ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-012

June 6, 2006

ALBERTA JUSTICE

Review Number 3062 & 3140

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") for access to a report prepared by independent consultants commissioned by the Public Body. The Public Body refused to disclose the report citing sections 4(1)(q) (records created for Executive Council), 24 ("advice") and 27 (privileged information).

The Applicant asked for a review of this decision and further argued that the Public Body failed to meet its duty to assist under section 10, and to properly extend the time limit for responding to a request under section 14 of the Act.

The Commissioner found that the record was not excluded by section 4(1). He also held that the Public Body had properly applied section 24 of the Act. Having made this determination the Commissioner found it unnecessary to consider the application of section 27.

The Commissioner found that the Public Body had met its duty to assist under section 10. However, it had not properly extended the time limit for responding to the request as authorized by section 14 of the Act. As a result, pursuant to section 72(3)(c) of the Act, the Commissioner ordered the Public Body to refund the fees paid by the Applicant.

Statutes Cited: AB: *Financial Administration Act*, R.S.A. 2000, c. F- 12, ss.76(2), *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2(a), 4(1)(q), 6(2), 10, 10(1), 11, 14, 14(1)(c), 24(1), 24(1)(a), 27, 71, 73(1)(b), 73(1)(c). *Government Organization Act*, R.S.A. 2000, c. G-10, Schedule 9, s. 2(a).

Authorities Cited: *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at p.1

Cases Cited: *Re: Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, *R. v. Sharpe* [2001] 1 S.C.R. 45, *Rubin v. C.M.H.C.* (1998), 52 D.L.R. (4th) 671 (Fed.C.A.).

Orders Cited: AB: Orders 96-006, 96-017, 97-004, 97-007, 98-002, 99-011, 2000-008, 2000-014; **B.C.:** Order No. 5-1994.

I. BACKGROUND

[para 1] The Applicant requested access to a report concerning proposed insurance coverage for Members of the Legislative Assembly ("MLAs") facing civil law suits (the "Report"). The Report itself was prepared by independent consultants commissioned by Alberta Justice (the "Public Body").

[para 2] The Public Body received an initial fee of $25 for access on July 12, 2004. On August 10, 2004 the Public Body wrote to the Applicant extending the time for response to September 10, 2004, pursuant to section 14(1)(c) (consultation with another public body) of the *Freedom of Information and Protection of Privacy Act* (the "Act").

[para 3] I received the Applicant's request for a review of the extension decision on August 15, 2004. The Applicant also complained that the Public Body did not meet its duty under section 10(1) of the Act. On September 10, 2004 the Public Body sent a letter to the Applicant refusing disclosure of the Report citing sections 4(1)(q) (records created for Executive Council), 24 ("advice") and 27 (privileged information) of the Act. On November 23, 2004, my office informed the Public Body that the decision to refuse disclosure was being referred to inquiry. The Report was subsequently released to the Applicant after being tabled in the Legislature.

II. RECORDS AT ISSUE

[para 4] Although the Report has been provided to the Applicant and is no longer directly at issue, I have nevertheless considered the Public Body's application of exceptions under the Act to originally withhold the Report.

III. ISSUES

[para 5] To better understand the application of the Act, I have re-ordered the issues. The five issues in this inquiry are:

A. Are the records excluded under section 4 of the Act? (Originally Issue C)

B. Did the Public Body properly apply section 24 of the Act? (Originally Issue E)

C. Did the Public Body properly apply section 27 of the Act? (Originally Issue G)

D. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act? (Originally Issue A)

E. Did the Public Body properly extend the time limit for responding to a request, as authorized by section 14 of the Act? (Originally Issue B)

IV. DISCUSSION OF THE ISSUES

A. Are the records excluded under section 4 of the Act?

[para 6] At the outset the Public Body concedes that it will bear the burden of proof with regard to the issues in this inquiry. In Order 97-004, Commissioner Clark stated that where section 71 does not establish which party has the burden of proof, it will be determined by the party who raised the issue and who is in the best position to meet the burden. Since the Public Body claimed the exceptions to disclosure, determined the need for an extension of time and had to discharge its duty under section 10, it not only has raised the issues, but is also best placed to bear the burden of proof. Accordingly, the Public Body will bear the burden of proof on the issues in this inquiry.

[para 7] Section 4(1)(q) reads:

> 4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> (q) a record created by or for
>
> (i) a member of the Executive Council,
>
> (ii) a Member of the Legislative Assembly, or
>
> (iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly
>
> that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the *Financial Administration Act* who is a Member of the Legislative Assembly;

[para 8] The Public Body states that the correspondence submitted in its in camera submission and the contract for service with the consultants, demonstrates that the Report was prepared expressly for, and on behalf of, members of the Executive Council, namely, the Minister of Justice, acting as the government's legal advisor, and the Revenue (now Finance) Minister, who manages the Risk Management Fund. With regard to the requirements of section 4, the Public Body argues that there ought to be no distinction between those instances where a member of the Minister's staff produces a report for the Minister and where the report is produced by an external source at the Minister's specific direction.

