

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2015-11

April 28, 2015

ALBERTA HEALTH SERVICES

Case File Number F6585

Office URL: www.oipc.ab.ca

Summary: In Order F2014-38 / Decision F2014-D-02 the Adjudicator decided that Alberta Health Services should be given the opportunity to gather evidence or persuasive authority to support its application of solicitor-client privilege to the records. She did so because it was unclear on the face of the records whether they contained or reflected communications between a solicitor and a client.

The Public Body submitted an affidavit from the lawyer who created the records to establish that the information in the records had been obtained or exchanged with the client. The Adjudicator confirmed that the records were the subject of solicitor-client privilege, and had properly been withheld under section 27(1)(a) of the *Freedom of Information and Protection of Privacy Act*.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 18, 19, 21, 21, 24, 27, 72;

Authorities Cited: AB: Order F2014-38 / Decision F2014-D-02

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

I. BACKGROUND

[para 1] On May 9, 2012, Alberta Health Services (the Public Body) received an access request under the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act) from the Applicant. She requested “all records including grievances, AHS and Human Resource employment records for duration of my employment. Also copies of harassment files.”

[para 2] On May 10, 2012, the Public Body received a second request for records from the Applicant, which the Applicant indicated was in addition to her first request. She stated:

I would like to have copies of the incident report that took place on the 12th floor of the Foothills Hospital where I was taken off the floor by the Emergency Response Team in 2007. I would also like a copy of the full report of the harassment claim that was submitted by [an employee] from employee and labour relation in 2010. I would also like a copy of my complete OHS file. I would like copies of all correspondence with my Ability advisor [...] in 2011. I will also like copies of my file at the Chronic Pain Clinic, Director [...]. I would also like to have copies of all information on all file during the 15 years of my employment at Human Resource. I would also like copies of my correspondence with [an employee] from Internal Audit and Risk Management which I submitted in 2008. I would also like a copy of the incident report that took place in 2007 by [an employee] from Human Resource. A copy of all grievances. I would also like a copy of my Human Rights file that was filed in 2003 and ended in 2010. Also, is it possible to know the names of who has access my file in the past 15 years?

[para 3] On September 7, 2012, the Public Body responded to the Applicant’s access request. The Public Body provided her with records, but withheld some information from them under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 19 (confidential evaluations), 21 (disclosure harmful to intergovernmental relations), 24 (advice from officials), and 27 (privileged information) of the FOIP Act.

[para 4] The Applicant requested that the Commissioner review the Public Body’s response to her access request. The Commissioner authorized mediation to resolve the dispute between the Applicant and the Public Body regarding the Public Body’s response. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] Prior to the inquiry, the Public Body reconsidered some of its decisions to apply exceptions to disclosure. The Public Body decided that it would no longer rely on sections 18, 19, 21, or 24 of the FOIP Act to withhold information from the Applicant, but would continue to rely on sections 17 and 27. In its submissions, it stated that it had reconsidered its decisions to withhold information under section 17 and was now applying this provision to only two documents.

[para 6] Following the inquiry, I issued Order F2014-38 / Decision F2014-D-02. In Order F2014-38, I ordered the Public Body to conduct a new search for responsive records. I confirmed its decision to withhold one record on the basis of solicitor-client privilege, and ordered it to disclose some other records that I found were not privileged.

However, with regard to the majority of the information to which the Public Body had applied section 27(1)(a), I decided to provide it with the opportunity to gather evidence or persuasive legal authority to support its contention that the information was subject to this provision. This information was the subject of Decision F2014-D-02.

[para 7] The Public Body has now conducted a new search for responsive records and obtained the affidavit of the lawyer who created the information addressed in Decision F2014-D-02. The Public Body has submitted this affidavit into evidence for this inquiry.

[para 8] The Applicant challenges the adequacy of the Public Body's evidence and seeks to obtain the information the Public Body withheld from her under section 27(1)(a).

II. INFORMATION AT ISSUE

Information severed from records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500383, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500414, 500415, 500416, 500417, 500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500475, 500476, 500477, 500489, 500523, 500660, 500661, 500669, 500671, 500672, 500673, 500674, 500675, 500676, 500678, 500679, and 500686 is at issue.

III. ISSUE

Issue A: Did the Public Body properly apply section 27(1)(a) (privileged information)?

[para 9] 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 10] 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 11] 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 12] In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112, the Alberta Court of Appeal explained that records need not contain legal advice to meet the Solosky test. If the information was exchanged so that legal advice could be obtained or given, even though the information is not in itself legal advice, the information meets the requirements of “a communication made for the purpose of giving or seeking legal advice”. The Court said:

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 13] The Applicant argues:

I made an application for my records on May 9, 2012. It is now March 10, 2015. This is almost 3 years since my original request. The Public Body has used section 27(1) as an excuse to not produce many of my records. The Public Body has also withheld my documents, quoting

solicitor-client privilege. The following records which I requested should not be identified under section 27(1).

(The Applicant goes on to describe records which do not correspond to the records at issue for this inquiry.)

[para 14] The records to which the Public Body applied section 27(1)(a) and is withholding on the basis of solicitor-client privilege are described in the affidavit submitted by the Public Body for the inquiry. The affidavit is sworn by the lawyer who represented the Public Body at a grievance arbitration. The arbitration award is dated March 12, 2009.

[para 15] The lawyer states:

All of the records referenced in this my affidavit were either created by myself or employees of AHS and were directly related to the seeking or giving of legal advice on the labour and employment file that I had carriage of. It was implicit in the creation of these notes and with the communication between AHS employees and legal representatives that such communication would be confidential. The records consisting of notes and working papers and information passing between myself as legal counsel and AHS employees directly relate[d] to the seeking or giving of legal advice and I believe constitute a continuation of communications for obtaining legal advice.

[para 16] In Order F2014-38 / Decision F2014-D-02 I stated at paragraphs 78 and 79:

As with the notes, possibly the Public Body is relying on an interpretation of solicitor-client privilege that does not depend on there being direct communications, or discussions of advice that has been given. It is also possible that some of the records withheld by reference to solicitor-client privilege may reveal communications made to the legal counsel by the Public Body as a client, which may possibly be supported by evidence. Similarly, it may be that litigation privilege applies, and there is evidence of related hearings, either ongoing or within contemplation, as described in *Blank, supra*.

As discussed above, normally when the burden of proof is not met in an inquiry, disclosure of the records in question is ordered. However, I cannot exclude the possibility that the records may consist of or reflect privileged communications and I am also unable to exclude the possibility that there could be proceedings related to the arbitration hearing in existence or within contemplation. Given that these privileges are of significant importance to the proper functioning of the justice system, I have decided to return the issue of the application of section 27(1)(a) to the Public Body with directions so that it may gather further evidence or authority to support its application of this provision.

[para 17] I noted that it was possible that the records contained solicitor-client communications but that there was no evidence before me that supported finding that they did. I decided to provide the Public Body with the opportunity to gather evidence to support its application of solicitor-client privilege.

[para 18] The lawyer who created the records has now confirmed in her affidavit that her notes contain or reflect communications made to her by her client, and in some cases, information she communicated to the client. With the additional evidence provided

by the lawyer, I am satisfied that the information severed by the Public Body from records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500383, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500414, 500415, 500416, 500417, 500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500475, 500476, 500477, 500489, 500523, 500660, 500661, 500669, 500671, 500672, 500673, 500674, 500675, 500676, 500678, 500679, and 500686 reflects information exchanged between solicitor and client for the purpose of seeking or giving legal advice. It follows that I find that the information is privileged.

[para 19] As I noted at paragraphs 98 – 100 of Order F2014-38 / Decision F2014-D-02, when a public body withholds information on the basis of solicitor-client privilege, the public importance of maintaining this privilege outweighs competing interests in disclosing the information. As the Public Body is withholding the information under section 27(1)(a) in order to protect its privileged communications, it follows that I find it has exercised its discretion to withhold the information reasonably.

IV. ORDER

[para 20] I make this Order under section 72 of the Act.

[para 21] I confirm the decision of the Public Body to apply section 27(1)(a) to records 500350, 500352, 500353, 500354, 500355, 500356, 500357, 500358, 500359, 500360, 500361, 500362, 500363, 500364, 500365, 500366, 500367, 500368, 500369, 500370, 500371, 500372, 500374, 500375, 500376, 500377, 500378, 500379, 500380, 500381, 500382, 500383, 500384, 500385, 500386, 500387, 500388, 500389, 500390, 500405, 500406, 500414, 500415, 500416, 500417, 500418, 500419, 500420, 500439, 500440, 500441, 500442, 500443, 500444, 500445, 500446, 500447, 500466, 500467, 500468, 500469, 500470, 500471, 500472, 500473, 500474, 500475, 500476, 500477, 500489, 500523, 500660, 500661, 500669, 500671, 500672, 500673, 500674, 500675, 500676, 500678, 500679, and 500686 and to withhold the information from the Applicant.

Teresa Cunningham
Adjudicator