's counsel. The Public Body's affidavit of records does not include any records that could be construed as discussions of creative sentencing, and the Public Body has not stated whether its search would have located any such communications, if such records existed.

[para 28] Regarding the Applicant's argument that the Public Body conducted its search in bad faith having already determined that no records would be disclosed to the Applicant, this is a possible interpretation of the FOIP advisor's final email (quoted above). However, prior to that email, the FOIP advisor informed the Applicant that they would review the records previously identified as responsive to the Applicant's earlier request (the initial request that was subsequently narrowed) to identify records responsive to the quantum of sentence issue (email dated March 4, 2021). Given this, I cannot conclude that the Public Body had already decided to withhold any responsive records, before conducting a search.

[para 29] That said, given the gaps in the Public Body's explanation regarding its search, set out above, I also cannot conclude that the Public Body conducted an adequate

search for records responsive to the Applicant's final, narrowed request. The fact that the vast majority of records identified as responsive are, in fact, not responsive also calls the Public Body's search parameters into question.

[para 30] I will order the Public Body to conduct a new search for records that are responsive to the Applicant's final clarified request. The Public Body should provide an explanation of its search to the Applicant in its response.

Did the Public Body respond to the Applicant openly, accurately and completely?

[para 31] The Public Body acknowledges (June 26, 2023 submission, at para. 3):

> In respect of the duty to provide an open, honest, and complete answer, the Public Body concedes that the records prior to August 1, 2010 should have been excluded from the scope of the Public Body's first affidavit. As described earlier, these records would have been responsive to earlier iterations of the Applicant's request, but were not responsive to the final version of the Applicant's request and could have been removed from scope earlier.

However, the Public Body also argues (at para. 4):

> The Public Body disagrees that any inadvertent overinclusion of records in the June 4, 2021 response establishes that the public body failed to meet its duty to reply openly and honestly.

[para 32] In *Edmonton (City) v Alberta (Information and Privacy Commissioner), 2016 ABCA 110*, the Court of Appeal discussed whether a public body has failed to meet its duty to assist an applicant by virtue of making an error in its application of the Act (in that case, the public body mischaracterized an access request as a request for general information rather than a request for personal information). The Court found that when a public body responds to an applicant with an incorrect interpretation of the Act, the duty to assist may still be fulfilled if the error was made in good faith. It said (at para. 42):

> The requirement of s. 10 that the public body must assist the applicant cannot reasonably mean that the public body must be right in law every time. The requirement that disclosures must be "accurate" reasonably relates to the thoroughness of the search, the production of the documents requested, and the minimization of production of un-requested documents. Further, just because the Commissioner subsequently decides that the public body has not properly responded to the request does not automatically mean that there has been a failure to apply "every reasonable effort".

[para 33] In this case, the Public Body did not minimize production of un-requested documents. In its June 4, 2021 response to the Applicant, the Public Body identified 440 pages of responsive records, and applied sections 27(1)(a) and 27(2) to all responsive records. The Public Body did not specify in that response which privilege it was claiming.

[para 34] The Public Body has now acknowledged that very few of those 440 pages of records are actually responsive to the Applicant's request. The Public Body has not specified how many pages are actually responsive, though it has said that the responsive information encompasses only a part of the last status update (of seven) comprising Record 8. Record 8 is a 155-page document. Based on the Public Body's description, it is reasonable to conclude that the number of responsive pages is somewhere between one page and a couple dozen pages. This is far from 440 pages.

[para 35] Moreover, while the inclusion of the non-responsive pages was referred to by the Public Body as 'inadvertent', the Public Body has offered no explanation of how this error occurred. Without some explanation, I cannot conclude that the Public Body took every reasonable effort to respond to the Applicant openly, accurately and completely. In other words, I cannot conclude that the Public Body's significant error was made in good faith without some explanation as to how it may have occurred.

[para 36] The Applicant argued that the Public Body essentially misled the Applicant into "using request language that defeated the right of access in FOIP" when it helped the Applicant narrow the scope of his request, only to refuse access to any responsive records (June 10, 2023 submission, at para. 10).

[para 37] While I have insufficient evidence to find that the Public Body made every reasonable effort to respond openly, accurately and completely, I also have insufficient evidence to find that the Public Body acted in a manner intended to thwart the Applicant's request.

[para 38] I find that the Public Body failed to fulfill its duty under section 10.

Did the Public Body properly apply section 27(1) and/or 27(2) of the Act (privileged information) to the information in the records?

[para 39] As stated above, the Public Body has claimed solicitor-client privilege and settlement privilege over the portion of Record 8 that is responsive to the Applicant's request.

[para 40] Section 27 of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice 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 41] 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 42] 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.

