ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-018

September 6, 2006

ALBERTA JUSTICE

Review Number 3061

Office URL: http://www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") for all records of any complaints or inquiries into the business practices of an Alberta registered corporation. The Public Body refused to disclose the records citing sections 24 ("advice") and 27 ("privileged information") of the Act.

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.

The Commissioner found that the Public Body had properly applied sections 24 and 27 of the Act. He also held that the Public Body had met its duty to assist under section 10.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6(2), 10(1), 24, 24(1)(a), 27, 27(1)(a), 71.

Authorities Cited: AB: 96-006, 96-017, 98-002, 98-003, 98-012, 2000-021, 2001-024.

Cases Cited: *Solosky v. The Queen* [1980] 1 S.C.R. 821

I. BACKGROUND

[para 1] On July 7, 2004, Alberta Justice (the "Public Body") received an access request for information pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act"). The request asked for all records of any complaints or inquiries into the business practices of an Alberta registered corporation.

[para 2] On August 10, 2004, the Public Body wrote to the Applicant indicating that its search for records had resulted in the location of 17 pages of records that may or not be responsive to the access request. The Public Body in its submission described those records as:

(a) A one page e-mail correspondence between seconded legal counsel and a client ministry;

(b) Eleven pages of Briefing Notes prepared for the Minister of Justice and Attorney-General;

(c) One page of comments/questions from the Minister of Justice and Attorney General, with respect to a specific ministerial action request;

(d) Four pages of an Alberta Registries/Corporate Registration system search.

[para 3] With the exception of the corporate registries search, which at inquiry the Public Body stated it is willing to release, the Public Body denied access to the records citing sections 24 ("advice") and 27 ("privileged information") of the Act.

[para 4] On August 16, 2004, the Applicant requested a review by this office. The Public Body, subsequently, conducted a second search for records which resulted in the location of an additional 13 pages of records, which it stated may or may not be responsive to the Applicant's request. The 13 pages of records consisted of e-mail correspondence between legal counsel for the Public Body and a client Ministry. These additional records were also excluded from disclosure pursuant to sections 24 and 27 of the Act.

II. RECORDS AT ISSUE

[para 5] There are 30 pages of records at issue. Seventeen pages were located as a result of the initial search conducted by the Public Body and 13 pages were found during the second search.

III. ISSUES

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

A. Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

B. Did the Public Body properly apply section 24 of the Act ("advice") to the records/information?

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

V. DISCUSSION OF THE ISSUES

A. Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 7] Section 71 of the Act is silent regarding who has the burden of proof pertaining to the applicability of section 10. However, as this section sets out a general duty for public bodies to assist applicants, the Public Body would appear best placed to meet the burden of proof. In Order 2000-021, Commissioner Clark stated that when section 10 (then 9(1)) is at issue, the burden of proof will usually rest with the Public Body. Accordingly, the Public Body will bear the burden of proof to establish that it fulfilled its duties under that section.

[para 8] Section 10(1) states:

> 10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 9] As stated in Order 98-012, to fulfill its duty under section 10(1), a public body must show that it conducted an adequate search. There are two components to an adequate search: every reasonable effort must be made to search for the actual record requested and the applicant must be informed in a timely fashion what has been done.

[para 10] The Public Body states that, during the first search for responsive records it conducted the following inquiries:

1. a search of the "Time Keeper" system which tracks time spent on specific files by lawyers of the Public Body's Civil Law Branch;

2. a search of the Minister of Justice and Attorney-General's Office;

3. a search of all Civil Law Branch offices including seconded counsel located to other client ministries;

4. a search of Central Records;

5. a search of Special Prosecutions; and

6. a search of the Justice On-line Information Network "JOIN");

[para 11] The Public Body indicates that no responsive records were located under the "Timekeeper" system, the Minister's Office or Central Records. Legal counsel for Special Prosecutions reported that the Alberta Securities Commission ("ASC") had a file regarding the corporation in question and that the Applicant be referred there. The 17 pages of records were received from seconded counsel located in two client ministries, in this case Municipal Affairs and Alberta Government Services. The Public Body in its submission did not indicate the result of its search on the JOIN network.

[para 12] Order 98-003 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is "reasonable". In Order 98-002, the former Commissioner adopted the definition of "reasonable" found in *Blacks' Law Dictionary* (St. Paul, Minnesota, West Corp., 1999) as "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view."

[para 13] In this instance, the Applicant submits that as a second search uncovered additional records, this in itself demonstrates that the Public Body did not adequately conduct the first search.

[para 14] However, I have examined the records of the second search, which consist of e-mails pertaining to a general discussion of the law. Given the wording of the Applicant's request, they are not responsive records. The Act does not apply to those records. In searching the information systems set out in paragraph 10, I find that the Public Body made a reasonable effort to identify and locate all responsive records relevant to the Applicant's request.

[para 15] The second component of an adequate search is that the Applicant must be informed by the Public Body in a timely fashion what it has done. On August 10, 2004, the Public Body informed the Applicant that 17 pages of records were found that may or may not be responsive to his request. It further informed him that the ASC held a file on the matter and directed him to make inquiries there. I find that the Applicant was informed in a timely fashion.

[para 16] Therefore, I find that the Public Body conducted an adequate search for responsive records and thereby met its duty to assist the Applicant, as provided by section 10(1) of the Act.

B. Did the Public Body properly apply section 24 of the Act ("advice") to the records/information?

[para 17] The Public Body submits that it withheld in accordance with section 24(1)(a), pages 2-13 from the first search, and from the second search, pages 1-3, 5, 6, 8 and 9. Since I have determined that the records that comprised the second search are not responsive records and that the Act does not apply to those records, I will not deal with any of the records pertaining to the second search.

[para 18] Section 24(1)(a) of the Act 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 19] Order 96-017 considered the decision-making process a public body must undertake in applying a discretionary ("may") exception of the Act, such as section 24. There is a two-step process consisting of a factual decision, namely, determining 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 if the exception applies.

[para 20] As stated in Order 96-006, for section 24(1)(a) to be applicable, a public body must show that there is advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council and the "advice" must be:

1. sought or expected, to be part of the responsibility of a person by virtue of that person's position;

2. directed towards taking an action; and

3. made to someone who can take or implement an action.

[para 21] I have examined pages 2-12 which consist of two draft briefing notes. The content of both drafts deal with the analysis of issues and are drafted by Ministry lawyers who by virtue of their positions have responsibility for giving advice. The briefing notes themselves relate to a suggested course of action, which as they are directed to a Minister are made to someone who can implement further action.

[para 22] With regard to page 13, this record is a set of questions from the Minister around which the analysis of the issues set out in the briefing notes were framed. Accordingly, disclosure of that record could reasonably be expected to reveal the nature of the advice, analyses and policy options that were developed in the briefing notes.

[para 23] Having determined 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 24] 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 briefing notes that were prepared by Ministry lawyers for the Minister of Justice and Attorney General. The head considered the importance of prosecutorial discretion and the rights enshrined by legal privilege and these considerations were given more weight than the Applicant's right of access. After reviewing the matters considered by the Public Body's head, it appears that there have not been any improper or irrelevant considerations taken into consideration in initially refusing to disclose these records to the Applicant.

[para 25] Finally, bearing in mind section 6(2) of the Act, I must consider whether the information excepted from disclosure can be reasonably severed from the records in question. However, after reviewing those records in their entirety, I have concluded that any attempt at severance would render the records meaningless.

[para 26] I find, therefore, that the Public Body properly applied section 24(1)(a) of the Act to the records.

C. Does section 27(1) of the Act (privileged information) apply to the records/information?

[para 27] The Public Body submits all the records were privileged under section 27. Since I have determined that the records that comprised the second search are not responsive records and that section 24 applies to the briefing notes and the one page of questions from the Minister, the only outstanding record is the one-page e-mail correspondence between seconded counsel and a client ministry.

[para 28] This record is an e-mail between the Public Body's lawyers and a public body, with a view to giving legal advice. It discusses legal issues and the proposed content of possible replies being considered. Examining the content of the e-mail it was clearly intended to be confidential and the notation in the e-mail reflects the confidential and privileged nature of the communication.

[para 29] I find, therefore, that the record meets the criteria for solicitor-client privilege as set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821, in that it is a communication between solicitor and client, which entails the giving of legal advice, and is intended to be confidential between the parties.

[para 30] Accordingly, the Public Body made the correct factual determination that this record could be excluded under section 27. With regard to its discretionary decision to withhold the record, I am satisfied that the Public Body's head considered the Applicant's right of access and the civil and legal rights that comprise legal privilege. The head also took consideration of the fact that the public body receiving the legal advice was a "client" ministry and it had not waived its legal privilege.

[para 31] Reviewing the Public Body's 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. I therefore find that the Public Body properly applied section 27(1)(a) to the one-page e-mail.

VI. ORDER

[para 32] I make the following Order under section 72 of the Act.

[para 33] I find that the records from the Public Body's second search are not responsive records. The Act does not apply to those records.

[para 34] I find that the Public Body conducted an adequate search for responsive records and thereby met its duty to assist the Applicant, as provided by section 10(1) of the Act.

[para 35] I find that section 24(1)(a) of the Act applies to pages 2-13 of the first search. I confirm the Public Body's initial decision not to disclose the record to the Applicant.

[para 36] I find that section 27(1)(a) of the Act applies to page one of the first search. I confirm the Public Body's initial decision not to disclose the record to the Applicant.

Frank Work, Q.C.
Information and Privacy Commissioner