ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2006-002

January 19, 2007

SHELL CANADA LIMITED

Case File Number P0026

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Summary: The Applicant had been an employee of the Organization. Subsequently, a complaint was made against the Applicant that led to an investigation which resulted in termination of the Applicant's employment. The Applicant requested copies of the documents that the Organization had in its possession regarding the investigation, pursuant to section 24(1) of the *Personal Information Protection Act* (the "Act"). The Organization provided some of the records but withheld others, citing the application of sections 24(2)(a) (legal privilege), 24(2)(c)(investigation or legal proceedings), 24(2)(d) (information no longer being provided to an organization), 24(3)(b)(information revealing personal information about another individual) and 24(3)(c)(information revealing the identity of an individual who provided a confidential opinion). The Commissioner found that the Organization had properly applied section 24(2)(a) and 24(2)(c) of the Act. As all the records withheld by the Organization fell under those sections, the Commissioner did not find it necessary to decide the applicability of the remaining exceptions to disclosure claimed by the Organization.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c.H-14; *Personal Information Protection Act*, R.S.A. 2000, c. P-6.5, ss. 1(f), 4(5)(a), 24(1), 24(2), 24(2)(a), 24(2)(c), 24(2)(d), 24(3), 24(3)(b), 24(3)(c), 51, 52.

Authorities Cited: *Black's Law Dictionary*, 8th ed. (St. Paul, West Corp.1999); Manes and Silver**,** *Solicitor-Client Privilege in Canadian Law***,** 1st ed., (Toronto, Butterworths 1993).

Cases Cited: *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. 29; *Canadian Southern Petroleum Ltd. v. Amoco Canada Petroleum Co. (1995), 176 A.R. 134 (Q.B.); LL.A. v. A.B.*, [1995] 4 S.C.R. 536; *Meany v. Busby* (1977), 15 O.R. (2nd) 71 (H.C.J); *Moseley v. Spray Lakes (1980) Ltd.* [1996] A.J. No. 380; *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2nd) 83 (C.A.); *Opron Construction Co. v. Alberta* (1989), 71 Alta L.R. (2nd) 183 (C.A.); *Pritchard v. Ontario (Human Rights Commission)* [2004], 1 S.C.R. 809; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Solosky v. The Queen* [1980] 1 S.C.R.821; *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.); *Wujuda v. Smith* (3rd) 476 (Man. Q.B.).

Orders Cited: AB: 96-015**,** 96-020, 97-009, 98-017, 2001-025, F2003-015.

I. BACKGROUND

[para 1] The Applicant had been employed by the Organization for over 15 years. In February 2004, a complaint was made against the Applicant. The Organization instituted an investigation which ultimately led to the termination of the Applicant's employment. In March 2004, the Applicant requested copies of the documents that the Organization had in its possession regarding the investigation pursuant to section 24(1) of the *Personal Information Protection Act* (the "Act"). On April 28, 2004, the Organization provided some records to the Applicant and withheld others pursuant to sections 24(2) and 24(3) of the Act. In total the Organization has disclosed 115 records either in full or partly severed. The scope of this inquiry is limited to the remaining 20 records which the Organization has refused to provide to the Applicant.

II. RECORDS AT ISSUE

[para 2] The records at issue consist of:

1) emails between the Organization's human resources representatives, investigators and legal counsel;

2) notes taken during the investigation by the Organization's human resources representatives;

3) an undated written complaint;

4) a draft investigation report, a final investigation report and executive summary.

III. ISSUES

[para 3] There are five issues in this inquiry:

A. Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the records/information?

B. Did the Organization properly apply section 24(2)(c) of the Act (investigation or legal proceedings) to the records/information?

C. Did the Organization properly apply section 24(2)(d) of the Act (information no longer being provided to an organization) to the records/information?

D. Does section 24(3)(b) of the Act (information revealing personal information about another individual) apply to the records/information?

E. Does section 24(3)(c) of the Act (information revealing identity of an individual who provided a confidential opinion) apply to the records/information?

IV. DISCUSSION OF THE ISSUES

A. Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the records/information?

[para 4] At the outset, pursuant to section 51 of the Act, the Organization will bear the burden of proof to establish that the Applicant has no right of access to the records.

[para 5] With the exception of one record, the Organization has claimed the application of section 24(2)(a) with regard to all of the remaining records at issue. Section 24(2)(a) reads:

> 24(2) An organization may refuse to provide access to personal information under subsection (1) if
>
> (a) the information is protected by any legal privilege;

[para 6] The Organization has referred to the following authorities on privilege, which I will examine in this Order: *Pritchard v. Ontario (Human Rights Commission)* [2004], 1 S.C.R. 809; *Moseley v. Spray Lakes Sawmills (1980) Ltd* (1996), A.J. No. 380; *Solosky v. The Queen* [1980] 1 S.C.R. 821; *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.) and Order 97-009.

