

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-63

December 21, 2016

ALBERTA HUMAN SERVICES

Case File Number F8138

Office URL: www.oipc.ab.ca

Summary: An individual made a request to Alberta Human Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for a copy of his Assured Income for the Severely Handicapped (AISH) investigation file. The Public Body provided responsive records, withholding some information under several provisions of the Act. The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. The Applicant subsequently requested an inquiry into only the Public Body's claim of solicitor-client privilege (under section 27(1)(a) of the Act).

The Adjudicator found that the Public Body properly applied section 27(1)(a) to information in the records at issue.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 27, 72.

Authorities Cited: AB: Orders F2007-014, F2010-007, F2010-036, F2012-08.

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

I. BACKGROUND

[para 1] In January of 2013, an individual made a continuing access request to Alberta Human Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for a copy of his Assured Income for the Severely Handicapped (AISH) investigation file. On March 5, 2014, the Public Body provided the Applicant with a copy of the requested records, withholding information under sections 4(1)(d), 17, 20, 24 and 27 of the Act.

[para 2] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This was partially successful; the Applicant requested an inquiry into only the Public Body's claim of solicitor-client privilege (under section 27(1)(a) of the Act).

II. RECORDS AT ISSUE

[para 3] The records at issue are those parts of pages 1-4, 9-15, 17-25, 37-40, 46-52, 54-80, 100-103, 111-118, 123, 124, and 126 that were withheld from the Applicant under section 27(1)(a) of the Act.

III. ISSUES

[para 4] The issue as set out in the Notice of Inquiry dated May 13, 2016, is as follows:

Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the record(s)?

IV. DISCUSSION OF ISSUES

[para 5] The Public Body applied section 27(1)(a) (solicitor-client privilege) to information on pages 1-4, 9-15, 17-25, 37-40, 46-52, 54-80, 100-103, 111-118, 123, 124, and 126. Only pages 1-3 were withheld in their entirety under section 27(1)(a); the remainder were partially withheld.

[para 6] Section 27(1) states the following:

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.

Application of section 27(1)(a)

[para 7] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada *Solosky v. The Queen* [1980] 1. S.C.R. 821. The Court said:

... privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 8] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 9] The Public Body did not provide me with copies of the records at issue, since it was claiming solicitor-client privilege over the withheld information. The Public Body followed the *Solicitor-Client Privilege Adjudication Protocol (Protocol)* and provided me with arguments regarding its claim of privilege, as well as an affidavit sworn by the Public Body lawyer who was involved in the Applicant's AISH file.

[para 10] In the affidavit provided with the Public Body's initial submission, the affiant states:

1. I am a member of the Law Society of Alberta. I am employed as a Barrister and Solicitor by Alberta Justice and Solicitor General.
2. In my employment, I am responsible for providing legal advice to Alberta Human Services (HS).
3. At various times in 2013 and 2014 I provided legal advice to clients at HS on matters involving the Applicant.
4. I have been advised and believe that the Applicant has made an access to information request to HS for certain records and the subsequent disclosure by the Public Body is now the subject of a review.
5. Within the disclosure package, certain records were created exclusively for the purpose of seeking legal advice or providing legal advice and were exchanged in confidence

between me, as legal advisor, and my HS clients. Attached as Exhibit “A” my Affidavit is a table identifying these records and containing additional information about the records.

8. With the exception of one record which was fully redacted, all of the records in question were partially redacted.

7. The privilege attached to these records has not been waived by HS or by the Solicitor General of Alberta.

[para 11] The affiant also provided a chart indicating

- how many pages comprised each record,
- the type of record (e.g. email or a “note to file”),
- the date of the record, who created the record, and
- to whom it was provided and/or copied.

This chart was accompanied by a list of the names appearing in the chart, as well as their job titles. All correspondents are Public Body employees in the AISH delivery or program areas, the Public Body investigation unit, the Public Body Service Review and Quality Assurance unit, the Public Body FOIP unit, or lawyers with Alberta Justice and Solicitor General (as is the affiant).

[para 12] Pages 1-3 of the records consist of a draft letter, and pages 9-10 are both described as a “note to file.” All other records are described as emails (pages 17-15 are described as “email and attachment”).

[para 13] With his request for review sent to this Office, the Applicant provided a copy of a letter he had received from the Public Body, dated September 20, 2013; the BP also provided a copy of this letter with its initial submission. This letter was written by the affiant, and begins:

This letter provides a summary of the steps that were taken by the Ministry respecting [the Applicant’s] Assured Income for the Severely Handicapped (AISH) benefits, acknowledges the administrative errors that occurred, and confirms the steps that have been taken to remedy those errors.

[para 14] The details about the records at issue provided in the affiant’s chart, as well as the issues raised and dates cited in the September 20, 2013 letter, provide me with context for the Public Body’s claim of solicitor-client privilege. Specifically, the matters discussed in the September 20, 2013 letter raise legal issues, and it would be reasonable to seek legal advice on those issues. The list of correspondents with their job titles shows that the Public Body employees who sent, received or were copied on the emails would all reasonably be involved in the seeking and discussion of legal advice on matters raised in the letter. The dates of the two records described as a “note to file” correspond with emails sent by the affiant to the creator of the note. Last, the record described as a draft letter was created by the affiant, who also wrote the September 20, 2013 letter to the Applicant.

[para 15] I accept the affiant's evidence that the records contain communications between a solicitor (the affiant) and client (the Public Body employees involved in the Applicant's file) that entailed the seeking or giving of legal advice. I also accept the affiant's statement that the information was intended to be kept confidential. Although many of the emails were copied to a number of recipients, the list of correspondents and their job titles show that all recipients were Public Body employees or lawyers with Alberta Justice and Solicitor General, who would reasonably have been involved in the Applicant's file at various points.

[para 16] For these reasons, I find that section 27(1)(a) applies to the information for which solicitor-client privilege was claimed.

Exercise of discretion

[para 17] Section 27(1)(a) is a discretionary exception to access, which means that after determining that the information at issue falls within the exception, the public body must then determine whether the information should nevertheless be disclosed.

[para 18] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)):

the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

[para 19] As I have found that the information in the records at issue is subject to solicitor-client privilege, I conclude that the Public Body properly exercised its discretion to withhold the information it withheld under section 27(1)(a).

V. ORDER

[para 20] I make this Order under section 72 of the Act.

[para 21] I confirm the Public Body's decision to withhold information in the records at issue under section 27(1)(a) of the Act.

Amanda Swanek
Adjudicator