

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-23

June 21, 2021

ROCKY VIEW COUNTY

Case File Number 006519

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Rocky View County (the Public Body) for records relating to the Elbow Valley West stormwater management system, specifying four particular records. The Public Body located three of the four records but withheld them in their entirety under section 27. The Public Body was unable to locate the fourth record.

The Applicant requested a review of the Public Body's decision to withhold the responsive records, as well as the adequacy of the Public Body's search. The Applicant subsequently requested an inquiry.

During the inquiry, the Public Body determined that it would no longer withhold two of the responsive records, but continued to withhold a settlement agreement under section 27(1)(a), citing settlement privilege.

The Adjudicator determined that the Public Body failed to meet its duty to assist the Applicant by not providing any explanation for not locating the fourth record. The Applicant recalled having been shown that record, and provided specific details to help locate it. As such, the Public Body ought to have provided an explanation of its search to the Applicant, including an explanation for why the record the Applicant recalls viewing could not be located.

The Adjudicator found that the Public Body properly applied section 27(1)(a) to the settlement agreement.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 27, 72.

Authorities Cited: **AB** Orders 2001-016, 97-006, 2001-016, F2007-029, F2016-60, F2020-13

Cases Cited: *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, *Sable Offshore Energy Inc. v. Ameron International*, 2013 SCC 37

I. BACKGROUND

[para 1] The Applicant made an access request dated April 18, 2017, to Rocky View County (the Public Body) for

1. A copy of the MPE Engineering Ltd.'s "independent assessment of the circumstances of the Infrastructure designed and constructed by Elbow Valley West (EVW) at the Development." This assessment report was requested by the County in or about 2016. It is the 'final report' that is requested.
2. A copy to the "Standstill Agreement" entered into by Rocky View County and Elbow Valley West Ltd. in December 2014.
3. A copy of the BSEI Municipal Consulting Engineers' Report prepared for the EVW Condo Corp in 2012-2015. The said Report was provided to the Country in December 2015, and, in turn, the County provided a copy of the Report to Elbow Valley West Ltd. On December 18, 2015.
4. A copy of the letter from County Administration written by [S. B.], Planning, to County Councillors respecting the Elbow Valley West Development. [Reeve B] and [Deputy Reeve S] referenced the letter during their on-site visit to our property on June 21, 2016. (They may have referred to the letter as an Administrative 'progress report' on EVW.) [Deputy Reeve S] also gave me a very brief look at the letter as they had a copy in hand. Thus, my understanding is that the letter would be dated on, or about, June 21, 2016. I trust both the Reeve and Deputy Reeve would be pleased to confirm the letter in question, and the date thereof.

[para 2] The Public Body located records 1-3, but withheld them in their entirety, citing litigation privilege (section 27(1)(a)). The Public Body was unable to locate item 4.

[para 3] The Applicant requested a review by this Office of the Public Body's application of section 27(1)(a), as well as the adequacy of the Public Body's search for the fourth item. The Applicant subsequently requested an inquiry.

[para 4] In the course of the inquiry, I asked the Public Body several questions regarding its claim of privilege (letter dated April 13, 2021). In its response, the Public Body states that it would no longer be claiming privilege over the MPE report and the BSEI report, due to the passage of time and change in circumstances since it first responded to the Applicant. The Public Body provided a copy of these reports to the Applicant. The Public Body continues to withhold the Agreement under section 27(1)(a).

[para 5] As such, the MPE and BSEI reports are no longer at issue in the inquiry. The Public Body's application of section 27(1)(a) over the Agreement remains at issue.

II. RECORDS AT ISSUE

[para 6] The record at issue consists of item 2 listed above, withheld as privileged.

III. ISSUES

[para 7] The issues set out in the Notice of Inquiry, dated January 28, 2021, are:

1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records in relation to item 4 of the Applicant's access request.

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

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 8] As set out in the Notice of Inquiry, this issue relates to the Public Body's inability to find a copy of the letter sought by the Applicant (item four in the list cited above).

[para 9] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 10] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. An adequate search has two components in that

every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 11] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 12] The Public Body states that it received the Applicant's access request on April 18, 2017. It asked the Engineering Services and Planning Services within the Public Body to search for responsive records on April 20, 2017. The Applicant was informed by letter dated May 16, 2017, that the first three items in the request were located but the fourth – the letter – was not.

[para 13] On July 13, 2017, the Applicant provided the Public Body with copies of emails between him and a Councillor to provide context for the letter he is seeking. The Public Body expanded its search for the letter, asking S.B., Reeve B and Deputy Reeve S, to conduct a search. The Public Body included additional information about the letter as provided by the Applicant: that Deputy Reeve S had the letter when the parties met at an on-site meeting on June 21, 2016. Deputy Reeve S allowed the Applicant to briefly review the letter. The Applicant believes it was written by S.B. as a result of a prior meeting between the Applicant and senior administration within the Public Body, on a given date.

