ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-031

March 19, 2001

ALBERTA HEALTH AND WELLNESS

Review Number 1830

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Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* to Alberta Health and Wellness. In that request, the Applicant requested information regarding the contracting-out by the Government of Alberta and Regional Health Authorities of insured and non-insured services to private, for-profit providers. Alberta Health and Wellness responded to the request by providing the Applicant with 60 of 69 responsive pages of records. Alberta Health and Wellness withheld 9 pages of records under sections 26(1)(a) and 26(1)(b). The Commissioner held that the records were subject to solicitor-client privilege and therefore agreed with Alberta Health and Wellness' decision to withhold these records under section 26(1)(a). The Commissioner also addressed section 31(1)(b) and said that this section did not require Alberta Health and Wellness to disclose the information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, ss. 2(a), 26(1)(a), 26(1)(b), 31(1)(b), 67, 68, 87(4)(b).

Authorities Cited: AB: Orders 96-002, 96-014, 96-017, 96-020, 98-011, 98-017, 98-019.

Cases Cited: *Solosky* v. *The Queen* (1980) 1 S.C.R. 821 (S.C.C.); *Balabel* v. *Air India*, (1988) 2 All E.R. 246 (C.A.).

I. BACKGROUND

[para 1.] On November 22, 1999, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Health and Wellness (the "Public Body") for :

> "Copies of all correspondence, letters, memoranda, studies, business plans, reports, and background papers prepared by or received by the Ministry of Executive Council/ Office of the Premier, for the period January 1, 1999 to November 22, 1999, regarding the contracting-out by the Government of Alberta and Regional Health Authorities of insured and non-insured services to private, for-profit providers."

[para 2.] On February 3, 2000, the Public Body responded to the access request, partially or entirely withholding 32 of 69 responsive pages of records. The Public Body cited sections 21, 23 and 26 of the Act as its authority to withhold the records. I note that on February 3, 2000, the Public Body also disclosed 11 non-responsive pages outside the Act.

[para 3.] On February 17, 2000, the Applicant requested a review of the Public Body's decision.

[para 4.] On July 21, 2000, the Minister of Health and Wellness disclosed, through a press release, 60 of the 69 records at issue. These records were disclosed outside of the process outlined in the Act.

[para 5.] On July 25, 2000, the Public Body disclosed, to the Applicant, the same 60 records that were publicly disclosed on July 21, 2000. However, the Public Body continued to withhold nine records under sections 26(1)(a) and 26(1)((b). As such, at the date of the inquiry, only nine records remain at issue.

II. RECORDS AT ISSUE

[para 6.] The records at issue consist of nine pages of text. These pages are numbered as 37, 38, 39, 40, 51, 59, 60, 61 and 62. In this Order, I will refer to each record by page number and will refer to all the pages collectively as the "records".

III. ISSUES

[para 7.] There are three issues in this inquiry:

A) Did the Public Body properly apply section 26(1)(a) to the records?

B) Did the Public Body properly apply section 26(1)(b) to the records?

C) Does section 31(1)(b) require the Public Body to disclose the information in the records?

IV. BURDEN OF PROOF

[para 8.] Section 67 of the Act addresses the burden of proof. This section reads as follows:

> *67(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.*
>
> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*
>
> *(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> >
> > *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 9.] In this inquiry, the Public Body refused to give the Applicant access to the information in the records at issue. Therefore, pursuant to section 67(1), the Public Body has the burden of proof in regard to sections 26(1)(a) and 26(1)(b).

[para 10.] However, section 67 does not establish which party has the burden of proof in regard to section 31(1)(b). In prior orders I said that when making this type of determination, I will consider, among others, the following criteria:

(a) who raised the issue, and

(b) who is in the best position to meet the burden of proof.

[para 11.] In this inquiry, the Applicant raised section 31(1)(b) as an issue and, in my opinion, is in the best position to meet the burden of proof. As such, the Applicant bears the burden of proof in regard to this section.

V. DISCUSSION

(A) Did the Public Body properly apply section 26(1)(a) to the records?

