

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2017-62

July 20, 2017

CITY OF CALGARY

Case File Number 000135

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the City of Calgary (the Public Body) pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) for information in relation to the Applicant found in a named employee's email account. The Public Body responded but withheld nine pages of information from the Applicant pursuant to sections 27(1)(b) and 27(1)(c) of the Act.

The Adjudicator found that the Public Body properly applied sections 27(1)(b) and 27(1)(c) of the Act to most of the information at issue but ordered the Public Body to disclose one email and the names, dates, business contact information and, "re lines" to the Applicant.

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

Authorities Cited: AB: Orders F2008-028, F2013-51, F2015-22, and F2015-31.

Cases Cited: *Guarantee Co. of North America v. Beasse* [1991] A.J. No. 1199

I. BACKGROUND

[para 1] On November 25, 2014, the City of Calgary (the Public Body) received an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act). The Applicant requested:

Any and all correspondence in relation to me that exists within [a named employee's] email account and that was communicated through [named employee's] instant messenger account.

[para 2] The Public Body responded to the Applicant's access request but severed nine pages of records, relying on section 27(1)(b) and 27(1)(c) of the Act.

[para 3] On December 23, 2014, the Applicant requested that this Office review the Public Body's response to his access request. Mediation was authorized but did not resolve the issues between the parties and on January 26, 2016, the Applicant requested an inquiry. I received submissions from both parties.

II. RECORDS AT ISSUE:

[para 4] The records at issue are the records severed pursuant to section 27(1)(b) and 27(1)(c) of the Act.

III. ISSUES

[para 5] The Notice of Inquiry dated September 26, 2016 state the issues in this inquiry as follows:

1. Did the Public Body properly apply section 27(1)(b) of the Act to the information it severed from the records?
2. Did the Public Body properly apply section 27(1)(c) of the Act to the it information it severed from the records?

IV. DISCUSSION OF ISSUES

- 1. Did the Public Body properly apply section 27(1)(b) of the Act to the information it severed from the records?**

[para 6] Section 27(1)(b) of the Act states:

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

...

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

[para 7] The words, “by or for” in the context of this section have been interpreted to mean, “by or on behalf of” (Order F2015-22 at para 107). Therefore in order for this section to apply:

1. The records at issue must have been prepared by or on behalf of an agent or lawyer of the Minister of Justice and Solicitor General or of the Public Body and
2. The information must be in relation to a matter involving the provision of legal services

[para 8] I will deal with each of these requirements separately below.

- a. Were the records at issue prepared by or on behalf of an agent or lawyer of the Minister of Justice and Solicitor General or of the Public Body?*

[para 9] According to the Public Body, the named employee in the Applicant’s access request is employed by the Public Body as Municipal Prosecutor. She is not a lawyer, but appears as an agent for the Public Body to prosecute or settle matters relating to municipal offences in the Provincial Court of Alberta – Traffic Division. As individuals are often charged with both municipal and provincial offences, the Municipal Prosecutor also works closely with Alberta Justice and Solicitor General lawyers and agents.

[para 10] The records consist of emails. The Public Body described the authors of the various emails as follows:

Others individuals prepared information contained in the Records. Both lawyer and non-lawyer employees of the Public Body wrote emails contained in the Records. Both a lawyer and an agent at Alberta Justice wrote emails contained in the Records. A non-presiding Justice of the Peace wrote one of the emails contained in the Records.

(Public Body’s initial submissions at para 20)

[para 11] Given the Municipal Prosecutor’s role as described by the Public Body, I find that she was acting as an agent for the Public Body as that term is used in section 27(1)(b) and (c) of the Act. The emails authored by the Municipal Prosecutor were, therefore, prepared by an agent of the Public Body. Further, with the exception of one email sent to the Public Body, all other authors of the emails were either lawyers or agents of the

Public Body or Alberta Justice and Solicitor General. As such, the first requirement of section 27(1)(b) of the Act noted above has been met, with the exception of the email that was sent to the Public Body and is found on page 00013-00014 of the records at issue. Because that email was not prepared by or for an agent or lawyer of the Public Body or Alberta Justice and Solicitor General, section 27(1)(b) of the Act would not apply to it.

b. Was the information in relation to a matter involving the provision of legal services?

[para 12] In Order F2013-51, the Adjudicator stated that:

For section 27(1)(b) to apply to information, the information in question must be prepared by the lawyer or someone acting under the direction of the lawyer for the purpose *that a lawyer will use the information in order to provide legal services to a public body.* (emphasis mine)

(Order F2013-51 at para 82)

[para 13] I would add to this explanation of the application of section 27(1)(b) of the Act that a lawyer or an agent will use the information in order to provide a legal service to a public body.

[para 14] The Applicant has appeared as agent for individuals charged with municipal offences where the Municipal Prosecutor acted on behalf of the Public Body. There was an interaction with the Municipal Prosecutor relating to a matter wherein the Municipal Prosecutor was acting as agent for the Public Body and the Applicant was acting as agent for a client. Following this interaction, the Applicant made his access request.

[para 15] The emails relate to incidents which occurred as the result of ongoing specific matters before the Provincial Court – Traffic Division wherein the agents for the Public Body or Alberta Justice and Solicitor General were representing their respective employers in prosecuting alleged offences.

[para 16] The Public Body submits that the “legal service” being provided by the Municipal Prosecutor or a lawyer for Alberta Justice and Solicitor General (as I described above) was prosecuting municipal and provincial offences. I find that prosecuting municipal and provincial offences is a legal service.

[para 17] The Public Body states that the purpose of the emails was as follows:

The information was prepared and communicated by the lawyer or agent to help educate and provide advice to other lawyers and agents of the Public Body and Alberta Justice regarding appropriate actions they should consider taking in future potential litigation and to promote consistent practice in future litigation.

(Public Body’s initial submissions at para 29)

[para 18] Therefore, according to the Public Body, the intention of the parties communicating the information was to help other lawyers and agents in future legal matters. This appears to be a very general purpose that is only loosely connected to legal matters, which, as the Adjudicator in Order F2013-51 pointed out, section 27(1)(b) of the Act does not apply to. She stated:

It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i - iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.

(Order F2013-51 at para 85)

[para 19] However, having reviewed the records at issue, and without revealing the content of those records, I believe that the advice being provided by and to lawyers and agents of the Public Body and Alberta Justice and Solicitor General went beyond merely referring to or describing legal services without revealing their substance. It was information shared in order to deal with and strategize about specific legal matters. Therefore, I find that section 27(1)(b) of the Act applies to the substantive proportions of three of the emails found at pages 00006, 00007, 00008, 00009, 00012-00013 of the records at issue.

[para 20] That being said, the Public Body withheld all parts of the records at issue from the Applicant because:

The Public Body respectfully submits that Section 27(1)(b) applies to withhold all of the information contained in the Records, including names, dates and contact information. The names, dates and contact information is an essential part of any correspondence, as a communication has little value if it cannot be addressed to the proper individual, identify the preparer or sender of such information, and identify the date on which such information was created. Furthermore, all of the information in the Records was directly prepared by the respective authors of the correspondence.

Disclosing the subject line, recipients, senders and dates contained in Records would reveal the individuals sending and receiving the communications. As recognized in *Beasse* [Tab 12] a lawyer or agent should have the freedom to communicate with others and to document such communication on the file without concern that these documents should be produced. Disclosing this information could harm future litigation conducted by the Public Body and Alberta Justice.

(Public Body's initial submissions at paras 30-31)

[para 21] In Order F2008-028, the Adjudicator found that in order for information to fall under section 27(1)(b) of the Act, information must be "prepared". Therefore names, business contact information and non-substantive information would not fall under section 27(1)(b) of the Act. He stated:

However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere.

(Order F2008-028 at para 157)

[para 22] In addition, despite the arguments put forward by the Public Body, I do not believe that disclosing the names and business contact information or "re lines" reveals anything substantive about the communications such that that information could be severed under section 27(1)(b) of the Act. The case cited by the Public Body in support of its decision to withhold the record (*Guarantee Co. of North America v. Beasse* [1991] A.J. No. 1199) dealt with the contents of a lawyer's file and stands for the general principle that all communications in a lawyer's file where a lawyer is acting in a solicitor-client relationship should be protected from disclosure because of privilege. This case, in my opinion, has little relevance to the information at issue in this inquiry. There is no claim of privilege being made by the Public Body and the communications did not occur in a solicitor-client relationship or role. As a result, I do not find the Public Body's argument on this point compelling and order that it disclose the non-substantive portions of the email communications.

[para 23] Finally, because sections 27(1)(b) and 27(1)(c) of the Act are discretionary, the Public Body's use of its discretion must be appropriate (see Order F2015-31 at para 66). The Public Body submitted that it took the following factors into consideration:

- The Public Body considered the general purpose of the Act which is to provide information subject to limited and specific exceptions.
- The purpose of section 27(1)(b) is to allow information to be gathered, prepared by, or provided to a lawyer or agent of a Public Body so that the information may be used by the lawyer or agent for the purposes of providing advice or legal services.
- The purpose of section 27(1)(c) is to allow information related to a matter involving the provision of advice or services by a lawyer or agent of a public body or Alberta Justice to be communicated to or from another person in confidence.
- The Public Body considered the litigation involving the Applicant in a matter the Public Body was prosecuting for a municipal offence, as well as the strong probability of future litigation where the Applicant will represent himself or individuals with an adverse interest to the Public Body and Alberta Justice.
- The Public Body further considered that providing the Applicant with

Records would disclose communications that are intended to be confidential in nature and not intended to be further disclosed. The communications are relevant to future litigation involving the Public Body and Alberta Justice. The Public Body believes that disclosing these confidential communications would discourage the free and candid exchange of information between the Public Body's legal staff, as well as with Alberta Justice, and result in staff being less prepared for litigation and conducting less consistent and efficient litigation.

- The Public Body also considered the Public Body's and Alberta Justice's staff need to be able to make frank, candid assessments of current and potential future litigation to determine the best course of action to take during such litigation and to promote consistent practice. This is especially important given that the Public Body and Alberta Justice share a courtroom in Traffic Court and sometimes need to coordinate litigation against defendants.
- The Public Body also considered the public's interest in its public servants being able to more consistently and effectively conduct litigation. There is little benefit to the public interest in disclosing the Public Body's confidential communications. The communications relate only to the Applicant.
- The Public Body also considered that disclosing the Public Body's and Alberta Justice's confidential communications would discourage these communications and harm the Public Body's and Alberta Justice's ability to conduct fulsome plea negotiations with defendants.
- The Public Body considered the limited purpose for which the confidential communications were made and documents created, which was to assist the Public Body's and Alberta Justice's legal staff in understanding how to best approach and coordinate litigation, and to take proactive steps to prepare for such litigation and adopt a consistent practice. The Public Body carefully considered the facts and circumstances of this particular request.

(Public Body's initial submissions at para 46)

[para 24] I find these are relevant and appropriate factors to take into consideration. Therefore, I find that the Public Body properly exercised its discretion to withhold the information in the records at issue to which I have found section 27(1)(b) applies.

2. Did the Public Body properly apply section 27(1)(c) of the Act to the information it severed from the records?

[para 25] Section 27(1)(c) of the Act states:

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

...

(c) information in correspondence between

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

[para 26] With the exception of the email on pages 00013-00014 of the records at issue that was sent to the Public Body, my reasoning above applies equally to the application of section 27(1)(c) of the Act.

[para 27] Regarding the email on pages 00013-00014, while it is information in correspondence between an agent or lawyer of the Public Body or Alberta Justice and Solicitor General, it is not in relation to the a matter involving the provision of advice or other services. As the Adjudicator in Order F2015-22 stated:

I believe that the understanding of both parties to the correspondence must be that there is a matter involving the provision of advice or other services by the lawyer, and the correspondence is intended, if not to advance the matter, then to relate to that matter. For example, if a party were to send an offer of settlement to the lawyer of a public body, then such correspondence would be "in relation to a matter involving the provision of advice or other services" by the public body's lawyer. However, if a third party sends correspondence to a public body's lawyer and the third party does not contemplate that there is a matter involving the provision of a lawyer's advice or services, then the correspondence cannot be said to be in relation to such a matter.

That is not to say that a lawyer cannot obtain information on a confidential basis from a third party that the lawyer requires in order to provide advice or services. (Such information is typically covered by litigation privilege when it is obtained for the dominant purpose of preparing for litigation.) Rather, I mean that section 27(1)(c) is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.

(Order F2015-22 at para 118-119)

[para 28] There is nothing in the email that suggests that it was a confidential communication (in fact, the opposite is indicated) and it was certainly not meant to advance a matter nor was it in relation to a matter about which the author and recipient needed to speak in order to allow the lawyer's services to be provided. Therefore, I find that section 27(1)(c) of the Act does not apply to the email on pages 00013-00014 of the records at issue and order it to be disclosed to the Applicant.

V. ORDER

[para 29] I make this Order under section 72 of the Act.

[para 30] I find that the Public Body properly applied section 27(1)(b) and 27(1)(c) of the Act to the substantive portions of the information at issue with the exception of the email on pages 00013-00014 of the records at issue.

[para 31] I order the Public Body to disclose to the Applicant the name, dates, business contact information, and “re lines” found in the records at issue to the Applicant.

[para 32] I further order the Public Body to disclose to the Applicant the email found on pages 00013-00014 of the records at issue.

[para 33] 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.

Keri H. Ridley
Adjudicator