

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2015-05

March 12, 2015

EDMONTON POLICE SERVICE

Case File Number F7293

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Summary: The Applicant requested records under the *Freedom of Information and Protection of Privacy Act* regarding an incident in which both he and the Edmonton Police Service's (the Public Body) Canine Unit had been involved in 2005.

The Public Body located responsive records and responded to the Applicant. The Public Body withheld a record entitled the "Canine Unit Report In Contemplation of Litigation" (ICOL) under section 27(1)(a) (privileged information).

The Adjudicator found that the record was subject to solicitor-client privilege. She confirmed the decision of the Public Body to withhold the record.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 17, 20, 21, 27, 72; **ON:** *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10 s. 9

Cases Cited: *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112; *Wood v. Schaeffer*, 2013 SCC 71; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815

I. BACKGROUND

[para 1] On January 30, 2013, the Edmonton Police Service received the Applicant's request for access to information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant requested a number of records

relating to an incident in which he had been involved in 2005, including a completed “Canine Unit Report In Contemplation of Litigation” form (ICOL).

[para 2] The Public Body responded to the Applicant’s access request. It provided some records to the Applicant, but withheld others under sections 4, 17, 20, and 21. It withheld the ICOL under section 27(1)(a) on the basis of solicitor-client privilege.

[para 3] The Applicant requested review by the Commissioner of the Public Body’s response to his access request. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] Prior to the inquiry, the Public Body reviewed its response and determined that it would provide additional information to the Applicant.

[para 5] Both parties exchanged initial submissions. In his rebuttal submissions, the Applicant stated that he was only interested in obtaining the completed Canine Unit Report, and was no longer interested in pursuing other issues. As a result, the only issue for me to decide is whether the Public Body properly applied section 27(1)(a) to withhold the ICOL.

II. RECORDS AT ISSUE

[para 6] The completed ICOL is at issue.

III. ISSUE

Issue A: Did the Public Body properly apply section 27(1)(a) (privileged information) of the Act to the information in the Canine Unit Report?

[para 7] Section 27(1) of the FOIP Act authorizes a public body to withhold privileged information. It 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 8] The Public Body states that it requires its members to prepare and submit ICOL forms whenever there is a possibility that a party may bring a claim for financial compensation. It states:

The EPS requires members to prepare and submit an ICOL where it is contemplated that the City of Edmonton (the “City”) or members of the EPS will either be sued or if there may be a claim brought for financial compensation or recovery from injury, loss or damage. The ICOL was, in this case, submitted in accordance with the EPS’ requirements.

When an ICOL is submitted to the EPS Legal Advisors' Section, it is reviewed by an EPS lawyer and / or the City Solicitor to assess their legal position and to provide advice to their respective clients.

[para 9] The affidavit prepared by the Public Body's Disclosure Analyst, states:

Given that the incident referred to in the ICOL occurred in 2005, I was unable to locate any documentation to confirm which of the Legal Advisors reviewed the ICOL when it was submitted. However, since the ICOL was maintained by the Legal Advisor's Section, and that is where I obtained the record, I believe that the ICOL would have been reviewed by a Legal Advisor when it was submitted.

[para 10] The Public Body argues that solicitor-client privilege attaches to the record. It states:

The ICOL clearly meets the test for solicitor-client privilege as it represents a communication between the EPS member and the EPS Legal Advisor's Section (and may be further provided to the City Solicitor). It was completed to allow the EPS lawyer or City Solicitor to assess legal risk, and to provide legal advice to their clients. The communication is also meant to be confidential by all the parties involved.

[para 11] With regard to confidentiality, the affidavit of the Disclosure Analyst states:

I am advised by [...], Legal Advisor, that when an ICOL is submitted, it is reviewed by an EPS lawyer and/or the City Solicitor to assess their legal position and provide advice to their respective clients.

I am informed by [the Legal Advisor] and do believe that the ICOL, and any legal advice that is provided in connection with the ICOL, is intended to remain confidential.

[para 12] The Applicant argues that the ICOL is not privileged and should be disclosed. He states:

It has been the experience of counsel for the Applicant that these ICOLs are not normally prepared for the purpose of obtaining legal advice or in contemplation of litigation. Indeed, they are prepared any time there is a dog bite, including in cases where no litigation is contemplated. This was established in the prosecution of [...] when an EPS Canine Unit member, [...] testified at the Preliminary Inquiry to that effect. The position of the defence was that there could be no argument that there was an illegal privilege and the ICOL has to be disclosed. It was disclosed. The relevant parts of the transcript are attached [...]

[para 13] From my review of the transcript submitted by the Applicant, I note that the member under cross-examination gave evidence that it was his practice to complete the form whenever someone was bitten, even though he did not form the opinion that litigation was contemplated before doing so. The Public Body subsequently stated that it would waive privilege and provided the document to counsel for the Applicant.

[para 14] The Public Body argues in reply:

The Applicant relies on the evidence of [a Constable] from a Preliminary Inquiry to support his position that ICOLs are not normally prepared for the purposes of obtaining legal advice or in contemplation of litigation.

[The Constable's] evidence was provided in an entirely separate criminal proceeding (preliminary inquiry) of another accused, [...], which took place in 2004.

[The Constable's] evidence is limited to his personal experiences with the ICOL, particularly in relation to the [unrelated] matter, and he does not provide evidence on what the EPS' institutional practices and policies were at the time.

Individual police officers also do not have the authority to waive solicitor-client privilege relating to legal advice sought and received by policing organizations on institutional-wide issues, like the avoidance of civil suits. As indicated in *R. v. Rutigliano*, privilege in these instances belongs to the Chief of Police who carries a "force-wide perspective", and is in the best position to waive privilege:

A Chief of Police or Commissioner will have a force-wide perspective of the instances where solicitor-client privilege ought to be waived with a view to relevant institutional factors, for example consistency of approach, avoidance of civil suits, etc., within the knowledge and policy-making purview of the force's management.

[para 15] The Applicant argues that the affidavit of the Disclosure Analyst contains hearsay and also argues that the source of some of the information she presents is unknown. He submits that the Disclosure Analyst and the Legal Advisor she consulted should be subjected to cross-examination in relation to the affidavit.

[para 16] I find that there is no need for me, or anyone else, in this inquiry to cross-examine the Disclosure Analyst or the Legal Advisor on the contents of the affidavit.

[para 17] The evidence of the Disclosure Analyst is that she located the completed form in the Legal Advisors' Section of the Public Body. She did not find the form anywhere else. That the form was located in the Legal Advisors' Section indicates that it was, at some time, provided to that section.

[para 18] The contents of the form, its title – "Canine Unit Report in Contemplation of Litigation" – and the location where it was found – the Legal Advisors' Section – allow me to infer that the record was created, if not to obtain legal advice, then certainly to exchange information in order to facilitate obtaining legal advice from the Legal Advisors' Section.

[para 19] In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA, the Alberta Court of Appeal described the kinds of information that may be considered legal advice:

The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):

Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 20] The ICOL constitutes a communication to a professional legal advisor by the Edmonton Police Service intended to inform the legal advisor of an event so that the legal advisor could provide legal advice if necessary. The ultimate objective of the Public Body in requiring members to create records of this kind is to enable a legal advisor to provide the Edmonton Police Service with legal advice regarding the matter recorded in the form.

[para 21] I agree with the Public Body that the intent of the member who completed the form, and any views he might have had regarding the possibility of litigation are irrelevant. Solicitor-client privilege in this case belongs to the Public Body. By completing the form created by the Public Body and submitting it to the Legal Advisors' Section, the member, in the course of his duties, created a communication that served the purpose of enabling the Public Body to obtain legal advice from its legal advisors.

[para 22] It is not necessary for the Public Body to prove that a legal advisor actually viewed the record at issue; the fact that the record was created by an employee of the Public Body in order to facilitate obtaining legal advice is sufficient for solicitor-client privilege to attach to it. That said, the fact that the record was located in the Legal Advisors' Section supports drawing an inference that a legal advisor reviewed it.

[para 23] The Disclosure Analyst states that she believes the record is confidential because a Legal Advisor told her that an ICOL, and any legal advice that is provided in connection with an ICOL is intended to remain confidential.

[para 24] The Applicant takes issue with the statement attributed by the Disclosure Analyst to the Legal Advisor. While it may have been optimal for the Legal Advisor to submit an affidavit regarding the practices of Legal Advisors' Section for the inquiry, in my view, the statement attributed to her describes practices attributable to any legal

counsel. Lawyers owe duties of confidence to their clients in relation to communications made by the client for the purposes of either obtaining legal advice or facilitating obtaining legal advice¹. This duty is not diminished by the fact that a lawyer works “in house”. I draw the inference that the record at issue was intended to be confidential, on the basis that it was located in the Legal Advisors’ Section and nowhere else, because of its contents, which the form indicates were created “in contemplation of litigation”.

[para 25] The Applicant also argues:

It has now been clearly established that there is a duty owed to accused persons by officers to make proper notes and it is unacceptable to have the preparation of the notes “lawyered.” *Wood v. Schaeffer*.

[para 26] The Public Body responds:

The decision in *Wood v. Schaeffer* has no application in this case. There is no evidence or suggestion that the police officers who were involved in the investigation pertaining to the Applicant obtained legal advice prior to completing their investigative notes or report. Moreover, there is no evidence that legal advice was obtained prior to completion of the ICOL itself. The evidence merely establishes that the ICOL was completed, and was then submitted to the Legal Advisors office for the purpose of obtaining legal advice.

The concern that was raised in *Wood v. Schaeffer* was that the officer would be influenced to report the investigative facts differently, as a result of consultations with legal counsel. The circumstances in which the officer’s notes and the ICOL were prepared do not give rise to the same concerns.

[para 27] In *Wood v. Schaeffer* 2013 SCC 71, the Supreme Court of Canada determined that consulting with counsel prior to, and in relation to, preparing notes for a serious incident investigation contravened the duty imposed on police officers by section 9 of the *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10. I am unable to find that this case has any application to the issues before me, given that the matter in question has not been demonstrated to be a serious incident for the purposes of serious incident investigation legislation. In addition, as the Public Body points out, there is no evidence that the police member sought legal advice prior to and in relation to making investigative notes.

Conclusion

[para 28] As I find that the information in the ICOL form is a communication between a client and a lawyer made for the purpose of obtaining legal advice, and as I find that the communication was intended to be confidential, it follows that I find that the ICOL is subject to solicitor-client privilege. I therefore find that the Public Body properly applied section 27(1)(a).

¹ For example, Rule 2.04 of the Alberta Law Society Code of Conduct requires lawyers in Alberta to “hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship” except in specified circumstances.

[para 29] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815 the Supreme Court of Canada determined that it is unnecessary to balance competing interests in record once it has been established that a record is subject to solicitor-client privilege. The Court said;

We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

[para 30] As the Public Body points out in its submissions, once a record has been established as being subject to solicitor-client privilege, the purpose of the privilege supports the decision to withhold the record.

[para 31] As I find that the record is subject to solicitor-client privilege, which the Supreme Court of Canada has said must be kept as close to absolute as possible, and as I find that the record was withheld under section 27(1)(a) for the reason that it is subject to solicitor-client privilege, I find that the Public Body properly exercised its discretion to withhold the record.

IV. ORDER

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

[para 33] I confirm that the Public Body properly applied section 27(1)(a) to withhold the Canine Unit Report In Contemplation of Litigation form.

Teresa Cunningham
Adjudicator