Solicitor-client privilege

[para 43] The Public Body withheld all responsive records citing solicitor-client privilege. Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 44] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*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 45] In *EPS* the Court further states that the role of this Office in inquiries involving claims of solicitor-client 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 46] It describes the role of this Office in reviewing a claim of solicitor-client 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?
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> 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 47] I understand the Court to mean that my role in reviewing the Public Body's claim of solicitor-client privilege is to ensure that the Public Body's assertion of that 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 48] In their initial submission, the Applicant argues:

> 15. Section 27(1)(a) does not ordinarily apply to prosecutors' files. A prosecutor is not a solicitor with a client, and they only form a solicitor-client relationship and the privilege associated with it in rare circumstances.
> 16. The records at issue in this request were created in the context of lawyers of Alberta Justice acting in their role as a Crown prosecutor, a role in which they act as an officer of the Court on behalf of the Attorney General. The prosecutor, when acting as a prosecutor, has no solicitor-client relationship.
> 17. The legislature was clearly aware that prosecutor's files are not typically the subject of section 27(1), as prosecutor's files were given a special protection from disclosure under *FOIP* section 20(1)(g). This exception to disclosure ends after ten years due to *FOIP* section 20(2).

[para 49] In its initial submission, the Public Body cited several cases relating to situations in which Crown prosecutors provided advice to police, or to decision makers with the respective department. The Public Body argues:

> 16. The Public Body submits that, as long as a crown prosecutor is providing legal advice to a client, a solicitor-client relationship may exist. Similarly, crown prosecutors may also request legal advice from a different lawyer.

[para 50] The Public Body cites *R. v. Ahmad*, 2008 CanLII 27470 (ON SC), which relates to a claim of solicitor-client privilege over a document (or documents) prepared for the purpose of advising the Deputy Attorney General who was charged with making the decision whether to consent to a direct indictment. The advice was provided by various prosecutors who worked on the file, and who made recommendations regarding the decision. The Court found that solicitor-client privilege can apply to the document, as

legal advice was provided by the prosecutors to the decision-maker (the Deputy Attorney General).

[para 51] In *R. v. Campbell*, 1999 CanLII 676 (SCC), the Court found that when an RCMP officer sought advice from the Department of Justice regarding investigation tactics, a solicitor-client relationship was established.

[para 52] The Public Body also cites *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*, 2020 ABQB 10, wherein the Court found that opinions prepared by Crown prosecutors for EPS were subject to solicitor-client privilege. The Court stated that EPS requested a legal opinion from Crown prosecutors asking whether criminal charges were warranted in a specific instance. Therefore, a solicitor-client relationship was established.

[para 53] In each case cited by the Public Body, the persons with whom Crown prosecutors are in a solicitor-client relationship have been identified. With respect to the records at issue in this case, the Public Body has not identified the person or body to whom it has provided advice.

[para 54] The affidavit provided by the Public Body with its initial submission states that the records at issue "reveal legal advice given on a prosecutorial matter." However, the affiant does not identify to whom this advice was provided.

[para 55] By letter dated April 5, 2023, I asked the Public Body to address the following in its rebuttal submission:

> Was someone other than the author of the records tasked with making the decision regarding sentencing? If so, were records prepared to advise that person (as was the case in *Ahmad*)? Please provide further information on this point.
>
> Or, is it the Public Body's position that all Crown prosecutors are in a solicitor-client privilege in a general sense? If so, with whom? Please provide additional arguments and case law to support that position.
> …
>
> I am asking the Public Body to provide additional information regarding its claim of privilege, addressing the concerns raised above. Please provide a response with respect to each record identified in Schedule 1 of the affidavit. The Public Body's response to my questions should specifically address the context of the records, which appears to be, based on the information before me, decisions of Crown prosecutors regarding sentencing in a non-criminal matter.
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> The Applicant has raised concerns regarding the Public Body's claim of privilege over information provided by investigators to the prosecutor (item f). The Public Body states that the information was provide "for the purposes of receiving advice." Presumably this means that the investigators were seeking legal advice from the prosecutor. Given the clarified scope of the Applicant's access request – records showing how the sentence was

> determined – it is unclear what advice investigators would be requesting from a prosecutor in relation to the prosecutor's decision regarding sentencing. Please clarify.

