ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-017

December 19, 1996

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1124

BACKGROUND

[1.] On May 21, 1996, Alberta Environmental Protection (the "public body") received the Applicant's request, under the *Freedom of Information and Protection of Privacy Act* (the "Act"), for access to the following documents in the custody or under the control of the public body:

> *Each & every piece of documentation including notes, minutes, memos (inter-office and/or inter-departmental), transcripts, letters, phone messages dealing with the discussions regarding & the events leading up to the amendment (by way of Order in Council O.C. #129/96) of Section 15 of the Waste Control Regulation found under the Environmental Protection & Enhancement Act, including the repealing of Clause (c) & (e) & the substitution of a new clause (e).*

[2.] On June 20, 1996, the public body provided access to some of the documents, but denied access to other relevant documents, claiming that the following sections of the Act applied to those documents: section 26(1)(a) (solicitor-client privilege) and (b) (legal services); section 23(1)(a) (advice), (b) (consultations or deliberations), and (e) (draft regulations).

[3.] Mediation was authorized between the Applicant and the public body, but was not successful. The matter was scheduled for inquiry on September 4, 1996.

[4.] Prior to the inquiry, I asked the public body to provide the Applicant with a page-referenced index showing the nature of the documents involved in the Applicant's access request, and showing the section numbers of the Act under which the information was excepted. That index was provided to the Applicant, through my Office, on August 15, 1996. On August 26, 1996, the public body provided an amended version of the index, which did not contain any new exceptions.

[5.] During the inquiry, I asked that the public body provide further evidence related to one of the issues in question, and that two legal issues be clarified. That information was provided to me and to the Applicant on September 18, 1996. I allowed the Applicant until September 30, 1996 to respond to the public body's additional information. The Applicant did not provide a further response.

RECORD AT ISSUE

[6.] The record consists of 128 pages of information relating to a draft regulation. The public body released 50 unsevered pages of the record to the Applicant, and provided another 78 pages in which the information on those pages was partly or entirely severed.

ISSUES

[7.] There are five issues in this inquiry:

A. Does the Information and Privacy Commissioner have a conflict of interest in hearing this inquiry?

B. Did the public body conduct an adequate search for responsive records?

C. Did the public body correctly apply section 26(1)(a) (solicitor-client privilege) and section 26(1)(b) (legal services) to the record?

D. Did the public body correctly apply section 23(1)(a) (advice), (b) (consultations or deliberations) and (e) (draft regulations) to the record?

E. Did the public body exercise its discretion properly under section 26(1)(a) and (b) and under section 23(1)?

DISCUSSION

Issue A: Does the Information and Privacy Commissioner have a conflict of interest in hearing this inquiry?

[8.] The Applicant raised this issue both at the beginning of the request for review and in the inquiry. The Applicant's concern about conflict of interest relates to my past association with the Alberta Special Waste Management Corporation ("ASWMC") before being appointed Information and Privacy Commissioner.

[9.] On July 10, 1996, I met with the Applicant to discuss the conflict of interest issue. After that meeting, I received a letter which stated that the Applicant had decided to accept whatever conflict of interest decision I arrived at.

[10.] From my knowledge of what this review is about, and from my review of the record, I could see no conflict between any past or present associations and my ability to take the present matter under review fairly and impartially. I communicated this decision in a July 18, 1996 letter to the Applicant.

[11.] I was associated with ASWMC from 1986 to 1992. I resigned on March 31, 1992. I have not since and do not now have any association with ASWMC. I have no interest in ASWMC or in any company that does. I was not associated with ASWMC at the time the regulation at issue was made, nor was I involved in any discussions leading up to amending this regulation.

Issue B: Did the public body conduct an adequate search for responsive records?

[12.] The Applicant claimed that although it gave as much detail as possible and sufficiently described the record it was seeking, the public body failed to provide the Applicant with what was requested. The Applicant stated that it is interested in learning what prompted the change in the regulation and what went into making the change. The Applicant is not interested in how the public body got its solicitors to write the amendment, but is interested in the environmental science basis for changing two definitions in the regulation. The Applicant believes it is left guessing who requested the change, and wants to know who made that request; how the change was made is not as important.

