

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2004-011**

May 7, 2004

**THE CITY OF CALGARY**

Review Number 2752

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

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* for a number of records regarding a fire which occurred in the Erlton district of southwest Calgary. In response to the access request, the City of Calgary provided access to only a portion of the records at issue. At the time of the inquiry, 153 pages of records remained at issue. The City of Calgary withheld the records on the ground that they contained privileged information (section 27(1) of the *Freedom of Information and Protection of Privacy Act*).

The Adjudicator held that the City of Calgary properly withheld the records under section 27(1)(a) (litigation privilege) of the *Freedom of Information and Protection of Privacy Act* and properly exercised its discretion in that regard.

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

**Authorities Cited: AB:** Order 97-009

**Cases Cited:** *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.).

## I. BACKGROUND

[para 1] On May 30, 2002, a fire occurred in the Erlton district of southwest Calgary.

[para 2] On March 10, 2003, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the City of Calgary (the “Public Body”) for the following:

1. Any internal fire investigation reports relating to the cause of the Erlton Fire, the spread of the Erlton Fire, and the Fire Department’s response to the fire;
2. Any maintenance and repair records relating to the water mains and fire hydrants between 25<sup>th</sup> Avenue S.W. at the southern extremity, 22<sup>nd</sup> Avenue S.W. on the northern extremity, Erlton Road on the eastern extremity and Erlton Street on the western extremity;
3. Any written records detailing both the water capacity of the mains and the water availability /flow on May 30, 2002;
4. Any written records of communication between the City of Calgary Fire Department and Enmax.

[para 3] Through subsequent discussions between the Public Body and the Applicant, the request was clarified as follows:

1. For May 29 to May 31 [2002] inclusive, any records that would relate to operational capacity (water mains, fire hydrants etc.) before or after the incident; and
2. For May 30 [2002] to the present, records regarding when the Calgary Fire Department instructed Enmax to shut off the power; including any additional correspondence following that directive up to and including the present.

[para 4] On April 25, 2003, the Public Body responded to the access request and provided the Applicant with access to records numbered 168, 169 and 172 - 258. The Public Body withheld records 170 and 171 as non-responsive and withheld records numbered 1 -167 pursuant to sections 27(1)(a) and 27(1)(b) of the Act.

[para 5] On June 4, 2003, the Applicant requested a review of the Public Body’s decision. Mediation was authorized and resulted in the release of records 150-163 to the Applicant. During mediation, the Applicant also expanded his initial request to include all communication logs. These logs were released on July 18, 2003.

[para 6] As all of the issues were not resolved during mediation, the matter was set down for a written inquiry. During the inquiry, the Public Body submitted an initial submission but did not submit a rebuttal. The Applicant submitted both an initial submission and a rebuttal.

## **II. RECORDS AT ISSUE**

[para 7] The records at issue are from the Public Body's Water Works Business Unit. They are numbered 1-149 and 164-167.

## **III. ISSUE**

[para 8] There is one issue in this inquiry:

Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/ information?

## **IV. DISCUSSION OF ISSUE:**

[para 9] The Public Body's position is that the records are subject to litigation privilege under section 27(1)(a) and that the Public Body properly exercised its discretion in deciding to withhold them. The Public Body's submission states that all of the criteria for litigation privilege are fulfilled in regard to these records. The Public Body's position is further supported by the affidavit of a lawyer employed by the Public Body's Law Department. The Public Body did not address section 27(1)(b) at the inquiry.

[para 10] The Applicant's position is that litigation privilege does not apply to the records. The Applicant states that given the seriousness of the incident, the dominant purpose for the creation of the records was not to submit them to a legal advisor for advice in contemplated or existing litigation but for other reasons. The Applicant states that the Fire Department's and/or the Public Body's own internal policies, its insurance policies and general custom and practices would have required the creation of the documents. In the Applicant's rebuttal, the Applicant stated that the only way to truly determine the dominant purpose behind the creation of the records would be to permit the Applicant to cross-examine the Public Body's affiants on their affidavits. As such, the Applicant requested that I convene an oral hearing to determine this issue.

[para 11] 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 12] In Order 97-009, the Commissioner said that litigation privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

[para 13] In that Order, the Commissioner said that to correctly apply litigation privilege, the Public Body must show that:

(1) There is a third party communication. Third Party communications may include:

(i) communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;

(ii) communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice; or

(iii) communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc

(2) The maker of the document or the person under whose authority the document was made intended the document to be confidential. The one exception to the requirement for confidentiality is the "work product" or "lawyer's brief" rule, in which case it is the lawyer's intention which is relevant when the lawyer assembles material for the brief for litigation.

(3) The "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.). The dominant purpose test consists of three requirements:

(i) the documents must have been produced with existing or contemplated litigation in mind,

(ii) the documents must have been produced for the dominant purpose of existing or contemplated litigation, and

(iii) if litigation is contemplated, the prospect of litigation must be reasonable.

[para 14] I have reviewed all of the records, the arguments of all of the parties as well as the Public Body's affidavits. I do not agree with the Applicant that it is necessary to convene an oral inquiry in order to determine whether the Public Body

properly applied litigation privilege to the records. As such, I have decided not to grant the Applicant's request for an oral hearing. I am satisfied that the evidence before me shows that the Public Body properly applied section 27(1)(a) to the records and properly exercised its discretion in that regard. I find that the records at issue fulfill all the requirements for litigation privilege. I find that the records consist of third party communications which were intended to be confidential. I also find that the dominant purpose for which the records were prepared was to submit them to a legal advisor for advice and use in contemplated litigation. I uphold the Public Body's decision to withhold these records from the Applicant.

**V. ORDER**

[para 15] I make the following Order under section 72 of the Act:

[para 16] I find that the Public Body properly applied section 27(1)(a) to the records at issue and properly exercised its discretion in this regard. I uphold the Public Body's decision to withhold these records from the Applicant.

Dave Bell  
Adjudicator