ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-016

January 14, 1999

ALBERTA JUSTICE

Review Number 1426

I. BACKGROUND

[para 1.] The Applicant was charged under the Criminal Code. Two of the charges were "stayed" and the third one was withdrawn by the Crown. [1] On January 26, 1998, the Applicant applied to Alberta Justice for access under the *Freedom of Information and Protection of Privacy Act* (the "Act") to all the documents and correspondence, which pertained to the RCMP file regarding the charges, held in the possession of the local Crown Prosecutors' Office or any other agency of the Provincial Government of Alberta.

[para 2.] Alberta Justice denied the Applicant's request for access, on the following grounds:

i. At the time of the request, the one-year stay of proceedings was to expire on June 9, 1998. Initially, Alberta Justice relied on section 4(1)(g) of the Act, which provides that the Act does not apply to records relating to a prosecution if all proceedings in respect of the prosecution have not been completed. After June 9, 1998, the one-year period had elapsed, and section 4(1)(g) no longer applied.
ii. A number of the records had already been disclosed as part of the Crown's obligation to provide full disclosure to an accused before trial.
iii. A number of the records were prepared by the Applicant's lawyer or sent to the Applicant's lawyer.

[1] A "stay" is a suspension of the proceedings.

iv. Section 26(1) (privileged information) of the Act applied to the remaining 14 letters and memoranda.

[para 3.] On April 20, 1998, the Applicant made a request to me as Commissioner to review Alberta Justice's decision.

[para 4.] On November 18, 1998, the inquiry was conducted in public, except for an "in camera" session with Alberta Justice when a review of the records was conducted. Before the inquiry, it was agreed by the parties that the 14 letters and memoranda were the only records at issue. The records publicly available through the courts and all records previously disclosed to the Applicant or the Applicant's lawyer by the prosecution were not subject to the inquiry.

[para 5.] Prior to the inquiry, my office arranged to have the Applicant's and the Alberta Justice's submissions exchanged. At the inquiry, Alberta Justice provided further submissions on the issue of waiver. At the conclusion of the inquiry I asked that both parties supply further information and I also provided the Applicant with the opportunity to respond to Alberta Justice's submission on the issue of waiver.

II. RECORDS AT ISSUE

[para 6.] The 14 records at issue consist of the following:

i. Records #2, 5, 6, 7, 8, 10, are letters between the Crown Prosecutors' Office and the RCMP;
ii. Record #12 is a memorandum between the RCMP and the Crown Prosecutor's Office;
iii. Records #1, 3, 9, 11,13, 14 are memoranda written to file by the Crown Prosecutors assigned to the file;
iv. Record #4 is a memorandum from a Crown Prosecutor to the Chief Crown Prosecutor.

[para 7.] Collectively, I will refer to all the records as the "Records".

III. ISSUES

[para 8.] There are five issues in this inquiry:

Issue A: Did Alberta Justice correctly apply section 26(1)(b) (legal services) to the Records?

Issue B: Did Alberta Justice correctly apply section 26(1)(c) (correspondence involving the provision of advice or other service) to the Records?

Issue C: Did Alberta Justice correctly apply section 26(1)(a) (legal privilege) to the Records?

Issue D: By waiving the non-disclosure agreement with the federal government relating to information obtained or prepared by the RCMP while performing policing services for the province, did Alberta Justice also waive its ability to apply exceptions to that same information under the Act?

Issue E: Did Alberta Justice exercise its discretion properly under sections 26(1)(a)(b)(c)?

III. DISCUSSION OF THE ISSUES

A. Position of the Applicant

[para 9.] It is the Applicant's position that the Records pertain to the Applicant and would assist the Applicant by showing that the Applicant was subject to a malicious prosecution. In addition, the Applicant states that Alberta Justice issued a waiver to the RCMP, which waived Alberta Justice's ability to withhold the Records under the Act.

B. Position of Alberta Justice

[para 10.] Alberta Justice claims that sections 26(1)(a)(b)(c) apply to each Record. Moreover, they state that the head of Alberta Justice has properly exercised his discretion by considering the objectives and purposes of the Act. Alberta Justice also states that it waived the non-disclosure agreement and not its ability to withhold the Records under the Act.

C. My Approach in this Order

[para 11.] I intend to deal with sections 26(1)(b) and 26(1)(c) before considering section 26(1)(a).

D. Application of the Exceptions

Issue A: Did Alberta Justice correctly apply section 26(1)(b) (legal services) to the Records?

[para 12.] Section 26(1)(b) provides:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(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.*

[para 13.] In Order 96-017, I said that 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. I also said that section 26(1)(b) allows an exception for information prepared *in relation to* [my emphasis] a matter involving the provision of legal services.

[para 14.] Records #1, 3, 9, 11, 13, 14 are memoranda written to file by the Crown prosecutors assigned to the file, and Record #4 is a memo from a Crown Prosecutor to the Chief Crown Prosecutor. At the inquiry, the witness for Alberta Justice described these records as memoranda containing a Crown counsel's own comments on a case, (noting any weaknesses in the case), problems with respect to witnesses, additional witnesses that might be called and general thoughts on the case.

[para 15.] These records were prepared by lawyers of the Minister of Justice and Attorney General in relation to a matter involving the provision of legal services: the criminal prosecution of the Applicant. Consequently, I find that Alberta Justice correctly applied section 26(1)(b) to these records.

Issue B: Did Alberta Justice correctly apply section 26(1)(c) (correspondence involving the provision of advice) to the Records?

[para 16.] Section 26(1)(c) provides:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.*

[para 17.] In order for a record to qualify for an exception under section 26(1)(c), a public body must meet the following criteria:

i. The record must be correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person; and
ii. The information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer.

Criterion (i): Was there correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person?

[para 18.] Records #2, 5, 6, 7, 8, 10 are letters between the Crown Prosecutors' Office and the RCMP. Record #12 is a memo between the RCMP and the Crown Prosecutor's Office.

[para 19.] The correspondence is between Crown prosecutors who are lawyers of the Minister of Justice and Attorney General and the RCMP. The RCMP can be considered as "any other person". Therefore, the first criterion has been met.

Criterion (ii): Was the information in the correspondence in relation to a matter involving the provision of advice or other services by the agent or lawyer?

[para 20.] Alberta Justice provided evidence to show that the records were prepared specifically in relation to the prosecution of the Applicant. Evidence showed that the Records were letters about requests or suggestions regarding the file, including instructions to the RCMP with respect to what charges ought to be laid. The purpose of the records was to appropriately exercise prosecutorial discretion as to the criminal charges and to review the evidence for those charges. Therefore, the second criterion is met because the prosecution of criminal charges is a service provided by the Crown Prosecutor's Office.

Issue C: Did Alberta Justice correctly apply section 26(1)(a) (legal privilege) to the Records?

[para 21.] Having found that Alberta Justice correctly applied sections 26(1)(b) and 26(1)(c), I do not find it necessary to also consider whether Alberta Justice correctly applied section 26(1)(a) to those same records.

Issue D: By waiving the non-disclosure agreement with the federal government relating to information obtained or prepared by the RCMP while performing policing services for the province, did Alberta Justice also waive its ability to apply exceptions to that same information under the Act?

[para 22.] At the inquiry, the Applicant stated that the Applicant had also made an access request to the RCMP pursuant to the federal access and privacy legislation. The Applicant stated in the inquiry that, as a result of the request, the RCMP disclosed numerous documents, five of which were copies of the records at issue. Four of the five documents were the same as those withheld by Alberta Justice and the fifth document was a duplicate of one of the four.

[para 23.] Alberta Justice stated that it was unaware that the RCMP had disclosed copies of the Records. According to Alberta Justice, there is usually some consultation before such disclosure occurs. Nevertheless, Alberta Justice stated that it was still maintaining that section 26(1) applied to these records. In view of the RCMP's

disclosure, the Applicant argued that Alberta Justice had waived its right to withhold those documents under the Act.

