OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island
Re: Department of Transportation and Infrastructure

Order FI-22-003

Maria MacDonald
Adjudicator

January 28, 2022

Summary: The Applicant made an access request for records relating to them, their property, and the road along their property. The Public Body responded, disclosed some records, and withheld 13 pages under clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege]. The Applicant requested a review of this decision, and a review of the adequacy of the Public Body's search.

The Adjudicator found that the Public Body had properly applied clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege], and that the Public Body's search was reasonable. The Public Body located and retrieved emails between the Public Body's external lawyer and the Applicant's lawyer but assumed that the Applicant would not be interested in these records. They did not confirm this with the Applicant, and in this respect, the Public Body failed to respond to the Applicant openly, accurately, and completely pursuant to subsection 8(1) of the *FOIPP Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, subclause 4(1)(h)(iii), section 7, subsection 8(1), clause 25(1)(a),

Decisions Considered:

Order FI-17-011, *Re: Department of Communities, Land and Environment*, 2017 CanLII 49927 (PE IPC)

Canada v. Solosky, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821

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

Alberta (Information and Privacy Commissioner) v. *University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555

Edmonton Police Service v *Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII)

Order F2021-24, *Re: Justice and Solicitor General*, 2021 CanLII 62588 (AB OIPC)

Calgary (Police Service) v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109 (CanLII)

British Columbia (Minister of Finance) v. *British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 (CanLII)

Descôteaux et al. v. *Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860

R. v. *Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565

Pritchard v. Ontario (Human Rights Commission), [2004] 1 SCR 80

Order FI-20-002, *Re: Department of Agriculture and Land,* 2020 CanLII 33892 (PE IPC)

I. BACKGROUND

[1] The Department of Transportation and Infrastructure, formerly known as the Department of Transportation, Infrastructure and Energy, or TIE (the "Public Body") made a decision about the location and status of a road. A landowner on the road (the "Applicant") made the following access to information request pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01 (the "*FOIPP Act*"):

> Any and all records as defined in FOIPPA relating to [name of Applicant] and [name of co-owner of the property] and or our property at [address], including records relating to or used in the review of the status of [a road], and those records from other government entities relating to the above.
>
> (Date range for Record Search from 6/11/2019 to 7/24/2019).

[2] The Public Body found 30 pages of responsive records and disclosed 17 of those pages. The Public Body withheld the remaining 13 pages pursuant to clause 25(1)(a) of the *FOIPP Act* [solicitor-client privilege]. The Applicant requested a review of the Public Body's decision that solicitor-client privilege applied, and about the adequacy of the Public Body's search. Former Commissioner Karen Rose delegated this matter to me to investigate, and if necessary, conduct an inquiry and issue an order.

II. ISSUES

[3] The issues in this review are:

a. Did the head of the Public Body properly apply solicitor-client privilege, clause 25(1)(a) of the *FOIPP Act,* to the records at issue?

b. Did the head of the Public Body fulfill their duty to conduct an adequate search, and respond to the Applicant openly, accurately, and completely pursuant to subsection 8(1) of the *FOIPP Act*?

III. RECORDS AT ISSUE

[4] The Public Body withheld 13 pages as solicitor-client privileged, which I will refer to collectively as the "records at issue".

IV. BURDEN OF PROOF

[5] The Public Body has the burden to prove that the records are subject to solicitor-client privilege. Subsection 65(1) of the *FOIPP Act* 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.
> . . .

[6] The *FOIPP Act* sets out obligations of public bodies, including the duty to respond to Applicants openly, accurately and completely [subsection 8(1)], which includes ensuring that they perform an adequate search for responsive records. Previous decisions of our office have held that a public body has the burden to show that they complied with these duties. Although the burden of proof is on a public body, it is helpful for an applicant to give reasons to show why they believe that a public body did not conduct an adequate search. [see for example, Order FI-17-011, *Re: Department of Communities, Land and Environment*, 2017 CanLII 49927 (PE IPC)]

V. ANALYSIS

Issue a: Did the head of the Public Body properly apply solicitor-client privilege, clause 25(1)(a) of the *FOIPP Act,* to the records at issue?

[7] The Public Body withheld 13 pages relying on clause 25(1)(a) [solicitor-client privilege], 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;
> . . .

