

April 13, 2020

When Solicitor-Client Privilege Protects the Government from You

By: Drew Yewchuk

Decision Commented On: *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, [2020 ABQB 207](#)

Edmonton Police Service v Alberta (Information and Privacy Commissioner), 2020 ABQB 207 (*EPS v IPC*) is a decision on judicial review of [Order F2018-36](#) (Re), made by an adjudicator at the Office of the Information and Privacy Commissioner (OIPC). The decision addresses the “Privileged Information” exemption from disclosure found in section 27 of Alberta’s *Freedom of Information and Protection of Privacy Act*, [RSA 2000 C-F-25](#) (*FOIP*). This post discusses the background to the decision and offers some commentary on the broader freedom of information implications of the decision.

The facts underlying the *FOIP* request discussed in the case go back to 2013, when the Edmonton Police Service (EPS) decided to create their own in-house version of ‘[Cops](#)’, which took the form of a web series called ‘The Squad’. Criminal defence lawyers immediately took issue with EPS’s careless treatment of the *Charter* rights and privacy rights of the people shown in the series. After initially [dismissing](#) those concerns, EPS scrapped the project, and [released a written statement](#) saying: “Based on some of the feedback we have received, we have decided to refocus the vision of The Squad and cancel any further episodes.” Although this post focuses on *FOIP*, the ongoing legal problems created by The Squad [also include issues at the Law Enforcement Review Board](#).

Discretionary and Mandatory Exceptions to Disclosure

Alberta’s *FOIP* Act, and other access to information acts across Canada, include two categories of exceptions to disclosure: mandatory and discretionary. A public body must not disclose information falling into a mandatory exception, but information falling into a discretionary exception may or may not be disclosed. The distinction is created by differences in statutory language, either the mandatory language of “The head of a public body must refuse to disclose...” or the discretionary language of “The head of a public body may refuse to disclose...”.

When applying a mandatory exception, the process of determining whether to refuse to disclose information is one step: the public body determines whether the information meets the requirements of the exception. Mandatory exceptions under *FOIP* include sections: 16, Disclosure harmful to business interests of a third party; 17, Disclosure harmful to personal privacy; and 22, Cabinet and Treasury Board confidences.

Determining whether a public body should refuse to disclose material under a discretionary exception is a more complicated two-step process. First the public body must determine if the information meets the requirements of the exception. If it does, the public body moves onto a second step: the public body must exercise their discretion consistent with the purposes underlying *FOIP* by balancing the importance of the interest protected by the particular exception to disclosure against the public interest in open government, public debate and the proper functioning of government institutions. (See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010 SCC 23](#) at paras 45-50, and 66-67) The exercise of discretion under *FOIP*, like the exercise of discretion granted under any statute, must be exercised consistently with the purposes underlying its grant.

Discretionary exceptions under *FOIP* include sections: 18, Disclosure harmful to individual or public safety; 20, Disclosure harmful to law enforcement; 24, Advice to officials; and, most importantly for this post: 27, Privileged information.

The *FOIP* Request, the OIPC Process, and the Decision from Queen's Bench

On June 13, 2013, The Criminal Trial Lawyer's Association (CTLA) filed a *FOIP* request to EPS for "all records relating to EPS YouTube Series "The Squad"", and in particular "records relating to the planning and implementation of the series, criticism of the series, any reviews of criticism and the Public Body's response to criticism, and records containing information about why the series was cancelled." ([Order F2018-36](#) (Re), at para 1) The initial 1448-page record release came on September 10, 2013. The OIPC became involved in October 2013, and then a series of submissions and responses between the CTLA, EPS, and the OIPC continued until December 2017. The order of the OIPC was issued on Aug 22, 2018.

The OIPC Adjudicator noted that EPS's initial redactions were inconsistent – some records were redacted under *FOIP* section 21(1)(b) for having been provided in confidence by another government, and also for having been the confidential work product of lawyers for EPS. The Adjudicator noted this was internally contradictory. ([Order F2018-36](#), at para 10) The Adjudicator described the over-broad manner in which EPS interpreted the exceptions to disclosure in sections 17 and 24 of *FOIP* and ordered further disclosure.

The Adjudicator also discussed how EPS exercised their discretion in redacting information under discretionary exemptions, and two of the factors EPS considered were: "That the sworn and non-sworn members of the EPS had a reasonable expectation that their advice, analyses and recommendations could be provided freely within the EPS and would be kept confidential" and "That the sworn and non-sworn members of the EPS had a reasonable expectation that consultations and deliberations could take place feely within the EPS and would be kept confidential." ([Order F2018-36](#), at para 227) The Adjudicator found these were inappropriate considerations, since "Employees that create (or are referred to) in public records in their role as representatives of a public body, do not have private interests in such records. Any expectation of such employees is irrelevant in deciding whether it is in the public interest to disclose records or not." ([Order F2018-36](#), at para 232) The Adjudicator ordered EPS to reconsider their application of discretion, and to release pages they had improperly found to be subject to *FOIP* exceptions. ([Order F2018-36](#), at paras 313-320)

EPS appealed the Adjudicator's decision only as it related to section 27(1) of *FOIP* (*EPS v IPC*, at para 11). Section 27 of *FOIP* reads:

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,
 - (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.
- (3)** Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.

