ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-26

June 28, 2018

SERVICE ALBERTA

Case File Number 002271

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Summary: The Applicant made a request to Service Alberta (the Public Body) for specific categories of information, such as advice, that it had relied on in determining its position as to whether the *Residential Tenancies Act,* S.A. 2004, c. R-17.1 (RTA) applied in national parks.

The Public Body provided some records, but withheld other information under section 27(1)(a) "privileged information" on the basis that they were subject to solicitor-client privilege.

The Adjudicator determined that the withheld records were subject to solicitor-client privilege on the balance of probabilities. The Adjudicator also found that section 32 of the FOIP Act did not require the Public Body to disclose the records. The Adjudicator confirmed the Public Body's decision.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 32, 56, 71, 72

Authorities Cited: AB: Orders F2004-024, F2009-044, F2012-03, F2014-R-01

Cases Cited: *F.H. v. McDougall* [2008] 3 S.C.R. 41; *Canada v. Solosky*, [1980] 1 S.C.R. 821; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 S.C.R. 555

I. BACKGROUND

[para 1] On September 29, 2015, the Applicant emailed the Director of Residential Tenancies (the Director) and asked: "Have you determined your position on whether the RTA applies in national parks?"

[para 2] On Friday, October 2, 2015 the Director replied by email:

> It has been determined that the RTA does not apply to the Town of Jasper as there is no agreement between the Federal Government and the Town for the RTA to apply. Provincial legislation cannot regulate proprietary rights on land owned by the federal Crown, unless the federal government specifically authorizes application of the legislation. Because the *Residential Tenancies Act* (RTA) regulates rights in land (tenant's rights vs. landlord's rights) the starting point is that it does not apply to land that is owned by the Crown in Right of Canada. This would include federal Crown lands in:
>
> - National Parks
> - Indian Reserves
> - Military Bases
>
> With respect to the Town of Banff, however, the RTA does apply, but only because the federal government authorized its application within the Town of Banff on August 21, 2006, by Amendment No. 9 to the Banff Incorporation Agreement. However, on other federal Crown lands within Banff National Park, the RTA does not apply.

[para 3] After he received the email, the Applicant requested records from the Public Body meeting the following requirements:

> (a) Any information or advice relied upon by the Director of Residential Tenancies in writing the email [of October 2, 2015] and in formulating opinions expressed therein including any information or advice that may have related to the interpretation of the Banff Incorporation Agreement or the interpretation of Amendment No. 9 to that Agreement.
>
> (b) Names and positions of any individuals who provided any information or advice referred to in sub-paragraph (a).
>
> Records being requested:
> […]
> a) Records or notes documenting any conversations;
> b) E-mails;
> c) Text Messages,
> d) Recordings of any voice mails;
> e) Briefing Notes
> f) Memoranda
> g) Written Opinions
> h) Departmental Directives, Policy Directives or any similar documents
> i) Policy Manuals; AND
> j) Any other documents or written materials in any way related to the information being requested.

The time frame of the access request was between January 1, 2015 and November 10, 2015. The Applicant also commenced judicial review regarding the Public Body's decision to refuse to accept his complaint regarding a landlord in the Town of Banff.

[para 4] The Public Body responded to the access request on December 9, 2015. It provided some records, but withheld other information under section 27(1)(a) (privileged information).

[para 5] The Applicant requested review of the Public Body's response to his access request.

[para 6] The Commissioner authorized a senior information and privacy manager (SIPM) to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

II. INFORMATION AT ISSUE

[para 7] The information the Public Body has severed under section 27(1)(a) is at issue in this inquiry.

III. ISSUE

Issue A: Did the Public Body properly apply section 27(1)(a) to the information it severed from the records?

Section 27(1)(a)

[para 8] Section 27(1) of the FOIP Act states, in part:

> *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* […]

Section 27(1)(a) permits a public body to withhold information from a requestor that is subject to legal privilege.

[para 9] In this case, the Public Body has decided that solicitor-client privilege applies to the information in the records and has applied section 27(1)(a) for that reason.

[para 10] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

> … 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.