[8] The leading Canadian decision to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821. The Court set out the following three requirements for solicitor-client privilege, which are sometimes referred to as the *Solosky* test:

> … 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.

[9] Many subsequent decisions in Canada have elaborated and expanded on the criteria described in the *Solosky* test, including some decisions to guide the procedures and role of our office when reviewing solicitor-client privilege claims.

[10] In their submissions, the Public Body refers to *Canadian Natural Resources Limited* v. *ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*) which relates to the evidence required

to assert a claim of solicitor-client privilege. The Applicant believes that this decision is not relevant because *ShawCor* arose in the context of a civil proceeding as opposed to an access to information matter. The Supreme Court of Canada considered the standard developed in the *ShawCor* decision to be relevant to solicitor-client privilege claims in the context of an access to information request, in *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555. The Supreme Court of Canada interpreted provisions very similar to those of PEI's *FOIPP Act*. It held that a public body may choose to provide the records over which they claim solicitor-client privilege for the Commissioner to review, but they are not required to do so. When a public body elects not to provide to the Commissioner a copy of the records that they claim are protected by solicitor-client privilege, the public body must nevertheless provide enough information about the records, relying on the findings in *ShawCor*. *ShawCor* states that a party claiming privilege must, for each record, describe the records with enough detail to support the claim. The description must have enough detail to assist other parties to assess the validity of the claimed privilege, short of revealing any privileged information.

[11] Alberta's Court of Queen's Bench recently explained the role of Alberta's Information and Privacy Commissioner's office in reviewing a public body's claim of solicitor-client privilege in *Edmonton Police Service* v *Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*). In a few decisions after this, such as Order F2021-24, *Re: Justice and Solicitor General*, 2021 CanLII 62588 (AB OIPC), at paragraph 71, Alberta's Office of the Information and Privacy Commissioner summarized the Queen's Bench decision as follows:

> 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).

[12] PEI's *FOIPP Act* is similar to Alberta's legislation. I agree with the above noted summary of our role on a review of a public body's claim of solicitor-client privilege. I must assess whether I can recognize the presence of the elements of solicitor-client privilege from the evidence.

[13] Initially, the Public Body was very concerned about giving the Applicant any information about the records over which they had claimed solicitor-client privilege. During the review, the Public Body modified their position and provided descriptions of the records. The Applicant was frustrated with the adequacy of the Public Body's evidence and descriptions. The Public Body asserted that their evidence was sufficient, stating:

> a. [After listing questions from *Calgary (Police Service)* v. *Alberta (Information and Privacy Commissioner)*, 2019 ABQB 109 (CanLII), about assessing solicitor-client privilege] The Department submits that these questions are clearly answered in the Affidavit;
> b. The Department submits that the Affidavit clearly and convincingly outlines that the 13 pages have been properly protected under section 25(1);
> c. [after listing the three elements of the *Solosky* test] The department submits that as evidenced by the Affidavit these criteria have been met;
> d. The Public Body states that all previous submissions concerning affidavits apply to the enclosed affidavits as they provide clear evidence that the records at issue meet the criteria of the *Solosky* test on a balance of probabilities and permit you to assess the claim;
> e. The descriptions in the schedules to the enclosed affidavits are adequate. . . .; and
> f. . . . we submit that we have provided adequate information and evidence; and no further details are required.

[14] I do not agree that the Public Body's affidavit evidence is adequate, or that it clearly and convincingly showed that the *Solosky* criteria were met. The body of the affidavit of the head of the Public Body repeats the elements of the *Solosky* test, but that is not enough evidence to support a claim of solicitor-client privilege. *ShawCor* and other decisions say that a party claiming privilege must, for each record, describe the record with enough detail to support the claim. The Public Body includes in most of the descriptions, the Public Body asserts that [it] " . . . contains solicitor-client privileged information." On its own, these descriptions are not enough to support claims of solicitor-client privilege.

[15] The Public Body also stated that "to provide any additional information would be revealing the privilege which attaches to the record." I do not agree. For example, the Public Body did not include the dates of the records, or the names of the authors or the recipients of the records. The Supreme Court of British Columbia remarks in *British Columbia (Minister of Finance)* v. *British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 (CanLII) that, although it is possible for the correspondents' names and the dates of records to be privileged information, that would be an unusual situation. Justice Steeves states:

> [81] In my view, it would be an unusual situation where the date of the document and the names of the sender and recipient are not disclosed for each document. It seems to me that some information is required to understand the document. It also seems to me that indicating whether the sender or the recipient is a lawyer could be helpful and even necessary. Certainly an explanation would be required if this information cannot be provided. Security or privacy concerns can be dealt with by other means such as sealed files.

[16] We encourage the Public Body to review paragraphs 78-88 of *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, *supra*. Although Justice Steeves says it is not possible to give one specific roadmap about how to establish a claim of solicitor-client privilege, he thoughtfully discusses the amount of detail that is required. We also encourage the Public Body to review Alberta Order F2021-024, *supra*, particularly at paragraphs 73 to 85, which illustrate how a public body could describe records to support their claims.

[17] Although I have concerns about the sufficiency of the Public Body's affidavit, I have other evidence, including copies of the 17 pages of responsive records the Public Body disclosed to the Applicant, and a few records the Applicant provided to our office. The Public Body also responded to a specific question about correspondence between the Public Body's lawyer and the Applicant's lawyer. With this evidence I will consider the three parts of the *Solosky* test.

i) Are the records a communication between solicitor and client?

[18] I will consider first whether the records are communications, and then consider whether they are between a solicitor and their client.

[19] In their affidavit, the head of the Public Body describes the types of records. Nine records, representing 11 pages, are described in part as email correspondence, which I accept are communications:

> **Email correspondence between Departmental client and legal counsel** made within the framework of a solicitor-client relationship that contains solicitor-client privileged information. [bolded emphasis added]

[20] The Public Body describes the remaining two records as:

- Internal discussions that reveal the substance of legal advice sought or given by or to the Department; and
- Record used for internal discussions that contain solicitor-client communications between a solicitor and a public body in the course of giving or seeking of legal advice.

[21] Although the last two records are not direct communications between a client and their lawyer, the affidavit says the records include the substance of these communications. Solicitor-client privilege may follow information when it is repeated in another format as long as the client is not waiving their privilege. The Public Body describes these records as internal discussions, and although we do not know who was a part of these internal discussions or how many individuals were involved, I have no reason to believe that the Public Body intended to waive privilege in their internal discussions.

[22] I accept that the records are, or contain, communications, so I will turn now to assess whether the communications are between a solicitor and their client.

[23] Although the affidavit evidence does not include the names of the authors or the recipients of the correspondence, we can tell from the context of the other records that the Public Body was in solicitor-client relationships with two lawyers: an internal government lawyer, and an external lawyer in private practice. One of the responsive records that the Public Body disclosed to the Applicant indicates the intention to give responsive records on a different access request of the same Applicant to a government lawyer. The records that the Applicant provided to our office also illustrate that the Public Body was represented by an external lawyer in private practice.

[24] I have enough information to establish that the records are either communications between a solicitor and their client or are records that contain information that is communications between a solicitor and their client. I am satisfied that the first part of the *Solosky* test has been met.

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

[25] The Public Body claims that solicitor-client privilege applies to all communications made within the framework of a solicitor-client relationship and refers to *EPS, supra,* which relies on the Supreme Court of Canada decision in *Descôteaux et al*. v. *Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860. The Applicant was concerned that the Public Body claims solicitor-client privilege only because a lawyer was involved. The Supreme Court of Canada has confirmed that communications that are wholly unrelated to the solicitor-client relationship are not privileged [see for example, *R.* v. *Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565 at paragraph 50]. The Public Body expressly denies that they are claiming solicitor-client privilege only because a lawyer was involved in the records. I do not have any reason to believe that the communications are wholly unrelated to the solicitor-client relationship.

[26] Although the Public Body did not explain it in their submissions or affidavit evidence, the other evidence before me explains some of the context in which the records at issue were created. I will address the external lawyer first, then the internal government lawyer.

[27] The Public Body made a decision regarding the location and status of the road along the Applicant's property, and the Applicant disagreed with the Public Body's process and legal authority for the Public Body's decision. Such legal issues would fall within the

practice area of the Public Body's external lawyer. The email exchanges that the Applicant provided between the Applicant's lawyer and the Public Body's external lawyer were created within the period of the access request. Based on the content of the email communications between the Applicant's lawyer and the Public Body's lawyer it is probable that the Public Body's lawyer was providing legal advice to the Public Body. In these circumstances, I am satisfied that records between the external lawyer and the Public Body entail the seeking or giving of legal advice.

[28] With respect to the internal government lawyer, in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 80, the Supreme Court of Canada recognized that in-house lawyers may be called upon to give policy or business advice, which is not legal advice and further evidence may be needed about the circumstances in which the legal advice arose:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

[29] The Public Body did not include in their affidavit anything about the nature of the relationship, the subject matter of the advice, or the circumstances in which it was sought or rendered.

[30] Among the responsive records, that were disclosed to the Applicant, is an email that indicates that the Public Body intended to ask a named government lawyer to review responsive records in another access to information request. We are aware that public bodies in the PEI government occasionally ask a government lawyer for an opinion on

the application of the *FOIPP Act*. I am satisfied that the government lawyer was more likely than not acting in a legal capacity as opposed to a business, policy, or other non-legal capacity.

[31] I am satisfied that any records exchanged between the Public Body and either lawyer would entail the seeking or giving of legal advice, and that the second part of the *Solosky* test has been met.

iii) Are the records intended to be confidential by the parties?

[32] Confidentiality is often implied when there are communications between a solicitor and their client involving legal advice. The affidavit of the head of the Public Body states that the records were intended to be confidential. The Applicant provided evidence that warranted further examination of the Public Body's claim.

[33] As noted earlier, the Applicant provided copies of a couple of emails from the Public Body's external lawyer to the Applicant's lawyer. The records appear to be responsive and are dated within the time frame of the Applicant's request, but they were not among the responsive records disclosed to the Applicant. The records include information about the Public Body's lawyer arranging to meet with the head of the Public Body, some aspects of the position of the Public Body, and some negotiation efforts of the Applicant's lawyer. As the Public Body's lawyer gave this information to the Applicant's lawyer, these records were not intended to be confidential and are not privileged.

[34] When asked about the search of records of the lawyer in private practice, the Public Body confirmed that "external counsel's file does not contain additional responsive

records". If the records were located and retrieved, but were not disclosed to the Applicant, it appeared that the Public Body was claiming solicitor-client privilege over email exchanges between the Public Body's lawyer and the Applicant's lawyer. The descriptions of records in the head of the Public Body's affidavit did not have enough detail to tell if the affidavit related to these records.

[35] The Public Body did not address these emails the first time the Applicant included them in their submissions. I provided another copy of the emails to the Public Body and asked them if they withheld these records. The Public Body confirmed that they found the emails between the Public Body's lawyer and the Applicant's lawyer, but they assumed that the Applicant had already received a copy from their lawyer. The Public Body confirms that they did not claim solicitor-client privilege on correspondence between their respective lawyers. I will address this further when I assess whether the Public Body conducted an adequate search, and responded to the Applicant's access request openly, accurately and completely under subsection 8(1) of the *FOIPP Act*.

[36] I am satisfied that I have enough information to establish that the records were intended to be confidential, and that the third part of the *Solosky* test has been met.

[37] In summary, the evidence before me is consistent with the tests for solicitor-client privilege. I find that the records are subject to solicitor-client privilege pursuant to clause 25(1)(a) of the *FOIPP Act*.

Exercise of discretion

[38] In their request for review, the Applicant stated:

> Communications that occurred between TIE, [the Minister] and counsel are not exempt from disclosure because they may contain evidence of the animus toward us, bias in the decisions made and may form the basis for future legal action or appeals which over-ride confidentiality concerns.

[39] I have no reason to think that the records contain any evidence of animus or bias, but if they do, there is no legal principle that evidence of animus or bias overrides claims of solicitor-client privilege.

[40] Clause 25(1)(a) of the *FOIPP Act* is a discretionary exception to disclosure. Other orders of this Office and other Canadian jurisdictions have found that, once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone. It is not necessary to review whether a public body properly exercised their discretion.

[41] Based on the foregoing, I am satisfied that the Public Body has met their burden to show, on a balance of probabilities, that the records at issue are subject to solicitor-client privilege. I confirm the decision of the Public Body to withhold the records at issue from the Applicant pursuant to clause 25(1)(a) of the *FOIPP Act*.

Issue b: Did the head of the Public Body fulfill their duty to conduct an adequate search, and respond to the Applicant openly, accurately, and completely pursuant to subsection 8(1) of the *FOIPP Act*?

[42] 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.

[43] Although it is not expressly set out in subsection 8(1) of the *FOIPP Act*, the duty to conduct an adequate search has been incorporated into a public body's duty to assist. A public body is not held to a standard of perfection. The test to determine whether a public body has satisfied their duty to assist an applicant under subsection 8(1) of the *FOIPP Act* is based on reasonableness.

[44] In their request for review, the Applicant says the responsive records are worthless emails;

> ". . . the majority of the pages provided are worthless emails simply describing the collection of the documents themselves; contain "boilerplate" language as to these emails; and. . .

[45] The Applicant requested access to any and all records that related to them. Many of the responsive records the Public Body disclosed to the Applicant relate to another access request of the Applicant. Based on the wording of the Applicant's request, and in the absence of any agreement by the Applicant to exclude these records, I find that these records are responsive to the Applicant's request.

[46] In Order FI-20-002, *Re: Department of Agriculture and Land,* 2020 CanLII 33892 (PE IPC), former Commissioner Karen Rose encourages public bodies to provide an applicant with records that are responsive to an access request, stating:

> [34] Although the Applicant complains that some records are irrelevant or "basic off the shelf information", it is not the duty of a Public Body responding to an access request, to make unilateral decisions as to which records will be of interest to an Applicant. I accept, and encourage, the Public Body's process of providing the Applicant with all those records responsive to the wording of the Applicant's request. If the Public Body had approached the request too narrowly, they may have been abrogating their duties under section 8 of the *FOIPP Act*. I find that the Public Body has taken an approach consistent

with section 8 of the *FOIPP Act*, by considering the entirety of the case files to be responsive to the Applicant's requests.

[47] When an access request is clear, it is not for the Public Body to unilaterally determine what records would be of interest to the Applicant. I do not fault the Public Body for locating and retrieving, then processing and disclosing, these records.

[48] The Applicant had a number of concerns about the adequacy of the Public Body's search, which I summarize as follows:

a. The Applicant expected to receive records of communications between employees of the Public Body and the Minister, news outlets, private persons, and citizen groups;
b. The Applicant expected to receive a registered copy of a survey;
c. The Applicant expected to receive records relating to an RCMP investigation; and
d. The Applicant questions the adequacy of the Public Body's external lawyer's search.

a. communications between the Public Body and the Public Body's Minister, etc.

[49] The Applicant believes that there were ongoing communications between employees of the Public Body and the Minister, news outlets, private persons, and citizen groups. The Applicant received a message that "the Minister is apparently receiving calls from the press". The Public Body searched the Minister's records, and they did not find any records related to communications with news outlets, private persons or citizens groups. The Public Body remarked that:

> The emails in question indicate that there may have been phone calls made and that there has been pressure. There are no dates referenced. The pressure referenced is not described. The Public Body does not believe that the emails provided support a belief that there must be undisclosed records between the Minister and the Deputy Minister as well as news outlets and

others responsive to the Applicant's access request. . .

[50] The Applicant's response was:

> . . . Of course, we cannot provide dates and descriptions of records that TIE possesses. That is why this FIOPPA request was made. TIE, not us, has the duty to disclose these records whether we give them specific dates or descriptions.

[51] The Public Body searched but did not find any such records. The Public Body described who searched, where, and the search terms they used for electronic records. They were prepared to search again but had no other information from the Applicant about their allegations that there were ongoing communications between the Public Body and the Minister of the Public Body, communications with news outlets, private persons, and citizens groups.

[52] The email exchange provided by the Applicant does not support a finding that the Public Body did not conduct an adequate search.

b. registered survey

[53] The Applicant noted that they did not receive a registered copy of a survey. Before this access request, the Public Body gave the Applicant an unregistered copy of a survey, but a registered copy of the same survey was not among the responsive records. The Applicant's lawyer advised the Applicant that the Public Body's lawyer ". . . didn't think [the survey] was registered in the Land Registry Office". I do not know if the survey was registered, but I did not ask for further details from the Public Body. If the survey was registered, it is available to the public. Pursuant to subclause 4(1)(h)(iii) of the *FOIPP*

Act, records made from information at the office of the Registry of Deeds are not subject to the *FOIPP Act*. Therefore, the Public Body is not required to search for, or disclose a registered copy of the survey, if it was registered.

