ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-76

December 14, 2018

PEACE RIVER SCHOOL DIVISION NO. 10

Case File Number 001723

Office URL: www.oipc.ab.ca

Summary: The Applicant requested and was given a meeting with the superintendent and deputy superintendent of the public body on September 4, 2013 to discuss her concerns. The Applicant indicates she brought and left 9 pages of notes on the table. The Applicant subsequently made an access request on June 12, 2015 for “any recordings or information that was used and given to the ASBA [Alberta School Boards Association] lawyer to write his response to my Human Rights Complaint, including my own information that I provided to [the superintendent] on September 4, 2013”.

The Public Body responded to the access request on July 13, 2015. It withheld some information from the Applicant on the basis of solicitor-client privilege. It did not locate any notes provided by the Applicant to the superintendent or deputy superintendent. It explained the scope of its search and also asked the superintendent and deputy superintendent whether they had collected the notes.

The adjudicator determined that the Public Body had met the duty to assist the Applicant. She also determined that the Public Body had taken all reasonable steps to respond to the Applicant within 30 days of receiving the access request. The adjudicator found that the Public Body had not failed to comply with sections 35 or 38 of the FOIP Act. The adjudicator found that the Public Body was authorized to sever records under section 27(1)(a) of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 11, 27, 35, 38, 71, 72

Authorities Cited: AB: Orders 97-011, 2001-016, F2002-014, F2010-007, F2010-023, P2007-029, F2008-023, P2011-D-003, F2013-14, F2015-29, F2017-39, F2018-37

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89; *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII)

I. BACKGROUND

[para 1] The Applicant requested and was given a meeting on September 4, 2013with the superintendent and deputy superintendent of the public body to discuss her concerns regarding bullying. The Applicant indicates she brought and left 9 pages of notes on the table. Six pages consisted of 40 paragraphs about bullying she had experienced and three were about what she wanted to say to the superintendent and deputy superintendent.

[para 2] On June 12, 2015, the Applicant made the following access request to the Public Body:

> On July 17, 2014, I requested the notes that [the deputy superintendent] supposingly took at my meeting with her and [the superintendent]. Today, I am requesting any recordings or information that was used and given to the ASBA lawyer to write his response to my Human Rights Complaint, including my own information that I provided to [the superintendent] on September 4, 2013.

[para 3] The access request was accompanied by the following clarification:

> My request is for you to access the information that was provided to the ASBA [Alberta School Boards Association] lawyer concerning my meeting with [two employees] on September 4, 2013. He was given a lot of inaccurate information and I want to know where he obtained this information from almost a year after the meeting took place and who provided it to him. I want any documents, not just the note [an employee] is saying she wrote, but every document that has information about this meeting, including the documents I left [another employee] meeting on the table that day [sic]. To be clear, I want all information recorded in any form (digital, paper, etc.) taken about my meeting with the above noted individuals. This information was provided to the ASBA lawyer and I would like to have access to all of it.
>
> I am asking for this, just in case you limited your search to just notes wrote by [the employee] [sic]. This may have been used as a technicality, so I want any and all information no matter who recorded it.

[para 4] The Public Body responded to the access request on July 13, 2015. It indicated that it was providing all responsive information it had on file, but was withholding information provided to its lawyer in connection with the Applicant's human

rights complaint on the basis that it was privileged. The Public Body did not provide a copy of the Applicant's notes.

[para 5] On July 13, 2015, the Applicant explained to the Public Body that she was seeking notes she "left on the table" for the superintendent.

[para 6] On July 14, 2015, the Public Body emailed the Applicant to ask when the notes to which the Applicant referred in her access request and email of July 13, 2015 had been submitted. On the same day, the Applicant explained that she was seeking the notes she had left on the table at the meeting of September 4, 2013.

[para 7] On July 17, 2015, the Applicant requested that the superintendent verify that she had left her notes with him at the September 4, 2013 meeting. The Applicant provided a copy of the notes to the FOIP Coordinator.

[para 8] On July 21, 2015, the Public Body's FOIP Coordinator wrote the Applicant and informed her that the notes had not been located in the search, as they were not in any of the Public Body's files.

[para 9] On August 19, 2015, the Public Body informed the Applicant that neither the superintendent nor the deputy superintendent could verify having received the notes the Applicant left at the meeting of September 4, 2013.

[para 10] The Applicant complained to the Commissioner that the Public Body did not respond to her access request as required by section 11, failed to assist her as required by section 10, and failed to comply with sections 35(a) and (b), and 38 of the Act with regard to the information she submitted to the Public Body.

