ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-09

April 14, 2015

ALBERTA HUMAN RIGHTS COMMISSION

Case File Number F7200

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Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Alberta Human Rights Commission (the Public Body). She requested two complaint files; one relating to a complaint she had made in 2002 and the other to a complaint she had made in 2008. The Applicant provided the file numbers of the complaint files she requested.

The Public Body stated that it was granting partial access and was providing copies of 198 of the 258 records she had requested. It stated that it was withholding information under sections 17 (disclosure harmful to personal privacy), 24 (advice from officials), 27 (privileged information) and 29 (information that is or will be available to the public). The Public Body also withheld some information as nonresponsive. At the inquiry, the Public Body stated that it had reconsidered its decisions and was no longer withholding information as nonresponsive. It also provided additional information that it had originally withheld under section 17.

The Adjudicator determined that the Public Body had conducted a reasonable search for responsive records.

With regard to the Public Body's application of section 17, the Adjudicator found that while it would be an unreasonable invasion of personal privacy to disclose the personally identifying information of third parties, the Public Body had not turned its mind to the question of whether it could sever this information and provide the remaining information

to the Applicant. She ordered the Public Body to sever the personally identifying information of third parties and provide the remainder to the Applicant.

The Adjudicator confirmed the decision of the Public Body to withhold records 144 – 146 on the basis of solicitor-client privilege. As these records were properly withheld under section 27(1)(a), it was unnecessary to decide whether section 24 applied to them.

The Adjudicator determined that section 29 did not apply to the records to which the Public Body had applied this provision and she ordered these records disclosed.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 10, 17, 24, 27, 29, 68, 72

Authorities Cited: AB: 2001-016 **ON:** Order 159

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22 ; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112

I. BACKGROUND

[para 1] On December 21, 2012, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Alberta Human Rights Commission (the Public Body). She requested two complaint files; one relating to a complaint she had made in 2002 and the other to a complaint she had made in 2008. The Applicant provided the file numbers of the complaint files she requested.

[para 2] The Public Body conducted a search for responsive records and responded to the Applicant on February 28, 2013. The Public Body stated that it was granting partial access and was providing copies of 198 of the 258 records she had requested. It stated that it was withholding information under sections 17 (disclosure harmful to personal privacy), 24 (advice from officials), 27 (privileged information) and 29 (information that is or will be available to the public). The Public Body also withheld some information as nonresponsive.

[para 3] The Applicant requested review of the Public Body's response to her access request. The Commissioner authorized an investigator to mediate and try to settle the matter under section 68 of the FOIP Act. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] In its initial submissions, the Public Body stated that it had reconsidered some of its severing decisions. It stated that it was no longer relying on sections 17(1), to sever information from records 6, 9 – 11, 16 – 27, 29, 31, 33 – 41, 43 – 57, 61 – 82, 92 – 93, 100, 104, 106 – 111, 116, 121 – 123, 125 – 127, 130, 132 – 134, 140 – 141, 177 – 178, 180 – 182, 213 – 220, 222, 226 – 228, 230, 232 – 233, 235 – 237, 244 and 247 – 258. It also stated that it was no longer relying on section 24 to sever information from records 6, 28, and 116 or section 27(1)(b) to sever information from records 144 – 146. The Public Body also stated that it was no longer severing information as nonresponsive

from records 2 – 3, 8, 12, 15, 28 – 29, 31 – 34, 42, 44, 58, 60, 112 – 113, 117, 122 – 123, and 130 – 13. It continues to withhold information from the Applicant from records 58 - 60, 144 – 146, 150 – 175, 184 – 209, and 223 – 225.

II. INFORMATION AT ISSUE

[para 5] The information at issue is the information severed by the Public Body from records 58, 59, 60, 144 – 146, 150 – 175, 184 – 209, 223, 224, and 225, as set out in its index of records (TAB 7 of the Public Body's submissions).

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

Issue B: Does section 17(1) (disclosure harmful to personal privacy) of the Act apply to the information to which the Public Body applied this provision?

Issue C: Did the Public Body properly apply section 24 of the Act to the information in the records?

Issue D: Did the Public Body properly apply sections 27(1)(a) and (c) to the information in the records?

Issue E: Did the Public Body properly apply section 29 (information that is or will be available to the public) of the Act to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 6] Section 10(1) of the FOIP 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 7] Previous orders of this office have held that the duty to assist an applicant includes conducting a reasonable search for records. For example, in Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

> Previous orders (E.g., Order 98-012, Order 2001-003 and Order 2001-007) say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(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.