[54] The failure of the Public Body to provide a registered copy of the survey does not support a finding that the Public Body did not conduct an adequate search.

c. records relating to vandalism, theft in an RCMP file

[55] The Applicant noted that they did not receive records relating to the vandalism or theft of their property, citing an RCMP file reference.

[56] The Public Body advises that they do not have in their custody or control any records related to an RCMP investigation. We have no reason to believe that the Public Body would have any records in their custody or control related to an RCMP file.

[57] The fact that the Public Body did not locate or retrieve or provide any records relating to vandalism or theft of their property, or records relating to an RCMP file does not support a finding that the Public Body did not conduct an adequate search.

d. external lawyer

[58] During the review, the Applicant expressed concerns about the adequacy of the search of the Public Body's external lawyer's records. The Public Body advised us that their external lawyer had searched their records and did not find any additional records. I wrote to the Public Body and asked if the Public Body claimed solicitor-client privilege on the emails between the Public Body's external lawyer and the Applicant's lawyer.

The Public Body advised our office that they had located and retrieved emails between the Public Body's external lawyer and the Applicant's lawyer, but did not provide them to the Applicant because the Public Body had assumed that the Applicant had received a copy from their own lawyer. In this response, the Public Body provided copies of records between the Public Body's external lawyer and the Applicant's lawyer.

[59] Applicants sometimes agree to exclude from their request any correspondence to or from themselves because they already have the information, and it reduces the number of responsive records and the cost. We are not aware that this was the agreement in this matter.

[60] Subsection 8(1) of the *FOIPP Act* requires public bodies to make every reasonable effort to assist an applicant and to respond to each applicant openly, accurately and completely. The Public Body did not initially advise the Applicant that they presumed the Applicant did not want these records. Nor did they advise our office when the Applicant provided copies of records that illustrated that responsive records were not included in the Public Body's response.

[61] As noted in Order FI-20-002, *supra,* if a public body approaches a request too narrowly, they may abrogate their duties under section 8 of the *FOIPP Act*. The Public Body made a unilateral decision of what records would be of interest to the Applicant. I find that the Public Body did not fulfill their duty to respond to the Applicant openly, accurately and completely, because they failed to confirm with the Applicant, the Public Body's assumption that the Applicant would not want records between the Public Body's lawyer and the Applicant's lawyer.

[62] I am not ordering the Public Body to process these records, because the Public Body recently gave copies of these records to the Applicant.

Conclusion regarding adequacy of the Public Body's search and section 8 duties

[63] The Public Body provided the particulars of who searched, where, and the search terms they used in electronic searches. On hearing the concerns of the Applicant, the Public Body undertook other searches. On the balance of probabilities, I find that the Public Body conducted adequate searches in the circumstances and made reasonable efforts to determine if there were any other responsive records.

[64] Although I find that the Public Body conducted an adequate search, I also find that the head of the Public Body did not communicate openly, accurately or completely with the Applicant as required under subsection 8(1) of the *FOIPP Act*.

VI. SUMMARY OF FINDINGS

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

[66] I find that the head of the Public Body conducted an adequate search, but did not communicate openly, accurately or completely with the Applicant as required under subsection 8(1) of the *FOIPP Act.*

VII. RECOMMENDATION

[67] When processing an access request, if the Public Body believes that an applicant is not interested in receiving responsive records that is correspondence to or from the Applicant, I recommend that the Public Body ask the Applicant to confirm this belief.

VIII. ORDER

[68] As I have determined that the head of the Public Body is authorized to refuse access to the records at issue under clause 25(1)(a) of the *FOIPP Act,* I will not order the Public Body to provide the Applicant with access to the records at issue. I confirm the decision of the head of the Public Body.

[69] I thank both parties for their submissions in this matter. 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 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.

SGD MARIA MACDONALD

Maria MacDonald, Adjudicator