[para 11] Section 71 of the FOIP Act establishes the burden of proof in an inquiry. It states, in part:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

Section 71(1) imposes the burden of proof in an inquiry on the public body to prove that an applicant has no right of access.

[para 12] The standard of proof imposed on a public body under section 71(1) of the FOIP Act is not the criminal standard, which requires proof beyond a reasonable doubt, but the civil standard, which requires proof on the balance of probabilities. In other words, a public body must prove that it is more likely than not that an exception under Division 2 of Part 1 applies to the information it seeks to withhold from an applicant.

[para 13] In *F.H. v. McDougall* [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 14] In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that a discretionary exception to disclosure applies to information it has withheld from an applicant. As the Public Body decided to apply sections 27(1)(a) to withhold information from the Applicant, it has the burden of proof under section 71(1) to prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[para 15] The Public Body decided not to provide the records to which it applied solicitor-client privilege for my review, but elected to provide descriptions of the records instead. The October 2, 2015 email from the Director, which gave rise to the access request, is before me, in addition to the other responsive records to which the Public Body did not apply an exception to disclosure.

[para 16] The Public Body provided the following descriptions of the records:

- Pages 2-5: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. The legal advice was intended to be confidential.
- Pages 6-11: Email correspondence attaching Memorandums from legal counsel to Service Alberta (client) where legal counsel was providing advice. The legal advice was intended to be confidential.
- Pages 12-13: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. The legal advice was intended to be confidential.
- Pages 21-23: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. The legal advice was intended to be confidential.
- Pages 25-31: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. The legal advice was intended to be confidential.
- Page 34: Handwritten notes taken from meeting between legal counsel and Service Alberta (client) where legal counsel was providing advice. The handwritten notes were taken by the client. The legal advice was intended to be confidential.
- Pages 35-38: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. The legal advice was intended to be confidential.
- Pages 39-42: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. Note: two emails are internal to the client discussing the privileged communication throughout the email chain. The legal advice was intended to be confidential.
- Page 43: The Public Body has reconsidered the application of section 27(1)(a) to page 43 of the responsive records and is pleased to provide an additional release.

    - Attachment: Page 43 (full disclosure).

- Pages 44-45: Emails between legal counsel and Service Alberta (client) where legal counsel was requested and providing advice. The legal advice was intended to be confidential.

[para 17] The foregoing descriptions would not, without more, support finding that the information severed from the records is subject to solicitor-client privilege. I say this, because in the absence of evidence regarding context, the descriptions could be viewed as arguments that the records are privileged. However, in this case, there is evidence as to the subject matter of the records, and the context in which they were created.

[para 18] In its submissions, the Public Body provided additional context regarding the records. It stated:

> The majority of the records withheld from disclosure are between legal counsel and Service Alberta (client) where legal counsel was requested to provide and subsequently provided legal advice.
>
> Two emails are internal to the client, and the Public Body's employees were discussing the contents of the privileged communication received from their legal counsel. One record is the client's handwritten notes of a meeting between the client and legal counsel where legal advice was provided. Regardless of the format, the legal advice sought and provided was intended to be kept confidential and disclosure outside of the Public Body would reveal the privileged communication.
>
> In Order F2013-17, the Adjudicator agreed that a public body's internal records could disclose a privileged communication when the content indicates a legal opinion. (para 225)
>
> […]

[para 19] From the Public Body's descriptions of the records, with the added context created by the October 2, 2015 email and the responsive emails that were disclosed to the Complainant, I am satisfied that the severed information is subject to solicitor-client privilege. I make this finding on the basis that the email of October 2, 2015 contains the legal position of the Public Body with regard to the application of the RTA in provincial parks. It follows that the communications leading to the creation of this email, were regarding a legal matter – the Public Body's position as to whether the RTA gave it jurisdiction to conduct investigations into complaints in National Parks – and constitute communications made for the purpose of giving or seeking legal advice in relation to that matter.

[para 20] I also accept the Public Body's evidence that these communications were intended to be confidential. When a client seeks legal advice from a lawyer, there is an expectation that communications between the two are confidential. While it may have been preferable had the Public Body asserted that the communications were confidential in an affidavit sworn by an employee with knowledge of the circumstances in which the records were created, as it has established that the communications are between a lawyer and a client, I accept the communications are confidential, as the Public Body asserts in its submissions.

