OFFICE OF THE INFORMATION
& PRIVACY COMMISSIONER
for Prince Edward Island

Order No. OR-24-009

Re: Department of Economic Development, Innovation and Trade
(file C/24/00006, formerly FI-19-320)

Maria C. MacDonald
Deputy Commissioner

December 18, 2024

Summary:

In 2019, an applicant requested access to some emails of an employee from a three-week period in 2012. The Public Body located and disclosed responsive records but withheld some information.

The Applicant requested a review of whether the Public Body properly applied solicitor-client privilege under clause 25(1)(a) of the *FOIPP Act*, and whether they conducted an adequate search under subsection 8(1) of the *FOIPP Act*.

The Deputy Commissioner partially upheld the Public Body's claim of solicitor-client privilege under clause 25(1)(a) of the *FOIPP Act,* and ordered the Public Body to disclose the information to which solicitor-client privilege does not apply. The Deputy Commissioner also found that the Public Body demonstrated that they conducted an adequate search.

Statutes Cited:

Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01, subsection 2(1), subsection 6(2), subsection 8(1), clause 25(1)(a), 56(3), and subsection 65(1)

Decisions Cited:

Order FI-22-006, *Re: Department of Transportation and Infrastructure*, 2022 CanLII 83334 (PE IPC)]

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

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

Canadian Natural Resources Limited v. ShawCor Ltd., 2014 ABCA 289 (CanLII)

Order FI-22-009, *Re: Health PEI*, 2022 CanLII 132949 (PE IPC)

Order FI-22-003, *Re: Department of Transportation and Infrastructure*, 2022 CanLII 19199 (PE IPC)

Order FI-19-013, *Re: Transportation, Infrastructure and Energy*, 2019 CanLII 93497 (PE IPC)

I. BACKGROUND

[1] In 2019, an individual (the "Applicant") asked the Department of Economic Growth, Tourism and Culture, which is now known as the Department of Economic Development, Innovation and Trade (the "Public Body"), for access to the following records:

> All emails for [Employee A] either sent to or received from [Employee B].
> Time period: August 25, 2012, to September 14, 2012

[2] In 2012, Employee A was the Chief Executive Officer of Innovation PEI, which is a Crown corporation under the Public Body. Employee B was the Deputy Minister of the Public Body.

[3] The Public Body located 179 pages of responsive records. The Public Body withheld a small amount of information under subsection 20(1) [Cabinet confidences], subsection 22(1) [advice to officials] and clause 25(1)(a) [solicitor-client privilege] of the *Freedom of Information and Protection of Privacy Act* (the "*FOIPP Act*"). The Applicant requested a review of the Public Body's application of clause 25(1)(a) of the *FOIPP Act* [solicitor-client

privilege] to two pages. The Applicant also questioned whether the Public Body conducted an adequate search.

[4] Former Commissioner Karen A. Rose received submissions from the Applicant and the Public Body. Commissioner Denise N. Doiron delegated this matter to me to complete the review.

II. ISSUES

[5] The issues in this review are:

(a) Did the Public Body properly claim solicitor-client privilege to withhold information under clause 25(1)(a) of the *FOIPP Act*? and

(b) Did the Public Body conduct an adequate search as part of their duty to assist under subsection 8(1) of the *FOIPP Act*?

III. RECORDS AT ISSUE

[6] The records at issue are the two pages the Public Body withheld under clause 25(1)(a) of the *FOIPP Act* which the Public Body claims are subject to solicitor-client privilege.

IV. BURDEN OF PROOF

[7] First, I will address the burden of proof when we review section 25 of the *FOIPP Act* [solicitor-client privilege], then I will address the burden of proof when we review the adequacy of a public body's search.

[8] When a public body withholds information that is not personal information, subsection 65(1) of the *FOIPP Act* says the public body has the burden of proof. Subsection 65(1) states:

> 65. (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.
> . . .

[9] The Public Body withheld information that they claim is subject to solicitor-client privilege, so the Public Body has the burden to prove that they properly applied clause 25(1)(a) of the *FOIPP Act*.

[10] With respect to the adequacy of a public body's search, previous decisions of our office have held that a public body has the burden to show that they conducted a reasonable search. Public bodies are in a better position to explain how they searched for responsive records, and to explain their role and their records. Although applicants do not have the burden of proof, it is helpful for an applicant to explain why they believe that a public body did not conduct an adequate search [see for example, Order FI-22-006, *Re: Department of Transportation and Infrastructure*, 2022 CanLII 83334 (PE IPC), at para 96].

[11] In summary, the Public Body has the burden to prove both that they properly applied clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege] and that they conducted an adequate search under subsection 8(1) of the *FOIPP Act*.

V. ANALYSIS

[12] First, I will address the Public Body's application of clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege]. Then I will address the adequacy of the Public Body's search.

(a) Clause 25(1)(a) – solicitor-client privilege

[13] The Public Body withheld two pages in their entirety, relying on clause 25(1)(a) of the *FOIPP Act*, which relates to legal privilege. In this matter, the Public Body claims the type of legal privilege is solicitor-client privilege. Clause 25(1)(a) of the *FOIPP Act* 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;
> . . .

Summary of the law

[14] The leading Canadian decision about solicitor-client privilege is *Solosky* v. *The Queen,* 1979 CanLII 9 (SCC)(*Solosky*). The Supreme Court of Canada set out the following three requirements for solicitor-client privilege:

> … 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.

[15] Subsequent decisions have added further guidance. I will not summarize them all, but will mention two decisions that relate to reviews by an Information and Privacy Commissioner. The Supreme Court of Canada interpreted provisions similar to PEI's *FOIPP Act* in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII). The Court held that Alberta's Information and Privacy Commissioner cannot compel a public body to provide a copy of records for inspection when they claim solicitor-client privilege applies. The Supreme Court of Canada relied on *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*) which addressed the evidence required on a claim of solicitor-client privilege. If a public body does not provide a copy of the record to

the Commissioner, the public body has to give sufficient description and information to allow the Commissioner to independently assess whether privilege applies.

[16] In Order FI-22-009, *Re: Health PEI*, 2022 CanLII 132949 (PE IPC), at paragraph 40, our office accepted Alberta's summary of the role of an Information and Privacy Commissioner when reviewing evidence about a public body's claim of solicitor-client privilege. (In this quote from a decision from Alberta's Office of the Information and Privacy Commissioner, they refer to section 27(1)(a), which is identical to clause 25(1)(a) of PEI's *FOIPP Act*.) Our role in reviewing evidence about a claim of solicitor-client privilege is:

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

[17] When a public body elects not to provide a copy of privileged information, but provides a description, my role is to consider whether I can recognize the elements of solicitor-client privilege set out in *Solosky*.

The Applicant's Request for Review

[18] In their request for review, the Applicant explained their concerns about the Public Body's claim of solicitor-client privilege. The Applicant gave us a partial copy of two pages that the Applicant obtained from the Court. I will refer to these as the "Court Records." The Court Records are a short email chain of two emails that fall within the time range of the Applicant's access request. Employee A received an email from an employee of Innovation PEI. Employee A forwarded this email to Employee B and carbon copied a private practice

lawyer. I describe it as a partial copy because although the email from the other employee of Innovation to Employee A is visible, someone blacked-out the body of the email from Employee A to Employee B and the lawyer and labelled it as "privileged."

[19] The Applicant is not sure if the Court Records are the same as the records at issue, but submits that if they are the same, the Applicant does not think solicitor-client privilege applies to a message that is only carbon copied to a lawyer. The Applicant states, in part:

> The email record I attached. . . is only copied to lawyer [name of the lawyer], not a direct communication.
>
> . . . I don't see how an email from one person who is not a lawyer to another person who is not a lawyer can be "solicitor-client" privileged.

The Public Body's submissions and evidence

[20] Initially, the Deputy Minister of the Public Body provided submissions and a sworn statement about their claim of solicitor-client privilege. They advised our office that the records at issue were confidential communications between a lawyer and their client about legal advice.

[21] A few months later the Public Body gave our office a severed copy of the records at issue which I will refer to as the "Severed Records." I can inspect a part of the information that the Public Body withheld from the Applicant, but not all of it. With respect to the information that the Public Body withheld from our office, the lawyer for the Public Body also verbally described the withheld information to former Commissioner Rose, who took notes for the file. Her notes do not include the substance of the legal advice sought or received. Former Commissioner Rose accepted the sworn statement, Severed Records, and verbal evidence *in camera*, as was her practice at the time. We provided a copy of the Public Body's submissions to the Applicant, but did not provide a copy of the Public Body's *in camera* evidence.

[22] When describing information that a public body withheld from an applicant, I have to be careful not to disclose the information that is in dispute. Clause 56(3)(a) of the *FOIPP Act* states:

> 56 (3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner shall take every reasonable precaution to avoid disclosing and shall not disclose
>
> (a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under subsection 7(1); or
>
> (b) . . .

[23] Therefore, I cannot confirm nor deny whether the records at issue are the same as the Court Records the Applicant gave to our office. Nor can I repeat or summarize the Public Body's *in camera* evidence or describe the records without disclosing the very information the Public Body withheld.

[24] Although I am not able to describe the Public Body's position beyond what appears above, I have carefully considered all of the Public Body's and the Applicant's submissions and evidence.

[25] I broadly describe the Applicant's concerns in two classes. As the Applicant described in their request for review, their first concern was about the possibility that the Public Body claimed solicitor-client privilege on an email when the lawyer was only carbon copied and is not the primary recipient. The second was about the nature of the relationship between the lawyer and the Public Body.

[26] As to the Applicant's concern about whether privilege applies when a lawyer is not the primary recipient, it is well-established that information is not privileged if the only evidence is that a lawyer received a copy of the information. Whether a lawyer was on a

"to" line or on a "cc" line of an email could be relevant but is not determinative. As with any assessment of whether solicitor-client privilege applies, the adjudicator needs evidence of all three parts of the *Solosky* test.

[27] The Applicant acknowledged that they did not know who the lawyer was but speculated about which law firm was involved based on their knowledge of some of the Public Body's activities during the period set out in their access request. The Applicant gave submissions on the solicitor-client relationship with a law firm, in particular, the firm's role, and scope of work. It is not necessary for me to address these submissions in detail. I have evidence that the lawyer included in the records was in a solicitor-client relationship with the Public Body, and that the Public Body sought or received legal advice in confidence.

[28] With respect to the information the Public Body withheld from our office in the Severed Records, I am able to recognize all the elements of solicitor-client privilege set out in *Solosky* from the evidence of the Public Body. The Public Body has satisfied their burden to prove that the information that the Public Body withheld from our office in the Severed Records is subject to solicitor-client privilege.

[29] With respect to the portions of the Severed Records that I am able to examine, the Public Body has not satisfied their burden to prove that it is subject to solicitor-client privilege. I cannot provide more details without revealing the *in camera* information that is in dispute. I considered all of the submissions and evidence before me and find that either the Public Body never intended this information to be confidential, or if it was once subject to solicitor-client privilege, the Public Body waived their privilege.

[30] A part of the responsive record is not protected by privilege. Our office usually takes a cautious approach to severing a record that a public body claims contains solicitor-client privileged information because of the risk that someone could figure out what the legal advice was about. I considered whether it would be reasonable to sever the privileged

information to disclose the remainder of the record. I considered the text, context, and purposes of clause 25(1)(a) of the *FOIPP Act*.

[31] In the words of clause 25(1)(a) of the *FOIPP Act,* a public body may withhold information that is subject to legal privilege. The Legislative Assembly did not choose to refer to withholding a record that is subject to legal privilege. Previous orders have observed that it is possible for a record to contain both information that is protected by privilege and information that is not protected by privilege [see Order FI-22-009, *supra*, at paragraph 56, and Order FI-22-003, *Re: Department of Transportation and Infrastructure*, 2022 CanLII 19199 (PE IPC) at paragraph 15.]

[32] Part of the context of the solicitor-client privilege exception to disclosure is that many Courts have recognized the importance of protecting solicitor-client privileged information as close to absolute as possible. Courts have also clarified that solicitor-client privilege also protects information that would allow someone to determine what the legal advice was about. The reason for this stance is to protect the ability of a client to speak to their lawyer freely and candidly when seeking legal advice, and to ensure public confidence in the legal system. These remarks do not apply to information that is not subject to solicitor-client privilege, even if it appears in the same record.

[33] Section 2 of the *FOIPP Act* sets out the purposes of the *FOIPP Act*, including subsection 2(a) which says one of the purposes is to allow any person a right of access to information in the custody or control of a public body, subject to specific and limited exceptions. Subsection 6(2) of the *FOIPP Act* says, when the *FOIPP Act* authorizes a public body to refuse access to part of a record, applicants have a right to access the remainder of a record. Subsection 6(2) of the *FOIPP Act* states:

> 6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[34] Subsection 6(2) of the *FOIPP Act* requires a public body, where it is reasonable to do so, to sever information that the public body is authorized or required to refuse access, and to disclose the remainder of the record. The Legislature anticipated that part of a record may contain information that a public body may sever, but not all of it. The Legislature addressed this possibility by creating a right for an applicant to receive the remainder of the record.

[35] In light of the above noted text, context, and purpose, I find that clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege] does not necessarily authorize a public body to withhold the entire record. Even if a record contains information that is subject to solicitor-client privilege, a public body must consider whether it would be reasonable to sever the privileged information and disclose the remainder of the record.

[36] Although I find that parts of the records at issue are subject to solicitor-client privilege, I do not find that the entire records at issue are subject to solicitor-client privilege. I find that it would be reasonable for the Public Body to sever the records at issue in the same manner as the Severed Record, and I will order the Public Body to disclose a severed copy of the records at issue to the Applicant, matching the Severed Records.

(b) Adequacy of Search

[37] Subsection 8(1) of the *FOIPP Act* states:

> 8.(1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[38] Subsection 8(1) of the *FOIPP Act* relates to a public body's duty to assist an applicant. The Applicant believed that the head of the Public Body did not adequately search for records responsive to the access request. Decisions of our office have confirmed that the duty to assist under subsection 8(1) of the *FOIPP Act* includes a duty to conduct a reasonable

search.

[39] The standard to review a public body's search is based on reasonableness in the circumstances. Our office does not hold any public body to a standard of perfection [Order FI-19-013, *Re: Transportation, Infrastructure and Energy*, 2019 CanLII 93497 (PE IPC), at paragraph 55]. A public body does not have to prove with absolute certainty that there are no more responsive records, but it must demonstrate that it has made every reasonable effort to locate responsive records.

[40] Former Commissioner Rose asked the Public Body for their submissions and evidence about their search. The Public Body's position is that their search was adequate and provided the following summary in their submissions:

> *1. Who conducted the search:* [Employee A] conducted a search of their email account.
>
> *2. Steps taken by the Public Body to identify and locate records responsive to the Applicant's access request:* all responsive records would have been available through the email account of [Employee A].
>
> The Public Body submits that all responsive records would have been retrieved by searching this one email account.
>
> *3. Scope* of *the Search (areas searched):* The inbox, sent box, and archive of [Employee A]'s email account were searched to retrieve any records between themself and [Employee B] for the responsive period.
>
> *4. Steps taken to identify and locate all possible locations* of *records responsive to the access request:* Please see the Public Body's submission for part two and three which also responds to part four.
>
> *5. Reasons the Public Body believes that no more responsive records exist:* The Public Body has no reason to believe that more responsive records exist that can be located as a result of a reasonable search.

[41] Former Commissioner Rose gave a copy of the Public Body's submissions to the Applicant for their response. The Applicant responded to the Public Body's submissions on solicitor-

client privilege, but did not respond to their submissions about the adequacy of their search.

[42] The records in the Public Body's processing file support the Public Body's submissions. The request was for emails of Employee A to or from Employee B. Employee A searched for responsive records. This was an appropriate person to conduct this search and was knowledgeable and experienced. The email account of Employee A was an appropriate location for the Public Body to search. The request was not related to any subject matter, and the Public Body did not have any information to identify any other search areas. An electronic keyword search by Employee A of their own email account was a reasonable effort in the circumstances.

[43] The Public Body has satisfied their burden of proof, and I find that the Public Body conducted an adequate search.

VI. SUMMARY OF FINDINGS

[44] I find that the Public Body properly applied clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege] to the information that they severed in the Severed Records.

[45] I find that the Public Body did not properly apply clause 25(1)(a) of the *FOIPP Act* to the rest of the Severed Records, that the Public Body provided to our office.

[46] I find that the Public Body conducted an adequate search for records in response to the Applicant's access request.

VII. ORDER

[47] As I have found that the Public Body properly applied solicitor-client privilege to the

information that they withheld from our office in the Severed Records, I confirm the Public Body's decision to withhold this information from the Applicant.

[48] As I have found that the Public Body did not properly apply solicitor-client privilege to the information that they disclosed to our office in the Severed Records, I order the Public Body to disclose these portions of the records at issue to the Applicant, in the same manner as they provided to our office in the Severed Records.

[49] I confirm that the Public Body complied with their duty to conduct an adequate search for responsive records.

[50] 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 period to bring an application for judicial review of the order under section 3 of the *Judicial Review Act*, RSPEI 1988, c J-3.

SGD MARIA MACDONALD

Maria C. MacDonald
Deputy Commissioner