Summary: An applicant sought a review of decision about a request for access to all records regarding the applicant held by the Public Schools Branch (“the Public Body”). The Public Body refused to disclose 61 records to the Applicant, based on section 25 of the Freedom of Information and Protection of Privacy Act (“the FOIPP Act”). The Public Body also claimed that section 22 of the FOIPP Act applies to withhold some of the records.

The Commissioner found that the Public Body properly applied clause 25(1)(a) (solicitor-client privilege) to the records at issue. As section 25 was properly applied, it was not necessary for the Commissioner to consider section 22 of the FOIPP Act.
Statutes Considered:  
*Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 1(i), 7, 22, 25, 53, 64, 65, 67, 68(1.1), *School Act*, RSPEI 1988, c s-2.1, s. 27 [repealed by 2016, c. 6, s. 136]

Decisions Considered:  

Order No. 07-001, *Prince Edward Island (Tourism) (Re)*, 2007 CanLII 55713 (PE IPC)

Order No. 08-005, *Prince Edward Island (Transportation and Public Works) (Re)*, 2008 CanLII 67686 (PE IPC)


*Alpheus Brass et al v. Her Majesty the Queen et al*, 2011 FC 1102 (CanLII)


Order F11-15, *College of Massage Therapists of British Columbia (Re)*, 2011 BCIPC 20 (CanLII)


*Dublin v. Montessori Jewish Day School of Toronto*, 2006 CanLII 7510 (ON SC)


Order F2011-018, 2011 CanLII 96581 (AB OIPC)

Order PO-2640, Ontario (Education) (Re), 2008 CanLII 4965 (ON IPC)
Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd. et al., 2000 NSCA 96

College of Opticians of B.C. v. Moss et al., 2000 BCSC 1343 (CanLII)

British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner), 1995 CanLII 634 (BC SC)


Canada (National Revenue) v. Thompson, [2016] 1 SCR 381, 2016 SCC 21 (CanLII)

Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104 (CanLII)

Review Report 280-2016 & 281-2016, Saskatchewan Government Insurance, February 1, 2017 (Sask IPC)

Stevens v. Canada (Prime Minister), (1998) 4 FCR 89

Order FI-15-16, Private Career Training Institutions Agency (Re), 2015 BCIPC 17 (CanLII)

Alberta Order 97-009, 1997 CanLII 15921 (AB OIPC)

Pritchard v. Ontario (Human Rights Commission), [2004] 1 SCR 809, 2004 SCC 31 (CanLII)


I. BACKGROUND

[1] An applicant (“the Applicant”) made a request pursuant to section 7 of the Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01 (the “FOIPP Act”), for access to the following:

all records, emails, correspondence, all forms of communications, legal opinions,
legal invoices and any and all documentation and records stored in all manner pertaining to or referencing the Applicant, between the Eastern School District, including the office of Superintendent, office of the Confidential Secretary, office of the Chair of the Board, and its solicitor.

The Eastern School District, as it then was, is now the Public Schools Branch, and will be referred to throughout this order as “the Public Body”.

[2] The Public Body initially located and retrieved 26 responsive records to the access request, and refused to disclose them to the Applicant, pursuant to subsection 25(1) of the FOIPP Act, on the basis that they contain information subject to solicitor-client privilege (clause 25(1)(a)), or information prepared by or for the Public Body’s lawyer (subclause 25(1)(b)(iii)).

[3] The Applicant requested a review of the Public Body’s decision. During the course of the review, the Public Body located and retrieved an additional 36 responsive records, and refused to disclose them to the Applicant, pursuant to subsection 25(1) of the FOIPP Act. In addition, or in the alternative, the Public Body also determined that these records contain advice to officials, and refused to disclose these records pursuant to subsection 22(1) of the FOIPP Act.

[4] The Public Body was asked to provide a copy of the responsive records to the Information and Privacy Commissioner, for the purposes of the review. The Public Body provided some evidence of its claims, on a record by record basis. The Public Body objected to producing the responsive records to the Commissioner, claiming that solicitor-client privilege prohibits disclosure, even to the Commissioner.

[5] Former Commissioner Maria MacDonald determined that the Public Body had not provided adequate preliminary evidence of solicitor-client privilege over some of
records at issue. Therefore, Commissioner MacDonald issued a Notice to Produce Records to the Public Body, pursuant to subsection 53(3) of the FOIPP Act, for the purposes of reviewing 36 of the records at issue. The Public Body produced the requested 36 records, and, later, on October 16, 2012, voluntarily provided the remaining records at issue for the Commissioner's review.

[6] Despite providing a copy of the responsive records to the Commissioner, the Public Body has maintained throughout this review that it was not required to do so in circumstances where solicitor-client privilege is claimed.

