

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2003-017

October 6, 2003

FAIRVIEW COLLEGE

Review Numbers 2540, 2572, 2573

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant filed an access request under the *Freedom of Information and Protection of Privacy Act* with Fairview College for access to information relating to a workplace conflict of interest allegation against him. The College released records to the Applicant in a severed form. The Applicant requested a review of the College's response. The Applicant also filed two privacy complaints against the College. The Adjudicator confirmed the College's severing of the information and found that the College had not breached Part 2 of the Act.

Statutes cited: *Colleges Act*, R.S.A. 2000, c. C-19, section 14; *Employment Insurance Act*, S.C. 1996, c. E-23, sections 51, 135; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, sections (1)(n), 24(1)(b), 27(1)(a) and (b)(iii), 40(1)(f)(h)(x), 40(4), 71(1), 72.

Authorities cited: AB: Orders 96-017, 96-020, 97-004, 99-013.

Cases cited: *Solosky v. The Queen* (1980), 1 S.C.R. 821.

I. BACKGROUND

[para. 1.] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Fairview College (the "Public Body") for records relating to a workplace conflict of interest allegation made against him. The Public Body released records to him in a severed form. The Applicant requested that the

Commissioner's office review the Public Body's response. Review file #2540 was opened.

[para. 2.] The Commissioner's office then received two privacy complaints from the Applicant relating to the Public Body. The Applicant alleged that the Public Body improperly disclosed his personal information to certain staff and members of the Public Body's Board of Governors during a Board meeting. The Applicant also alleged that persons in the Human Resources office of the Public Body improperly disclosed the Applicant's personal information to a Human Resources Development Canada Officer investigating his claim for employment insurance benefits (the "HRDC Officer"). The Commissioner's office opened review file numbers #2572 and #2573.

[para. 3.] One written inquiry was set down to deal with the three matters.

II. RECORDS AT ISSUE

[para. 4.] The Public Body severed information from the following records: page 3, 12-16, 37, 38, and the unnumbered page which precedes page 12. It applied section 27(1)(a) (solicitor-client privilege) to all of that information. In the alternative, the Public Body applied section 27(1)(b)(iii) to pages 12 through 16 of the records. In the further alternative, the Public Body claimed that section 24(1)(b) applied to pages 12 through 16.

III. ISSUES

[para. 5.] The issues in this inquiry are:

- A. Did the Public Body properly apply section 27(1)(a) and section 27(1)(b)(iii) of the Act to the records (#2450)?
- B. Did the Public Body properly apply section 24(1)(b) of the Act to the records (#2450)?
- C. Did the Public Body disclose the Applicant's personal information in contravention of Part 2 of the Act(#2572, #2573)?

[para. 6.] The Applicant raised new issues in his submission. To begin with, I have no jurisdiction to deal with his allegations of defamation. The Applicant did not object to the issues as they were set out in the Notice of Inquiry given to him before the inquiry. As the accuracy and correction of the records were not issues when this inquiry was set down, and the Applicant failed to raise them in a timely fashion, I will not add them to this inquiry.

IV. DISCUSSION OF THE ISSUES

Issue A. Did the Public Body properly apply section 27(1)(a) and section 27(1)(b)(iii) of the Act to the records?

i. The Law

[para. 7.] These are the relevant provisions of section 27(1):

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...
- (b) information prepared by or for
...
(iii) an agent or lawyer of a public body,
in relation to a matter involving the provision of legal services...

[para. 8.] The Public Body refused to provide the Applicant access to the severed information. Under section 71(1) of the Act, it bears the burden of proving that section 27(1) applies to the records.

ii. Summary of major submissions of the parties

[para. 9] The Public Body argues that it was entitled to refuse to disclose the information to the Applicant, as the information is subject to either solicitor-client privilege under section 27(1)(a), or was prepared by the Public Body's lawyer in relation to a matter involving the provision of legal services, engaging section 27(1)(b)(iii). The Public Body submitted an affidavit of the Manager of Human Resources for the Public Body (the "Manager"). The Manager deposed that she retained the legal services of a law firm and sought legal advice and assistance in regard to the conflict of interest investigation, on behalf of the Public Body. A stream of solicitor-client advice flowed between the Public Body and its legal counsel before, during and after the investigation. The Manager deposed that at all times it was intended that the advice obtained and reflected in the documents would remain confidential.

[para. 10.] The Applicant stated in his submission: "I have no doubt that the College followed legal advice for every step of this inquiry and subsequent action, and as such has merit to apply section 27 and 24 of the Act." He disputes the confidentiality of the information, arguing that the Public Body made the information public when it showed a record to staff employed by the Public Body.

iii. Discussion

[para. 11.] Section 27(1)(a) and (b)(ii) are discretionary provisions. This means that I must determine two things: first, whether the information that is severed comes within one of the categories of privileged information; and, if it does, whether the Public Body properly exercised its discretion against disclosure.

Section 27(1)(a)

[para. 12.] Section 27(1)(a) pertains to information covered by solicitor-client privilege. Orders 96-017 and 99-013 follow the test for solicitor-client privilege laid down in *Solosky v. The Queen* (1980), 1 S.C.R. 821. In *Solosky* the Supreme Court of Canada held that solicitor-client privilege must be claimed document by document, and that each document must meet the following criteria:

- a. it must be a communication between a solicitor and a client;
- b. which entails the giving or seeking of legal advice; and
- c. is intended to be confidential by the parties.

[para. 13.] Section 27(1)(a) (previously numbered as section 26(1)(a)) encompasses solicitor-client communications in any form: Order 99-013. It has been held that notes documenting legal advice given orally to a client fall within the privilege: Order 99-013. It has also been held that a document passed between employees of an organization which transmits or comments on a privileged communication is also privileged: Order 96-020.

[para. 14.] The affidavit evidence of the Manager satisfies me that the Public Body retained legal counsel and obtained legal advice throughout the course of the conflict of interest investigation and its culmination. After reviewing the records and the law cited at paragraphs 12 and 13 of this Order, I find that section 27(1)(a) was properly applied by the Public Body to the severed information in the following records: page 3, the unnumbered page preceding page 12, page 37, and page 38. However, I am not satisfied that section 27(1)(a) applies to pages 12 through 16 of the records. Therefore, I will examine the Public Body's alternate claim under section 27(1)(b)(iii) for this information.

Section 27(1)(b)(iii)

[para. 15.] Section 27(1)(b)(iii) has a broader scope than section 27(1)(a). It applies to "any law-related service performed by a person licensed to practice law": see Order 96-017. Although I cannot disclose information that the Public Body is entitled to withhold, I can say that the contents of the record, the letterhead found on the unnumbered page preceding page 12, the date of that record, and the record following it, satisfy me that the information in these records was prepared by legal counsel for the Public Body within the meaning of section 27(1)(b)(iii).

[para. 16.] In the Applicant's submissions, he contends that when the Manager disclosed information to a Dean, among others, the information lost its confidentiality, and by implication its privileged status as well. The burden of proof to establish waiver of legal privilege lies upon the Applicant. I prefer the evidence of the Public Body on how and to whom the information was circulated. I do not agree that disclosing information to staff in the Public Body amounted to making the information public. The evidence of the Public Body is that the information remained within the organization. There is no waiver of privilege in this case, where legal advice or documents prepared by the lawyer are circulated within the Public Body. The information remains confidential.

[para. 17.] I must still consider the Public Body's decision to exercise its discretion against disclosing the information to the Applicant. The Public Body justifies its decision on the basis that it had already disclosed a substantial amount of information to the Applicant in response to his access request. In effect, it complied with the core purpose of the Act, which is to afford an applicant access to the records of the Public Body, subject to limited and specific exceptions. The Applicant contends that during the investigation he was led to believe that he would have access to some of the severed information. However, I note that the evidence indicates that there was, at best, a tentative agreement "in principle" on access to these records. The Applicant's own evidence is that he was subsequently asked to put the request for access in writing, and it was denied. This happened before he made his access request. Given all of the evidence before me, and after considering the objects and purposes of the Act, I find that the Public Body properly exercised its discretion against disclosing the information to the Applicant.

[para. 18.] In summary, I find that the Public Body properly applied section 27(1)(a) to pages 3, 37, 38, and the unnumbered page which precedes page 12. I find that the Public Body properly applied section 27(1)(b)(iii) to pages 12 through 16.

Issue B. Did the Public Body properly apply section 24(1)(b) of the Act to the records (#2450)?

[para. 19.] As I have accepted the section 27(1)(b)(iii) claim for the information found in pages 12 through 16 of the records, I do not need to consider issue B.

Issue C. Did the Public Body disclose the Applicant's personal information in contravention of Part 2 of the Act?

i. The Law

[para. 20.] The relevant provisions of section 40 of the Act are these:

40(1) A public body may disclose personal information only

.....

- (c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,
 - ...
 - (f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,
 -
 - (h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member,
 -
 - (x) for the purpose of managing or administering personnel of the Government of Alberta or the public body,
 - ...
- (4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para. 21.] The Act is silent on which party bears the burden of proof in a breach of privacy case. Following the rationale for allocating the burden of proof laid out in Order 97-004, as the Applicant raised the issue, he has the initial burden to establish that his personal information was disclosed as he alleged. If some disclosure of personal information is proven, then the burden shifts to the Public Body to justify the disclosure(s) under the Act.

ii. Summary of major submissions of the parties

Review File #2572

[para. 22.] The Applicant argues that the Public Body breached the Act by disclosing his personal information to staff and members of the Public Body’s Board of Governors (the “Board”) who had no involvement in the conflict of interest investigation, and were not responsible for his terms of employment with the Public Body. The Applicant argues: “the parties to whom information about me was disclosed do not receive confidential information about other staff members from college executives. They had no right to receive confidential information about me.” The Applicant is also concerned that the Public Body disclosed a report and other information about the Applicant’s resignation to the Public Body’s Board of Governors the day before he formally submitted his letter of resignation to the College.

[para. 23.] The Public Body argues that the Applicant’s submission is “filled with a number of allegations but no specific details are provided, including names of the persons who provided him the information and other particulars surrounding the disclosure of such information to him.” The Public Body relies upon the affidavit evidence of the Manager, who deposed that she disclosed the Applicant’s personal information to two

administrative staff members, who saw the information at pages 12 to 16 of the records, for the purpose of filing the information on the Applicant's personnel file. The Manager also deposed that she recalls speaking in her office to the Dean in question after the Applicant's resignation. The Manager deposed that the Applicant had been working on a number of projects for the Department. In response to the Dean's expressed concerns about the Applicant's departure, the Manager deposed that she said that a legitimate investigation had been conducted, and showed the Dean a copy of the information contained in pages 12 to 16 of the records. The Public Body argues that these disclosures are authorized under section 40(1) (x) of the Act.

[para. 24.] The Public Body also admits it disclosed information about the investigation to members of its Board of Governors (the "Board"), during the *in camera* portion of a Board meeting held on May 16, 2002. It argues that the Board members are employees or officers of the Public Body, and that the disclosure of the Applicant's personal information is authorized under section 40(1)(h) and (x) of the Act, read with section 14 of the *Colleges Act*.

[para. 25.] In support of that argument, the Public Body submitted an affidavit sworn by a member of the Public Body's Board (the "Board Member"). In his affidavit, the Board Member reviewed his understanding of the duties of a Board under section 14 of the *Colleges Act*. These duties include the following: a Board must ensure that the business and affairs of a Public Body are conducted in a manner that is consistent with the *Colleges Act*. A Board is also responsible for the expenditures and operation of a Public Body. The Board Member deposed that the President of the Public Body, or his designate, is required to advise the Board about human resources issues that may have a financial impact on the Public Body, and matters which may result in litigation. The Board Member deposed that no employee or officer of the Public Body disclosed personal information about the Applicant during the public portion of a Board meeting held on May 16, 2002. He deposed that the Applicant's personal information was disclosed by the Vice-President Academic of the Public Body to Board members during the *in camera* portion of the May 16, 2002 meeting.

Review File #2573

[para. 26.] The Applicant's major argument is this:

I feel the College should only disclose the details of the cessation of my employment as indicated in the RELEASE [capitals in the original] signed by the Manager Human Resources and myself. The speculation that has been shared with an outside agency about misconduct of employment is inaccurate and does not reflect the positive contribution I made to the institution.

[para. 27.] The Public Body argues that disclosure of the Applicant's personal information is authorized under section 40(1)(f). The Manager's evidence is that she was contacted by the HRDC Officer examining the Applicant's claim for employment insurance benefits and his Record of Employment. The HRDC Officer asked the Manager why the Public Body would have paid the Applicant a retiring allowance if he had "quit." The Manager deposed that she replied that the Public Body had sought the

Applicant's resignation because of a workplace conflict of interest, and that the Public Body would have terminated his employment if he had not resigned. The Manager deposed that she believed she was obligated to answer the questions of the HRDC Officer. The Public Body submitted portions of the *Employment Insurance Act* which set out how a claim for employment insurance benefits is processed.

iii. Discussion

[para. 28.] The threshold issue in a breach of privacy complaint is whether the information at issue is a complainant's personal information, within the meaning of section 1(n) of the Act. Here, the parties agree that the Applicant's personal information is at issue. However, they differ on how that personal information was disclosed, and to whom. The Applicant did not provide clear and specific evidence in support of his allegations in these two complaints. Because the Public Body's evidence was candid, specific and provided in the form of affidavits from individuals with personal knowledge of the disclosures, I prefer its evidence.

Review File #2572

[para. 29.] One of the core functions of a Human Resource office is to maintain current employment-related information about an organization's employees. There is nothing improper in the Manager disclosing information about the Applicant's conflict of interest to employees whose job is to file personnel-related information. The disclosure is necessary to the sound management and the administration of personnel within the Public Body. I am satisfied that section 40(1)(x) authorizes the disclosure. I am also satisfied that the extent of the disclosure was necessary to enable the Public Body to carry out the stated purposes in a reasonable manner, as per section 40(4) of the Act.

[para. 30.] The Public Body justified the Manager's disclosure of the Applicant's personal information to the Dean on the basis that the Applicant had been doing work in the Dean's area of responsibility. The Applicant stated in his submission that he hired staff from the Dean's department, and was working with the Coordinator and various staff from the department on several initiatives. Although the parties agree that Dean had no direct authority over the Applicant, the Applicant admitted that he did work in the Dean's area of responsibility. It makes sense to me that the Public Body would disclose the Applicant's personal information to a person in the Dean's position, as the Dean was a senior administrator who was losing the services of a significant employee in his area. As part of a responsible approach to management, the Public Body responded to the Dean's expressed concerns about the Applicant's departure by giving the Dean the opportunity to read some information and understand the Public Body's detailed rationale for its actions. The Dean's response to that offer does not determine whether or not it was a breach of the Act. I accept the argument of the Public Body that section 40(1)(x) authorizes the disclosure of the Applicant's personal information in pages 12 through 16 of the records to Dean. I am also satisfied that the extent of the disclosure was necessary to enable the Public Body to carry out the stated purposes in a reasonable manner, as per section 40(4) of the Act.

[para. 31.] As for the disclosures of the Applicant's personal information to members of the Board of Governors, the Public Body did not clarify whether it was arguing that the Board members were "employees or "officers" of the Public Body. It did not offer a definition of what it interpreted an "officer" to be for the purposes of section 40(1)(h).

[para. 32.] Black's Law Dictionary (Sixth Edition) defines an "officer" as: "[P]erson holding office of trust, command or authority in corporation, government...or another institution". On the basis of this definition, I find that the Board members are "officers" for the purposes of the Act, since they hold an authoritative office that is related to the overall management and administration of the Public Body at the level stated in the *Colleges Act*. I am satisfied that disclosure of the Applicant's personal information to members of its Board is authorized under section 40(1)(h) of the Act, that the Act permits the Board to know about the Applicant's alleged conflict of interest and imminent resignation, and that the disclosure is consistent with section 40(4) of the Act. The timing of the disclosure of that information is immaterial. Given this determination, I do not need to examine the Public Body's claim under section 40(1)(x) of the Act.

[para. 33.] As for the disclosure of the Applicant's personal information to the HRDC Officer, the release signed by the Applicant and the Public Body settles the employment relationship and any legal actions between the parties which might arise out of that relationship. The release is just a contract. It cannot be read to frustrate the operation of a federal law, in this case the *Employment Insurance Act*. Further, the release does not contain all of the information needed to assess a claimant's eligibility for Employment Insurance benefits. The process for assessing a claim for employment insurance benefits puts the burden on a claimant to prove entitlement. It contemplates an investigation process in which additional information needed to process a claim is gathered from a claimant and his ex-employer. I accept the argument of the Public Body set out at paragraphs 37 to 42 of its submission that the release of the Applicant's personal information by the Public Body is authorized as a result of the *Employment Insurance Act*. I accept the Public Body's argument that section 51 of the *Employment Insurance Act* authorizes employers to disclose personal information of ex-employees to HRDC officers processing claims:

51. If, in considering a claim for benefits, the Commission finds an indication from the documents relating to the claim that the loss of employment resulted from the claimant's misconduct or that the claimant voluntarily left employment, the Commission shall

(a) give the claimant and the employer an opportunity to provide information as to the reasons for the loss of employment; and

(b) if the information is provided, take it into account in determining the claim.

I also accept the Public Body's argument that the section 135 of the federal Act required the Manager to answer the questions of the HRDC officer, which necessitated the disclosure of the Applicant's personal information.

[para. 34.] The process set out under the federal Act is intended to allow the federal government to probe the claimant's employment history, and gather more information than could be provided by an employer on a Record of Employment. Accordingly, I find that disclosure of the Applicant's personal information to the HRDC Officer was authorized under section 40(1)(f) of the Act, which permits disclosure where it is authorized by a federal enactment. I am also satisfied that the extent of the disclosure was necessary to enable the Public Body to carry out the stated purposes in a reasonable manner, as per section 40(4) of the Act.

V. ORDER

[para. 35.] I make the following Order under section 72 of the Act.

[para. 36.] On issue A, I find that the Public Body properly applied section 27(1)(a) to pages 3, 37, 38, and the unnumbered page which precedes page 12. I find that the Public Body properly applied section 27(1)(b)(iii) to pages 12 through 16. I confirm the actions of the Public Body.

[para. 37.] Given my determination of issue A, I do not need to consider issue B.

[para. 38.] On issue C, I find that the Public Body did not disclose the Applicant's personal information in contravention of Part 2 of the Act.

Dave Bell

Adjudicator