

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2004-003

April 20, 2004

### UNIVERSITY OF ALBERTA

Review Number 2735

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the University of Alberta for access to communications sent or received by University officials in which his name was mentioned and which related to a Decanal review proceeding in his faculty. The University provided some of the documents but withheld or severed others, citing various sections of the Act.

The Adjudicator upheld the University’s decision to withhold the records. He held that the records fell within solicitor-client privilege, and that the University properly withheld them under the ‘legal privilege’ exception to disclosure in the Act.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 17(1), 24, 27, 27(1), 27(1)(a), 27(1)(c)(iii), 71(1), 71(2), 72.

**Authorities Cited: AB:** Order 96-008, Order 96-015, Order 96-017, Order 96-020, Order 99-013, Adjudication Order #4 *Hugh MacDonald MLA v. Alberta Justice / The Globe and Mail v. Alberta Justice*, March 13, 2003, *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

## **I. BACKGROUND**

[para 1] On March 17, 2003 the Applicant made a request to the University of Alberta (the “Public Body”) for

“personal information in the form of communication and documents”

- that related to the Decanal review process of the Dean of the Faculty of Graduate Studies and Research, and
- in which the Applicant’s name was mentioned by any of four named university officials

for the period October 2002 to the date of the request.

[para 2] The Public Body located nine documents (22 pages) that were responsive to the request. It released one of these documents to the Applicant (one page), withheld four of them (11 pages) in their entirety, and provided the rest in severed form. In withholding or severing information, the Public Body relied on numerous sections of the *Freedom of Information and Protection of Privacy Act* (the “Act”) and regulations.

[para 3] The Applicant was not satisfied with the response and by letter dated May 23, 2003 requested that the Office of the Information and Privacy Commissioner review the Public Body’s decision to withhold or sever documents.

[para 4] The matter was mediated. Following mediation, the Public Body released additional material. At the conclusion of this process, with the exception of two severed documents (4 pages), all responsive documents then put forward in the process had been released in their entirety.

[para 5] Subsequently, the Public Body located 14 more pages of responsive documents that had inadvertently been omitted from the access process. It withheld six of these pages, and provided the rest in severed form. Pursuant to instructions from the Office of the Information and Privacy Commissioner, it provided these documents to the Applicant by way of including them in Appendix 1 of the Public Body’s ‘Submission to be Exchanged Among the Parties’ in the inquiry.

[para 6] In its submission, the Public Body provided its reasons for severing or withholding the new documents. The new documents are also addressed in the rebuttal submission of the Applicant.

## **II. RECORDS AT ISSUE**

[para 7] The records consist of severed and withheld portions of e-mail communications (18 pages) between the Public Body’s officials and legal advisors to the Public Body, and amongst the Public Body’s officials.

### **III. PRELIMINARY ISSUES**

[para 8] Two preliminary issues were raised by the parties – the former by the Applicant in his rebuttal submission and the latter by the Public Body in its initial submission.

- A. Was the Applicant prejudiced by the delayed submission of some of the documents by the Public Body?
- B. Did the Applicant have the burden of proof in the inquiry?

### **IV. DISCUSSION OF PRELIMINARY ISSUES**

#### **Preliminary Issue A: Was the Applicant prejudiced by the delayed submission of some of the documents by the Public Body?**

[para 9] The Applicant submits that he was ‘potentially prejudiced’ by the fact that 14 pages of responsive records were added by the Public Body after the mediation process had concluded. He is concerned he did not have the benefit of putting them through what he saw as a ‘positive’ mediation process.

[para 10] The Public Body’s evidence is that the delay was completely inadvertent, and there is nothing to counter this evidence. While the delay meant that these records were not part of the mediation process, examination of the new records reveals that they have been withheld or severed for the same reasons as documents were severed after the mediation. Thus mediation relative to the new documents would not have resulted in greater access than the Applicant has been given. For this reason I conclude the Applicant suffered no prejudice as a result of the delayed submission of these records.

#### **Preliminary Issue B: Did the Applicant have the burden of proof in the inquiry?**

[para 11] The Public Body submits, by reference to section 71(2) of the Act, that because the records contain the personal information of third parties (the Public Body’s officials who made or received the requested communications), “the burden of proof in this inquiry rests with the Applicant”.

[para 12] The Applicant makes a number of points to demonstrate there has been no unreasonable invasion of personal privacy. He says that the third parties whose information would be revealed are the very officials who, in the performance of their official duties, conducted the requested communications. In his view, in an open process, the privacy of these officials should yield to the public interest. He also notes that no ‘identifiable individuals’ have requested that their information be withheld or feel their privacy is being violated. Finally, he points out that the personal information such as e-mail addresses and features of employment are publicly available in the university directory and on the Internet, and that such information is in any case severable from the remaining records.

[para 13] The relevant parts of section 71 read:

*71(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.*

[para 14] Section 17(1) of the Act provides:

*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 15] The records contain personal information (the names, addresses and occupational positions of the Public Body's officials and their legal advisors). However, I do not accept the Public Body's submissions as to how section 71(2) operates in view of this fact.

[para 16] First, it does not follow from the fact that the records contain personal information that "the burden of proof in this inquiry rests with the Applicant" in some general sense. The burden under section 71(2) is the specific one of showing that disclosure of the personal information would not be an unreasonable invasion of third parties' personal privacy – the question that arises under section 17(1).

[para 17] Second, in my view even the narrower burden under 71(2) is not triggered unless section 17 becomes an issue in the inquiry. This will obviously be so if the Public Body has relied on section 17(1) as a ground for withholding records. While in its original response to the Applicant the Public Body relied on section 17 to withhold some of the records, it has since retreated from this position. It has expressly disclaimed any reliance on this section in its submissions. Thus the Public Body has not put section 17 in issue in this inquiry.

[para 18] There is another way for section 17 to become an issue. In Order 96-008, the former Commissioner decided that because he had responsibility for the overall administration of the Act, he would consider whether a mandatory exception applied whether or not it had been raised. Section 17 is a mandatory exception. Even where a Public Body has not relied on this provision to withhold records, the records may on their face suggest that section 17(1) might apply. In such cases, the Commissioner or Adjudicator may put the section in issue and notify the parties and third parties to this effect, giving them an opportunity to make submissions.

[para 19] The records in this case do not contain material such as would suggest an unreasonable invasion of a third party's personal privacy. Accordingly I have not put section 17 in issue.

[para 20] Because section 17 is not an issue in this inquiry, the Applicant does not bear a burden of proof under section 71(2).

[para 21] Since the Public Body refused to disclose the records on the basis of other exceptions to disclosure under the Act, the burden of proof is on the Public Body, as provided by section 71(1) of the Act.

## V. ISSUES

[para 22] The issues are:

- A. Did the Public Body properly apply section 27 of the Act to the records?
- B. Did the Public Body properly apply section 24 of the Act to the records?

## VI. DISCUSSION OF ISSUES

### **Issue A: Did the Public Body properly apply section 27 of the Act to the records?**

[para 23] The Public Body made arguments relative to every exception available under sections 24 and 27 of the Act. Of all these potential exceptions to disclosure, the one that is strictest and requires the most precision in its application is section 27(1)(a) – 'legal privilege'. I could avoid answering whether this section applies by deciding the issue on the basis of one of the broader exceptions, for example, section 27(1)(c)(iii). However, given that the Public Body contends that this most rigorous exception applies, I will deal with this contention first. If it applies, it is unnecessary to deal with the others.

[para 24] The relevant parts of section 27 are:

*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,*

*(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.*

## **Application of section 27(1(a))**

[para 25] The Public Body asserts, by reference to an Affidavit it supplied to the Commissioner in confidence and to the records themselves, that in the case of each record, confidential legal advice was being sought or given, or quoted or discussed by its officials. On this basis it submits that all the records were subject to solicitor-client privilege within the terms of section 27(1(a)).

[para 26] The Applicant's response to these assertions is that it is unclear to him how the Decanal review proceeding has any logical relation to legal privilege. He also speculates that the Decanal review committee was involved in discussions about these matters, and that this would have been improper without soliciting his views.

[para 27] As set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 (discussed in Order 96-015) a document must meet the following criteria for solicitor-client privilege to apply:

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

[para 28] I accept the Public Body's submission that the records meet the criteria for solicitor-client privilege.

[para 29] In Order 96-017, the Commissioner adopted a definition of 'legal advice' set out by the Ontario Information and Privacy Commissioner. This definition requires that the advice in question, "include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications". In my view this test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to their legal advisor to determine what those legal implications might be. In this case there was evidence that the Applicant was involved in legal proceedings in another context but relative to the same or similar subject matter. This raised a reasonable concern that the way his involvement in the Decanal review was handled by the Public Body's officials could have some legal implications. Thus the advice requested from or given by the lawyers in this case meets the test for 'legal advice'.

[para 30] With regard to the criterion of confidentiality, there is no express mention of confidentiality in most of the communications. However, it is implicit in the circumstances under and purposes for which the legal advice was being sought or given in this case that the communications were intended to be confidential. To be useful, legal advice about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute, relative to the subject matter of the existing or potential dispute, must necessarily be sought and given in a confidential manner.

[para 31] The privilege applies not only to the records that actually give the legal advice but also to those that seek it and that provide factual information relative to which the advice

is sought (see Adjudication Order #4 *Hugh MacDonald MLA v. Alberta Justice / The Globe and Mail v. Alberta Justice*, March 13, 2003, at paras. 16 to 18).

[para 32] Records 1 to 9 and 11 to 15 (as numbered in the Public Body's submission) meet the criteria discussed above. Thus I find the Public Body properly determined that they fell within the 'legal advice' branch of solicitor-client privilege under section 27(1)(a).

[para 33] Solicitor-client privilege also applies to records that quote or discuss the legal advice. In Orders 96-020 and 99-013, the Commissioner said that solicitor-client privilege applies to information in written communications between officials or employees of a public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor. On this basis I find the Public Body properly determined that record 10 fell within the 'legal advice' branch of solicitor-client privilege under section 27(1)(a).

### **Exercise of discretion**

[para 34] The Public Body was right to conclude that all the records fall under section 27(1)(a) and that it had the discretion to withhold them. That does not end the matter. It must go on to demonstrate that it considered which way that discretion ought to be exercised in the situation before it given the purposes of the Act, and that its decision to withhold was for a proper purpose – one consistent with the purposes of the Act.

[para 35] The Public Body's submission does not expressly deal with its reasons for exercising its discretion to withhold under section 27. However, in various parts of its submission, in the Affidavit evidence, and in the records themselves, the Public Body has revealed its reasons for withholding the records.

[para 36] Various parts of the submission refer to the fact that the Applicant was involved in other proceedings, including litigation, with officials of the Public Body. The implication is that the Public Body had a concern that its handling of the Decanal Forum might also give rise to legal consequences. This is confirmed by the Affidavit of the Privacy Advisor, who says that the Public Body's officers anticipated problems around the Decanal review process, given the history of the matter, and that legal advice was being sought in an ongoing way "as part of an effort to avoid or limit further litigation" with the Applicant.

[para 37] The submissions and evidence that demonstrate the Public Body's concerns about the possible legal implications of its decision making about the Decanal Forum enable me to judge whether it exercised its discretion to withhold the documents for a proper purpose. As I have said above, legal advice about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute, relative to the subject matter of the actual or potential dispute, is not useful if it is disclosed. Withholding documents that relate to obtaining legal advice in order to preserve the utility of that advice is proper, and consistent with the purposes of the Act.

## **Information for the Applicant**

[para 38] I note that the submissions and evidence, when combined with the severed records, also provide meaningful information for the Applicant. I recognize that all the information disclosed to the Applicant was either created by him or had been sent to him and was thus already in his possession. However, this information was provided to him *in the context of the severed documents*. The Public Body describes the withheld documents and severed parts of the documents as all being for the purpose of obtaining or discussing legal advice relative to decisions to be made about the Decanal Forum. I have reviewed the documents and find this to be an accurate description. Thus the Applicant is allowed to know that all the undisclosed portions of the communications were withheld to enable the Public Body to obtain or discuss confidential legal advice on matters which it regarded as having possible legal implications.

## **Conclusion under section 27(1)(a)**

[para 39] I find the Public Body properly applied section 27(1)(a) of the Act to the records.

## **Application of the remainder of section 27(1)**

[para 40] Having concluded that the records were properly withheld under section 27(1)(a), it is unnecessary for me to decide whether the remaining provisions of section 27(1) apply to the records.

## **Issue B: Did the Public Body properly apply section 24 of the Act to the records?**

[para 41] Having concluded that the records were properly withheld under section 27(1)(a), it is unnecessary for me to decide whether section 24 was properly applied to the records.

## **VII. ORDER**

[para 42] I make the following Order under section 72 of the Act.

[para 43] I find the Public Body properly applied section 27(1)(a) of the Act to the records. I confirm the decision of the Public Body not to disclose these records.

Dave Bell  
Adjudicator