[para 56] The Public Body responded to my questions cited above, in its rebuttal submission. The arguments provided in the rebuttal related to the interaction between Crown prosecutors and the investigation team that conducted the investigation preceding the prosecution. By letter dated May 5, 2023, I again asked for additional information. Part of that letter was reproduced above, at paragraph 5 of this Order. I reminded the Public Body that the Applicant's request was for records that show how a particular sentence was determined, which the Applicant appears to believe is a determination made by the prosecutor. I further said:

> The cases cited in the Public Body's initial submission relate to findings that solicitor-client privilege can apply to advice provided by Crown prosecutors to investigators (including police officers) during the course of the investigations conducted by the investigators. The Applicant's request is primarily focussed on the prosecutor's determination regarding sentencing, which occurs after the investigation has been handed over to a prosecutor. The Public Body has not specified how the cases it cites relate to the records at issue, given the context of the Applicant's request.
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> Regarding the Applicant's concerns raised in their rebuttal submission, the Public Body states in its rebuttal submission (at para. 18):
>
> > At paragraphs 7, the Applicant indicates that the decision being made in these records is the quantum of sentence to pursue. At paragraph 8, the Applicant submits that the investigation team was providing evidence, but not seeking or receiving legal advice on any issue. The Public Body notes that the specific subject on which legal advice has not been provided as it is protected by solicitor-client privilege. Regardless, as noted above, the specific topic on which legal advice is sought by AEP or provided by ACPS is not relevant for determining the applicability of solicitor-client privilege.
>
> Clearly, the Public Body is not required to reveal the content of any legal advice in the records. That said, the Public Body bears the onus of substantiating its claim of privilege.
>
> The Applicant's argument, as I understand it, is that the quantum of sentencing is a decision for the prosecutor and not the investigators. Therefore, to the extent that the records relate to the decision to be made by the prosecutor, there was nothing for the prosecutor to advise the investigators about. While the prosecutor may have obtained information from the investigators in order to make a determination regarding sentencing, this is not the same as providing advice to the investigators. It is also unclear how the information obtained by the prosecutor for a sentencing determination (if any was obtained) would reveal advice that may have been provided to the investigators for the preceding investigation. The Public Body's rebuttal submission did not directly address these arguments.
>
> The Public Body has referred to the continuum of communications between a solicitor and client. It cites *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), which was summarized in Order F2015-22 as essentially finding 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). The Public Body states that the records reveal legal advice given in the context of a solicitor-client relationship.

However, from the Public Body's submissions thus far, it is not clear how broadly the Public Body is applying this principle. Is it the Public Body's submission that this principle applies to any communications between the prosecutor and investigators, for the reason that the prosecutor had provided legal advice to the investigators at some point during the investigation? If so, please provide support for this argument.

Although I am working under the assumption that the records relate to or include information about how the prosecutor made a determination regarding sentencing, it seems possible from the Public Body's rebuttal submission that the records at issue relate only to advice provided by the prosecutor to investigators regarding the investigation that led to the prosecution.

The affidavit provided with the Public Body's initial submission specifies that record 4 relates to pre-charge advice provided by ACPS to investigators. Record 9 is described as information provided by investigators to the prosecutor for the purpose of obtaining advice.

However, with respect to the remaining records, the descriptions provided in the affidavit do not make it clear that they relate to legal advice provided by a prosecutor to investigators. For example, it may be the case that investigators and prosecutors met and exchanged information without the purpose of that exchange being to provide legal advice to the investigators for the purpose of the investigation that led to the prosecution. As noted above, it is possible that the prosecutor obtained information from the investigators in order for the prosecutor to make a determination regarding sentencing, which reflects the language used in the Applicant's access request. It is unclear how this exchange of information – presumably occurring after the prosecution – would reveal legal advice that may have been provided by the prosecutor to the investigators during the investigation that led to the prosecution.

All of this is to say that the Public Body's claim of privilege remains unclear. If I am misunderstanding the factual underpinnings of the Public Body's claim of privilege (e.g. the context of some or all of the records at issue), I am asking the Public Body to clarify.

The Public Body may also wish to revisit the questions posed in my April 5, 2023 letter, as they were not all directly addressed in the Public Body's rebuttal submission.

With its response to this letter, I am asking the Public Body to provide an updated affidavit, which should clarify the claim being made by the Public Body. The updated affidavit should include a clear statement for each record, as to whom legal advice was being provided.

[para 57] In response to this letter, the Public Body clarified that only a portion of Record 8 is responsive to the Applicant's request, as it is the only record (or part of a record) created within the requested timeframe (August 1, 2010 to October 31st, 2010).

All other records previously identified as responsive were created prior to August 1, 2010 and were therefore not actually responsive to the Applicant's narrowed request.

[para 58] In their final submission, the Applicant agrees that a claim of solicitor-client privilege over communications between the prosecutor and investigation team for the purpose of providing advice relating to the investigation prior to the prosecution "is an intelligible position that Alberta Justice should have described initially." I agree.