[para 8] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable or adequate search for responsive records.

[para 9] The Applicant states in her request for an inquiry:

> I would like to have the notes taken by [a human rights officer] regarding the meetings that was scheduled in March 2010 on the 12 floor of the Foothills Hospital. I would also like to know who these people were that was interviewed in March, 2010 (see attachment (4). I would like to know who was the manager involved in this meeting. **The reason why I would like to know** who was interview and who was the manager, is that by March 2010, the only person that was left on the floor was again the nurse named, […], everyone else was new to the floor. The manager, […] was no longer my manager and [an employee of Alberta Health Services] had moved on. I would like to know which manager did the interview in March 2010. [emphasis in original]
>
> Because [a second Alberta Health Services employee] and the agreement seem to have disappeared and I was not able to contact her, I would like to know who gave the information to [a human rights officer] in the email dated March 31, 2010, about the contact person in Human Resource (5).
>
> Also the email dated June 2, 2010, I would like to know who sent this email. This was the full resolution of the file (6). **I ended my Human Rights claim on May 4, 2010 and by August 2010, when I tried to contact [a second Alberta Health Services employee], I was not able to contact her. How can the information disappear so soon from Human Resource.** [emphasis in original]
>
> I would also like to know who was the Non-Responsive on page 112. As I said above, by the time this file was investigated in 2010, there was no one left on the floor but the nurse, […]. I would like to know who the non-responsive are. This is very important because no one seem to know anything about the agreement that was made between [the second employee of Alberta Health Services] (7).

[para 10] The Public Body argues:

> As noted in section I. Background of this submission, the request was for two (2) specific Human Rights Complaint files. Upon receipt and clarification of the request, the JSG FOIP Office sent a records request, indicating the file numbers to the FOIP contact with the AHRC. That person then forwarded the request to the appropriate program area (South Office). The JSG FOIP Office was informed that one file was stored on site and the other file would need to be retrieved from their off-site storage facility. Both AHRC files were retrieved, copied and the copy was sent to the JSG FOIP Office via courier.
>
> Based on the above information and the wording of the request, it is the position of the Public Body that all responsive records were located in regard to this request.
>
> On at least two (2) occasions in the Applicant's Initial Submission (her Request for Inquiry attachments), the Applicant states that "[she] would like to have [a human rights officer's] notes ..." and those "... taken by [a second human rights officer] ..."

> The Public Body maintains that both files in their entirety were provided to the JSG FOIP Office and reviewed in response to the Applicant's access request. If notes existed, they would have been included in the file.
>
> The Public Body believes the statements the Applicant made in her Initial Submission regarding her version of events, such as "According to the email dated January 15, 2004, [she] was suspended the afternoon ... but [she] remember[s] being suspended in the morning", "there is a lot of discrepancies in what [her] managers has said in [her] files and what really happened", "there are many false reports on this file", are not relevant to this Inquiry.
>
> The Public Body respectfully submits that the purpose of this Inquiry is limited to whether the Public Body met its duty to assist and appropriately applied the *FOIP Act* to the records and not whether the information in the records is correct.
>
> As for the statement "I do not see why my information should be kept from me" the Public Body maintains it properly withheld information in accordance with the provisions of the *FOIP Act.*

[para 11] The Public Body described the search it conducted for responsive records. In this case, as the Applicant had specified that she was seeking the contents of specific case files, it was a matter of obtaining the case files from the locations where they were stored.

[para 12] In her submissions, which were made prior to the Public Body's decision to release additional information, the Applicant points to information she believes should exist but was not provided. I note that the majority of the information the Applicant refers to in her submissions as not being provided, is the information that the Public Body originally withheld from her on the basis of section 17 or on the basis of being nonresponsive, but has now agreed to provide. The Public Body's belated reconsideration resolves those issues.

[para 13] The only issue raised in the Applicant's submissions that is both referable to the adequacy of search conducted by the Public Body and unresolved by the decision to release more information, is her request for the human rights officer's notes. There are no notes created by a human rights officer present on either of the case files.

[para 14] The Public Body's response is that it has reviewed the entirety of the files and did not find any notes; if notes were on the file, it would have included them in the response.

[para 15] From the Public Body's submissions, I infer that it interpreted the Applicant's access request as one for copies of two complaint files. I agree with the Public Body that the Applicant restricted her access request to the contents of two human rights complaint files. Her access request is clear in this regard. Information forming part of the complaint files for which she provided the file numbers is responsive; any information that does not form part of these files is not. There are no notes made by human rights officers on the files the Applicant requested.

