ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-013

December 3, 2003

ALBERTA HEALTH and WELLNESS

Review Number 2534

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Summary: The Applicant requested records from Alberta Health and Wellness (the "Public Body") related to the transfer of authority from the Universities Coordinating Council to the Alberta Dental Association or the Alberta Dental Association and College. The Public Body released some records, severed certain records and withheld other records in their entirety. The Public Body cited sections 17(1), 24(1)(a) and 27(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the "Act") to support the decision to withhold information or records. The Applicant argued that the sections of the Act relied upon by the Public Body did not apply; alternatively, section 32(1)(b) of the Act applied and therefore it was in the public interest that the Public Body be required to make full disclosure. The Commissioner found that sections 17(1), 24(1)(a) and 27(1)(a) of the Act applied to the information and records withheld and that section 32(1)(b) of the Act did not require the Public Body to disclose information in the public interest.

Statute Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n)(vii), 17(1), 17(4)(d), 17(5), 24(1)(a), 27(1)(a), 32(1)(b), 65(1) and 71(2).

Authorities Cited: AB: Orders 96-006, 96-011, 96-017, 96-020, 96-021, 97-002, 98-004, 98-010, 99-005, 99-023, 2000-031, 2001-002.

I. BACKGROUND

[para 1] On March 05, 2002, the Applicant requested, under the *Freedom of Information and Protection of Privacy Act* (the "Act"), from Alberta Health and Wellness (the "Public Body") records of meetings, discussions and correspondence related to the transfer of authority from the Universities Coordinating Council to the Alberta Dental Association or the Alberta Dental Association and College.

[para 2] On June 29, 2002, the Public Body advised the Applicant that information in some records and some records in their entirety were excepted from disclosure under the Act.

[para 3] On August 18, 2002, the Applicant responded to the decision of the Public Body and disputed the exceptions specified in the Public Body's letter of June 29, 2002. On August 18, 2002, the Applicant requested that the Office of the Information and Privacy Commissioner review the Public Body's decision to deny access to certain information and records.

[para 4] Prior to the mediation process, the Public Body made a disclosure of records to the Applicant. On December 30, 2002, during the mediation process, the Public Body provided the Applicant with additional records which it believed had been wrongly severed. An inquiry was subsequently scheduled to decide whether the Public Body properly severed and withheld the remaining information or records.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of records of meetings, discussions and correspondence relating to the Universities Coordinating Council, the Alberta Dental Association and the Alberta Dental Association and College. The records at issue are numbered 10-15, 17-20, 39-43, 45-46, 48, 50-71. All of the records were submitted and accepted *in camera*.

III. ISSUES

[para 6] The issues in this inquiry are:

> A. Did the Public Body properly apply section 24(1)(a) of the Act to the records/information?
>
> B. Did the Public Body properly apply section 27(1) of the Act to the records/information?

[para 7] Two additional issues were set out for the inquiry, dealing with sections 22(1) and 27(2) of the Act; however, the Public Body abandoned those issues. Therefore, I do not have to consider those issues.

[para 8] The inquiry submissions of the parties raised arguments not specifically addressed in the issues noted at the outset of the inquiry. As the Applicant and the Public Body, during the inquiry process, were aware of the additional issues and responded without objection to the additional issues raised, I have decided to accept the inclusion of the two issues to this inquiry as follows.

[para 9] The Public Body argued that section 17(1) of the Act applied to specific documents. This argument will now be Issue C:

> C. Does section 17(1) of the Act apply to the records/information?

[para 10] The Applicant argued that section 32(1)(b) of the Act applied in these circumstances. This argument will now be Issue D:

> D. Does section 32(1)(b) of the Act require the Public Body to disclose information in the public interest?

IV. DISCUSSION OF THE ISSUES

Preliminary Issue: Non-Responsive Records

[para 11] The Public Body decided that records numbered 39, 40, 42, 43, and 48 were non-responsive to the Applicant's access request. A determination of whether records are responsive is a decision of a public body. Section 65(1) of the Act allows me to review any decision that relates to an applicant's access request.

[para 12] I have reviewed the complete text of the records and find that the Public Body, in assessing the responsiveness of these particular records, has correctly determined that records 39, 40, 42, 43 and 48 are non-responsive, as they are not related to the Applicant's access request. The Public Body is not required to disclose those records to the Applicant.

ISSUE A: Did the Public Body properly apply section 24(1)(a) of the Act to the records/information?

[para 13] The Public Body argued that information severed from records 10 (partial), 11-15, 17(partial) 18-20, 41, 45 (partial), 46, 50 (partial) and 66-68 falls within the discretionary exception of section 24(1)(a) of the Act, which 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,…*

[para 14] The Public Body described the type of information as being made up of an overview of issues, a discussion of options, proposed criteria for generic registration, proposals for an appeal strategy, a proposed process for program approval and a strategy paper. The Public Body argued that section 24(1)(a) of the Act allows government officials that have the responsibility of making decisions, to freely discuss the issues before them in order to arrive at a decision.

[para 15] Order 96-006 establishes that when determining whether section 24(1)(a) of the Act will be applicable to information, the "advice" (which includes advice, proposals, recommendations, analyses or policy options) must meet the following criteria, in that the advice should:

> 1. be sought or expected, or be in part of the responsibility of a person by virtue of that person's position,
> 2. be directed toward taking an action,
> 3. be made to someone who can take or implement the action.

[para 16] The Public Body argued that the documents falling under section 24(1)(a) of the Act met the criteria established in Order 96-006, as the information was provided "in accordance with a government initiative" and "as requested by Alberta Health". The Public Body argued that it is clear that the stakeholder's advice was sought by the Minister, that the advice was related to the implementation of an action (amending legislation), and was directed to a public body that had the authority to implement the action.

[para 17] I examined the severed information, which is clearly advice, proposals and recommendations that address registration standards and processes as well as analyses and arguments for and against divergent courses of legislative responses. The information also includes analyses and recommendations regarding proposals for legislated registration changes related to the Public Body and discussion of policy options for registration purposes being developed for the Public Body. Furthermore, the information meets the three criteria noted above.

[para 18] The Public Body's *in camera* submission provided acceptable details as to why it exercised its discretion, in these particular circumstances, in not disclosing the information pursuant to section 24(1)(a) of the Act.

[para 19] I am satisfied that the Public Body properly exercised its discretion in not disclosing the information severed from the records numbered 10-15 (proposals, recommendations, analyses and policy options regarding proposed legislation), 17-20 (proposals, recommendations, analyses and policy options regarding between public bodies regarding training and assessment), 41 (addressed proposed legislative changes), 45 (proposals for action), 46 (proposals for action), 50 (recommendations for action and timing of that action) and 66-68 (proposals and recommendations for legislative change).

I am also satisfied that the records, developed by or for the Public Body, are in accordance with Order 2001-002 and do not contain information that has been previously disclosed in the public domain. I find that the Public Body properly applied section 24(1)(a) of the Act to the records/information.

ISSUE B: Did the Public Body properly apply section 27(1)(a) of the Act to the records/information?

[para 20] The Public Body applied section 27(1)(a) of the Act to records 51-65.

[para 21] Section 27(1)(a) 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,…*

[para 22] The Public Body argued that the records meet the criteria for solicitor-client privilege because each record:

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

[para 23] The Public Body argued "legal advice" has been defined in Order 96-017 as being about "a legal opinion but a legal issue, and a recommended course of action, based on legal considerations, regarding a matter of legal implications".

[para 24] The Public Body argued that in Orders 98-004 and 99-005, the Commissioner has found that solicitor-client privilege may apply to attachments to records to which solicitor-client privilege applies if the attachments are proven to be part of the continuum of the legal advice. The Public Body also argued that solicitor-client privilege applies to communications between the solicitor and client that constitute a continuum of advice which is intended to keep both informed so that advice may be sought or given as required (see Orders 96-020 and 96-021).

[para 25] Records 52-53 were previously disclosed to the Applicant and by doing so the Public Body has waived its privilege regarding those two documents. Therefore, section 27(1)(a) of the Act does not apply to records 52-53. I intend to order the Public Body to disclose those records to the Applicant.

[para 26] The Public Body provided sufficiently detailed evidence that the remaining undisclosed records involved communications as between a solicitor and client, that the records involve the seeking of legal advice and that the records were intended to be confidential as the only parties involved were solicitor and client to the exclusion of others. Therefore, the remaining records meet the criteria for solicitor-client privilege.

[para 27] The Public Body provided evidence that prior to deciding which records to disclose, the head of the Public Body reviewed the records, disclosed a great deal of information and subsequently reconsidered and disclosed further information. The Public Body, in exercising its discretion, also provided evidence that as a result of its review, it withdrew its reliance on certain provisions of the Act and exercised its discretion only after conducting thorough internal and external consultations.

[para 28] I find that the Public Body properly exercised its discretion in refusing to disclose the records and therefore properly applied section 27(1)(a) of the Act to records 51 and 54-65.

ISSUE C: Does section 17(1) of the Act apply to the records/information?

[para 29] Section 17(1) of the Act reads:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[para 30] The Public Body argued that personal information severed from records 69, 70 and 71 was properly withheld under the mandatory provision of section 17(1) of the Act. The Public Body argued that the records contain personal information which if disclosed would be an unreasonable invasion of third parties' (students) personal privacy.

[para 31] Personal information is defined in section 1(n) of the Act to include information about a person's educational, employment and financial history.

[para 32] Section 1(n)(vii) reads:

> *1* In this Act,
>
> (n)
>
> "personal information" means recorded information about an identifiable individual, including…
>
> *(vii) information about the individual's educational, financial, employment or criminal history…*

[para 33] The Public Body further argued that previous Orders of this office have said that the list of personal information found in sections 1(n) (i) to (ix) of the Act is not exhaustive. These Orders have noted that other facts, observations, the nature of the information, and the context of the information found in the records may reveal personal information and therefore should be considered. The Public Body referenced Orders 96-021, 97-002, 98-010, 99-023.

[para 34] The Public Body noted that prior to making a determination under section 17(1) of the Act, it took into consideration the factors found in section 17(2) of the Act. If any of the section 17(2) factors were found to apply it would render a section 17(1)

determination as unreasonable. The Public Body, upon closely examining the records, concluded that none of the section 17(2) factors to could be reasonably applied.

[para 35] The Public Body in reviewing record 70 found and provided evidence that the record specifically related to employment and educational history of identifiable third parties and therefore disclosure would be presumed to be an unreasonable invasion of those third parties' privacy under section 17(4)(d) of the Act. Section 17(4)(d) of the Act reads:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if….*
>
> *(d) the personal information relates to employment or educational history,…*

[para 36] In order for a public body to make a finding under both section 17(1) and section 17(4) of the Act, it has to factor in the application of section 17(5) of the Act. The Public Body initially did not provide sufficient evidence that it had in fact done so. The Public Body made a subsequent *in camera* submission weighing all the relevant circumstances.

[para 37] The Public Body argued and provided supportive evidence that under section 17(5)(h) of the Act, disclosure of the personal information contained in record 70 could unfairly damage the reputations of all of the third parties referred to in the record. Section 17(5)(h), which weighs in favor of withholding the third parties' personal information, reads:

> *17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether…*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, …*

[para 38] The Public Body, in making a determination regarding records 69 and 71, provided evidence that section 17(5)(e) of the Act was a relevant circumstance that weighed in favour of withholding the third parties' personal information. Section 17(5)(e) reads:

> *17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether…*
>
> *(e) the third party will be exposed unfairly to financial or other harm,…*

[para 39] The Public Body's evidence supported its argument that disclosure would expose the third parties unfairly to harm. The Public Body referenced Order 96-020.

[para 40] The Public Body also argued that section 17(1) of the Act shifted the burden to the Applicant to prove that disclosure of the personal information would not be an

unreasonable invasion of the third parties personal privacy and that the Applicant had failed to provide evidence in this regard, as required by section 71(2) of the Act.

[para 41] The solitary argument made by the Applicant, regarding the application of section 17(1) of the Act to these circumstances, is that the section cannot apply as the information is "possibly very public". The Applicant could not understand why withholding the information is appropriate. The Applicant did not attempt to prove that disclosure of the personal information would not be an unreasonable invasion of the third parties' personal privacy, as required by section 71(2) of the Act.

[para 42] I have reviewed the section 17(1) records at issue, the initial submission and the supplemental *in camera* submission. I agree that in these circumstances disclosing the severed personal information in records 69, 70 and 71 would be an unreasonable invasion of the third parties' personal privacy. I find that section 17(1) of the Act applies to the personal information. The Public Body must not disclose that personal information to the Applicant.

ISSUE D: Does section 32(1)(b) of the Act require the Public Body to disclose information in the public interest?

[para 43] Section 32(1)(b) reads:

> *32(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 44] The Applicant argued that the action of the Alberta Dental Association (ADA) directly impacted the Universities Coordinating Council (UCC) candidates and as a result the public must be interested. The Applicant elaborated by stating that:

> …the secondary effects, even if the candidates have a small success rate, would affect thousands of Albertans either with marginally higher costs for dental services, and/or marginally poorer availability of dental services. The requested information may assist with documenting and understanding the actions of the ADA and UCC. The disclosure is clearly in the public interest.

[para 45] The Applicant went into great detail regarding the history surrounding the reasons as to why he wants copies of the records at issue. The Applicant believes the process for the licensure of a foreign dentist is discriminatory and expensive. The bottom line for the Applicant is that he believes that he needs to document the "background and actions of the government, ADA…and the UCC…because as such the requested documents contain information that is in the public interest." By obtaining the records the Applicant believes he may be able to expose the reasons why the Universities Coordination Council dental registration exam process was abandoned.

[para 46] In relation to the application of section 32(1)(b), the Public Body argued that the Commissioner, in the past, has determined that:

> (a) The section imposes a statutory obligation on a public body to release information of certain risks in "emergency-like" circumstances.
> (b) The provision contains significant overrides of privacy rights and, therefore, information "caught" by the provision must be narrowly defined.
> (c) The applicant has the burden to prove that the information falls within one of the enumerated pre-conditions, and the burden will not be easily met.
> (d) There is a distinction between a "matter of interest to the public", and a "matter of public interest". In order to fall under the latter, it must "clearly" be a matter that is of "compelling" public interest. A mere assertion of "interest" by a member of the public is not sufficient (see Order 96-011).

[para 47] The Applicant has the burden of proof (see Order 2000-031). The Applicant did not provide any references to Orders, empirical or concrete data or non-speculative and supportive evidence to sustain his arguments. I find that the evidence and arguments of the Applicant do not establish a compelling "public interest". Therefore, section 32(1)(b) of the Act does not require the Public Body to disclose information in the public interest.

V. ORDER

[para 48] I make the following Order under section 72 of the Act.

[para 49] I find that the Public Body correctly determined that records 39, 40, 42, 43, and 48 are non-responsive to the Applicant's access request. The Public Body is not required to disclose those records to the Applicant.

[para 50] I find that the Public Body properly applied section 24(1)(a) of the Act to the severed records 10-5, 17-20, 41, 45, 46, 50 and 66-68. I uphold the decision of the Public Body and order the Public Body not to disclose those records to the Applicant.

[para 51] I find that the Public Body properly applied section 27(1)(a) of the Act to records 51, 54-65. I uphold the decision of the Public Body and order the Public Body not to disclose those records to the Applicant.

[para 52] I find that the Public Body did not properly apply section 27(1)(a) to records 52 and 53. I order the Public Body to disclose those records to the Applicant.

[para 53] I find that section 17(1) of the Act applies to the severed personal information in records 69, 70 and 71. I uphold the decision of the Public Body and order the Public Body not to disclose that personal information to the Applicant.

[para 54] I find that section 32(1)(b) of the Act does not require the Public Body to disclose information in the public interest.

[para 56] 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.

Frank Work, Q.C.
Information and Privacy Commissioner