

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2014-13**

February 21, 2014

**CALGARY BOARD OF EDUCATION**

Case File Number F6195

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

**Summary:** The Applicant requested her personal information from the Calgary Board of Education (the Public Body). The Public Body located responsive records, but severed information from them under sections 24 (advice from officials) and 27 (privileged information) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Adjudicator found that with the exception of the names of employees, their business contact information, the subject lines and dates and times of an email, the Public Body had properly applied section 24 in order to withhold information. The Adjudicator confirmed the decision of the Public Body to withhold the substance of two emails under section 24.

The Adjudicator found that the information to which the Public Body had applied section 27 was subject to solicitor-client privilege. The Adjudicator confirmed the decision of the Public Body to withhold the information to which it had applied section 27.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24, 27, 72

**Authorities Cited: AB:** Orders F2004-026

**Cases Cited:** *Canada v. Solosky* [1980] 1 S.C.R. 821; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

## **I. BACKGROUND**

[para 1] The Applicant made eight requests for her personal information to the Calgary Board of Education (the Public Body). Each request indicated that the Applicant was seeking records created between October 27, 2010 and February 29, 2012 that contained her name in the context of facts or opinions on specific subjects. The subjects included conflict of interest, pecuniary interest, disclosure of information, meeting with third parties, interaction with the media, fiduciary duty and performance, and investigation.

[para 2] The Public Body conducted a search for responsive records and located 25 pages of records that were responsive to the access request that referred to interaction with media. The Public Body severed information from the records under section 24 (advice from officials) and section 27 (privileged information) and removed information it considered to be non-responsive.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to her access request. In particular, the Applicant sought review of the amount of information that had been redacted from the records.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful in resolving the issues, the matter was scheduled for a written inquiry.

## **II. RECORDS AT ISSUE**

[para 5] Twenty-five pages of records located by the Public Body in response to the Applicant's access requests are at issue.

## **III. ISSUES**

**Issue A: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

**Issue B: Did the Public Body properly apply section 27(1)(a) of the Act (privileged information) to the information in the records?**

## **IV. DISCUSSION OF ISSUES**

**Issue A: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

[para 6] The Public Body severed information from records 1 – 8 under sections 24(1)(a) and (b) and section 27(1)(a), and from record 13 under section 24(1)(b). I need

not address whether records 1 – 8 are subject to section 24(1)(a) or (b), given my conclusion, below, that the Public Body properly applied section 27(1)(a) to these records. I will therefore address only the question of whether the Public Body properly applied section 24(1)(b) to the information it severed from record 13.

[para 7] Section 24(1)(b) authorizes the head of a public body to withhold information that would reveal consultations or deliberations. It states:

*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*

*(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[...]*

[para 8] A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision seeks advice or recommendations regarding decision or action that the person is considering taking. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision.

[para 9] In its submissions, the Public Body describes the information it withheld in the following way:

[...] these Records at Issue contain assessment, discussion and consideration of options identified as being available to CBE in dealing with a situation by relevant decision makers within CBE. A connection is thus demonstrated between the seeking of advice (as considered in subsection 24(1)(a)), and the making of a decision based on that advice (as considered in subsection 24(1)(b)).

[para 10] The information severed from record 13 consists of two emails sent by two employees of the Public Body to one another. The earlier email describes a course of action that the sender is considering taking; the later email responds to the email and evaluates the course of action under consideration. I find that the contents of the two emails are consultations and deliberations within the terms of section 24(1)(b). However, I note that the Public Body also severed the names and business contact information of the individuals who created the emails, the topic under discussion, and the times and dates of the emails. In Order F2004-026, former Commissioner Work held that information of this kind cannot be withheld under section 24(1). He said:

I do not accept that in this case, any inferences can accurately be drawn about what advice was given by particular persons. The Public Body did not point to a particular clause in the resulting legislation and say "here is the clause that reflects the advice given by person X." At most the

Public Body says that based on such names, I may know that the advice of a particular person or persons was advice about Bill 27 generally, or the regulations, or some component of either, or had a particular degree of importance relative to the final outcome. This does not tell me what particular advice was given by any particular individual, much less in any particular document. The legislation that was enacted is highly complex. As the Applicant has pointed out, there were many bodies and individuals providing advice and comments on the proposed legislation, at various stages of the process. Even if it could be concluded, from knowing the names alone, that a particular person or persons provided much of the advice for the development of the legislation, there is nothing to establish or even suggest that no significant advice on the same topic came from other sources at earlier or later times, nor that the ultimate decision makers followed the advice given by any particular persons. Significant advice and significant changes to proposed legislation can occur at many stages both before and after the drafting stage.

It is possible to imagine a situation in which the name of the giver of advice could reveal the substance of the advice. Where advice about a particular topic was given by a person who was known to be a proponent of a particular viewpoint on that topic is a possible example. A hypothetical example suggested by counsel for the Public Body is a document created by a known anti-smoking group. It might be possible to infer in some circumstances that a particular document authored by such a group contained anti-smoking material. However, this is not such a case. In my view, the Public Body did not establish that any of the people involved in this case held particular opinions, nor has it shown or suggested any other way in which an accurate inference about the substance of the particular advice given can be made from disclosure of the names of the persons receiving or giving it.

I turn to the second of the Public Body's points (discussed at paragraph 69 above), that the names of public servants who participated in a discussion must be kept confidential to ensure they are not dissuaded from participating in certain kinds of discussions. I accept that the policy behind the rules is to allow a free discussion. However, in my view the rule achieves this policy by shielding the substance of the discussions. [Section 24(1)(a)] does not permit the withholding of who gave advice; it permits the withholding of advice. In my view the words "reveal advice" means 'reveal what the advice was', Similarly, with respect to section 24(1)(b), "reveal ... consultations or deliberations" means 'reveal what the consultations or deliberations were'.

I acknowledge there may be circumstances where a public servant's participation in certain kinds of discussions may give rise to criticism. Despite this, I do not accept that the words of section 24(1) are intended to shield from exposure the very fact that consultations or deliberations between particular officers or employees took place, or took place about a particular topic, on the basis that this may dissuade public servants from participating in discussions of particular subjects. Where a person consults or is consulted on a given subject as a function of their office, and the application of section 24 is claimed on the basis that they are officers or employees of a public body, the very fact they participated in the consultation cannot, in my view, be withheld under section 24 unless this fact also reveals the substance of the consultation. If there is something in such a disclosure that could give rise to an unreasonable invasion of the personal privacy of such employees, that is a consideration to be addressed under section 17, not section 24. I reject the Public Body's argument that sections 24(1)(a) and 24(1)(b) permit withholding of a document or a portion of a document that would reveal only that an individual participated in a discussion. This reasoning applies as well to the parts of the correspondence that contain non-substantive content (for example, cover documents that convey the advice, or parts of the bodies of e-mail exchanges indicating only that comments are being sought or provided).

The same point applies to subject matter or timing of the consultation. The exceptions in section 24(1)(a) and 24(1)(b) do not apply to the subject line or other indicator of the topic (or the date it took place), unless they would allow an accurate inference to be drawn about the substance of the advice or consultations. In Order 96-012, the former Commissioner held (at paragraph 31) that "... a summary statement of the topic of a consultation or deliberation, as opposed to a

summary of the consultation or deliberation in itself, is also not exempt.” I note as well that in the present case, given the nature of the request, it is clear that this inquiry is about information relating to a particular topic, so that disclosure of the subject line in much of the correspondence does not reveal information that cannot be derived from the very fact the documents are responsive. (However, this reasoning does not necessarily apply to headings of a more specific nature. A heading or sub-heading in a document can itself constitute advice – for example, where the need to address a particular matter or matters is part of the advice, or where part of the advice consists in developing categories. In such cases, headings may be withheld because they are substantive components of the advice.)

[para 11] In Order F2004-026, former Commissioner Work found that the names and contact information of employees involved in consultations or deliberations, subject lines, and the date of consultations or deliberations, could not be withheld under section 24(1)(b) unless this information revealed something substantive about the consultations or deliberations. In this case, I find that the employees’ names and contact information, subject lines, and the dates, do not reveal anything substantive about the deliberations in the emails. I therefore find that the names and contact information of the employees, the subject line, and the dates and times of the emails cannot be withheld under section 24(1)(b).

#### *Exercise of Discretion*

[para 12] I turn now to the question of whether the Public Body properly exercised its discretion when it withheld the bodies of the emails appearing on record 13. As the Public Body notes in its submissions, it is not enough to establish that section 24(1)(b) applies to information; a public body must also establish that it exercised discretion appropriately when it decided to withhold the information from the Applicant under the authority of this provision.

[para 13] In *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 14] While the foregoing case was decided in relation to the law enforcement provisions in Ontario’s legislation, it is clear from paragraphs 45 and 46 of this decision (not reproduced) that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in

freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 15] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 24(1)(b) applies means that the public interest in ensuring that public bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 16] The Public Body explained its decision to withhold the consultations and deliberations in record 13 in the following terms:

Accordingly, one of the objects of the Act is to facilitate access by members of the public to records maintained and held by a public body. However, this right of access is not unfettered, and is subject to certain other considerations. For example, the public body has a need to carry out its objectives and meet its legislative and other responsibilities, to encourage collaboration and dialogue between its staff and stakeholders, and protect the right and ability of its staff to communicate openly and freely. Without this, analysis, deliberation and decision-making cannot occur in context, or in an open and fully-informed manner.

Section 24(1) of the Act therefore creates an exception to the general right of access discussed in section 2. As noted in Paragraph 43, in Order 96-006, former Commissioner Clark stated that the core purpose of this section was to facilitate free and open discussion between decision makers within a public body in order to ensure that decisions made make sense, are well thought out, and thoroughly vetted and debated.

If release of information regarding advice and deliberations of and by officials within a public body is likely to have a chilling effect on the likelihood and ability for the advice to be sought, and deliberation to occur, on a go-forward basis, then CBE submits that it is reasonable for the public body to exercise its discretion not to release the information considered in section 24(1).

As such a chilling effect is very likely to result from the release of the Records at Issue, CBE respectfully submits that the relevant Records at Issue were properly withheld, and its discretion to withhold properly exercised, pursuant to subsection 24(1) of the Act.

[para 17] Having reviewed the consultations and deliberations appearing in the bodies of the severed emails on record 13, I agree that a relevant consideration weighing against disclosure is that disclosing the contents of the email could have a chilling effect on the ability of employees to deliberate with one another when making decisions. The subject matter under discussion is current, and there could be enough interest in the subject matter of the email to make it likely that the public body's decision making processes could be subjected to interference if the information were disclosed.

[para 18] I confirm that the Public Body properly exercised its discretion when it withheld the bodies of the emails under section 24(1)(b). However, as discussed above, I find that the names of employees, their business contact information, the subject lines and the dates and times of the emails cannot be withheld under section 24(1)(b), and I will order that information to be disclosed.

**Issue B: Did the Public Body properly apply section 27(1)(a) of the Act (privileged information) to the information in the records?**

[para 19] Section 27(1)(a) authorizes public bodies to withhold privileged information and other kinds of information prepared by lawyers and agents of a public body. It states:

*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[...]*

[para 20] The Public Body applied section 27(1)(a) to withhold records 1 – 8 and 18 – 23. The Public Body takes the position that these records are subject to solicitor-client privilege.

[para 21] The test for determining whether solicitor-client privilege applies to records is that set out in *Canada v. Solosky* [1980] 1 S.C.R. 821. According to this case, a record is subject to solicitor-client privilege if it is a communication between solicitor and client, which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

[para 22] The Public Body argues:

Pages 1-8 and 18-23 of the Records at Issue contain communications by and to CBE legal counsel regarding legal advice (and among CBE employees regarding legal advice provided by CBE legal counsel), and that were intended to be treated and maintained as confidential. As such, the three part test in *Solosky v. The Queen, infra*, applies, and the relevant Records at Issue are subject to solicitor-client privilege. CBE respectfully submits that subsection 27(1) of the Act was therefore properly applied by CBE, and that it properly exercised its discretion not to disclose the relevant Records at Issue due to the importance of the maintenance and protection of this privilege.

[para 23] At paragraphs 12 and following of its submissions, the Public Body states:

Solicitor-client privilege applies to any record or document that (a) constitutes a communication between a solicitor and a client, (b) that entails the giving or seeking of legal advice, and (c) is intended by the parties to be confidential.

CBE submits that all of the Records at Issue withheld on the basis of subsection 27(1) meet this three part test, and as such, solicitor-client privilege will apply to same. More specifically, the Records at issue:

a) constitute correspondence between CBE internal and/or external legal counsel and CBE, or between CBE employees regarding this correspondence, as evidenced by the addressees of such correspondence.

b) contain, or contain a discussion of, legal advice and recommendations made by legal counsel, as described and defined by the Adjudicator in several previous orders, including for example, Orders 96-017 and Order F2007-013. Namely, certain CBE employees sought and / or obtained,

via this correspondence, advice from their legal advisor(s) regarding a particular decision or course of action due to its potential for legal implications.

c) were and are intended by the parties to the correspondence to be treated and handled as confidential. This is evidenced in some cases implicitly, by the nature and content of and level of candour used within the Records at Issue, and, in some cases, explicitly by the notation of “Privileged and Confidential” in the subject line of the Record at Issue. In all cases, the CBE and the specific employees involved in the correspondence expected that the communication occurring therein would be kept confidential.

[para 24] I agree with the Public Body that the discussions documented in records 1 – 8 and 18 – 23 are communications between a solicitor and a client, made for the purpose of giving or receiving legal advice, and intended to be kept confidential. I therefore find that these records are subject to solicitor-client privilege, and are subject to section 27(1)(a).

### *Exercise of Discretion*

[para 25] In *Ontario (Public Safety and Security)*, the Supreme Court of Canada discussed the extent to which decisions to exercise discretion to withhold information under solicitor-client privilege should be reviewed. The Court said:

We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

[para 26] The Court held that the public interest in protecting solicitor-client privilege will almost always outweigh any competing interests in disclosing information that is subject to this privilege. As a result, exercising discretion to withhold information that is subject to solicitor-client privilege does not require balancing interests on a case-by-case basis.

[para 27] As the Public Body withheld records 1 – 8 and 18 – 23 on the basis that the records are subject to solicitor-client privilege, and it is in the public interest for solicitor-client privilege to be near absolute, I am satisfied that the Public Body appropriately exercised its discretion when it withheld these records under section 27(1)(a).

## **V. ORDER**

[para 28] I make this Order under section 72 of the Act.

[para 29] I confirm the decision of the Public Body to withhold the bodies of the emails that were severed from record 13 on the basis of section 24(1)(b).

[para 30] I confirm the decision of the Public Body to withhold records 1 – 8 and 18 – 23 on the basis of section 27(1)(a).

[para 31] I order the Public Body to disclose to the Applicant the employee names, business contact information, subject lines and dates and times that it severed from record 13 under section 24(1)(b).

[para 32] I further 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.

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Teresa Cunningham  
Adjudicator