[para 24.] Alberta Justice provided evidence to show that, on June 23, 1983, Alberta entered into a non-disclosure agreement with the federal government. This agreement prohibits all federal government institutions from disclosing any information including personal information obtained or prepared by the RCMP while performing policing services for the province. This agreement reflects the provisions in the federal access and privacy legislation, as follows.

[para 25.] Section 16(3) of federal *Access to Information Act*, R.C.S., 1985, c. A-1states:

> *16(3) Policing services for provinces or municipalities- The head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province of municipality pursuant to an arrangement made under section 20 of the Royal Canadian Mounted Police Act, where the Government of Canada has, on the request of the province or municipality agreed not to disclose such information.*

[para 26.] Section 22(2) of the federal *Privacy Act* R.S.C., 1985 c. P-21, states:

> *22(2) The head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or a municipality pursuant to an arrangement made under section 20 of the Royal Canadian Mounted Police Act, where the Government of Canada has, on the request of the province or municipality, agreed not to disclose such information.*

[para 27.] Consequently, when the RCMP receives an access request concerning records that were obtained or prepared by the RCMP while performing policing services for the province of Alberta, the RCMP must first ask Alberta whether it will waive the non-disclosure agreement, before it proceeds with the access request. Alberta Justice provided evidence that the RCMP did ask whether Alberta Justice would waive the non-disclosure agreement in order for the RCMP to respond to the Applicant's request, and that Alberta agreed to waive the non-disclosure agreement. The RCMP then proceeded with the Applicant's access request according to the provisions of the federal legislation.

[para 28.] I understand that the waiver of the non-disclosure agreement pertained only to the RCMP's ability to respond to the Applicant's federal access request. Without

that waiver, the RCMP would not have been able to review their records under the federal legislation.

[para 29.] In my view, neither the waiver of the non-disclosure agreement, nor the RCMP's subsequent disclosure of records under the federal access legislation, prevents Alberta Justice from applying exceptions to the Records. The federal and provincial processes for obtaining access are separate.

[para 30.] I conclude that Alberta Justice did not waive its ability to apply exceptions to the Records under the Act, contrary to what the Applicant believes.

Issue E: Did Alberta Justice exercise its discretion properly under sections 26(1)(b)and 26(1)(c)?

[para 31.] In Order 96-017, I discussed the two-step decision-making process a public body must do when claiming a discretionary exception such as section 26(1).

[para 32.] In an inquiry, a public body must provide evidence on how a particular exception applies; and secondly, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold access to information. Consequently, Alberta Justice must show that it considered the purposes of the Act, one of which includes allowing access to information.

[para 33.] I find that Alberta Justice provided direct evidence through its witness to show that sections 26(1)(b) and 26(1)(c) applied to the Records. However, Alberta Justice did not provide direct evidence to show how the head exercised its discretion. Often, this evidence can be given by the public body's FOIP coordinator or the person responsible for reviewing the records.

[para 34.] Nonetheless, Alberta Justice did provide by way of argument and by written submission that it did exercise its discretion properly under this Request for Access. It is preferable, especially in an oral inquiry, to have a witness give evidence on this point.

[para 35.] However, I find from a review of the Records and the submissions that it appeared that Alberta Justice exercised its discretion properly under sections 26(1)(b) and 26(1)(c).

V. ORDER:

[para 36.] Under section 68 of the Act, I make the following Order:

1. Alberta Justice correctly applied section 26(1)(b) of the Act Records # 1, 3, 4 , 9, 11, 13, 14.

2. Alberta Justice correctly applied section 26(1)(c) of the Act Records #2, 5, 6, 7, 8, 10,12.

3. Having reached these decisions, I do not find it necessary to decide whether Alberta Justice correctly applied section 26(1)(a) to those same Records.

4. By waiving the non-disclosure agreement with the federal government relating to information obtained or prepared by the RCMP while performing policing services for the province, Alberta Justice did not waive its ability to apply exceptions to that same information under the Act.

5. Consequently, I uphold the head's decision to refuse access to the Records requested.

Robert C. Clark
Information & Privacy Commissioner