

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2002-007

September 19, 2002

ALBERTA JUSTICE

Review Number 2264

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant applied to Alberta Justice (the “Public Body”) for access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the details of billing and the fees the Public Body paid to solicitors who represented both the Public Body and the Public Body’s employee in two related lawsuits, one against the Public Body and one against the Public Body’s employee. The Commissioner found that solicitor-client privilege applied to the solicitors’ statements of accounts. However, he could not distinguish between the information to which solicitor-client privilege of the Public Body applied (section 27(1)(a) of the Act, a discretionary provision allowing the Public Body to disclose privileged information of the Public Body), and the information to which solicitor-client privilege of the employee applied (section 27(1)(a) and section 27(2) of the Act, a mandatory provision requiring the Public Body to refuse to disclose privileged information of a person other than a public body). Therefore, the Commissioner adopted an all or nothing approach and found that section 27(2) of the Act applied to prevent disclosure of the solicitors’ statements of accounts.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27(1)(a), (b) and (c) [previously section 26(1)(a), (b) and (c)], 27(2) [previously section 26(2)], 32 [previously section 31], 72 [previously section 68].

Orders Cited: AB: Orders 96-015, 96-019, 99-022.

Authorities Cited: *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.), affirming [1997] 2 F.C. 759 (T.D.); *Matthison v. Odishaw*, 1999 ABQB 207; *Municipal Insurance Assn. of British Columbia v. British Columbia Information and Privacy Commissioner* (1996), 143 D.L.R. (4th) 134 (B.C. S.C.).

I. BACKGROUND

[para 1] On July 30, 2001, the Applicant applied to Alberta Justice (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”), for access to the details of billing and the fees the Public Body paid to solicitors who represented both the Public Body and the Public Body’s employee in two related lawsuits, one against the Public Body and one against the Public Body’s employee.

[para 2] The Applicant’s request was for the time period from March 1999 to the date of the access request.

[para 3] On August 15, 2001, the Public Body denied access to the requested information under section 27(1) [previously section 26(1)] (privileged information) and section 27(2) [previously section 26(2)] of the Act (privileged information relating to a person other than a public body).

[para 4] By letter dated September 1, 2001, the Applicant requested a review of the Public Body’s decision. In that letter, the Applicant said:

I am not interested in the details of any solicitor-client communication in this matter, nor do I require detailed billing information (steps taken, costs per billing item, hourly rates, costs of disbursements etc). I am only interested in the total value of fees, disbursements and GST charged to the government by its legal counsel in these matters. Surely the disclosure of this information would not violate the solicitor-client confidentiality between the government and its lawyers?

[para 5] Mediation was authorized but was not successful. The matters were set down for a written inquiry.

[para 6] For the inquiry, the Public Body provided two statements of account from a firm of solicitors employed by the Public Body in the two lawsuits. Both statements of account had 2001 dates. When asked whether there might be responsive records from an earlier date as set out in the Applicant’s access request, the Public Body located statements of account rendered by a firm of solicitors previously employed by the Public Body, and provided those records to this Office.

[para 7] On January 1, 2002, the revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, came into force. Most of the section numbers of the Act changed, but not the substance of the sections. In this Order, the previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 8] The records at issue consist of a number of statements of account submitted by the solicitors who represented both the Public Body and the Public Body's employee, as well as cover letters setting out the amounts billed. In this Order, I will refer to those records collectively as the "Records".

[para 9] A July 31, 2001 statement of account is one day outside of the Applicant's access request. However, I intend to consider it since the Public Body provided it for the inquiry and said it was a record at issue.

III. ISSUES

[para 10] There are two issues in this inquiry:

A. Did the Public Body properly apply section 27(1) [previously section 26(1)] of the Act (privileged information) to the records or information?

B. Does section 27(2) [previously section 26(2)] of the Act (privileged information of a person other than a public body) apply to the records or information?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body properly apply section 27(1) [previously section 26(1)] of the Act (privileged information) to the records or information?

[para 11] Section 27(1) [previously section 26(1)] reads:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for

(i) the Minister of Justice and Attorney General

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

(c) information in correspondence between

(i) the Minister of Justice and Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.

[para 12] In Order 99-022, which this Office provided to the parties for the inquiry, the former Commissioner found that section 27(1)(b) [previously section 26(1)(b)] applied to a solicitor's statements of account in which the public body disclosed to the applicant the dollar amounts paid for the legal services provided to the public body, but withheld the information describing the legal services. Given that decision, the former Commissioner did not find it necessary to consider whether section 27(1)(a) [previously section 26(1)(a)] also applied to the same information.

[para 13] In a January 31, 2002 fax to the Applicant (Tab F of the Applicant's submission), the Public Body says:

With regard to your question about the applicable subsection of 26(1), it appears that all (a, b, c) would apply although a) would seem to be preponderant.

[para 14] In the Public Body's written submission, the Public Body argues only the applicability of the solicitor-client privilege exception to disclosure in section 27(1)(a) [previously section 26(1)(a)]. The Public Body does not argue the applicability of section 27(1)(b) or (c) [previously section 26(1)(b), (c)]. Consequently, I will first consider the applicability of section 27(1)(a) [previously section 26(1)(a)].

[para 15] The Applicant says he is interested only in the total value of the fees, disbursements and GST charged to the Government by its legal counsel, and is not interested in the detailed billing information. While I will decide whether the dollar amounts meet the requirements for solicitor-client privilege under section 27(1)(a) [previously section 26(1)(a)], I will also decide the larger issue of whether solicitors' statements of account (the Records) meet those requirements.

[para 16] Despite what the Applicant argues, the case law is clear that solicitor-client privilege applies to solicitors' statements of account, including the detailed billing information and the amounts billed: see *Stevens v. Canada (Prime Minister)*, [1998] 4

F.C. 89 (C.A.), affirming [1997] 2 F.C. 759 (T.D.), a case cited by both the Applicant and the Public Body. The Public Body also provided evidence that the courts in Alberta have followed the *Stevens* case: see *Matthison v. Odishaw*, 1999 ABQB 207 (Tab 9 of the Public Body's submission).

[para 17] I find that each of the Records meets the criteria for solicitor-client privilege because it is a communication between a solicitor and client, which entails the seeking or giving of legal advice, and which is intended to be confidential by the parties. Therefore, section 27(1)(a) [previously section 26(1)(a)] applies to the Records.

[para 18] If solicitor-client privilege applies to a record, as here, it applies to the entire record. As a result, I do not have authority to order severing of the Records: see Order 96-015.

[para 19] There is one further matter. The Government accounts stamp appears on some of the statements of account. The stamp is a new record that is not a solicitor's statement of account. However, the stamp sets out amounts billed by the solicitors. It is evident from the stamp that the solicitors' statements of account were sent within the Government to be paid.

[para 20] In previous Orders, the former Commissioner found that solicitor-client privilege applied to information that was communicated between a public body's employees, provided that the information initially met the requirements for solicitor-client privilege. Consequently, I find that solicitor-client privilege applies to the information in the stamp setting out the amounts billed by the solicitors, and communicated between the Government's employees. Furthermore, based on the case law the parties have provided, I find that the Public Body has not waived solicitor-client privilege by sending the solicitors' statements of account within the Government in order to be paid.

[para 21] Given my decision that section 27(1)(a) [previously section 26(1)(a)] applies to the Records, I do not find it necessary to consider whether section 27(1)(b) or (c) [previously section 26(1)(b), (c)] also applies to the Records or information.

ISSUE B: Does section 27(2) [previously section 26(2)] of the Act (privileged information of a person other than a public body) apply to the records or information?

[para 22] Section 27(2) [previously section 26(2)] reads:

27(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[para 23] The Public Body says that the Crown retained legal counsel to act on behalf of itself in the one lawsuit and on behalf of an employee who was named as a defendant in the other lawsuit.

[para 24] As set out in section 27(2) [previously section 26(2)], solicitor-client privilege applies only to privileged information that relates to a person other than a public body. Is the Public Body's employee a person other than a public body for the purposes of section 27(2) [previously section 26(2)]?

[para 25] In Order 96-019, the former Commissioner said that an employee of a public body could be a "third party" for the purposes of the Act ("third party" is defined to exclude an applicant and a public body). Consequently, I find that an employee of a public body is a "person other than a public body" for the purposes of section 27(2) [previously section 26(2)]. Solicitor-client privilege and therefore section 27(2) [previously section 26(2)] would apply to statements of account from solicitors acting on behalf of the Public Body's employee.

[para 26] However, the solicitors who represented both the Public Body and the Public Body's employee submitted one statement of account for both. The statements of account do not distinguish between the representation of the Public Body and the Public Body's employee. While I have the sense that the statements of account dated June 29, 2001 and July 31, 2001 may relate to the Public Body's employee, even those are not completely clear.

[para 27] The solicitor-client privilege is that of the Public Body and the Public Body's employee. I am unable to distinguish between the privileged information relating to the Public Body and the privileged information relating to the Public Body's employee, as the privileged information is intertwined. That puts me in the difficult position of having to take an all or nothing approach to the application of section 27(2) [previously section 26(1)]. That approach is consistent with previous Orders of this Office when considering intertwined personal information of an applicant and a third party.

[para 28] Given the intertwined privileged information and that section 27(2) [previously section 26(2)] is a mandatory ("must") provision that requires a public body to refuse to disclose privileged information if the provision applies, I therefore find that section 27(2) [previously section 26(2)] applies to the Records. The Public Body must not disclose the Records.

[para 29] Having made the decision that the mandatory ("must") provision of section 27(2) [previously section 26(2)] applies, I do not need to consider whether the Public Body exercised its discretion properly when refusing to disclose under the discretionary ("may") provision of section 27(1)(a) [previously section 26(1)(a)] relating only to the Public Body's privileged information.

[para 30] However, if I had to consider the Public Body's exercise of discretion, I would have found that the Public Body exercised its discretion properly in withholding the information, as the matter was still before the courts. The case of *Municipal Insurance Assn. of British Columbia v. British Columbia Information and Privacy Commissioner* (1996), 143 D.L.R. (4th) 134 (B.C. S.C.) (Tab 10 of the Public Body's submission) supports the Public Body's position that a matter before the courts is a relevant consideration in exercising discretion to withhold information to which solicitor-client privilege applies.

[para 31] Nevertheless, the Applicant makes a great deal of the Government's disclosure of the dollar amounts paid to solicitors in the Lorne Goddard and Stockwell Day lawsuit (Tab G of the Applicant's submission). However, that disclosure was under the public interest provision of section 32 [previously section 31] of the Act, which overrides the entire Act, including section 27(1)(a) [previously section 26(1)(a)] and section 27(2) [previously section 26(2)]. The Applicant has not persuaded me that section 32 [previously section 31] requires disclosure in the public interest in this case. Furthermore, there is no merit to the Applicant's argument that the legal doctrine of estoppel requires disclosure.

V. ORDER

[para 32] I make the following Order under section 72 [previously section 68] of the Act.

[para 33] The Public Body properly applied section 27(1)(a) [previously section 26(1)(a)] of the Act to the Records.

[para 34] Section 27(2) [previously section 26(2)] of the Act applies to the Records.

[para 35] I uphold the Public Body's decision to refuse to disclose the Records. I order the Public Body not to disclose the Records to the Applicant.

Frank Work, Q.C.
Information and Privacy Commissioner