[para 59] The affidavit provided with the Public Body's initial submission included a brief description of the responsive records (at schedule 1). Record 8 is described as 7 ACPS status reports created by the prosecutor in relation to the prosecution.

[para 60] The Public Body further describes Record 8 in its rebuttal submission as follows (rebuttal submission, at para. 9):

> 9. Record 8 consists of seven status reports prepared by a prosecutor. These updates include summaries of legal advice, strategy, or reveal the content of correspondence between lawyers in ACPS and their clients in AEP described above.

[para 61] This additional explanation was not provided by way of a sworn affidavit.

[para 62] It is clear that the responsive portion of Record 8 does not relate to the investigation that preceded the prosecution. By August 1, 2020, the relevant company, Syncrude, had been found guilty of the relevant charges (see *R. v. Syncrude Canada Ltd.,* 2010 ABPC 229). The responsive portion of Record 8 would be any status update created between August 1, 2010 and October 31, 2010, after the trial had concluded.

[para 63] Therefore, the questions posed in my letters to the Public Body remain relevant to the Public Body's claim of solicitor-client privilege over the responsive portion of Record 8. In my last letter, I asked the Public Body to provide a new affidavit of records clarifying its claims of privilege over the responsive records. The Public Body provided an affidavit with its final submission, but this affidavit related only to the Public Body's response to the Applicant under section 10; it did not address the concerns I previously raised over the Public Body's claim of solicitor-client privilege to records relating to decisions or discussions about sentencing.

[para 64] In its final submission, the Public Body states:

> 16. To reiterate, in this matter, the responsive updates were prepared by a lawyer. The audience for these updates would be other Crown Prosecutors or, depending on the scenario, other members of the public body, including future investigation teams. These updates summarize legal advice requested and provided through all stages of the investigation and trial preparation procedure. These internal records of legal advice prepared by lawyers for the use of other lawyers or the public body in future occasions clearly carry an expectation of confidentiality as disclosure of these records would reveal summaries of legal advice provided by Crown Prosecutors.

[para 65] The Public Body also argues:

> 19. Justice Renke in *Edmonton (City) Police Services v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 [EPS] makes clear that privilege should not be assessed by isolating particular communications or fragments of communications and scrutinizing them individually or atomistically for satisfaction of the privilege criteria without reference to the context that provides meaning and significance to those communications.
>
> 20. Justice Renke cites Justice Mandziuk in Alberta Municipal Affairs for the proposition that a "holistic" approach must be taken towards assessing whether this communication is privileged.
>
> 21. The Public Body submits that the Applicant's suggestion that any claim of solicitor client privilege must be limited to "only information repeating the information conveyed by the Alberta Justice lawyer to the investigation team during the investigation stage" would be inconsistent with Justice Renke's decision in EPS.

[para 66] I understand that Record 8 is comprised of status updates, which may summarize legal advice that was provided. I do not dispute that if solicitor-client privilege applies to advice provided to investigator, it will also apply to a summary of that advice appearing in a status update. However, it must be shown that the record contains or reveals advice to which solicitor-client privilege applies.

[para 67] With respect to records relating to the sentencing determination, it remains unclear how solicitor-client privilege applies. The Public Body still has not told me to whom legal advice was given in this regard, and did not respond to my question whether someone other than the prosecutor was making the relevant decision such that the prosecutor was providing advice to that decision-maker.

[para 68] The Public Body has referred to the continuum of communications, of which it said (rebuttal submission at para. 17, footnotes omitted):

> The Public Body submits this finding is consistent with *Blood Tribe v. Canada (A.G.)* in which solicitor-client privilege applies to records 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 69] As stated in Order F2023-16, this is a well-established extension of solicitor-client privilege.

[para 70] In its June 5, 2023 submission, the Public Body states (at para. 15):

> While the information may be in relation to settlement negotiations, the Public Body submits the record that contains them is subject to solicitor-client privilege as an internal document meant to update other members of the ACPS on a file's status and the advice given in relation to it. The Public Body submits that this falls within the continuum of legal advice.

[para 71] I understand the Public Body to be saying that status updates are subject to solicitor-client privilege by themselves (i.e. whether or not they reveal legal advice that had been provided to a client on a matter) because they update and inform colleagues on the status of the matter at hand. The Public Body has not provided any case law to support such an extension of solicitor-client privilege. The Public Body has also not provided any support for me to find that a prosecutor is in a solicitor-client relationship with colleagues on the sole grounds that they are colleagues, and for the sole purpose of updating those colleagues on the status of ongoing projects (even where those projects pertain to legal services).

[para 72] Similarly, the Public Body's arguments quoted above (at paragraph 64) refer to the status updates possibly being used by Public Body employees in the future. The Public Body also did not provide any case law to support an argument that the continuum of communications extends to records that may be read by a possible future client in relation to some future event that is not currently contemplated (if that is indeed the Public Body's argument, which is unclear).

