

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-004

January 4, 2008

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number F3631

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

Summary: The Applicant requested records about the Adult Criminal Staff Lawyer Pilot Project. Alberta Justice and Attorney General ("Public Body") disclosed some information, but withheld other information pursuant to section 24(1)(b) (advice from officials), section 27(1)(b) (legal privilege - legal services) and section 27(1)(c) (legal privilege - information in correspondence) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"). The Applicant said that section 32 of FOIP required the Public Body to disclose the information (disclosure required in public interest).

The Adjudicator found that the Public Body properly applied section 27(1)(c) of FOIP to most of the information withheld and properly applied section 27(1)(b) to the balance of the information. She did not find it necessary to consider whether the Public Body properly applied section 24(1)(b) of FOIP to the same information. The Adjudicator found no evidence that any of the criteria under section 32(1) (disclosure required in public interest) were met, and therefore, she found that section 32 of FOIP did not apply to the information. She confirmed the Public Body's decision to refuse to disclose the information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24, 24(1), 24(1)(b), 27, 27(1), 27(1)(b), 27(1)(c), 29(1)(a), 32, 32(1), 71(1) and 72.

Orders Cited: AB: F2004-026, OIPC External Adjudication Order #4, October 3, 2003, *Hugh MacDonald, M.L.A. v. Alberta Justice and The Globe and Mail*, F2004-026, 2000-021, 98-016, 96-017 and 96-011.

I. BACKGROUND

[para 1] On November 9, 2005, the Applicant made a request to Alberta Justice and Attorney General (“Public Body”) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“FOIP”) for access to:

All records, as defined by the FOIPP Act relating to the Adult Criminal Staff Lawyer Pilot Project.

[para 2] On February 24, 2006, the Public Body responded to the Applicant by providing the links to public websites for access to 219 pages of records under section 29(1)(a) of FOIP (information readily available to the public). The application of section 29(1)(a) of FOIP is *not* at issue. The Public Body disclosed a further three pages to the Applicant. There were a total of 705 pages of responsive records, from which 483 pages were withheld in their entirety under sections 24 and 27 of FOIP.

[para 3] On March 27, 2006, the Applicant asked for a review of the Public Body’s decision, saying the Public Body improperly exercised its discretion and that it is in the public interest to disclose all of the information. In a letter dated April 3, 2006, the Commissioner authorized mediation, but the Applicant was not satisfied with the mediation authorized. The matter was set down for a written inquiry (the “Inquiry”).

[para 4] The Information and Privacy Commissioner, Frank Work, delegated me to hear the Inquiry. At the Inquiry, the Public Body provided a written initial submission, which was provided to the Applicant. The Public Body provided a copy of the records at issue, which was accepted *in camera*. The Public Body provided a letter with corrections to its initial written submission, which was provided to the Applicant. The Applicant did not provide a submission.

II. RECORDS/INFORMATION AT ISSUE

[para 5] The Public Body numbered the responsive records from pages #1 to #705. In its *in camera* submission, the Public Body provided copies of the following pages, which are the 483 pages remaining at issue (“Records at Issue”):

- Pages #3-8, 9-17, 18, 19-21, 22, 23-150, 283, 288-292, 294, 296-451, 459-478, 503-565, 570-580 and 628-705.

[para 6] Also in its *in camera* submission, the Public Body provided an “Index of Records at Issue”, which is a page-by-page description of the information withheld and the exceptions claimed under FOIP for each page. A summary of the responsive records is provided in the Appendix.

III. INQUIRY ISSUES

[para 7] The issues in the Notice of Inquiry are:

- ISSUE A: Did the Public Body properly apply section 24(1)(b) of FOIP (advice from officials – consultations or deliberations) to the records/information?
- ISSUE B: Did the Public Body properly apply section 27(1)(b) of FOIP (legal privilege - legal services) to the records/information?
- ISSUE C: Did the Public Body properly apply section 27(1)(c) of FOIP (legal privilege – information in correspondence) to the records/information?
- ISSUE D: Does section 32 of FOIP (disclosure required in public interest) require the Public Body to disclose information in the public interest?

IV. DISCUSSION OF INQUIRY ISSUES

[para 8] Due to the type of information in the Records at Issue, I will first address Issue C (section 27(1)(c)). I will then address Issue B (section 27(1)(b)), Issue A (section 24(1)(b)) and then Issue D (section 32).

ISSUE C: DID THE PUBLIC BODY PROPERLY APPLY SECTION 27(1)(c) OF FOIP (LEGAL PRIVILEGE – INFORMATION IN CORRESPONDENCE) TO THE RECORDS/INFORMATION?

[para 9] Section 27(1)(c) of FOIP says:

27(1) The head of a public body may refuse to disclose to an applicant

(c) information in correspondence between

- (i) the Minister of Justice and Attorney General,
- (ii) an agent or lawyer of the Minister of Justice and Attorney General, or
- (iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.

[para 10] The Public Body says that section 27(1)(c) of FOIP applies and allows it to refuse to disclose the following information (“Section 27(1)(c) Records”):

- Pages #3-8, 9-17, 18, 22, 23-150, 283, 288-292, 294, 296-451, 459-478, 503-565, 570-580 and 628-705.

[para 11] Page #22 is the only page of the Records at Issue that the Public Body withheld only under section 27(1)(c) of FOIP. Except for page #22, the Public Body also withheld all of the above pages under section 27(1)(b) as well as section 24(1)(b) of FOIP. The Public Body's *in camera* submission contains a lengthy list of the lawyers whose names appear on the face of the records.

[para 12] Section 27(1) of FOIP is a "may" or discretionary provision. This means that a public body *may* refuse to disclose the information to an applicant. When section 27(1) of FOIP applies, a public body has the choice of whether to disclose and may choose to disclose the information. When a public body refuses to disclose information under section 27(1), it has the burden of proof under section 71(1) of FOIP, not only to show that section 27(1) allows it to refuse to disclose the information, but also to show that it properly exercised its discretion.

[para 13] In order for a public body to withhold information under section 27, the information must fall within one of the categories of legal privilege under section 27(1) of FOIP. In order for the Section 27(1)(c) Records to fall under section 27(1)(c) of FOIP, the following two criteria must be met:

- The record must be correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person; and
- The information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer (Order 98-016 (para 17)).

[para 14] When considering section 27(1)(c) of FOIP in an external adjudication, Justice McMahon stated:

Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to the non-legal staff of Alberta Justice) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer. It would be difficult to draft a more general or exclusionary clause (OIPC External Adjudication Order #4, October 3, 2003, *Hugh MacDonald, M.L.A. v. Alberta Justice and The Globe and Mail* (para 12)).

As I have already indicated earlier in these Reasons, it is clear that the Government of Alberta has legislatively cast a wide net in terms of what is not subject to disclosure under the Act, especially as it relates to documents originating from, or being sent to, Alberta Justice. While the breadth of this net may not comport with the underlying rationale of access to government information, it is not for me as an Adjudicator to rewrite or narrow the scope of ss. 27(1)(b) and (c). As drafted, these sections clearly go beyond the legal privilege contemplated by s. 27(1)(a) (*Ibid.* (para 24)).

[para 15] The Public Body says that all of the information in the Section 27(1)(c) Records pertains to *information in correspondence* between the Minister, an agent or lawyer of the Minister or an agent or lawyer of a public body and any other person in relation to a matter involving the provision of advice or other services by the Minister or the agent or lawyer. The Public Body says that it is apparent on the face of the records that they are comprised of *information in correspondence* between a lawyer or agent of a public body and someone else, and that section 27(1)(c) is engaged.

[para 16] I have reviewed the Section 27(1)(c) Records and accept the Public Body's argument. Therefore, I find that all of the information in the Section 27(1)(c) Records falls under section 27(1)(c), and the Public Body is allowed to withhold that information under section 27(1)(c) of FOIP. A public body that exercises its discretion to withhold information under section 27(1)(c) of FOIP has the burden of proof to show that it properly exercised its discretion.

[para 17] The Applicant's request for review, under Tab 9 of the Public Body's written initial submission, says "[I]t is our position that [sic] public body improperly exercised its discretion". However, the Public Body says that it properly exercised its discretion, as it considered the objects and purposes of FOIP and balanced this with the Applicant's right to information. The Public Body says that it made a "conscious reflective decision to refuse to disclose the records" based on "a full consideration of the objects and purposes" of FOIP and the "proper application of the law to the relevant facts and circumstances".

[para 18] Orders issued from the Office have considered the proper exercise of discretion under FOIP (Order 2000-021 (paras 49-51)). The Public Body quotes from Order 96-017, which describes the approach of the Federal Court of Appeal to the exercise of discretion, as follows:

The courts have considered that issue in both *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147, affirmed (1993), 154 N.R. 319 (Fed CA) and in *Rubin v. C.M.H.C.* (1998), 52 D.L.R. (4th) 671 (Fed CA). Both these cases set out a two-step decision-making process (under federal access and privacy legislation): (i) a factual decision, namely, a determination as to whether the information comes within the description of information potentially subject to being withheld from disclosure, and (ii) a discretionary decision, namely, whether that information should nevertheless be disclosed, even though the exception applies (para 47).

A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* 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 49).

In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation (para 51).

[para 19] The proper exercise of discretion also requires the Public Body to consider the purpose of the provision itself. The Commissioner states:

In my view the Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case (Order F2004-026 (para 46)).

[para 20] The Public Body says that when exercising its discretion to refuse to disclose to the Applicant, it considered factors that include:

- The records relate to an idea or concept for a possible pilot project that would be established and operated by Legal Aid Alberta. This Pilot Project does not currently exist.
- Legal Aid Alberta is not a government entity, but an independent organization.
- Legal Aid Alberta operates under an agreement between Legal Aid, the Law Society of Alberta, and the Government of Alberta. Legal Aid Alberta is governed by its own Board of Directors and is accountable to the Law Society of Alberta as well as the Government of Alberta.
- The records were comprised of deliberations and consultations of a nature that ought to be shielded from disclosure in order that the Government of Alberta can fulfill its obligations under the Legal Aid agreement with candour.
- The records show on their face that they contain information prepared by or for a lawyer of the Minister of Justice and Attorney General relating to the provision of legal services.
- The records show on their face that they contain information in correspondence between a lawyer for the Minister of Justice and Attorney General and others, including Legal Aid Alberta, regarding the provision of advice or legal services to Legal Aid Alberta.
- The records were carefully reviewed and those that were available publicly were identified to the Applicant. This included providing the Applicant with website addresses at which he could find these public records.

[para 21] In my view, the above considerations weigh strongly in favour of a finding that the Public Body considered not only the objects and purposes of FOIP, including the Applicant's right of access to information, but also the discretionary exception itself and the interests that section 27(1)(c) of FOIP attempts to balance. There is no evidence before me to suggest that the Public Body exercised its discretion for an improper or irrelevant purpose or improperly exercised its discretion in any way. Therefore, I find the Public Body discharged its burden of proof to show that it properly exercised its discretion under section 27(1)(c) of FOIP when refusing to disclose the Section 27(1)(c) Records.

[para 22] In my view, the Public Body discharged its burden of proof to show not only that section 27(1)(c) of FOIP allows it to refuse to disclose the information, but also to show that it properly exercised its discretion when refusing access to the Section 27(1)(c) Records at Issue. For all of the above reasons, I find that the Public Body properly applied section 27(1)(c) of FOIP to the Section 27(1)(c) Records.

ISSUE B: DID THE PUBLIC BODY PROPERLY APPLY SECTION 27(1)(b) OF FOIP (LEGAL PRIVILEGE - LEGAL SERVICES) TO THE RECORDS/INFORMATION?

[para 23] Section 27(1)(b) of FOIP reads:

27(1) The head of a public body may refuse to disclose to an applicant

(b) information prepared by or for

- (iv) the Minister of Justice and Attorney General,
- (v) an agent or lawyer of the Minister of Justice and Attorney General, or
- (vi) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal advice.

[para 24] The Public Body says that section 27(1)(b) of FOIP allows it to refuse to disclose the following information ("Section 27(1)(b) Records"):

- Pages #3-8, 9-17, 18, 19-21, 23-150, 283, 288-292, 294, 296-451, 459-478, 503-565, 570-580 and 628-705.

[para 25] Pages #19-21 are the only pages of the Records at Issue that the Public Body withheld only under section 27(1)(b) of FOIP. Except for pages #19-21, the Public Body also withheld all of the above pages of records under section 27(1)(c) and section 24(1)(b) of FOIP.

[para 26] I said that section 27(1)(c) of FOIP applies to all of the Section 27(1)(b) Records, except for pages #19-21. I do not find it necessary to consider whether the Public Body is also allowed to refuse to disclose the same information under section 27(1)(b) of FOIP. I will only consider the balance of the information at issue under section 27(1)(b) of FOIP, which is pages #19-21 of the Records at Issue. ("Section 27(1)(b) Records").

[para 27] As with section 27(1)(c), section 27(1)(b) of FOIP is a "may" or discretionary provision. This means that a public body *may* refuse to disclose the information to an applicant and has the choice of whether to disclose or refuse to disclose. When a public body refuses to disclose information to an applicant under the authority of section 27(1)(b) of FOIP, it must properly exercise its discretion.

[para 28] The Public Body says that all of the information in the Section 27(1)(b) Records falls under section 27(1)(b) of FOIP, as this provision applies to *information* prepared by or for the Minister, an agent or lawyer of the Minister or an agent or lawyer of a public body in relation to a matter involving the provision of legal services.

[para 29] The Public Body says that it is apparent on the face of the records that they are comprised of *information* relating to a matter involving the provision of legal

services and that section 27(1)(b) is engaged. I have reviewed the Section 27(1)(b) Records and accept the Public Body's submission that all of the information in the Section 27(1)(b) Records falls within section 27(1)(b) of FOIP.

[para 30] In my view, the Public Body discharged its burden of proof to show that section 27(1)(b) of FOIP allows it to refuse to disclose the Section 27(1)(b) Records to the Applicant. For the same reasons as under section 27(1)(c), I find that the Public Body discharged its burden of proof under section 27(1)(b) of FOIP to show that it properly exercised its discretion when refusing to disclose the Section 27(1)(b) Records. For all of the above reasons, I find that the Public Body properly applied section 27(1)(b) of FOIP to the information in the Section 27(1)(b) Records.

ISSUE A: DID THE PUBLIC BODY PROPERLY APPLY SECTION 24(1)(b) OF FOIP (ADVICE FROM OFFICIALS - CONSULTATIONS OR DELIBERATIONS) TO THE RECORDS/INFORMATION?

[para 31] The Public Body says that section 24(1)(b) of FOIP applies to the following information ("Section 24(1)(b) Records"):

- Pages #3-18, 80-81, 98-103, 118-119, 148-149, 288-289, 315-316, 325-330, 331-332, 341-342, 503, 506-509, 511-512, 527, 542-543 and 639-705.

[para 32] I said that all of the pages in the Section 24(1)(b) Records are also in the Section 27(1)(c) Records. Due to my finding that section 27(1)(c) of FOIP applies to all of the information in the Section 27(1)(c) Records, I do not find it necessary to consider whether the Public Body is allowed to also refuse to disclose the same information under an additional exception to access under section 24(1)(b) of FOIP. Therefore, I find that there is no information remaining to be considered under section 24(1)(b) of FOIP.

ISSUE D: DOES SECTION 32 OF FOIP (DISCLOSURE REQUIRED IN PUBLIC INTEREST) REQUIRE THE PUBLIC BODY TO DISCLOSE INFORMATION IN THE PUBLIC INTEREST?

[para 33] The relevant parts of section 32 of FOIP read:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

- (a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or
- (b) information the disclosure of which is, for any other reason, clearly in the public interest.

[para 34] The Applicant's request for review of the Public Body's decision says, "[I]t is our position that ... it is in the public interest that all of this information be disclosed". In its written initial submission, the Public Body says that the Applicant "advanced no argument in support of this position". The Public Body also said, "[I]n the matter at hand the Applicant has made no argument in support of his one declarative statement that the records should be disclosed in the public interest". The Applicant did not provide a submission.

[para 35] The application of section 32 of FOIP has been described in orders issued from the Office under FOIP. For example, the former Commissioner states:

I agree with the proposition that it is the applicant who bears the burden of proof as a general principle. ... Once the pre-conditions set out in section 31 [now section 32] are met, a statutory obligation arises for the head of a public body to release information, notwithstanding that other sections of the Act protecting individual privacy may have to be over-ridden in releasing that information. The Act cannot be taken to lightly impose this statutory duty on the head of a public body, or to lightly allow an over-riding of individual privacy rights. ... The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met. ... 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 (Order 96-011 (pages 17-18)).

[para 36] For section 32 of FOIP to apply, one of the following criteria must be met:

- Risk of significant harm to the environment, or
- Risk of significant harm to the health or safety of the public, or
- Release is clearly in the public interest (Order 96-011 (page 18)).

[para 37] The Applicant has not provided any evidence whatsoever to show that any of the above criteria are fulfilled. I accept the submission of the Public Body that the Applicant has not discharged his burden of proof to show that section 32(1) of FOIP applies to require the Records at Issue to be disclosed in the public interest. I find that none of the criteria for the application of section 32(1) of FOIP are met, and therefore, I find that section 32 of FOIP does not apply in the circumstances of this case.

V. ORDER

[para 38] I make this Order under section 72 of FOIP:

- ISSUE C: I find that the Public Body properly applied section 27(1)(c) of FOIP (legal privilege - information in correspondence) to the Section 27(1)(c) Records. In particular:

- When section 27(1)(c) of FOIP applies, a public body *may* refuse to disclose, because it has the discretion to decide to either disclose or refuse to disclose the information;
 - When a public body refuses access under section 27(1)(c) of FOIP, the public body has the burden of proof to show that it properly applied section 27(1)(c) and that it properly exercised its discretion when refusing to disclose the information;
 - I find that the Public Body discharged its burden of proof to show section 27(1)(c) of FOIP applies and to show that it properly exercised its discretion when refusing to disclose the information under section 27(1)(c) of FOIP, and therefore, I find that the Public Body properly applied section 27(1)(c) of FOIP to the Section 27(1)(c) Records; and
 - Consequently, I confirm the decision of the Public Body to refuse to disclose the Section 27(1)(c) Records pursuant to section 27(1)(c) of FOIP.
- ISSUE B: I find that the Public Body properly applied section 27(1)(b) of FOIP (legal privilege – legal services) to the Section 27(1)(b) Records. In particular:
 - When section 27(1)(b) of FOIP applies, a public body *may* refuse to disclose, because it has the discretion to decide to either disclose or refuse to disclose the information;
 - When a public body refuses access under section 27(1)(b) of FOIP, the public body has the burden of proof to show that it properly applied section 27(1)(b) and that it properly exercised its discretion when refusing to disclose the information;
 - I find that the Public Body discharged its burden of proof to show that section 27(1)(b) of FOIP applies and to show that it properly exercised its discretion when refusing to disclose the information under section 27(1)(b) of FOIP, and therefore, I find that the Public Body properly applied section 27(1)(b) of FOIP to the Section 27(1)(b) Records; and
 - Consequently, I confirm the decision of the Public Body to refuse to disclose the Section 27(1)(b) Records pursuant to section 27(1)(b) of FOIP.
 - ISSUE A: Due to my finding under section 27(1)(c), I do not find it necessary to consider whether the Public Body properly applied section 24(1)(b) of FOIP (advice from officials – consultations or deliberations) to the same information in the Section 24(1)(b) Records. Therefore, I find that there is no information remaining to be considered under section 24(1)(b) of FOIP.

- ISSUE D: I find that section 32 of FOIP (disclosure required in public interest) does not require the Public Body to disclose the information in the Records at Issue. In particular:
 - When section 32(1) of FOIP applies, a public body *must* disclose the information in the public interest;
 - When an applicant says that section 32 applies, the applicant has the burden of proof to show that one of the criteria in section 32(1) of FOIP applies to the information;
 - I find that the Applicant did not discharge the burden of proof to show that section 32 applies, as the Applicant did not show that any of the criteria in section 32(1) of FOIP are met;
 - I find that section 32 of FOIP does not require the Public Body to disclose the information in the Records at Issue in the public interest; and
 - Consequently, I confirm the Public Body's decision not to disclose the information in the Records at Issue pursuant to section 32 of FOIP.

Noela Inions, Q. C.
Adjudicator

VI. APPENDIX: SUMMARY OF RESPONSIVE RECORDS

Records at Issue

PAGE #	FOIP EXCEPTION
22	27(1)(c) only
19-21	27(1)(b) only
150 and 283	27(1)(c) and 27(1)(b) only
3-18, 80-81, 98-103, 118-119, 148-149, 288-289, 315-316, 325-330, 331-332, 341-342, 503, 506-509, 511-512, 527, 542-543 and 639-705	24(1)(b)
3-8, 9-17, 18, 23-150, 283, 288-292, 294, 296-451, 459-478, 503-565, 570-580 and 628-705	27(1)(c) and 27(1)(b)
3-18, 80-81, 98-103, 118-119, 148-149, 288-289, 315-316, 325-330, 331-332, 341-342, 503, 506-509, 511-512, 527, 542-543 and 639-705	27(1)(c), 27(1)(b) and 24(1)(b)
Total # of Pages = 483	

Records Not at Issue

PAGE #	FOIP EXCEPTION
1-2	None
295	None
151-282, 284-287, 293, 452-454, 455-456, 457-458, 479-502, 566-569 and 581-627	29(1)(a)
Total # of Pages = 222	