

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-008

January 23, 2008

ALBERTA INFRASTRUCTURE AND TRANSPORTATION

Case File Number 3520

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Summary: The Applicant made an access request to Alberta Infrastructure and Transportation (the “Public Body”) for records relating to the suspension of her driver’s licence. The Public Body provided some records, but refused to provide others in reliance on section 27(1) of the Act (legal privilege) and section 24(1) (advice from officials).

The Adjudicator reviewed the disputed records. She found that almost all of them involved the seeking or giving of legal advice, and the remaining record involved discussion of the advice the lawyer had given. She held that the Public Body had withheld the privileged records on the basis that such advice must necessarily be kept confidential. Thus she confirmed the Public Body’s decision to withhold the records under section 27.

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

Authorities Cited: **AB:** Orders 96-015, 96-017, 96-020, 99-013, F2003-015, F2004-003.

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

I. BACKGROUND

[para 1] The Applicant made an access request to Alberta Infrastructure and Transportation (the “Public Body”) for records relating to the suspension of her driver’s licence. Specifically, she asked for “... all of the information including documents, e-mails, faxes, notes, reports, or recorded conversations regarding the Novice Driver Zero Alcohol Tolerance Program Suspension and/or the Alberta Administrative License Suspension relating to [the Applicant’s] alleged impaired driving offence which apparently took place on August 20, 2005 in Vermilion, Alberta”.

[para 2] The Public Body provided some records, but refused to provide 11 pages, in reliance on section 27(1) of the Act (legal privilege) and section 24(1) (advice from officials).

[para 3] The Applicant requested a review of the Public Body’s decision. A mediator was assigned but the matter was not resolved, and it was set down for a written inquiry.

[para 4] The Applicant provided an initial submission. The Public Body provided both an initial and a rebuttal submission.

II. RECORDS AT ISSUE

[para 5] The records at issue are the 11 pages withheld by the Public Body.

III. ISSUES

[para 6] The issues, as stated in the Notice of Inquiry, are:

Issue A: Did the Public Body properly apply section 24(advice) to the records/information?

Issue B: Did the Public Body properly apply section 27 (privileged information) to the records/information?

[para 7] I will deal with Issue B first, because my conclusion falls under this heading.

IV. DISCUSSION OF ISSUES

Issue B: Did the Public Body properly apply section 27 (privileged information) to the records/information?

[para 8] In withholding the records, the Public Body relied on sections 27(1)(a) and 27(1)(c). The sections provide:

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

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, ...or*

- (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 9] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 (discussed in Order 96-015) held that a document must meet the following criteria for solicitor-client privilege to apply:

- (i) it is a communication between solicitor and client,
- (ii) which entails the seeking or giving of legal advice, and
- (iii) which is intended to be confidential by the parties.

[para 10] In Order 96-017, the former Commissioner adopted a definition of “legal advice” which requires that the advice in question, "include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications". Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor-client communications.

[para 11] I have reviewed the records in this case. With the exception of one of them (page 17) and part of another (the top half of page 11), the records are all communications between the Public Body and its lawyer, in which the Public Body seeks, and the lawyer provides, advice about how to deal with a matter. The advice sought and given deals with a question that has a legal aspect, and calls upon the lawyer’s legal expertise. Some parts of the records do not consist of advice, but state facts in relation to which the advice was sought, thus forming part of the "continuum of communications" in the seeking and giving of advice.

[para 12] Page 17 is not a communication directly with the lawyer, but is a discussion between two public officials about how to frame the question that is to be asked of the lawyer. Thus it is part of the seeking of legal advice, which falls within the privilege in section 27.

[para 13] The top half of page 11 is also not a communication with the lawyer, but it is a communication between two Public Body officials that discusses and comments on the lawyer's advice. In Orders 96-020 and 99-013, the former Commissioner said that solicitor-client privilege applies to information in written communications between officials or employees of a public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor.

[para 14] I also accept that the communications were intended to be confidential. This is indicated by express statements of an intention of confidentiality on many of the records. As well, I agree with the Public Body that confidentiality in this case is implicit from the nature of the documents themselves. In Order F2004-003, Adjudicator Bell said (at para 30):

... it is implicit in the circumstances under and purposes for which the legal advice was being sought or given in this case that the communications were intended to be confidential.

[para 15] Thus I find that all the records fall within section 27(1)(a). (I note from para 56 of her submission that the Applicant appears to believe that the privilege accorded to legal advice is the same as litigation privilege, and since the prospect of litigation has, according to the Applicant, ended, the records ought to be disclosed even if the privilege applies or once applied. In this regard, I note that litigation privilege is a privilege distinct from the privilege for legal advice. The two cannot be equated and it is only the latter kind of privilege that applies in this case.)

[para 16] I also note from the Applicant's initial letter requesting review (which was quoted in the Public Body's rebuttal submission) that she does not see how material responsive to her particular questions could be subject to legal privilege. She states:

In particular, I was looking for information that would disclose when the first license suspension document was sent to Driver Fitness and Monitoring by the investigator in this case. I wanted to know what kind of suspension document it was. I wanted to know if he sent a replacement suspension at a later date, and what kind of document that was. If no official documents were sent, I was asking for their equivalent, which might have been recorded as an e-mail, or a note to file, etc.

I agree that particular kinds of documents that would answer these particular questions – if such documents existed - might not be covered by legal privilege. Whether additional records exist was not raised as an issue in this inquiry. As the Public Body points out, the records at issue, though still responsive to the Applicant's request, are not such documents. They are communications asking for and giving legal advice.

[para 17] To withhold a record under a discretionary exception, a public body must do more than just determine that the record falls within the provision. It must also exercise its discretion, and in doing so it must consider the purposes of the applicable exception, and whether withholding the record would meet those purposes.

[para 18] In this case, the Public Body said it exercised its discretion, but it did not expressly indicate what it regarded the purpose of the exception to be. However, in other parts of its submission it adopts statements made by this office that documents can be shown to be confidential where the importance of confidentiality is implicit from the documents themselves. I am satisfied that the Public Body exercised its discretion to withhold documents recording the seeking and giving of legal advice because it recognized that in a case such as the present, such advice must necessarily be confidential.

[para 19] In Order F2003-015, the Commissioner said:

Withholding documents that relate to obtaining legal advice in order to preserve the utility of that advice is proper, and consistent with the purposes of the Act.

[para 20] Thus I conclude that the Public Body properly applied section 27(1)(a) to all of the records. Therefore, it is not necessary for me to decide whether it properly applied sections 27(1)(c), 24(1)(a) or 24(1)(b), (on which the Public Body also relied).

[para 21] In closing I note that the Applicant's submission states at paragraph 7 that the Portfolio Officer recommended disclosure of the records in this case. The results of mediations should not be included in the submissions. There is a directive to this effect at page 3 of the Notice of Inquiry in this case.

V. ORDER

[para 22] I make this Order under section 72 of the Act.

[para 23] I find the Public Body properly applied section 27(1)(a) in withholding the records in this case.

Christina Gauk, Ph.D.
Director of Adjudication