

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-27

July 5, 2018

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number 003116

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Summary: An individual made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the 2013 floods and more specifically, information relating to the berms that were constructed.

The Public Body located responsive records but withheld them in their entirety, citing sections 4(1), 16(1), 17(1), 21(1), 24(1), 25(1) and 27(1).

The Applicant requested an inquiry into the Public Body's response. This Order deals with the Public Body's claim of solicitor-client privilege under section 27(1)(a) of the Act to some of the responsive records, which were not provided to the Adjudicator for the inquiry.

The Adjudicator determined that the Public Body failed to meet its burden to show that it properly claimed solicitor-client privilege over the records at issue in this part of the inquiry.

The Adjudicator ordered the Public Body to review the relevant records at issue and respond to the Applicant and the Adjudicator without relying on that privilege.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 71, 72.

Authorities Cited: AB: Order F2015-22.

Cases Cited: *Canada v. Solosky* [1980] 1 S.C.R. 821, *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31.

I. BACKGROUND

[para 1] On August 27, 2015, the Applicant made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the 2013 floods and more specifically, information relating to the berms that were constructed.

[para 2] The Public Body located responsive records but withheld them in their entirety, citing sections 4(1), 16(1), 17(1), 21(1), 24(1), 25(1) and 27(1).

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This was not successful; the Applicant requested an inquiry.

[para 4] Some of the records to which sections 16(1), 17(1), 21(1), 24(1) and 27(1)(b) and (c) were applied, and all of the records to which section 25(1) was applied, are records over which the Public Body has claimed solicitor-client privilege. These records have not been provided to this Office for the inquiry. The inquiry has therefore been divided into two parts: Part 1 – to which this Order relates – will address the Public Body's claim of solicitor-client privilege over records that were not provided to me for the inquiry. Part 2 of the inquiry will address the Public Body's application of the various exceptions applied to the records that have been provided to me for the inquiry.

[para 5] If the Public Body's claim of solicitor-client privilege is found not to apply to some or all of the records to which it has been claimed, another part of the inquiry will address the remaining exceptions applied to those records.

II. RECORDS AT ISSUE

[para 6] The records at issue for the first part of this inquiry consist of the records over which the Public Body has claimed solicitor-client privilege under section 27(1)(a) and which the Public Body has not provided to me for this inquiry.

III. ISSUES

[para 7] The issues as set out in the Notice of Inquiry are as follows:

1. Are records excluded from the application of the Act by section 4(1)(a) (information in court records)?

2. Did the Public Body properly apply section 27(1)(a) (privileged information) to the records?

[para 8] However, section 4(1)(a) was moved to Part 2 of this inquiry so the only remaining issue for this part of the inquiry is:

Did the Public Body properly apply section 27(1)(a) (privileged information) to the records?

IV. DISCUSSION OF ISSUES

Did the Public Body properly apply section 27(1)(a) of the Act (privilege information) to information in the records?

[para 9] The Public Body applied section 27(1)(a) (solicitor-client privilege) to many pages of the records at issue.

[para 10] 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 Solicitor General,

*(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General or by the agent or lawyer.

[para 11] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [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.

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 12] Section 71(1) of the Act states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

[para 13] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

[para 14] The Public Body states in its initial submission that the records over which solicitor-client privilege has been claimed are records that meet the Solosky test. It cites *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31, in which the Court stated that the fact that the lawyer giving the advice is “in-house” does not preclude the application of solicitor-client privilege.

[para 15] The Public Body provided an affidavit sworn by the Director of FOIP and Records Management for the Public Body. In the affidavit, the Director states in part:

6. I have reviewed the Records and believe that they meet the criteria required to claim solicitor-client privilege.
7. All of the Records consist of either
 - a. communications
 - i. between a lawyer and the Public Body;
 - ii. made in confidence; and
 - iii. in the course of seeking or providing legal advice; or
 - b. communications made within the framework of the solicitor-client relationship that were intended to be confidential; or
 - c. records reflecting internal discussions about legal advice that were intended to be confidential.

8. All of the lawyers referenced in the Records are employed as barristers and solicitors and serve as lawyers for the Public Body.
9. All of the lawyers referenced were acting in their capacity as legal advisors in relation to creation of the Records.
10. The advice from the lawyers contained in the Records was given in the context of the solicitor-client relationship and is not business, policy or other non-legal advice.

[para 16] The records contained in the Schedule of records over which the privilege has been claimed are described as:

- correspondence made within the framework of the solicitor-client relationship;
- documents that reveal the substance of legal advice sought by or given to the Public Body; or
- correspondence between legal counsel and the Public Body seeking or giving legal advice.

[para 17] It is not entirely clear what the Public Body means by “correspondence made within the framework of the solicitor-client relationship”. Possibly this means that the correspondence falls within the “continuum of communications” between the solicitor and client. As noted by the Supreme Court of Canada, cited in Order F2015-22, if information is passed between solicitor and client for the purpose of giving and/or obtaining legal advice, that information falls within the continuum of communications and is subject to solicitor-client privilege. On that assumption, each of the bullets above properly describe types of information that would meet the Solosky test (I accept the Public Body’s affidavit evidence that the information was intended to be kept confidential, meeting the third requirement of Solosky).

[para 18] In its initial submission, the Public Body states that it is no longer relying on section 4(1)(a) to withhold the information on pages 1405-1449 and 1456-1488 of the records at issue. It also stated that it was claiming solicitor-client privilege over the information in those pages. The index of records provided by the Public Body with its initial submission, and the Schedule 1 of records attached to the affidavit both describe these pages as a “document that reveals the substance of legal advice sought by or given to the Public Body; correspondence made within the framework of the solicitor-client relationship”.

[para 19] Because the Public Body did not initially claim privilege over these pages, I have copies of them. After reviewing the information in these pages, I asked the Public Body for further information (by letter dated February 23, 2018):

The affidavit sworn by [the Director of FOIP and Records Management] states that the list of records in Schedule 1 (attached to the affidavit) are all subject to solicitor-client privilege. Schedule 1 includes records 1405-1449 and 1456 – 1488, copies of which were previously provided to me.

Records 1405-1449 and 1456-1488 appear to involve/relate to parties other than the Public Body and its counsel. In other words, on the face of the records, it appears that the Solosky test cannot be met, and the Public Body has not offered any explanation as to *how* the Solosky test is met for these records.

Because these records are such that it appears that the Solosky test cannot be met (absent additional information that provides context not apparent from the records themselves or the Public Body's submissions thus far) this brings into question the Public Body's claim of solicitor-client privilege over the remaining records that I do not have before me. I note as well that the affiant did not assert any legal training that would indicate expertise in identifying information over which solicitor-client privilege can be claimed.

For this reason, I am requesting additional support for the Public Body's claim of solicitor-client privilege. Specifically, I am requesting a new affidavit sworn by a Public Body lawyer in support of the claim of solicitor-client privilege for each record as listed in Schedule 1 of [the Director's] affidavit.

[para 20] The Public Body responded (supplemental submission dated March 16, 2018, at paragraphs 2-4), stating:

The Public Body has revised the affidavit to: (1) reflect changes in Schedule 1; and (2) clarify that [the Director] is swearing the affidavit based on personal knowledge or on information he has been advised on by legal counsel.

In instances where [the Director] does not have personal knowledge of solicitor-client privilege, he has been informed by legal counsel (and [the director] believes it to be true) that the records in Schedule 1 are privileged.

As such, the Public Body will not be submitting a new affidavit sworn by a Public Body lawyer.

[para 21] The changes made to Schedule 1 (the list of records over which the Public Body is claiming solicitor-client privilege) no longer includes records 1405-1449 and 1456-1488. A new index of records provided by the Public Body describes those records as "Transcript of Witness" and indicates that only section 17(1) is now being applied to some information in those records.

[para 22] The Public Body has not offered any explanation for why it claimed privilege over those records in its initial submission, or why it has dropped that claim now. Thus, the concerns I expressed in my letter of February 23, 2018 have not been allayed.

[para 23] As I noted in that letter, records 1405-1449 and 1456-1488 contain information that cannot meet the Solosky test (absent some context not apparent from the records themselves and not provided by the Public Body at any point). In other words, the claim of privilege over those records presents a clear and apparent misapplication of that

privilege; because the Public Body dropped the claim of privilege I am left to conclude that there are no additional factors or context that *could* make them subject to the privilege. That the Public Body claimed solicitor-client privilege over those records raises a concern about how the Public Body applied that privilege to other records that have not been provided to me. Specifically, it raises concerns about the basis on which the affiant believes solicitor-client privilege applies generally. Had the Public Body explained that the claim of solicitor-client privilege over records 1405-1449 and 1456-1488 had been erroneously made and why, this might have mitigated my concerns regarding how the privilege has been applied to records that have not been provided to me. However, the Public Body offered no explanation as to why the privilege was claimed over these records, nor did it provide a new affidavit from a lawyer, as I had requested.

[para 24] Instead, the affiant swore another affidavit, identical to the first affidavit with only the following distinction: the first affidavit begins:

I, [affiant], of Edmonton, Alberta, make oath and say:

...

while the second affidavit begins:

I, [affiant], of Edmonton, Alberta, have personal knowledge of the following or I am informed and do believe that:

...

[para 25] The second affidavit does not identify who informed the affiant, but the submission provided with that affidavit explains that legal counsel informed him that some of the records over which the privilege has been claimed are indeed subject to that privilege. I do not know for which records the Director received this advice or for which records he had personal knowledge. I also don't know whether the lawyer that advised the Director had personal knowledge of the records.

[para 26] Because of the Public Body's apparent error in claiming privilege over records 1405-1449 and 1456-1488, which was left unexplained, I am left with the same concerns I expressed in my letter of February 23, 2018. I do not know if the error was made by the affiant based on his personal knowledge, or whether he was "informed and believed" that those records were privileged.

[para 27] I don't know why the error was made, or – more importantly – how the Public Body ensured the same error was not made elsewhere in the records.

[para 28] The remainder of the Public Body's evidence regarding its claim of solicitor-client privilege is not sufficient to overcome my concerns. The context of the access request and responsive records are such that some of the records could be subject to solicitor-client privilege. However, the descriptions of the records over which the privilege is now claimed are the same as the descriptions initially applied to records 1405-1449 and 1456-1488. As those descriptions were clearly incorrect for some records,

it is not unreasonable to expect that a similar error could have been made to some other records. As I do not have the other records to review, I have no way of knowing whether a similar error was made elsewhere, or to which records. There may have been a valid reason for why those descriptions were erroneously applied to records 1405-1449 and 1456-1488, but none has been offered.

[para 29] Because the Public Body has the burden of proving it has correctly applied the privilege (on a balance of probabilities), I cannot conclude that the Public Body has met its statutory burden to show that it properly claimed the privilege. As such, the Commissioner's order making powers under section 72 of the Act, which I have been delegated for this inquiry, require me to order the Public Body to disclose the records over which it has claimed solicitor-client privilege, subject to other exceptions in the Act.

[para 30] In this case, the Public Body cited several other exceptions for withholding information in these records. Therefore, I will retain jurisdiction to review the Public Body's application of those other exceptions to the information in these records.

V. ORDER

[para 31] I make this Order under section 72 of the Act.

[para 32] I find that the Public Body did not meet its burden to show that it properly claimed solicitor-client privilege over the information in the records listed at Schedule 1 of its March 16, 2018 submission. As the Public Body has also applied sections 16(1), 17(1), 21(1), 24(1) and 27(1)(b) and (c) to information in those records, I retain jurisdiction to review the Public Body's application of those sections in the next part of this inquiry. In order that I may do so, the Public Body is to provide me with a copy of the unredacted records at issue with the redactions highlighted, or otherwise noted, and the relevant section numbers of the Act identified on the records.

[para 33] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator