ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-42

October 24, 2013

CALGARY ROMAN CATHOLIC SEPARATE SCHOOL DISTRICT NO. 1

Case File Number F6000

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Calgary Roman Catholic Separate School District No. 1 (the Public Body) pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) for all records relating to him.

The Public Body responded but withheld some records pursuant to section 27(1)(a) of the Act because it claimed those records were subject to solicitor-client privilege. The Applicant complained to the Office of the Information and Privacy Commissioner (this Office) that the Public Body did not perform an adequate search (section 10(1) of the Act) and that it applied section 27(1)(a) of the Act incorrectly.

The Adjudicator found that the Public Body met its duty to perform an adequate search pursuant to section 10(1) of the Act. The Adjudicator also found that the Public Body properly applied section 27(1)(a) of the Act to the records at issue.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 27, and 72.

Authorities Cited: AB: Orders 96-017, 2001-016, F2004-003 , F2007-029, and F2008-016.

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

I. BACKGROUND

[para 1] On July 18, 2011, the Applicant wrote to the Calgary Roman Catholic Separate School District No. 1 (the Public Body). Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), he requested:

> …any and all material in the possession of the [Public Body] and any of its entities regarding my person and this should include all materials received or sent whether internally or to any third parties of any sort from 2000 until July 18, 2011.

[para 2] The Applicant also provided the Public Body with background to his request and was very specific in what he was looking for from the Public Body.

[para 3] My review of the records suggests that the Applicant was asked on a number of occasions in 2008 to leave high school sporting events by staff at the schools. According to the records, one such incident occurred in November of 2008. Following that incident, the Applicant contacted the school on several occasions throughout 2008 and in the early part of 2009.

[para 4] The Public Body responded on September 19, 2011. It provided the Applicant with 26 pages of responsive records. Some information in the records was severed or withheld pursuant to section 27 of the Act (solicitor-client privilege).

[para 5] The Applicant was not satisfied with the Public Body's response and on November 23, 2011, the Office of the Information and Privacy Commissioner (this Office) received a request for review from the Applicant. In his request, the Applicant stated that the Public Body's response was inadequate and pointed to the reason he believed that the Public Body had further information that was responsive to his request. The Commissioner authorized mediation to attempt to resolve the issues between the parties, but this was not successful. As a result, the Applicant requested an inquiry. I received initial and rebuttal submissions from both parties.

II. INFORMATION AT ISSUE

[para 6] The information at issue consists of the severed and withheld portions of the records which were provided to the Applicant by the Public Body on September 19, 2011.

III. ISSUES

[para 7] The Notice of Inquiry dated July 9, 2013 stated the issues in this inquiry as follows:

A. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider

whether the Public Body conducted an adequate search for responsive records.

B. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.

[para 8] Section 10(1) of the Act 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] In Order 2001-016, the Commissioner stated:

> Previous orders…say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.
>
> (Order 2001-016 at para 13)

[para 10] Previous orders issued by this office have stated evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029 at para. 66)

[para 11] In its submissions, the Public Body provided an affidavit sworn by the Freedom of Information and Protection of Privacy Coordinator (FOIP Coordinator) for the Public Body. The following information was provided in her affidavit:

- She contacted everyone named in the Applicant's access request except for one individual who was not an employee or agent of the Public Body.

- Additionally, she contacted all employees of the Public Body (13 in total) who she felt would have personal information relating to the Applicant given the context of his request – that is – individuals who would have been made aware of concerns about individuals attending sporting events and who would have had contact with the Calgary Police Service.

- The FOIP Coordinator requested that these individuals search their offices, for handwritten records, drafts, documents, final documents, opinions or assessments, as well as all records appearing in their e-mail accounts for records relating to the Applicant.

- The FOIP Coordinator then reviewed the responsive records, she also directed general counsel and a Technical Support Analyst that the e-mail accounts of some of the employees of the Public Body be searched further for e-mails in which the Applicant's name (or variations of his name) is mentioned.

- Finally, the FOIP Coordinator also contacted the coach of the one of the teams which was playing when the Applicant was asked to leave. She was advised he did not have any responsive records.

- Based on these searches, it was her belief that there were no further responsive records.

[para 12] The responsive records contain a record from 2009 which is a note from an employee of the Public Body stating what she recalls from dealing with the Applicant in 2007. She recalls that a photo was taken by another employee of the Public Body using that employee's cell phone. The photo was sent to another organization and that organization was asked to distribute it. However, the organization advised the Public Body that it could not distribute the photo because of the Act. Given the wide breath of the FOIP Coordinator's search and the number of individuals she had search for responsive records, I believe that if the photo was still in the possession of the Public Body at the time of the access request, it would have been found.

[para 13] Given this, and that fact that the FOIP Coordinator's affidavit was very detailed, I have sufficient evidence to find that the Public Body conducted an adequate search as required by section 10(1) of the Act and find that the Public Body met its obligations under section 10(1) of the Act.

B. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 14] Section 27(1)(a) of the Act states:

> *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,*

[para 15] The Public Body argues that the information that was severed from the responsive records was subject to solicitor-client privilege. The Public Body opted to use this Office's Solicitor-Client Privilege Adjudication Protocol (the Protocol), so I have not been provided with unredacted versions of the responsive records, only with copies of the Solicitor-Client Privilege Adjudication Protocol record form which asks for details of the records such as:

- Who the client is and if they are a party to this inquiry;
- If the record involves giving or seeking legal advice between the client and lawyer;
- The date of the record;
- The type of record;
- The author of the record;
- To whom the record is addressed;
- If the record was copied to anyone;
- If there were attachments;
- How long the record is
- If copies of the record were forwarded

[para 16] From the information provided by the Public Body both as part of its submissions and as part of the information it provided on the Solicitor-Client Privilege Adjudication Protocol, I know that the records to which it has applied section 27(1)(a) of the Act, were e-mail strings involving employees of the Public Body and the Public Body's in-house General Counsel in which legal advice was sought and given, on January 6, 2009. I also know that it is understood by Public Body employees that all communications with and the provision of legal advice by in-house General Counsel are considered to be confidential. As well, at the end of e-mail from in-house General Counsel, the following disclaimer appears:

> This e-mail communication, including any attachments, is intended only for the use of the recipient(s) named above and may contain information that is legally privileged, confidential, or exempt from disclosure according to law. If you are not the intended recipient, then please take notice that any use, distribution, or copying of this communication or any of the information contained in it, including any attachments, is strictly prohibited. If you have received it in error,

> then please notify the sender immediately by way of rely e-mail and then delete it.

[para 17] In order for information to be considered subject to solicitor-client privilege the information must meet the test set out by the Supreme Court of Canada in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 (Solosky test) which states:

> i. The communication must be between a solicitor and his/her client;
> ii. It must entail the seeking or giving of legal advice; and
> iii. It must be intended to be confidential by the parties.

i. Communication between solicitor and client:

[para 18] I agree with the Public Body's argument that solicitor-client privilege can apply to communications between in-house counsel and employees of the Public Body just as it would if the Public Body were communicating with external counsel (see Order F2008-016 at para 131). Therefore, this portion of the test is met for the records which were noted in the Protocol.

ii. Seeking or giving of legal advice:

[para 19] The definition of legal advice that was previously adopted by this Office includes, "…a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications." (Order 96-017 at para 23). Order F2004-003 further elaborated on this definition were it was stated:

> …this test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turn to their legal advisor to determine what those legal implications might be."
>
> (Order F2004-003 at para 29)

[para 20] In addition, previous orders issued by this Office have found that background information can be included as part of the definition of legal advice because it forms part of a "continuum of communication" between a solicitor and his or her client. As I said in Order F2008-016:

> Some of the responsive records provided information directly to legal counsel regarding what had occurred at bail hearings. They do not contain a direct request for advice; however, the information was supplied to legal counsel in order to give a factual background to assist legal counsel in choosing what to advise and how to draft the complaint. I find that providing this factual information, regarding the advice sought, is appropriately caught under the umbrella of seeking legal advice as part of the "continuum of communications" (Order F2004-003 at para 31).

[para 21] The Public Body argues that the information in the withheld records contained background information provided to in-house General Counsel by employees of the Public Body which constitute a continuum of communication.

[para 22] As I stated above, I have not reviewed the records to which the Public Body applied section 27(1)(a) of the Act because the Public Body chose to use this Office's Protocol. I do note that the Applicant argued that the Public Body took records to which solicitor-client privilege did not attach and provided them to its solicitor in order to avoid disclosure. I have no evidence of that and no reason to disbelieve the submissions and evidence of the Public Body as to the contents of the records to which it applied section 27(1)(a) of the Act. The records at issue are all dated January 6, 2009 and said to be an e-mail chain. According to the records that have been disclosed, in late 2008 and early 2009, the Applicant was contacting the Public Body seeking information and explanation about why he was asked to leave certain high school sporting events. It seems very likely the Public Body was seeking legal advice from its solicitor about what its obligations were in relation to allowing the Applicant to attend high school sporting events. It also seems appropriate that the Public Body would advise its solicitor of the circumstances surrounding its dealings with the Applicant, should the Applicant continue to try to contact the Public Body or attend any further high school sporting events.

[para 23] Finally, I note that the Public Body provided protocol documents that covered fewer pages than the number to which it initially applied section 27 of the Act. The Public Body explained that the records that were not noted in the Protocol documents had been released to the Applicant.

[para 24] Based on the information that I have, I find on a balance of probabilities that the records at issue entail the giving or seeking of legal advice.

iii. Supplied in Confidence:

[para 25] Confidentiality can be express or implied given the nature of the records. The Public Body argued that the confidentiality was both express (the disclaimer at the bottom of the in-house General Counsel's e-mail) and implied (because employees of the Public Body expected that communications with in-house General Counsel would be kept confidential).

[para 26] I find have found above that legal advice was sought or given by in-house General Counsel. Therefore, I find that the expectation of confidentiality relative to the records at issue was implicit (Order F2004-003 at para 30).

iv. Conclusions of section 27(1)(a) of the Act:

[para 27] As a result of my finding above, I find that the Public Body properly applied section 27(1)(a) of the Act to the records at issue.

V. ORDER

[para 28] I make this Order under section 72 of the Act.

[para 29] I find that the Public Body performed an adequate search for records responsive to the Applicant's request and met its duty under section 10(1) of the Act.

[para 30] I find that the Public Body properly applied section 27(1)(a) of the Act to the records at issue.

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Keri H. Ridley
Adjudicator