[para 9] A similar argument was advanced by a public body and rejected by the Commissioner in Order 97-007. At paragraph 19 Commissioner Clark stated:

> I believe section 4(1)(l) [now section 4(1)(q)] encompasses only communications between those persons listed in section 4(1)(l)(i) to (iii) [now section 4(q)(i) to (iii)], or communications between any of those persons. Should I adopt the interpretation argued by the Public Body and the Intervenors, any document created for the Minister and is, sent to, or intended to be sent to the Minister will fall out of the Act's application. Such an interpretation would potentially exclude a vast number of records.

[para 10] The Commissioner went on to state in Order 97-007 that the persons listed in subparagraphs 4(1)(l)(i) to (iii) must be the source of the documents and generate the documents for them to fall within section 4(1)(l) [now section 4(1)(q)]. Section 4 does not exclude records "destined for" a minister unless the record originated from one of the other people defined in section 4(1)(q).

[para 11] In this instance, the Report was written by private consultants. The contract for services states that the consultants can confer with a wide range of individuals such as leaders of the opposition, academics and other persons as it deems appropriate. The contract does not stipulate that the Report must be submitted directly to the individual Ministers specified. With regard to the in camera correspondence, one memorandum requests the Minister and "your department" to conduct the review, and another records the fact that the consultants had conducted discussions on the matter with department officials. In such a case, it cannot be said that the source and generation of the Report is from those individuals who are described in section 4(1)(q)(i) to (iii). The Report accordingly does not fall within section 4(1)(q) of the Act, and is not excluded under section 4 of the Act.

B. Did the Public Body properly apply section 24 of the Act?

[para 12] The Public Body has submitted that if section 4 of the Act does not apply, then it was proper to refuse disclosure of the Report pursuant to section 24 of the Act. Order 96-017 considered the decision-making process a public body must undertake in applying a discretionary exception of the Act, such as section 24. There is a two-step process consisting of a factual decision, namely, the determination as to whether the information falls within the exception to withhold the information from disclosure, and a

discretionary decision, which determines whether the information should nevertheless be disclosed, even if the exception applies.

[para 13] Sections 24(1)(a) and (b) of the Act read:

> 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,
>
> (b) consultations or deliberations involving
> (i) officers or employees of a public body,
> (ii) a member of the Executive Council, or
> (iii) the staff of a member of the Executive Council,

[para 14] Order 96-006 set out the criteria for "advice", which includes advice, proposals, recommendations, analyses or policy options under then section 23(1)(a)[now section 24(1)(a)]. That advice should:

> (a) Be sought or expected, or be part of the responsibility of a person by virtue of that person's position;
>
> (b) Be directed towards taking an action; and
>
> (c) Be made to someone who can take or implement the action.

[para 15] The contract for services expressly directs the consultants to review current insurance protection and to make recommendations as to possible changes in that coverage. It further requires the consultants to report their findings and recommendations to the Public Body. Therefore, the first requirement, that advice be sought or expected or be part of the responsibility of a person by virtue of that person's position, has been met.

[para 16] With regard to the second requirement, the contract required the consultants to develop recommendations, and the in camera memoranda stated that the Report would assist in determining insurance coverage in the future. The requirement that the advice was directed towards taking an action, has been met.

[para 17] As to the final requirement, the contract for services was executed by both the Deputy Minister for the Public Body and the Deputy Minister for Alberta Revenue. Under Schedule 9, section 2(a) of the *Government Organization Act*, the Public Body is responsible for legal advice to the Government of Alberta. Pursuant to section 76(2) of the *Financial Administration Act*, Alberta Revenue (now Finance) is responsible for the administration of the Risk Management Fund. Both parties received the Report and, given their respective responsibilities, were persons who could take action regarding the

recommendations made. Therefore, I find that the Public Body was right to conclude that the Report fell within section 24(1)(a).

[para 18] Having determined that the factual decision made by the Public Body was correct, I now turn to the second step of the process, namely, whether the head of the Public Body properly exercised his discretion, considering the objects and purposes of the Act.

[para 19] The Public Body in this instance has not provided direct evidence from the head of the public body. It has, however, provided by way of argument the matters considered by the head in making his determination. The prime consideration was the nature of the Report, which dealt with the type and scope of insurance coverage provided to MLAs and the impact any changes recommended in the Report would have on them. For this reason the decision was made to withhold disclosure until the Report could be presented to the Legislative Assembly.

[para 20] In reviewing the Public Body's submission, it appears that there have been no improper or irrelevant considerations taken into consideration in initially refusing to disclose the Report to the Applicant. I further note that the day after the Report was tabled in the Legislative Assembly, the Public Body forwarded a copy of it to the Applicant. In this instance, I find that the Public Body properly exercised its discretion to initially withhold the Report.

[para 21] One final matter remains. As stated in Order 97-007, section 24 does not have the inherent quality of non-severability, as in the case of solicitor-client privilege. In accordance with section 6(2) of the Act, a right of access does not extend to information excepted from disclosure; however, if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of that record. The Public Body has argued that since the Report itself is so interwoven with the information to which section 24 applies, any attempt at severing would have rendered the Report meaningless.

[para 22] I have examined the Report and agree that the analysis and proposals are so interwoven into the body of the Report, that any severing would have rendered the Record meaningless.

[para 23] I find, therefore, that the Public Body properly applied section 24(1)(a) of the Act to the Report.

C. Did the Public Body properly apply section 27 of the Act?

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

D. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 25] The Applicant states that after the access request was made, but prior to this inquiry, he was informed by a spokesperson for the Public Body that the Report would be released during the next sitting of the Legislature. The Applicant argues that in such a case the sections of the Act relied on by the Public Body to withhold the Report were no longer applicable and, in refusing to release the Report at that time, the Public Body failed in its duty to assist.

[para 26] As stated in Order 99-011, a public body's duty to assist under section 10(1) is triggered by an access request. It should also be noted that, although section 10(1) sets out a general duty of public bodies to assist applicants, it does not encompass other, more specific duties set out under the Act: Order 2000-014.

[para 27] In this case the Public Body initially relied on the exception to disclosure found at section 24. In exercising its discretion to initially withhold the Report under section 24, the Public Body's prime consideration was to allow the Report to first be presented to the Legislature, whose Members were the most directly affected by its recommendations. This was a valid consideration for the decision to initially withhold the Report. The fact that the Report was to be tabled later does not invalidate that decision.

[para 28] I have also reviewed the actions of the Public Body in responding to the Applicant. I note that it received the fee for access on July 12, 2004 and the Report was located the next day. The Public Body properly informed the Applicant of the extension of time and the reasons behind the extension. While there are concerns regarding the time extension itself, I find that the Public Body has fulfilled its general duty to assist under section 10 of the Act.

E. Did the Public Body properly extend the time limit for responding to a request as authorized by section 14 of the Act?

[para 29] At the inquiry, a senior manager with the Public Body testified that he had received the Applicant's access request on July 7, 2004, and was in receipt of the initial fee for access by July 12, 2004. The Report was located on July 13, 2004. The senior manager then left on holidays for 2 ½ weeks and there matters remained until his return on August 3, 2004. The senior manager testified that upon his return, although he cannot recall when, it became apparent that the Public Body needed to consult with another public body prior to deciding whether to grant access. Subsequently, on August 10, 2004 the Public Body wrote to the Applicant extending the time for response to September 10, 2004 pursuant to section 14(1)(c) (communication with another public body) of the Act.

[para 30] Those consultations were conducted on behalf of the Public Body by one of its lawyers. That lawyer should have been acquainted with the issues involved, as at Appendix "B" of the Report this individual is listed as one the persons consulted during

the creation of the Report. The senior manager stated that not being privy to the consultations between the public bodies, he could not give any indication as to their duration or complexity; he could only state that they were "ongoing". The senior manager further testified that he kept the lawyer apprised of the statutory timelines required by section 14 on three or four occasions, but he did not diarize or follow-up the matter regularly.

[para 31] The Applicant submits that the Report was completed in December 2001. In November 2003 the Applicant, while not making an actual access request, made an inquiry with the Public Body regarding the possible public release of the Report. The Applicant states that he was informed that it might be released during the next session of the Legislature. The Applicant argues that if the Report was prepared for release in 2003, then further consultation between public bodies regarding his access request should have been unnecessary or if required should not have been of such duration where an extension under section 14 of the Act was needed.

[para 32] Section 14(1)(c) reads:

> 14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if:
> …
> (c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record…

[para 33] Section 14(1)(c) is a discretionary ("may") provision. As discussed, a discretionary decision is a two-step process consisting of a factual decision, namely, the determination as to whether the section of the Act applies to the situation at hand, and a discretionary decision, which determines, given the policy and objectives of the Act, whether the section should nevertheless be applied.

[para 34] In this instance, a factual determination was made by the head of the Public Body that it was required to consult another public body and that this could not be done within the original time limit set by section 11. The Public Body's in camera submission demonstrated that another public body was active in the review of the Report upon on its completion. In such circumstances, it was proper for the Public Body to determine that consultations with another public body were necessary. The Applicant, on the other hand, has not provided any evidence to indicate that consultations with that public body had occurred prior to the Public Body's decision to seek an extension.

[para 35] The factual decision having been made, I now turn to the second step of the process, namely whether the head of the public body properly extended the time for responding to a request for up to 30 days.

[para 36] Order 96-017 cited *Rubin v. C.M.H.C.* (1988), 52 D.L.R. (4th) 671 (Fed. C.A.) that stated that a discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in that case stated that

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act."

[para 37] One of the purposes of the Act as set out in section 2(a) is to allow any person a right of access to records in the custody or control of a public body, subject to limited and specific exceptions. I agree with the comment of the British Columbia Commissioner in Order No. 5-1994 that a presumption of greater openness is fundamental to freedom of information legislation and should be supported whenever possible, especially if the head of a public body is applying a discretionary exception.

[para 38] I must also bear in mind the principles of legislative interpretation. The Supreme Court of Canada in *R. v. Sharpe* [2001] 1 S.C.R. 45 has cited with approval *Re: Rizzo and Rizzo Shoes Ltd*. [1998] 1 S.C.R. 27, wherein that court declared its preference for the "modern principle" of statutory interpretation. This principle is set out in *Sullivan and Driedger on the Construction of Statutes* (Toronto, Ontario: Butterworths, 2002) at page 1 as:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament

[para 39] I therefore must interpret section 14(1)(c) in light of the "modern principle" of statutory interpretation.

[para 40] Section 14 states that the head of a public body may make an extension "for up to 30 days". The Public Body's August 10, 2004 correspondence to the Applicant, acknowledged such an obligation when it stated that it would "endeavour to respond prior" to the date set by the extension. The intent of a timely response is also echoed in section 11 which states that a public body must make "every reasonable effort" to respond to a request not later than 30 days after receiving it unless the time limit is extended by section 14.

[para 41] That the scheme of the Act includes a timely response is further demonstrated by sections 72(3)(b) and (c), wherein I can confirm or reduce a time limit under section 14 and reduce or order a refund of a fee, in the appropriate circumstances, including, if a time limit is not met. The aforementioned sections demonstrate that the discretion of the head of a public body to extend the time for responding to a request is not absolute, nor is taking a 30-day extension automatic.

[para 42] It is against this statutory background that I must examine the head of the public body's decision to extend the time. The Public Body submits that reasonableness is the standard for determining the need for an extension. What is reasonable or unreasonable in the circumstances depends on the facts. The Public Body cites Order 98-002 wherein, at paragraph 50, Commissioner Clark accepted the definition of "every reasonable effort" as:

> Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable. The use of "every" indicates that a public body's efforts are to be thorough and comprehensive.

[para 43] The Public Body has stated that it was reasonable given the legislative and program responsibilities of Alberta Revenue (now Finance) that consultations were made with that public body. That it was reasonable for consultations to take place is not in question; however, it is not the only criterion for an extension under section 14. Given the statutory background of the section, it must be demonstrated that the period of time taken for the extension was also reasonable.

[para 44] The Public Body bears the burden of proof. Usually, to discharge this burden, a public body will submit evidence as to the manner and complexity of consultations undertaken so that a conclusion may be drawn that such consultations could not be undertaken within the initial 30 days and could only be completed within the extended time frame contemplated. In this instance, the only evidence tendered is that consultations were "ongoing". This does not demonstrate a reasonable effort to make a timely response nor is it sufficient to discharge the burden of proof that is incumbent upon the Public Body. Accordingly, I find that the Public Body did not properly extend the time limit for responding to the request, as authorized by section 14 of the Act.

[para 45] Given the passage of time it is impossible for me, under section 72(3), to reduce the time limit under section 14. My only available remedy is section 72(3)(c) of the Act which allows me to order a refund of fees, in the appropriate circumstances, including if a time limit is not met. In Order 2000-008, Commissioner Clark stated that this section (then section 68) can be interpreted very broadly to give the Commissioner a great deal of discretion when deciding to confirm or reduce a fee or order a refund. In this case the Public Body has not demonstrated that it made a reasonable effort to make a timely response. Therefore, I find that such a failure is an appropriate circumstance in which to order the Public Body to refund the fees paid to it by the Applicant.

V. ORDER

[para 46] I make the following Order under section 72 of the Act.

[para 47] I find that the record is not excluded by section 4(1) of the Act.

[para 48] I find that that section 24 of the Act applies to the record. I confirm the Public Body's initial decision not to disclose the record to the Applicant.

[para 49] Having found that section 24 the Act was applicable to the record, it was unnecessary to consider whether the Public Body properly applied section 27.

[para 50] I find that the Public Body met its general duty to assist the Applicant under section 10(1).

[para 51] I find that the Public Body did not properly extend the time limit for responding to the request, as authorized by section 14 of the Act.

[para 52] Pursuant to section 72(3)(c) of the Act, I order a refund of the fees paid by the Applicant.

[para 53] 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