ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ADJUDICATION ORDER #4

October 3, 2003

ALBERTA JUSTICE

Review Numbers 2170 and 2234

Date: 20031003

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

INTRODUCTION

[1] In late 2000 and early 2001, two requests were made for access to information under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the "*Act*"). Those requests, by Mr. Hugh MacDonald, MLA for Edmonton Goldbar, and the Globe and Mail through Jill Mahoney of the Edmonton Bureau (collectively the "Applicants"), relate to the defamation suit brought in 1999 by Red Deer lawyer Lorne Goddard, against Stockwell Day, then the Provincial Treasurer for the Government of Alberta. That law suit was eventually settled for a total cost of $792, 064.40, which was paid with public funds from the Province's Risk Management and Insurance Fund (although Mr. Day later repaid $60,000.00 from his own resources).

[2] Understandably, the law suit and its settlement generated a considerable amount of interest with the general public and the media. Some documents respecting the suit were released by the Minister of Justice and Attorney General under s. 32(1)(b) of the *Act* (information must be disclosed if in the public interest). The Applicants seek a much wider range of documentation about the suit. The public body - Alberta Justice - claims privilege, and other exceptions to disclosure under the *Act*, with respect to the documents (or the "Records").

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

[4] This is the third (and presumably final) decision rendered in this matter in my role as Adjudicator. For the reasons that follow, I conclude that some of the documents, as set out in Schedule "A" to these Reasons, should be released to the Applicants.

BACKGROUND

[5] Mr. MacDonald made the following request to Alberta Justice:

> Copies of all reports, memoranda, claim submissions, claim receipts, agreements and background documents prepared by or for Alberta Justice, or sent to Alberta Justice, for the period September 9, 1999 to December 27, 2000, relating to the Government of Alberta, through the Alberta Risk Management Fund, covering legal and other expenses incurred by Stockwell Day.

[6] Two requests for access to information were made by the Globe and Mail. The first was dated January 25, 2001, and was in these terms:

> Copies of all reports, memoranda, letters, e-mails, notes, claim submissions, claim receipts, agreements, and background documents prepared by Alberta Justice or sent to Alberta Justice or sent between lawyers relating to the

> defamation lawsuit of Stockwell Day, former provincial treasurer of Alberta, for the period from March, 1999 to present.
>
> Documents should include, but in no way be limited to: the June 19, 1999 decision to grant Mr. Day coverage under Risk Management and Insurance; the July 2, 1999 letter from Gerald Chipeur to Virginia May; the July 15, 1999 letter from Gerald Chipeur to Virginia May; Bob Thompson's Sept. 7, 2000 and Sept. 18, 2000 letters to Alberta Justice; communications strategy relating to the possible disclosure of terms of settlement; the request by Robert Seidel to postpone Oct. 19, 2000 as the deadline for Mr. Day to decide to continue as a participant under Risk Management and Insurance; all documents relating to the postponement of this Oct. 19, 2000 deadline; all documents relating to the second deadline of Dec. 8, 2000; the communications plan for the Jan. 16, 2001 public release of information relating to the Dec. 22, 2000 settlement.

[7] Ms. Mahoney made a second request on January 31, 2001:

> Copies of all reports, memoranda, letters, e-mails, notes claim submissions, claim receipts, agreements and background documents relating to legal counsel who worked in any way for Alberta Justice and/or Stockwell Day on the matter of Mr. Day's defamation lawsuit.
>
> Specifically, I am requesting the number of hours billed for the Day/Alberta government side of this lawsuit, the number of lawyers who worked on this file for the Day/Alberta government side and the time period for when hours were billed. I am also requesting the lawyer's hourly rates.

[8] In March of 2001 a fee estimate was provided by Alberta Justice to both of the Applicants in the amount of $59,571.00 for Mr. MacDonald's request and $60,696.00 for the Globe and Mail's request. These fees were for a page by page review of some 60,000 documents to determine responsiveness to the requests. The Applicants requested a fee waiver on the basis that the Records requested were in the public interest, pursuant to s.93(4)(b) of the *Act*. By a decision dated May 24, 2002, I considered the issue of the fee waiver and reduced the amount to be paid by each of the Applicants. Those fees were paid and a review of the documents undertaken. Alberta Justice identified 68,822 "responsive records". The vast majority of the responsive documents had not been released to the Applicants.

[9] The Applicants asked for a review of the decision to not release the Records. By agreement of all concerned, I dealt with the issue of the legal accounts paid by Alberta Justice arising from the Goddard/Day litigation first. By a decision dated March 13, 2003, I found that the documents were subject to solicitor-client privilege and should not be released.

[10] These Reasons deal with the balance of the documents identified by Alberta Justice as "responsive records", which they have refused to release to the Applicants. Some 44 boxes of

documents have been produced. Exemptions have been claimed for these files. I have reviewed all of the Records.

THE EXEMPTIONS AND EXCEPTIONS TO DISCLOSURE OF GOVERNMENT RECORDS

[11] As stated previously, Alberta Justice has asserted several exceptions and exemptions to disclosure of government records as found in the *Act*. Most of the exemptions relate to solicitor-client privilege and an "unreasonable invasion of third party personal privacy". Not all of the exceptions or exemptions have been claimed for every record. The following have been claimed for some, or all, of the Records.

> s. 4(1)**:** This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> > (d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;
> >
> > ...
> >
> > (q) a record created by or for
> >
> > > (i) a member of the Executive Council,
> > >
> > > (ii) a Member of the Legislative Assembly, or
> > >
> > > (iii) a chair of a Provincial agency as defined in the *Financial Administration Act* who is a Member of the Legislative Assembly
> >
> > that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the *Financial Administration Act* who is a member of the Legislative Assembly.
>
> s. 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.
>
> s. 24(1): The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> > (a) advice, proposals, recommendations, analyses or policy options

developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or
(iii) the staff of a member of the Executive Council,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,

(d) plans relating to the management of personnel or the administration of a public body that have not yet been implemented,

(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,

(f) the contents of agendas or minutes of meetings

(i) of the governing body of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations, or

(ii) of a committee of a governing body referred to in subclause (i),

(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision, or

(h) the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years.

s. 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 Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney 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 Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney 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 Attorney General or by the agent or lawyer.

s. 27(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.

s. 29(1): The head of a public body may refuse to disclose to an applicant information

(a) that is available for purchase by the public, or

(b) that is to be published or released to the public within 60 days after the applicant's request is received. [I note that s. 29 was recently amended. Nothing in this case turns on those amendments.]

(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1)(b).

(3) If the information is not published or released within 60 days after the applicant's request is received, the head of the public body must reconsider the request as if it were a new request received or the last day of that period, and access to the information requested must not be refused under subsection (1)(b).

[12] As can be seen from the forgoing, the exemptions and exceptions are very wide and

have the potential to sweep in a number of government documents. In addition, the head of a public body has a discretion in many cases to release documents or not. Despite the noble sentiments often expressed in support of this kind of legislation, the reality is that a government's desire for secrecy too often trumps the nominal objective of "freedom of information". When attempting to access information from Alberta Justice files in particular, one need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to the non-legal staff of Alberta Justice) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer.

[13] It would be difficult to draft a more general or exclusionary clause. Despite the fact that it was public money facilitating Mr. Day's legal defence, only selective documents have been released to the public under the "public interest override" contained in s. 32 of the *Act*. These documents deal with, primarily, settlement costs. Thousands of records still remain hidden from public view. Vesting in the head of the public body, in this case the Minister of Justice, the discretion to disclose or not to disclose in the context of these broad provisions permits government to manipulate public knowledge by the selective release of documents, as occurred here. That process has however received legislative sanction.

DISCUSSION

[14] Alberta Justice relies primarily on ss. 17 and 27 of the *Act* to argue that the Records should not, or may not, be released to the Applicants. For this reason, I will briefly review the principles applicable to a consideration of these sections to ascertain whether the Records should remain undisclosed to the Applicants.

A. Solicitor-Client Privilege

[15] There are at least two separate principles in operation when considering the issue of solicitor-client privilege: litigation privilege and "legal advice" privilege. The distinction was described by the Alberta Court of Appeal in ***Moseley v. Spray Lakes Sawmills (1980) Ltd.*** (1996), 39 Alta. L.R. (3d) 141 (C.A.), at para. 18:

> The solicitor-client privilege and the litigation privilege are distinct, and should not be confused. The former attaches to all confidential communications made between lawyer (or lawyer's agent) and client, where the client is seeking the lawyer's advice. Litigation privilege is broader in scope, in that it attaches even to communications with, or documents prepared by, third parties. Litigation

> privilege is limited, though, to situations where the dominant purpose for the communications or creation of the document was, at the time of its creation, use in relation to litigation.

See also: ***Susan Hosiery Limited v. Minister of National Revenue***, [1969] 2 Ex. C.R. 27 at 33; ***Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)***, [1996] 1 F.C. 268 (T.D.) at paras. 51-55.

[16] The public body submits that the privilege referred to in s. 27(1)(a) corresponds with the privilege identified in the cases cited above. The public body also relies on what they call a "continuum of communication" principle. This principle was espoused in ***Balabel v. Air India***, [1988] 2 All E.R. 246 (C.A.). At page 254 the Court stated:

> In my judgement, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. 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 solicitor and client.

[17] The Alberta Court of Queen's Bench accepted this principle in ***R. v. Chan*** (2002), 325 A.R. 208 (Q.B.). Sulyma J. held at para. 42 that:

> ...communications which are part of the necessary exchange of information between the solicitor and the client for the ultimate objective of the provision of legal advice constitute a "continuum of communication" that is covered by solicitor-client privilege.

[18] In ***Bank of Montreal v. Lysyk***, 2003 ABQB 200, Veit J. accepted that ***Balabel*** "may well be good law in Alberta" and noted that the Court of Appeal in that case found that privilege may extend to "advice as to what should prudently and sensibly be done in the relevant legal context" (at para. 24).

[19] It should also be noted that not every record produced by a government (or any other) lawyer will attract privilege: ***Canadian Jewish Congress*** at para. 56. In ***R. v. Shirose*** (1999), 133 C.C.C. (3d) 257 (S.C.C.), Binnie J. for the Court stated at 288-89:

> 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 of the solicitor-client relationship is not protected.

[20] The public body seems to rely on the litigation privilege in relation to some of the Records. More specifically, as stated in its written submissions, the public body appears to rely on the "lawyer's brief" rule in respect of:

> ...records that add to knowledge or collected to provide legal advice such as newspaper articles, case law, legal articles, legislation, news releases, etc; research memos/opinions prepared by Justice or outside counsel; old documents collected to add knowledge to the file.

[21] It seems doubtful that Alberta Justice can rely on the litigation privilege or the "lawyer's brief" rule, which is a subset of the litigation privilege: see generally, R. Manes & M. Silver, ***Solicitor-Client Privilege in Canadian Law*** (Toronto: Butterworths, 1993) at 89-126. Unless a document otherwise meets the test for solicitor-client privilege, litigation privilege ceases once the litigation is concluded: ***Boulianne v. Flynn***, [1970] 3 O.R. 84 (H.C.J.) at 88-89; ***Allied Signal Inc. v. Dome Petroleum Ltd.*** (1995), 28 Alta. L.R. (3d) 79 (Q.B.).

B. Sections 27(1)(b)(c) and 27(2)

[22] Sections 27(1)(b) and (c) allow the head of a public body the discretion to refuse to disclose information prepared by or for *i.a.* an agent or lawyer of a public body (including specifically an agent or lawyer of the Minister of Justice or Attorney General) in relation to a matter involving the provision of legal advice and information in correspondence in relation to a matter involving the provision of advice or other services by the Minister of Justice or agent or lawyer.

[23] The public body submits that the term "legal services" in s. 27(1)(b) is broader than solicitor-client privilege. The public body further submits that the term "advice or other services" referred to in s. 27(1)(c) is broader than the term "legal services" referred to in s. 27(1)(b). The public body argues that the presumption of consistent expression recognized in statutory interpretation holds that the legislature is presumed to use language carefully and consistently, so that within a statute or legislative instrument the same words have the same meaning and different words have different meanings. Thus, once a particular way of expressing a meaning is used, it is used each time that meaning is intended. Where a different form of expression is used, a different meaning is intended.

[24] As I indicated earlier in these Reasons, it is clear that the Government of Alberta has legislatively cast a wide net in terms of what is not subject to disclosure under the *Act*,

especially as it relates to documents originating from, or being sent to, Alberta Justice. While the breadth of this net may not comport with the underlying rationale of access to government information, it is not for me as an Adjudicator to rewrite or narrow the scope of ss. 27(1)(b) and (c). As drafted, these sections clearly go beyond the legal privilege contemplated by s. 27(1)(a).

[25] Section 27(2) is cast in mandatory, rather than permissive language. Whereas the public body <u>may</u> refuse to disclose records over which they claim privilege, they <u>must</u> refuse to disclose a record that relates to the legal privilege of someone other than the public body. Section 27(2) would apply to Mr. Day's privilege in the Records. Assuming that there is privilege in the Records as claimed, it is not relevant whether that privilege is the public body's or Mr. Day's. This follows from my previous Reasons regarding the solicitor's accounts where I held that the public body had the right to exercise its discretion under s. 27(1)(a) to refuse to disclose privileged documents.

C. Unreasonable Invasion of Third Party Personal Privacy

[26] In addition to ss. 27(1) and (2) of the *Act*, the public body also relies on s. 17 to refuse disclosure of the documents to the Applicants. Disclosure of personal information is prohibited by s. 17 of the *Act* where that disclosure would be an unreasonable invasion of a third party's personal privacy. "Personal information" is defined in s. 1(n) and means recorded information about an identifiable individual including, *i.a.*:

> (i) the individual's name, home or business address or business telephone number,
>
> (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs and associations,
>
> (iii) the individual's age, sex, marital status or family status.

[27] I note that s. 71(2) of the *Act* places the burden of proving that "disclosure of the information would not be an unreasonable invasion of a third party's personal privacy" on the Applicants.

[28] Section 17(2) sets out a number of situations where the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. Section 17(4) lists a number of instances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Pursuant to s. 17(5), in determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body (and by extension, an Adjudicator on a review) must consider all relevant circumstances including, whether, *i.a.*:

(a) the disclosure is desirable for the purposes of subjecting the activities of the Government of Alberta or a public body to public scrutiny, and

(f) the personal information has been supplied in confidence.

[29] While the public body asserts that the protection of privacy is as much a "pillar" of the *Act* as access to information, I note that the protection of privacy is not one of the purposes of the *Act* outlined in s. 2, but rather is dealt with as an exception to the right to information: ***University of Alberta v. Pylypiuk***, 2002 ABQB 22 at para. 35.

[30] Having considered all of the relevant factors in s. 17, I conclude that release of the records could be an unreasonable invasion of third party personal privacy in relation to a number of individuals named in the Records. I do not accept this proposition as it relates to Mr. Day, however. While Mr. Day may technically be a "third party" as defined by the *Act*, he is not in the same position as other members of the public whose information may be held by government. Mr. Day, at the time of the litigation, was an elected public official and a Minister of the Crown. His legal defence was paid with public monies because he maintained that he was acting in his capacity as a public official when he made statements about Mr. Goddard. What would constitute an unreasonable invasion of Mr. Day's personal privacy is not the same as it would be for others under the *Act*. Considering all of the relevant circumstances, the release of the requested Records cannot amount to an unreasonable invasion of Mr. Day's privacy.

D. Waiver and Public Interest

[31] The Applicants did not file any new materials in relation to this final aspect of my review of the Records. I will assume that they would wish to make substantially the same arguments as were made with respect to the solicitor's accounts.

[32] The Applicants argued that if the privilege claimed is the public body's, then the privilege has been waived by the disclosure of the information in the January 2001 press release and associated documents. Once privilege was waived on that issue, the Applicants submit, it was waived for all supporting materials. With respect to Mr. Day's and other third party privilege, the Applicants stated that since no third parties have objected to disclosure in a substantive way, despite having been given notice of these proceedings in accordance with the *Act*, this constitutes a waiver of privilege.

[33] For the reasons outlined in my previous decision, I find that neither Mr. Day not the public body have waived their solicitor-client privilege in the Records. Mr. Day's lack of response cannot be taken as a waiver and the public body's use of s. 32 of the *Act* to release some of the records does not compel the public body to release all associated records.

[34] Similarly, I find that the public interest override in s. 32 is of no assistance to the Applicants. The release of some information does not amount to a waiver regarding other

information or a compulsion to disclose that other information.

ANALYSIS

A. General

[35] For reasons unknown to me, Alberta Justice has produced files to me which contain many documents which predate the Goddard/Day matter and are wholly irrelevant to the requests submitted by the Applicants. I have therefore excluded some documents which predate this matter and have no relevance.

[36] Other documents, which if the test were relevance to the requests submitted, would not have been identified as responsive records. These documents do not necessarily predate the subject at hand and some of these documents will be released to the Applicants as long as they do not fall legitimately within the exceptions and exemptions claimed by Alberta Justice.

[37] With respect to boxes labelled 1 through 49 (although I note that each item identified as a "box" is not necessarily coextensive with a physical box, so that only 44 physical boxes were provided to me for review), Alberta Justice claimed the exceptions to disclosure contained in ss. 17, 27 and 29 of the ***Act***. These are not all of the exceptions/exemptions which could have been applied. For example, many of the files contain correspondence between Ministers and MLA's which fall outside of the purview of the ***Act*** under s. 4(1)(q). I am inclined to ignore other potentially relevant exceptions and exemptions under the *Act* where the public body has not claimed them. I do note, however, that other exceptions were applied to Box 50 and this suggests that those exceptions and exemptions could have been applied to the other Records as well, but the public body chose not to claim them. Thus, my review has been based on those exceptions and exemptions actually applied and claimed by the public body.

[38] Given that there are thousands of documents at issue in this review, it would clearly be unworkable to refer to each document individually. I will only refer specifically to those documents which, in my view, should have been released to the Applicants. In all other instances, subject to what I have said above with respect to wholly irrelevant documents, I conclude that the public body correctly applied the claimed exceptions or exemptions.

B. Solicitor-Client Privilege

[39] The majority of the Records are solicitor's files obtained from the law firms retained to conduct Mr. Day's defence. I accept that these are subject to solicitor-client privilege and need not be disclosed to the Applicants.

[40] The retention of outside counsel to defend Mr. Day was managed through Alberta Justice. Other of the documents which I reviewed were the files of Alberta Justice lawyers in connection with the retention of outside counsel and the defence of Mr. Day. I conclude that these documents are also privileged.

[41] That Mr. Day's legal fees were paid by the Risk Management Fund is well known. Documents pertaining to the payment of Mr. Day's fees by the fund were requested by the Applicants and produced to me for this review. Most of the documents relating to the payment of fees by the fund are on Alberta Justice files and were generated in the course of obtaining legal opinions with respect to Mr. Day's coverage and payment of outside legal counsel. These documents, including documents which relate to the public relations aspect of managing the file, are subject to solicitor-client privilege. Other documents contained on these files are exempt under the wider scope of s. 27(1)(b) or (c) of the *Act*.

[42] There is one further issue which I will address specifically. Some of the boxes contain binders from the files of the outside counsel retained to defend Mr. Day. They relate to the discovery of documents in the litigation. These binders are generically described as "file notes" in the list provided by the public body. Some of the spine labels on the binders, however, indicate that these are the "Producible Records" of Stockwell Day. As producible documents in the litigation, this signifies that no privilege was claimed for these records. In *A. v .L.* (1997), 202 A.R. 77 (Q.B. - Master), r'vsd on other grounds (1998), 58 Alta. L.R. (3d) 280 (Q.B.) it was stated at 79:

> Both counsel made the common mistake of lumping discovery of documents and production of documents together. [Counsel] says that he does not know the difference between discovery of documents and production of documents. The first relates to what documents a litigant has or had that touches on the issues in the lawsuit. The second relates to what documents the opposing litigant is entitled to see. The first is about relevance. The second is about privilege.

Thus documents labelled as "producible" are not privileged; or the privilege, for some reason, has been waived.

[43] Not all of the documents contained in the "producible" binders are releasable to the Applicants. Some are not discloseable for other reasons, such as an unreasonable invasion of third party privacy (other than Mr. Day's). Additionally, there are binders which are not labelled "producible". With respect to the latter binders, I have concluded that the public body has correctly applied the privilege provisions of s. 27.

C. Unreasonable Invasion of Third Party Personal Privacy

[44] As outlined previously, s. 17(5)(a) of the *Act* states:

> 17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all of the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.

[45] The comments of Gallant J. in ***University of Alberta v. Pylypiuk*** at para. 48, regarding what is now s. 17(5)(a), are apt:

> In my opinion, the reference to public scrutiny of government or public body activities in s. 16(5)(a) speaks to the requirement of public accountability, public interest, and public fairness. In this case, we are not concerned with a public component. The Commissioner determined that Pylypiuk had no rights at stake that might raise an issue of fairness. The activities here were private, involving private correspondence, primarily concerned with individual educational programs.

[46] In this case it is clear that the Goddard/Day litigation is a matter of public interest and the payment of Mr. Day's legal fees with public funds raises issues of public accountability. The comments of citizens on this issue of public interest, and government replies, are essential components of the public scrutiny of government conduct. The explanations given by government to citizens for the expenditure of public funds is a matter of public interest and accountability and should not be hidden from public view.

[47] I conclude that the public body has erred in not giving effect to this factor. In releasing certain letters to and from private citizens, the citizen's personal privacy will be protected by the deletion of any information that would identify that person (name and address). Section 6(2) of the *Act* provides that if "information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record".

D. Decision and Records to be Released

[48] After review, the following Records, as set out on Schedule "A" to these Reasons, do not fit the exceptions or exemptions claimed by the public body. These Records should have been released to the Applicants.

[49] I instruct the public body to sever any third party personal information, other than the personal information of Mr. Day and Mr. Goddard from the Schedule "A" documents and then release them to the Applicants. I have retained copies of the Schedule "A" documents.

[50] The Box and Record numbers in Schedule "A: correspond to those used in the binder provided to me by the public body entitled "Listing of Records of Alberta Justice".

DATED at Calgary, Alberta this 3rd day of October, 2003.

Justice T.F. McMahon
Adjudicator

Schedule "A": Records to be Released

Box No.	Record No.	COMMENT
4	Binder 12	The documents under Tabs 131, 132,141, 142 and 143 of Binder 12 are NOT to be released.
6	Binder 13	The documents under Tabs 146, 147, 152, 166, 167, 178 and 183 of Binder 13 are NOT to be released.
6	Binder 14	The documents under Tabs 224, 227, 229, 234, 266 and 267 of Binder 14 are NOT to be released.
6	Binder 15	The documents under Tabs 306, 307, 308, 333, 334 and 338 of Binder 15 are NOT to be released.
39	(D) 12	
39	(G) 57	
39	(G) 58	
40	(C) 10	
40	(C) 11	
40	(C) 12	
40	(C) 13	
40	(C) 14	
40	(C) 15	
40	(C) 20	
40	(C) 22	
40	(D) 4	
40	(E) 4	
40	(E) 5	
40	(E) 11	
40	(E) 12	
40	(E) 13	
40	(E) 16	

40	(E) 17	
40	(E) 19	
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