[para 21] In his reply submissions, the Applicant states:

> Although applicant feels that there is circumstantial evidence (described in Section 6 below) as to what the legal advice may have been, it is difficult to determine whether the respondent properly applied section 27(1)(a) of the Act as the respondent has thus far not provided disclosure of that legal advice even to the Information and Privacy Commissioner for a confidential review of same.

[para 22] I acknowledge the Applicant's concern that I do not have access to the records in order to assess the Public Body's claim of solicitor-client privilege with the additional context the records would provide. As a result, it is possible that some of the information I have found, on the balance of probabilities, to be subject to solicitor-client is not, in fact, privileged. However, the decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 S.C.R. 555 precludes me from exercising authority under section 56(3) of the FOIP Act to demand the records if a public body chooses not to provide them.

Section 32

[para 23] The Applicant's primary argument in relation to the Public Body's decision to withhold information from him is grounded in section 32 of the FOIP Act. He states:

> **1. Introduction**
>
> Applicant submits that there is a compelling public interest in disclosure of the legal advice referred to in Paragraph (g) above. Applicant is relying on Section 32(1)(b) of the Act.

Applicant also submits that there are specific circumstances described in the next Section […] which suggest that [the Director] may have disregarded legal advice in formulating the statements contained in her October 2, 2015 e-mail. Among the most questionable of those statements was her claim that the Residential Tenancies Act did not apply in national parks except in the Banff town-site. (She subsequently retracted her claim that the RTA did not apply in national parks […]

If [the Director] disregarded the above legal advice, it is submitted that that circumstance would significantly increase the likelihood that she knew that the contents of her October 2, 2015 e-mail were untrue including her interpretation of the Banff Incorporation Agreement and Amendment No. 9 to that agreement.

2. Specific Circumstances

The specific circumstances referred to above include:

a) Unsound Interpretation

[The Director's] patently absurd interpretation in her October 2, 2015 e-mail **(Tab 3)** of the Banff Incorporation Agreement and Amendment No. 9 to that agreement **(See Sections 3 and 4 of Part C below).** Because [the Director's] interpretation of those documents appears to be so unsound, it does not seem plausible that a lawyer would support that interpretation or suggest that it was correct. (A copy of the applicant's October 2, 2015 e-mail to [the Director] is also in the Appendix - **Tab 2.** That e-mail explains why [the Director's] interpretation of the above documents is wrong.)

b) Reaction to Court Applications

The fact that the respondent reversed its position so quickly on two issues directly related to the supposed non-application of the RTA in national parks after being served by the applicant, on two separate occasions, with applications for judicial review **(Tabs 11 to 17).** In both of those cases, the respondent reversed itself in exactly the same time-frame: namely within two days after being served with the respective applications for judicial review **(See Sections 8 and 9 of Part C below).** Applicant submits that it is more than just a coincidence that the respondent reversed itself so quickly, and in exactly the same amount of time, after being served with each of those court applications **(See Section 5 of Part G below).**

c) Selective Enforcement & RTA Handbook

The apparent effort generally by the respondent to conceal from the public its actual policy of selective enforcement of the *Residential Tenancies Act* in national parks (ie. not enforcing it in national parks except in the Banff town-site). The respondent's own publication, the RTA Handbook **[…]** indicated that the Residential Tenancies Act did apply in national parks yet the respondent rejected a tenant complaint filed by the applicant solely because it arose in a national park. […]

3) Alleged Motive

The above tenant complaint involved the applicant's apartment in Lake Louise but the respondent rejected that complaint because it claimed that the RTA did not apply in national parks. Applicant's belief, however, is that [the Director] and the respondent did not want to enforce the RTA in national parks and intentionally [misled] him about its supposed non-application there simply to avoid dealing with his complaint.

4. Respondent's Reversal after Judicial Review Application

Respondent and [the Director] subsequently reversed their decision not to investigate applicant's tenant complaint (as well as retracting their claim that the RTA did not apply in national parks) but only informed him after being served with an application for judicial review of their initial decision not to investigate it. **(See Section 8 of Part C below)**

5. Impact of Respondent's Policy on the Public

The policy of selective enforcement of the RTA referred to in Section 2(c) above arbitrarily deprived thousands of national park residents of the rights and protections contained in the Residential Tenancies Act. The applicant therefore submits that his request for access to the records at issue is reasonable and not a matter of passing curiosity or interest.

6. Whether Sufficient Grounds under Section 32(1)(b) of Act

If [the director] did engage in the conduct alleged above **(See Section 2(c) and Section 3 above),** it is submitted that that would constitute serious misconduct involving dishonesty and dereliction of duty. The fact that she is a senior public servant occupying a position of public trust would likely be an aggravating factor in this regard. [The Director] was appointed Director of Residential Tenancies for the Province of Alberta pursuant to Section 55 of the Residential Tenancies Act and her duties include supervising the enforcement of the RTA throughout the province.

Applicant submits that the alleged misconduct is of sufficient seriousness such that it should be treated in a manner similar to corruption or serious misuse of public funds which are already recognized as grounds under Section 32(1)(b) of the Act. (Chapter 6, Page 229 of respondent's publication: FOIP Guidelines and Practices (2009) - see Tab 6)

The Applicant provided further illustration of these points in his submissions.

[para 24] The thrust of the Applicant's argument is that section 32 of the FOIP Act requires the Public Body to disclose the records because of what he views to be the Public Body's misconduct, despite the application of section 27(1)(a).

[para 25] Section 32 of the FOIP Act states:

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> > *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
> >
> > *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *(2) Subsection (1) applies despite any other provision of this Act.*

(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,

(a) notify any third party to whom the information relates,

(b) give the third party an opportunity to make representations relating to the disclosure, and

(c) notify the Commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure

(a) to the third party, and

(b) to the Commissioner.

[para 26] Section 32 is a mandatory provision. It requires the head of a public body to disclose information, without delay, when the information is about a risk of significant harm to the health or safety of any person or when it is clearly in the public interest to disclose the information. Section 32 applies despite any other provision in the FOIP Act.

[para 27] The basis for the Applicant's position that section 32 requires disclosure of the information severed by the Public Body is that he believes it likely that the Director of Residential Tenancies disregarded legal advice in setting out her legal position in her email of October 2, 2015. This belief is based on the Applicant's view that there are factual and legal errors in this email and because the Public Body subsequently reversed its position after he served it with an originating notice of motion. He argues that it serves the public interest to disclose the advice given to the Director to assist her to prepare this email to demonstrate the manner in which she, and the Public Body, ignored advice and developed a practice of not investigating residential tenancy complaints in national parks, despite having the power to do so.

[para 28] Past orders of this office have held that deciding whether disclosure of information is required under section 32(1)(b) requires consideration of the public interest weighing for or against disclosure to determine whether disclosure is *clearly* in the public interest.

[para 29] In Order F2004-024 at para. 57, former Commissioner Work stated:

> Order 96-011 established that an applicant has the burden of proof to show that a public body is required to disclose information under section 32. Due to section 32 overriding the Act, section 32 is interpreted narrowly and the burden of proof is difficult to meet. An applicant must show that the information concerns matters of compelling public interest and that there are "emergency-like" circumstances compelling disclosure. An applicant must show that a matter is "clearly in the public interest" as opposed to a matter that may be of interest to the public: see Orders 96-011, 2000-005 and 2000-031.

[para 30] In Order F2014-R-01, the Adjudicator said:

> Regardless, for section 32(1)(b) to apply, there must be circumstances *compelling* disclosure, or disclosure *clearly* in the public interest, as opposed to a matter that may merely be of interest to the public (Order F2004-024 at para. 57). My review of the information at issue does not lead me to conclude that any of it should be released on the basis that there is a clear or compelling public interest in disclosure.

[para 31] In Order F2012-03, the Adjudicator stated at paragraphs 21 - 22:

> […] With respect to section 32(1)(b), it is not enough for the Applicant to argue that the public has some interest in the information; the Applicant must show that there is compelling public interest (Order 97-018).
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> In Order F2009-010, the Adjudicator considered comments from the Ontario Court of Appeal with respect to Alberta's section 32 in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 2007 ONCA 392 (CanLII), 86 O.R. (3d) 259. The Court stated in that decision that "[t]here is no balancing between the public interest and the exemption: the test is whether disclosure is 'clearly in the public interest'." The Adjudicator agreed that the test for section 32 is whether disclosure would be clearly in the public interest, but added that
>
> > … the application of this test requires a balancing of the public interest in disclosure versus the public interest represented by the exceptions in the Act, in situations where an exception to disclosure applies, to determine whether disclosure is "*clearly* in the public interest". The right of access is subject to limited and specific exceptions. Each exception to disclosure in the Act reflects the decision of the legislature that a specific public interest in withholding the information may outweigh an individual's right of access. Consequently, one must balance the public interest in disclosure with the public interest in withholding information, in order to determine whether disclosing or withholding information best serves the public interest, or is clearly in the public interest.

[para 32] In Order F2009-044, the Adjudicator stated at paragraphs 78 - 80:

> I agree with the Adjudicator in Order F2009-010. I believe that the public interest in protecting third party privacy rights must be balanced with the section 32 exemption to allow disclosure where it is clearly in the public interest.
>
> I acknowledge that that the Applicant believes that disclosing the names of the EPS members involved in the incident would assist the Applicant in bringing misconduct of individual EPS members to the public's attention and shed light on EPS members who may be seen to be involved in misconduct frequently. However, in this matter, the EPS investigated the conduct of the EPS members involved and determined that there was no need to subject the EPS members involved in the incident to sanction. Therefore, the EPS members involved in the incident were, in the opinion of the EPS, not guilty of misconduct.
>
> I understand that the Applicant may take issue with the EPS investigation of its members' conduct and the EPS' determination that there was no misconduct worthy of any sanction; however I find that there is sufficient information already disclosed to the Applicant to scrutinize the EPS's investigation without disclosing the personal information of third parties, including the EPS members involved in the incident. I find that disclosing the personal

> information of the EPS members involved in the incident would not further serve the public interest.

Past orders of this office have held that the public interest to which section 32(1)(b) must be compelling and that the interest must outweigh any public interest served by withholding the information, such that disclosure may be said to be "*clearly* in the public interest".

[para 33] As I have found that the information at issue more likely than not reflects confidential communications between a solicitor and a client, it follows that I find there is a strong public interest in protecting these communications from disclosure. I say this because section 27(1)(a) may be viewed as recognizing that there is a public interest served by allowing the government to protect its privilege by withholding records subject to solicitor-client privilege from a requestor.

[para 34] The Applicant has not established that there is a compelling public interest that would be served by disclosing the information severed by the Public Body. There is nothing before me that would lead me to believe that the activities of the Director and the manner in which she obtained or followed legal advice should be subject to public scrutiny or to suggest that the Director did anything improper with respect to her decision as to whether the Public Body could rely on its enforcement powers under the RTA in national parks. That the Public Body subsequently reversed its position does not support finding that the Director disregarded legal advice or conducted herself unreasonably. Even assuming that the Director did not follow legal advice, as the Applicant argues, a client may reasonably choose not to act on legal advice or may disregard it completely without being negligent or derelict in fulfilling duties. I do not accept the proposition, which appears to ground the Applicant's arguments, that a government actor is required to follow legal advice and is negligent or corrupt if it does not. In any event, there is no evidence before me to allow me to conclude that the Director did not follow any legal advice the Public Body was given.

[para 35] In sum, there is simply no evidence before me to support finding that the activities of the Director or the Public Body should be subject to heightened public scrutiny or that a public interest outweighing the public interest in preserving the confidentiality of solicitor-client communications would be served by disclosing the records. As a result, I cannot find that ordering disclosure of the information severed by the Public Body would serve the public interest or that section 32 requires the Public Body to disclose the records to the Applicant.

IV. ORDER

[para 36] I make this Order under section 72 of the Act.

[para 37] I confirm the decision of the Public Body to withhold the information it severed under section 27(1)(a) from the Applicant.

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Teresa Cunningham
Adjudicator