[para 14] The Applicant also notes that when he asked Deputy Reeve S to make a copy of the letter on June 21, 2016, Deputy Reeve S refused, stating that perhaps he shouldn't have shared it with the Applicant.

[para 15] On July 21, 2017, Reeve B advised that he searched his office for the letter, spending 30 minutes on the task, and did not locate it. Deputy Reeve S advised that he searched his emails and all boxes of documents, spending six hours on the task, and did not locate the letter.

[para 16] On January 10, 2018, during the review by this Office, the Public Body asked Planning Services, Reeve B and Deputy Reeve S to search for the letter again, with the following instructions:

The letter, dated on or about June 21, 2016 from County Administration written by [S. B.], Planning, to County Councillors respecting the Elbow Valley West Development. The applicant has provided that [Reeve B] may have referenced the letter as an Administrative 'progress report' on EVW.

For the time period of:
March 1, 2016 to Sep 30, 2016.

[para 17] Deputy Reeve S responded that he had searched “all files in my possession” and did not locate the letter. Reeve B responded that he searched his home office and did not locate the letter. S.B. searched the SharePoint site for the Planning Services area, and did not locate the letter.

[para 18] With its submission, the Public Body provided a copy of the January 2018 letter it sent to Planning Services, Reeve B and Deputy Reeve S requesting the latest search. The Public Body noted in that letter that it is an offence under the FOIP Act to alter, falsify, conceal or destroy any record in order to evade an access request (Section 92 of the FOIP Act).

[para 19] The Public Body’s first search for records, in April 2017, did not include Reeve B or Deputy Reeve S. I do not think that search was sufficiently thorough. However, the subsequent searches that included these individuals, as well as S.B., who may have authored the letter, corrected that error.

[para 20] I understand that the Applicant believes the letter exists because he reviewed it, however briefly, in June 2016. I do not know why the letter was not located. No one has acknowledged having had the letter, or offered an explanation regarding what might have happened to the letter.

[para 21] In Order F2020-13, the Director of Adjudication considered a public body’s obligation in a similar situation, where the applicant had reason to believe particular records existed at some time; for example, records that had initially been provided to the public body by the applicant, and documents that were referenced in records that were provided to the applicant by the public body. The Director found (at paras. 79-80, footnotes omitted):

In some earlier orders of this office, the Adjudicator held that the fact a very thorough search had been conducted and records were not found was itself an adequate explanation

for the belief that no further records exist. While I agree with the logic of this in the appropriate case, in circumstances such as the present, where the Applicant is able to demonstrate with certainty for some of the records she describes that the public body was once in possession of them, or that this is reasonably likely, I believe the duty under section 10 includes giving an explanation as to what happened to them or likely happened to them that would account for their no longer being in the public body's possession.

If such explanations cannot be given due to the passage of time, a public body should explain why the passage of time impedes its ability to provide an explanation – for example, that there are no longer people employed by it who have knowledge of the related events, or if there are, that they no longer remember details about the particular case, or that records retention policies permitted or provided for the destruction of pertinent recorded information.

[para 22] I agree with this analysis. In many cases, evidence of a thorough search is a sufficient answer to the question why the public body believes no additional records exist.

[para 23] In this case, the Applicant recalls seeing a copy of the record he has requested. He has provided details about who had possession of the letter and on what day. The searches conducted by the Public Body appear thorough, but no one has acknowledged whether they recall the specific letter being sought, or what might have happened to it. In other words, the Applicant has provided sufficient reason to believe that the record exists (or existed) yet the Public Body has not provided any explanation as to why it was not located, other than to say that certain individuals within the Public Body searched for it.

[para 24] A similar situation was discussed in Order F2016-60, in which an applicant was seeking a copy of a letter written by a public body employee and sent to the applicant. The applicant had misplaced her own copy and wanted another. The letter had been written in 1993 and the access request was made in 2013. In that case, the public body had conducted a thorough search for the letter but did not locate it. The public body explained its records retention policy, and surmised that given the passage of time, the letter had likely been destroyed in accordance with that policy. The public body was found to have met its duty to assist the applicant under section 10, as its search and explanation were sufficient.

[para 25] As stated earlier in this Order, section 10 requires not only that an adequate search for records be conducted, but also that the Public Body respond to the Applicant openly, accurately and completely. Given that the Applicant seems to have first-hand knowledge of the record, and the amount of detail he was able to provide about the record, the Public Body's answer is not sufficient to meet its duty in section 10. My finding is not that the Public Body didn't conduct a thorough search; rather, the Public Body did not provide a sufficient explanation for not locating a particular record that the Applicant has previously seen in the custody of a Public Body employee.

[para 26] In this case, there may be many reasons why the record cannot be located. Possibly a satisfactory answer will not be found. In that case, the Public Body can, at minimum, tell the Applicant whether the relevant parties recall the record and whether they have any explanation for not being able to locate it. Some explanation is better than no explanation at all.

Conclusion regarding the duty to assist

[para 27] While the Public Body has conducted several searches, the facts of this case lead me to conclude that the duty under section 10 is not met until the Public Body provides additional information about the search for the letter the Applicant is seeking. Where possible, the Public Body should speak with Deputy Reeve S and S.B., as well as any other Public Body employees who may reasonably be expected to have knowledge of the letter. The Public Body should determine whether these individuals recall having had a copy of (or writing) the letter, and if they have any explanation for not being able to locate the letter now.

[para 28] If the individuals' answers indicate that another search may elicit results, the Public Body should conduct that search. If not, the Public Body is to respond to the Applicant with the information it was able to obtain from the individuals.

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

[para 29] Section 27 of the Act 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,

(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.

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[para 30] The Public Body has initially claimed privilege over the Settlement Agreement, the MPE report and the BSEI report.

[para 31] In its May 25, 2021 submission to the inquiry, the Public Body states that given the time that has passed since its initial response to the Applicant's request, and the change in circumstances in that time, it reconsidered its claim of privilege over the records at issue. The Public Body determined that it would no longer claim privilege over the MPE report or the BSEI report. The Public Body provided a copy of these reports to the Applicant.

[para 32] In his response (dated June 14, 2021), the Applicant indicates that he believes the Public Body ought to respond to the questions I posed in my April 2021 letter regarding its claim of privilege over the reports (as well as the Agreement). He argues that the Public Body provided these reports to third parties long before it decided to provide them to the Applicant, which indicates a biased and flawed approach in the Public Body's FOIP process.

[para 33] I do not know with whom the Public Body shared the reports or in what circumstances that may have been done. I understand that the Applicant is frustrated with the time it has taken to obtain records from the Public Body in response to his 2017 access request. Nevertheless, it is unnecessary to require the Public Body to justify a position it no longer holds, especially when the relevant information has since been provided to the Applicant.

[para 34] The Public Body continues to claim privilege over the record the Agreement; specifically, the Public Body has claimed settlement privilege over that record.

[para 35] The Applicant had requested "A copy to the 'Standstill Agreement' entered into by Rocky View County and Elbow Valley West Ltd. in December 2014." The responsive record located by the Public Body is described as a Settlement Agreement. The Public Body states that this agreement was reached between it and Elbow Valley West, in order to resolve a legal conflict between the parties.

[para 36] The purpose of settlement privilege was discussed by the Alberta Court of Appeal in *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, at para. 21:

Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because an admission of liability is often implicit as part of settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.

[para 37] The Court stated the “necessary elements that cloak a communication with settlement privilege” as (at para. 15):

- (a) the existence, or contemplation, of a litigious dispute;
- (b) an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed; and
- (c) the purpose of the communication must be to attempt to effect a settlement.

[para 38] In *Sable Offshore Energy Inc. v. Ameron International*, 2013 SCC 37, the Supreme Court of Canada confirmed that settlement privilege encompasses the settlement agreement made between parties.

[para 39] The Public Body argues that the Agreement fulfills the test for settlement privilege set out above. It points to specific paragraphs of the Agreement that set out the legal dispute being resolved, specify the confidentiality of the Agreement, and the purpose of the Agreement.

[para 40] I cannot discuss the specific paragraphs of the Agreement, as that is the information at issue here. However, having reviewed the Agreement, I conclude that the purpose was to resolve an existing legal conflict between the parties, and that it expressly states that the Agreement is to be kept confidential between the parties.

[para 41] It is also clear that the purpose of the Agreement is to effect a settlement. As such, the test for settlement privilege is met.

Exercise of discretion

[para 42] Section 27(1)(a) is a discretionary exception; this means that even if the exception applies, the Public Body must consider whether it is nevertheless appropriate to disclose the information.

[para 43] The Public Body has not provided submissions regarding its exercise of discretion to apply section 27(1)(a) to the Agreement. However, it is clear from case law that settlement privilege belongs to both parties to the settlement and that it cannot be unilaterally waived by one party (*Bellatrix Exploration*, at para. 26). This means that the settlement privilege belongs also the Elbow Valley West, and the Public Body cannot unilaterally exercise its discretion to waive the privilege and provide the Agreement to the Applicant.

[para 44] Although the Public Body did not argue this point, the Agreement may arguably have been withheld under section 27(2) of the Act, cited above. This provision requires a public body to withhold privileged information where the privilege belongs to a third party. If that provision applies, a public body cannot exercise its discretion to withhold or disclose the information.

[para 45] As such, I am satisfied that the Public Body's decision to continue to withhold the Agreement is a proper exercise of its discretion.

V. ORDER

[para 46] I make this Order under section 72 of the Act.

[para 47] I find that the Public Body did not fulfill its obligation under section 10 of the Act with respect to the fourth record request by the Applicant (the letter from Administration to Counsellors). I order the Public Body to seek further information and respond again to the Applicant, as set out in paragraphs 27-28 of this Order.

[para 48] I uphold the Public Body's application of section 27(1)(a) of the Act to the Agreement.

[para 49] I further order the Public Body to notify me, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator