OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-20-008

Re: Department of Environment, Water and Climate Change

June 18, 2020

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

Summary: An applicant asked the Department of Environment, Water and Climate Change for access to various records relating to the Applicant and their business over a nine-year period. The Department provided the Applicant with access to some records but withheld others. The Applicant sought a review.

In the course of the review, the parties resolved most issues. The remaining issues are whether the Department properly applied section 22 (advice to officials), and 25 (solicitor-client privilege) of the *FOIPP Act* to some records.

The Commissioner found that the Department properly applied section 22 of the *FOIPP Act* to the information in the records. The Commissioner confirmed the Department's decision not to provide the applicant with access to the information.

The Commissioner further found that the Department properly applied section 25 of the *FOIPP Act* to withhold records which are subject to solicitor-client privilege.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 2(a), 7, 22, 25, 65, 68 (1.1)

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 19 (subsequently revised)

Decisions Cited: Order FI-18-013*, Re: Office of the Premier*, 2018 CanLII 130518 (PE IPC)

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

Order FI-18-006, *Re: Department of Economic Development and Tourism*, 2018 CanLII 54182 (PE IPC)

Lizotte v. *Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII)

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

Blank v*. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII)

Ontario (Attorney General) v. *Holly Big Canoe*, 2002 CanLII 18055 (ON CA)

Order F2010-029, *Re: Alberta Employment and Immigration*, 2011 CanLII 96618 (AB OIPC)

Re: Town of Ajax, 2018 CanLII 64010 (ON IPC)

Solosky v. The Queen 1979 CanLII 9 (SCC)

CBC v. Privacy Commissioner & IIDI, 2012 PESC 32 (CanLII)

Order FI-20-005, *Re: Department of Justice and Public Safety*, 2020 CanLII 33893 (PE IPC)

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

Other Resources: Prince Edward Island *Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006)

I. BACKGROUND:

[1] An individual and their business had been charged with several offences under a provincial statute. The individual ("the Applicant") made an access to information request, pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act* ("the *FOIPP Act*") to the Department of Environment, Water and Climate Change (formerly known as the Department of Communities, Land and Environment – "the Public Body"). The access to information request, as amended, is:

> Briefing notes referring to [the Applicant] and/or [the Applicant's business]. June 1, 2008 to June 7, 2017
>
> Emails (received or sent) by these eight employees/elected officials referring to [the Applicant] and/or [the Applicant's business]. June 1, 2008 to June 7, 2017
>
> - [a list of eight individuals' names]
>
> Field notes taken by these two [employment positions of the Public Body] referring to [the Applicant] and/or [the Applicant's business]. June 1, 2008 to June 7, 2017
>
> - [a list of two individuals' names]

[2] The Public Body provided some responsive records to the Applicant, and withheld others, on the basis of exceptions under the *FOIPP Act*. The Applicant sought a review by the Information and Privacy Commissioner ("the Commissioner").

[3] In the course of the review, the Public Body located further responsive records, and amended their position regarding some records. They located and retrieved 391 pages of responsive records, not including duplicates. The Public Body withheld some information pursuant to the following provisions of the *FOIPP Act*, which are no longer at issue:

- clause 4(1)(a) [the *FOIPP Act* does not apply to records of a judge of the Provincial Court of Prince Edward Island],

- subsection 15(1) [disclosure of personal information would be an unreasonable invasion of personal privacy],
- subsection 19(1) [harm to intergovernmental relations],
- clause 22(1)(b) [negotiations by a public body], and
- clause 22(1)(f), [related to a pending policy or budgetary decision].

[4] The Public Body also withheld information pursuant to two clauses of section 22 of the *FOIPP Act*, often referred to as "advice to officials", and section 25 of the *FOIPP Act*, claiming that the records are solicitor-client privileged. Prior to the issuance of this order, the Public Body exercised their discretion to provide the Applicant with access to some of the privileged records, leaving 60 pages remaining at issue.

II. RECORDS AT ISSUE

[5] The Public Body disclosed records in four sets of 144, 24, 27, and 107 pages. Throughout this Order, I will refer to each record as numbered by the Public Body in these four sets, and to the records together as "the records at issue". The 60 pages which the Public Body claims are subject to solicitor-client privilege are not numbered. Throughout this order, I will refer to these pages as "the 60 pages in question".

[6] Of the 391 responsive records, the following remain at issue in this review pursuant to the below-listed provisions of the *FOIPP Act*:

a. clause 22(1)(a) [consultations or deliberations]:
    i. page 20 of 24,
    ii. page 24 of 27,
    iii. pages 105 - 106 of 144 (duplicates at pages 110 -113), and
    iv. page 117 of 144.
b. clause 22(1)(g) [advice to officials]:
    i. page 20 of 24,
    ii. page 1 of 144 (duplicates at pages 119, 127, and 131),
    iii. pages 105 - 106 of 144 (duplicates at pages 110 -113), and
    iv. page 117 of 144.
c. clause 25(1)(a) [solicitor-client privilege]: 60 pages, unnumbered.

III. ISSUES

[7] There are two issues remaining in this review:

> Issue 1: Did the head of the Public Body properly apply section 22 of the *FOIPP Act*?
>
> Issue 2: Did the head of the Public Body properly apply section 25 of the *FOIPP Act*?

IV. BURDEN OF PROOF

[8] As this inquiry relates to the decision of the head of the Public Body to refuse to provide the Applicant with 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*. The Public Body is required to prove that information is of the various types described in subsection 22(1) of the *FOIPP Act*, and that they have exercised their discretion reasonably. The Public Body must also prove that the 60 pages in question are the subject of solicitor-client privilege under clause 25(1)(a) of the *FOIPP Act*.

V. ANALYSIS OF THE ISSUES

Issue 1: Did the head of the Public Body properly apply section 22 of the *FOIPP Act*?

[9] Subsection 22(1) of the *FOIPP Act* lists several types of information that a public body may withhold from an applicant. The Public Body relies upon two clauses:

- clause 22(1)(a) which relates to consultations or deliberations; and
- clause 22(1)(g) which relates to various types of advice to officials.

[10] Although subsection 22(2) of the *FOIPP Act* limits the scope of these exceptions under certain circumstances, I reviewed these provisions and confirm that none of them apply to the information that the Public Body withheld in the records at issue.

[11] The Public Body has claimed clauses 22(1)(a) and 22(1)(g) of the *FOIPP Act* apply to some of the same information. I will consider first clause 22(1)(a) of the *FOIPP Act* [consultations or deliberations] and, if it does not apply to the information the Public Body withheld, then I will consider whether clause 22(1)(g) of the *FOIPP Act* [advice to officials] applies to that information. If either applies, I will then consider whether the Public Body properly exercised their discretion to withhold the information.

Clause 22(1)(a) – consultations or deliberations

[12] The Public Body submits that clause 22(1)(a) of the *FOIPP Act* applies to information that appears on the following pages:

- page 20 of 24;
- page 24 of 27;
- pages 105 - 106 of 144 (duplicates at pages 110 -113); and
- Page 117 of 144.

[13] Clause 22(1)(a) of the *FOIPP Act* states, in part:

> 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
>
> (a) consultations or deliberations involving
>
> (i) officers or employees of a public body,
>
> . . .

[14] The following definitions of the terms "consultation" and "deliberation" have been accepted in previous decisions:

> A *deliberation* is a discussion or consideration by a group of individuals of the reasons for and against a measure.

> A *consultation* is a very similar activity where the views of one or more individuals are sought about the appropriateness of particular proposals or suggested actions.
>
> [see for example, Order FI-18-013*, Re: Office of the Premier*, 2018 CanLII 130518 (PE IPC), at paragraph 23]

[15] To meet the requirements of clause 22(1)(a) of the *FOIPP Act*, the views expressed must be sought or be part of the responsibility of the person from whom they are sought. The views must be for the purpose of doing something, such as taking an action, or making a decision or a choice (see Order FI-18-013, *supra*, at paragraph 24).

[16] On page 20 of 24, the Public Body withheld parts of sentences, while disclosing that two employees are responding to a question about the hourly rate which ought to be paid to an employee. I confirm that the information that the Public Body withheld is a consultation or deliberation, as the views expressed are part of the responsibility of the Director, the person from whom the views are sought, and are for the purpose of making a decision. I accept that clause 22(1)(a) of the *FOIPP Act* applies to page 20.

[17] On page 24 of 27, the author of the email asks a question of another employee who is in a position to provide an answer. The author then relays their views on a subject that, the email suggests, the two parties had been discussing previously. I find that this information is part consultation and part deliberation, the views expressed are part of the responsibility of the person from whom they are sought, and they are for the purpose of making a decision or choice. I accept that clause 22(1)(a) of the *FOIPP Act* applies to page 24.

[18] Pages 105-106 of 144 are part of an email chain. The Public Body disclosed an earlier email in the chain, at page 107 of 144, in which the Deputy Minister requests options on a matter. I reviewed the information the Public Body withheld, and confirm that the information that the Public Body withheld is a consultation or deliberation, as the views expressed are part of the responsibility of the person from whom they are sought, as

indicated by the email from the Deputy Minister at page 107 of 144, and they are for the purpose of taking an action. I accept that clause 22(1)(a) of the *FOIPP Act* applies to pages 105-106.

[19] The Public Body describes the information that they withheld from page 117 of 144 as "information relating to a potential meeting with a third party." I reviewed the information the Public Body withheld. The withheld information does not contain the reasons for and against a measure pursuant to the definition of a deliberation, and does not seek the views about the appropriateness of particular proposals or suggested actions pursuant to the definition of a consultation. I do not find that this information is a consultation or deliberation within clause 22(1)(a) of the *FOIPP Act*.

[20] I find that clause 22(1)(a) of the *FOIPP Act* applies to pages 20 of 24, 24 of 27 and 105-106 of 144, but do not find that it applies to page 117 of 144. The Public Body claims that clause 22(1)(g) of the *FOIPP Act* also applies to page 117 of 144, and I will consider this below.

Clause 22(1)(g) – advice to officials

[21] The Public Body claims clause 22(1)(g) of the *FOIPP Act* applies to information that appears on the following pages:

- pages 20 of 24;
- pages 1 of 144 (duplicates at pages 119, 127, and 131 of 144);
- 105 - 106 of 144 (duplicates at pages 110 -113 of 144); and
- 117 of 144.

[22] Having determined that clause 22(1)(a) of the *FOIPP Act* applies to the information the Public Body withheld from pages 20 of 24, and 105-106 of 144, it is not necessary to consider whether the information also satisfies clause 22(1)(g). I will continue to review whether clause 22(1)(g) of the *FOIPP Act* applies to page 1 of 144, and page 117 of 144.

[23] Clause 22(1)(g) of the *FOIPP Act* states, in part:

> 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
> . . .

[24] The following definitions of the terms in clause 22(1)(g) of the *FOIPP Act* have been accepted in previous orders:

> 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.
>
> [see Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC), at paragraph 63]

[25] Clause 22(1)(g) of the *FOIPP Act* applies to advice, proposals, recommendations, analyses or policy options, which I will collectively call 'advice'. The person giving the advice must have the responsibility to give the advice, and the views must be for the purpose of doing something, such as taking an action, or making a decision or a choice [see Order FI-18-006, *Re: Department of Economic Development and Tourism*, 2018 CanLII 54182 (PE IPC), at paragraph 53].

[26] The Public Body describes the information that they withheld from page 1 of 144 as "a suggested course of action from one employee of a public body to another employee".

The Public Body also disclosed the subject matter of the advice: "If any media are looking for a quote from government".

[27] I reviewed the content of the information that the Public Body withheld and confirm that it contains a suggested course of action pursuant to the definitions of recommendations or advice. I confirm that the person providing the advice is responsible to provide it, and it is for the purpose of taking an action. I accept that clause 22(1)(g) of the *FOIPP Act* applies to page 1.

[28] I reviewed the content of the information that the Public Body withheld from page 117 of 144, and find that it reveals a suggested course of action pursuant to the definition of "advice" described above. It is an update on advice which has been given regarding an ongoing issue, by a person who has responsibility to give the advice, and for the purpose of taking an action. I accept that clause 22(1)(g) of the *FOIPP Act* applies to page 117.

[29] I find that clause 22(1)(g) of the *FOIPP Act* applies to pages 1 and 117 of 144.

Exercise of Discretion

[30] The Public Body has discretion to decide whether to withhold or disclose to the Applicant pages 20 of 24, 24 of 27, 1 of 144, 105-106 of 144, and 117 of 144, and their corresponding duplicate pages. The Public Body must exercise their discretion reasonably.

[31] The *Prince Edward Island Freedom of Information and Protection of Privacy Guidelines and Practices Manual* (May 2006), at pages 58 and 59, lists a number of potential factors that a public body may consider when exercising their discretion:

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.

[32] The Public Body advises that they considered the purposes of the *FOIPP Act* (factor a), the purposes of section 22 (factor b), whether there was any compelling need to disclose the information (factor h), and that the Commissioner had not ordered disclosure of similar records (factor i).

[33] With respect to all of the withheld information, I am persuaded that the Public Body considered the purpose of the *FOIPP Act*, as set out at subsection 2(a), and the purpose of clauses 22(1)(a) and 22(1)(g) of the *FOIPP Act*. 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 conducted a thorough analysis and disclosed as much information as is reasonably practicable. All of these factors weigh in favour of the Public Body's decision to withhold the information.

[34] The information the Public Body withheld from page 20 of 24 is a consultation about an individual's wage. The Public Body does not expressly rely on the sensitivity of this information (factor e), but I have considered that the consultation is about someone's

sensitive personal information. With regard to page 20 of 24, and 117 of 144, I have also considered factor c, that the Applicant's request is still satisfied by severing the record. I note that the information withheld from the Applicant on these pages does not relate to the Applicant's access request. It is merely additional information contained in emails which also happen to reference the Applicant in other areas.

[35] I have considered all of the factors weighed by the Public Body, and the additional factors described above. Based on all of these factors, I am satisfied that the Public body exercised their discretion reasonably in deciding to withhold information from pages 20 of 24, 24 of 27, 1 of 144, 105-106 of 144, and 117 of 144, and their corresponding duplicate pages.

Summary of conclusions related to Issue 1, section 22 of the FOIPP Act

[36] I find that clause 22(1)(a) of the *FOIPP Act* applies to the information the Public Body withheld from pages 20 of 24, 24 of 27 and 105-106 of 144, and that clause 22(1)(g) of the *FOIPP Act* applies to the information the Public Body withheld from page 1 and 117 of 144. I do not find that any of the exceptions to subsection 22(1), enumerated at subsection 22(2), apply to the information. I further find that the Public Body exercised their discretion reasonably in deciding to withhold this information from the Applicant.

Issue 2: Did the Public Body properly apply section 25 of the *FOIPP Act*?

[37] The Public Body claims that the records are subject to legal privilege, specifically solicitor-client privilege under clause 25(1)(a) of the *FOIPP Act,* which states:

> 25. (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;
>
> . . .

[38] The Public Body did not provide copies of the records over which they claim solicitor-client privilege, for the Commissioner to review. They are guided by two Supreme Court of Canada decisions issued in 2016, *Lizotte* v. *Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII), related to litigation privilege, and *Alberta Information and Privacy Commissioner* v. *University of Calgary*, 2016 SCC 53 (CanLII), related to solicitor-client privilege.

[39] In *University of Calgary*, *supra*, the Supreme Court of Canada held that a provision very similar to section 53(3) of the *FOIPP Act* was "not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege" (at paragraph 44). *Lizotte, supra,* held that the statutory language needed to empower an investigator to compel production of records over which litigation privilege is claimed, needs to be 'clear, explicit and unequivocal language'. Similarly, section 53(3) of the *FOIPP Act* does not contain sufficiently clear, explicit, and unequivocal language to abrogate solicitor-client privilege. These decisions, read together, indicate that the Commissioner does not have authority to compel a public body to produce records over which they claim solicitor-client or litigation privilege.

[40] In their initial submissions on this review, the Public Body advised that there were 343 pages of records subject to Crown work product privilege. Later, the Public Body revised their position, instead claiming that the records are subject to solicitor-client privilege. As there appeared to be some confusion about the nature and scope of Crown work product privilege, I discuss this privilege below, for the purpose of providing guidance to all public bodies.

Crown work product privilege

[41] Crown work product privilege is a type of litigation privilege. Litigation privilege permits a party in an existing or contemplated court process to explore and consider how to present their position. In an adversarial system, it would not be fair for an opposing party to have access to such information. The Supreme Court of Canada recently

considered litigation privilege, and when comparing solicitor-client privilege to litigation privilege, made the following summary statements relating to litigation privilege in *Lizotte* v. *Aviva Insurance Company of Canada*, *supra*, referring to principles of litigation privilege as set out in an earlier decision of the Supreme Court of Canada in *Blank* v. *Canada (Minister of Justice)*, 2006 SCC 39 (CanLII):

> [22] However, since *Blank* was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:
>
> - The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process (para. 27);
> - <u>Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);</u>
> - Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
> - Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65);
> - Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).
>
> (underline emphasis added)

[42] At common law, litigation privilege is temporary and lapses when the litigation ends. The Applicant had advised in their request for review that all charges had been completed or withdrawn. The Public Body pointed out, correctly, that a statutory Crown work product privilege had been found to be of indefinite duration, under Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as it was then written, in *Ontario (Attorney General)* v. *Holly Big Canoe*, 2002 CanLII 18055 (ON CA). In *Holly Big Canoe, supra,* the Ontario Court of Appeal was interpreting the following provision from Ontario's FOIPP legislation:

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[43] Section 19 of the Ontario law does not refer to Crown work product privilege, or legal privilege, but includes some of the components of litigation privilege, except that the privilege expires when the litigation is completed. The Ontario Court of Appeal held that the statutory provision was not the same as litigation privilege at common law, and the Legislature of Ontario did not intend for the common law time limits to apply. Therefore, the exception to disclosure of section 19 under Ontario's freedom of information legislation does not expire when the litigation is completed.

[44] The *FOIPP Act* of Prince Edward Island is not written the same way as it is written in Ontario. There is no provision equivalent to section 19 of Ontario's legislation. Clause 25(1)(a) of the *FOIPP Act* refers to "legal privilege", which imports the principles of common law, one of which is that litigation privilege lapses when litigation ends. By using the common law expression, the Legislature of PEI incorporates common law principles of legal privilege as opposed to creating a separate statutory exception. I find that, in PEI, the common law time limits apply to litigation privilege, including Crown work product privilege.

[45] The Public Body further advised, in initial submissions, that 133 of 343 pages over which they claimed Crown work product privilege involved the defense counsel of the Applicant, and that the Applicant could obtain copies of these 133 records from their defense counsel. During the course of the review, the Public Body changed their position and did not require the Applicant to obtain the records from counsel. Their change in approach is supported by the *FOIPP Act*, and the nature of litigation privilege, as set out below.

[46] Subsection 3(a) of the *FOIPP Act* states that the right to access to information under the *FOIPP Act* is in addition to, and does not replace, existing procedures for access to information or records. The fact that there is an alternate mechanism for the Applicant to access information is not a reason authorized by the *FOIPP Act* for a Public Body to refuse to provide access to information to an Applicant. I adopt the reasoning in Order F2010-029, *Re: Alberta Employment and Immigration*, 2011 CanLII 96618 (AB OIPC):

> [para 62] Section 3(a) states that the Act is "in addition to" existing procedures for access to information or records. An applicant generally has a right to request information under the Act for any reason. Both the Affected Party and the Applicant note that production during a court action is restricted to records that are relevant and material to the litigation. The Act has no similar limitation in terms of the right to request and obtain records. Where there is more than one procedure for an applicant to obtain records, and especially where the procedures have different scopes, an applicant is perfectly entitled to use those different procedures as he or she sees fit. Of course, there are exceptions to disclosure under the Act, and I must decide whether any apply in this case. In this respect, the Applicant's alleged motive to harm the Affected Party may be relevant to determining whether section 16(1) applies, assuming that the harm is contemplated by that section. The underlying litigation between the parties may also be relevant to determining whether section 17(1) applies, as discussed later in this Order.

[47] In *Lizotte, supra*, the Supreme Court of Canada stated that one of the purposes of litigation privilege is to protect the trial preparation work of a lawyer from opposing counsel. At paragraph 53, the Supreme Court cites the following statement of the United States Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), at pp. 510-11:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his

> strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [Underlined emphasis in the SCC decision]

[48] Consistent with the Supreme Court of Canada remarks above, the Ontario Information and Privacy Commissioner, in discussing litigation privilege at common law, has confirmed that litigation privilege does not include communications with opposing counsel [see *Re: Town of Ajax*, 2018 CanLII 64010 (ON IPC), at paragraph 18].

[49] In this review, the Public Body reconsidered their position and abandoned their reliance on Crown work product privilege. However, for future guidance, I wish to offer public bodies two guiding remarks:

- Crown work product privilege does not apply to records already provided to opposing counsel of an applicant; and
- Crown work product privilege does not apply to a record related to litigation that is either completed, or not contemplated.

Solicitor-client privilege

[50] During the review, the Public Body disclosed to the Applicant 186 records that involved the Applicant's lawyer. The Public Body relies on solicitor-client privilege to withhold the 60 pages in question (without duplicates) which remain. The Public Body has not provided a copy of the disclosed records to our office and, as they are no longer at issue,

I make no assessment about whether the Public Body properly applied legal privilege to these records.

[51] *Solosky v. The Queen,* 1979 CanLII 9 (SCC) is a leading Canadian decision on solicitor-client privilege. At page 837, Justice Dickson approved some of the remarks of the trial judge, and set out three criteria of 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. . .

[52] These three criteria are known as the *Solosky* test. Many subsequent decisions have elaborated on the criteria.

[53] As the Public Body declined to provide copies of the records to the Commissioner, they provided affidavit evidence of the Deputy Minister of the Public Body. In their affidavit, the Deputy Minister asserts that the criteria of the *Solosky* test are satisfied. 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, the Deputy Minister affirms they have reviewed the records, 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, or are confidential communications between lawyers for the purpose of providing legal advice.

[54] Attached to the affidavit are tables with columns that set out the number of pages of records, the type of claim (solicitor-client privilege), and a short description of the record. The description of the 60 pages in question includes the method of correspondence, and the professional role of the solicitor involved.

[55] The Public Body requested that the Commissioner receive their submissions and affidavit *in camera.* This would mean that the submissions and the affidavit would not be provided to the Applicant, nor disclosed in this order. There is no legislative requirement for the Commissioner to provide a public body's submissions to an applicant. However, the Supreme Court of PEI in *CBC v. Privacy Commissioner & IIDI*, 2012 PESC 32 (CanLII), at paragraph 24, accepted the submissions of a public body that "absent any specific statutory restrictions, a tribunal is a master of its own procedure. The only limitation on its power is that it must act fairly." One of the principles of procedural fairness is that a person must be given an adequate opportunity to be heard; that is, the person must know the case being made against them, and be given the opportunity to answer. Providing a public body's evidence and submissions to the other party allows the other party to test it, which enables the Commissioner to make a decision on the best available evidence and submissions.

[56] Another principle of procedural fairness is that a decision-maker must provide reasons for their decision. To address the issues in a review, the Commissioner refers to submissions and evidence in orders, without revealing the disputed contents of the records at issue. To do so meaningfully, the Commissioner requires submissions to which the Commissioner may refer in the order.

[57] In the course of the review, the Public Body consented to the Commissioner providing their submissions and affidavit to the Applicant, with the exception of the description of the records in Schedule "A". I agreed to receive the description *in camera.* However, this is not a decision that the description is solicitor-client privileged, nor am I reviewing in this order whether the description is solicitor-client privileged information.

[58] The Applicant opposes the Public Body's claim of solicitor-client privilege. The Applicant did not provide any evidence, nor did I expect any. An applicant is rarely in a position to be able to provide evidence and submissions, as they typically are not aware of the

content or circumstances of the records. Their concern is that the Public Body is withholding information "as it may be damning to the Government based on the malicious prosecution [the Applicant and the Applicant's business] have been dealing with over the last twelve years."

[59] I have reviewed the Public Body's affidavit and submissions with a view to assessing whether it establishes the records 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?

(i) Is there a communication between a solicitor and their client?

[60] Part of the Applicant's request for access to information is for emails received or sent by eight individuals who are either at a senior management level, or were involved in the prosecutions. None of these eight individuals were acting as solicitors. However, it may be that one or more of them received communication from a solicitor, or were copied on such a communication, over the 9 year span covered by the Applicant's request.

[61] The head of the Public Body states that the 60 pages in question are a communication between a solicitor and their client. Given the above described circumstances, I accept this evidence.

(ii) Does the communication entail the seeking or giving of legal advice?

[62] If the information in the 60 pages in question relates to a Crown prosecutor's independent prosecutorial discretion, then it does not attract solicitor-client privilege [see the discussion in Order FI-20-005, *Re: Department of Justice and Public Safety,* 2020 CanLII 33893 (PE IPC), at paragraphs 45-49]. We asked the Public Body to review the 90 pages over which the Public Body had claimed solicitor-client privilege, and confirm their assessment of whether the information withheld relates to prosecutorial discretion. Around this time, the Public Body decided to disclose a further 30 pages to

the Applicant. A solicitor for the Public Body confirms that they reviewed the 60 pages in question, and that they do not relate to prosecutorial discretion.

[63] The Public Body provided affidavit evidence that the communication entails the seeking or giving of legal advice. In the circumstances, where I have accepted that the 60 pages in question are between a solicitor and their client, and do not relate to prosecutorial discretion, I accept the evidence that the 60 pages in question relate to the seeking or giving of legal advice.

(iii) Is the communication intended to be confidential by the parties?

[64] In some circumstances, confidentiality may be implied. Order FI-20-005, *supra*, at paragraph 52, cites the following paragraph from Alberta Order F2018-01, *Re: University of Alberta*, 2018 CanLII 1820 (AB OIPC):

> [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.

[65] I accept that the communications in the 60 pages in question were intended to be confidential, as the communications are between a solicitor and their client, at a time when offence charges were either ongoing or contemplated.

[66] I am persuaded that the head of the Public Body has proven, on a balance of probabilities, that the three criteria of the *Solosky* test are satisfied, and I find that they have properly applied clause 25(1)(a) of the *FOIPP Act* to the 60 pages in question.

VI. FINDINGS

[67] I find that the head of the Public Body properly applied clause 22(1)(a) of the *FOIPP Act* to pages 20 of 24, 24 of 27 and 105-106 (and 110-113) of 144 of the records at issue, and clause 22(1)(g) of the *FOIPP Act* to pages 1 (and 119, 127 and 131) and 117 of 144 of the records at issue.

[68] I find that the head of the Public Body properly exercised their discretion to withhold information from pages 20 of 24, 24 of 27 and 1 (and 119, 127 and 131), 105-106 (and 110-113), and 117 of 144.

[69] I find that the head of the Public Body properly applied clause 25(1)(a) of the *FOIPP Act* to the 60 pages in question.

VII. ORDER

[70] I confirm the decision of the head of the Public Body to withhold information from the Applicant on the basis of clauses 22(1)(a) and (g), and 25(1)(a) of the *FOIPP Act*.

[71] I thank the parties for their participation in this review, and their respective concessions which resulted in the narrowing of the issues in dispute. According to 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*, R.S.P.E.I. 1988, c. J-3.

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Karen A. Rose
Information and Privacy Commissioner