[para 12.] Section 26(1)(a) reads:

> *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.*

[para 13.] In Order 96-017, I said that to correctly apply solicitor-client privilege under section 26(1)(a), the public body must meet the common law criteria for that privilege which was set out in *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and that each document must meet the following criteria:

> (i) it must be a communication between solicitor and client;
>
> (ii) which entails the seeking or giving of legal advice; and
>
> (iii) it must be intended to be confidential by the parties.

(1) Is the information in the records a communication between a solicitor and a client?

[para 14.] The Public Body states that the information in the records are communications between a solicitor and a client. The Public Body states that the records show, on their face, that they are communications between the Public Body and Alberta Justice lawyers who were acting in their capacity as barristers and solicitors.

[para 15.] After a careful review of the records, I find that all of the records fulfill this criterion. The records entail a communication between the Public Body and Alberta Justice lawyers who were acting in their capacity as barristers and solicitors.

(2) Does the information in the records entail the seeking or giving of legal advice?

[para 16.] The Public Body states that the information in the records entail the seeking or giving of legal advice. The Public Body states that in order for a record to involve the seeking or giving of legal advice, it is not necessary that the communication specifically request or offer advice. It is sufficient if the record can be placed in the continuum of communication in which the solicitor tenders advice.

[para 17.] In Order 96-017, I defined the term "legal advice" as including "a legal opinion about a legal issue, and a course of action, based on legal considerations, regarding a matter with legal implications".

[para 18.] Furthermore, in Order 96-020, I said that solicitor-client privilege will apply to a continuum of legal advice. This continuum includes not only telling the client the law, but also advice as to what should be done in the relevant legal context. In support, I referred to the English Court of Appeal decision of *Balabel* v. *Air India*, [1988] 2 All E.R. 246 [C.A.]. At page 254 the Court stated:

> *There will be a continuum of communications between solicitor and client… Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach… Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.*

[para 19.] After a review of the records at issue, I find that this criterion is met. I find that the information in the records entail the seeking or giving of legal advice. The records consist of e-mails between an Alberta Justice lawyer and the Public Body, which either request or provide legal advice. In these e-mails, the Alberta Justice lawyer provides specific advice regarding the law, but also other information that I find falls within the continuum of legal advice.

(3) Was the information intended to be confidential by the parties?

[para 20.] The Public Body states that the information in the records was intended to be confidential. The Public Body states that all legal advice given by Alberta Justice counsel to its client departments is impliedly and expressly confidential.

[para 21.] After a review of the submissions and after reviewing the nature and content of the records at issue, I find that the information in the records was intended to be confidential by the parties.

(4) Did the Public Body waive its privilege over the information in the records?

[para 22.] The Applicant states that the records are no longer subject to solicitor-client privilege under section 26(1)(a). The Applicant states that the Public Body already disclosed a number of records on July 21, 2000, regarding the development of the Policy Statement on the Delivery of Surgical Services and the Health Care Protection Act. The Applicant states that the remaining records at issue in this inquiry address the same subject matter and therefore cannot be considered confidential. In essence, the Applicant appears to be arguing that by disclosing this

information, the Public Body has waived its solicitor-client privilege in regard to the nine records at issue.

[para 23.] The Public Body states that it did not waive its solicitor-client privilege over the information in the records. The Public Body states that the privilege that arises out of the professional legal relationship is that of the client. The Public Body states that only the client, who in this inquiry is the Public Body, can consent to waive the solicitor-client privilege. In this case, the Public Body states that it has not consented to waive this privilege.

[para 24.] In Order 98-017, I defined the term waiver as "the intentional or voluntary relinquishment of a known right". In the case of solicitor-client privilege, the "right" is the ability to maintain the confidentiality of information that meets the criteria for the privilege.

[para 25.] On February 3, 1999, the Public Body disclosed 32 of 69 responsive records and 11 non-responsive records to the Applicant. On July 25, 2000, the Public Body disclosed 60 of 69 responsive records to the Applicant. After a review of these records, I find that they do not contain the same information as the remaining nine records at issue in this inquiry. I do not find that the Public Body waived solicitor-client privilege in regard to these nine records.