[para 11] The Commissioner assigned a senior information and privacy manager to investigate and attempt to settle the matter. Following this process, the Applicant requested an inquiry.

[para 12] The Commissioner delegated her authority to conduct the inquiry to me. The Applicant subsequently requested that I recuse myself on the basis of bias. On August 17, 2018, I issued a decision that the Applicant had not established a reasonable apprehension of bias and the inquiry continued.

II. ISSUES

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

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

Issue C: Did the Public Body properly apply section 27(1)(a) of the Act (legal privilege) to the information it located but withheld?

Issue D: Did the Public Body make every reasonable effort to ensure the Applicant's personal information used to make a decision was accurate and complete, as required by section 35(a) of the Act?

Issue E: Did the Public Body retain the Applicant's personal information used to make a decision for at least one year, as required by section 35(b) of the Act? (This issue relates to the Applicant's complaint that the Public Body destroyed her notes rather than retaining them.)

Issue F: Did the Public Body fail to comply with section 38 of the Act (protection of personal information)? (This issue relates to the Applicant's complaint that the Public Body destroyed her notes rather than retaining them.)

III. DISCUSSION OF ISSUES

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

[para 13] Section 10 of the FOIP Act states, in part:

> *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 14] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, former Commissioner Work, then the Assistant 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 ... 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 15] 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 16] In Order F2007-029, former Commissioner Work explained the kinds of evidence that must be provided in order to discharge the burden of proving that a search was conducted in a reasonable way. He said:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> > •The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> >
> > •The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> >
> > •The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> >
> > •Who did the search
> >
> > •Why the Public Body believes no more responsive records exist than what has been found or produced[.]

[para 17] In addition, the duty to assist has also been held to have an informational component. In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

> Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 18] In *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII), the Alberta Court of Queen's Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission,* F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced.* [Emphasis added in original]
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords

would not lead to responsive records*, its reasons for concluding that no more responsive records existed.* [My emphasis]

[para 19] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional records are likely to exist. I turn now to the question of whether the Public Body met the duty to assist by conducting an adequate search for responsive records, and whether it provided a satisfactory explanation as to how the search was conducted.

[para 20] The Applicant raises the following points regarding the Public Body's response to her access request:

> Ironically, the Applicant requested a copy of the notes she left on the table to be provided, but the Public body illegally destroyed them and supplied a falsified note that they stated was written by [deputy superintendent] DURING the meeting (See Superintendent […]'s May 9, 2014 Statement to the sub-committee of the Board of Trustees P. 84) (See Schedule B of Dec. 26, 2014 letter to correct personal information). However, [the deputy superintendent] didn't have a pen or paper at this meeting and nothing on the false note was discussed on Sept 4, 2013 meeting (See Schedule C of Dec. 26, 2014 letter to correct personal information or P. 90). It was only addressed in an email 23 days later (See Schedule D of Dec. 26, 2014 letter to correct personal information or P. 39).
>
> In other words, the False Note was not written DURING or AFTER the Sept. 4. 2013 meeting. It was written to match the false statement given by Superintendent […] on May 9, 2014. The information located on the fake note was offered in an email 23 days after the meeting (See Schedule D of Dec. 26, 2014 letter to correct personal information or P. 39). [The deputy superintendent] FINALLY admitted that she didn't take notes at this meeting to the Alberta Education investigator. (See Exhibit"A" [para] 50 & 83 attached P. 21 -22)
>
> The Public Body **ONLY** provided the Applicant with a **FALSIFIED NOTE** that was **FABRICATED** and then **ALTERED it,** which is a contravention of section 92 (e) of the *FOIP Act.*
>
> If the public body had no records of the Sept 4, 2013 meeting, what did the ASBA solicitor use as information to write the inaccurate July 24, 2014 Human Rights Submission? The Applicant is quoted, and yet no records are produced and many inaccuracies of what occurred at this meeting were also fabricated in the Public Body's Human Rights Response. In other words, **FALSE information** is intentionally being used against the Applicant to cover up the wrongdoing and unprofessional conduct of the superintendent and deputy superintendent of this public body because they lied and stated they carried out an investigation when they didn't and couldn't provide any evidence that they did. (Exhibit "C" P. 26-62) (Burden of Proof not reached).
>
> Instead all evidence shows they admitted to pre-determining the outcome before an investigation occurred as supplied in their Human Rights Submission on July 24, 2014 (Exhibit "C" P. 26-62). *A* huge blunder! (Proof of admitting retaliation and pre-determining an outcome without an investigation).
>
> […]

The Public body failed to assist the Applicant as required by section 10 because they did not provide the information requested, even though they were given the information 3 times and **instead provided a falsified and altered document instead.**

[…]

1) Did the Public Body meet its obligations required by section 10(1) of the Act(duty to assist applicants)?

Duty to assist applicants

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.

In all honesty, if the OIPC is clearly not following the *FOIP Act* or enforcing it, then how can they criticize this public body for contravening the *Act,* as well? The hypocrisy is evident and I fear I have wasted so much of my time trying to seek justice in a process that clearly lacks any legitimacy.

Section 10(1) is a copout. The Public Body ONLY provided a Falsified Note that wasn't even written at the Sept 4, 2013 meeting and not the 9 pages left on the table by the Applicant, even though 6 of these pages were provided, not once, but 3 times to this Public Body by the Applicant.

The Falsified Note was also altered and [the deputy superintendent] eventually admitted she didn't write the note at this meeting, but only admitted this to the Alberta Education Investigator, […], and not the OIPC. (Exhibit "A"[para] 50 & 83 attached P. 21 -22). She also admitted that the Applicant's references were "good" and "credible", just not current. (Exhibit "A" [para] 46 attached P. 23)

[para 21] The Applicant’s position regarding the Public Body’s compliance with section 10 is that the Public Body failed to meet the duty to assist her regarding her access request because it did not include in its response the notes she left behind at the September 4, 2013 meeting. In addition, the Applicant takes issue with the fact that the deputy superintendent’s notes, which she requested specifically, were apparently not written during the September 4, 2013 meeting, but afterwards.

[para 22] In response, the Public Body states:

The Public Body has satisfied its obligation to “make every reasonable effort to assist [the Applicant] and to respond to [the Applicant] openly, accurately and completely”. More specifically, the Public Body has conducted an adequate search for responsive records to the Applicant’s Request to Access Information.

An adequate search under section 10(1) has two components. A public body must:
a. make every reasonable effort to search for the actual record requested; and b. inform the applicant in a timely fashion of what it has done. An adequate search requires a reasonable search, not perfection.

In responding to the Request for Access to Information, [the FOIP Coordinator] reviewed the Public Body's personnel records, the Public Body's filing system, contacted the Superintendent and Deputy Superintendent and checked emails for documentation regarding the September 4, 2013 meeting. [The FOIP Coordinator] advised the Applicant

> of these steps that were taken to search records in response to her Request to Access Information.
>
> [The FOIP Coordinator's] search was reasonable, and included a reasonable search to identify where records could be held by the Public Body respecting the September 4, 2013 meeting. This included searching hard copy files and electronic communications, and consulting with individuals involved and who would have had firsthand knowledge of the meeting.
>
> It was not until July 17, 2015 that the Applicant forwarded [the FOIP Coordinator] a copy of the Notes that she was seeking. At that time, [the FOIP Coordinator] requested a response from Superintendent […] and Deputy Superintendent […]. However, due to annual leaves of parties within the Public Body, [the FOIP Coordinator] was not able to respond until August 18, 2015.
>
> The Public Body has clearly confirmed for the Applicant that the Notes were not on the Public Body's files, and therefore, there were no records with which to respond to the Applicant's request for the documents that she allegedly left behind in the September 4, 2013 meeting.

[para 23] The Public Body has explained the search it conducted for the inquiry. In addition, it took the additional step of answering the Applicant's questions regarding the search it conducted, including asking the superintendent and the deputy superintendent whether they had received Applicant's notes. I find that the evidence of the Public Body establishes that it conducted a reasonable search for responsive records and that it also took reasonable steps to explain the search it conducted to the Applicant.

[para 24] The Public Body has explained that it did not have copies of the Applicant's notes on file until she provided them on July 17, 2015. As it did not have custody or control of the notes at the time of the Applicant's access request, it was under no duty to include them in its response.

[para 25] The Applicant is adamant that she left her notes for the use of the superintendent and deputy superintendent on September 4, 2013. I accept it is possible that she did. However, it does not follow from this that the Public Body would have the notes in its custody or control on June 12, 2015, when the Applicant made her access request. In this case, the Public Body has established that it did not have the notes in its custody or control on June 12, 2015.

[para 26] The duty to assist does not require a public body to keep and maintain all records an applicant may request in the future; it requires only that the public body conduct a reasonable search for the records it has in its custody or control.

[para 27] The Applicant is also concerned that the deputy superintendent did not take notes at the September 4, 2013 meeting, but created them some time after the meeting. There are no provisions in the FOIP Act requiring a public body to record information or dictating when notes are to be taken.

[para 28] To conclude, I find that the Public Body met its duties to the Applicant under section 10 of the FOIP Act.

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 29] The Applicant argues:

> The Applicant's records shows the Public Body did not respond in 30 days and didn't ask for an extension that she is aware of or was notified of for this file 2014-08 FOIP PR. See Request to Access Information submitted on June 12, 2015. A response was received on July 13, 2015 without a copy of the notes the Applicant left on the table as requested. So she emailed the FOIP Coordinator and requested them again. See Applicant's email to FOIP Coordinator in July 13, 2015 email provided to the OIPC already in the request for inquiry.
>
> **Section 11(2) failure to respond within 30-day period.** The Applicant specifically asked for her notes she left on the table and the FOIP Coordinator did not inform her they were destroyed or missing on July 13, 2015. This was intentional. The fact that they are refusing to verify these documents is another violation of section 92 (c) of the *FOIP Act*. They could have easily verified this in the proper time frame in June. They were stalling and being misleading. It makes no sense that [the deputy superintendent's] falisified [*sic*] note would be kept and the Applicant's typed documents would be destroyed, unless for the purpose of evading a request for access to information, which is another violation of the *FOIP Act*.
>
> The Applicant received another response from the FOIP Coordinator on July 21, 2015, which still didn't verify the notes left on the table. The Applicant contacted the FOIP Coordinator [again] on August 18, 2015 asking for the information to be verified. I finally received a response on August 19, 2015, which stated Superintendent […] or [the deputy superintendent] could not verify or confirm that the documents left on the table were the ones I forwarded to them by the Applicant for the 3rd time, even though [the superintendent] acknowledged in his May 9, 2014 statement to the sub- committee that he received them. Not only are they late in their response, but they also destroyed personal documents from this meeting, altered, fabricated and supplied a fake note from this meeting and it is all being ignored by the OIPC to cover up concrete evidence of contraventions of the *FOIP Act* by this public body. (Fraudulent Activity equals Corruption). (All supplied in the Request for Review of this file Sept. 5, 2015 letter and attachments).

[para 30] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request no later than 30 days after receiving the request. Section 11 of the Act states:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> > *(a) that time limit is extended under section 14, or*
> >
> > *(b) the request has been transferred under section 15 to another public body.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[para 31] Section 11 requires a public body to make all reasonable efforts to respond to an applicant no later than 30 days after receiving the access request.

[para 32] From my review of the Applicant's submissions, I understand that this aspect of her request for review relates to the fact that the Public Body did not include her notes in its response. She reasons the Public Body has not yet responded, as it has not provided these records.

[para 33] Section 11 of the FOIP Act does not require a public body to include particular records in a response. Rather, it requires a public body to respond. In this case, the public body clearly responded to the Applicant's access request. The question I must address to determine whether the Public Body complied with section 11 is whether the Public Body made all reasonable efforts to respond no later than 30 days after receiving it.

[para 34] The Applicant made her access request on June 12, 2015 and the Public Body responded to it on July 13, 2015. Clearly, the Public Body exceeded the 30-day period for responding by a day. The Public Body relies on Order 97-011 to support its position that it complied with section 11. In that Order, former Commissioner Clark stated:

> However, in this case, section 22(2) of the *Interpretation Act*, R.S.A. 1980, c. I-7, is relevant. Section 22(2) reads:
>
> *s. 22(2) If in an enactment the time limited for registration or filing of an instrument, or for **the doing of anything**,* [emphasis added in original] *expires or falls on a day on which the office or place in which the instrument or thing is required to be registered, filed or done is not open during its regular hours of business, the instrument or thing may be registered, filed or **done on the day next following on which the office or place is open*** [emphasis added in original].
>
> Does section 22(2) of the *Interpretation Act* apply to section 10(1) of the *Freedom of Information and Protection of Privacy Act*?
>
> Section 3(1) of the *Interpretation Act* provides:
>
> *s. 3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.*
>
> Section 25(1)(e) of the *Interpretation Act* defines "enactment" to mean "an Act or a regulation or any portion of an Act or regulation". "Enactment" therefore includes the *Freedom of Information and Protection of Privacy Act*. Neither the *Interpretation Act* nor the *Freedom of Information and Protection of Privacy* say that the *Interpretation Act* doesn't apply to the *Freedom of Information and Protection of Privacy Act*. Consequently, the *Interpretation Act* applies to the *Freedom of Information and Protection of Privacy Act*; in particular, section 22(2) applies.
>
> The 30-day time limit for responding to the Applicant's request expired on a Saturday. The Public Body's offices are not open on Saturday. The Public Body responded on the following Monday, the day on which its offices were next open. Therefore, the Public Body meets the requirements set out in section 22(2) of the *Interpretation Act*. Because of the operation of section 22(2) of the *Interpretation Act* and section 10(1) of the *Freedom of Information and*

> *Protection of Privacy Act*, I find that the Public Body did not go over the 30-day time limit in responding to the Applicant's request.

[para 35] In Order 97-011, former Commissioner Clark relied on section 22(2) of the *Interpretation Act* to find that a public body had complied with section 11 of the FOIP Act, despite responding to an access request more than 30 days after having received it. Section 22(2) of the *Interpretation Act,* R.S.A. 2000, c. I-8 states:

> *22(2) If in an enactment the time limited for registration or filing of an instrument, or for the doing of anything, expires or falls on a day on which the office or place in which the instrument or thing is required to be registered, filed or done is not open during its regular hours of business, the instrument or thing may be registered, filed or done on the day next following on which the office or place is open.*

[para 36] I disagree with former Commissioner Clark that section 22(2) would apply so as to extend the 30-day period when the conclusion of this period falls on a day where government offices are closed. Section 22(2) of the *Interpretation Act* operates only when the office or place *in which the instrument or thing is required to be registered, filed or done* is not open. The FOIP Act does not require responding to an access request to be done in a particular office.

[para 37] Despite the fact that section 22(2) of the *Interpretation Act* does not appear to extend the 30-day period, and despite the fact that the Public Body took 31 days to respond, I conclude that it met its duty under section 11. Section 11 requires a public body to *make every reasonable effort* to respond within the 30-day period. Here, it appears that the Public Body had the response ready within the 30-day period, but was unable to provide it within the period because its offices were closed. In my view, it would be unreasonable for the Public Body to insist that its employees come to work in order to respond to the access request on a day in which the office was closed.

[para 38] To conclude, I find the Public Body made every reasonable effort to respond within the 30-day period set out in section 11.

Issue C: Did the Public Body properly apply section 27(1)(a) of the Act (legal privilege) to the information it located but withheld?

[para 39] Section 27 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,*
> >
> > *(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 40] The Public Body is asserting solicitor-client privilege over some of the records and has applied section 27(1)(a) for that reason.

[para 41] In *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821, Dickson J. (as he then was) speaking for the majority, stated the following criteria for establishing the presence of solicitor-client privilege:

> 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 42] The test for establishing the presence of solicitor-client privilege is not a narrow one. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal determined that records need not contain legal advice to be subject to solicitor-client privilege. If the information has been communicated 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 43] From the foregoing authorities, I conclude that communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege.

[para 44] Where government entities are concerned, it is not always the case that communications involving such lawyers are made within the solicitor-client framework. In *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 (CanLII), the Supreme Court of Canada held as follows (at paragraphs 19 and 20):

> Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 49. In *Campbell*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
>
> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Campbell*, *supra*, at para. 50.

[para 45] In *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, the Supreme Court of Canada stated:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), *per* Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:
>
> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered […].

[para 46] From the foregoing authorities, I conclude that communications to and from a lawyer that are not made in the lawyer's capacity as a legal advisor, but in another capacity, are not protected by solicitor-client privilege. The Courts in *Pritchard* and in *Campbell* acknowledged that government lawyers may have functions other than providing legal advice, even when they draw on their legal expertise.

[para 47] In Decision P2011-D-003, former Commissioner Work stated:

> An illustration of the kind of information that will be satisfactory to establish a solicitor-client privilege claim is found in *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Ct. J.). In that case, the Court quoted prior cases asserting that a party cannot avoid production by giving an "unadorned assertion that the documents are subject to solicitor and client privilege". It said that the degree of detail required "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged" (paras. 10, 19). See also the "Record Form" portion of the Protocol, and accompanying instructions. (At para 127)

[para 48] From the authorities I have cited, I understand that questions may be asked (and answered) as to the purposes for which, and the circumstances in which, communications over which a public body asserts privilege took place. Whether solicitor-client privilege attaches to a communication between the public body and a government lawyer depends on the nature of the relationship, the subject matter of any advice, and the

circumstances in which any advice is sought and rendered. To meet its burden under section 71, it is not enough for a public body to state generally that the communications to which it has applied section 27(1)(a) are privileged or involve the giving or seeking of legal advice; a public body must provide persuasive evidence regarding the nature of the relationship between itself and the lawyer, the subject matter of the advice, and the circumstances in which it sought advice, sufficient to allow a decision as to whether the information is subject to the claimed exception.

[para 49] As noted above, the Applicant requested: "information that was used and given to the ASBA lawyer to write his response to my Human Rights Complaint". It can be inferred from this that the severed information would be information provided to the Public Body's lawyer in relation its defense in a human rights complaint, given that it would necessarily be so in order to be responsive to the request.

[para 50] The Public Body submitted an affidavit, *in camera*, to support its claim of privilege over the records to which it applied section 27(1)(a). The affidavit provided facts regarding the nature of the relationship between the Public Body and its lawyer, a description of the subject matter of the communications, and the circumstances in which it sought and received advice from the lawyer.

[para 51] From the context provided by the access request, and from the *in camera* affidavit, I conclude that the records to which the Public Body applied section 27(1)(a) are more likely than not subject to solicitor-client privilege, given that they would be likely to be confidential communications between a client and its solicitor as to what should be done in relation to a legal matter.

Issue D: Did the Public Body make every reasonable effort to ensure the Applicant's personal information used to make a decision was accurate and complete, as required by section 35(a) of the Act?

Issue E: Did the Public Body retain the Applicant's personal information used to make a decision for at least one year, as required by section 35(b) of the Act? (This issue relates to the Applicant's complaint that the Public Body destroyed her notes rather than retaining them.)

[para 52] Section 35 of the FOIP Act requires a Public Body to ensure personal information that will be used to make a decision directly affecting the individual is accurate and complete. It states:

> *35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must*
>
> > *(a) make every reasonable effort to ensure that the information is accurate and complete, and*

(b) retain the personal information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it, or for any shorter period of time as agreed to in writing by

(i) the individual,

(ii) the public body, and

(iii) if the body that approves the records and retention and disposition schedule for the public body is different from the public body, that body.

[para 53] If a public body uses personal information to make a decision directly affecting the individual whom the personal information is about, then section 35 of the FOIP Act imposes a duty on the Public Body to ensure that the personal information it uses is accurate and complete.

[para 54] In Order F2017-39, the Adjudicator interpreted this provision, stating:

> In any event, I do not believe that section 35(a) of the Act goes so far as to place a burden on public bodies to investigate and research other sources of information to ensure that its decision is correct. Section 35(a) is about the accuracy and completeness of the information that the Public Body had before it when making its decision, not about the decision itself, nor what information the Public Body should have used when making its decision (Order 98-002 at para 73). As stated in other orders issued by this Office, section 35(a) of the Act ensures fair information practices and emphasizes the importance of data quality (Order F2006-019 at para 88). Therefore, the purpose of section 35(a) of the Act is to ensure that the factual data before a public body when making its decision is accurate and complete such as a birthdate or a social insurance number or, in this case, what information individuals contacted for reference checks provided about the Complainant (see Order F2013-50 at para 161). I do not believe that it extends to examining if the Public Body took enough information into account.

[para 55] In Order F2013-14, the Director of Adjudication said:

> Given these considerations, in my view, despite its broad wording, section 35(a) is to be engaged primarily in relation to information that does not depend, for the determination of its accuracy, on a quasi-judicial process. Rather, resort may be had to it where a public body is to make a decision on the basis of information the accuracy of which is readily ascertainable by reference to concrete data. As the Adjudicator noted in Order F2006-019, section 35 is intended to promote fair information practices and data quality in relation to personal information.

Past orders of this office hold that section 35 is intended to ensure data accuracy, rather than to direct the manner in which a public body makes decisions outside the FOIP Act. For example, if the age or social insurance number of an individual is relevant to a public body's decision regarding an individual, then the FOIP Act requires a public body to take reasonable steps to ensure the accuracy of the number.

[para 56] Further, section 35 may be seen to require a public body to ensure that information it obtains to make a decision directly affecting an individual's rights is

accurately recorded. When a public body makes a decision directly affecting an individual's rights, section 35(b) requires the public body to maintain the information for a year following the decision, unless the public body and the applicant agree to a shorter period.

[para 57] The Applicant argues:

> **Section 35 (a) (b) accurate and retention of documents for one year.** My teaching career has been destroyed due to the wrongful decision to dismiss my complaint against the Unprofessional Conduct of Superintendent […] This decision was made based on the bogus documents that didn't exist and couldn't be found. **(Exhibit Q, Tab 8 p. 183- 188).** Also in this same decision they stated my reference were unsupportive and they were overwhelming SUPPORTIVE **(p. 25, 81, & 82).** This inaccurate information was used to destroy my career. I DON'T CARE if [the senior information and privacy manager] is persuaded, I CARE IF THE EVIDENCE PRESENTED PROVES THAT THE *FOIP ACT WAS* VIOLATED AND **IT CLEARLY DOES!!!!!**
>
> **Verify that the notes left on the table were also provided to […] (Registrar Department of Education).** When [the Registrar] asked me for the notes I provided to the Superintendent and Deputy Superintendent at this meeting, I gave her a copy in June 2015 and in another email on August 23, 2015(p. **85-87).** That means they existed and Superintendent […] even stated he received them in his statement on May 9, 2014(p. **84).** I also provided 6 of these pages to the FOIP Coordinator on March 10, 2014 for the Board of Trustees and again in an email for verification on July 17, 2015. It is not reasonable for my typed documents to be destroyed and [the deputy superintendent's] fraudulent note that she couldn't possibly have written at this meeting be kept, especially, since she didn't have a writing utensil or paper with her. This is NOT reasonable at all! This is corruption and they destroyed the documents to hide that I provided proof of my bullying complaint from the very first meeting. They violated the Harassment Policy 10.51 by not conducting an investigation into my formal complaint. A written report was required and they falsely reported that they carried out an investigation verbally, but could not provide any names or dates of these verbal conversations. There is no evidence that an investigation took place. If one DID, I was required to be contacted and I WAS NOT. This public body actually bragged in their report in their Human Rights submission that they improperly concluded the outcome before they performed an investigation **(p. 26-62).** It is a violation of section 92 (c) and (g) of the *FOIP Act* and prosecution is warranted. I am not persuaded in the least that this public body did an adequate search for these responsive records. So the Superintendent admits to receiving the documents but doesn't protect them from destruction. They were conveniently and intentionally destroyed to cover up the evidence of bullying and unprofessional conduct of the administrators at [the school]. This is an abuse of power. The information should have been kept to carry out an investigation and they were required to be kept for one year, especially if there is a complaint underway.
>
> MORE VIOLATIONS of section 92 and more evidence of CORRUPTION.

[para 58] The Applicant alleges that the Public Body submitted evidence in a hearing that was inaccurate or untrue. She also argues that it violated some of its policies. Even assuming the Public Body did these things, section 35 would not be engaged. Section 35 applies to a public body *making a decision directly affecting an individual*, not a public body engaged in legal proceedings with an individual, where another entity, such as the Human Rights Commission, is making a decision. I have reviewed the Applicant's submissions and attachments; I find that these documents do not support finding that the Public Body failed to meet the requirements of sections 35(a) and (b) of the FOIP Act.

Issue F: Did the Public Body fail to comply with section 38 of the Act (protection of personal information)? (This issue relates to the Applicant's complaint that the Public Body destroyed her notes rather than retaining them.)

[para 59] Section 38 of the FOIP Act states:

> *38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.*

[para 60] While section 38 creates a broad duty to protect personal information, section 4 of the FOIP Act limits the scope of the Act to records in the custody or control of a public body. In other words, if a public body does not have custody or control of records, it has no duty to protect the record under section 38.

[para 61] In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

> Under the Act, custody and control are distinct concepts. "Custody" refers to the physical possession of a record, while "control" refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.
>
> A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

[para 62] Former Commissioner Work interpreted "custody" as referring to physical possession of a record. He also suggested that it would be possible for a public body to have custody over a record but not control over it. Subsequent decisions of this office have moved away from this position and have determined that custody, like control, requires that a public body have rights and duties in relation to the record in question before a public body could be said to have custody over it.

[para 63] For example, in Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

> In prior FOIP orders, the term "custody" was defined as the physical possession of a record, whereas the term "control" was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that "bare" possession of information does not amount to custody, as the word "custody" implies that there is some right or obligation to hold the information in one's possession (Order F2009-023).

[para 64] In Order F2010-023, I said:

> In section 6 of the FOIP Act, the word "custody" implies that a public body has some right or obligation to hold the information in its possession. "Control," in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.
>
> I find that the question "Does the Public Body have a right to obtain the records?" must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

[para 65] The phrase "custody or control" refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. "Custody or control" also imparts the notion that a public body has duties and powers in relation to a record, such as the duty to preserve or maintain records, or the authority to destroy them.

[para 66] Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 67] Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said, after consideration of the factors, that a public body has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records.

[para 68] The Applicant argues:

> **Section 38 protect personal information from unauthorized destruction.** My notes were intentionally destroyed to hide the fact that I provided concrete evidence that proved bullying and harassment occurred at [the school] against me and nothing was done as required by Board Policy 10.51. There were no storage issues. This is another violation of section 92 (c) of the *FOIP Act.* This actions were clearly taken to cover up the fact that the Applicant's Discrimination Complaint was NOT investigated even though she provided evidence of bullying, discrimination and Harassment on the Sept 4, 2013 meeting. The Complaint of Unprofessional Conduct of the Superintendent was also covered up because he didn't follow Board Policy 10.51 and didn't investigate the Applicant's Discrimination Complaint as required. Instead, he pre-determined the outcome without an investigation and retaliated against the Applicant by stating she was unsuitable to teach at the elementary level conveniently at the same meeting she voiced her concerns about being harassed and discriminated against by the administrators and some colleagues. The Human Rights submission by PRSD No. 10 states they concluded on Sept 4, 2013 that the Applicant was unsuitable prior to any investigation. **PROOF** an investigation **DIDN'T** occur.

[para 69] The Public Body argues:

> Section 38 of the *Act* requires a public body to protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.
>
> The Applicant bears the burden of establishing that the Public Body has failed to fulfil its duty under section 38, which has been described with reference to *The Law of Evidence* as follows:
>
>> The term "evidential burden" means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.
>
> The Applicant indicates that she "left" the Notes after her September 4, 2013 meeting. She then makes the assumption that the Notes were destroyed. However, there is no evidence that the Records were destroyed. Instead, the Public Body has never confirmed that it received from the Applicant the Notes that were alleged to have been left behind by the Applicant in the September 4, 2013 meeting.
>
> Further, section 38 of the *Act* imposes an obligation on a public body to secure records once they are collected by the Public Body. As there is no evidence that the Notes were collected by the Public Body, there can be no contravention of section 38.

[para 70] From the evidence before me, I am unable to find that the Public Body had custody and control over the Applicant’s notes. The Applicant argues that she left the notes for the superintendent and deputy superintendent, but she does not say that she informed the superintendent and deputy superintendent that she intended for them to collect them. Even accepting that the notes were left on a table, I am unable to say that the Public Body would have custody or control over them, without more.

[para 71] I reviewed page 84 of the Applicant’s submissions, which is a statement made by the superintendent. Although the Applicant interprets this statement as acknowledging that the Applicant provided the notes to him, the only mention of notes in this document is a reference to the deputy superintendent taking notes. There is no

indication as to when the notes were taken. On the evidence before me, I am unable to find that the Public Body had custody or control over the Applicant's notes until she provided them to it on July 15, 2015.

[para 72] In Order F2018-37, I rejected the argument that a public body would have custody or control over a record containing personal information if the record were merely left on its premises. I said:

> Even if I were to find that a nurse reviewed or accessed the note, which I do not, I would be unable to find that this action would bring the note within the custody or control of the Public Body. As discussed above, in order to be said to have custody or control over a record, a public body must have some rights or duties in relation to the record. If an employee of the Public Body obtains a record that the Public Body does not have any right or duty to obtain, and does not obtain it on behalf of the Public Body, then the Public Body cannot be said to have custody or control over the record or to have collected it. When a public body does not have custody or control over a record, it has no duty to protect the record under section 38 of the FOIP Act. Were it otherwise, anytime an individual lost personal information on a public body's premises, such as a university campus, the public body would be responsible for protecting the information, even if it did not have any reason to know of the information's existence or location.

[para 73] To conclude, if I accept that the Applicant left her notes on a table, I would be unable to find that this action alone put the records into the Public Body's custody or control. There is no evidence before me to establish that the Public Body received the notes, or knew that the Applicant intended to provide the notes to it. As the evidence falls short of establishing that the Public Body had custody or control of the notes before the Applicant sent them to it on July 14, 2015, I am unable to find that the Public Body failed in its duties under section 38.

IV. ORDER

[para 74] I make this Order under section 72 of the Act.

[para 75] I find that it has not been established that the Public Body failed to meet its duties under the FOIP Act.

[para 76] I confirm that the Public Body is authorized to withhold records from the Applicant under section 27(1)(a).

____

Teresa Cunningham
Adjudicator