

**ALBERTA**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**ORDER F2004-017**

February 28, 2005

**ALBERTA JUSTICE**

Review Number 2813

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

**Summary:** The Applicant applied to Alberta Justice (the “Public Body”) for access to information regarding the legal costs incurred by the Alberta Government in proceeding with the case entitled, *Reference Re: Firearms Act*. The Applicant subsequently stated that it would be prepared to receive only a breakdown of costs incurred by the Public Body at each stage of the proceedings. The Commissioner found that “solicitor-client privilege” applied to the records including the amounts billed and therefore that the Public Body had properly applied section 27(1) (privileged information). The Applicant had not established that the matter was of compelling public interest and therefore the override provision found in section 32 (public interest) did not apply. The Public Body had raised the applicability of section 17 (personal privacy). However, given his decision under section 27(1), the Commissioner did not find it necessary to decide whether section 17 applied to the personal information contained in the records.

**Statutes Cited:** **AB:** *Financial Administration Act* R.S.A. 2000, c.F-12 ss.2, 25; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 17,17 (4),17(4)(d) 17(5)(a), 27(1),27(1)(a),32.

**Cases Cited:** *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.).

**Authorities Cited:** *Black’s Law Dictionary* (7<sup>th</sup> ed. 1999); Manes and Silver, *Solicitor-Client Privilege in Canadian Law* (1<sup>st</sup> ed. 1993).

**Orders Cited:** **AB:** 96-011, 96-014, 96-015, 96-017, 98-004, 98-017, F 2002-007.

## **I. BACKGROUND**

[para 1] On June 26, 2003, the Applicant applied to Alberta Justice (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to the following:

“Any and all legal costs incurred by the Alberta Government in proceeding with the reference case entitled, *Reference Re Firearms Act*, in accordance with, but not limited to, Order in Council 461/96 dated September 26, 1996, at all levels of court including but not limited to the Alberta Court of Appeal in *Reference Re Firearms Act*, 1998 ABCA 305 and Supreme Court of Canada *Reference Re Firearms Act* (Can.), [2000] 1 S.C.R. 783.”

[para 2] On August 27, 2003, the Public Body denied access to the requested information under section 27(1)(a) (privileged information) of the Act.

[para 3] By letter dated September 11, 2003, the Applicant requested a review of the Public Body’s decision citing section 32 (public interest) of the Act. The letter further stated that the Applicant would be prepared to withdraw its request for disclosure of the records in return for a breakdown of costs incurred by the Public Body at each stage of the legal proceedings.

[para 4] On April 20, 2004, the Public Body wrote to the Commissioner requesting that the application of section 17 (personal information) be added as an issue to the inquiry. On April 28, 2004, the Commissioner agreed that this issue be added.

## **II. RECORDS AT ISSUE**

[para 5] The records at issue are the solicitor’s accounts rendered to the Public Body.

## **III. ISSUES**

[para 6] There are three issues to this inquiry:

- A. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?
- B. Did section 32 of the Act (public interest) require the Public Body to disclose information in the public interest?

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

#### IV. DISCUSSION OF ISSUES

##### **ISSUE A: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?**

[para7] Order 96-017 considered the decision-making process a public body must undertake in applying a discretionary exception of the Act such as section 27(1). There is a two-step process consisting of a factual decision, namely, the determination as to whether the information falls within the exception which allows the information to be withheld from disclosure, and a discretionary decision, which determines whether the information should nevertheless be disclosed, even if the exception applies.

[para 8] After an examination of the records, which consist entirely of solicitors' accounts, I find that they meet the criteria for solicitor-client privilege as set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821 in that they are communications between a solicitor and client, which entail the seeking or giving of legal advice, and are intended to be confidential between the parties.

[para 9] With regard to the Applicant's request for a breakdown of the costs associated with the records, in Orders 96-015 and 98-004, the former Commissioner found that if solicitor-client privilege applies, it applies to the entire document and I have no jurisdiction either to determine the factual component of the document or to require that the Public Body sever that document. There is also no obligation under the Act to create such a record as a breakdown.

[para 10] Further, in Order F2002-007, I considered whether a breakdown of the total value of the fees charged to the Government by its legal counsel met the requirement for solicitor-client privilege under section 27(1)(a). In that Order after examining the case law, in particular *Stevens v. Canada (Prime Minister)*, [1998]4 F.C. 89 (C.A.), I concluded that solicitor-client privilege applied to solicitors' statements of account including the amounts billed. There is nothing in the Applicant's submission or on the face of the records that would convince me to depart from this finding. Accordingly, I find that section 27(1)(a) applies to the entire body of the records in question.

[para 11] The Applicant has argued that even if solicitor-client privilege applies, disclosure should be made as the Public Body implicitly waived this privilege if it correctly applied section 25 of the *Financial Administration Act* which states that payments made in accordance with an agreement shall be reported in the public accounts.

[para 12] A similar argument was made in *Stevens v. Canada (Prime Minister)* where it was argued that disclosure of a Commission of Inquiry's legal bills to the Privy

Council Office amounted to a waiver of privilege. In this regard Linden J.A. agreed with the analysis of the trial judge Rothstein J. that:

Even in the event the PCO were a third party, disclosure to that office still would not amount to a waiver, as the disclosure was compulsory pursuant to Order in Council P.C. 1986-1139. (para 6)

[para 13] Ronald D. Manes and Michael P. Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto, Ontario: Butterworths, 1993), at page 191 state:

So where a statute requires disclosure, e.g., of a report, no voluntariness is said to be present and no implied waiver occurs.

[para 14] I agree that a waiver, which Black's Law Dictionary defines as an "intentional or voluntary relinquishment" cannot be involuntarily surrendered in such a way. I therefore find that the Public Body did not waive solicitor-client privilege.

[para 15] Furthermore, I note the Applicant's argument fails to take into account section 2 of the *Financial Administration Act* which states that it operates subject to the *Freedom of Information and Protection of Privacy Act*.

[para 16] I would add one final comment. The Act does not define "solicitor-client privilege". The Legislature, if it had wished, could have defined or narrowed the scope of this privilege, but it did not. By not doing so it is apparent that section 27 of the Act incorporates the entire common law doctrine of solicitor-client privilege. I agree with the view of Linden J.A. in *Stevens* at paragraph 22, that whether the client is an individual, a corporation or government, there is no distinction in the degree of protection offered by solicitor-client privilege. A government being a public body may have a greater incentive to waive the privilege, but the privilege is still its to waive.

[para 17] I now turn to the second step of the process, namely, whether the head of the Public Body or its delegate properly determined, considering the objects and purposes of the Act, whether the information should be released, even though the exception applies.

[para 18] The Public Body in this instance has not provided direct evidence from the head of the public body or its delegate. It has, however, provided by way of argument the matters considered by the delegate in making its determination. The submission makes reference that the delegate considered the objects and purposes of the Act and balanced the Applicant's right to information with the legal rights enshrined in solicitor-client privilege.

[para 19] Reviewing this submission it appears that there have been no improper or irrelevant considerations made. The rationale for exercising the discretion appears to be both demonstrable and reasonable.

**ISSUE B: Did Section 32 of the Act require the Public Body to disclose the information in the public interest?**

[para 20] Order 96-011 stated that the burden of proof under section 32 will be upon the Applicant to show that the head of the Public Body incorrectly decided that release of the records was not in the public interest. That Order states that this is a burden that will not be easily met.

[para 21] Order 96-011 also determined that because this section is an override provision, it will be narrowly interpreted. In that Order the former Commissioner commented:

I cannot conclude that the Legislature intended for section 31[now section 32] to operate simply because a member of the public asserts “interest” in the information. The pre-condition that the information must be “clearly a matter of public interest” must refer to a matter of compelling public interest. (page 18 )

[para 22] In Order 96-014 Justice Cairns made the distinction between information that “may well be of interest to the public” and a matter that is a “matter of public interest”.

[para 23] The Applicant states that “what is at issue is the provincial government’s cost in proceeding with the reference case in this division of powers case”. While this may be of interest to the Applicant, it was reasonable for the Public Body to determine that this issue, confined to the cost of a single (albeit longstanding) litigation file and not to the general issue of gun control, is not of compelling public interest.

[para 24] Both Orders 96-011 and 98-017 have stated that the Commissioner will only interfere with a decision of the head of a public body when it is not “rationally defensible”. The decision by the head of the Public Body is rationally defensible in this instance. Although I agree that government expenditure regarding a litigation file is a matter of interest to the public, I find that the Applicant has not established that this is a matter of compelling public interest.

[para 25] I therefore find that the information in question is not information that is clearly in the public interest within the meaning of section 32(1)(b) and that this section does not require the Public Body to disclose the information.

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

[para 26] In determining that solicitor-client privilege applies to the records in question, I do not find it necessary to consider whether section 17 applies to personal information contained in the records.

**V. ORDER**

[para 29] I make the following Order under section 72 of the Act.

[para 30] I find that the Public Body properly applied section 27(1) of the Act to the records/information. I uphold the Public Body's decision to refuse access.

[para 31] I find that section 32 does not require the Public Body to disclose information.

[para 32] I do not find it necessary to decide whether section 17 applies to personal information contained in the records.

Frank Work Q.C.  
Information and Privacy Commissioner