

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-001

February 25, 2004

ALBERTA ENVIRONMENT

Review Number 2370

Office URL: www.oipc.ab.ca

Summary: The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to all records relating to a specific approval under the *Water Act*. Alberta Environment disclosed a number of records, but withheld 36 pages of records as being privileged information under section 27(1) of the Act. The Adjudicator found that all but a small amount of information met the requirements of section 27(1) and could be withheld from the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6(1) [number unchanged by R.S.A. 2000, c. F-25], 10(1) [previously section 9(1)], 15 [previously section 14], 15(1)(a), (b), (c) [previously section 14(1)(a), (b), (c)], 17 [previously section 16], 27(1) [previously section 26(1)], 27(1)(a), (b), (c) [previously section 26(1)(a), (b), (c)], 35(a) [previously section 34(a)], 65(1) [previously section 62(1)], 72 [previously section 68]; *Public Lands Act*, R.S.A. 2000, c. P-40; *Water Act*, R.S.A. 2000, c. W-3.

Authorities Cited: AB: Orders 96-020, 97-006, 98-004, 99-021, 2001-013.

I. BACKGROUND

[para 1] On September 19, 2001, the Applicant applied to Alberta Environment (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to “all available records available for Approval No. 00137322-00-00/Water Act”.

[para 2] The Public Body subsequently clarified with the Applicant the scope of the Applicant’s access request, as follows:

Request is for ALL information/records pertaining to Approval #00137322-00-00. Records include, but are not limited to, all correspondence, applications, approvals, draft copies of records, reports, notifications of contravention of the approval, drawings, etc.

The approval pertains to weed removal and the re-establishment of Ascot Beach on the SW1/4 Sec 09 Twp 053 Rge 04 W5M, Wabamun Lake.

Time Frame: From the commencement of the approval process which may have been the latter part of 1999 to present.

[para 3] The Public Body provided access to most of the responsive records, but withheld some records and information under section 27(1) [previously section 26(1)] of the Act (privileged information). The Public Body also withheld information under section 17 [previously section 16] of the Act (personal information of a third party) in one record. The Applicant requested a review under the Act, which subsequently proceeded to a written inquiry.

[para 4] The revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. 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. In this Order, I have used the new section numbers. The previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the following numbered pages (36 pages in total) that the Public Body either withheld in their entirety or from which the Public Body withheld certain information:

3, 22, 37, 43, 44, 49, 50, 57, 59, 85, 86, 93, 94, 99, 100, 109, 110, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 174, 205, 206, 207, 208

[para 6] The Public Body disclosed the remaining pages from page 1 to page 210. The Public Body says there is no page number 6 because of a numbering skip.

III. ISSUES

[para 7] The Notice of Inquiry set out the following issues:

- A. Did the Public Body meet its general duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act?
- B. Did the Public Body conduct an adequate search for responsive records and thereby meet its duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act?
- C. Should the Public Body have transferred the access request, as provided by section 15 [previously section 14] of the Act?
- D. Did the Public Body properly apply section 27(1) [previously section 26(1)] of the Act (privileged information) to the records/information?

[para 8] The Public Body removed what it says is non-responsive information from pages 3 and 22 of the records. I agree that the information removed from those pages is non-responsive. The Public Body is not required to provide the Applicant with that information. I do not need to consider pages 3 and 22 any further in this inquiry.

[para 9] The Public Body also severed and did not disclose to the Applicant the facial image of an individual who appears in a photograph of Lake Wabamun. The Public Body said that section 17 [previously section 16] of the Act (personal information of a third party) applied to that image. The Public Body disclosed to the Applicant the remainder of the photograph, which is page 174 of the records.

[para 10] I agree that the facial image is recorded information about an identifiable individual and therefore personal information for the purposes of section 17. However, the Public Body did not argue the application of section 17, and the Applicant did not raise the issue of the Public Body's application of section 17. Consequently, the application of section 17 to page 174 is not at issue in this inquiry, and I do not intend to consider it. The Applicant has page 174, minus the facial image.

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body meet its general duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act?

[para 11] Section 10(1) [previously section 9(1)] of the Act reads:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 12] As part of the Public Body's duty under section 10(1), the Applicant wants a review of whether the Director who issued Approval No. 00137322-00-00 under the *Water Act* (the "Approval") obtained all the records from the applicable sources to render a decision on the approval. The Applicant also wants a review of whether the Environmental Appeal Board ("EAB") obtained all the records from the decision-makers (that is, the Public Body and Alberta Sustainable Resource Development) that the EAB needed to properly adjudicate an appeal matter regarding the Approval.

