

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ADJUDICATION ORDER #3

March 13, 2003

ALBERTA JUSTICE

Review Numbers 2170 and 2234

Date: 20030313

INFORMATION AND PRIVACY COMMISSIONER
(ADJUDICATOR: JUSTICE T.F. MCMAHON)

IN THE MATTER OF AN APPLICATION PURSUANT TO THE FREEDOM OF
INFORMATION AND PROTECTION OF PRIVACY ACT, R.S.A. 2000 c.F-25 AND IN
THE MATTER OF AN ADJUDICATION INQUIRY, PURSUANT TO S.75 THEREOF

BETWEEN:

HUGH MacDONALD, M.L.A.

Applicant

- and -

ALBERTA JUSTICE

Public Body
Respondent

AND BETWEEN:

THE GLOBE AND MAIL

Applicant

- and -

ALBERTA JUSTICE

Public Body
Respondent

REASONS FOR DECISION
of the
HONOURABLE MR. JUSTICE T. F. MCMAHON, ADJUDICATOR

APPEARANCES:

Peter M. Jacobsen

Carlos P. Martins

for the Globe and Mail

Hugh MacDonald, MLA

for himself

Christopher D. Holmes

for Alberta Justice

SUMMARY & CONCLUSION

[1] These reasons deal with the request for copies of certain legal accounts (or "the Records") pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (or "the Act"). The public body (Alberta Justice) claims privilege over those Records. By a letter dated December 7, 2002, the head of the public body, while releasing some documents, refused to release the majority of the materials sought. I have been asked to review that decision. For the reasons that follow, I conclude that the documents are subject to a solicitor-client privilege and should not be released.

BACKGROUND

[2] Two access requests have been made pursuant to the *Freedom of Information and Protection of Privacy Act* by Mr. Hugh MacDonald, MLA for Edmonton Gold Bar, and by Jill Mahoney on behalf of the Globe and Mail (collectively, the "Applicants"). They arise from a defamation suit brought in 1999 by a Red Deer lawyer against Stockwell Day, then a senior Cabinet Minister and a member of the Legislative Assembly of Alberta. The suit was eventually settled on December 22, 2000. According to a Government News Release of January 16, 2001, the total settlement cost was \$792,064.40 including \$60,000 in damages paid to the plaintiff. Those costs were paid with public funds out of the Province's Risk Management and Insurance Fund (although Mr. Day later repaid the \$60,000 in damages from his own resources). The suit, settlement and payment generated considerable media interest.

[3] The Information and Privacy Commissioner concluded that he had a conflict with respect to this matter and, accordingly, I was appointed as a Adjudicator under Part 5, Division 2 of the *Act* to deal with the requests.

[4] By a decision dated May 24, 2002, I considered the issue of the fees demanded from the Applicants by government. The fees were paid and a review of the documents was undertaken. Alberta Justice now claims to have identified 68,822 "responsive records". A few have been released. The vast majority have not.

[5] I have now had argument in respect of the request for copies of the legal accounts paid by Alberta Justice arising from the above described litigation. The request for the balance of the documents will be dealt with later.

[6] Alberta Justice invokes sections 17(1), 27(1)(a) and 27(2) of the *Act* in refusing to release the legal accounts:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

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,

...

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[7] The term "third party", as used in section 17 of the *Act*, is defined as "a person, a group of persons or an organization other than an applicant or a public body" (section 1(r)). The term "personal information" as used in section 17, includes, *inter alia*, an individual's name, home or business telephone number, or home or business address (s. 1(n)).

[8] The burden of proof is generally on the public body to prove that an applicant has no right of access (section 71(1)). The onus is on the applicant, however, to satisfy the Commissioner or adjudicator that the release of a record would not be an unreasonable invasion of a third party's privacy, where there is a refusal to release records that contain personal information about a third party (section 71(2)).

[9] Although Mr. MacDonald's request did not specify billing information or details from the lawyer's statements of account, for the purposes of this application, I intend to treat both requests in the same way, as it is clear that both Applicants are seeking access to the same Records.

PRINCIPLES AND OBJECTIVES OF THE ACT

[10] Alberta Justice cites section 2(a) of the *Act* to find the purpose of the legislation:

2. The purposes of this Act are

(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,

[11] It should be observed that while the exceptions may be "limited and specific", the consequences of invoking those exceptions is, in this case, that thousands of relevant records remain hidden from public view.

[12] A more principled description of the purpose of this kind of legislation was cited by me in my earlier decision in this case (Adjudication Order No. 2 (May 24, 2002)):

[25] The Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, considered the federal *Access to Information Act*, R.S.C. 1985, c.A-1. La Forest, J., although dissenting in the result in that case, described the legislation's purpose in these terms at para. 61:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci* 479, at p.480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

LEGAL PRIVILEGE

[13] There is some dispute between the parties as to whose solicitor-client privilege is at stake in these proceedings. The public body submits that it has privilege in the Records which it has not waived. The public body also submits that Mr. Day has privilege in the Records and by virtue of s. 27(2) of the *Act*, the public body must not release those Records. The Applicants argue that the privilege belongs to Mr. Day, and that he has waived that privilege by failing to object to the disclosure of the solicitor's accounts.

[14] The Supreme Court of Canada has recently described solicitor-client privilege as "a principle of fundamental justice and civil right of supreme importance in Canadian law": *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61. The scope of legal privilege was examined in *Stevens v. Canada*, [1998] 4 F.C. 89 (C.A.). At para. 11 the Federal Court of Appeal cited Wigmore:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

[15] The Court acknowledged the tension that exists when the doctrine of privilege is used to obstruct the truth finding process. Nevertheless, the need to protect the solicitor-client relationship takes priority. At para. 30, Linden J.A. properly observed:

It is essential to keep in mind that what the privilege protects is the integrity of the solicitor-client relationship. From a tactical point of view, in the context of litigation, clients should be free from the possibility that communications to their lawyers in "seeking, formulating or giving of legal advice" might be used against them. From a psychological point of view, in creating an atmosphere in which a client can be forthright and at ease, the privilege protects the relationship from the prying eyes of the state or other parties. A solicitor's bills of account are at the heart of that relationship. In my view, the terms and amounts of the retainer; the arrangements with respect to payment; the types of services rendered and their cost — all these matters are central to the relationship. If the relationship is indeed worth protecting, these matters must be immune to any intrusion.

[16] A request for information as to the total of a legal bill incurred by the City of North Vancouver was denied in *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.). The Court there relied upon section 14 of the British Columbia *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61, which is virtually identical to s. 27(1)(a) of the Alberta legislation.

[17] In *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.), a request was made for the amounts paid to a lawyer by the Legal Services Society. The Court framed the issue this way, at para. 12:

The question to be asked must be whether granting access to a record requested will disclose *any* information, directly or indirectly, that is the subject of solicitor-client privilege. [Emphasis in the original.]

[18] And further, at paras. 25 and 26:

Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that what would at common law be the subject of solicitor-client privilege remain privileged. There is absolutely no room for compromise. Privilege has not been watered-down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.

Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question

of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.

[19] In January of 2001, just after the case was settled, Alberta Justice released selected settlement-related documents, as well as a total of legal accounts paid. The accounts now sought contain detailed descriptions of the work performed, the lawyers involved and the time spent.

[20] I have reviewed those legal accounts. They fall clearly within the ambit of solicitor-client privilege and so are within the contemplation of s. 27(1)(a) and 27(2).

[21] To the extent that the privilege in these records is the public body's, section 27(1)(a) provides a discretion to the public body. Here, for whatever reason, Alberta Justice has chosen to exercise its right to withhold the accounts from public view. It has the right to do so, unless it has waived its privilege: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875; *Stevens, supra* at paras. 22 and 51-53; *Legal Services Society, supra* at paras. 25-26; *Municipal Insurance Assn. of British Columbia, supra* at para. 44.

[22] To the extent that the privilege is Mr. Day's, then the issue is whether he has waived that privilege in some fashion as argued by the Applicants in this case. The issue of waiver is dealt with below.

WAIVER

[23] The Globe and Mail argues that if the privilege claimed is the public body's, then that privilege has been waived by the disclosure of the information in the January 2001 press release and the associated documents. Once privilege was waived on that issue, the Globe submits, it was waived for all supporting materials. If the privilege belongs to a third party, including Mr. Day, the Globe and Mail points to the fact that no third parties have objected to the disclosure in a substantive way, despite having been given notice of these proceedings in accordance with the *Act*. Mr. MacDonald made essentially the same submissions in relation to this issue. The Applicants make further arguments dealing with the public interest override in s. 32 of the *Act* which will be considered below.

[24] The *Act* does not indicate which party has the burden of proof on the issue of waiver. The common law is that the party asserting waiver of privilege has the burden of proof: *Syncrude Canada Ltd. v. Babcock & Wilcox Canada Ltd.* (1992), 10 C.P.C. (3d) 388 (Alta. C.A.) at para. 5; *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 50 Alta. L.R. (3d) 131 (Q.B.) at para. 18. The Applicants therefore bear the burden of proving that the public body and Mr. Day have waived their privilege in the records.

[25] Neither Applicant has brought to my attention any case or other legal authority on the issue of waiver. In R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993), the authors state the following at 187:

Waiver of privilege is established where it is shown that the possessor of the privilege:

- (i) knows of the existence of the privilege and
- (ii) demonstrates a clear intention to forego the privilege.

[26] As I noted in *Western Canadian Place Ltd.*, *supra*, waiver can be express, inadvertent, by implication or where fairness requires (at para. 20). There must be some intention manifested with respect to the waiver either from the client's voluntary disclosure of confidential information or from objective consideration of the client's conduct: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, *supra*.

[27] I find that Mr. Day did not waive his privilege in the Records at issue. The documents that were released to the public were released by the Government of Alberta under the auspices of the public interest override in s. 32 of the *Act*. This cannot constitute a blanket waiver on Mr. Day's part with respect to his privilege in the Records.

[28] On the issue of the notice given to third parties, including Mr. Day, the lack of response to that notice can not be taken as a waiver of solicitor-client privilege. The notice sent to the third parties in this case did not address waiver. On these facts, silence does not amount to waiver. There was no apparent intention on the part of Mr. Day to waive privilege, either express or implied by his failure to respond to the notice.

[29] Similarly, I find that the public body has not waived its privilege in the Records. I do not find that use of the public interest override in section 32 to disseminate information regarding the legal costs of the Goddard/Day litigation constitutes a waiver of the public body's privilege in the circumstances of this case. I agree with the public body that section 32 is of narrow and extraordinary application and it does not compel the head of a public body to release all records associated with the records disseminated under that section.

PUBLIC INTEREST OVERRIDE

[30] The relevant portions of section 32 of the *Act* read:

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.

[31] Selective information and documents were released by the Alberta Government in January 2001 regarding the Goddard/Day lawsuit. The Alberta Government News Release dated January 16, 2001, stated the following:

We sought consent to release this information, but that has been slow in coming. Because this matter is in the public interest we are releasing it now in accordance with the *Freedom of Information and Protection of Privacy Act*.

Section 31.4 [now section 32] of the *Freedom of Information and Protection of Privacy Act* allows the government to release private information considered to be in the public interest.

[32] The public body therefore released some privileged information regarding this matter under the public interest override. The Globe and Mail says that the public interest override applies to the Records as a whole for two main reasons. First, the public body has already acknowledged the public interest in these Records. Secondly, the matter is of importance to Albertans as the request raises issues about the questionable spending of taxpayer's dollars.

[33] This matter, in early 2001, had become an intense political issue. It is unlikely, in my view, that section 32 was ever intended to be used to relieve political pressure. In any event, its use in that way to release some information does not amount to a waiver regarding other records.

[34] There is a mischief associated with section 32 as it relates to the Government's privileged information in that it can be selective in its release of privileged documents (as it has been here). The ramifications however are in terms of public accountability, and not, in the circumstances of this case, in terms of the release of privileged information to the Applicants.

UNREASONABLE INVASION OF THIRD PARTY PERSONAL PRIVACY


[35] The records at issue in this review are subject to solicitor-client privilege. There is no need to consider whether section 17 also applies.

DECISION

[36] The public body correctly applied sections 27(1)(a) and (2) to the records. I confirm

that the head of the public body is required to refuse access to the records under section 27(2) of the *Act* and authorized to refuse access under section 27(1)(a).

DATED at Calgary, Alberta this 13th day of March, 2003.



J.C.Q.B.A.

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