

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-033

August 3, 2011

SUMMER VILLAGE OF GULL LAKE

Case File Number F5252

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

Summary: The Applicant made an access request to the Summer Village of Gull Lake (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for information related to two stop orders that had been issued against him. In response to the access request, the Public Body provided the Applicant with a partial copy of records. The Applicant requested a review of the Public Body’s decision.

The Adjudicator found that solicitor-client privilege and litigation privilege under section 27(1)(a) applied to the information at issue. The Adjudicator upheld the Public Body’s decision not to disclose this information to the Applicant.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(e), 24, 24(1)(a), 24(1)(b), 27, 27(1)(a), 72.

Orders Cited: AB: FOIP Orders: 96-017, 97-009, 98-017, F2003-005, F2004-003, F2005-008, F2007-008, F2007-013, F2008-028, F2010-007.

Cases Cited: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2d) 183 (C.A.); *O’Scolai v. Antrajenda*, 2008 ABQB 77; *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821; *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.).

I. BACKGROUND

[para 1] On October 5, 2007, the Public Body issued a development permit to the Applicant for tree removal. On October 16, 2009 the Public Body issued a stop order against the Applicant for contravention of that development permit. This stop order was subsequently rescinded and a new stop order was issued on November 12, 2009. The Applicant then filed an appeal of this stop order with the Subdivision and Development Appeal Board (SDAB).

[para 2] On December 2, 2009, the Applicant made an access request to the Public Body under the FOIP Act. The Applicant requested “all relevant documents” related to the stop orders that were issued against the Applicant which included the following:

- Copies of all inspection reports;
- Copies of all internal memoranda, notes, reports (before or after the issuance of the October 16, 2009 and November 12, 2009 stop orders);
- Copy of development permit 34-07
- Copies of any internal memoranda, notes or other documentation relating to the withdrawal of the October 16, 2009 stop order and the issuance of the November 12, 2009 stop order;
- Copy of a development permit issued in 2008 for tree clearing/landscaping at 107 Premier Avenue, Summer Village of Gull Lake;
- Subdivision and Development Appeal Board Bylaw No. 294; and
- Minutes appointing the Subdivision and Development Appeal Board of the Public Body as at October 16, 2009 and November 12, 2009.

[para 3] The Applicant requested this information from October 5, 2007, the date of Development Permit 34-07, to December 2, 2009, the date the access request was made.

[para 4] On December 14, 2009, the Public Body provided the Applicant with 66 pages of records, but withheld 94 pages of records. On January 11, 2010, the Public Body partially disclosed, to the Applicant, an additional 36 pages of records.

[para 5] On January 18, 2010, the Applicant requested a review of the Public Body’s decision. Mediation was authorized. On January 28, 2010, the Public Body partially disclosed another 10 pages or records. In addition, as a result of mediation, on February 23, 2010, the Public Body identified one additional record that was responsive to the access request. The Public Body did not, however, provide this record to the Applicant.

[para 6] On February 17, 2010, the Applicant requested that the Information and Privacy Commissioner conduct an inquiry.

[para 7] During the inquiry, the Public Body and the Applicant each made a submission. The Public Body submitted a portion of its submission in camera.

[para 8] In the Public Body's submission, the Public Body stated that it was withholding records 26-32 from production to this Office pursuant to the solicitor-client adjudication protocol. On April 26, 2011, I wrote to the Public Body requesting further submissions and/or evidence regarding the Public Body's claim of solicitor-client privilege to the records under that protocol. On May 19, 2011, the Public Body responded to my request for further information by providing me with a copy of those records it had previously withheld under the protocol.

II. INFORMATION AT ISSUE

[para 9] There are 53 pages of records at issue. They consist of the following: record 24 (2 pages), record 25 (4 pages), record 26 (2 pages), record 27 (13 pages), record 28 (15 pages), record 29 (8 pages), record 30 (2 pages), record 31 (3 pages), record 32 (4 pages).

III. ISSUES

[para 10] There were two issues identified in the inquiry notice:

- A. Did the Public Body properly apply section 27 of the FOIP Act (privileged information) to the records/information?
- B. Did the Public Body properly apply section 24 of the FOIP Act (advice, etc.) to the records/information?

[para 11] In the Applicant's submission, the Applicant also raised the issue of whether the Third Party was advised not to speak to the Applicant's lawyer and, if so, whether this was appropriate or contrary to law. As this issue is outside my jurisdiction, I will not address it in this Order.

IV. DISCUSSION

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

[para 12] The Public Body applied sections 27(1)(a) to records 24-32. The Public Body claimed solicitor-client privilege for records 26, 27, 28, 29, 30, 31 and 32 and litigation privilege for records 24, 25, 31 and 32.

[para 13] Section 27(1)(a) reads:

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*

1. Solicitor-client privilege

[para 14] The Public Body states that records 26, 27, 28, 29, 30, 31 and 32 are subject to solicitor-client privilege.

[para 15] In *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821, the Supreme Court of Canada set out the criteria for solicitor-client privilege. The Court held that the records 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 (Orders 96-017 and F2007-013).

[para 16] Privilege also applies to information passing between a client and lawyer that is provided for the purpose of seeking or giving legal advice, as part of the continuum of solicitor-client communications. Although a particular document need not show, on its face, that legal advice was sought or given, in order to attract the privilege, it must be shown to be part of a continuum in which this is actually done (Order F2003-005).

a. Communication between a solicitor and client

[para 17] After a review of the records 26, 27, 28, 29, 30, 31 and 32, I find that each of these records consist of a communication between a solicitor and a client. Records 26-29 clearly show, on their face, that they are communications between a solicitor and a client. In addition, records 30-32 also fulfill this criterion. Although records 30-32 consist of communications between a Third Party and the Public Body's solicitor, I find that the Third Party was an "employee" of the Public Body at the time of the communications.

[para 18] Section 1(e) of the FOIP Act defines an "employee" as follows:

1 In this Act,

...

(e) "employee", in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body

[para 19] After a review of all of the submissions of the parties, I find that the Third Party was acting under a contract with the Public Body at the time of those communications and therefore was an "employee" of the Public Body. I accept the Public Body's submission that it hired the Third Party under a verbal contract following the Third Party's completion of her position as Chief Administrative Officer for the Public Body on January 31, 2009. In coming to this conclusion I reviewed the

submissions of all parties including the invoices that the Third Party submitted to the Public Body for her services rendered after January 31, 2009. These invoices support the Public Body's contention that the Third Party was hired on contract to prepare a report and to assist in development enforcement against the Applicant.

b. Communication entailing the seeking or giving of legal advice

[para 20] 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 the future be on the other side of a legal dispute (Order F2004-003).

[para 21] After a review of the records 26, 27, 28, 29, 30, 31 and 32, I find that each of these records consist of a communication entailing the seeking or giving of legal advice.

c. Communication intended to be confidential

[para 22] The confidentiality of documents may be explicitly stated or implicit from the nature of the documents themselves (Order F2007-008) or from the circumstances under and, purposes for which, the legal advice was being sought or given (Order F2004-003).

[para 23] After a review of the records 26, 27, 28, 29, 30, 31 and 32, I find that each of these records consist of a communication that was intended to be confidential. I find that these records either explicitly state that they are confidential or it is implicit from the nature of the documents that the communication within these documents was intended to be confidential.

d. Conclusion regarding solicitor-client privilege

[para 24] I find that records 26, 27, 28, 29, 30, 31 and 32 are subject to solicitor-client privilege under section 27(1)(a). I find that each of these records consist of a communication between a solicitor and client, which entail the seeking or giving of legal advice, and which was intended to be confidential. I therefore conclude that the records are subject to solicitor-client privilege.

[para 25] In addition, I find that the Public Body properly exercised its discretion under section 27(1)(a). 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 where the public body establishes that this particular privilege applies (Order F2008-028). If information is withheld under section 27(1)(a) because it is subject to solicitor-client privilege, then that is reason enough to establish

that discretion was exercised appropriately (Order F2010-007). In this inquiry, I find that the Public Body properly exercised its discretion to withhold records 26, 27, 28, 29, 30, 31 and 32 from the Applicant under section 27(1)(a).

2. Litigation privilege

[para 26] The Public Body states that records 24, 25, 31 and 32 are subject to litigation privilege. As I have found that the Public Body properly applied solicitor-client privilege to records 31 and 32, I will not address whether those records are also subject to litigation privilege. Only records 24 and 25 remain at issue under litigation privilege.

[para 27] In Order 97-009, the former Information and Privacy Commissioner stated that litigation privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.).

[para 28] In that Order, the former Information and Privacy Commissioner stated that to correctly apply litigation privilege, a public body must show that:

- (1) There is a third party communication. Third Party communications may include:
 - (i) communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;
 - (ii) communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice; or
 - (iii) communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.
- (2) The maker of the document or the person under whose authority the document was made intended the document to be confidential. The one exception to the requirement for confidentiality is the "work product" or "lawyer's brief" rule, in which case it is the lawyer's intention which is relevant when the lawyer assembles the material for the brief for litigation.
- (3) The "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board* [1979] 2 All E.R. 1169 (H.L.). The dominant purpose test consists of three requirements:
 - (i) the documents must have been produced with existing or contemplated litigation in mind,

- (ii) the documents must have been produced for the dominant purpose of existing or contemplated litigation, and
- (iii) if litigation is contemplated, the prospect of litigation must be reasonable.

[para 29] After a review of the records 24 and 25 and all of the submissions before me, I find that the Public Body properly applied litigation privilege to records 24 and 25. I find that records 24 and 25 consist of third party communications which were intended to be confidential. Although the records do not explicitly state that they are confidential, I find that it is implicit from the nature of these documents. Given the content of records 24 and 25, I also accept the Public Body's submission that the dominant purpose for which the records were prepared was to submit them to a legal advisor for advice and use in contemplated litigation.

[para 30] Furthermore, I find that the Public Body properly exercised its discretion to withhold those records. As previously mentioned, the records consist of confidential third party communications which I have found were prepared for the dominant purpose of submitting them to a legal advisor. Given the content of these records, I find that the Public Body properly exercised its discretion to withhold those records.

3. Waiver of privilege

[para 31] In the Applicant's submission, the Applicant states that the Public Body waived litigation privilege in regard to the records at issue.

[para 32] In Order 98-017, the former Information and Privacy Commissioner defined the term waiver as "the intentional or voluntary relinquishment of a known right". After a review of all of the information and evidence before me, I find that there is insufficient evidence of an intentional waiver of litigation privilege over the records. Although the Public Body provided the Applicant with copies of other records such as the Third Party's notes and final report, I do not find that there is sufficient evidence before me that the Public Body intended, by disclosing those other records, to waive privilege over the records at issue. I do not find that the Public Body's disclosure of those other records to the Applicant, in and of itself, shows that the Public Body intended to waive privilege over the records at issue.

[para 33] In the Applicant's submission, the Applicant also suggested that the Public Body impliedly waived litigation privilege over the records, by disclosing records such as the Third Party's notes and the final report and through the Public Body's reliance or future reliance on those records in litigation. In support, the Applicant referred to the Court of Queen's Bench decision of *O'Scolai v. Antrajenda*, 2008 ABQB 77 where the Court addressed the implied waiver of litigation privilege and, in particular, the role that fairness plays in determining whether an implied waiver has occurred. The Court held as follows:

[7] The issue in the present case, is whether the contested material must be disclosed by implication or as required by fairness. There has been no inadvertent disclosure and the Defendants have made it clear they did not intend to waive privilege in respect to any of the other items sought by the Plaintiffs.

[8] What constitutes waiver by implication was set out in Wigmore on Evidence, McNaughton revisions, vol. 8, s. 2327 at pp.635-38:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

[para 34] Later in that decision, the Court addressed whether partial disclosure will result in a waiver of privilege:

*[30] When evidence will be relied on by a party, any privilege claimed over it will almost certainly be waived to comply with fairness and consistency: **Thorpe, Huntley**. Further, if there is a danger that partial disclosure will mislead the Court or inaccurately present the content of certain facts, fairness will require disclosure: **Miller, Trask**. However, where there is no reliance on a document, waiver is less likely: **McCarty; B.C. (Minister of Forests) v. C.N.R.***

[para 35] After a review of all of the information and evidence before me, I find that there is insufficient evidence that there has been an implied waiver of privilege. I do not find that the Public Body's disclosure of the records, such as the Third Party's notes and the final report, is sufficient to find that there was an implied waiver of privilege nor do I find the Applicant's suggestion that the Public Body has, or will be, relying on those records in litigation sufficient to find an implied waiver. In my view, whether the Public Body relies on these records in litigation and whether this reliance leads to a finding of implied waiver is a decision for the Court to make, after reviewing all of the information and evidence before it at that time.

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

[para 36] The Public Body applied section 24(1)(a) and 24(1)(b) to records 27, 28, 29, 31 and 32. As I have found that the Public body properly applied section 27(1)(a) to those records, I will not address whether the Public Body also properly applied sections 24(1)(a) and 24(1)(b) to those records.

V. ORDER

[para 37] I make the following order under section 72 of the FOIP Act.

[para 38] I find that that Public Body properly applied section 27(1)(a) to records 24-32 and properly exercised its discretion in that regard. I uphold the Public Body's decision to withhold these records from the Applicant.

Lisa McAmmond
Adjudicator