

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2008-011

January 15, 2009

CITY OF CALGARY

Case File Numbers F3928 & F3929

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the City of Calgary (the Public Body) for a copy of a valuation report relating to the Calgary Airport (the Airport) and communications relating to the preparation of the valuation report.

The Public Body identified a valuation report and a draft briefing book as responsive records, but severed information from these records on the basis of sections 24 (advice from officials) and 25 (disclosure harmful to economic and other interests) of the *Freedom of Information and Protection of Privacy Act* (the Act). Later, the Public Body decided that it would not rely on section 25 but would withhold the information under section 24(1)(a).

The Adjudicator decided that section 24(1) of the Act did not apply to the information severed by the Public Body because the information fell under section 24(2). The Adjudicator found that the severed information from the valuation report had become, for the purposes of section 24(2)(g), a substantive rule or statement of policy by which the Public Body interpreted its taxation powers and administered its activities under the *Municipal Government Act*. She ordered the Public Body to disclose the records in their entirety to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24, 25, 72; *Municipal Government Act* R.S.A. 2000, c. M-26

Authorities Cited: AB: Orders 96-006, 98-011, F2004-024
Canadian Oxford Dictionary 2nd edition (Don Mills: Oxford University Press, 2004)

I. BACKGROUND

[para 1] On September 1, 2006, the Applicant requested a copy of a valuation report of the Calgary Airport prepared by The Climans Group. The Applicant also requested copies of communications relating to the preparation of the valuation report.

[para 2] The Public Body responded to the access request on November 7, 2006. The Public Body withheld portions of the valuation report on the basis of section 25(1) of the Act. The Public Body applied section 24(1)(a) of the Act to portions of a draft briefing book, which was prepared by The Climans Group to expand on Sections 6.1 and 6.2 of the valuation report.

[para 3] On January 8, 2008, the Applicant requested review by this Office of the Public Body's decision to sever information from the records. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The Climans Group was identified as a potentially affected party and was provided with a copy of the request for review under section 67. However, The Climans Group declined to participate in the inquiry.

[para 5] The Public Body and the Applicant provided initial and rebuttal submissions. In its submissions, the Public Body advised that it no longer relied on section 25 to withhold the valuation report, but had decided to exercise its discretion to withhold this record under section 24(1)(a).

II. RECORDS AT ISSUE

[para 6] Information severed from a draft valuation report dated August 19, 1999 and a draft briefing book, dated November 15, 1999, is at issue. The information was prepared by The Climans Group under contract with the City of Calgary and relates to the valuation of the Calgary Airport.

III. ISSUE

Issue A: Did the Public Body properly apply section 24 of the Act (advice from officials) to the records/information?

IV. DISCUSSION OF ISSUE

Issue A: Did the Public Body properly apply section 24 (advice from officials) of the Act to the records/information?

[para 7] Section 24(1) reflects a public interest in protecting the government decision making process and enables a public body to withhold certain kinds of advice or other information directed at taking an action. It does so by ensuring that information revealing the decision making process is not disclosed, as this disclosure could have the effect of preventing governments from making decisions or taking advice through exposure to untimely or uninformed criticism.

[para 8] Section 24(2) contains provisions that prevent a Public Body from withholding certain types of information or records under section 24(1). The relevant provisions of section 24 for the purposes of this inquiry state:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council...

(2) This section does not apply to information that...

(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function...

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal, that is complete or on which no progress has been made for at least 3 years...

...
(g) is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an Act or regulation or administering a program or activity of the public body...

[para 9] The Public Body argues that section 24(1)(a) applies to the information it withheld. It relies on Order F2004-024, in which the Commissioner stated:

Order F2002-028 also dealt with a draft report that was withheld under section 24(1)(a). That Order refers to the three criteria for “advice” (which includes advice, proposals, recommendations, analyses and policy options). The “advice” must be:

- sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- directed toward taking an action; and
- made to someone who can take or implement the action.

In Order F2004-024, the Commissioner upheld a decision of Alberta Finance to withhold a draft of an actuarial report.

[para 10] The Public Body argues that the severed information was directed toward taking an action and continues to be germane regarding actions such as changes and variances to the Public Body's assessments of the Airport. It notes that release of the severed information would allow others to second guess and challenge possible decisions before they are final. In rebuttal, the Public Body stated that it continues to use the records to analyze the manner in which the Airport should be taxed and that the severed portions of the records are used to make recommendations and take potential courses of action regarding the Airport.

[para 11] The Public Body argues that the severed information contains recommendations and that it has adopted some, but not all of these recommendations. An employee states in an affidavit that the Public Body's assessment of the Airport is appealed each year and that staff members annually review the assessment methodology used for the Airport to ensure fairness and equity.

[para 12] The Applicant argues that section 24(1)(a) does not apply to information when the information is a bare "recitation of facts" and asserts that the valuation report is primarily factual. The Applicant relies on Order 96-006 in support of this position. The Applicant takes the position that section 24(2) enumerates categories of information to which section 24(1) does not apply. In particular, the Applicant argues that section 24(2)(e) (the result of research of a scientific or technical nature) applies to the records at issue and that the Public Body cannot therefore rely on section 24 to withhold them.

[para 13] With respect to the principles set out in Orders 96-006 and F2004-024, the Applicant argues that the severed information was not sought or expected. It relies on Order 98-011, which held that "gathering information does not meet the criterion of seeking or expecting advice or recommendations." Further it argues that the report was not directed at taking an action, as the consultant was engaged to prepare a valuation report and not to prescribe action to be taken. Finally, the Applicant argues that there is no indication that the report was made to someone who could implement the action.

[para 14] As the former Commissioner noted in Order 98-011, section 24(2) may apply to information that would otherwise meet the requirements of section 24(1):

Section 23(2) [now (24(2))] of the Act sets out several kinds of information which specifically must not be withheld, even though that information might otherwise fall within section 23(1) [now 24(1)].

Therefore, before considering whether section 24(1)(a) applies, I will first consider whether any provisions of section 24(2) apply.

Section 24(2)

[para 15] The Public Body raises the issue of the application of section 24(2)(b) (reasons for a decision) and argues that it does not apply. I agree with the Public Body that the severed information is not a statement of the reasons for a decision for the purposes of section 24(2)(b), as the severed information was prepared prior to any tax decisions being made.

[para 16] The Applicant argues that section 24(2)(e) (result of background research of a scientific or technical nature) applies to the information withheld by the Public Body. I have determined, for the reasons set out below, that section 24(2)(g) (substantive rule or statement of policy) applies to the information severed from the records at issue. I therefore need not consider whether section 24(2)(e) applies.

[para 17] Section 24(2)(g) states that section 24 does not apply to information that is a substantive rule or statement of policy adopted by a public body in order to interpret a statute or administer a program or activity.

[para 18] The *Canadian Oxford Dictionary* 2nd edition (Don Mills: Oxford University Press, 2004) defines “substantive” as “having a firm or solid basis; important, significant”. It defines “rule” as

1. a principle to which an action, procedure, etc. conforms or is required to conform
2. a prevailing custom or standard; the normal state of things.

[para 19] This dictionary also offers the following definition of “policy”:

a course or principle of action adopted or proposed by a government, party, business or individual etc.

[para 20] A substantive rule by which a public body interprets an Act or regulation, or administers a program or activity, under subsection 24(2)(g) would therefore be an important or significant principle to which actions or procedures of a public body conform or adhere when it interprets its statute or administers its programs or activities.

[para 21] I consider “rule” as used in section 24(2)(g) to refer to actions or procedures that conform to an informal or unofficial custom or standard, and not only to those actions and procedures that are formally or officially required to conform to a principle. The intent of subsection 24(2)(g), in my view, is to ensure transparency and accountability in the manner by which public bodies perform their statutory functions and duties, which may involve making decisions affecting the rights of citizens under legislation. If I were to interpret “rule” as meaning that there is an official or formal requirement to follow a policy, information about informal or unofficial policies that are nevertheless substantive and consistently followed by a public body in interpreting legislation or administering programs, could be withheld under section 24(1). Such a result would defeat the purpose of section 24(2)(g).

[para 22] The Public Body made the following arguments in relation to section 24(2):

As to Section 24(2) of the Act, the records have not been in existence for 15 years and are not statements of the reason for a decision. Particularly in regards to decisions that may yet be made to the way in which the Calgary Airport assessment is done, the City Assessor must be free to deliberate, study and accept recommendations as part of that process. Release of the records would allow others to second guess and challenge possible decision(s) before they are final.

[para 23] In its rebuttal submissions, the Public Body stated:

The severed records, including facts, figures and tables... continue to be used to analyze the manner in which the Airport should be taxed. The severed records are used to make recommendations and potential courses of action regarding the Airport. [My emphasis]

It is the Public Body's position that the applicable test for the application of Section 24 of the Act has been met;

- the records were sought by [an employee] who had the responsibility for and the power to vary or change the method by which the Airport would be assessed;
- the records were and continue to be use[d] in the process of analyzing and possibly changing the methodology by which the Airport is taxed, and;
- [An employee and another employee] have the authority to act [on] the advice and recommendations contained in the records.

The exception in Section 24(2)(e) is not applicable to the severed records. As attested to by [an employee], the process of assessing the Airport is ongoing and the methodology applied has and may again be changed.

[para 24] The Public Body also supplied an affidavit that states that an employee believes:

...That in 1998 the Public Body was in the process of implementing market value assessments for the 1999 tax year. The new market value assessments were mailed in 1999 with an effective date of July 1, 1998.

That the Calgary Airport was and remains a very large and complicated tax account. There are, on the Airport site, runways, air terminal buildings, parking structures, commercial tenants, a hotel, hangers and industrial facilities. The Airport's assessment has been and continues to be contentious with the Calgary Airport Authority (CAA) appealing its assessment every year.

That [an employee of the Public Body] in 1999, was the Calgary City Assessor. He had responsibility for the change to market value assessments and the responsibility to ensure the new assessments were fair and equitable. He had decision making powers in particular in regards to the Airport and the method and calculations to be used which would best reflect the market value of the Airport. [The employee] retired as City Assessor in January 2008 and continued to have responsibility for and decision making powers and the Airport assessment until his date of retirement.

[The employee], in 1999 authorized me to engage Climans Group Inc... for the purpose of providing the Public Body with a market value assessment prepared using a different valuation methodology from that employed by the City.

It was my understanding that the [employee] intended to rely on Mr. Climans' advice and analysis to determine whether the market value of the Airport was fair and equitable and where appropriate make changes to the methodology used.

The Public Body adopted some but not all recommendations in the said report. The Public Body annually reviews the Airport's market value assessment in conjunction with the Climans' recommendations and when appropriate may make changes to the assessment methodology. The new City Assessor... has the authority to act on the advice, recommendations and analysis done by Mr. Climans... [my emphasis]

...[the current Valuation Manager] has advised me that the Airport appeals its assessment each year, that the Airport's market value assessment each year is in the hundreds of millions of dollars and generates considerable tax revenue and that he and his staff annually review the assessment methodology used for the Airport to ensure fairness and equity.

[para 25] The evidence of the Public Body is that it reviews and applies the severed information in the records at issue when it makes decisions about the Airport's tax assessment each tax year as appropriate, to ensure fairness and equity in the way it exercises its taxation powers and duties under the *Municipal Government Act*. Further, the Public Body describes the City Assessor as *having authority to act on* the "advice, recommendations, and analysis" provided by The Climans Group in the valuation report. In my view, this evidence, and my review of the information at issue, supports a finding that the information severed from the valuation report has become a substantive rule by which the Public Body interprets and applies its taxation powers when assessing the airport and therefore falls under section 24(2)(g). While the severed information may not have been intended to be substantive rule when it was originally created, the evidence of the Public Body establishes that it has become a substantive rule for employees of the Public Body, as their decisions in relation to the exercise of the Public Body's taxation powers conform to the principles and methodologies set out in the severed information.

[para 26] Further, I find that the information severed by the Public Body has effectively become a statement of its policy in relation to the way it interprets and applies its taxation powers when assessing the airport. To paraphrase from the affidavit of an employee of the Public Body, cited above, that statement is: When making decisions about the Airport's tax assessment each tax year, the Public Body will consider and apply the methodology contained in the severed information, as appropriate, to ensure fairness and equity in the way it exercises its taxation powers under the *Municipal Government Act*.

[para 27] I do not agree with the suggestion of the Public Body, cited above, that records must be in existence for fifteen years for section 24(2) to apply. Section 24(2) contemplates a number of situations in which information may not be withheld under section 24. The situations contemplated by section 24(2) can be exclusive of one another, as evidenced by the word "or" linking subsection 24(2)(f) to subsection 24(2)(g).

[para 28] For these reasons, I find that section 24(2)(g) applies to the information severed by the Public Body, as this information has become both a substantive rule and a

statement of policy by which the Public Body interprets legislation and administers its program or activities.

Section 24(1)(a)

[para 29] I have already concluded that section 24(2) applies to the information severed by the Public Body. As a result, section 24(1) does not apply and the Public Body cannot withhold the records at issue under section 24(1)(a).

V. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I order the Public Body to give the Applicant access to the records at issue in their entirety.

[para 32] 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.

Teresa Cunningham
Adjudicator