[para 13] The Public Body says that my jurisdiction is limited by section 65(1) [previously section 62(1)] of the Act to reviewing a public body's decision, act or failure to act related to a request for access to a record under the Act or a request for correction of personal information under the Act. The Public Body points out that the Applicant's concerns about the nature of the records that were before a regulatory decision-maker do not fall within section 65(1) and are therefore outside of my jurisdiction.

[para 14] I agree with the Public Body that my jurisdiction in this case extends only to reviewing decisions of the Public Body relating to the Applicant's access request under the Act, as set out in section 65(1) of the Act.

[para 15] Furthermore, the only provision of the Act that would allow me to conduct a review of the completeness of information is section 35(a) [previously section 34(a)], which reads:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete,...

[para 16] Under section 35(a) [previously section 34(a)], I only have jurisdiction to enquire into the completeness of the Applicant's personal information and only if the Public Body is using the Applicant's personal information to make a decision that directly affects the Applicant. There is no evidence before me that the decisions of the Director and the EAB concerning the Approval have anything to do with the Applicant's personal information. That conclusion is supported by the Applicant's own Request to Access Information, in which the Applicant checked the general information box, not the personal information box.

[para 17] I find that I do not have jurisdiction under section 65(1), section 35(a) or any other provision of the Act to review decisions of the Director and the EAB concerning whether they secured all the appropriate information or records for the approval and appeal processes, respectively.

[para 18] The Public Body provided the following reasons to support its claim that it met its general duty to the Applicant under section 10(1) of the Act: (i) the Public Body provided publicly available records to the Applicant outside of the Act; (ii) in relation to the publicly available records, the Public Body provided additional information requested; and (iii) on later re-examining the records withheld, the Public Body decided to disclose further records to the Applicant. The Public Body went on to explain, as follows.

[para 19] The Public Body says that, during the appeal process, the Director submits to the EAB all information relevant to the decision concerning an approval. This record, often referred to as the Director's Record, then becomes part of the public record. A complete copy of the Director's Record is provided to each party to an EAB appeal. The Director's Record is available outside the process of the Act without any cost.

[para 20] Therefore, when the Public Body received the Applicant's access request, it says it attended at the EAB, a separate public body under the Act, to compare the responsive records with the records held by the EAB regarding the appeal of the Approval. The EAB's records, which consisted of documents that had been in front of the Director when making his decision to issue the Approval, were deemed to be public. The purpose of the comparison was to determine which of the responsive records matched those held by the EAB, thereby maximizing the records that could be released to the Applicant outside the process under the Act and without any associated fee, as part of the public record of the appeal.

[para 21] The Applicant attended at the Public Body's office and reviewed the publicly available records. He tagged the records he wanted copied, included additional instructions on some records and, as a result of his review, asked five additional questions to which the Public Body says it responded.

[para 22] The Public Body also submitted to me a copy of its January 13, 2003 letter to the Applicant, as evidence that the Public Body later decided to disclose additional records to the Applicant, consisting of pages 58, 63-73, 87-92, 97, 111-120 and 135-166.

[para 23] The Applicant says he is not convinced that he received a reasonable amount of information, given that the Public Body was quite adamant at the start of the access request that it had well over 2000 pages of information. The Applicant says he received only 200 pages of information.

[para 24] In response, the Public Body says that the difference between the estimate and the actual number of pages can be explained by the fact that the initial estimate was calculated before the Public Body reviewed the records, and included (i) the public records held by the EAB, that were later processed outside of the Act; and (ii) numerous duplicates and triplicates of records, which the Applicant had initially wanted, but then later modified his request to exclude.

[para 25] The Applicant had reviewed the records in (i) above, outside the process under the Act. Once the records in (i) and (ii) are removed, the Public Body argues that the final number of 200 responsive pages is quite reasonable. I accept that explanation.

[para 26] Based on the Public Body's evidence and explanations, I find that the Public Body met its general duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act.

ISSUE B: Did the Public Body conduct an adequate search for responsive records and thereby meet its duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act?

1. The Applicant's first complaint

[para 27] The Applicant's first complaint is that he has seen "...virtually zero information with respect to Alberta Sustainable Resource Development or Public Lands roles in this approval process."

[para 28] In reply, the Public Body says that the Applicant's access request was very specific; it was concerned only with the specific numbered Approval under the *Water Act*. Therefore, the Public Body searched only for records concerning the Approval.

[para 29] The Public Body also cites section 6(1) [number unchanged by R.S.A. 2000, c. F-25] of the Act, which provides that an applicant has a right of access to any record in the custody or under the control of a public body.

[para 30] The Public Body says that it no longer has custody or control of records concerning approvals under the *Public Lands Act*. As a result of the government reorganization in March 2001, program areas that had been the responsibility of the Public Body were split among three public bodies: Alberta Environment, Alberta Sustainable Resource Development and Alberta Community Development. The Public Body retained the mandate for the *Water Act*. Custody and control of records concerning approvals under the *Public Lands Act* was transferred to Alberta Sustainable Resource Development.

[para 31] To ensure a thorough search for records that would be in the Public Body's control after the government reorganization, the Public Body says it conducted a blanket search not only within the Public Body, but also within Alberta Sustainable Resource Development and Alberta Community Development where it was believed there may have been even a remote possibility of existing responsive records under the *Water Act*.

[para 32] However, the Public Body says that it did not search Alberta Sustainable Resource Development for any *Public Lands Act* records that would be in the custody or under the control of Alberta Sustainable Resource Development after the government

reorganization. The Public Body says that the *Public Lands Act* authorization is substantively and legislatively separate and distinct from the specific *Water Act* approval in the Applicant's access request.

[para 33] In response, the Applicant raises the "one-window" approach, in which the government expedites the approval process under both the *Public Lands Act* and the *Water Act*. At Tab 12 of the Public Body's initial written submission, the Public Body provides the "One-Window Protocol for Proposed Activities involving the Modification of Lakeshores, Watercourses and other Bodies of Water", which includes a single application form under both the *Public Lands Act* and the *Water Act*. It is evident from this Protocol that different public bodies issue those approvals. The Applicant argues that the "one-window" approach for the approval process should also apply to his access request. Therefore, the Applicant believes that the Public Body has not made every reasonable effort to secure all the information available, including the information under the *Public Lands Act*.

[para 34] Given the government's one-window approach for approvals, I have no doubt the Applicant believed that, by asking for the Approval under the *Water Act*, he would also get the records for any approval under the *Public Lands Act*. However, section 6(1) of the Act contemplates that an applicant must make an access request to the public body that has custody or control of the records. There is no provision in the Act to make one access request across multiple public bodies. The one-window approach does not apply to access requests under the Act.

[para 35] The Public Body argues that Alberta Sustainable Resource Development is a separate public body for the purposes of making an access request under the Act, and that the Act does not require it to search for records outside of its control that are in the custody or under the control of Alberta Sustainable Resource Development. The Public Body relies on Order 2001-013 (citing Orders 97-006 and 99-021), in which the Commissioner said that a public body is required to search only for records that are in its custody or under its control; a public body is not required to search for records in the custody or under the control of other public bodies. I agree with the Public Body's argument.

2. The Applicant's second complaint

[para 36] The Applicant's second complaint relates to late-found records. On January 13, 2003, the Public Body sent a letter to the Applicant, informing him that it found further responsive records, which the Public Body numbered as pages 198-210. The Public Body did not disclose pages 205-208.

[para 37] The Public Body explained that an oversight within the program area of the Public Body regarding the electronic records of one employee of the Public Body resulted in the initial omission of a small number of responsive records. However, the Public Body maintains that it made every reasonable effort, using reasonable systems, to

search for all responsive records, and kept the Applicant informed of its progress on the request on a timely basis.

[para 38] The Applicant wants the Commissioner's Office to investigate the matter of the late-found records. He believes it is questionable that he received all the information that was requested.

[para 39] As we are in an inquiry, the issue of the late-found records is one for me to decide in the inquiry, not investigate. The issue relates to the adequacy of the search.

[para 40] Section 10(1) requires that a public body make every reasonable effort, which does not require perfection. The fact that the Public Body found these records, although not on its first search, does not prevent me from finding that the Public Body made every reasonable effort. I find that the Public Body made every reasonable effort.

3. Conclusion

[para 41] Based on the Public Body's evidence and explanations, I find that the Public Body conducted an adequate search for responsive records and thereby met its duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act.

ISSUE C: Should the Public Body have transferred the access request, as provided by section 15 [previously section 14] of the Act?

[para 42] I need to consider only section 15(1) [previously section 14(1)] of the Act, which reads:

15(1) Within 15 days after a request for access to a record is received by a public body, the head of the public body may transfer the request and, if necessary, the record to another public body if

(a) the record was produced by or for the other public body,

(b) the other public body was the first to obtain the record,
or

(c) the record is in the custody or under the control of the other public body.

[para 43] The issue is whether the Public Body should have transferred the Applicant's access request to Alberta Sustainable Resource Development. The Public Body maintains that it should not have transferred the access request because the request

relates only to the Approval under the *Water Act*, over which the Public Body has had exclusive jurisdiction at all times.

[para 44] For the Public Body to consider whether it should transfer the Applicant's access request, one of the provisions of section 15(1)(a), (b) or (c) [previously section 14(1)(a), (b), (c)] must first apply. I have found that the records are in the custody or under the control of the Public Body, not in the custody or under the control of Alberta Sustainable Resource Development. Therefore, section 15(1)(c) does not apply, and neither does section 15(1)(a) or section 15(1)(b). Since section 15(1) does not apply, there is no issue about the Public Body's properly exercising its discretion to transfer the access request under section 15(1), which is a discretionary ("may") provision.

[para 45] The Applicant raises the one-window approach argument again under section 15. Given that section 15 is about transferring an access request to another public body, the provision in itself negates a one-window approach.

[para 46] I find that the Public Body did not have to transfer the access request, as provided by section 15 [previously section 14] of the Act.

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

1. Application of section 27(1)(a) [previously section 26(1)(a)]

[para 47] The Public Body argues that it properly applied section 27(1)(a) (solicitor-client privilege) to the following pages of the records: 37, 43, 44, 49, 50, 57, 59, 85, 86, 93, 94, 99, 100, 109, 110, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 205, 206, 207 and 208.

[para 48] Section 27(1)(a) 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,...

[para 49] The Public Body argues that the records meet the criteria for solicitor-client privilege in that each record is:

- (a) a communication between a solicitor and client,
- (b) that entails the giving or seeking of legal advice, and
- (c) is intended by the parties to be confidential.

[para 50] Alternatively, the Public Body argues that the records are attachments and fax cover sheets that are part of the continuum of legal advice and thereby also meet the criteria for solicitor-client privilege, as set out in Orders 96-020 and 98-004.

[para 51] Some of the records are the Public Body's employees' communications among themselves about legal advice given by the Public Body's solicitors. In Order 96-020, the former Commissioner found that such communications also meet the criteria for solicitor-client privilege.

[para 52] I have reviewed all the records. Considering the Public Body's evidence and arguments, I find that the following pages of the records meet the criteria for solicitor-client privilege under section 27(1)(a): pages 43, 44, 49, 50, 59, 85, 86, 93, 94, 99, 100, 109, 110, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 205, 206, 207 and 208.

[para 53] Page 37 of the records also meets the criteria for solicitor-client privilege. However, I find that the Public Body has waived the privilege as against the Applicant by disclosing pages 47 and 48 of the records to the Applicant. Therefore, section 27(1)(a) does not apply to page 37.

[para 54] The Public Body says that section 27(1)(b) and section 27(1)(c) also apply to page 37. Therefore, I will consider page 37 under those provisions.

[para 55] I also find that page 57 of the records does not meet the criteria for solicitor-client privilege.

[para 56] The Public Body says that section 27(1)(b) also applies to page 57. Therefore, I will consider page 57 under that provision.

2. Application of section 27(1)(b) [previously section 26(1)(b)]

[para 57] Section 27(1)(b) reads:

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

...
(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,...

[para 58] The Public Body argues that section 27(1)(b) and section 27(1)(c) apply to the same records that I have found meet the criteria for solicitor-client privilege under section 27(1)(a). Given my decision under section 27(1)(a), I do not find it necessary to consider the Public Body’s alternative arguments for those same records.

[para 59] I need to consider only pages 37 and 57 under section 27(1)(b).

[para 60] I find that page 57 of the records meets the criteria for section 27(1)(b). I am satisfied that page 57 is information prepared by or for a lawyer of the Minister of Justice and Attorney General in relation to a matter involving the provision of legal services.

[para 61] I find that page 37 of the records does not meet the criteria for section 27(1)(b), as this is not “information prepared by or for”. I will consider page 37 under section 27(1)(c).

3. Application of section 27(1)(c) [previously section 26(1)(c)]

[para 62] Section 27(1)(c) reads:

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

...

(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 63] I find that most of the information contained in page 37 of the records meets the criteria for section 27(1)(c). However, section 27(1)(c) applies only to the “information in correspondence”. It does not apply to the remainder of the information, specifically, the fact that the record is correspondence between persons specified in section 27(1)(c).

4. Exercise of discretion under section 27(1) [previously section 26(1)]

[para 64] The Public Body says that it initially withheld 90 pages of records under section 27(1). After a review of the content of the records, considering the access provisions of the Act, and the effect of disclosing the records of concern, the Public Body determined that 61 of those pages could be disclosed to the Applicant. That disclosure is documented in the Public Body's January 13, 2003 letter to the Applicant. Furthermore, during preparation for the inquiry, the Public Body says that 13 additional pages of responsive records were discovered. Only four of those pages were withheld under section 27(1).

[para 65] The Public Body submits that it disclosed as much information as it could to the Applicant. Consequently, the Public Body asks that I find that it exercised its discretion properly under section 27(1).

[para 66] Based on the Public Body's evidence and arguments, I find that the Public Body exercised its discretion properly in withholding the information and records from the Applicant under section 27(1).

5. Conclusion under section 27(1) [previously section 26(1)]

[para 67] I find that the Public Body properly applied section 27(1)(a) [previously section 26(1)(a)] of the Act (solicitor-client privilege) to the following pages of the records: 43, 44, 49, 50, 59, 85, 86, 93, 94, 99, 100, 109, 110, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 205, 206, 207 and 208. I intend to confirm the Public Body's decision not to disclose those records to the Applicant.

[para 68] I find that the Public Body properly applied section 27(1)(b) [previously section 26(1)(b)] of the Act to page 57 of the records. I intend to confirm the Public Body's decision not to disclose page 57 to the Applicant.

[para 69] I find that the Public Body did not properly apply section 27(1)(b) [previously section 26(1)(b)] to page 37 of the records. I have considered page 37 under section 27(1)(c) [previously section 26(1)(c)].

[para 70] I find that the Public Body properly applied section 27(1)(c) [previously section 26(1)(c)] of the Act to the information in correspondence, contained in page 37 of the records. I intend to confirm the Public Body's decision not to disclose that information to the Applicant.

[para 71] However, I find that the Public Body did not properly apply section 27(1)(c) [previously section 26(1)(c)] to the remainder of the information contained in page 37 of the records. I intend to order the Public Body to disclose that information to the Applicant.

V. ORDER

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

Issue A: General duty to the Applicant

[para 73] The Public Body met its general duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act.

Issue B: Adequacy of the search

[para 74] The Public Body conducted an adequate search for responsive records and thereby met its duty to the Applicant, as provided by section 10(1) [previously section 9(1)] of the Act.

Issue C: Transfer of the access request

[para 75] The Public Body did not have to transfer the access request, as provided by section 15 [previously section 14] of the Act.

Issue D: Application of section 27(1) [previously section 26(1)]

[para 76] The Public Body properly applied section 27(1)(a) [previously section 26(1)(a)] of the Act (solicitor-client privilege) to the following pages of the records: 43, 44, 49, 50, 59, 85, 86, 93, 94, 99, 100, 109, 110, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 205, 206, 207 and 208. I confirm the Public Body's decision not to disclose those records to the Applicant.

[para 77] The Public Body properly applied section 27(1)(b) [previously section 26(1)(b)] of the Act to page 57 of the records. I confirm the Public Body's decision not to disclose page 57 to the Applicant.

[para 78] The Public Body did not properly apply section 27(1)(b) [previously section 26(1)(b)] to page 37 of the records. I have considered page 37 under section 27(1)(c) [previously section 26(1)(c)].

[para 79] The Public Body properly applied section 27(1)(c) [previously section 26(1)(c)] of the Act to the information in correspondence, contained in page 37 of the records. I confirm the Public Body's decision not to disclose that information to the Applicant.

[para 80] The Public Body did not properly apply section 27(1)(c) [previously section 26(1)(c)] to the remainder of the information contained in page 37 of the records. I order the Public Body to disclose that information to the Applicant. Along with this

Order, I have provided the Public Body with a copy of page 37, highlighting the information that is to be disclosed.

[para 81] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Dave Bell
Adjudicator