OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-20-005

Re: Department of Justice and Public Safety

April 2, 2020

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

Summary: An applicant asked the Department of Justice and Public Safety for access to correspondence relating to the Applicant and their business over a ten-year period. The Department provided access to some information, but withheld some information based on exceptions under the *FOIPP Act*. The applicant requested a review.

In the course of the review, the parties resolved some issues. The only remaining issues were whether the Department had properly applied clause 22(1)(g) [advice to officials] to one paragraph, and whether they had properly applied clause 25(1)(a) [solicitor-client privilege] to 23 pages.

The Commissioner ordered the Department to re-exercise their discretion related to the one paragraph withheld pursuant to clause 22(1)(g), and confirmed the decision of the Department related to clause 25(1)(a) of the *FOIPP Act*.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 7, 18, 22, 25(1)(a), 65, 68(1.1)

Decisions Cited: Order FI-19-012, *Re: Department of Justice and Public Safety*, 2019 CanLII 93498 (PE IPC)

Order FI-19-006, *Re: Executive Council Office*, 2019 CanLII 32852 (PE IPC)

Solosky v. *The Queen* 1979 CanLII 9 (SCC)

Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 CSC 53 (CanLII)

Order Fl-19-005, *Re: Department of Workforce and Advanced Learning,* 2019 CanLII 32855 (PE IPC)

Calgary (Police Service) v. *Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656 (CanLII)

R. v. Campbell, 1999 CanLII 676 (SCC)

Blank v. *Canada (Minister of Justice),* [2005] 1 FCR 403, 2004 FCA 287 (CanLII),

Miazga v. Kvello Estate, 2009 SCC 51 (CanLII)

Order F2017-57, *Re: Edmonton Police Service*, 2017 CanLII 46445 (AB OIPC)

Order F2018-01, *Re: University of Alberta*, 2018 CanLII 1820 (AB OIPC)

I. BACKGROUND:

[1] An individual and their business (the "Applicant") requested access to information, pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act* ("the *FOIPP Act"*), from the Department of Justice and Public Safety ("the Public Body"). The access to information request, as amended, is for:

- Briefing notes referring to [the Applicant] and/or [their business] June 1, 2008 to June 7, 2017.

- Emails (received or sent) by these 12 employees/elected official referring to [the Applicant] and/or [their business] June 1, 2008 to June 7, 2017 [list of 12 provincial employees].
- Field notes taken by these four Conservation Officers referring to [the Applicant] and/or [their business] June 1, 2008 to June 7, 2017 [list of four provincial employees].

[2] The Public Body located and retrieved 222 pages of responsive records. The Public Body provided the Applicant with access to most of the records, but withheld some information pursuant to the following provisions of the *FOIPP Act*:

- subsection 15(1), [disclosure of personal information would be an unreasonable invasion of personal privacy];
- section 18 [disclosure would interfere with law enforcement];
- section 22 [advice to officials]; and
- clause 25(1)(a) [solicitor-client and litigation privilege].

[3] The Applicant sought a review by the Information and Privacy Commissioner (the "Commissioner"). During the course of the review, the parties resolved the issues relating to section 15 and section 18 of the *FOIPP Act*. The Public Body located one additional record, which they claim is subject to solicitor-client privilege. The Public Body also amended their original position and disclosed to the Applicant some of the records over which they had originally claimed litigation privilege and solicitor-client privilege.

II. RECORDS AT ISSUE

[4] The Public Body claims that clause 22(1)(g) of the *FOIPP Act* applies to information in one paragraph, at page 125 of the responsive records. Page 125 is part of an email chain. The paragraph the Public Body withheld is from the former Deputy Minister of the Public Body to two employees, copied to three other employees. All of the employees worked for the Public Body on the date of the email. Throughout this Order, I will refer to this information by its page number, page 125.

[5] There remain 23 pages which the Public Body claims are subject to solicitor-client privilege, pursuant to clause 25(1)(a) of the *FOIPP Act*. Throughout this order, I will refer to these pages as "the 23 pages in question".

[6] Throughout this Order, I will refer to all of the records under review as "the records at issue".

III. THE ISSUES

[7] The two issues of this review are:

1. Did the head of the Public Body properly apply clause 22(1)(g) of the *FOIPP Act* to one paragraph at page 125?

2. Did the head of the Public Body properly apply clause 25(1)(a) of the *FOIPP Act* to the 23 pages in question?

IV. BURDEN OF PROOF

[8] As this inquiry relates to the decision of the head of the Public Body to refuse the Applicant access to all or part of a record, the burden of proof is on the Public Body. Pursuant to section 65(1) of the *FOIPP Act,* it is up to the head of the Public Body to prove that the Applicant has no right of access to the information in the records at issue. The Public Body must present evidence which shows that they have properly applied clause 22(1)(g) and 25(1)(a) of the *FOIPP Act*.

V. ANALYSIS

Issue 1: Did the head of the Public Body properly apply clause 22(1)(g) of the FOIPP Act to one paragraph at page 125?

[9] Subsection 22(1) of the *FOIPP Act* lists the types of information to which section 22 applies. Subsection 22(2) limits the scope of this exception. As section 22 is a discretionary provision, the analysis of section 22 involves assessing:

- whether a clause of subsection 22(1) applies and, if so,
- whether a clause of subsection 22(2) applies and, if not,
- whether the head of the Public Body properly exercised their discretion to withhold the information.

[10] The Public Body claims that they are authorized to withhold the paragraph on page 125 from the Applicant, as the information in the paragraph is advice to officials under clause 22(1)(g) of the *FOIPP Act.* I will assess the Public Body's application of clause 22(1)(g) of the *FOIPP Act*. If it applies, then I will consider whether any clauses of subsection 22(2) apply. If not, I will assess the Public Body's exercise of discretion.

Clause 22(1)(g) – advice to officials

[11] The Public Body relies upon clause 22(1)(g) of the *FOIPP Act,* which states:

> 22. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> . . .
>
> (g) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council; or
>
> . . .

[12] Previous orders of this office have set out definitions of the terms of clause 22(1)(g) of the *FOIPP Act*. See, for example, Order FI-19-012, *Re: Department of Justice and Public Safety*, 2019 CanLII 93498 (PE IPC), at paragraph 56:

> [56] The following definitions of the terms in clause 22(1)(g) have been accepted in previous orders of the Commissioner:
>
> > The term *recommendations* refers to formal recommendations about courses of action to be followed which are usually specific in nature and are proposed mainly in connection with a particular decision being taken.
> >
> > *Advice*, on the other hand, refers to less formal suggestions about particular approaches to take or courses of action to follow.
> >
> > *Proposals* and *analyses* or *policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of actions.

[13] To satisfy the clause 22(1)(g) exception to disclosure, the information has to be one of the enumerated types of information: advice, proposals, recommendations, analyses or policy options. These types of information are often referred to collectively as "advice". To satisfy this exception to disclosure the information also needs to be:

> (1) sought or expected, or be part of the responsibility of a person by virtue of that person's position;
> (2) directed toward taking an action; and
> (3) made to someone who can take or implement the action.

[14] The Applicant questions the Public Body's use of clause 22(1)(g) in the following comments:

> . . . on page 125 of 161, the DM at the time responded back to [two named employees of the Public Body]. The previous associated emails are about me and my [property]. I would like to know what the DM said to these two Government employees as there was no one else spoke about other than me in the trail of the email.

[15] The Public Body claims that the information is advice and a recommendation. They state:

> The advice and recommendation that is protected was sought by an employee of JPS from an individual who had the authority to

> suggest action and it is the advice and recommendation pertaining to that action that is protected.

[16] Based on my review of the paragraph that the Public Body withheld from page 125, I confirm that the information is advice. The withheld information is a suggested course of action and brief information that is necessary for the recipients of the email to consider this suggested course of action.

[17] As noted above, one of the requirements of section 22 is that the advice needs to have been sought or expected, or be part of the responsibility of a person by virtue of that person's position. The Public Body disclosed to the Applicant that the author of the email is a former Deputy Minister and the recipients are employees of the Public Body. On a reading of the email chain and other records, the named employees do not appear to be seeking advice. However, I accept that advice is part of the responsibility of the author, the former Deputy Minister of the Public Body.

[18] The other two requirements of clause 22(1)(g) of the *FOIPP Act* are that the advice is directed toward taking an action, and that the advice was made to someone who can take or implement the action. I accept that these two requirements of this exception to disclosure are satisfied.

[19] I find that disclosure of the information the Public Body withheld from page 125 could reasonably be expected to reveal the advice developed by or for the Public Body. I accept that the elements of clause 22(1)(g) of the *FOIPP Act* have been satisfied.

Subsection 22(2): exceptions to subsection 22(1)

[20] As I have found that clause 22(1)(g) of the *FOIPP Act* applies to the information the Public Body withheld from page 125, I now turn to assess whether any clause of subsection 22(2) of the *FOIPP Act* applies to this information.

[21] Subsection 22(2) of the *FOIPP Act* lists several categories of information that may not be withheld by a public body, although that information might otherwise fall within subsection 22(1). Neither the Applicant nor the Public Body has raised any of the provisions of subsection 22(1) of the *FOIPP Act*. I have reviewed each clause of subsection 22(2) of the *FOIPP Act*, and find that none applies to the information the Public Body withheld from page 125. I therefore find that clause 22(1)(g) of the *FOIPP Act* authorizes the Public Body to refuse to provide the Applicant with access to the paagraph at page 125, subject to the Public Body's reasonable exercise of discretion.

Exercise of Discretion

[22] Section 22 uses the words "may refuse to disclose". The head of the Public Body is authorized, but not required, to withhold the information from the Applicant. The head of the Public Body must exercise discretion regarding whether to provide the Applicant with access to the paragraph at page 125.

[23] The head of a public body must exercise their discretion reasonably. A decision is not reasonable if, for example, the head of a public body made a decision in bad faith or for an improper purpose, took into account irrelevant considerations, or failed to take into account relevant considerations. The head of a public body must show that all relevant factors for and against access were considered in a balanced and judicious manner when making their determination.

[24] Some potential considerations in the exercise of discretion include:

a. the general purposes of the *FOIPP Act*, including that public bodies should make information available to the public, and individuals should have access to personal information about themselves;
b. the wording of the discretionary exception and the interests which the exception attempts to balance;
c. whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
d. the historical practice of the public body with respect to the release of similar types of records;

e. the nature of the record and the extent to which the record is significant or sensitive to the public body;
f. whether the disclosure of the information will increase public confidence in the operation of the public body;
g. the age of the record;
h. whether there is a definite and compelling need to release the record; and
i. whether Commissioners' orders have ruled that similar types of records or information should or should not be disclosed.

[Order FI-19-006, *Re: Executive Council Office*, 2019 CanLII 32852 (PE IPC), at paragraph 23]

[25] The Public Body submits:

> Subsection 22(1) allows public bodies to engage in discussions without fear of outside scrutiny and enables them to have open and candid discussions before arriving at well-reasoned decisions. Even though the general purpose of the Act is to allow an Applicant access to records, there are exceptions, section 22 being one of them. As noted above the protected records contain information protected under clause 22(1)(g) as it is a recommendation regarding the appropriate course of action to be taken.
>
> Other than the protection of information under section 25, we note that the entire record save one paragraph has been provided to the Applicant.
> . . .

[26] I am persuaded that the Public Body considered a key purpose of the *FOIPP Act*, and the purpose of this exception to disclosure. Neither the Applicant nor the Public Body has identified any compelling need for the Applicant to have access to this information. The Public Body has withheld only a small amount of information pursuant to section 22 of the *FOIPP Act*. I am persuaded that the Public Body considered several relevant factors in the exercise of their discretion.

[27] The Public Body has not provided any information or submissions related to the sensitivity or significance of the paragraph they withheld. The Public Body has not described the potential impact that disclosure of the advice on page 125 may have. I

have no evidence that suggests that the information that the Public Body withheld from page 125 is sensitive or significant. As the Public Body has failed to demonstrate that they considered this relevant factor, I am not persuaded that the head of the Public Body exercised their discretion reasonably.

[28] As section 22 of the *FOIPP Act* is a discretionary exception, I cannot replace the Public Body's exercise of discretion with my own. However, I will order the head of the Public Body to re-exercise their discretion, having regard to the sensitivity and/or significance of the information withheld on page 125.

Issue 2: Did the head of the Public Body properly apply clause 25(1)(a) of the FOIPP Act to the 23 pages in question?

[29] The Public Body claims that the 23 pages in question are subject to solicitor-client privilege, pursuant to clause 25(1)(a) of the *FOIPP Act*:

> 25. Privileged information
> (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;
> . . .

Criteria for solicitor-client privilege

[30] *Solosky v. The Queen* 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, 1979 CanLII 9 (SCC) is one of the leading Canadian decisions on solicitor-client privilege. At page 837, Justice Dickson approved some of the remarks of the trial judge, and confirmed a three-part test for solicitor-client privilege:

> As Mr. Justice Addy notes, 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.
> . . .

[31] These three criteria are widely known as the *Solosky* test. There have been many subsequent decisions of various courts since this 1979 decision, which have elaborated on the three criteria.

Evidence

[32] The Public Body declined to provide the 23 pages in question to the Commissioner for review. The 2016 Supreme Court of Canada decision, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 CSC 53 (CanLII), held that the Alberta Office of the Information and Privacy Commissioner could not compel a public body to provide records over which the public body claims solicitor-client privilege. The provisions considered in the Supreme Court decision are similar to those of Prince Edward Island. Therefore, the Commissioner cannot compel a public body to produce to the Commissioner the records over which they claim solicitor-client privilege.

[33] As noted above, the Public Body has the burden to prove that they properly applied clause 25(1)(a) of the *FOIPP Act* to the 23 pages in question. The Public Body provided an affidavit of the head of the Public Body. The Deputy Minister states that they have personal knowledge of the matters herein deposed to, except where stated to be based upon information and belief, in which case, they believe the information to be true. Further, they have reviewed the 23 pages in question, and are advised by legal counsel that they are subject to solicitor-client privilege as they are confidential communications between a lawyer and client that entail the giving or seeking of legal advice.

[34] Attached to the affidavit is Schedule "A". Schedule "A" includes a table of ten rows, with columns that set out the number of pages of the record, the type of claim (solicitor-client privilege), and a description of the record (the method of correspondence, and the professional role of the solicitor involved).

[35] The Public Body requested that the Commissioner receive their submissions and affidavit with Schedule "A", *in camera.* This would mean that the submissions and the affidavit would not be provided to the Applicant, nor disclosed in this Order. In the course of the review, the Public Body consented to providing their submissions and affidavit to the Applicant with the exception of the description of the record in Schedule "A". I agreed to receive the description *in camera.* However, this is not a decision that the description is subject to solicitor-client privilege, nor am I reviewing in this order whether the description is solicitor-client privileged information.

[36] As noted in Order FI-19-005, *Re: Department of Workforce and Advanced Learning,* 2019 CanLII 32855 (PE IPC), reviewing a claim of solicitor-client privilege without benefit of reviewing the records is challenging:

> [81] The Public Body's affidavit evidence requires consideration. However, that does not mean that the Commissioner must accept the claim of the Public Body without testing it. Without the records to review, the Commissioner's job is more challenging than simply reviewing the records and determining whether the *Solosky* test is satisfied. The Commissioner must consider the exception and the context, and must rely upon the submissions and evidence offered by the Public Body.

[37] The Public Body has the burden of proof, and they must show the Commissioner, on a balance of probabilities, that the record is subject to solicitor-client privilege. The risk of not providing enough evidence is that the public body might not persuade the Commissioner that they have properly claimed solicitor-client privilege. It may be advisable, in some circumstances, for a public body to provide more evidence to the Commissioner, including further particulars, or severed copies of the responsive records, without disclosing the information that is subject to solicitor-client privilege. This is particularly so if the Commissioner advises a public body that they require further evidence.

[38] There is a difference between asserting solicitor-client privilege and proving solicitor-client privilege. In *Calgary (Police Service)* v *Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656 (CanLII), the Court of Queen's Bench of Alberta commented at paragraphs 18-20 about the Supreme Court of Canada decision *Information and Privacy Commissioner of Alberta v Board of Governors of the University of Calgary*, *supra*:

> [18] Reviewing those comments by the Supreme Court of Canada in context, and noting that the Supreme Court of Canada was not there determining how solicitor-client privilege was to be proven, I find that those comments of the Supreme Court of Canada relate to the *assertion* of solicitor-client privilege by a party. In relation to an inquiry under the *Act*, all the public body is required to provide to the Commissioner to *assert* privilege is a description of the documents that would be a sufficient description if it was placed in an Affidavit of Records in a civil action.
>
> [19] However, that only relates to what is necessary for a public body to *assert* a claim of privilege.
>
> [20] The task of the Commissioner is to determine whether, in fact, a claim of privilege has been made out. In doing so, the Commissioner must apply the law respecting proof of privilege.

[39] The Applicant opposes the Public Body's claim of solicitor-client privilege. Their concern is that public servants are "trying to protect the Government from malicious intent". The Applicant did not provide any evidence regarding solicitor-client privilege, and I did not expect any. An applicant is rarely in a position to be able to provide such evidence, as they are not aware of the content or circumstances of the records.

[40] Below, I have reviewed the Public Body's affidavit and submissions with a view of assessing whether they establish that the 23 pages in question satisfy the three criteria of the *Solosky* test:

> (i) Is there a communication between a solicitor and their client?
> (ii) Does it entail the seeking or giving of legal advice? and
> (iii) Is it intended to be confidential by the parties?

a. Is there a communication between a solicitor and their client?

[41] The Public Body states that the 23 pages in question are communications between a solicitor and their client. The Public Body's affidavit evidence is:

> I am advised by legal counsel for the Public Body, and do believe, the records in Schedule "A" are subject to solicitor-client privilege as they are confidential communications between a lawyer and client that entail the giving or seeking of legal advice.

[42] Part of the Applicant's request for access to information is for emails received or sent by twelve individuals, six of whom are Crown attorneys. The Applicant had been charged with a number of provincial offences. In consideration of the circumstances and the wording of the access request, it is reasonable to expect that some responsive records were to, or from, a lawyer.

[43] Initially, in addition to their claim of solicitor-client privilege, the Public Body had withheld the 23 pages in question pursuant to clause 18(1)(e.1) of the *FOIPP Act* which relates to prosecutorial discretion. Subsection 18(1)(e.1) of the *FOIPP Act* states:

> 18.(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> . . .
>
> (e.1) reveal any information relating to or used in the exercise of prosecutorial discretion;

[44] The Public Body has since withdrawn their reliance on clause 18(1)(e.1). Their initial reliance on this provision, combined with the fact that the Applicant requested emails sent or received by six Crown attorneys, warrants consideration of whether a communication involving a Crown attorney may also be a communication between a solicitor and their client.

[45] A finding that a lawyer is the recipient or author of a record does not resolve the question of whether there was a communication between a solicitor and their client. In

addition, the role of a Crown prosecutor is different from other lawyers, including other lawyers employed by government. The assessment of whether there is a communication between a lawyer and their client involving a Crown prosecutor includes an assessment of the nature of the communication. The Supreme Court of Canada has accepted that it is possible for a lawyer who is responsible for conducting prosecutions to provide legal advice, for example, to law enforcement agencies, see *R. v. Campbell*, 1999 CanLII 676 (SCC). Legal advice from a Crown prosecutor to a law enforcement agency may be sought or provided to assist the law enforcement agency to govern their actions or investigations within accepted standards. However, this role of providing legal advice must be separate from the prosecutor's role of conducting prosecutions.

[46] In the traditional solicitor-client relationship, a lawyer provides legal advice to their client, and the client decides how to act, or gives instructions and directions to their lawyer to act on their behalf. Subject to certain ethical boundaries, lawyers receive and follow the instructions of their client; lawyers act on behalf of their client as their agent, on their client's directions. In the conduct of a prosecution, the Crown prosecutor does not have a client in the traditional sense [*Blank v. Canada (Minister of Justice), 2004 FCA 287 (CanLII),* at paragraph 96]. The Crown prosecutor's "client" is the public at large.

[47] One of the hallmarks of the Crown prosecutor's role is that their prosecutorial discretion is independent of instruction or direction from any arm of government. Even courts are reluctant to adjudicate on issues involving the exercise of prosecutorial discretion. As noted by the Supreme Court of Canada in *Miazga v. Kvello Estate*, 2009 SCC 51 (CanLII):

> 46. The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process.

[48] I referred the Public Body to comments in Alberta Order F2017-57, *Re: Edmonton Police Service*, 2017 CanLII 46445 (AB OIPC). At paragraph 80, the Adjudicator cited "The Accidental Consistency: Extracting a Coherent Principle from the Jurisprudence Surrounding Solicitor Client Privilege between the Police and the Crown", Marc S. Gorbet, (2004) 41 Alta. L. Rev. 825 – 852:

> The foregoing article contains a review of case law in which courts found, or did not find, that a Crown prosecutor and a police officer / service entered a solicitor-client relationship. The author arrives at the conclusion that when Crown counsel acts as a Crown prosecutor, he or she *cannot* enter a solicitor-client privileged relationship with a party, including the police, regarding the prosecution, for the reason that the Crown does not act as a solicitor in a prosecution, and because taking on a client in relation to a prosecution would conflict with the function and duties of Crown counsel. However, when the police seek legal advice in the course of a criminal investigation, and the matter is not being prosecuted, it is possible for Crown counsel to act as a solicitor, and the police and the Crown in such a case could enter a solicitor-client relationship. This analysis, is, in my view, consistent with what the Supreme Court of Canada held in *Campbell* (*supra*) and with the case law I have reviewed.

[49] Other provisions of section 25 of the *FOIPP Act* reinforce the concept of the unique role of government lawyers. One of the principles of statutory interpretation is that the Legislature does not intend two clauses to be redundant. The special role of Crown prosecutors and other Crown counsel is implicitly accepted by the Legislature in enacting clauses 25(1)(b) and 25(1)(c), which state:

> 25. (1) The head of a public body may refuse to disclose to an applicant
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> . . .
>
> (b) information prepared by or for
>
> (i) the Minister of Justice and Public Safety and Attorney General,
>
> (ii) an agent or lawyer of the Department of Justice and Public Safety, or
>
> (iii) an agent or lawyer of a public body,

> in relation to a matter involving the provision of legal services; or
>
> (c) information in correspondence between
> (i) the Minister of Justice and Public Safety and Attorney General,
> (ii) an agent or lawyer of the Department of Justice and Public Safety, or
> (iii) an agent or lawyer of a public body,
> and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Public Safety and Attorney General, the agent or lawyer.

[50] The solicitor for the Public Body confirms that they reviewed the 23 pages in question, and confirms that they do not relate to prosecutorial discretion. Based on all the circumstances, including the wording of the Applicant's request, and the evidence and submissions of the Public Body, I am satisfied that the communications in the 23 pages in question are between a solicitor and their client. The first criterion of the *Solosky* test is satisfied.

b. Does the communication entail the seeking or giving of legal advice?

[51] The Public Body provided affidavit evidence that the communication entails the giving or receiving of legal advice. In the circumstances, where I have accepted that the records are between a solicitor and their client, and do not relate to prosecutorial discretion, I accept the evidence that the 23 pages in question relate to giving or seeking legal advice.

c. Is the communication intended to be confidential by the parties?

[52] The Alberta Information and Privacy Commissioner, in Order F2018-01, *Re University of Alberta*, 2018 CanLII 1820 (AB OIPC), comments that in some circumstances, confidentiality may be implied:

> [para 30] Regarding part three of the *Solosky* test, confidentiality can be implied by the circumstances of the communication (here, a communication between solicitor and client involving obtaining

> legal advice), it does not need to be express (see Order F2004-003 at para 30). I find that confidentiality can be implied in the circumstances given that the communications were between a lawyer and a client during a time when there were either grievances looming or activity being arbitrated. Therefore, the third part of the *Solosky* test is met.

[53] I accept that the communication was intended to be confidential, as the communication is between a solicitor and their client during a time when offence charges were either ongoing or being contemplated.

[54] As the head of the Public Body has proven, on a balance of probabilities, that the three criteria of the *Solosky* test are satisfied, I find that they have properly applied clause 25(1)(a) of the *FOIPP Act* to the 23 pages in question.

VI. FINDINGS

[55] Although I find that clause 22 (1)(g) of the *FOIPP Act* authorizes the head of the Public Body to withhold one paragraph at page 125, I find that the head of the Public Body failed to consider a relevant factor when exercising their discretion, specifically relating to the sensitivity or significance of the information they withheld.

[56] I find that the head of the Public Body has properly applied clause 25(1)(a) of the *FOIPP Act* to the 23 pages in question.

VII. ORDER

[57] I order the head of the Public Body to re-exercise their discretion under clause 22(1)(g) of the *FOIPP Act,* regarding whether to withhold one paragraph at page 125, and to consider the sensitivity and/or significance of the withheld information.

[58] I confirm the decision of the head of the Public Body to withhold the 23 pages in question pursuant to clause 25(1)(a) of the *FOIPP Act.*

[59] I thank all parties for their submissions. I am particularly appreciative of the cooperation of the Applicant, and for their patience in what has been a lengthy review process.

[60] In accordance with subsection 68(1.1) of the *FOIPP Act*, the Public Body shall not take any steps to comply with this order until the end of the time for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act.*

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Karen A. Rose
Information and Privacy Commissioner