ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-25

July 19, 2024

ALBERTA HEALTH SERVICES

Case File Number 006461

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to Alberta Health Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "arbitration notes (Nov 24-28, 2014) between the Public Body, [Named Entity] and [the Applicant] with presiding Arbitrator [Named Individual]."

The Applicant made two requests for the information. The first request was made to the arbitration counsel, an employee of the Public Body, directly, the arbitration counsel emailed a response stating that the records were subject to solicitor-client privilege and would be withheld. The response was never received by the Applicant due to an error in the email address.

The second request was sent to the Public Body's Information Access Services office and was responded to in accordance with the FOIP Act. Upon receiving the second request from the Applicant, the Public Body responded similarly as the lawyer did, stating that it was withholding the responsive records pursuant to solicitor-client privilege (section 27(1)(a)). The Applicant requested a review of the Public Body's decision, and subsequently an inquiry.

The Adjudicator found that upon receiving the initial email from the Applicant, the arbitration counsel failed in the duty to assist, pursuant to section 10 of the FOIP Act; she ought to have transferred the request to the Public Body's Information Access Services office.

The Adjudicator found that in response to the second request from the Applicant, the Public Body conducted an adequate search for the records; however, when responsive records were not found, the Public Body ought to have informed the Applicant that there were no records, instead of making a blanket claim of solicitor-client privilege.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 7, 8, 10, 11, 27, 71, 72

Freedom of Information and Protection of Privacy Regulation, Alberta Regulation 186/2008, s. 11

Authorities Cited: AB: Orders F2007-029; F2023-16

Cases Cited: *Canadian Natural Resources Limited v ShawCor Ltd*., 2014 ABCA 289, *Solosky v. The Queen*, [1980] 1 SCR 821, *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, *Blank v. Canada (Minister of Justice)*, 2006 SCC 39

Other Documents Cited: OIPC Privilege Practice Note

I. BACKGROUND

[para 1] On June 7, 2017, the Applicant made an access request to Alberta Health Services (the Public Body), under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "arbitration notes (November 24-28, 2014) between [the Public Body], [Named Entity and Named Public Body Employees]."

[para 2] On March 9, 2017, the Applicant sent an email to the Public Body's arbitration counsel requesting the records. Arbitration counsel responded by email on March 17, 2017, denying access to the records, stating that they were protected by solicitor-client privilege. This email response was not received by the Applicant due to a typographical error in the email address.

[para 3] The Applicant sent a second request for the records on June 7, 2017, and marked the request as a second request.

[para 4] On July 5, 2017, the Public Body responded to the Applicant and informed her that it had contacted the arbitration counsel for the records. The arbitration counsel informed the Public Body that she had received an email from the Applicant and had responded to her on March 17, 2019, stating that the records were protected by solicitor-client privilege relying on section 27 of the FOIP Act and would not be produced. Accordingly, the Public Body also refused disclosure of the requested records relying on section 27 of the FOIP Act.

[para 5] The Applicant requested a review of the Public Body's decision, and subsequently an inquiry.

[para 6] On September 1, 2023, I wrote a letter to the Public Body, requesting that it submit an affidavit per the OIPC Privilege Practice Note.

[para 7] An affidavit was provided to this office on November 9, 2023, sworn by the Associate General Counsel (affiant), leading the Public Body's Labour and Employment Legal Team (L&E). At paragraph 26, the affiant swears that:

> …I do verily believe that records responsive to the Applicant's access request no longer exist within L&E's files or, if they do still exist, cannot and will not be located by L&E despite further searches for same.

[para 8] On February 22, 2024, I requested additional clarification from the Public Body, specifically, if the Public Body had canvassed its employees for the notes taken at the arbitration and if there was a record retention policy in 2014.

[para 9] The Public Body responded to my query. It stated that it had requested the notes from each of its employees including the arbitration counsel on June 9, 2017; no responsive records were returned.

[para 10] The Public Body further explained that such records would have been transitory and pursuant to the retention policy in place at that time, "…the notes requested by the Applicant would have had no further value or usefulness once the arbiter had rendered his decision in the arbitration or, in the discretion of their author, upon expiry of the period for bringing an application for judicial review of that decision, which in either case would have rendered the notes obsolete long before the Applicant's access request of June 7, 2017. It would seem likely that this would be the reason that the search for the notes was unsuccessful."

[para 11] It was not until the response to my February 22, 2024 query that the Public Body appears to have ascertained that the Call for Records did not produce a result. Despite this, it continued to assert a blanket claim of solicitor-client privilege over records that it had never located by way of search, catalogued or examined.

II. ISSUES

Preliminary

[para 12] The following preliminary issues have been raised in the submissions:

Was the request made to the Public Body's arbitration counsel a request made under the FOIP Act? If yes, did the duty to assist under section 10 of the FOIP Act apply when the arbitration counsel attempted to respond to this request?

[para 13] In addition to the issue set out in the April 10, 2019 Notice of Inquiry, I am including an additional issue, of whether an adequate search was conducted by the Public Body.

[para 14] The two issues are:

1. Was an adequate search conducted by the Public Body when it received the Applicant's formal FOIP request for responsive records?

2. Did the Public Body properly apply section 27(1)(a) of the Act (legal privilege) to the information/records it located but withheld?

[para 15] I note the second issue is framed as though records were located by the Public Body, which as discussed above, is not the case.

III. DISCUSSION OF PRELIMINARY ISSUE

Was the request made to the Public Body's arbitration counsel a FOIP request? If yes, did the duty to assist under section 10 of the FOIP Act apply when the arbitration counsel attempted to respond to this request?

[para 16] The Applicant submits that she requested records by email from the Public Body's arbitration counsel on March 9, 2017; however, she did not receive a response. She submits that she was given the "run around" as to who she should make the request to and she did finally find the correct person and submitted a second request.

[para 17] The second request was submitted by way of a "Request to Access Information" form provided to the Public Body, with the word "Second" hand written on the top, on June 7, 2017. In her request the Applicant made a reference to the initial request that was sent to the Public Body's arbitration counsel on March 9, 2017.

[para 18] On July 5, 2017, the Public Body responded to the June 7, 2017 request. The Public Body's response indicated that its arbitration counsel responded to the Applicant on March 17, 2017 at 2:54 PM.

[para 19] I requested the March 17, 2017, correspondence from the Public Body and it was able to provide me with both the response and the email request sent on March 9, 2017.

[para 20] The subject line of the email to the arbitration counsel reads: "Arbitration notes from 2014" and the body of the email is as follows:

> Please forward all arbitration notes from Dec 24-28, 2014 written by yourself, [Named Public Body Employees] to my email within one week.

[para 21] The response back to the Applicant on March 17, 2017 was:

> AHS will not provide the requested documentation. Notes created by AHS lawyers, paralegals and AHS representatives at the request of Counsel at the arbitration hearing between AHS and [Named Entity] that occurred in November and December 2014 are protected by solicitor-client privilege.

[para 22] The Applicant did not receive the above-noted response. On closer inspection of the address line on the response, I note that there is a typographical error in the Applicant's email address.

Analysis

[para 23] Sections 7, 8 and 11 provide the requirements for submitting FOIP requests:

i. Request should be submitted directly to the public body that possesses the sought after records (s.7(1))
ii. Requests must be made in writing (s.7(2))
iii. An application fee of $25 may be required (s. 8(1)(b) and under the Freedom of Information and Protection of Privacy Regulation, s.11(2)(a))
iv. Public Bodies have 30 days to respond to a FOIP request (this may be extended) (s.11(1))

[para 24] The email sent by the Applicant to arbitration counsel on March 9, 2017, could be considered a request under the FOIP Act. It does not appear that the arbitration counsel perceived it as a request under FOIP, as she did not forward the request on to the appropriate office, nor was the $25 fee requested from the Applicant. When counsel did email an answer to the Applicant on March 17, 2017, I note that the standard FOIP language directing an unsatisfied Applicant to the OIPC office was not used.

[para 25] Unfortunately, because of a typographical error in the Applicant's email address, the Applicant never received this response to her initial request for records. The Applicant made a second request directly to the Public Body's Information Access Services office on June 7, 2017. This request was processed under the FOIP Act and responded to accordingly.

Conclusion

[para 26] I find the first request made on March 9, 2017, was a request under the FOIP Act. Although it was made to a particular person in the Public Body's employ rather that to its FOIP Information Access Services unit, I believe in this case it can be regarded as having been made "to the public body" within the terms of section 7(1).

[para 27] The duty to assist, as specified in section 10 of the FOIP Act applies. While the arbitration counsel did respond to the Applicant herself (albeit using the incorrect email address), had she referred the request to the Public Body's Information Access Services office, the fee requirement could have been addressed, and the Applicant's request could have been dealt with "accurately and completely", thus fulfilling the Public Body's duty to assist.

IV. DISCUSSION OF ISSUES

Issue 1: Was an adequate search conducted by the Public Body when it received the Applicant's formal FOIP request for responsive records?

[para 28] It was not clear to me from the Public Body's response to the June 7, 2017 FOIP request (nor from its submissions to me) whether a Call for Records had been made to its employees.

[para 29] Section 10(1) of the Act states:

> *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 30] Previous orders have established the test for what an adequate search should cover. In Order F2007-029, at paragraph 66, the former Commissioner set out the evidence a public body should provide in an inquiry with respect to the search it conducted:

- 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.

[para 31] The Public Body's answer to my February 22, 2024 request for clarification indicates that at the time it received the FOIP request, it issued a Call for Records to its employees who had taken notes as well as to the arbitration counsel to whom the Applicant had written directly, and no records were received.

[para 32] I find that given the very specific nature of the request, for specified notes taken during specified dates, and the identification of the individuals who took these notes and therefore might have had responsive records, an adequate search for these records was conducted by the Public Body.

[para 33] As no records were located from this adequate search, I do not believe it is necessary to claim an exception to disclosure for them. However, for the sake of completeness and in case the records should ever be located, I will consider whether the privilege exception would be appropriately claimed for such records.

Issue 2: Did the Public Body properly apply section 27(1)(a) of the Act (legal privilege) to the information/records it located but withheld?

Applicant's Submissions

[para 34] Between, November 24-28, 2014, the Applicant participated in an arbitration with respect to an assault that she experienced at a facility operated by the Public Body.

[para 35] Subsequent to the arbitration, in summer 2016, the Applicant met with Calgary Police Service (CPS) in relation to the assault and submitted that CPS asked for an un-redacted copy of the arbitration notes.

[para 36] The Applicant submits that the arbitration notes "involve a criminal act that occurred against [her] and as a victim, [she] should be entitled to the notes to formulate a defense."

[para 37] The Applicant further submits that, "without the access to the un redacted arbitration notes civil/criminal legal proceedings are being obstructed."

FOIP Act

[para 38] The Applicant submits that while the FOIP Act outlines reasons that a Public Body should refuse to release records, those reasons are not applicable to her request for the records.

[para 39] The Public Body has a duty to assist the Applicant as per section 10 of the FOIP Act and furthermore the "records are required by law for police investigation as requested by Calgary Police Service. According to the concept of Paramountcy, federal and provincial laws/Rules of the Court would prevail over the FOIP Act."

[para 40] The Applicant submits that the police requested that she obtain the records and further submits that under section 139(1) of the Criminal Code of Canada, "everyone who willfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding can be found guilty of an indictable offense and liable to imprisonment."

[para 41] The Applicant submits that it is the job of this office to ensure that legal proceedings are not obstructed by withholding of the records.

Public Body's Submissions

[para 42] The Public Body submits that it processed the request for the arbitration notes correctly. The information contained in the notes is personal information as defined by section 1(n) and the notes were withheld under section 27(1)(a) as they are subject to solicitor-client privilege.

[para 43] The notes were taken by four employees of the Public Body who attended the arbitration. One of the four employees was the arbitration counsel for the Public Body. It says that any notes taken by the legal counsel are characterized as:

- solicitor's work product,
- records created for the dominant purpose of litigation, or
- communication between solicitor and client.

[para 44] It says that the other three employees who were in attendance took notes for the purpose of seeking legal advice, or communicating with their legal counsel and for use in a legal proceeding. These notes were meant to be confidential.

[para 45] The Public Body submits the test for solicitor-client privilege as set out in *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837 and later affirmed in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at paras. 15-21:

i. Communication must be between solicitor and client;
ii. The communication entails the seeking or giving of legal advice; and
iii. The communication is intended to be confidential by the parties.

[para 46] The Public Body further submits that "solicitor-client privileged records should be protected from disclosure because solicitor-client privilege is one of the cornerstones of the justice system, without which clients could not seek and receive the legal advice they require."

[para 47] The Public Body quotes paragraph 26 of *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 to summarize the role of solicitor-client privilege:

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

Analysis

[para 48] The Act places the burden of proof on the Public Body to show that section 27(1)(a) applies to the requested records:

> Privileged information
> 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,

Burden of Proof
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 49] In Order F2023-16, at para 57, the Adjudicator states:

> Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the Rules of Court (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in Canadian Natural Resources Limited v. ShawCor Ltd., 2014 ABCA 289 (CanLII) (ShawCor). ShawCor states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of ShawCor).

[para 50] As quoted in *Canadian Natural Resources Limited v. ShawCor Ltd*., 2014 ABCA 289 (*ShawCor*):

> [6] …Discovery should not be used to undermine legitimate spheres of privilege. At the same time, privilege should not be used to turn litigation into a game of hide and seek – with the seeker blindfolded.

[para 51] Courts have struck a balance between protecting privileged documents and giving an opposing party an opportunity to dispute the claim of solicitor client privilege without disclosing the actual documents. A process was established in *ShawCor*:

> [42] …Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.
>
> [43] Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

[para 52] The approach has been adopted by this office as outlined in Schedule 1 of the sample affidavit in the OIPC Privilege Practice Note:

> For claims of solicitor-client privilege, the Respondent should provide:

- Information about the relationship between the Respondent and the lawyer in the context of the relevant communication
- Information about the circumstances to establish that the record was created in the course of requesting or providing legal advice or is a record revealing such a request or advice
- Information about the confidentiality of the communication

[para 53] The Public Body was unable to locate the records at issue and therefore could not comply with the OIPC Privilege Practice Note.

[para 54] In its correspondence to me, dated April 26, 2024, the Public Body states:

> Although the existence of the requested records is implied in the Public Body's correspondence to the Applicant dated July 5, 2017 and November 29, 2017, in neither case did the Public Body expressly represent to the Applicant "that there were responsive records in existence" [emphasis added] nor, specifically, whose notes were being referenced. Rather, the Public Body made a blanket assertion of solicitor-client privilege in support of its application of section 27 to refuse access to any records created by the lawyer and her client, who had opposed the Applicant and her union at arbitration. Supported by the very nature of any such records (if they ever existed), the context in which any such records were created (if they ever were) and their use in the provision of legal advice for the purposes of the arbitration hearing (if they ever existed), this was a fair and accurate assertion that was not dependent on review of the records themselves (if they existed).

[para 55] I cannot help but wonder why the Public Body would not simply have stated that the requested records were not located. There were many opportunities in the last seven years for this matter to be resolved by reference to this fact.

[para 56] *ShawCor* established its process as described in para 51 above, so that assertions of solicitor-client privilege are made thoughtfully and accurately; without examining the records, using a "blanket assertion" of solicitor-client privilege runs contrary to the intent of the process set out in *ShawCor.*

[para 57] If the records were ever located by the Public Body, it would not be able to rely on its "blanket" assertion of solicitor-client privilege under section 27(1)(a). The process set out in *ShawCor* would have to be followed and the Public Body would be obligated to number and provide a brief description of each record to which section 27(1)(a) was being applied.

Conclusion

[para 58] I find that an adequate search was conducted for the records when the June 7, 2017 access request was made; the June 9, 2017 Call for Records did not yield a response. It would have been sufficient to inform the Applicant that records were not located rather than applying an exception to none-existent records.

V. ORDER

[para 59] I make this Order under section 72 of the FOIP Act.

[para 60] I find that the Public Body met its duty to assist the Applicant by conducting an adequate search for responsive records under section 10 of the FOIP Act.

[para 61] As there are no records that have been located in response to the request, there is no order to be made relating to the application of exceptions.

_____
Pam Gill
Adjudicator
/kh