

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2018-18**

May 15, 2018

**ALBERTA LABOUR**

Case File Number 004351

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

**Summary:** The Adjudicator considered whether the Public Body had properly exercised its discretion under section 24 of the Act with respect to information the Public Body now asserts is subject to solicitor-client privilege. She held that the Public Body could not claim the privilege for the first time after the decision about which provisions applied to the records that had already been made in an order, but that the Public Body could rely on the fact the records were subject to privilege as a basis for exercising its discretion so as to withhold the records in exercising its discretion under section 24. Accordingly, she permitted the Public Body to withhold information which she agreed was covered by solicitor-client privilege, both where the information was in itself part of a communication involving a request for legal advice, and also where disclosure of the information at issue would reveal information that was privileged in the context of other communications.

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

**Authorities Cited: AB:** Orders F2016-63, F2017-65.

**Cases Cited:** *Maranda v. Richer*, [2003] 3 SCR 193, 2003 SCC 67 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA); *Imperial Tobacco Canada Limited v. The Queen*, 2013 TCC 144 (CanLII).

## **I. BACKGROUND**

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act) for records from the Public Body that documented the Public Body's dealings with him over a specified time period. The Public Body provided some records to the Applicant, but withheld others. Much of the withheld information has already been dealt with in earlier orders and directions to the Public Body.

[para 2] In the most recent order issued in this matter, Order F2017-65, I had concluded that many of the records contained information which the Public Body used to make decisions, and on this account they fell under section 24 of the Act as integrally related to the decisions that were made. However, I asked the Public Body to take into account in exercising its discretion that some of the emails conveyed information about events in which the Applicant was involved and of which he would be aware, and therefore, it was not clear what interest recognized in the statute would be served by withholding them. For these records, I said I would retain jurisdiction to decide whether discretion was properly exercised.

[para 3] The Public Body continues to withhold these emails. It now says that it believes they are subject to solicitor-client privilege. The Applicant has asked me to review this decision.

## **RECORDS AT ISSUE**

[para 4] The records still at issue are:

- page 81 – the first paragraph of the second email and the first and second paragraphs of the third email (as well as the same information where this is replicated on pages 82, 83, 84, 85 and 86), and;
- the withheld information on pages 90 and 91.

## **II. ISSUES**

[para 5] The issues are:

Did the Public Body properly exercise its discretion under section 24(1) of the Act (advice from officials) to the information in the records?

## **III. DISCUSSION OF ISSUES**

[para 6] As noted in my earlier order, the Supreme Court of Canada held in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* that a finding that section 24(1)(a) 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)(a) 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 7] The Public Body's earlier explanation for its decision to continue to withhold the records under section 24 included the following:

... These records were directed toward taking an action. The consultation and deliberation statements have a substantive element and could conceivably be inhibited if they were subject to disclosure.

[para 8] I accepted this rationale for the withholding of records under section 24 generally, but said it was not apparent to me that such an inhibitory effect would arise from release of the following information:

- the first paragraph of the second email and the first paragraph of the third email<sup>1</sup> on page 81 (as well as the same information where this is replicated on pages 82, 83, 84, 85 and 86), and
- the withheld information on pages 90 and 91.

This information appeared to me to have a neutral quality, and it is already known to the requestor because he participated in the events being described. Thus it seemed to be unlikely to have the inhibitory effects on the free flow of information which the Public Body said it apprehended.

[para 9] The Public Body did not provide any information that countered these observations. However, it said that it is continuing to withhold the parts of the emails listed in the bullets at the top of page 12 of the order on the basis that section 27(1)(a), which the Public Body did not formerly claim, applies to the withheld material. It says that "... when considered in context, there is a reasonable argument that they are part of the continuum of communications between lawyer and client for the purpose of providing legal advice".

[para 10] I do not believe that it is open to the Public Body to now claim it is relying on a different exception to access than the one (section 24) which it originally claimed, *after* I have issued an order determining which exceptions apply to the information.

[para 11] I do, however, consider that the Public Body can exercise its discretion to withhold records/information under section 24(1) (which I have already held applies) on the basis that section 27(1)(a) is the provision it ought to have applied, and the policy reasons for withholding under section 27(1)(a), had it originally done so, are relevant in deciding to

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<sup>1</sup> Order F2017-65 contains an error, in that the information that I did not regard as necessarily having an inhibitory effect included the second paragraph of the third email on page 81, but this paragraph was omitted from the list of such information I set out in para 37 of the Order. Para 43 of the Order correctly includes the second paragraph of the third email on page 81 (and the subsequent pages on which it is replicated) as among the information to be reconsidered in terms of its inhibitory effect. (For the Applicant's information, the final redacted block on page 81 in the most recent redacted version of the records at issue contains two paragraphs; the now-disclosed portion [consisting of two lines] that follows is the third paragraph.)

exercise discretion to withhold under the exceptions to disclosure (advice and consultations and deliberations) set out in the provision it did apply (section 24). The courts have held that because people seeking legal advice always need to be able to speak freely with their counsel, records subject to solicitor-client privilege must always be treated as having been properly withheld. It is therefore not necessary to further assess the exercise of discretion where solicitor-client privilege applies to records/information.<sup>2</sup>

[para 12] This reasoning applies in the present case to the email chains that provide to the Public Body's legal counsel accounts of interactions staff had with the Applicant. It is reasonable to presume these emails were provided to the lawyer to obtain legal advice. I believe, in particular, that the email of Thursday, November 5, 2009 at 10:55 a.m., which was sent to a Department of Justice lawyer (among others), can reasonably be characterized as a request for advice about a legal matter for which the factual accounts in the emails which preceded the question provide background. (The question was as a matter of fact answered by a staff member in a reply email (at 11:12 a.m.) rather than by the lawyer, but conceivably the lawyer could have provided a legal opinion on legal matters in order to address the question, or commented on the answer given by the staff member.) A request for legal advice is covered by solicitor-client privilege as much as is the answer.

[para 13] In view of this, I accept that the Public Body may withhold the first paragraph of the second email and the first and second paragraphs of the third email on page 81, the fourth email on page 83 that concludes on page 84, and the last email on page 84 (all of which fall within section 24(1)). Because the conversation in these emails is covered by solicitor-client privilege, that is a valid public policy reason to exercise the discretion under section 24(1) to withhold the information.

[para 14] In saying this I have noted that not all of the email chains that are included in the list in the first bullet in para 8 above contain the question noted above (the one which is characterizable as a legal question). Some of the email chains appear to convey accounts of the staff's interactions with the Applicant for different reasons (possibly for the purposes of providing updates for an unknown reason relating to a separate matter). These comments apply to the email chain on page 82, and on pages 85 to 86. Although parts of the email chain on page 82 and on pages 85 to 86 are copied to the Justice lawyer, no question is asked that could be characterized as a legal question. The law is clear that the mere fact that information is conveyed to a lawyer does not attach solicitor-client privilege to that

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<sup>2</sup> In Order F2016-63, the adjudicator stated:

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.

information.<sup>3</sup> The final email in the chain on page 82 (which is replicated on pages 85 to 86) involves one staff member asking another staff member a factual question that relates to the lawyer, but there is no apparent legal question raised, and none addressed to a lawyer to which the preceding emails could provide background.

[para 15] For the reasons given above, I do not accept that the Public Body can exercise its discretion under section 24 so as to withhold the parts of page 82 still at issue and the parts of pages 85 to 86 still at issue (which duplicate one another), on the basis that they form part of the continuum of communications subject to solicitor-client privilege.

[para 16] There is, however, another reason which requires me to conclude that parts of the foregoing emails were properly withheld. The sequence of events in this matter is such that the names, dates and subject matters of the emails in the pages at issue have all already been disclosed. As well, my previous order made clear that parts of the email sequence are repeated throughout the pages. It is therefore evident that the particular portions of the email chains that are not subject to solicitor-client privilege as they appear on some of the pages, and would therefore be otherwise disclosable, are the very same portions of these chains that I have found to not be disclosable on other pages because they are subject to solicitor-client privilege. If I were to order their disclosure in the former context, therefore, I would in effect be revealing information I have found to be privileged.

[para 17] Section 27 of the FOIP Act says that the Public Body may withhold information that is *subject to* privilege; it does not speak to information that is not in and of itself “subject to” privilege, the disclosure of which would *reveal* information that is subject to privilege.

[para 18] I must be guided, however, by a line of court decisions relating to the privileged status of lawyers’ legal fees and bills of account, including decisions of the Supreme Court of Canada. These cases hold that information is subject to privilege which would permit privileged information *to be deduced*, including by reference to other information.<sup>4</sup>

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<sup>3</sup> See. For example, *Imperial Tobacco Canada Limited v. The Queen*, 2013 TCC 144 (CanLII), wherein the Court said:

... an internal communication that does not constitute the passing on of confidential legal advice or directly involve the seeking of legal advice will not be privileged. Further, such a document does not become privileged merely because a copy is sent to a lawyer.

See also *Jacobson v. Atlas Copco Canada Inc.*, 2015 ONSC 4 (CanLII), at para 19.

<sup>4</sup> In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), the Ontario Court of Appeal addressed the presumption of privilege with respect to bills of account as follows (at para 12):

... In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 2003 BCCA 278 (CanLII), 226 D.L.R. (4<sup>th</sup>) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use

[para 19] In the present case, by virtue of the sequence of events in this matter, the Applicant is already in possession of information (the sender/receiver, subject line, and date/time information associated with the emails) which would allow him to deduce the content of information that was provided to a lawyer to obtain advice in the context of the emails described at para 13 (which I have held to be subject to privilege). Consequently, the emails in question, though they would not in themselves be considered as subject to privilege in the context in which they appear in some of the email chains, would permit the Applicant to deduce information that is subject to privilege in some of the other chains. Hence, according to the line of cases noted above, they are themselves to be treated as though privileged. The rationale for exercise of discretion under section 24 that I described at paras 11 and 13 would therefore apply to these emails as well.

[para 20] Consequently, I am unable to order disclosure of emails that would otherwise be disclosable (had they not also been conveyed in a different email chain for the purposes of asking for legal advice, and were this fact not apparent to the Applicant from other information he already has).

[para 21] With respect to pages 90 and 91, I accept the Public Body's argument that solicitor-client privilege applies to the email chains on these pages. I agree that section 24(1) applies to this information, and find that the same rationale respecting exercise of discretion under section 24(1) applies to these emails as well.

## **V. ORDER**

[para 22] I make this order pursuant to section 72 of the Act.

[para 23] I accept the Public Body properly exercised its discretion to withhold information.

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Christina Gauk, Ph.D.  
Adjudicator and Director of Adjudication

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the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act.

See also *Maranda v. Richer*, [2003] 3 SCR 193, 2003 SCC 67 (CanLII) at para 47 (wherein the Court discusses information that could *not* be used to deduce legal advice).