[para 73] Further, the 'legal advice' to which the Public Body refers at paragraph 16 of its final submission (quoted at paragraph 64) is that which was provided "through all stages of the investigation and trial preparation procedure." However, as stated above, the responsive records should not relate to the investigation or trial preparation procedure, as they would be created after the end of the trial. The Public Body's claim of solicitor-client privilege over advice provided to the investigation team is reasonable; however, that is not the information at issue here.

[para 74] The Public Body has not provided any detail about what information is actually contained in the portion of Record 8 created in the relevant time frame. As stated in my June 6, 2023 letter to the parties:

> It remains unclear to me whether Record 8 (or portions of it) is actually responsive to the Applicant's clarified request insofar as it contains the requested information relating to how the sentence was determined, or if the Public Body's arguments mean only that of the ten records discussed in the Public Body's submissions, Record 8 is the sole record that *could be* responsive, because it is the only record that was created within the time frame of August 1, 2010 to October 31, 2010.

[para 75] The Public Body has stated in its final submission that the relevant portion of Record 8 reveals contents of settlement discussions. Presumably such settlement discussions relate to the matter of sentencing. The Public Body has not said who was involved in these discussions, although it has also stated that section 27(2) applies to the information; this provision applies to privileged information that relates to a person other than the a public body. Specifically the Public Body states:

> 41. Any information subject to settlement privilege would, necessarily, belong to both parties to the settlement discussions and could not be waived by one party unilaterally (*Bellatrix Exploration Ltd. v Penn West Petroleum Ltd*., 2013 ABCA 10). The Public

> Body submits that records subject to settlement privilege would be subject to both 27(1)(a) and 27(2).

[para 76] From this argument it would appear that settlement discussions occurred between the Public Body and Syncrude. The Public Body has not explained how solicitor-client privilege could be claimed over communications with the party the Public Body has prosecuted.

[para 77] It may be that the responsive portion of the status update also contains legal advice to someone tasked with making a decision regarding any proposed settlement; however, the Public Body has not said as much. This is despite several opportunities to do so, in response to specific questions on this point from me and from the Applicant.

[para 78] The Public Body submissions are not sufficient to meet the requirements set out in *ShawCor*, insofar as it has not established that each element of the *Solosky* test is met. Using the language of Justice Renke in the *EPS* decision cited above, the Public Body has not provided "evidence supporting a claim of privilege [that is] sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities" (at para. 82 of *EPS*).

[para 79] Given the foregoing, I cannot find that the Public Body established its claim of solicitor-client privilege over whatever portion of Record 8 is actually responsive to the Applicant's access request.

[para 80] I will consider the Public Body's claim of settlement privilege over the same information.

Settlement privilege

[para 81] In its final submission, the Public Body states that the responsive portion of Record 8 reveals the content of settlement discussions.

[para 82] As stated by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 (*University of Calgary*) settlement privilege is a privilege of the law of evidence:

> [44] Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege of the law of evidence".

[para 83] This is consistent with past decisions, such as *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, in which the Supreme Court said the following of settlement privilege (at para. 37, emphasis added):

> In Quebec law, as at common law, settlement privilege is an **evidentiary rule that relates to the admissibility of evidence of communications**. It does not prevent a party from disclosing information; it just renders the information inadmissible in litigation.

[para 84] Following the above case law, and as stated in Order F2022-28, "…settlement privilege continues to be a "privilege of the law of evidence" and section 56 of the FOIP Act therefore requires records over which a public body claims this privilege to be given to the Commissioner for review in an inquiry" (at para. 19).

[para 85] Section 56 of the FOIP Act states, in part:

> *56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquires Act and the powers given by subsection (2) of this section.*
>
> *(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of the Act.*
>
> *(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).*

[para 86] I agree with the adjudicator's conclusion in Order F2022-28, that section 56(3) of the FOIP Act authorizes the Commissioner to require the Public Body to produce records over which settlement privilege has been claimed, as settlement privilege has clearly been defined by the courts as a privilege of the law of evidence. This approach has also been followed in Order F2023-34, in which the adjudicator concluded (at para. 31):

> In *University of Calgary*, the Court determined that section 56(3) applies to records over which settlement privilege is claimed, but not records over which solicitor-client privilege is claimed. In my view, the decision of the Supreme Court of Canada regarding the correct interpretation of section 56(3) is binding on this office. In addition, this statement is consistent with the characterization of settlement privilege in *Union Carbide*, supra, which also holds that settlement privilege is a privilege "of the law of evidence".

See also paragraphs 18-30 of that Order for the preceding discussion.

[para 87] That said, past Orders of this office have made findings regarding claims of settlement privilege without the adjudicator having an unredacted copy of the relevant records. I will consider whether the Public Body meets its burden of satisfying me that

the responsive records are subject to settlement privilege on the basis of its submissions alone.

[para 88] The purpose of settlement privilege was discussed by the Alberta Court of Appeal in *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, at para. 21:

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

[para 89] The Court stated the "necessary elements that cloak a communication with settlement privilege" are (at para. 15):

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

[para 90] As stated above, the Public Body has also claimed section 27(2) applies to the relevant portion of Record 8, which indicates that the settlement discussions involved parties outside the Public Body.

[para 91] In its June 5, 2023 submission, the Public Body states:

> 23. That said, the Public Body notes that any discussion of the settlement referenced in the records would, in addition to being part of a record of legal advice provided and internal discussion of legal advice, also be subject to settlement privilege as it would involve communications between the Public Body and other parties intended to effect a negotiated settlement to a litigious matter.
> …
> 26. Although any criminal proceedings related to the settlement in this matter have concluded, the Public Body submits that this would not mean the settlement privilege claim has ended.
>
> 27. Settlement privilege continues to apply even after a settlement has been reached (*Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35 at paragraphs 34-36; *McDiarmaid Estate v Alberta (Infrastructure)*, 2023 ABKB 14 at paragraph 22; *Buck v Canada (Attorney General)*, 2022 CanLII 19523 (FC) at paras 28-29). As described in *Union Carbide,* there are compelling reasons to protect settlement privilege and, as described at paragraph 25: "Without knowing that such privilege exists to shield communications during settlement discussions from future disclosure, parties would be more reluctant to settle disputes out of court."

[para 92] In its final submission, the Public Body further states:

> 33. The Public Body submits that any settlement negotiations contained in the responsive records will be subject to settlement privilege. First, a contested sentence is, naturally, a litigious dispute. Second, negotiation between parties through their counsel carries a clear implication that the conversations would be confidential. These discussions must be frank and honest about settlement positions and possible options. This type of discussion is not possible without an expectation of confidentiality. Third, records of these types of communications would clearly be for the purposes of reaching a negotiated settlement.

[para 93] The remaining arguments in the Public Body's submissions regarding settlement privilege primarily addresses the Applicant's contention that settlement privilege has an end, like litigation privilege. I will address this concern first.

[para 94] The Applicant contends that settlement privilege ends when the related litigious dispute ends. The Applicant cites *Mahe v. Boulianne*, 2010 ABCA 74, in which the Alberta Court of Appeal states:

> [9] Not all privileges are of perpetual duration. For example, the litigation privilege ends when the litigation (and any collateral litigation) is over: ***Blank v. Canada (Minister of Justice)***, 2006 SCC 39, [2006] 2 S.C.R. 319. The primary purpose of the "without prejudice" settlement privilege is to encourage efforts to resolve the dispute, by giving assurances that any concessions of fact or liability in the negotiations and the offer will not be shown to the trier of fact. Once the litigation (and any related litigation) is concluded, the reason for the privilege is ordinarily spent. As the Court held in ***Blank*** at para. 34 with respect to litigation privilege: "Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification". So absent any specific agreement between the parties (or other special circumstances) the "without prejudice" privilege is presumed to expire once the merits of the dispute have been decided.

[para 95] The Applicant argues that the case law cited by the Public Body (reproduced above) concern situations in which there is ongoing related litigation. The Applicant argues that the case law "are not authorities for the claim that settlement privilege survives the end of the litigation and the related litigation" (Applicant's final submission, at para. 23).

[para 96] The Applicant further argues:

> 30. Alberta Justice's position in relation to settlement privilege is based on a misstatement of the law in *McDiarmaid Estate v Alberta (Infrastructure)*
>
> > While litigation privilege ends with the end of the litigation and any collateral litigation, settlement privilege survives unless it is set aside in accordance with a recognized public policy exception: *Union Carbide* at paras 34-35 and *Buck v Canada (Attorney General),* 2022 CanLII 19523 (FC) at paras 28-29.
>
> 31. *McDiarmaid Estate* misunderstood both *Union Carbide* and *Buck* and relied on an inaccurate paraphrase of the first step of the test for settlement privilege: "first, that at the time of the communication a litigious dispute existed or was in contemplation". The error