The OIPC Adjudicator was not given access to the records that EPS considered to be privileged and subject to section 27(1). Justice Gill at the Court of Queen's Bench was provided the records EPS considered subject to privilege in a sealed envelope, and reviewed those records in the first instance in the judicial review (*EPS v IPC*, at paras 9-10, 12; also see the procedural decision of Justice Hall in *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, [2017 ABQB 656](#), upheld by the Court of Appeal in [2018 ABCA 114](#)). This odd procedure where the OIPC is not given the material supposedly subject to privilege, and then the material is provided to the court is a result of the Supreme Court decision in *Alberta (Information and Privacy Commissioner) v University of Calgary*, [2016 SCC 53](#) where the Supreme Court concluded that the OIPC cannot pierce solicitor-client privilege. Justice Gill noted that this is the fourth judicial review to undertake this split process. (*EPS v IPC*, at para 29)

Justice Gill found the OIPC Adjudicator had misapplied the standard of proof to EPS. EPS was only subject to the balance of probabilities to show the records were privileged, and the Adjudicator erred in requiring "persuasive evidence" the records were subject to privilege. (*EPS v IPC*, at paras 21) Justice Gill concluded that the records in question were protected by solicitor-client privilege, and set aside the Adjudicator's records in relation to section 27(1)(a) of *FOIP*. (*EPS v IPC*, at paras 32-33)

Commentary: Discretion and Legal Privilege Under FOIP

First, the length of time the OIPC process took in this case impairs the purpose of FOIP. From the initial FOIP request to the conclusion of the OIPC process took more than five years. That is far too long to resolve what is essentially a disclosure issue. Many FOIP requests are filed to gather background for legal actions, and at the end of five years, most limitation periods will have ended. The first stage of FOIP questions should not be taking this long to resolve.

On the substance of the Court of Queen's Bench decision, I do not take issue with Justice Gill's conclusion on the scope of privilege, or the standard of proof to which public bodies are subject under FOIP. What troubles me is the absence of the second step (the application of discretion) for a discretionary exception by a public body. Justice Gill found that if the records were privileged and therefore potentially subject to redaction under section 27: "No additional scrutiny of discretion concerning the EPS's claim of solicitor-client privilege is warranted." (at para 22) I note that Justice Gill is in good company in reaching this conclusion, as Justice Renke recently came to the same conclusion (*Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, [2020 ABQB 10](#) at paras 74 and 113-118).

The conclusion that the court should not review a public body's application of discretion under section 27 of FOIP is a strange one. The Supreme Court has described the process for public bodies to apply discretionary exceptions under access to information legislation as follows:

This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made. (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010 SCC 23](#), at para 66)

Now that approach applies to all other discretionary access to information redaction powers, but the exemption in FOIP based on legal privilege is to be treated differently. The approach of Justice Gill and Justice Renke would mean that the discretion provided by section 27 of FOIP is different from the discretion provided by all other discretionary exemptions in Canadian access to information law. The federal courts, in considering the equivalent section 23 of the *Access to Information Act*, [RSC 1985, c A-1](#), continue to review the exercise of discretion of public bodies to redact information subject to legal privilege (*Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, [2019 FCA 95](#) at paras 80-90).

Public bodies should be required to show that the discretion to withhold records under section 27 was exercised in conformity with the purpose of FOIP. This does not violate the principle that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (*R v McClure*, [2001 SCC 14](#) para 35) because the requirement would not reduce the scope of solicitor-client privilege or pierce solicitor-client privilege. This is because solicitor-client privilege is a privilege for the client, not for the solicitor, and it is always within the power of the client to waive privilege and disclose or make public the records in question.

(*Geffen v Goodman Estate*, [1991 CanLII 69](#), [1991] 2 SCR 353, at p. 383) By enacting access to information legislation and making information covered by solicitor-client privilege a discretionary exception, the Alberta government has directed public bodies to waive solicitor-client privilege over records except where invoking the privilege is necessary in the public interest.

The Supreme Court previously considered the clash between litigation privilege and the federal *Access to Information Act*, RSC 1985, c A-1, and noted the *Access to Information Act* may impair the federal government's ability to invoke litigation privilege, but found that:

This is a matter of legislative choice and not judicial policy. It flows inexorably from Parliament's decision to adopt the *Access Act*. Other provisions of the *Access Act* suggest, moreover, that Parliament has in fact recognized this consequence of the [Act](#) on the government as litigator, potential litigant and guardian of personal safety and public security. (*Blank v. Canada (Minister of Justice)*, [2006 SCC 39](#) at paras 53)

Solicitor-client privilege is designed to facilitate the administration of justice by encouraging clients to speak freely to their lawyers, so that lawyers can advise clients to the best of their abilities (*R v Durham Regional Crime Stoppers Inc.*, [2017 SCC 45](#) at para 24; citing *R v McClure*, [2001 SCC 14](#) at para 33). Access to information legislation is designed to facilitate democracy by ensuring citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry (*Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403, [1997 CanLII 358](#) at para 61). It would be a cruel irony if the courts' stalwart defence of solicitor-client privilege, intended to facilitate the administration of justice, were to become a shield for government secrecy and an obstacle to democratic accountability.

This post may be cited as: Drew Yewchuk, "When Solicitor-Client Privilege Protects the Government from You" (April 13, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/04/Blog_DY_EPSvAB.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