II. RECORDS AT ISSUE

[7] Although there initially appeared to be 62 responsive records, the Public Body identified a duplicate record during the review, identified as Record 45 below. Therefore, there are 61 records at issue, primarily emails, but also including letters, notes and documents, more particularly described as follows:

08-11-01 Record 1: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated January 15, 2010 with attachment being documents on which legal advice was being sought (3 pages);

08-11-02 Record 2: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated April 13, 2010, including email string of earlier emails circulated within the Public Body and copied to legal counsel (6 pages);

08-11-03 Record 3: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated April 15, 2010, copied to an employee of the Public Body, with attachment being documents from the Public Body providing information requested by solicitor (4 pages);
08-11-04 Record 4: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated April 22, 2010, copied to an employee of the Public Body, with 1 attachment being draft correspondence on which legal advice was being sought (2 pages);

08-11-05 *Record 5: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated May 10, 2010 (2 pages);

08-11-06 *Record 6: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated May 31, 2010, with 1 attachment being a legal opinion letter (6 pages);

08-11-07 Record 7: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated June 8, 2010, with 5 attachments being client billings reports and related emails (6 pages);

08-11-08 Record 8: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated June 18, 2010, copied to an employee of the Public Body, with 5 attachments being documents relative to questions on which legal advice was being sought (10 pages);

08-11-09 *Record 9: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated June 18, 2010 (2 pages);

08-11-10 Record 10: Invoice for legal fees from solicitor to the Public Body involving seeking/giving legal advice dated June 28, 2010 (3 pages);

08-11-11 Record 11: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated August 23, 2010, copied to an employee of the Public Body, with 4 attachments being documents on which legal advice was being sought (8 pages);

08-11-12 *Record 12: draft correspondence from solicitor to the Public Body involving seeking/giving legal advice dated October 4, 2010, with 2 attachments being draft documents prepared by solicitor (7 pages);

08-11-13 *Record 13: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated October 13, 2010, with attached report (9 pages);
08-11-14 *Record 14: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated November 9, 2010, with attached draft legal opinion (3 pages);

08-11-15 *Record 15: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated November 9, 2010, with attached legal opinion (3 pages);

08-11-16 Record 16: Invoice for legal fees from solicitor to the Public Body involving seeking/giving legal advice dated December 21, 2010 (2 pages);

08-11-17 Record 17: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated January 18, 2011, with 4 attachments, being correspondence on which legal advice was being sought (6 pages);

08-11-18 *Record 18: Letter from solicitor to the Public Body involving seeking/giving legal advice dated January 20, 2011 (1 page);

08-11-19 *Record 19: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated January 20, 2011 (1 page);

08-11-20 *Record 20: Brief/memo from solicitor to the Public Body involving seeking/giving legal advice dated January 21, 2011 (2 pages);

08-11-21 Record 21: E-mail from the Public Body to the Public Body involving seeking/giving legal advice dated January 21, 2011, with attached email and legal memorandum from solicitor (3 pages);

08-11-22 *Record 22: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated February 14, 2011 (1 page);

08-11-23 Record 23: E-mail from Public Body trustee to the Public Body involving seeking/giving legal advice dated February 15, 2011, copied to trustees, employees and solicitor for the Public Body (3 pages);

08-11-24 *Record 24: E-mail from solicitor to the Public Body involving seeking/giving legal advice dated February 16, 2011, with three attachments of applicable law (42 pages);

08-11-25 Record 25: E-mail from Public Body trustee to the Public Body involving seeking/giving legal advice dated February 16, 2011, copied to trustees, employees and solicitor for the Public Body with 2 attachments including regulations, letter and email containing legal advice (7 pages)
08-11-26  Record 26: E-mail from Public Body trustee to the Public Body involving seeking/giving legal advice dated February 18, 2011, copied to trustees, employees and solicitor for the Public Body (1 page).

02-12-01  Record 27: Email between the Public Body and solicitor, involving seeking/giving legal advice dated April 22, 2010 (1 page);

02-12-02  Record 28: Email between solicitor and the Public Body, involving seeking/giving legal advice dated April 22, 2010 (2 pages);

02-12-03  Record 29: Email between the Public Body and solicitor, involving seeking/giving legal advice dated April 23, 2010, with one attachment (3 pages);

02-12-04  Record 30: Email between solicitor and the Public Body, involving seeking/giving legal advice dated April 23, 2010 (2 pages);

02-12-05  *Record 31: E-mail from the Public Body to solicitor involving seeking/giving legal advice dated April 27, 2010 (2 pages);

02-12-06  Record 32: E-mail from the Public Body, authored by third party, sent to solicitor, involving seeking/giving legal advice dated April 27, 2010 (3 pages);

02-12-07  Record 33: E-mail from the Public Body, authored by third party, sent to solicitor, involving seeking/giving legal advice dated June 9, 2010 (3 pages);

02-12-08  Record 34: Email from solicitor to the Public Body, involving seeking/giving legal advice dated September 14, 2010 (2 pages);

02-12-09  Record 35: Email from the Public Body to solicitor, involving seeking/giving legal advice dated September 16, 2010;

02-12-10  *Record 36: E-mail from solicitor to the Public Body, involving seeking/giving legal advice dated September 17, 2010 (2 pages);

02-12-11  Record 37: Email between the Public Body and solicitor, involving seeking/giving legal advice dated September 18, 2010, with copy forwarded to FOIPP Coordinator (2 pages);
02-12-12  *Record 38: E-mail between the Public Body and solicitor, involving seeking/giving legal advice dated September 24, 2010 (1 page);

02-12-13  Record 39: Letter from third party contracted by the Public Body to the Public Body, involving seeking/giving legal advice dated September 2, 2010, with attached interview notes (10 pages);

02-12-14  Record 40: Confidential report from third party contracted by the Public Body, to the Public Body, involving seeking/giving legal advice dated September 24, 2010, with attachment of supporting documents (12 pages);

02-12-15  *Record 41: E-mail from solicitor to the Public Body, involving seeking/giving legal advice dated October 4, 2010 (1 page);

02-12-16  *Record 42: E-mail from solicitor to the Public Body, involving seeking/giving legal advice dated October 4, 2010 (1 page);

02-12-17  Record 43: E-mail from solicitor to the Public Body, involving seeking/giving legal advice dated October 27, 2010, and attached copy of draft letter to Trustee (3 pages);

02-12-18  *Record 44: E-mail from the Public Body to solicitor, involving seeking/giving legal advice dated October 28, 2010 (2 pages);

02-12-19 and 02-12-21  *Record 45: E-mail from solicitor to the Public Body, involving seeking/giving legal advice dated November 17, 2010, with attached rules, copied to Board Chair and Superintendent (3 pages);

02-12-20  Record 46: E-mail from the Public Body to solicitor, Board trustees and Public Body employees, involving seeking/giving legal advice dated November 17, 2010, with attachment (4 pages);

02-12-22  Record 47: E-mail from the Public Body to solicitor, involving seeking/giving legal advice dated January 14, 2011, with attached email request (3 pages);

02-12-23  *Record 48: E-mail from the Public Body to solicitor, involving seeking/giving legal advice dated February 4, 2011 (1 page);
02-12-24  Record 49: Email between solicitor and the Public Body, involving seeking/giving legal advice dated February 9, 2011, with attached draft letter (5 pages);

02-12-25  *Record 50: Email from solicitor to the Public Body, involving seeking/giving legal advice dated February 3, 2011 (1 page);

02-12-26  *Record 51: Email from the Public Body to solicitor, involving seeking/giving legal advice dated February 6, 2011 (1 page);

02-12-27  Record 52: Email from solicitor to the Public Body, involving seeking/giving legal advice dated February 8, 2011 (1 page);

02-12-28  Record 53: Email from the Public Body to solicitor, involving seeking/giving legal advice dated February 9, 2011 (2 pages);

02-12-29  Record 54: Email from solicitor to the Public Body, involving seeking/giving legal advice dated February 10, 2011 (1 page);

02-12-30  *Record 55: Email from the Public Body to solicitor, involving seeking/giving legal advice dated February 10, 2011 (1 page);

02-12-31  *Record 56: Email from the Public Body to solicitor, involving seeking/giving legal advice dated February 11, 2011 (1 page);

02-12-32  Record 57: Email between solicitor and the Public Body, involving seeking/giving legal advice dated February 14, 2011 (1 page);

02-12-33  *Record 58: Email from solicitor to the Public Body, involving seeking/giving legal advice dated January 19, 2011 (1 page);

02-12-34  Record 59: Email between the Public Body and solicitor, involving seeking/giving legal advice dated February 14, 2011, with attached draft letter (4 pages);

02-12-35  Record 60: Meeting notes made by the Public Body, with attached statement, involving seeking/giving legal advice dated February 16, 2011 (4 pages); and

02-12-36  Record 61: Meeting notes made by the Public Body, involving seeking/giving legal advice dated February 17, 2011 (3 pages).
Those records marked with an asterisk are from the records provided by the Public Body on October 16, 2012. Throughout the remainder of this order, I will refer to each record by its corresponding number (ie. “Record 1”, “Record 2”, etc.), noted above. When referring to all records, I will use the term “the records at issue”.

III. ISSUES

There are two issues identified in this review:

Section 25 of the FOIPP Act: Privileged Information – Did the head of the Public Body properly apply subsection 25(1) of the FOIPP Act in deciding to refuse the Applicant access to the records at issue, on the grounds that they contain information subject to solicitor-client privilege, or information prepared by or for the Public Body’s lawyer in relation to a matter involving the provision of legal services?

Section 22 of the FOIPP Act: Advice from Officials – Did the head of the Public Body properly apply clauses 22(1)(a) and (e) of the FOIPP Act in deciding to refuse the Applicant access to some of the records at issue, on the grounds that disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, or the contents of agendas or minutes of meetings?

IV. BURDEN OF PROOF

The head of the Public Body has refused the Applicant access to all responsive records on the basis of sections 22 and 25 of the FOIPP Act. Pursuant to subsection 65(1) of the FOIPP Act, it is the Public Body’s burden to prove it properly determined that the records at issue satisfy these two exceptions to disclosure.
V. ANALYSIS OF THE ISSUES

Section 25 of the FOIPP Act: Privileged Information – Did the head of the Public Body properly apply subsection 25(1) of the FOIPP Act in deciding to refuse the Applicant access to the records at issue, on the grounds that they contain information subject to solicitor-client privilege, or information prepared by or for the Public Body’s lawyer in relation to a matter involving the provision of legal services?

[10] The clauses of section 25 of the FOIPP Act upon which the Public Body relies to withhold the records at issue, are discretionary exceptions to disclosure. Thus, if it is determined that these clauses apply to the records at issue, then the head of the Public Body must exercise his discretion to either provide access to the record, or refuse to provide access. Section 25 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; (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.

(2) The head of a public body shall refuse to disclose information described in clause (1)(a) that relates to a person other than a public body.

(3) Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.
The Public Body relies upon a mandatory subsection of section 25 of the **FOIPP Act** as well, subsection 25(2), with respect to two records only, Record 19 and Record 58.

[11] The Public Body relies specifically on clause 25(1)(a) of the **FOIPP Act**, and subclause 25(1)(b)(iii), for refusing the Applicant access to the records at issue. An analysis of each of these clauses follows.

### Clause 25(1)(a): Solicitor-Client Privilege

[12] With regard to clause 25(1)(a) of the **FOIPP Act**, the elements required to establish solicitor-client privilege were set out by the Supreme Court of Canada in **Solosky v. The Queen**, [1980] 1 SCR 821, 1979 CanLII 9 (SCC) at page 837. This test has been adopted in many jurisdictions, including in Order No. 07-001, **Prince Edward Island (Tourism) (Re)**, 2007 CanLII 55713 (PE IPC). The record at issue must satisfy the following elements (“the Solosky test”):

(i) there is a communication between a lawyer and the lawyer's client; and
(ii) the communication entails the giving or seeking of legal advice; and
(iii) the communication was intended to be confidential.

[13] Former Commissioner Judith Haldemann also addressed section 25 of the **FOIPP Act** in Order No. 08-005, **Prince Edward Island (Transportation and Public Works) (Re)**, 2008 CanLII 67686 (PE IPC). At page 16, she describes the essential nature of solicitor-client privilege to our legal system:

Section 25 of the FOIPP Act is a discretionary provision and the Public Body is not obligated to either disclose or withhold the records at issue, where the records are subject to solicitor-client privilege or involved “the provision of advice or other services ... by a lawyer” to the Public Body. Solicitor-client privilege has been considered by the Supreme Court of
Canada (SCC) in many cases, and the SCC has held that the rule respecting solicitor-client privilege has become a rule of substance rather than just a rule of evidence. The SCC has stated that solicitor-client privilege is fundamental to the proper functioning of our legal system. [Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 at paragraphs 9 and 10 approving Solosky v. The Queen, [1980] 1 SCR 821 and other cases]. Therefore, it can be said that so long as the records at issue are actually communications between a public body and its lawyer, they are protected from disclosure under section 25.

[14] In Order No. 08-005, supra, at page 16, Commissioner Haldemann also addresses the law on severing of records for which solicitor-client privilege is claimed. Ordinarily, if information a public body may properly refuse to disclose, can reasonably be severed from a record, the Applicant has a right of access to the remainder of the record. This is not the case for records containing information subject to solicitor-client privilege, as described by Commissioner Haldemann:

In the matter of the severance of information from documents subject to solicitor-client privilege, I agree with the Public Body that severing is not a concept applicable to records subject to solicitor-client privilege [underline emphasis added]. In Blank v. Canada (Minister of Justice), 2007 FCA 87 (CanLII), the Federal Court of Appeal said this (in respect of a section that provides for severance) at paragraph 13:

... section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament’s intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

If I find that a record is subject to solicitor-client privilege, I will not be examining whether portions of the record may be severed; the entire record will be found to be subject to solicitor-client privilege.
[15] The Public Body’s submissions refer to many decisions, including several Supreme Court of Canada decisions relating to the issue of solicitor-client privilege. The Public Body notes that this exception to disclosure, in access legislation, has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship (Ontario (Public Safety and Security) v. Criminal Lawyers’ Association, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), at paragraph 53). I agree, as did Former Commissioner Haldemann in Order 08-005, supra. However, in order to engage this exception to disclosure, the privilege must first be established. It must be determined that the records at issue raise the exception of solicitor-client privilege.

[16] The Public Body submits that the test for determining solicitor-client privilege has expanded since the Solosky test. Quoting paragraph 69 of the federal court decision in Alpheus Brass et al v. Her Majesty the Queen et al, 2011 FC 1102 (CanLII), for example, the Public Body submits that solicitor-client privilege attaches to records as soon as the solicitor-client relationship begins, with no requirement of pending litigation. It is well settled that pending litigation is not a necessary element of a finding of solicitor-client privilege.

[17] I have reviewed the submissions and authorities which the Public Body provided. The Solosky test is still a valid legal test to determine whether solicitor-client privilege attaches to a record. Several decisions have permitted a more detailed understanding of solicitor-client privilege, and I have considered some of these decisions below.

Element One: Is there is a communication between a lawyer and the lawyer's client?

[18] In addition to its submissions which were provided to the Applicant, the Public Body made in camera submissions, to the Commissioner only. This process is permitted by subsection 64(3) of the FOIPP Act. If the in camera submissions were provided to the
Applicant, they might identify the contents of the records at issue. These submissions were essential to my determination of whether solicitor-client privilege applies. A determination of solicitor-client privilege, including the question of whether the records constitute communications between the Public Body and its solicitor, would have been very challenging without the background evidence provided by the Public Body.

[19] The Applicant questions whether all of the records at issue are communications between solicitor and client. The Applicant states, in part:

I suspect that the requests for the legal opinions, and the preparation of the legal opinions, were without the necessary board approval and authority and if that is correct, no privilege would apply as the request, such as it was, and the opinions given, are invalid as privileged communication.

I have reason to believe that the request for the legal opinions came from a third party, not [the Public Body]. As such, no privilege would apply as the opinions are for that third party, but they were or ought to be in the possession of [the Public Body], for which they can claim no privilege...

Is the Public Body the client?

[20] The Public Body points out, correctly, that solicitor-client privilege belongs to the client. Thus, it is essential, in an analysis of the first element of the Solosky test, to determine whether the Public Body is, indeed, the client, for each of the records at issue.

[21] As noted above, the Applicant submits that a third party, separate from the Public Body, may have been giving instruction to the solicitor for some of the records at issue; for those records, the Applicant submits that the Public Body is not the client. The Public Body maintains that for all records at issue, the Public Body is the client. The Superintendent of the Public Body states that all of the legal advice sought by the Public
Body, and over which a claim to solicitor-client privilege is made in this matter, was requested either by himself, by the Board Chair, by the Executive Committee, or by a Public Body employee, who had authorization from him to do so. Based on my review of the records at issue, and the in camera submissions of the Public Body, I confirm that this is so.

[22] The Applicant also submits that, for those records at issue where the Public Body is the client, the Applicant still has entitlement. The Applicant states that their entitlement arises firstly, because the records refer to the Applicant, and secondly, because when the Applicant was a Public Body trustee, the Applicant was entitled to such records. The Applicant submits, “The client was the board and as I was at the material time a member of the board, I have a fundamental right to this information.” The Public Body disagrees, stating that the Applicant’s status, in a FOIPP Act request, is that of a member of the public, and no longer as a board member.

[23] The Applicant distinguishes between the Board of Trustees and the Eastern School District (the Public Body), notes the solicitor appears to have been representing both entities, and submits:

The August 25 affidavit includes contradictory information, I refer you to page 2 item numbers 10, where [the Superintendent] indicates that "each such request was also required in order to carry on the business of the board of trustees or the district". I refer you to page 3 numbers 18, where he indicates "Our legal counsel was retained by the district to provide legal counsel to the district and the district alone". [The Superintendent] can't have it both ways; [the solicitor] was either the board of trustees' legal counsel or the district alone. If she was legal counsel to the board of trustees the accountability is back to the board of trustees, if she was legal counsel to the district and the district alone, there was no authority for a district employee to obtain legal opinions pertaining to or referencing a trustee.

I do not perceive a conflict in the Superintendent’s two statements. Pursuant to section
27(3) of the School Act, RSPEI 1988, c s-2.1 [repealed by 2016, c. 6, s. 136], the Board of Trustees is part of “the district”, and “the district” is the Public Body.

[24] The Superintendent of the Public Body states that on February 22, 2011 the Minister of Education and Childhood Development removed the Board of Trustees of the Public Body, including the Applicant, from their positions as trustees, and replaced them with a single official trustee. With regard to the Applicant’s submission that their entitlement to the records at issue arises due to the Applicant’s status as a former trustee, the Public Body has submitted, from the outset, that the Applicant’s former status does not give the Applicant a right of access different from any member of the public. The Public Body relies upon an order of the Ontario Information and Privacy Commissioner, Order M-96, Wellington County Board of Education, March 9, 1993 (On IPC), on page 3, upheld on judicial review. While that Order dealt with the exception for unreasonable invasion of personal privacy, and not solicitor-client privilege, I agree with the following statement of the Ontario Commissioner:

In my view, a requester’s status cannot be a relevant factor in determining whether disclosure of personal information will constitute an unjustified invasion of personal privacy. Disclosure of a record under Part I of the Act is, in effect, disclosure to the world and not just to the requester, and I find that the status of the Federation, or the relationship of a Federation to its members, is not a relevant consideration.

[25] The Public Body further points out that, while as a trustee, the Applicant had a fiduciary duty to the Public Body, and was required to maintain the privilege over Public Body records. The Applicant has no such obligation as a member of the public seeking access to Public Body records. I agree that, if the Public Body disclosed the records at issue to this or another applicant, it could not put restrictions upon the applicant’s subsequent use or disclosure of this information.
[26] The Public Body submits that the Applicant was not the solicitor’s client, in the context of the records at issue. The Public Body states that the Applicant “was merely an individual trustee of the client”. A similar circumstance arose in a British Columbia access review, Order F11-15, College of Massage Therapists of British Columbia (Re), 2011 BCIPC 20 (CanLII). In that review, the public body submitted that the solicitor-client privilege is that of the public body and not of any individual board member, and only the public body can waive the privilege. The Adjudicator rejected the applicant’s argument that solicitor-client privilege could not be asserted against her because, as a member of the board, she, like the other board members, was the client (at paragraph 18). I note that this finding was made although the applicant requested access to the records while she was still a board member.

[27] The Public Body relies upon Re Livent Inc. (1999) CarswellOnt 4838 (Ont.S.C.J.), affirmed May 25, 2000, Doc. CA C33053 (Ont.C.A.), and Dublin v. Montessori Jewish Day School of Toronto, 2006 CanLII 7510 (ON SC), for its submission that the Applicant in this case has no right to the records at issue. The Livent case involved directors who were in litigation with their corporation, seeking access to draft minutes of audit committee meetings. The court held that, in such circumstances, the right of directors to access records of the corporation is subject to solicitor client or litigation privilege. The court stated:

To hold otherwise would lead to the ludicrous result that the director engaged in litigation with the corporation would not be entitled to access in his capacity as a litigant, but would be entitled to access in his capacity as a director, thereby indirectly negating the solicitor client privilege or litigation privilege of the corporation.

The Dublin case relied on Livent to reach a similar conclusion, where the requesting board member was in conflict with the board (paragraphs 18-19). The board members in both cases were not entitled to disclosure of the requested records.
The Applicant submits that the Applicant has entitlement to the records at issue because the records refer to the Applicant. An applicant’s name is his or her personal information, and the *FOIPP Act* provides a right to access our own personal information. However, this right of access is not absolute. It is subject to the limited and specific exceptions as set out in the *FOIPP Act*, including subsection 25(1).

With regard to the Applicant’s submission that the Applicant has entitlement to the records at issue because the records refer to the Applicant, the Public Body points out that, because the Applicant’s access request asks for any records pertaining to or merely "referencing" the Applicant, the Applicant’s name may appear in a record, but the record may not be "about" the Applicant. I agree that the Applicant has no special right to records simply because they may reference the Applicant as a former trustee. I also agree with the Public Body that, as the Public Body is the client, the client does not include individual trustees, including the Applicant.

The Superintendent of the Public Body states that it has been the practice of the Public Body, since at least 1992, that the Chair of the Board, the Executive Committee of the Board, the Superintendent, or other employees of the Public Body, with the Superintendent’s consent, may seek legal advice on behalf of the Public Body, without seeking authority from the Board of Trustees. I accept this evidence, and my review of the records at issue confirms that all records are a communication between a lawyer and the lawyer’s client, the Public Body. This is to be expected, as the Applicant’s request seeks communications and documentation between the Public Body and its solicitor. To address the Applicant’s submission, there is no evidence that communications were made by anyone other than the Public Body and its solicitor.
[31] There are several records, Record 39, Record 40, Record 60, and Record 61, which are not communications between a lawyer and their client, upon their face. These are not emails or letters between the Public Body and its solicitor. However, the submissions of the Public Body satisfy me that these records are part of communications between the Public Body and its solicitor. The fact that these records are responsive to the Applicant’s request also supports the finding that they are between the Public Body and its solicitor.

[32] I now proceed to the second element, whether the communication entails the giving or seeking of legal advice.

**Element Two: Does the communication entail the giving or seeking of legal advice?**

[33] In Order No. 07-001, supra, I refer to the second element of the Solosky test, at pages 29-30, as follows:

> The second part of the test was addressed in Order 96-017 by the Alberta Information and Privacy Commissioner. The Commissioner held that the legal advice in the record must "include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications".

[34] The Public Body makes extensive in camera submissions relating to solicitor-client privilege. The following are accurate statements of the law, regarding the interpretation of solicitor-client privilege, with which I agree, focusing on this second element of the Solosky test:

- For solicitor-client privilege to apply, it is not necessary that the communication specifically request or offer advice (*Samson Indian Nation and Band v. Canada*, [1995] 2 FCR 762, 1995 CanLII 3602 (FCA), at page 5);
- The subject of a privileged communication and the factual assumptions on which legal advice is sought or given are also privileged. The FOIPP Act does not require a public body to sever information from a privileged
communication, even if the information is factual, innocuous or of a general nature, where it is nonetheless part and parcel of the privileged communication. (Order F2011-018, 2011 CanLII 96581 (AB OIPC), at paragraph 91);

- Solicitor-client privilege applies to background documents provided by the client to legal counsel as part of the continuum of communications in order to assist legal counsel in formulating and giving legal advice on the ongoing issues (Order PO-2640, Ontario (Education) (Re), 2008 CanLII 4965 (ON IPC), at page 9), and applies to draft documents worked on by legal counsel (Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd. et al., 2000 NSCA 96 at paragraphs 32-33);

- Solicitor-client privilege applies to memos from a client's employee forwarding non-confidential enclosures which indicate how the client may be directing its lawyer (College of Opticians of B.C. v. Moss et al., 2000 BCSC 1343 (CanLII), at paragraph 21);

- Solicitor-client privilege applies to internal documents of a public body which reference or discuss a solicitor's legal advice (Alpheus, supra, at paragraph 75);

- The fact that a document may be compellable from the client does not mean that it is compellable within the context in which it was given to the lawyer: “if the purpose was to obtain legal advice then the privilege attaches even if the communication entails no more than the passing of factual information. (British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner), 1995 CanLII 634 (BC SC), at paragraphs 67-68).

Based on the foregoing, I note that the “continuum” of legal advice is a central question in the determination of whether a communication entails the giving or seeking of legal advice. I examine this continuum below.

The continuum of legal advice

Solicitor-client privilege is not limited to opinions or advice from lawyers and extends to any fact that may reveal information about the relationship and communications between a lawyer and client. All information shared between a lawyer and a client is presumed to be privileged absent evidence to the contrary.

The Public Body also cites a case of the Federal Court of Appeal, Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104 (CanLII), where the court states, at paragraphs 26 and 27:

[26] All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See Samson Indian Nation and Band v. Canada, 1995 CanLII 3602 (FCA), [1995] 2 F.C. 762 at paragraph 8.

[27] Part of the continuum protected by privilege includes “matters great and small at various stages...including advice as to what should prudently and sensibly be done in the relevant legal context” and other matters “directly related to the performance by the solicitor of his professional duty as legal advisor to the client.” See Balabel v. Air India, [1988] 2 W.L.R. 1036 at page 1046 per Taylor L.J.; Three Rivers District Council v. Governor and Company of the Bank of England, [2004] UKHL 48 at paragraph 111.

Despite the characterization of solicitor-client privilege as being close to “absolute”, not all information which passes between a lawyer and their client will be privileged. This was stated, again succinctly, by the Federal Court of Appeal, in Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), supra, cited by the Public Body:

[24] However “fundamental,” “all-encompassing” and “nearly absolute” the privilege may be, these cases confirm that not everything uttered by a lawyer to a client is privileged: see, e.g., Pritchard, supra, at paragraph 20; Blood Tribe, supra, at paragraph 10. Before us, counsel for the Ministers quite properly conceded that comments by lawyers to clients about matters wholly unrelated to their solicitor-client relationship are not privileged.

[25] Rather, communications must be viewed in light of the context

[38] Upon a thorough review of the records at issue, I find that the following records are either legal advice, or part of a communication continuum involving the provision of legal advice, including background information communicated between the solicitor and client, and the communication of the solicitor’s legal advice within the Public Body: Records 1-4, 6, 8, 9, 12-15, and 17-61.

[39] One record may only reveal that an exchange of information took place (Record 37), but that very exchange reveals something about the legal advice being sought or provided. Two records (Records 39 and 40) are simply documents which were forwarded to the solicitor, and the only evidence of the communication is in the Public Body’s submission, and the fact that these records were in the custody of the Public Body’s solicitor. Records 60 and 61 are meeting notes taken by the Superintendent during two separate meetings. Record 60 relates to an in-camera meeting, during which legal matters are to be addressed, in accordance with Board Regulation BDBA-R, page 9 (supplementary affidavit of the Superintendent), and it does, in fact, address a legal matter involving the Board. Record 61 refers to legal advice communicated by the Public Body’s solicitor, to the Public Body. On this basis, they entail legal advice given to the Public Body by its solicitor.

*Invoices for legal services*

[40] The Public Body submits that invoices for legal services are subject to solicitor-client privilege. The Saskatchewan Information and Privacy Commissioner recently issued a brief report which addresses this issue (Review Report 280-2016 & 281-2016,
Saskatchewan Government Insurance, February 1, 2017). Relying on the Federal Court of Appeal in Stevens v. Canada (Prime Minister), (1998) 4 FCR 89, the Commissioner stated, and I agree, that invoices of lawyers constitute communications for the purpose of giving advice, and that solicitor-client privilege applies. However, the Commissioner also noted that the presumption of solicitor-client privilege is rebuttable, referring to Order F15-16, Private Career Training Institutions Agency (Re), 2015 BCIPC 17 (CanLII), of the British Columbia Information and Privacy Commissioner.

[41] As identified in B.C. Order F15-16, supra, at paragraphs 16 and 17, the test to determine whether the presumption of privilege has been rebutted, requires answering the following two questions in the negative:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and

2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

I adopt this approach, and note that in B.C. Order F15-16, supra, the adjudicator found the privilege to be rebutted. However, the legal fee amounts in that review were considered to be neutral information, as they were not actual invoices, but only a list of law firms which the public body had paid more than $10,000 in a given year. The record did not reveal the nature of the services, nor the dates of the services, from which an applicant could deduce privileged communications.

[42] I find that Records 5, 7, 10, 11, and 16 satisfy the second element of the Solosky test, as they are solicitor invoices, or they relate to legal services accounts, over which the presumption of solicitor-client privilege has not been rebutted. I have thus found that all of the records at issue are communications which entail the giving or seeking of legal advice.
**Element Three: Was the communication intended to be confidential?**

[43] The third element that must be present to claim privilege over the records is that the communication was intended to be confidential. The Applicant acknowledges that the records at issue were initially intended to be confidential. Based on my review of the records at issue, and corresponding evidence regarding the background of each, I am satisfied that each of the records at issue forms part of a communication between solicitor and client which was intended to be confidential. Therefore, I find that the records at issue are subject to solicitor-client privilege, in accordance with clause 25(1)(a) of the *FOIPP Act*.

[44] The Applicant argues that much of the information in the records at issue was shared by the Public Body. The Applicant makes reference to specific documents which have been in the public domain. The Applicant claims that, if solicitor-client privilege applies to the records at issue, it has been waived by the Public Body. I consider this submission below.

**Waiver of Privilege**

[45] The Applicant submits that, even if solicitor-client privilege is found to exist, it has been waived. The Applicant submits that waiver of privilege is established where it is shown that the possessor of the privilege

- knows of the existence of the privilege; and
- demonstrates a clear intention to forgo the privilege.

The Applicant submits that, “Much of it was also released publically to the media and much of that release was with the participation of the legal counsel in question”.

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The Applicant also submits that any confidentiality that might have been protected by the privilege, has been abandoned, or is not applicable.

I agree that waiver of privilege requires the client’s clear intention to voluntarily relinquish it. In Order F11-15, *supra*, at paragraphs 27-29 the Adjudicator cited R.D. Manes and M.P. Silver, in *Solicitor-Client Privilege in Canadian Law*, describing the general principle of waiver:

Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

... Generally, waiver can be implied where the court finds that an objective consideration of the client’s conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

In the above order, the Adjudicator found that statements alluding to the records, during a public meeting, did not evince an express or implicit intention of the public body to waive solicitor-client privilege.

An affidavit of the Superintendent of the Public Body states that, to the best of his knowledge, with the exception of Record 60, and based on a further query made to the Confidential Secretary of the Public Body, none of the records at issue were forwarded to anyone who was not either a board trustee or an employee of the Public Body. Further, any legal advice received, is discussed at *in camera* sessions, rather than public meetings.

With specific regard to Record 60, the Public Body advises, in its preliminary evidence of solicitor-client privilege, that a copy of Record 60 was provided to representatives of the Public Body, and members of the Executive of the Department of Education and Early Childhood Development, as it then was (“the Department”). The Superintendent states, in his supplementary affidavit, that Board Regulation BDBA-R, which sets out the
role and authority of the Executive Committee of the Board of Trustees, included the power to coordinate and liaise with the Department of Education, to consider Board business, and private Board business relating to legal matters between Committee of the Whole meetings of the Board (page 9). Further, at page 2 of this Board Regulation, it is specified that deliberations during in camera sessions are to be kept confidential and are not for a trustee to release or discuss in public without prior approval. On this basis, I find that the Public Body’s decision to disclose Record 60 to the Executive of the Department is a limited waiver, and does not demonstrate an intention by the Public Body to waive its overall right to solicitor-client privilege with regard to Record 60. The privilege is not waived as against other parties. This finding is similar to Alberta Order 97-009, 1997 CanLII 15921 (AB OIPC), at paragraphs 123-125, where the adjudicator found that a waiver of solicitor-client privilege for a limited purpose does not extend to a waiver for other purposes.

[50] Waiver depends on intention. There is no evidence before me that the Public Body formed an intention to waive its solicitor-client privilege over any of the records at issue. The Applicant submits that some of the records at issue were available to the Board of Trustees, including the Applicant, while the Applicant was a trustee. The Applicant also submits that some records were available to the public. If this were the case, and if those same records were provided by a client to their solicitor for legal advice, they are still subject, together with the communications providing the records, to a claim of solicitor-client privilege, because it would disclose that the client was seeking legal advice about the record or contents of the record. There must be a clear intention by the Public Body to relinquish its solicitor-client privilege, which has not been shown here.

[51] As a further reason to deny the Public Body its claim of solicitor-client privilege, the Applicant makes a claim of a “common interest” exception. Essentially, the Applicant
submits that the Applicant and the Public Body share a common interest in the records at issue. The Public Body submits that the Applicant and the Public Body did not have a common interest, pursuant to Pritchard v. Ontario (Human Rights Commission), [2004] 1 SCR 809, 2004 SCC 31 (CanLII), at paragraph 22. In addition, the Public Body submits, based on the affidavit of the Superintendent, that the Applicant has been in an adversarial position with the Public Body from time to time. Even without this evidence, I find that the Applicant does not have a common interest with the Public Body, in the records at issue.

[52] As I have found that the records at issue are subject to solicitor-client privilege, and there is no evidence that the Public Body waived its privilege, it is not necessary for me to consider subclause 25(1)(b)(iii) of the FOIPP Act, upon which the Public Body relies in the alternative.

**Exercise of Discretion**

[53] A public body may still exercise its discretion to disclose records determined to be records of legal privilege. I speak to this in Order 07-001, *supra*, as follows:

> In terms of the exercise of discretion as to whether to waive privilege and disclose Record 13, the Public Body relies on the Alberta Commissioner, who stated that refusing to disclose solicitor-client privileged records in an attempt to preserve the utility of legal advice is a proper exercise of discretion as it is consistent with the FOIPP Act’s purposes [AB Order F2004-003].

[54] The Public Body submits that once the head of the Public Body exercised his discretion to withhold the records at issue, on the basis of solicitor-client privilege, his exercise of discretion cannot be challenged.
I agree with the Public Body that proof of a balancing of interests is not necessary to determine whether discretion was exercised properly to withhold information on the basis of solicitor-client privilege. The finding of solicitor-client privilege is enough. The decision of the Supreme Court of Canada, in *R. v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII) at page 459, sets this out succinctly:

However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

I find that the head of the Public Body properly applied subsection 25(1) of the *FOIPP Act* in deciding to refuse the Applicant access to the records at issue, on the grounds that they contain information subject to solicitor-client privilege.

**Subsection 25(2)**

The Public Body also submits that disclosure of Record 19 and Record 58 is prohibited by subsection 25(2) of the *FOIPP Act*. As I have already found that both of these records are subject to solicitor-client privilege, it is not necessary for me to consider this provision.

**Section 22 of the FOIPP Act: Advice from Officials** – Did the head of the Public Body properly apply clauses 22(1)(a) and (e) of the *FOIPP Act* in deciding to refuse the Applicant access to some of the records at issue, on the grounds that disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, or the contents of agendas or minutes of meetings?

The Public Body also submits that disclosure of some of the records at issue, falls under the discretionary exception to disclosure of subsection 22(1) of the *FOIPP Act*. As I have found that the records at issue are subject to solicitor-client privilege, it is not necessary for me to consider this provision.
VI. SUMMARY OF FINDINGS

[59] I find that the 61 records at issue are subject to solicitor-client privilege, pursuant to clause 25(1)(a) of the *FOIPP Act*. I confirm the decision of the head of the Public Body to withhold these records from the Applicant.

VII. ORDER

[60] I confirm the decision of the head of the Public Body to withhold all 61 records at issue, more particularly described at paragraph [7] herein, from the Applicant, on the basis of section 25(1) of the *FOIPP Act*.

[61] I thank both parties for their thoughtful submissions in this review. I expect that the Public Body, and all public bodies, will benefit from the Applicant’s request for review, as it has enabled the clarification of issues which had not previously been adjudicated under the *FOIPP Act*. I also note that this Order results from a review that has been ongoing for more than five years, and I appreciate the gracious patience the Applicant has shown in seeing this review completed.

[62] In accordance with section 67 of the *FOIPP Act*, the Commissioner’s order is final. However, I note that an application for judicial review of the order may be made pursuant to section 3 of the *Judicial Review Act*.

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Karen A. Rose
Information and Privacy Commissioner