[para 7] Section 24(2)(a) of the Act excepts from disclosure information that is protected by “any legal privilege”. The term “legal privilege” is, however, not defined in the Act.

[para 8] Similarly, the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) did not define the term “legal privilege”. In Order 96-020 Commissioner Clark determined the definition of “legal privilege” in relation to the FOIP Act by first stating that if information is “privileged” it does not have to be disclosed. Commissioner Clark then used the definition of “legal” found in *Black’s Law Dictionary* to determine the scope of that term.

[para 9] The latest edition of *Blacks Law Dictionary*, 8th ed. (St. Paul: West Corp 1999) at page 912, defines “legal” as: “of or relating to law; falling within the province of the law…established, required, or permitted by law.” “Law”, itself is defined at page 900 as: “The aggregate of legislation, judicial precedents, and accepted legal principles.”

[para 10] “The aggregate of legislation, judicial precedent, and accepted legal principles” means that as section 24(2)(a) refers to “any legal privilege”, privilege can encompass both statutory and common law privileges.

[para 11] With regard to privilege at common law the Supreme Court of Canada in *LL.A. v.A.B*., [1995] 4 S.C.R. 536 and *R. v. Gruenke*, [1991] 3 S.C.R. 263 stated that there are two categories of privileges: a “class privilege” and a “case-by-case privilege”.

[para 12] A “class privilege” is a privilege already recognized by the common law for a certain types of information. Solicitor-client privilege is an example of a “class privilege” recognized by the common law for solicitor-client communications. A “case-by-case privilege” refers to communications for which there is usually a prima facie assumption that they are not privileged. However, a privilege is found by a decision-maker to exist for information in that particular case.

[para 13] In *Solosky* v. *The Queen*, *supra*, the Supreme Court of Canada set out the criteria for the application of solicitor-client privilege (a “class privilege”) that each record must meet for the privilege to exist:

(i) it must be 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 14] Further, in *Pritchard* v. *Ontario (Human Rights Commission)*, *supra*, the Supreme Court of Canada stated that solicitor-client privilege will extend to in-house counsel provided the aforementioned criteria for solicitor-client privilege are met.

[para 15] I have examined the records in question and they can be described as follows:

1. E-mails from the Organization's management and investigators to in-house counsel (the e-mails have been identified in the *in camera* submission as Tabs 6, 8, 10, 12, 14);

2. Notes prepared by in-house counsel (identified in the *in camera* submission as Tabs 2, 5, 9, 11);

3. Notes prepared by the Organization's management concerning meetings with in-house counsel (identified in the *in camera* submission as Tabs 1(a), 1(b), 1(d), 1(e), 1(f) and 1(g));

4. Drafts of an investigation report and an executive summary (identified in the *in camera* submission as Tabs 13, 15, 16);

5. An undated written complaint (identified in the *in camera* submission at Tab 3).

[para 16] Examining the five e-mails produced in the *in camera* submission (Tabs 6, 8, 10, 12, 14), I find that they are communications from the Organization's management and investigators to its in-house counsel, who was acting as a solicitor in her professional capacity. It is clearly a solicitor-client relationship. The communications entailed the seeking of legal advice regarding the investigation of the complaint and, as is evident from the content of the e-mails and by specific reference on the face of the records at Tabs 10 and 12, were intended to be confidential communications between the parties.

[para 17] The notes prepared by in-house counsel (Tabs 2, 5, 9, 11) and the Organization's management (specifically at Tabs 1(d), 1(e), 1(f) and 1(g)), and drafts of the investigative reports with executive summary (Tabs 13, 15, 16), all are communications between client and solicitor and directly related to the seeking or giving of legal advice. The nature and content of these notes demonstrate an intention that such communications were to be confidential between the parties.

[para 18] Section 24(2)(a) is a discretionary ("may") exception of the Act. As a discretionary exception, I usually will have the ability to review whether a organization properly exercised its discretion under the Act. However, the discretion exercised in this instance is in regard to legal privilege. Section 4(5)(a) states that the Act is not to be applied so as to affect any legal privilege.

[para 19] An analysis of discretion inevitably leads to an examination of an organization's rationale for relying on the exception claimed. Such an evaluation could have the potential to affect the legal privilege claimed if I decided that an organization did not properly exercise its discretion. In that case, I would require an organization to reconsider its decision. Therefore, I find that the wording of section 4(5)(a) precludes an

analysis of the exercise of discretion. However, section 4(5)(a) does not preclude an analysis of whether legal privilege applies in the first instance. In this case, I have concluded that legal privilege, namely, solicitor-client privilege, applies.

[para 20] Therefore, I find that the Organization properly applied section 24(2)(a) of the Act to the records described in the *in camera* submission as Tabs 1(d),1(e),1(f),1(g), 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

[para 21] This leaves the notes prepared by the Organization identified at Tabs 1(a), 1(b) and the written complaint found at Tab 3. These records are not communications between client and solicitor. However, in this instance the Organization submits that litigation privilege applies to the records in question.

[para 22] In Order 96-015 Commissioner Clark, following the view stated in Manes and Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993), stated that solicitor-client privilege encompasses both solicitor and client communications, and third party communications (also referred to as "litigation privilege"). Further, in the recent Supreme Court decision of *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. 39, decided after the submissions closed in this inquiry, Bastarache J stated that the two-branch approach to solicitor-client privilege should continue to exist while at the same time recognizing that solicitor-client privilege and litigation privilege have distinct rationales. Following this line of reasoning, I find that the definition of "legal privilege" under section 24(2)(a) of the Act includes not only solicitor-client privilege (comprising solicitor-client communication) but also litigation privilege.

[para 23] As stated in Order 96-015 litigation privilege applies to papers and materials created or obtained by the client for a lawyer's use in existing or contemplated litigation, or created by a third party on behalf of the client for a lawyer's use in existing or contemplated litigation.

[para 24] In Order 97-009 Commissioner Clark stated that for litigation privilege to apply a party must show that:

1. There is a third party communication; this communication may include:

    I. communications between the client (or the client's agent) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;

    II. communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice; or

III. communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.,

2. The maker of the document or the person under whose authority the document was made intended the document to be confidential: *Opron Construction Co. v. Alberta* (1989), 71 Alta L.R. (2nd) 183 (C.A.).

3. The "dominant purpose" for which the documents were prepared was to submit them to legal counsel for advice and use in litigation, whether existing or contemplated: *Waugh v. British Railway Board, supra*; *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2nd).

[para 25] Order 97-009 also cites Manes and Silver, *Solicitor-Client Privilege in Canadian Law,* which sets out three requirements of the "dominant purpose" test:

1. the documents must have been produced with existing or contemplated litigation in mind,

2. the documents must have been produced for the dominant purpose of existing or contemplated litigation, and

3. if litigation is contemplated, the prospect of litigation must be reasonable.

Further, in determining the "dominant purpose" for which documents were prepared, consideration must be given of the intent of the author when the document was created: *Opron Construction Co. v. Alberta*, *supra.*

[para 26] I agree with the observation of Conrad J.A. in *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, *supra,* that the rationale for litigation privilege provides an essential guide for determining the scope of its application. In that case Conrad J.A. stated that the purpose of litigation privilege:

> … is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation… Thus at the time of creation, preparation for litigation must be the dominant purpose.

[para 27] In *Opron Construction, supra*, the Alberta Court of Appeal deprecated the practice in some cases to find rules of privilege for specific fact situations. The court in that instance stated that the extent of privilege will depend on the facts of a particular case.

[para 28] In this instance, the three records in question consist of two handwritten notes written by a manager of the Organization dated February 24 and 26, 2004, respectively, and an undated written complaint.

[para 29] Examining the records, I find that they are third party communications, being records created at their inception by the client (the Organization) and which, due to their content, were intended to be confidential.

[para 30] With respect to the "dominant purpose" for which the documents were created, having examined the records, affidavit evidence and the Organization's written policy on workplace conduct, I am unable to conclude that the dominant purpose for the preparation of the records was for use in contemplated litigation.

[para 31] The affidavit evidence demonstrates that the Organization received a complaint regarding the Applicant on February 23, 2004. The content of the handwritten notes dated February 24 and 26 and the undated written complaint demonstrate an intention to investigate and substantiate whether a factual basis for the complaint existed, rather than to create such records so as to assist with contemplated litigation.

[para 32] In addition, there is no indication in either party's submissions that litigation was, in fact, ever initiated. The Supreme Court of Canada in *Blank* v. *Canada (Minister of Justice)*, *supra*, gave endorsement to a pre-existing line of authorities that state litigation privilege is finite in duration and comes to an end upon termination of the litigation, absent closely related proceedings, that gave rise to the privilege: *Wujuda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977),15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co*. (1995), 176 A.R. 134 (Q.B.). This Office has also followed this line of authority in Orders F2003-015, 2001-025 and 98-017.

[para 33] The Organization's submission does not make reference to the finite duration of litigation privilege, nor does it advance any argument or evidence as to why the duration of this privilege should be maintained to the present time.

[para 34] Accordingly, I find that the records described in the *in camera* submission as Tabs 1(a), 1(b) and 3 do not meet the criteria for litigation privilege and therefore do not fall within the exception to withhold information under section 24(2)(a).

B. Did the Organization properly apply section 24(2)(c) of the Act (investigation or legal proceedings) to the records/information?

[para 35] The Organization has further argued the applicability of section 24(2)(c) to withhold disclosure of the records at Tabs 1(a), 1(b) and 3, and the last remaining record at issue, a handwritten note by a manager of the Organization which described the results of the investigation (Tab 1(c) in the *in camera* submission).

[para 36] Section 24(2)(c) reads:

> 24(2) An organization may refuse to provide access to personal information under section (1) if
>
> (c) the information was collected for an investigation or legal proceeding;

[para 37] "Investigation" is defined at section 1(f) of the Act as:

> 1 (f) "investigation" means an investigation related to
>
> (i) a breach of agreement
>
> (ii) a contravention of an enactment of Alberta or Canada or another province of Canada, or
>
> (iii) circumstances or conduct that may result in a remedy or relief being available in law,
>
> if the breach, contravention, circumstances or conduct in question has or may not have occurred or is likely to occur and it is reasonable to conduct an investigation.

[para 38] The Organization has argued that as the records contain personal information that was collected during an investigation, it need not be disclosed. It relies on the definition of "investigation" in section 1(f), stating that its investigation was warranted as the Applicant's conduct was allegedly a contravention of an enactment of the province of Alberta, specifically the *Human Rights, Citizenship and Multiculturalism Act*. It further argues that given the nature of the complaint and the potential remedies that could be brought against the Organization under such legislation, it was reasonable for it to investigate the Applicant's conduct.

[para 39] I have examined the evidence and the records concerned. I agree that the allegations made against the Applicant, if substantiated, may have given rise to a remedy being available in law and given the nature of those allegations, it was reasonable for the Organization to conduct an investigation to determine whether a contravention of human rights legislation had occurred. I find, therefore, that the Organization collected personal information for the purposes of conducting an investigation.

[para 40] As section 24(2)(c) is a discretionary ("may") exception of the Act, I shall now determine whether the Organization properly exercised its discretion to withhold personal information, considering the objects and purposes of the Act and the purpose of the exception. The Organization's affidavit evidence demonstrates that the privacy officer balanced the rights of the Applicant with the right to preserve investigatory materials disclosing the Applicant's personal information where possible after severing other information. I note that section 24(4) does not require severing and disclosure of information under section 24(2)(c). The fact that the Organization did sever and disclose the remaining personal information speaks to the Organization having properly exercised

its discretion. It also appears there have not been any improper or irrelevant considerations taken into consideration in refusing to disclose these records to the Applicant.

[para 41] Therefore, I find that the Organization properly exercised its discretion and properly applied section 24(2)(c) to the records in question described in the *in camera* submission as Tabs 1(a), 1(b), 1(c) and 3.

C. Did the Organization properly apply section 24(2)(d) of the Act (information no longer being provided for an organization) apply to the records/information?

D. Does section 24(3)(b) of the Act (information revealing personal information about another individual) apply to the records/information)?

E. Does section 24(3)(c) of the Act (information revealing identity of individual who provided a confidential opinion) apply to the records/information

[para 42] Given my decisions under Issues A and B that the Organization properly applied sections 24(2)(a) and 24(2)(c) to the records, I do not find it necessary to consider under Issues C, D and E whether the Organization also properly applied section 24(2)(d), and whether sections 24(3)(b) and 24(3)(c) apply to the records.

V. ORDER

[para 43] I make the following Order under section 52 of the Act.

[para 44] I find that the Organization properly applied section 24(2)(a) of the Act to the records described in the Organization's *in camera* submission as Tabs 1(d), 1(e), 1(f), 1(g), 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16. I confirm the Organization's decision not to disclose those records to the Applicant.

[para 45] I find that the Organization properly applied section 24(2)(c) of the Act to the records described in the Organization's *in camera* submission as Tabs 1(a), 1(b), 1(c) and Tab 3. I confirm the Organization's decision not to disclose those records to the Applicant.

Frank Work, Q.C.
Information and Privacy Commissioner