

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-01

January 12, 2018

UNIVERSITY OF ALBERTA

Case File Number F8240

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), the Applicant made an access request to the University of Alberta (the Public Body) for records relating to his claim for Long Term Disability benefits (LTD). The Public Body responded but withheld some records as non-responsive or in reliance on section 17 (unreasonable invasion of a third party's personal privacy) of the Act and others in reliance on section 27 (subject to solicitor client privilege) of the Act.

The Adjudicator found that the Public Body properly withheld records as non-responsive, and properly applied section 17 and section 27(1)(a) of the Act.

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

Authorities Cited: AB: Orders F2004-003, F2006-011, and F2011-016.

Cases Cited: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, *Alberta (OIPC) v. University of Calgary* 2016 SCC 5.

I. BACKGROUND

[para 1] The Applicant was employed by the University of Alberta (the Public Body) and went on medical leave in January of 2012. On September 5, 2012, he was placed on non-disciplinary suspension. In May of 2013, the Applicant applied for long term

disability benefits (LTD). His claim was handled by an administrator in the Organizational Health and Effectiveness unit (previously called the Health Promotion and Worklife Services unit (HPaWS)).

[para 2] The Applicant was terminated for cause on January 2, 2014. The Applicant grieved his termination through the collective agreement between the Public Body and the Association of Academic Staff: University of Alberta (AASUA) (who represented the Applicant). Concurrently, the Applicant also brought other grievances, including one related to the processing of his LTD claim. In March of 2016, prior to the conclusion of the arbitration, the AASUA withdrew its grievances in total. The Applicant's LTD application was deemed abandoned on June 3, 2016.

[para 3] On March 6, 2014, the Applicant made an access request to the Public Body pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) for:

...all records pertaining to [the Applicant's] medical leave or application for Long Term Disability benefits in the possession of [an administrator] in HPAWS, Human Resource Services or any other staff member in HPAWS. This request includes:

1. all correspondence and emails written by or to [an administrator] to/from any party regarding [the Applicant] or [his] application for benefits
2. records of meeting requests, dates of meetings held and meeting notes where [the Applicant's] application for benefits was discussed by anyone in HPAWS with any party
3. the names and titles of all individuals involved in any discussions with [an administrator] pertaining to [the Applicant's] medical Leave, employment status and LTD application
4. all medical documentation including letters and reports to and from [a named individual] as well as records of calls to [a named individual] or his office
5. all documentation including letters and reports to and from the Medical Advisor [an administrator] that had (sic) review my LTD application
6. all documentation, emails or records of discussions with any representative of AASUA

[para 4] On May 27, 2014, the Public Body responded to the Applicant's access request but withheld some information from the Applicant pursuant to sections 17, 24, and 27 of

the Act. It also withheld some records stating that they were not responsive to the Applicant's access request.

[para 5] On June 23, 2014, the Applicant requested the Office of the Information and Privacy Commissioner review the Public Body's response to his access request. Mediation was authorized but did not resolve the matters between the parties and on February 23, 2016, the Applicant requested an inquiry. I received initial submissions from both parties.

II. RECORDS AT ISSUE

[para 6] The records at issue are the records severed in reliance on sections 17 and 27 of the Act as well as the records that the Public Body withheld as non-responsive to the Applicant's access request.

III. ISSUES

[para 7] The Notice of Inquiry dated April 10, 2017 state the issues in this inquiry as follows:

1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?
2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
3. Did the Public Body properly apply sections 24(1)(a), (b) and (d) (advice from officials) to the information in the records?
4. Did the Public Body properly apply sections 27(1)(a), (b), and (c) (privileged information) to the information in the records?

If "solicitor-client privilege" is asserted over any one or more of the records at issue please refer to the "Privilege Practice Note" enclosed with this Notice of Inquiry and also available on the Resources page on our Office web site at www.oipc.ab.ca.

[para 8] As part of its initial submissions, the Public Body released some records that were previously withheld. As such, it no longer relies on section 24 of the Act. Therefore, I will make findings regarding issues, 1, 2, and 4 only.

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 9] The Applicant's access request (which is noted above in more detail) was for records relating to his claim for LTD. The Public Body explains that it did a search of

the Applicant's name and that search retrieved several pages of records which contained his name but were not about him. Most were about another employee's employment matters, time sheets and invoices and one was about an invoice for a fee incurred by the Public Body with respect to the Applicant's LTD claim (though there was no medical or other information relating to the Applicant's LTD claim included in that record).

[para 10] The Public Body states that it initially withheld records 186-195, 197-198, 204-205, 235-236, and 262-263 in their entirety because they were not about the Applicant or reasonably related to his medical leave or application for LTD benefits. In the interest of narrowing the issues in this inquiry, the Public Body did disclose one line on each of pages 186, 188, 189, and 194 that contained the Applicant's personal information.

[para 11] In order to respond to a request, the Public Body must take a broad view of the Applicant's request and any information reasonably related to the Applicant's access request will be responsive (see Order F2011-016 at para 27).

[para 12] I have reviewed the Applicant's access request and the records that were withheld by the Public Body because they were not responsive to the Applicant's request. I agree with the Public Body's assessment that these records were non-responsive to the access request. Even on the broadest view of the Applicant's access request, these records were not reasonably related to the access request. The information was not related to the Applicant's LTD benefits or his medical information. Therefore, I confirm the Public Body's decision to withhold the information on pages 186-195, 197-198, 204-205, 235-236, and 262-263.

2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 13] In addition to withholding the information on pages 186-195, 204-205, and 235-236 from the Applicant because the information was not responsive to the Applicant's access request, the Public Body also applied section 17 of the Act to these records. If I am incorrect and the records withheld were responsive to the Applicant's request, I would still find that the Public Body was correct to withhold the information on pages 186-195, 204-205, and 235-236 from the Applicant pursuant to section 17 of the Act for the following reasons.

[para 14] Section 17 of the Act states that a public body must refuse to disclose a third party's personal information where the disclosure of that information would be an unreasonable invasion of the third party's personal privacy. In order for section 17 to apply, the information must be a third party's personal information.

[para 15] Personal information is defined by section 1(n) of the Act as follows:

1(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 16] The information severed from the above-noted pages of the responsive records included a Third Party's name, and information about the Third Party's health and employment history, all of which are the Third Party's personal information.

[para 17] Section 17(2) of the Act sets out when the disclosure of a third party's personal information would not be an unreasonable invasion of personal privacy. None of the subsections of section 17 are applicable in this inquiry.

[para 18] Section 17(3) and 17(4) of the Act set out when the disclosure of a third party's personal information would be presumed to be an unreasonable invasion of a third party's personal privacy. The Public Body argues that sections 17(4)(a), 17(4)(d), and 17(4)(g) of the Act apply to the Third Party's personal information. The relevant portions of section 17(4) of the Act state:

17(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,

...

(d) the personal information relates to employment or educational history,

...
(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,

[para 19] On review of the information the Public Body withheld in reliance on section 17 of the Act, I find that the information related to the Third Party's medical condition or employment history and also consisted of the Third Party's name along with other personal information about her (such as her employment and medical history). Therefore, I find that there is a presumption that disclosure of the Third Party's personal information would be an unreasonable invasion of her personal privacy.

[para 20] Section 17(4) of the Act raises only a presumption. The Public Body must still review the balancing factors listed under section 17(5) of the Act and all other relevant factors to determine if the disclosure of a third party's personal information is in fact an unreasonable invasion of his or her personal privacy. Section 17(5) of the Act states:

17(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 21] The Public Body argues that none of the factors in section 17(5) of the Act weigh in favour of disclosure. It further argues that sections 17(5)(e), 17(5)(f), and 17(5)(h) of the Act weigh against disclosure.

[para 22] I find no compelling argument or evidence to suggest that any section 17(5) factors weigh for or against disclosure. As a result, the presumption created by section 17(4) of the Act governs and I find that the disclosure of the Third Party's personal information would be an unreasonable invasion of her personal privacy. Further I find that Third Party's personal information cannot reasonably be severed from any of the records to which section 17 within the terms of section 6(2) of the Act. Therefore, I find that the Public Body properly applied section 17 of the Act in withholding the information on records 186-195, 204-205, and 235-236.

**3. Did the Public Body properly apply sections 24(1)(a), (b) and (d)
(advice from officials) to the information in the records?**

[para 23] As the Public Body is no longer relying on section 24 of the Act, I will not make any finding regarding this issue.

**4. Did the Public Body properly apply sections 27(1)(a), (b), and (c)
(privileged information) to the information in the records?**

[para 24] The Public Body applied sections 27(1)(a), (b), and (c) to over 80 pages of records that were responsive to the Applicant's access request.

[para 25] Section 27(1)(a), (b), and (c) of the Act state:

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,

(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

(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] Although the Public Body applied sections 27(1)(a), (b), and (c) to the records at issue, its arguments focused on section 27(1)(a) specifically, that the records which were withheld were subject to solicitor-client privilege. In accordance with the Supreme Court of Canada decision, *Alberta (OIPC) v. University of Calgary*, instead of providing me with the records, in support of this argument, the Public Body provided an Affidavit sworn by an employee which gave details of the records. This was provided to me *in camera*.

[para 27] The test to determine if solicitor-client privilege applies to a record was set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821. The test states that the evidence must establish the record is:

1. A communication between a lawyer and the lawyer's client;
2. The communication entails the giving or seeking of legal advice; and
3. The communication is intended to be confidential.

[para 28] The Public Body correctly points out that solicitor-client privilege also applies to the "continuum of legal advice", which this Office has described as follows:

I have reviewed the 11 pages at issue in this case. All of them appear to have been provided to a lawyer as part of a response to a request by the lawyer to another lawyer for information needed by the Police Chief. The request was not expressly for legal advice, but, having regard to the nature of the matter and the role of the person to whom it was made, it was implicit in the request that legal advice was called for, and the response that was given included legal advice. Some parts of the records do not consist of advice, but consist of attachments outlining facts in relation to which the advice was given, or which provide factual background for the advice. This latter material has the same character as factual material that is supplied by someone requesting advice as background for the advice being sought. Many cases have held that the latter can be withheld on the basis that it forms part of the "continuum of communications" in the seeking and giving of advice, I find the material in the attachments relative to which the advice was given is covered by the privilege in this case on the basis of the same principle.

(Order F2006-011 at para 10)

[para 29] According to the dates of the communications provided to me by the Public Body in its *in camera* Affidavit, the communications occurred following the Applicant's

suspension and prior to the time when the Applicant's grievances were withdrawn. It seems reasonable that during that time, the Public Body would have sought the counsel of a lawyer for advice on any legal matters concerning the Applicant. Also, according to the *in camera* Affidavit, the communication was either between an employee of the Public Body and a lawyer, or was part of a continuum of communication. While I do not know the precise content of the communications, I assume that the continuum of communication either involved relaying the advice of the lawyer to other employees, or involved providing further background and information to the lawyer. In any event, I accept the Public Body's Affidavit and find either the communication was between a lawyer and a client (or would reveal communication between a lawyer or client) and involved the giving or seeking of legal advice (or was part of the continuum of communication). Therefore, I find that the first two parts of the Solosky test have been met.

[para 30] Regarding part three of the Solosky test, confidentiality can be implied by the circumstances of the communication (here, a communication between solicitor and client involving obtaining legal advice), it does not need to be express (see Order F2004-003 at para 30). I find that confidentiality can be implied in the circumstances given that the communications were between a lawyer and a client during a time when there were either grievances looming or activity being arbitrated. Therefore, the third part of the Solosky test is met.

[para 31] Due to the fact that section 27(1)(a) of the Act is a discretionary exception, the Public Body must prove that it used its discretion appropriately. To that end, the Public Body submitted that it took into consideration the nature of the records, the purposes of section 27, and the following:

- (a) the impact the disclosure would reasonably be expected to have on the University's ability to carry out similar communications, particularly with their lawyers, in the future;
- (b) that the release of the information could make consulting with lawyers less candid, open and comprehensive in the future if it is understood that such information would be made publicly available;
- (c) that the University employees and administrators expected that consultations with the University Lawyers would be kept confidential; and
- (d) the objectives and purposes of the Act, including the Applicant's right of access.

(Public Body's initial submissions at para 74)

[para 32] Based on the foregoing, I find that the Public Body properly applied section 27(1)(a) of the Act to the records at issue. I further find that the Public Body properly exercised its discretion to apply section 27(1)(a) of the Act to the records at issue. As a result, I do not need to consider if the Public Body also properly applied section 27(b) and (c) of the Act to the records at issue. However, I note that recent orders issued by

this Office have found that if information is withheld in reliance on section 27(1)(a) because it is advice, it cannot at the same time be information in relation to the provision of advice. Although it does not affect the outcome of this Order because the Public Body's evidence regarding section 27(1)(a) of the Act was independently strong enough to support its claim of privilege, if this issue arises in the future, the Public Body should be careful that the application of section 27(1)(a), (b), and (c) to the same information does not undermine its application of section 27(1)(a) of the Act.

V. ORDER

[para 33] I make this Order under section 72 of the Act.

[para 34] I find that the Public Body properly withheld records that were not responsive to the Applicant's access request.

[para 35] I find that the Public Body properly applied sections 17 and 27(1)(a) of the Act to the records at issue.

Keri H. Ridley
Adjudicator