[para 16] I do not know whether the Applicant has any basis for believing that such notes exist, but assuming that a human rights officer did take notes, and assuming that any such notes have also been retained, the Applicant would not be precluded from requesting them in another access request. However, notes that do not form part of the complaint files, even notes containing information relating to her in some way, are not responsive to the access request giving rise to this inquiry.

[para 17] I find that the Public Body conducted a reasonable search for responsive records as it searched for and located the two complaint files the Applicant requested.

[para 18] The Applicant also raises questions regarding the investigation conducted into her complaints by the Public Body. She states:

> I am asking for the names of the respondent group and the names of the respondents which was marked NR on page 2. I would also like the names of the respondent group and the respondents marked NR on page 3. On March 13, 2003 my Human Rights claim went to investigation. On January 15, 2004, [a human rights officer] from Human Rights had a meeting with [three employees of the former Calgary Health Region]. My Human Rights claim was submitted on November 8, 2002. [One of the employees] was not a part of the Calgary Health Region at the time. [She] should not have being part of the group or the investigation as she was hired after I submitted my Human Rights claim. I am wondering why she would be involved in an investigation meeting on January 15, 2004 that started before she became employed by the Calgary Health Region. She is now employed again by Alberta Health Service, but at the time of me submitting my Human Rights claim, she was not employed yet. She also was hired as a clerk at the beginning of her employment and she was not moved up to [manager] until some 6 months later. You cannot add someone into the investigation who was not originally part of the Human Rights claim.

[para 19] The first two issues raised by the Applicant in the foregoing excerpt from her submissions are effectively resolved by the Public Body's new decision to produce the information it previously withheld from her as nonresponsive or "NR". However, the issues the Applicant raises regarding the identities of those participating in the Public Body's investigation process and the reasons for their inclusion in that process, appear to be comments regarding the quality of the Public Body's investigation, as opposed to concerns regarding the quality of its search or response under the FOIP Act. If the Applicant is seeking records that would serve to explain the Public Body's decision to interview particular people, then that would be the subject of a new access request, as information answering that question does not appear on the complaint files and is not responsive to her access request. Concerns and questions about the quality of the Public Body's investigation, which the Applicant raises in the portion of her submissions excerpted above, and elsewhere in her submissions, are outside the FOIP Act and beyond my jurisdiction to address.

[para 20] To meet the duty to assist, a public body must not only conduct an adequate search for responsive records, but it must also respond to the Applicant openly, accurately, and completely. In this case, the Public Body's initial response to the Applicant was incomplete, as it withheld information from the files she requested as nonresponsive.

[para 21] The Public Body states in its submissions:

> As for the statement "I do not see why my information should be kept from me" the Public Body maintains it properly withheld information in accordance with the provisions of the FOIP Act."

It is unclear to me why the Public Body makes the foregoing statement, given that it notes in paragraph 7 of its submissions that the information it originally severed as nonresponsive, is responsive since it forms part of the complaint file. The Applicant's submissions were prepared prior to the Public Body's decision to produce the records it had originally withheld as nonresponsive. The Applicant's submissions reflect the fact that the Public Body had severed information that was the subject of her access request on the basis that she had not requested it.

[para 22] The Applicant's access request was clear that she was requesting two complaint files. She did not indicate that there was information on these files that she did not want. The Public Body's decision to sever information from these files as nonresponsive is therefore inexplicable. Moreover, if the Public Body considered the Applicant's access request to be ambiguous, such that her request for her two complaint files was not in fact a request for the contents of those files, then it was incumbent on the Public Body to clarify the kinds of records the Applicant was seeking. It did not do so, with the result that the Applicant has waited over a year to receive the information she requested.

[para 23] In severing information as nonresponsive despite the clear language of the Applicant's access request, or alternatively, failing to clarify the kinds of records that were being requested in view of its theory that she had not requested all the records on the complaint files, the Public Body failed to respond to the Applicant, openly, accurately, and completely.

[para 24] The Applicant's request for an inquiry was in part driven by the Public Body's decision to sever information as nonresponsive. Most of the information she points to as specifically missing is information severed as "nonresponsive". It should not have been necessary to undergo the inquiry process in order to for the Public Body to recognize that it was withholding responsive information as nonresponsive, given its duty under section 10 of the FOIP Act.

[para 25] As the Public Body has now made a new decision to release the information it originally withheld as nonresponsive (but for information to which an exception to disclosure has been applied), were I to order it to respond openly, accurately, and completely by producing responsive information, I would only be ordering to do what it has now done. I will therefore make no order in this regard. However, I suggest to the Public Body that it avoid interpreting access requests in a restrictive or unreasonable manner in the future, or alternatively, that it take steps to clarify the scope of an access request it considers to be ambiguous prior to severing information as nonresponsive.

Issue B: Does section 17(1) (disclosure harmful to personal privacy) of the Act apply to the information to which the Public Body applied this provision?

[para 26] The Public Body now relies on section 17(1) only in relation to information severed from records 58, 59, 60, 223, 224, and 225.

[para 27] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 28] Section 1(n) of the FOIP Act defines personal information. It states:

> *1 In this Act,*
>
> > *(n) "personal information" means recorded information about an identifiable individual, including*
> >
> > > *(i) the individual's name, home or business address or home or business telephone number,*
> > > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> > > *(iii) the individual's age, sex, marital status or family status,*
> > > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> > > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
> > > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> > > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> > > *(viii) anyone else's opinions about the individual, and*
> > > *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 29] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 30] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[…]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation […]*
>
> *[…]*
>
> *(g) the personal information consists of the third party's name when*
>
> > *(i) it appears with other personal information about the third party, or*
> >
> > *(ii) the disclosure of the name itself would reveal personal information about the third party […]*
>
> *[…]*

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> *(f) the personal information has been supplied in confidence,*
>
> *(g) the personal information is likely to be inaccurate or unreliable,*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*

(i) the personal information was originally provided by the applicant.

[para 31] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 32] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 33] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22 the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).
>
> In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4). [my emphasis]

[para 34] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 35] Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act, which states:

> *6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

Records 58, 59, 60

[para 36] The Public Body severed records 58 and 60 in their entirety. It severed information relating to a third party from record 59. These records contain the contact information and dates of birth of several individuals and chart numbers. The names of the individuals associated with this information have been "crossed off" with a felt pen and are illegible. Handwritten notes on record 59, in addition to the context provided by record 61, indicate that the Applicant provided these records to an employee of Alberta Health Services to discuss them as part of her work duties.

[para 37] The records indicate that the individuals listed on the records had appointments at a clinic on a particular date. Record 60 describes conditions that testing is intended to rule out; the name of the patient is severed from the record while the contact information is not.

[para 38] As set out in sections 1(n)(i) and (vi) telephone numbers and identifying numbers are personal information under section 1(n)(i). Someone recognizing the contact information of an individual whose information appears on these records, could associate the contact information with the name of the individual, and learn that the individual sought neurological testing. Recorded information revealing that an individual is seeking or has sought neurological testing is information falling within section 1(n)(vi) and is therefore personal information.

[para 39] As the information severed from the records is personal information, I turn now to the question of whether the Public Body properly withheld this information under section 17(1).

[para 40] I agree with the Public Body that the information in records 58, 59, 60 is subject to the presumption set out in section 17(4)(a), as the information relates to medical history and evaluation of identifiable individuals. I also agree with the Public Body that there are no compelling factors weighing in favor of disclosing the personal information in these records under section 17(5). Certainly, none have been raised in the inquiry. I therefore find that section 17(1) requires the Public Body to withhold any personally identifying information of patients appearing in these records.

[para 41] Although I agree with the Public Body that the personally identifying information of patients contained in records 58, 59 and 60 must not be disclosed, I do not agree with its decision to withhold as much information as it did. As discussed above, section 6(2) of the FOIP Act creates a right of access to remaining information once information subject to an exception is severed.

[para 42] From the fact that the Public Body does not discuss severing in its submissions, I infer that it did not turn its mind to the question of whether personal information could be severed from these records and the remaining information provided to the Applicant. However, once personally identifying information of patients (i.e. patient names, contact information and chart numbers) is removed from the records, neutral information that may be useful to the Applicant for the purpose of learning what materials the Public Body had access to in reviewing her complaint could be produced to her.

[para 43] As I find that the personally identifying information of patients can be severed from the records, I intend to order the Public Body to do so and to provide the remaining information to the Applicant.

Records 223, 224, and 225

[para 44] Records 223 and 224 contain references to another employee with Alberta Health Services who had made a complaint to the Public Body. The Public Body has severed the personally identifying information of this employee and provided the remainder of these records to the Applicant. Record 225 contains a reference to the personal reasons of a lawyer of Alberta Health Services for taking leave. The Public Body severed this information and provided the remaining information in the records to the Applicant.

[para 45] The information severed from records 223 and 224 is about another employee of Alberta Health Services acting in a personal capacity. I find that this information is personal information falling within the definition set out in section 1(n) of the FOIP Act. The presumption created by section 17(4)(g), reproduced above, applies. Moreover, I am unable to find that there are any relevant considerations that would weigh in favor of disclosing the information.

[para 46] With regard to the information about the lawyer appearing in record 225, I find that the presumption created by section 17(4)(g) also applies. As with records 223 and 224, I also find that there are no relevant considerations weighing in favor of disclosure present.

[para 47] I intend to confirm the Public Body's decision to sever information under section 17 from records 223, 224, and 225.

Issue C: Did the Public Body properly apply section 24 of the Act to the information in the records?

[para 48] The Public Body applied section 24, in addition to sections 27(1)(a) and (c), to withhold information from records 144, 145, and 146. As I find below that the information severed from these records is subject to solicitor-client privilege and therefore properly withheld under section 27(1)(a), I need not address the question of whether the information is subject to section 24.

Issue D: Did the Public Body properly apply sections 27(1)(a) and (c) to the information in the records?

[para 49] The Public Body applied section 27(1)(a) to records 144, 145, and 146 on the basis that they are subject to solicitor-client privilege. These records are duplicates of one another and contain copies of the same memorandum prepared by a human rights officer. The memorandum is addressed to counsel for the Public Body and a director of the Public Body and recounts a conversation that took place between the human rights officer, the director and counsel for the Public Body.

[para 50] Section 27(1)(a) 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 51] The test to determine whether information is subject to solicitor-client privilege is set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In *Solosky*, the Court said:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) 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. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[para 52] The Court in *Solosky* is clear that not every communication between a solicitor and another party is legal advice or subject to solicitor-client privilege. Rather, solicitor-client privilege will attach to confidential communications between a legal advisor, acting in that capacity, and a client, where the communication is made for the purpose of giving or seeking legal advice. It will only be communications that meet all three requirements of this test that are subject to solicitor-client privilege.

[para 53] In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112, the Alberta Court of Appeal described the kinds of information that may be considered legal advice and subject to solicitor-client privilege:

> 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 54] The Public Body provided copies of records 144, 145, and 146 for my review. The records enabled me to determine that the email documents legal advice received by a human rights officer. The record was created and provided to counsel for the Human Rights Commission for the purpose of ensuring that the legal advice was understood and to obtain any additional legal advice if necessary. The information clearly falls within the continuum "aimed at keeping both solicitor and client informed", referred to in the foregoing excerpt from *Blood Tribe*.

[para 55] I am satisfied from my review of the records and the submissions of the parties that the information in the records is a confidential communication between a legal advisor, acting in that capacity, and a client, made for the purpose of giving or seeking legal advice. I therefore find records 144, 145, and 146 are subject to solicitor-client privilege and therefore fall within the terms of section 27(1)(a). As the Public Body's reason for withholding these records is to preserve solicitor-client privilege, I find that it exercised its discretion reasonably in withholding these records. I will therefore confirm the Public Body's decision to withhold these records from the Applicant.

[para 56] As I have found that section 27(1)(a) applies to these records, I need not address the Public Body's arguments in relation to section 27(1)(c).

Issue E: Did the Public Body properly apply section 29 (information that is or will be available to the public) of the Act to the information in the records?

[para 57] The Public Body applied section 29(1)(a) to withhold records 150 – 175 and records 184 – 209 from the Applicant. These records contain two copies of the decision of a labour arbitrator regarding a grievance the Applicant's union had filed on her behalf.

[para 58] Section 29 states, in part:

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, or*
>
> *(b) that is to be published or released to the public within 60 days after the applicant's request is received.*
>
> *(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1)(b).*

[para 59] Section 29(1)(a) is a discretionary exception to disclosure. It authorizes a public body to withhold information when the information requested by an applicant is publicly available.

[para 60] The Public Body relies on section 29(1)(a) to withhold the two copies of the arbitrator's decision that are located in the complaint files. It argues:

> A public body may withhold information under section 29(1)(a) if the information is available to the general public and is not a "restricted" public. The Public Body submits it properly applied section 29(1)(a) to the information as the information is available to the general public.
>
> As per section 29(2) of the Act, in its final letter to the Applicant, the Public Body informed the Applicant that the information was available to the public and provided the URL Link below: [link to an arbitrator's decision published on CanLII].

[para 61] I note that in Order 159, a decision of the Ontario Office of the Information and Privacy Commissioner, the former Assistant Commissioner held that the phrase "information currently available to the public" describes information for which there is a system of public access. He said:

> After carefully considering the representations of the appellant and the institution together with the information obtained from the Registrar's office, I am of the view that the unreported decisions requested are publicly available.
>
> Support for the position I have taken can be found in an analysis of the way in which the Federal and various Provincial access legislation deals with publicly available information, by McNairn and Woodbury in *Government Information: Access and Privacy*, De Boo, 1989. At pages 2-24 the authors state:
>
> > Other information for which there is already a system of public access in place will be regarded as being available to the public. Someone who is seeking such information will normally be required to proceed in accordance with the rules of that system. A person who puts in an access request for a deed to property or a list of directors in a company's information return, for example, will likely be instructed to visit the land or companies registry to locate and view the relevant document. A government institution

> is unlikely to undertake a search for such a document when it has provided the facility for that to be done by members of the public or their representatives. If copies of a deed or a company return, once located, are ordered from the public office, charges will be levied in accordance with the scale of fees under the land registration or companies legislation, rather than that under the access legislation.
>
> The authority for diverting the requester to another access system in these circumstances is fairly clear under the federal, Manitoba and Ontario Acts. While the other access statutes are silent on this matter, they should not be interpreted as creating a right to use their access processes in preference to resorting to the public record. In other words, the existing systems for access to particular kinds of information will take priority even if not as convenient or cost effective for the requester. In fact, the Quebec Act states specifically that its access rights do not apply to information in certain public registers, namely those with respect to land transactions, civil status and matrimonial regimes.

In the foregoing case, the Assistant Commissioner determined that unreported decisions, which were the subject of an access request, were publicly available as they were published on QuickLaw, and members of the public could purchase information published on this service.

[para 62] Order 159 is authority for the position that requests for decisions published on services such as QuickLaw or CanLII are requests for information for which there is a system of public access, or "information that is readily available to the public". If any member of the public can gain access to information through a process other than the FOIP régime, for example, by accessing QuickLaw or CanLII, then section 29(1)(a) may apply to the information when it is the subject of an access request.

[para 63] However, for the reasons that follow, I am not satisfied that section 29(1)(a) applies to the information to which the Public Body has applied it in this case. The Applicant's access request is for the contents of two files created in relation to two complaints she made, not for copies of a decision made by a labour arbitrator. Information responsive to her access request will enable the Applicant to know what kinds of information the Public Body had available to it in relation to her complaints, and, to a certain extent, who provided it and when. For information to be responsive to her request, it must be located on one of two complaint files. Information accessed through CanLII does not meet this requirement, as the information from this source is not associated with the Applicant's two human rights complaint files and communicates nothing about the contents of these files.

[para 64] In my view, if information posted on CanLII (or some other public forum) would be responsive to an applicant's access request by virtue of its content, then section 29(1)(a) may apply to the information. However, if publicly available information would not be responsive by virtue of its content, but is only responsive to an access request by virtue of its presence on a requested file, then section 29(1)(a) does not apply. In this case, the arbitrator's decision is responsive not because of its content but because it appears twice on one of the complaint files the Applicant specified in her access request.

[para 65] There are also physical differences between the decision of the arbitrator posted on CanLII and the two copies of the decision appearing in the records at issue. For example, the two copies of the arbitrator's decision that appear in the complaint files have the fax number and name of the arbitrator's law firm on them, as well as the date and time they were transmitted by the arbitrator's law firm to the party providing the copy to the Public Body. The copies also have the fax numbers of the parties who sent the copies to the Public Body as well as the time and date of transmission. The version of the order appearing on CanLII lacks this information, although this information is responsive to the Applicant's access request, given that it is located on the complaint file and provides information about what was before the Public Body at the time of the Applicant's human rights complaints.

[para 66] For the foregoing reasons, I find that section 29(1)(a) does not apply to the information to which the Public Body applied this provision.

V. ORDER

[para 67] I make this Order under section 72 of the Act.

[para 68] I confirm that the Public Body conducted a reasonable search for responsive records.

[para 69] I order the Public Body to sever the personally identifying information of patients from records 58, 59, and 60 and to provide the remaining information to the Applicant.

[para 70] I confirm the decision of the Public Body to withhold personally identifying information from records 223, 224, and 225.

[para 71] I confirm the decision of the Public Body to withhold records 144, 145, and 146 under section 27(1)(a).

[para 72] I order the Public Body to disclose the remaining information to the Applicant.

[para 73] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator