

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-021

April 09, 2003

ALBERTA INFRASTRUCTURE

Review Numbers 2295 and 2296

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Summary: The Applicant requested records from Alberta Justice and Alberta Infrastructure. Alberta Justice had a single record, which was transferred to Alberta Infrastructure, who then dealt with the Applicant's requests. Both requests for review (2295 and 2296) were dealt with in this Inquiry.

Alberta Infrastructure located 192 records, 95 of which were disclosed or partially disclosed. Records were exempted or severed under sections 24(1) [previously section 23(1)], 25 [previously section 24] and 27 [previously section 26] of the *Freedom of Information and Protection of Privacy Act*. The Adjudicator found that section 24(1) and section 27 applied to the records and confirmed Alberta Infrastructure's decision not to disclose the records to the Applicant.

Statute Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24(1)(a)(b)(c)(d) [previously section 23(1)(a)(b)(c)(d)]; 25(1)(c)(i), (ii), (iii) [previously section 24(1)(c)(i) (ii)(iii)]; 27(1)(a)(b)(c) and (2) [previously section 26(1)(a)(b)(c) and (2)]; 32 [previously section 31]; 32(1)(b) [previously section 31(1)(b)].

Orders Cited: AB: Orders 96-012, 96-015, 96-017, 96-020, 97-007, 97-009, 98-004, 99-013, 2000-021 and 2001-018.

I. BACKGROUND

[para 1] On June 25, 2001, the Applicant submitted two requests for records under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the “Act”). One submission was to Alberta Infrastructure (the “Public Body”) and the other was to Alberta Justice (Justice).

[para 2] The requests to the Public Body and Justice were:

Copies of all records, from January 1998 to June 2001, in whatever form, but not limited to correspondence, e-mail correspondence, meeting notes, telephone conversation notes, directives, instructions, reports, financial information, financial analysis or legal advice relating to:

*-the Guardian Foundation,
-Safe Harbour Inc. (aka Safe Harbour Home Services Ltd.),
-Aspen House,
-Heritage House,
-Aspen Regional Health Authority and Lakeland Regional Health Authority (the “affected parties”).*

[para 3] On July 12, 2001, Justice advised the Applicant and the Public Body that they had only one record related to the request for disclosure and transferred that record to the Public Body for consideration. The Public Body subsequently amalgamated the files and became solely responsible for addressing the combined requests.

[para 4] The Public Body responded to the Applicant by disclosing some records and by excepting and severing others. The specific sections relied on by the Public Body are sections 24(1)(a)(b)(c)(d) [previously section 23(1)(a)(b)(c)(d)]; 25(1)(c) [previously section 24(1)(c)] and 27(1)(a)(b)(c) and (2) [previously section 26(1)(a)(b)(c) and (2)] of the Act.

[para 5] On October 4, 2001, the Applicant asked the Commissioner to review the decision of the Public Body and subsequently the matter proceeded to written inquiry.

[para 6] The revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, F-25 came into force on January 1, 2002. Most of the section numbers of the Act changed but not the substance of the sections. Consequently, in this Order, I have set out the new section numbers. The previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 7] The request for records applied to a total of 192 pages of records, 95 of which were disclosed or severed. The Public Body supplied a copy of the records with its submission.

III. ISSUES

[para 8] There are three issues for this inquiry:

- (1) Did the Public Body properly apply section 24(1)(a)(b)(c)(d) [previously section 23(1)(a)(b)(c)(d)] of the Act to the records/information?
- (2) Did the Public Body properly apply section 25(1)(c) [previously section 24(1)(c)(i)(ii)(iii)] of the Act to the records/information?
- (3) Did the Public Body properly apply section 27(1)(a)(b)(c) and (2) [previously section 26(1)(a)(b)(c) and (2)] of the Act to the records/information?

IV. DISCUSSION OF THE ISSUES

[para 9] I note that the Applicant put forward only one argument regarding all three issues. The Applicant's argument was that all the records contain information that would expose wrongdoing and unlawful actions by the Public Body and the affected parties. Therefore, the Applicant believed that it was in the public interest to release all of the records. I have addressed the question of public interest later in this Order.

[para 10] The Public Body was not specific about which sections or subsections of the Act applied to each record. The Public Body applied multiple sections to each record. While ordinarily it is my practice to return records to a public body when it does not specifically set out what information falls within each exception claimed on each record, I decided not to do so because of the unique circumstances of this case. Consequently, I reviewed each record and made a decision, based on the arguments of the Public Body and the face of the records, which, if any, section applied, and to what information on the record. I first looked at section 27 [previously section 26], then section 24 [previously section 23] and lastly, section 25 [previously section 24]. I then considered section 32 [previously section 31]. Once I determined that a specific section applied to a particular record/information, I did not consider any subsequent section for the same record/information.

A. Did the Public Body properly apply section 27 (1)(a)(b)(c)(d) [previously section 26(1)(a)(b)(c)(d)] and 27(2) [previously section 26(2)] of the Act to the records?

[para 11] Section 27 [previously section 26] of the Act 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.*

(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 12] The Public Body argued that section 27 [previously section 26] of the Act authorizes it to exercise its discretion, to refuse to disclose information that is subject to any type of legal privilege, particularly solicitor-client privilege. I agree with this position as it relates to section 27(1)(a) [previously section 26(1)(a)], which is a discretionary exception. Section 27(2) [previously section 26(2)] relates to a legal privilege of a third party and is a mandatory exception.

[para 13] The Public Body stated that in exercising its discretion, it followed the guidelines set out in the “Freedom of Information and Protection of Privacy Guidelines” 2002 (page 175) which contains a non-exclusive list of indicators that, if present, suggest that section 27 [previously section 26] of the Act may apply.

[para 14] The Public Body argued that the records meet the three criteria for legal privilege established in Order 96-017 (para 22). The Public Body provided evidence that the records are subject to solicitor-client privilege in that they are:

1. A communication between a solicitor and client
2. Which entails the seeking or giving of legal advice and
3. Which is intended to be confidential by the parties

[para 15] The Public Body reinforced their arguments by referring to previous Orders, which the Public Body listed as follows:

- 96-015 (para 84), *Legal advice is 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;*
- 2000-021 (para 42), *It is well-accepted law that solicitor-client communications are “privileged” (confidential). This legal privilege is of indefinite duration. It cannot be waived – except by the client;*
- 97-007 (para 58), *Severing is not a concept applicable to records subject to solicitor-client privilege. Therefore, the privilege must be claimed for the entire record or not at all;*
- 96-017 (para 30), *Solicitors’ briefing notes and working papers, directly related to the giving or seeking of legal advice, may meet the criteria for solicitor-client privilege and excepted under section 27(1)(a)[previously section 26(1)(a)];*
- 98-004 (para 41), *Solicitor-client privilege may apply to attachments to documents to which solicitor-client privilege applies if the attachments are shown to be part of the continuum of legal advice;*
- 96-020 (paras 133-134) *Solicitor-client privilege has been applied to communications between employees of a public body that discusses the application of legal advice given by the public body solicitor. The privilege applies if the public body claims solicitor-client privilege for the communication.*
- 99-013 (paras 62-63), *Solicitor-client privilege may also apply to notes documenting legal advice given orally to a public body by its solicitor and*
- 2001-018 (para 44), *Common interest privilege exists when documents are provided among parties where several parties have a common interest in anticipated litigation. It exists when one party consults with a lawyer on an issue of common interest and shares or exchanges the legal opinion with other parties with the same interest.*

[para 16] Needless to say, all the previous Orders do not apply to each of the individual records. I have reviewed the records, divided into Tables 1 and 2 by the Public Body, and find that sections 27(1) and (2) [previously section 26(1) and (2)] apply to specific records as follows:

Table 1

Section 27(1)(a) [previously section 26(1)(a)] (solicitor-client privilege of Public Body or public body) pages: 1, 16, 17, 118, 140, 190 to 192

Section 27(2) [previously section 26(2)] (solicitor-client privilege of Public Body or public body) pages: 43 to 50, 63 to 77, 88 to 92, 95 to 99, 119, 120, 141, 142, 144 to 146, 150.

Table 2

Section 27(1)(a) [previously section 26(1)(a)] (solicitor-client privilege of Public Body or public body) pages: 1, 2, 8, 9, 10 to 12, 14 to 19, 22, 24, 25, 30, 34, 35, 38, 40 to 43, 47 to 50, 65, 69, 70, 91 to 93.

Section 27(1)(b) [previously section 26(1)(b)] (information prepared by an agent of lawyer or the Public Body or public body) pages: 72 to 82, 94 to 96.

Section 27(1)(c) [previously section 26(1)(c)] (information in correspondence between an agent or lawyer of the Public Body or public body) pages: 44 to 46.

Section 27(2) [previously section 26(2)] (solicitor-client privilege that relates to a person other than the Public Body) pages: 31 to 33, 87, 88.

[para 17] I find the Public Body properly exercised its discretion in finding that the records noted in paragraph 16 as being under section 27(1)(a)(b) and (c) [previously section 26(1)(a)(b) and (c)] of the Act. Section 27(2)[previously section 26(2)] is a mandatory exception. Therefore, the Public Body having found records as specified in paragraph 16 to be under section 27(2)[previously section 26(2)] of the Act must refuse to disclose the applicable records.

[para 18] Having found that sections 27(1) and (2) [previously section 26(1) and (2)] of the Act apply to these records, I will not consider the application of section 24 [previously section 23] or section 25 [previously section 24] of the Act to these records.

B. Did the Public Body properly apply section 24(1)(a)(b)(c)(d) of the Act [previously section 23(1)(a)(b)(c)(d)] to the records?

[para 19] Section 24 [previously section 23] of the Act reads:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
- (b) consultations or deliberations involving*
 - (i) officers or employees of a public body,*
 - (ii) a member of the Executive Council, or*
 - (iii) the staff of a member of the Executive Council,*
- (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,*
- (d) plans relating to the management of personnel or the administration of a public body that have not yet been implemented,...*

[para 20] To support the Public Body’s interpretation of section 24(1) [previously section 23(1)] of the Act, it referred to previous Orders, which the Public Body listed as follows:

Order 97-009 (para 153) *To apply section 24(1)(a) [previously section 23(1)(a)] a public body must show that there is advice, proposals, recommendations, analysis or policy options (“advice”) developed by or for a public body or a member of the Executive Council, and the “advice” must be*

- *sought or expected, or be part of the responsibility of a person by virtue of the person’s position*
- *directed toward taking an action or making a decision, and*
- *made to someone who can take or implement the action*

Order 96-012 (para 37) *The intent is to protect information generated during the process of making a decision but not to protect the decision itself. The information must relate to the negotiations.*

[para 21] The Public Body argued that the records matched the criteria specified in section 24(1)(a) [previously section 23(1)(a)] of the Act and noted in para 20. The Public Body further argued that the records clearly contain:

- (1) advice and recommendations provided to the Public Body
- (2) consultation and deliberations during a decision-making process
- (3) positions, instructions and plans related to the solving of the matter with the Applicant, and

that the employees of the Public Body were in a position to make recommendations and decisions throughout the process.

[para 22] I have reviewed the records, divided into Tables 1 and 2 by the Public Body, and find that section 24(1) [previously section 23(1)] of the Act applies to the following specific records:

Table 1:

Section 24(1)(a) [previously section 23(1)(a)] pages: 27, 31, 32, 34, 36, 37, 100 to 103, 109 to 115, 122 to 125, 127 to 129, 134 to 136, 152, 153, 155, 156, 158 to 162, 164 to 166, 168 to 172.

Section 24(1)(b) [previously section 23(1)(b)] pages: 14, 15, 104, 106, 116, 121, 131 to 133, 138, 139, 147 to 149.

Table 2:

Section 24(1)(a) [previously section 23(1)(a)] pages: 6, 20, 21, 60 to 64.

Section 24(1)(b) [previously section 23(1)(b)] pages: 3, 26 to 28, 36, 52 to 55, 66, 85, 86.

[para 23] I find the records noted in paragraph 22, withheld by the Public Body, fall under section 24(1)(a) and (b) [previously section 23(1)(a) and (b)] of the Act. Section 24 [previously section 23] is a discretionary exception.

[para 24] The application of multiple sections for each record could be an indication that the Public Body was determined to withhold all of the records. However, I note that the Applicant was given all or part of 95 of 192 pages. This is an indication that the Public Body exercised its discretion to allow access to approximately half of the records that were responsive to the Applicant's request. The Public Body properly exercised its discretion to refuse to disclose the applicable records

C. Did the Public Body properly apply section 25 [previously section 24] to the records?

[para 25] Having found that sections 27 [previously section 26] and 24(1) [previously section 23(1)] of the Act apply to all of the records withheld by the Public Body, I will not consider the application of section 25 [previously section 24] of the Act.

V. PUBLIC INTEREST

[para 26] The Applicant argued that all records should be released in the public interest. Public interest is dealt with in section 32 [previously section 31] of the Act. Section 32(1)(b) [previously section 31(1)(b)] of the Act places a duty on the head of a public body to release information that is clearly in the public interest. The Applicant did not offer specific evidence about the potential wrongdoing that he alleges. I have reviewed the records and find that there is nothing on the face of them that would lead me to conclude that they relate to an issue of public interest. Therefore, I find that section 32 [previously section 31] of the Act does not apply to the records in this inquiry.

VI. ORDER

[para 27] I make this Order under section 72 [previously section 68] of the Act.

[para 28] Having found that sections 24(1) [previously section 23(1)] and 27 [previously section 26] of the Act were properly applied to all of the records withheld by the Public Body, I do not need to consider the application of section 25 [previously section 24] of the Act.

[para 29] I find that section 32 [previously section 31] does not apply to the records in this inquiry.

Dave Bell
Adjudicator