The Applicant believes there ought to be a wider search for relevant documents to answer these questions.

[13.] Before considering whether the public body conducted an adequate search, I must consider whether the Applicant provided enough detail to enable the public body to identify the record, as provided by section 7(2) of the Act.

[14.] The public body gave evidence that the Applicant's request was very specific. Consequently, the public body saw no need to clarify the Applicant's request.

[15.] I find that the Applicant provided sufficient detail to enable the public body to accurately identify the record.

[16.] I received oral evidence under oath relating to the search conducted by the public body. The full text of the Applicant's request was sent to all the "line contacts" within the public body. When the records came back from the line contacts, the public body reviewed those records for responsiveness. The public body stated that every file would have been searched for relevant documents. I asked the public body whether there was any follow-up to ensure that the line contacts complied with the request to provide relevant records. The public body responded that its automated database was searched and that line contacts were also questioned.

[17.] When asked about particular records, the public body stated that its automated tracking system will identify categories of records, but not individual records. This identification process is in keeping with the Act, which functions on a record basis, and not on a type-of-information basis. Since the Applicant's request focused on amendments and regulations, concerns about other issues the Applicant may have had in mind, and records relating to those issues, would not have been searched as part of the Applicant's specific request.

[18.] I find that the public body's interpretation of the Applicant's request was reasonable in the circumstances. Given the detail in the Applicant's request, I find that the public body acted reasonably in not seeking further clarification from the Applicant. Furthermore, based on the evidence given in both the public and the in camera parts of the inquiry, I am satisfied that the public body conducted an adequate search for the records. The only comfort I can offer the Applicant regarding records related to who initiated the amendment to the regulation is to say that the decision was internal to the public body; the initiative did not come from without. Because the evidence relating to this issue was given in camera, I may not discuss that evidence in this Order.

Issue C: Did the public body correctly apply section 26(1)(a) (solicitor-client privilege) and section 26(1)(b) (legal services) to the record?

[19.] Section 26(1)(a) and (b) read:

> *26(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 an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services.*

[20.] By way of preliminary clarification, I believe that section 26(1)(a) (solicitor-client privilege) is intended to encompass both aspects of solicitor-client privilege: (i) solicitor and client communications, and (ii) third party communications (sometimes referred to as "litigation privilege"). Since the public body's submission focused only on the former privilege, I do not intend to discuss the latter. Throughout this Order, I will refer to the solicitor and client communication aspect of solicitor-client privilege as simply "solicitor-client privilege."

[21.] If a document is subject to solicitor-client privilege, it means that the document is confidential and does not have to be disclosed. The public body applied section 26(1)(a) to the following pages of the record: 4-5, 6, 7-8, 9, 10, 11, 12-13, 14-15, 23, 24-27, 28-29, 31-32, 33-38, 39-41, 42-48, 50, 51, 52, 57, 63, 64, 65, 66, 67, 68-70, 71, 72-73, 74, 75-76, 77, 78, 79, 80, 81, 82, 83, 84-85, 86-93, 118-119, 120, 121, and 128.

[22.] To correctly apply section 26(1)(a), the public body must meet the criteria for that privilege. Those criteria are set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada states that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria for the privilege: (i) it is 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.

[23.] In Ontario Order 210, [1990] O.I.P.C. No. 71, "legal advice" has been defined to include "a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications." I accept that definition.

[24.] During the inquiry, I asked the public body whether the *Solosky* case contained a fourth criteria: an evidentiary connection, which means an intention that each document be used in a proceeding of any kind. I also asked the public body to rationalize the *Solosky* case with *Desc⊥teaux v. Mierzwinski*, [1982] 1 S.C.R. 860, which also sets out tests for solicitor-client privilege. The public body requested time to research those issues and report back to me in a supplementary brief.

[25.] The public body's supplementary brief reaffirmed the three criteria for determining whether solicitor-client privilege may be claimed for a document. According to the public body, an evidentiary connection is not required. Having reviewed the *Desc⊥teaux* case, I accept the public body's conclusion.

[26.] In *Desc⊥teaux*, the Supreme Court of Canada states that although the right to confidentiality of documents in a solicitor-client relationship first took the form of a rule of evidence (that is, the document had to be used in a proceeding), the right to confidentiality is now broader in scope. In the court's view, solicitor-client privilege has become a substantive rule, rather than just an evidentiary rule. This means that solicitor-client privilege may be raised in any circumstances, not just in proceedings. The court further stated that the conditions or criteria for the existence of the right to confidentiality are the three criteria set out in the *Solosky* case, and that by applying these criteria, *Solosky* in fact applied a substantive rule. The court in *Desc⊥teaux* formulated the substantive rule as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[27.] There is nothing in the Act that appears to modify the criteria for solicitor-client privilege, as set out in *Solosky* and in *Desc⊥teaux*. Consequently, the public body must meet the three criteria for solicitor-client privilege to apply to the documents in question. As Commissioner, I would also consider the substantive rule set out in *Desc⊥teaux* when reviewing a public body's claim that solicitor-client privilege applies to documents.

[28.] Did the public body meet the three criteria for solicitor-client privilege?

[29.] I accept the public body's evidence that it met the three criteria for solicitor-client privilege, and thus correctly applied section 26(1)(a) to the following pages of the record: 4-5, 6, 7-8, 9, 10, 12-13, 14-15, 24-27, 28-29, 31-32, 33-38, 39-41, 42-48, 50, 51, 52, 63, 64, 65, 66, 67, 69-70, 71, 72-73, 74, 75-76, 77, 78, 79, 80, 81, 82, 83, 84-85, 86-93, 118-119, 120, 121, and 128.

[30.] In concluding that these pages meet the three criteria for solicitor-client privilege, I have accepted that certain solicitors' briefing notes and working papers, directly related to the seeking or giving or legal advice, are also properly excepted under section 26(1)(a) (see Ontario Order 49, [1989] O.I.P.C. No. 13). I have also accepted that the public body did not waive solicitor-client privilege by "cc'ing" (copying) a number of the documents to other individuals, since those individuals appear to be lawyers, or employees within the confines of the public body (for a similar decision, see Ontario Order M-739, [1996] O.I.P.C. No. 116).

[31.] I find that the public body did not meet the three criteria for solicitor-client privilege, and thus did not correctly apply section 26(1)(a) to the following pages of the record: 11, 23, 57 and 68.

[32.] Pages 11 and 68 are facsimile cover sheets. The names and an Internet address have been severed on page 11, and one name has been severed on page 68, but the rest of the information on page 68 has been left intact. I do not see how the information on these two facsimile pages entails the giving or seeking of "legal advice", as previously defined (for a similar decision, see Ontario Order P-1241, [1996] O.I.P.C. No. 294).

[33.] Even if page 68 could be considered "legal advice", I find that there is a deemed waiver of solicitor-client privilege for page 68 because the privilege has not been claimed for the entire communication on that page. The following two cases provided by the public body support this reasoning. In *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.), the court said that severing is not a concept applicable to solicitor-client privilege. The privilege must be claimed for the entire document, or not at all. Furthermore, *Great*

Atlantic Insurance Co. v. Home Insurance Co., [1981] 2 All E.R. 485 (C.A.) supports the view that there is a deemed waiver of solicitor-client privilege when part of a document has been released.

[34.] Although I have decided that the public body did not correctly apply section 26(1)(a) to pages 11 and 68, I will nevertheless uphold the public body's decision to sever the names and other identifying information that it did sever on those pages. Section 16(2)(g) (disclosure of personal information) could apply to allow that information to be severed in this case.

[35.] Pages 23 and 57 are not communications between a solicitor and client. Furthermore, because there is no evidence that the public body intended to maintain confidentiality by restricting the use of the communication by the person who received it, the public body could be said to have waived solicitor-client privilege for pages 23 and 57 (for a similar decision, see Ontario Order M-19, [1992] O.I.P.C. No. 63).

[36.] Since the public body did not correctly apply section 26(1)(a) to pages 23 and 57, I must consider whether the public body correctly applied section 26(1)(b) (legal services) to those pages.

[37.] I intend to give "legal services" its ordinary dictionary meaning. As such, "legal services" would include any law-related service performed by a person licensed to practice law.

[38.] Section 26(1)(b) allows an exception for information prepared *in relation to* [my emphasis] a matter involving the provision of legal services. As such, the section is broader than solicitor-client privilege. Neither British Columbia nor Ontario has a similar section in its legislation.

[39.] Pages 23 and 57 of the record contain information, prepared by a Justice Department lawyer, in relation to a matter that involves providing legal services to the public body. Consequently, the public body correctly applied section 26(1)(b) to those two pages.

[40.] Having made the foregoing decisions, I do not find it necessary to consider the substantive rule set out in *Desc⊥teaux*.

Issue D: Did the public body correctly apply section 23(1) (a) (advice), (b) (consultations or deliberations) and (e) (draft regulations) to the record?

[41.] Since the public body correctly applied section 26(1)(a) and (b) and section 16(2)(g) to the pages of the record previously mentioned, I do not intend to deal with the public body's claim that section 23(1)(a) and (b) also apply to several of those same pages of the record.

[42.] The only remaining page of the record is page 59, which the public body excepted under section 23(1)(e).

[43.] Section 23(1)(e) reads:

> *23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council.*

[44.] I have reviewed page 59. The information on this page could reasonably be expected to reveal the contents of a draft regulation. Consequently, I find that the public body correctly applied section 23(1)(e) to page 59 of the record.

Conclusion as to Issues C and D:

[45.] The public body correctly applied the following sections of the Act to the record: section 26(1)(a) (73 pages); section 26(1)(b) (2 pages); and section 23(1)(e) (1 page). In other words, the public body correctly applied those sections of the Act to 76 pages of the record on which it severed information. I have applied section 16(2)(g) to the remaining 2 pages of the record on which information was severed.

Issue E: Did the public body exercise its discretion properly under section 26(1)(a) and (b) and under section 23(1)(e)?

[46.] Section 26(1)(a) and (b) and section 23(1)(e) are discretionary ("may") exceptions. On the surface, these sections appear to allow the public body a choice as to whether or not to disclose information. Are there any limits on how the public body may make its choice; in other words, exercise its discretion?

[47.] The courts have considered that issue in both *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147, affirmed (1993), 154 N.R. 319 (Fed. C.A.) and in *Rubin v. C.M.H.C.* (1988), 52 D.L.R. (4th) 671 (Fed. C.A.). Both these cases set out a two-step decision-making process (under federal access and privacy legislation): (i) a factual decision, namely, a determination as to whether the information comes within the description of information potentially subject to being withheld from disclosure, and (ii) a discretionary decision, namely, whether that information should nevertheless be disclosed, even though the exception applies.

[48.] I do not agree with the public body's contention that a factual determination of whether or not an exception applies is an exercise of discretion. There is no discretion to wrongly apply an exception. The discretionary decision comes into play after the public body has determined that the exception applies. The discretion relates to the decision as to whether the information should nevertheless be disclosed, even though an exception *may* [my emphasis] properly be claimed.

[49.] A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."

[50.] The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.

[51.] In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.

[52.] The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5). Although a client which is a public body has the discretion to waive solicitor-client privilege, that public body also has considerable obligations under the Act. Therefore, in exercising its discretion, a public body must take all relevant factors into consideration when deciding not to waive solicitor-client privilege.

[53.] In British Columbia Order No. 91-1996, [1996] B.C.I.P.C.D. No. 17, the Commissioner further stated that a public body must exercise its discretion "in good faith, and not for an improper purpose, or based on irrelevant considerations". However, the Commissioner believed that arguments of a more technical and legal nature, such as whether discretion has been fettered,

are more properly a matter for a court of law to decide, and not something the Commissioner should determine under the legislation.

[54.] In Ontario, the issue of discretion in relation to solicitor-client privilege has arisen in Order M-520, [1995] O.I.P.C. No. 183. The inquiry officer in that case stated that in making solicitor-client privilege a discretionary exception, the legislature recognized that documents created as part of the solicitor-client relationship, in and of themselves, should not always attract the protection of the exception; that it is important to consider the purpose of the information and privacy legislation when considering the application of the exception to particular documents; and that two of the purposes are that information should be available to the public and that necessary exceptions from the right of access should be limited and specific. According to the inquiry officer, a broad application of the exception to any correspondence between a solicitor and his client, regardless of the content, is inconsistent with the purposes of the legislation.

[55.] In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.

[56.] I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[57.] I must now consider whether I may review a discretionary decision.

[58.] A factual decision as to whether an exception applies to information is reviewable. If I find that the public body did not correctly apply an exception, I can substitute my own decision.

[59.] A discretionary decision is also reviewable. On this issue, the public body and I disagree.

[60.] The court in both the *Kelly* and *Rubin* cases states that an exercise of discretion is reviewable to determine whether the discretion has been exercised according to the objects and purposes of the legislation in question, and to ensure that the discretion has not been exercised for an improper or irrelevant purpose. However, both these cases are in agreement that the person who

reviews the exercise of discretion cannot exercise the discretion *de novo*. In other words, I cannot substitute my own decision if I find that the discretion has not been exercised properly. I must return a decision involving an improper exercise of discretion to the original decision-maker for reconsideration.

[61.] In Ontario, the Commissioner has stated that it is the responsibility of the Commissioner to ensure that the head has properly exercised his discretion under the information and privacy legislation (Ontario Order 163, [1990] O.I.P.C. No. 27). The Commissioner made the same statement in Ontario Order 58, [1989] O.I.P.C. No. 22, in response to the public body's claim that once a head determines that the record falls within the scope of a discretionary exception, the decision to release the record or not is entirely the head's to make. The Commissioner said that while he may not have the authority to substitute his discretion for that of the head, in the appropriate circumstances he can order a head to reconsider the exercise of discretion if he feels it has not been done properly.

[62.] In British Columbia, the Commissioner has stated that his role in reviewing an exercise of discretion relates to ensuring that the underlying policies and goals of the legislation are taken into account. The Commissioner has accepted that his overview of the exercise of discretion by a head should be limited to "whether the discretion was exercised in good faith, and not for an improper purpose, or based on irrelevant considerations" (British Columbia Order No. 91-1996, [1996] B.C.I.P.C.D. No. 17).

[63.] In the present case, the public body has not provided any representations outlining the factors which were considered by the head when exercising his discretion in favour of non-disclosure of the information excepted under either section 26(1)(a) or (b) or under section 23(1)(e). In particular, there is no evidence before me that the public body considered the objects and purposes of the Act when exercising its discretion. Consequently, I am not satisfied that the public body exercised its discretion properly under section 26(1)(a) and (b) and section 23(1)(e).

[64.] Since I may not exercise the discretion *de novo* (that is, in the place of the head), I must return the decision to the public body. I believe that section 68(2)(b) of the Act is the mechanism by which I may return a decision, on the ground that the discretion has been improperly exercised. The Government of Alberta *Freedom of Information and Protection of Privacy Policy Manual* also supports this view (see page 179).

ORDER

[65.] As required by section 68(1), I make the following order disposing of the issues in this inquiry:

1. I do not have a conflict of interest in hearing this inquiry.

2. The public body conducted an adequate search for responsive records.

3. Except as noted, the public body correctly applied the Act to the information contained in the record. Having found that the public body correctly applied the Act, I can either confirm the head's decision or require the head to reconsider his decision, as provided by section 68(2)(b). Because I am not satisfied that the head considered the objects and purposes of the Act when exercising his discretion to refuse disclosure, I order that the head reconsider his decision (except for the personal information on pages 11 and 68), particularly with respect to the following twenty-seven pages of the record: 4-5, 7-8, 9, 10, 14, 51, 52, 59, 63, 64, 65, 66, 69-70, 71, 72-73, 74, 77, 78, 79, 80, 82, 120, and 128.

[66.] As provided by section 68(4), this Order is made with the following terms and conditions:

(i) The reconsideration must be made within 30 days of receiving a copy of this Order.

(ii) In reconsidering his decision, the head must keep in mind the main object and purpose of the Act, namely, access.

(iii) Written reasons for the decision resulting from this reconsideration must be given to the Applicant, and a copy sent to my office, within the 30-day period set out in (i) above.

Robert C. Clark
Information and Privacy Commissioner