> was taken from *Phoa v Ley* where the Alberta Court of Appeal was quoting from the lower court. Where the Court of Appeal stated the test in *Phoa v Ley*, they stated it correctly: "(1) there is a litigious dispute in existence or within contemplation".
>
> 32. *[McDiarmaid] Estate* appears to be the only authority for the position that settlement privilege is endless, and it is an error based on a mistaken citation. Settlement privilege ends when the litigation and any related litigation completes.
>
> 33. Alberta Justice relies on an affidavit that misstates the test for settlement privilege by adopting the language from *[McDiarmaid] Estate.*
>
> 34. Settlement privilege "enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation."
>
> 35. Alberta Justice's position would be a massive and wholly unwarranted extension of settlement privilege. Alberta Justice's two positions (1) that a party cannot unilaterally waive settlement privilege, and (2) that settlement privilege is endless, would convert settlement privilege into a common law rule of perpetual confidentiality for all parts of the settlement process, successful or unsuccessful.
>
> 36. There is no ongoing dispute or litigation relating to the records in this case. The issue is ten years old, and all related litigation has been resolved. The records have no possibility of being put before a court as part of related litigation in a way that would prejudice Syncrude or Alberta Justice. A *FOIP* request cannot lead to the records being entered into evidence in any court proceeding.

[para 97] I understand the points the Applicant is making regarding the purpose of settlement privilege, and whether settlement privilege must survive the completion of any related litigation in order for that purpose to be met.

[para 98] In *McDiarmaid Estate v. Alberta (Infrastructure)*, 2023 ABKB 14, cited by the Public Body, the Court of King's Bench stated:

> [21] Settlement privilege is based on the public policy objective of encouraging open settlement negotiations and improving access to justice: ***Union Carbide*** at para 1.
>
> [22] While litigation privilege ends with the end of the litigation and any collateral litigation, settlement privilege survives unless it is set aside in accordance with a recognized public policy exception: ***Union Carbide*** at paras 34-35 and ***Buck v Canada (Attorney General***), 2022 CanLII 19523 (FC) at paras 28-29.

[para 99] The Applicant argues that the Court in *McDiarmaid Estate* misunderstood the case law on settlement privilege in making this finding. The Public Body argues that even if this were true, the decision is binding on me.

[para 100] In the case cited by the Applicant in support of their position that settlement privilege has an end, *Mahe*, the Court of Appeal appears to expressly make this point (see paragraph 9, reproduced above). I note that this case relates to whether an informal settlement offer by one party can be considered by the court in relation to the awarding of

costs. Many subsequent decisions citing *Mahe* do so in the context of settlement offers and the awarding of costs (see *Zahn v. Taubner*, 2012 ABQB 636, *Phoa v Ley*, 2020 ABCA 195, *Barkwell v McDonald*, 2022 ABQB 208).

[para 101] In any event, a more recent decision of the Alberta Court of Appeal supports the Public Body's argument that settlement privilege does not automatically end with the conclusion of the litigious dispute. In *Kaufmann v. Edmonton (City) Police Service*, 2019 ABCA 272, the appellant had disclosed part of a settlement offer to third parties. The Court of Appeal stated:

> [20] We also reject the appellant's contention that once a matter is resolved, any privilege that attaches to without prejudice settlement offers disappears. If negotiations are successful, the privilege continues to apply: *Union Carbide* at para 34. One recognized exception is when the existence or interpretation of the settlement is at issue. In that case, settlement communications may be tendered to prove the existence or scope of the settlement: *Union Carbide* at para 35. In the case of failed settlement negotiations, the privilege that attaches to unaccepted settlement offers does not disappear once a matter is resolved. If that were the case, the goal of facilitating settlement discussions would not be achieved: see Bryant, Lederman and Fuerst, at para 14.372.

[para 102] This is a clear statement regarding the duration of settlement privilege. In my view, the case law supports the Public Body's argument that it is not barred from claiming settlement privilege for the reason that the litigious dispute has ended.

[para 103] That said, for the following reasons, I cannot accept the Public Body's claim of settlement privilege solely based on its submissions to this inquiry.

[para 104] As stated above, in my last letter to the parties, I asked the Public Body to provide a new affidavit of records clarifying its claims of privilege over the responsive records. The Public Body's affidavit in its final submission did not address its claims of privilege.

[para 105] The Public Body provided an affidavit with its June 5, 2023 submission, stating:

> 17. In respect of record 8, the records would reveal information exchanged in communications subject to settlement privilege and, more specifically, that the following criteria apply:
>
> a) at the time of the communication a litigious dispute existed;
> b) the communication was made with the express or implied intention that it would not be disclosed;
> c) the purpose of the communication was to attempt settlement.

[para 106] The schedule attached to the affidavit states, with respect to the information in Record 8:

> The status updates would reveal the substance of legal advice requested by or provided to the investigation team in the context of the investigation and preparation for trial and

> internal discussions about legal advice requested or provided. Additionally, the records would reveal the content of communications subject to settlement privilege.

