

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2009-042

June 30, 2010

### ALBERTA HEALTH SERVICES

Case File Number F4579

Office URL: [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant asked the Calgary Health Region, which is now part of Alberta Health Services (the “Public Body”), for records pertaining to complaints that he had filed with it. The Public Body withheld some of the requested information under the *Freedom of Information and Protection of Privacy Act* (the “Act”), on the basis that it was exempted from disclosure under section 17 (disclosure harmful to personal privacy), section 24 (advice, etc.) and section 27 (privileged information, etc.).

The Adjudicator found that disclosure of the responsive information that the Public Body withheld under section 17 of the Act would not be an unreasonable invasion of the personal privacy of third parties. This was because the information was either the Applicant’s own personal information, the personal information of a third party who consented to and requested disclosure, or information that merely revealed the work-related activities of third parties. The Adjudicator accordingly ordered the Public Body to disclose the information.

The Adjudicator found that the Public Body properly applied section 24 of the Act to most of the information that it withheld under that section, as disclosure could reasonably be expected to reveal advice or recommendations developed by or for the Public Body under section 24(1)(a), and/or consultations or deliberations involving its officers or employees under section 24(1)(b). The Adjudicator confirmed the Public Body’s decision to withhold the information. In a few instances, the Public Body improperly

withheld some non-substantive information under section 24, so the Adjudicator ordered the Public Body to disclose it.

The Adjudicator found that the Public Body properly applied section 27(1)(a) of the Act to the records that it withheld under that section, as it provided sufficient argument and evidence to establish that the information was subject to solicitor-client privilege. The Adjudicator confirmed the Public Body's decision to withhold the information.

**Statutes and Regulations Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 1(n)(vi), 1(n)(viii), 2(e), 17, 17(2)(a), 17(4), 17(5), 18, 24, 24(1), 24(1)(a), 24(1)(b), 24(2), 27, 27(1)(a), 27(1)(b), 27(1)(c), 40(1)(c), 71(1), 71(2), 72, 72(2)(a) and 72(2)(b); *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(k), 1(1)(k)(i) and 16(1); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 7(3) and 7(4).

**Authorities Cited:** **AB:** Orders 96-006, 96-017, 96-019, 99-001, 99-013, 99-027, 2001-025, F2002-028, F2004-003, F2004-026, F2005-008, F2006-030, F2007-013, F2008-028 and F2008-031; *Alberta (Director of Child Welfare) v. C.H.S.*, 2005 ABQB 695. **CAN:** *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821. **Other:** Office of the Information and Privacy Commissioner (Alberta), *Solicitor-Client Privilege Adjudication Protocol* (Edmonton: October 24, 2008).

## I. BACKGROUND

[para 1] In February 2006, the Applicant began to receive treatment from a clinic of the Calgary Health Region. In May 2006, he was discharged from the clinic because staff felt that he was displaying minimal progress. The clinic recommended other treatment options and steps to be followed by the Applicant, and invited him to seek a reassessment by the clinic once he followed these other recommendations. The Applicant then lodged a complaint regarding the manner in which he was discharged.

[para 2] The Calgary Health Region tried to address the Applicant's complaint, but he was not satisfied. Between 2006 and 2008, he continued to contact staff in order to have his initial complaint, and other complaints, addressed. The relationship between the Applicant and the Calgary Health Region deteriorated to the point of staff alerting Security Services, Legal Services and possibly even the police.

[para 3] In a Request to Access Information received by the Calgary Health Region on June 5, 2008, the Applicant asked for "[a]ll records pertaining to treatment and all records pertaining to complaints filed with [the] Calgary Health Region." The Calgary Health Region is now part of Alberta Health Services (the "Public Body").

[para 4] By letter dated July 17, 2008, the Public Body responded to the Applicant under the *Freedom of Information and Protection of Privacy Act* (the "Act"). It granted the Applicant access to most of the information that he requested, but withheld other information on the basis that it was excepted from disclosure under section 17 (disclosure

harmful to personal privacy), section 18 (disclosure harmful to individual or public safety), section 24 (advice, etc.) and section 27 (privileged information, etc.).

[para 5] By letter dated July 21, 2008, the Applicant asked the Commissioner to review the Public Body's decision to refuse access to the information that it withheld. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was partly successful, and the Public Body disclosed additional information to the Applicant by letter dated November 7, 2008.

[para 6] Because the Public Body continued to withhold some of the requested information, the Applicant requested an inquiry by letter dated November 27, 2008. A written inquiry was set down.

## **II. RECORDS AT ISSUE**

[para 7] The Public Body submitted approximately 375 pages of records that were responsive to the Applicant's access request. The records at issue consist of information that it continues to withhold from the Applicant, in whole or in part, on approximately 50 of those pages.

[para 8] The Public Body included, in its submissions, an index setting out the information that it continues to withhold from the Applicant, and the sections of the Act under which the information is being withheld. The index refers to page numbers among "2006 Records", "2007 Records" and "2008 Records". In this Order, I will refer to those sets of records and page numbers.

## **III. ISSUES**

[para 9] The Notice of Inquiry, dated July 3, 2009, set out the following issues:

Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the records/information?

Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?

Did the Public Body properly apply section 27 of the Act (privileged information, etc.) to the records/information?

[para 10] In its submissions, the Public Body states that it is no longer relying on section 18 to withhold any information. The issue under section 18 will therefore not be discussed in this Order.

[para 11] In his submissions, the Applicant raises concerns about the accuracy of some of the information that he received from the Public Body. He also raises concerns about the use and disclosure of information by the Public Body. By letter dated October 15, 2009, this office advised the Applicant that the foregoing matters were outside the scope of the inquiry, as his request for review of July 21, 2008 was only about the Public Body's decision to withhold information. This office advised the Applicant how he could go about addressing his other concerns.

[para 12] In his access request, the Applicant stated that he was making his request under the *Health Information Act* (the "HIA"). The Public Body responded under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act"). In a telephone conversation with this office, the Applicant questioned whether the Public Body should have responded to him under the HIA.

[para 13] Given the scope of the Applicant's request for records regarding both his "treatment" and his "complaints", and my review of the package of responsive records submitted by the Public Body, I find that some of the information requested by the Applicant was his health information to which the HIA applies, and other information requested by him was his personal information or non-personal information to which the FOIP Act applies.

[para 14] However, the purpose of the present inquiry is to determine whether the Public Body properly withheld the information that it withheld. On my review of the withheld information, I find that it does not consist of the Applicant's "health information" as defined under section 1(1)(k) of the HIA, and to which that Act applies. The information that is the Applicant's health information – namely his "diagnostic, treatment and care information" under section 1(1)(k)(i) of the HIA – was disclosed to him by the Public Body.

[para 15] Rather, the withheld information consists of information in the context of the Public Body's non-health-related dealings with the Applicant, and information about the relationship between the Public Body, the Applicant and the Applicant's family members as the Applicant's complaints were being addressed. In this particular inquiry (although perhaps not others, depending on the facts and situation), the records at issue are in the context of a complaint resolution process that was not, or at least was no longer, in relation to the Applicant's treatment or care, or in relation to health services provided to him. While the Applicant's initial complaint was about the way he was discharged from a clinic, the records at issue are about actions of the Public Body and procedural matters not related to the Applicant's health.

[para 16] I accordingly find that the FOIP Act applies to the information that the Public Body withheld from the Applicant in this inquiry. The information consists of the Applicant's personal information as defined under section 1(n) of the FOIP Act, the personal information of third parties, and non-personal information about the Public Body as it attempted to resolve the Applicant's complaints.

[para 17] Section 16(1) of the HIA states that, if a request is made under the HIA for access to a record that contains information to which the FOIP Act applies, the part of the request that relates to that information is deemed to be a request under the FOIP Act and the FOIP Act applies to that part of the request as if it had been made under the FOIP Act. Given my finding that the records at issue in this inquiry are subject to the FOIP Act, the FOIP Act applies even though the Applicant referred to the HIA in his access request.

#### **IV. DISCUSSION OF ISSUES**

##### **A. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?**

[para 18] Section 17 of the Act reads, in part, as follows:

*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.*

*(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

*(a) the third party has, in the prescribed manner, consented to or requested the disclosure,*

...

*(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

*(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*

...

*(g) the personal information consists of the third party's name when*

*(i) it appears with other personal information about the third party, or*

*(ii) the disclosure of the name itself would reveal personal information about the third party,*

...

*(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 the relevant circumstances, including whether*

...

*(e) the third party will be exposed unfairly to financial or other harm,*

...

*(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant...*

[para 19] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld. In the context of section 17, the Public Body must establish that the severed information is the personal information of a third party, and may show how disclosure would be an unreasonable invasion of the third party's personal privacy. Having said this, section 71(2) states that, if a record contains personal information about a third party, it is up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy. Because section 17 sets out a mandatory exception to disclosure – and section 2(e) provides for independent reviews of the decisions of public bodies – I must also independently review the information in the records at issue and determine whether disclosure would or would not be an unreasonable invasion of personal privacy.

### **1. The information at issue**

[para 20] The Public Body relied on section 17 of the Act to withhold all or part of the information on the following pages:

2006 Records – pages 10, 23, 28, 81, 98, 103, 115A, 155, 196 and 210

2007 Records – pages 5, 7-9, 13, 17 and 22

2008 Records – page 50

[para 21] On many of the foregoing pages, the Public Body withheld the information on the additional basis that it was not responsive to the Applicant's access request. I find that this was the proper basis for withholding some of the information, as the information pertains to the treatment of other individuals or complaints made by other individuals, not the Applicant's treatment or complaints made by him.

[para 22] Because much of the information on the foregoing pages is non-responsive, it is only necessary for me to review the application of section 17 to the responsive information withheld on the following pages:

2006 Records – pages 23, 28, 81, 98 and 155

[para 23] The Public Body withheld all of page 28, which consists of notes following a meeting between the Applicant's brother and the staff of the clinic attended

by the Applicant. The names of the staff are their personal information under section 1(n)(i) of the Act, but I find that no other information is their personal information, as it merely reveals the performance of work-related activities. I considered whether information in the fifth- and eighth-to-last lines on page 28 added a personal dimension to the work-related activities of staff, so as to render some of the information their “personal information” (Order F2006-030 at paras. 12, 13 and 16). I decided otherwise, as the information contains insufficient background facts or details, and disclosure is unlikely to have any adverse effect. Because page 28 contains only the names of staff acting in their work-related capacities, and no other personal information about them, I conclude that disclosure of the names of the staff would not be an unreasonable invasion of their personal privacy, in accordance with principles articulated in previous orders of this office (see Order F2008-028 at paras. 53 to 55).

[para 24] Other information on page 28 is the personal information of the Applicant, namely information about his health and health care history under section 1(n)(vi) of the Act. The Public Body cannot withhold the personal information of the Applicant under section 17, as it is not third party personal information.

[para 25] Finally, some of the information on page 28 is the personal information of the Applicant’s brother, primarily opinions about him under section 1(n)(viii) of the Act. I find that it would not be an unreasonable invasion of the personal privacy of the Applicant’s brother to disclose his personal information, as the Applicant’s brother has consented to and requested disclosure of his own personal information under section 17(2)(a). With his submissions, the Applicant included a letter from his brother, in which his brother indicates that he is aware that the records at issue contain his own personal information and states that the Applicant should get the balance of the records withheld by the Public Body.

[para 26] The Public Body argues that the letter from the Applicant’s brother is irrelevant to the consideration of the issues in this inquiry, as the brother has not filed a complaint with the Public Body, is not seeking access to information, and therefore has no status in this matter. However, the Public Body overlooks the relevance of a third party’s consent or request in relation to disclosure of his or her own personal information under section 17(2)(a). As just explained, the letter from the Applicant’s brother constitutes his consent to and request for disclosure. It is in the prescribed manner set out under sections 7(3) and (4) of the *Freedom of Information and Protection of Privacy Regulation*, in that it is in writing and signed.

[para 27] Because section 17(2)(a) applies, to the effect that disclosure of the personal information of the Applicant’s brother would not be unreasonable invasion of his personal privacy, none of the Public Body’s submissions under section 17(4) (presumptions against disclosure) and 17(5) (relevant circumstances weighing against disclosure) are relevant to disclosure of the personal information of the Applicant’s brother.

[para 28] The Public Body withheld the upper portion of page 81, which consists of notes in relation to a meeting between the Applicant, his brother and clinic staff. It also withheld a small amount of information on each of pages 23, 98 and 155. For the same reasons set out above, I find that section 17 does not apply to the information withheld on page 23, the line at the top of page 81, the information on the right hand side of page 81, the line withheld on page 98, and the line withheld on page 155. All of this information is either the Applicant's personal information, the personal information of the Applicant's brother who has consented to and requested disclosure, or information that merely reveals the performance of work-related activities of staff such that disclosure would not be an unreasonable invasion of their personal privacy.

[para 29] I find that the withheld information on the left hand side of page 81 is not responsive to the Applicant's access request, as it refers to "[an]other case" and is about individuals who appear to be unconnected to matters involving the Applicant.

## **2. Conclusion under section 17**

[para 30] I conclude that section 17 of the Act does not apply to any of the responsive information that the Public Body withheld under that section, as disclosure would not be an unreasonable invasion of the personal privacy of third parties. The Public Body therefore did not have the authority to withhold the information under that section.

[para 31] In his rebuttal submissions, the Applicant made various arguments about why he should be entitled to the third party personal information in the records at issue. I do not need to address these arguments, given that I have just found that the information should be disclosed to him.

### **B. Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?**

[para 32] Section 24 of the Act reads, in part, as follows:

*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,*

...

(2) *This section does not apply to information that*

*[various types of information, none of which are at issue here]*

[para 33] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 24.

[para 34] The Public Body relied on section 24(1)(a) to withhold information from the Applicant, in whole or in part, on the following pages:

2006 Records – pages 60, 149, 208, 210 and 212-124

2007 Records – pages 17, 33-34 and 36A

2008 Records – pages 14, 18, 21, 30, 37, 49 and 63-64

[para 35] The Public Body relied on sections 24(1)(b) to withhold information from the Applicant, in whole or in part, on the following pages:

2006 Records – pages 60, 103, 149, 208, 210, 212-214, 254 and 258

2007 Records – pages 36, 36A and 37

2008 Records – pages 14, 18, 21, 30, 37, 46-48, 55 and 63-64

[para 36] Section 24(2) of the Act states that section 24 does not apply to certain information, meaning that a public body cannot withhold that information in reliance on section 24(1). I considered whether any of the provisions of section 24(2) were relevant in this inquiry, but found that none of them were.

### **1. Advice, etc. and consultations or deliberations**

[para 37] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options (“advice, etc.”), the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person’s position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2007-013 at para. 107).

[para 38] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations

involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council. The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

[para 39] The Public Body submits that the information that it withheld from the Applicant under section 24 was sought or expected from various individuals as part of their regular duties and the normal chain of command at the Public Body. In its submissions, it lists these individuals and their roles in the handling, review and investigation of the Applicant's complaints, including security-related issues that arose. It explains that the information was exchanged in the context of investigating the Applicant's complaints, and was for the purpose of determining the action that would be taken with respect to that ongoing investigation. It says that the communications involved individuals empowered to pursue the investigation and take or implement action in response.

[para 40] I find that the information that the Public Body withheld under section 24 of the Act was sought or expected from or was part of the responsibilities of various individuals, by virtue of their positions, and was directed toward other individuals who could take or implement action. As for whether the specific information at issue was directed toward an action – which includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29) – the Public Body made detailed submissions as to how the information on each specific page constitutes advice or recommendations under section 24(1)(a), or consultations or deliberations under section 24(1)(b). I accepted these more detailed submissions *in camera* because they reveal the information that was withheld.

[para 41] On my review of the information at issue, I find that almost all of it meets the test for withholding information under section 24(1)(a) and/or section 24(1)(b). (The exceptions are discussed below.) The information relates to a suggested course of action, which is to be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order 99-001 at para. 17; Order F2007-013 at para. 108). The Public Body withheld the substantive parts of communications that expressly or implicitly seek an opinion as to the appropriateness of particular proposals, discussions or considerations of the reasons for and against particular actions or decisions, and sufficiently interwoven background information (Order F2004-026 at para. 90).

[para 42] Section 24(1) does not generally apply to information that merely reveals that advice, etc. was sought or given, consultations or deliberations took place, or that particular individuals or topics were involved, when the information does not reveal the substance of the discussions; there may be cases where some of the foregoing items reveal the content of advice, etc., or consultations or deliberations, but that must be demonstrated for every case for which it is claimed (Order F2004-026 at paras. 71 and 75).

[para 43] Here, the Public Body usually did not withhold the foregoing type of non-substantive information. However, I find that it improperly withheld the dates and subject lines, and the names and e-mail addresses of the senders and recipients of e-mail correspondence on pages 254 and 258 of the 2006 Records, pages 36 and 36A of the 2007 Records, and pages 46-48 of the 2008 Records. I considered whether the names, dates or subject lines revealed the substance of advice, etc., or the substance of consultations or deliberations, but concluded otherwise. This information is no different than information that the Public Body disclosed on other pages where it withheld the content of e-mail correspondence. I also considered whether disclosure of the names or e-mail addresses (all of which are business e-mail addresses) would be an unreasonable invasion of personal privacy under section 17 of the Act, but concluded otherwise, as the names and business contact information merely reveal that individuals acted in their work-related capacities.

## **2. Conclusion under section 24**

[para 44] I conclude that the dates, subject lines, and names of the senders and recipients of certain e-mail correspondence that was withheld by the Public Body do not reveal advice, etc. under section 24(1)(a), or consultations or deliberations under section 24(1)(b). The Public Body therefore did not have the discretion to withhold this information under section 24 of the Act.

[para 45] I find that the remaining information at issue in this part of the Order falls under section 24(1)(a) and/or 24(1)(b). The Public Body therefore had the discretion to withhold it. A public body exercising its discretion relative to a particular provision of the Act should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 46] The Public Body submits that, in deciding which records to disclose, it reviewed them, disclosed a great deal of information, and ultimately withheld only selective portions of the records. It says that, in considering the application of section 24, it balanced the Applicant's right of access against the impact of disclosure on the operations of the Public Body and the confidential nature of the information. In an affidavit sworn by the Public Body's Access and Privacy Analyst, she expands on these points by noting that disclosure of the withheld information could have an impact on the Public Body's ability to carry out decision-making processes in the future, and could make the exchange of information less candid, open and comprehensive, if employees and agents of the Public Body believed that their views would be made publicly available. The Public Body adds that it also considered whether disclosure would satisfy any need for public scrutiny of its investigative process.

[para 47] The foregoing satisfies me that the Public Body properly exercised its discretion to withhold the information that I have found to fall under section 24(1)(a) and/or section 24(1)(b).

[para 48] The Applicant submits that the Public Body is a public agency and that it is in the public interest that he, as a patient, and others know whether the Public Body is misusing taxpayer money to cover up misconduct of its employees, such as the alleged provision of false statements about the Applicant to police. The Applicant argues that, in his experience, the personal concerns of the Public Body's employees override the well-being of patients. He says that the Public Body has refused to fairly investigate his concerns, so that his only recourse is to request all records and proceed with his concerns through other avenues.

[para 49] The Applicant's submissions do not change my conclusion that the Public Body properly exercised its discretion under section 24 of the Act. The Public Body has disclosed most of the information relating to its investigation of the Applicant's complaints, and has withheld only a minimal amount of information that would reveal advice, etc. or consultations or deliberations. Disclosure of the withheld information would not serve to scrutinize the particular matters raised by the Applicant.

**C. Did the Public Body properly apply section 27 of the Act (privileged information, etc.) to the records/information?**

[para 50] Section 27 of the Act reads, in part, as follows:

*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.*

[para 51] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 27.

[para 52] The Public Body relied on section 27 to withhold information from the Applicant on the following pages:

2006 Records – pages 34, 36, 132, 134, 136-137, 148, 150-151, 163-164, 225, 233-235, 248 and 256

[para 53] Under this office's *Solicitor-Client Privilege Adjudication Protocol* (the "SCP Protocol"), a public body may refuse to provide, in an inquiry, a copy of records over which it is claiming solicitor-client privilege. Here, the Public Body has not provided copies of the records to which it applied section 27.

[para 54] On my initial review of the Public Body's submissions explaining why it applied section 27, I noted that it appeared to apply sections 27(1)(b) (information prepared in relation to legal services) and/or section 27(1)(c) (information in correspondence to or from lawyers or agents) to some of the information. However, the SCP Protocol applies only to records over which solicitor-client privilege is claimed. Although information prepared in relation to legal services, and information in correspondence to or from lawyers or agents, may also be subject to solicitor-client privilege, it is not necessarily so. The Protocol does not apply to permit a public body to refuse to provide copies of records over which it is not claiming solicitor-client privilege, but is instead withholding on other grounds under section 27, including on the basis of other types of privilege. I therefore arranged for this office to ask the Public Body whether it was also claiming that solicitor-client privilege applies, under section 27(1)(a), to the records that it has not provided in this inquiry. By letter dated November 10, 2009, the Public Body responded that it was.

[para 55] The Public Body prepared a table describing the records over which it is claiming solicitor-client privilege. It also submitted relevant affidavits sworn by its Legal Counsel and by its Access and Privacy Analyst. Although the table and affidavit of the Access and Privacy Analyst were included in the Public Body's exchangeable submissions, it initially submitted the affidavit of the Legal Counsel *in camera*. I declined to accept the affidavit *in camera*, as well as most of the submissions that accompanied it. Although the affidavit and submissions provided general descriptions of the records at issue and explained why the Public Body applied section 27 to them, I did not see how they revealed the records at issue or information subject to solicitor-client privilege. As noted in this office's letter returning the affidavit and submissions to the Public Body, it is important for a public body's arguments and evidence regarding a claim of solicitor-client privilege to be exchanged with an applicant, so that the applicant

may respond, as contemplated by the SCP Protocol, by submitting opposing evidence or questions to be answered by the public body about its claim of solicitor-client privilege. The Public Body re-submitted the affidavit of its Legal Counsel and the related submissions in a form that could be exchanged with the Applicant.

[para 56] To correctly apply section 27(1)(a) in respect of solicitor-client privilege, the Public Body must meet the criteria for that privilege set out in *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 (at p. 837), in that the record must (i) be a communication between a solicitor and client; (ii) entail the seeking or giving of legal advice; and (iii) be intended to be confidential by the parties (Order 96-017 at para. 22; Order F2007-013 at para. 72).

### **1. Communication between a solicitor and client**

[para 57] The table and affidavit of the Legal Counsel provided by the Public Body indicate that many of the records were communications, by fax or e-mail, between the Legal Counsel and employees of the Public Body, for whom the Legal Counsel acts as a lawyer in the Public Body's Legal and Privacy Division. Given this, I find that most of the records are direct communications between a solicitor and client, namely those found at pages 132, 134, 136-137, 148, 150-151, 163-164, 225 and 233-235.

[para 58] The table indicates that pages 34, 36, 248 and 256 consist of handwritten notes of an employee of the Public Body in which she describes communications involving the Legal Counsel. Solicitor-client privilege may extend to an employee's notes regarding a solicitor's legal advice, and comments on that advice (Order 99-027 at para. 95), and may extend to notes "to file" in which legal advice is quoted or discussed (Order F2005-008 at para. 42). Page 148 is an e-mail between two employees of the Public Body in which one of them summarizes a communication from the Legal Counsel. Solicitor-client privilege may likewise extend to written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor (Order 99-013 at paras. 62 to 63; Order 2001-025 at para. 67).

[para 59] Given that the records withheld by the Public Body under section 27 of the Act are direct communications between the Legal Counsel and the Public Body's employees who are his clients, or are handwritten notes or e-mails discussing those communications, I find that the first criterion above is met for establishing solicitor-client privilege.

### **2. Communication entailing the seeking or giving of legal advice**

[para 60] As for whether the communications in question entail the seeking or giving of legal advice, the Public Body submits that the records contain the substance of legal opinions of the Legal Counsel regarding particular legal issues that arose during the Public Body's investigation of the Applicant's complaints. The Public Body indicates that some of these records consist of faxed correspondence between the Legal Counsel

and the employees receiving the legal opinions, as the faxed correspondence references the Legal Counsel's need for particular evidence in order to complete the legal opinions. It further explains that some of the information that it withheld consists of drafts of documents with commentary provided by the Legal Counsel.

[para 61] In his affidavit, the Legal Counsel states that he reviewed the records to which the Public Body applied section 27, and that they refer to the substance of legal advice provided by him to employees of the Public Body. He explains that, on August 8, 2006, he received an e-mail communication from an employee of the Public Body regarding the Applicant's complaints. The e-mail provided background information and attached a document about which the employee requested the Legal Counsel's legal advice. The Legal Counsel explains that, between August 8 and 11, 2006, he received additional documentation and provided more legal advice. On or about August 21, 2006, he discussed with the employee the advisability of a course of action regarding the Applicant's complaints. He states that, on September 8, 12 and 15, 2006, he was asked for, or gave, further legal advice regarding next steps, another course of action in relation to the Applicant, and a legal issue that had arisen.

[para 62] The test for legal advice is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to his or her legal advisor to determine what those legal implications might be; legal advice may be about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute (Order F2004-003 at para. 30). Given this, and on my initial review of the Public Body's submissions and the Legal Counsel's affidavit, I found that, generally speaking or for the most part, the records entailed the seeking or giving of legal advice.

[para 63] However, due to my inability to examine the records, I sought additional information from the Public Body, as contemplated by the SCP Protocol, in order to determine whether each *specific* record entailed the seeking or giving of legal advice. First, I requested further submissions and evidence explaining how solicitor-client privilege applies to pages 136-137 and 150-151, which the table indicated to be "fax transmission sheets" or "fax sheets". It was not clear to me what these sheets revealed. Second, I requested further information regarding the table's various references to "documents" or "documentation" that formed part of these fax sheets, or were attached to the e-mails found at pages 132, 134, 163-164, 225 and 233-235. It was not clear to me what this other documentation consisted of.

[para 64] The Public Body responded that the fax transmission sheets reproduce the faxed correspondence in full, and that the sheets include information beyond merely the names and business contact information of the sender and receiver, in that they also contain reference to the documentation that is being forwarded and about which legal advice is being sought. In other words, the transmission sheets reveal more than merely the fact of a communication between a solicitor and client, which arguably might not be covered by solicitor-client privilege unless that fact itself reveals something covered by solicitor-client privilege.

[para 65] As for what the faxed correspondence and other documentation consisted of, the Public Body responded that it could not provide a description without breaching solicitor-client privilege. It submitted that providing details about a document would permit identification of the document and therefore the subject-matter of the legal advice. However, it stated that all of the documentation referenced in the table was provided to or from the Legal Counsel in the furtherance of obtaining legal advice, and that the Legal Counsel was providing advice in connection with, or about, that documentation.

[para 66] The Public Body's submissions, affidavit and responses to my questions satisfy me that the faxes, e-mails and accompanying documentation sent between the Legal Counsel and employees of the Public Body entail the seeking or giving of legal advice. Because some of those communications were then summarized in an employee's handwritten notes at pages 34, 36, 248 and 256, and discussed in the e-mail between two employees at page 148, I also find that these handwritten notes and e-mail reveal legal advice. In his affidavit, the Legal Counsel states that he reviewed the handwritten notes and e-mail, determining that they indeed summarized, or were regarding, the legal advice that he had given.

[para 67] As a result of the foregoing, I find that the second criterion for establishing solicitor-client privilege is met in this inquiry.

### **3. Communication intended to be confidential**

[para 68] In his affidavit, the Legal Counsel states that it was understood by himself, and by the employees of the Public Body to whom he provided legal advice, that the communications between them were confidential. He states elsewhere that it is his understanding that the legal advice that he provides is provided on a confidential basis. In her affidavit, the Access and Privacy Analyst indicates that all creators and recipients of the records that the Public Body withheld under section 27 were either lawyers or employees of the Public Body, and not any outside parties. Given this, I find that the records were intended to be confidential, and that the third criterion for establishing solicitor-client privilege is met.

### **4. Conclusion under section 27**

[para 69] The Public Body has provided sufficient argument and evidence to establish that all of the records that it withheld under section 27 of the Act reveal a communication between a solicitor and client, entail the seeking or giving of legal advice, and are intended to be confidential. I therefore conclude that the records are subject to solicitor-client privilege.

[para 70] The Applicant has concerns that the Public Body may be using arguments about solicitor-client privilege to withhold information that should really be turned over to him. However, I have found, in this inquiry, that the privilege has been properly claimed. The Applicant further submits that there is no legitimate reason for the Public Body's employees to be discussing any aspect of his interactions with the Public Body

with someone who should not have access to information about him, including the Public Body's solicitor. However, the Public Body's employees were entitled to discuss matters pertaining to the Applicant with the Public Body's solicitor. There is a unity of interest between the Public Body, as the keeper of information about the Applicant, and its solicitor, so that disclosure from the Public Body to its solicitor should not be taken to be prevented by statute, unless that is expressly stated [see *Alberta (Director of Child Welfare) v. C.H.S.*, 2005 ABQB 695 at para. 19]. A disclosure of information about the Applicant from the Public Body's employees to the Public Body's solicitor would be authorized under section 40(1)(c) of the Act, on the basis that it is for a use consistent with the purpose of collecting the information about the Applicant [see *Alberta (Director of Child Welfare) v. C.H.S.*, 2005 ABQB 695 at para. 24].

[para 71] Due to the importance attached to solicitor-client privilege, a public body's decision to withhold information under section 27(1)(a) will be a reasonable exercise of discretion in most cases where the public body establishes that this particular privilege applies (Order F2008-028 at para. 68; Order F2008-031 at para. 82). Here, I find that the Public Body properly exercised its discretion to withhold the information that it withheld from the Applicant under section 27(1)(a). It considered that disclosure would reveal privileged legal advice, that the information was created and obtained for the confidential use of the Public Body alone, and that the records already released to the Applicant permit him to review the Public Body's resolution of his complaints, without the additional release of the privileged information. In her affidavit, the Access and Privacy Analyst adds that disclosure of the information subject to solicitor-client privilege may make employees less candid, open and thorough when they seek legal advice in the future.

## **V. ORDER**

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

[para 73] I find that some of the information withheld by the Public Body is not responsive to the Applicant's access request.

[para 74] I find that section 17 of the Act does not apply to any of the responsive information that the Public Body withheld under that section, as disclosure would not be an unreasonable invasion of a third party's personal privacy. Under section 72(2)(a), I require the Public Body to give the Applicant access to the information that it withheld on the following pages:

2006 – pages 23 (all of the information withheld), 28 (the entire page), 81 (line at the top and information on the right hand side), 98 (the line withheld) and 155 (the line withheld)

[para 75] I find that the Public Body properly applied section 24 of the Act to most of the information that it withheld under that section, as disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options

developed by or for the Public Body under section 24(1)(a), and/or consultations or deliberations involving its officers or employees under section 24(1)(b). Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the information that it withheld on the following pages, with the exception of the information noted in the next paragraph of this Order:

2006 Records – pages 60, 103, 149, 208, 210, 212-214, 254 and 258

2007 Records – pages 17, 33-34, 36, 36A and 37

2008 Records – pages 14, 18, 21, 30, 37, 46-49, 55 and 63-64

[para 76] I find that the Public Body did not properly apply section 24 of the Act to the information in the “subject”, “date”, “from”, “organization”, “to”, “sent” and “cc” lines (as the case may be) in the e-mail correspondence on pages 254 and 258 of the 2006 Records, pages 36 and 36A of the 2007 Records, and pages 46-48 of the 2008 Records, as this information does not reveal the substance of advice, etc. under section 24(1)(a), or the substance of consultations or deliberations under section 24(1)(b). Under section 72(2)(a), I require the Public Body to give the Applicant access to the foregoing information.

[para 77] I find that the Public Body properly applied section 27 of the Act to the information that it withheld under that section, as it has established that the information is subject to solicitor-client privilege under section 27(1)(a). Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the following information:

2006 Records – pages 34, 36, 132, 134, 136-137, 148, 150-151, 163-164, 225, 233-235, 248 and 256

[para 78] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub  
Adjudicator