(5) Did the Public Body properly exercise its discretion under section 26(1)(a)?

[para 26.] Section 26(1)(a) is a discretionary ("may") provision in that, even if the section applies, a public body has a choice as to whether to disclose or withhold the information. To exercise its discretion properly, the Public Body must show that it considered the objects and purposes of the Act and that it did not exercise its discretion for an improper or irrelevant purpose.

[para 27.] The Public Body states that it properly exercised its discretion. The Public Body states that it considered the objects and purposes of the Act and balanced the Applicant's right to information with the principle of solicitor-client privilege. The Public Body states that it considered that, under section 2(a), the purpose of the Act is to allow any person a right of access to the records in the custody or under the control of a public body, subject to limited and specific exceptions.

[para 28.] After a review of the submissions and the records at issue, I am satisfied that the Public Body considered the objects and purposes of the Act and did not exercise its discretion for an improper or irrelevant purpose. I find that the Public Body properly exercised its discretion under section 26(1)(a). In coming to this conclusion, I took into account that the Public Body disclosed the vast majority of records at issue (60 of 69 records) to the Applicant.

(B) Did the Public Body properly apply section 26(1)(b) to the records?

[para 29.] As I have determined that the Public Body properly withheld the information in the records at issue under section 26(1)(a), I do not find it necessary to decide whether the Public Body properly applied section 26(1)(b) to that same information.

(C) Does section 31(1)(b) require the Public Body to disclose the information in the records?

[para 30.] The Applicant argues that the information in the records should be disclosed under section 31(1)(b). Section 31(1)(b) states:

> *31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> ...
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[para 31.] The Applicant states that section 31(1)(b) applies to the records because it is critical that the public be clearly appraised of all the issues regarding changes in the delivery of health services, including the provision of insured and non-insured health care services by private providers under contractual arrangements with the Regional Health Authorities. The Applicant argues that Albertans are extremely concerned about the erosion in the quality of health care in the province and have expressed consistent disapproval of the government's handling of health care. The Applicant also stated that the criteria used to determine public interest under section 87(4)(b) (fee waiver) as set out in Order 96-002, may also be used to determine public interest under section 31(1)(b).

[para 32.] I do not agree with the Applicant. I find that section 31(1)(b) does not require the Public Body to disclose the information in the records.

[para 33.] As I stated in Orders 98-011 and 98-019, I find that the criteria relevant to the issue of public interest under section 87(4)(b) are not relevant to a determination under section 31(1)(b). While both sections refer to the term "public interest", the test applied under each of these sections is distinct.

[para 34.] Obviously, there are some Albertans that have genuine concerns about various portions of the health care system. However, the information in the records largely concerns the legal interpretation of several words and phrases and does not concern the quality of health care as such. In Order 96-014, Mr. Justice Cairns considered what type of information would qualify as "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest".

[para 35.] In this case, the Applicant has not established that the information in the records relates to a compelling public interest. I do not find that there is any information in the records that would substantiate the public interest concerns raised by the Applicant.

VI. ORDER

[para 36.] I make the following Order under section 68 of the Act.

A) Did the Public Body properly apply section 26(1)(a) to the records?

[para 37.] I find that the Public Body properly applied section 26(1)(a) to the records. In addition, I find that the Public Body properly exercised its discretion under section 26(1)(a) in regard to those records. Therefore, I uphold the Public Body's decision to withhold this information from the Applicant.

B) Did the Public Body properly apply section 26(1)(b) to the records?

[para 38.] As I have determined that the Public Body properly withheld the information in the records at issue under section 26(1)(a), I do not find it necessary to decide whether the Public Body properly applied section 26(1)(b) to that same information.

C) Does section 31(1)(b) require the Public Body to disclose the information in the records?

[para 39.] I find that section 31(1)(b) does not require the Public Body to disclose the information in the records.

Robert C. Clark
Information and Privacy Commissioner