[para 107] It may be the case that the responsive portions of Record 8 contain information about settlement communications. However, the Public Body has not said that the entire responsive portion of Record 8 contain or would reveal settlement communications. The nature of the record – a status update – indicates that it could contain information other than information revealing any settlement communications. The Public Body has not provided details such as the number of pages comprising the responsive portion of Record 8, or provided any details of the communications that Record 8 might reveal (e.g. how many communications there might have been). Therefore, I have no way of ascertaining whether it is reasonable to conclude that the entire responsive portion would contain or otherwise reveal settlement communications.

[para 108] The Public Body has provided insufficient evidence to support its claim of settlement privilege over the responsive portion of Record 8 in its entirety. I will order the Public Body to review the responsive portion of Record 8 to determine whether it contains information not properly subject to a claim of settlement privilege.

[para 109] I will also order the Public Body to respond again to the Applicant regarding the responsive portion of Record 8, in compliance with its obligations under section 12(1)(c). A public body's obligations under this provision were set out by former Commissioner Work in Order F2011-003 (at para. 32):

> According to earlier decisions of this office, to comply with section 12(1)(c) with respect to records it is withholding, a public body is obliged to indicate how many records (including numbers of pages) are being withheld, to describe or classify these records insofar as this is possible without revealing information that is to be or may be excepted, and to provide the reasons for withholding for each category. (See Order F2004-026 at paras 98 and 99. See also Order 2000-014, which held that public bodies should be as specific as possible about records to which they have decided to give access and not give access.) In failing to do this, the Public Body has failed to comply with the terms of section 12(1)(c). I will therefore direct it to comply with its duty to the extent that it earlier failed to do so by now providing to the Applicant the numbers and a general description of the records that it is withholding, and the reasons for withholding each record or part thereof.

[para 110] The Public Body also briefly referred to the applicability of section 27(1)(b) to the information at issue. The Public Body did not provide submissions on this point, as it is not an issue in this inquiry. If the Public Body has applied section 27(1)(b) to the relevant information, it is to include this in its response to the Applicant.

[para 111] The Public Body is to provide me with a copy of its new response to the Applicant. Given my findings above regarding the applicability of section 56(3) to information over which settlement privilege is claimed, I will also order the Public Body to provide me with an unredacted copy of the records at issue, showing the exceptions that have been applied, if any. I will then determine whether the Public Body has properly claimed settlement privilege and/or applied section 27(1)(b) as necessary.

Section 27(2)

[para 112] Section 27(2) is quoted at paragraph 40 above. It is a mandatory exception to access, which means that if the provision applies then the Public Body must withhold the relevant information.

[para 113] The Public Body has applied section 27(2) to the responsive portion of Record 8, as an extension of its claim of settlement privilege. The Public Body's argument regarding section 27(2) is reproduced at paragraph 75 of this Order; essentially, the Public Body argues that settlement privilege necessarily belongs to both parties to the settlement. Therefore, not only does section 27(1)(a) apply to information subject to settlement privilege, section 27(2) does as well.

[para 114] I have found that I have insufficient information to find that section 27(1)(a) applies on the basis of the Public Body's submission regarding settlement privilege. Accordingly, I also cannot find that section 27(2) applies on the basis of the Public Body's claim of settlement privilege. I can review the application of this provision when I review the Public Body's application of section 27(1)(a) and (b), discussed above.

[para 115] The Public Body has also argued (June 5, 2023 submission):

> 22. As a joint prosecution, the Public Body submits that these records may also be subject to section 27(2) of FOIP since any legal advice provided in the context of the joint prosecution provided to investigators employed by the Crown in Right of Canada would belong to them rather than the Public Body.

[para 116] Again, the Applicant's access request is for record created *after* the investigation was completed; therefore, any advice provided to federal investigators would appear to be outside the scope of the Applicant's request.

V. ORDER

[para 117] I make this Order under section 72 of the Act.

[para 118] I find that the Public Body did not meet its duty to assist the Applicant. I order the Public Body to conduct a new search for responsive records.

[para 119] The Public Body's evidence is insufficient for me to find that the Public Body properly claimed solicitor-client privilege over the responsive portion of Record 8.

[para 120] The Public Body's evidence is insufficient for me to find that the Public Body properly claimed settlement privilege over the responsive portion of Record 8. I order the Public Body to review these records and respond to the Applicant in accordance with paragraphs 108-111 above. I also order the Public Body to provide me with a copy of its new response to the Applicant, along with a copy of the unredacted records at issue.

I retain jurisdiction to review the Public Body's application of section 27(1)(a) and (b) as necessary.

[para 121] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator