

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2010-015

December 15, 2010

### ALBERTA TRANSPORTATION

Case File Number F4952

Office URL: <http://www.oipc.ab.ca>

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to Alberta Transportation (the “Public Body”) for “any reports on a high-speed rail system in Alberta”. The Public Body denied the Applicant’s request. The Public Body withheld the records pursuant to sections 4(1)(q), 16(1), 22(1), 24(1)(a), 24(1)(b), 24(1)(c), 24(1)(g) and 25(1)(c). The Adjudicator held that the records did not fulfill the requirements of section 4(1)(q) as there was insufficient evidence that the records were created “on behalf of” one of the classes of persons listed in section 4(1)(q)(i) to (iii). However, the Adjudicator held that section 22(1) applied to the records and upheld the Public Body’s decision to withhold the records.

**Statutes Cited:** AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25 ss. 4(1)(l), 4(1)(q), 4(1)(q)(i), 4(1)(q)(ii), 4(1)(q)(iii), 16, 16(1), 22, 22(1), 22(2), 24, 24(1)(a), 24(1)(b), 24(1)(c), 24(1)(g), 25, 25(1)(c), 72

**Authorities Cited:** AB: **Orders:** 96-020, 97-007, 97-010, 2000-013

#### I. BACKGROUND

[para 1] On April 12, 2009, the Applicant made a request under the FOIP Act to the Public Body for “any reports on a high-speed rail system in Alberta”.

[para 2] On April 24, 2009, the Public Body denied the Applicant's access request. The Public Body withheld the records pursuant to sections 16(1), 22(1), 24(1)(a), 24(1)(b), 24(1)(c), 24(1)(g) and 25(1)(c).

[para 3] On May 19, 2009, the Applicant requested a review by this Office. Mediation was authorized but did not resolve the issue.

[para 4] On July 17, 2009, the Applicant requested that the Information and Privacy Commissioner conduct an inquiry into the matter. The matter was scheduled for an inquiry.

[para 5] During the inquiry, the Public Body and the Applicant each submitted an initial submission. A portion of the Public Body's initial submission was submitted, and accepted by this Office, *in camera*. The Public Body and the Applicant did not submit a rebuttal submission.

## II. ISSUES

[para 6] There were 4 issues identified in the inquiry notice:

- A. Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?
- B. Does section 22 of the Act (cabinet and treasury board confidences) apply to the records/ information?
- C. Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?
- D. Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body) to the records/information?

[para 7] In the Public Body's initial submission, the Public Body also addressed section 4(1)(q) of the FOIP Act. As section 4(1)(q) is a jurisdictional provision, I have added that section as an issue to this inquiry. In addition, in the Public Body's initial submission the Public Body stated that it was no longer applying sections 16 and 25 to the records. As such, these sections are no longer at issue in this inquiry.

[para 8] The revised list of issues reads as follows:

- A. Are the records/information excluded from the application of the FOIP Act by section 4(1)(q)?
- B. Does section 22 of the Act (cabinet and treasury board confidences) apply to the records/ information?
- C. Did the Public Body properly apply section 24 of the FOIP Act (advice, etc.) to the records/information?

### III. INFORMATION AT ISSUE

[para 9] The information at issue consists of two reports. The first report was prepared by the Public Body and attached to a memo from a Minister to another Member of the Executive Council (pages 1-17). The second report was prepared by a government contractor for the Public Body (pages 18-28).

### IV. DISCUSSION

#### A. Are the records/information excluded from the application of the FOIP Act by section 4(1)(q)?

[para 10] Section 4(1)(q) reads:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

...

*(q) a record created by or for*

*(i) a member of the Executive Council,*

*(ii) a Member of the Legislative Assembly, or*

*(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*

*that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;*

[para 11] In Order 97-007, the former Commissioner discussed the interpretation of section 4(1)(q) (formerly section 4(1)(l)). He said that in order for a record to fall outside the Act by reason of section 4(1)(q), the record must be created by or for any of those classes of persons listed in section 4(1)(q)(i) to (iii). He interpreted the word “for” to mean “on behalf of” and said that “for” did not mean “intended to go to” or “destined for” because that interpretation would allow a record created by anyone in the world to be excluded from the application of the FOIP Act.

[para 12] In that Order, the former Commissioner also found that the concluding part of section 4(1)(q) requires that the record “has been sent or is to be sent” to one of the same three classes of persons listed in section 4(1)(q)(i) to (iii). Therefore, section 4(1)(q) is intended to exclude from the application of the FOIP Act communications among only those persons listed in section 4(1)(q)(i) to (iii).

[para 13] In Order 96-020, the former Commissioner said that if a record is created by a person who acts on behalf of one of the classes of persons listed in section 4(1)(q)(i) to (iii), that record must indicate that the individual is acting on that person’s behalf, or it must be evident in some other way.

[para 14] After a review of the records and the all of the submissions before me, I find that the records do not fulfill section 4(1)(q). I find that there is insufficient evidence that the records were created by or for one of the classes of persons listed in section 4(1)(q)(i) to (iii).

[para 15] The first report (pages 1-17) consists of a record which was created by the Public Body and attached to a memo from a Minister to another Member of Executive Council. This report shows, on its face, that it was created by the Public Body. The report does not, however, indicate that it was created by the Minister or on behalf of the Minister rather than having been “destined for” or “intended to go to” the Minister. In this regard I note that not every record created by a public body is created on behalf of a Minister.

[para 16] In Order 2000-013, the former Commissioner addressed whether an attachment to a record which is authored by a person listed in section 4(1)(q) would fulfill the requirements within section 4(1)(q). The former Commissioner held that in order for an attachment to fulfill the requirements of section 4(1)(q), the attachment must individually fulfill the requirements found within that section. The fact that a Member of the Executive Council attaches a covering letter to a record authored by someone else does not mean that the Member of the Executive Council “created” the record or that the record was created on behalf of the Member of the Executive Council. The former Commissioner held that the Legislature did not intend that any record could be shielded from the Act simply by attaching it to a record that is exempt from the Act under section 4(1)(q). In this inquiry, I find that there is insufficient evidence that the first report (pages 1-17), individually fulfills the requirements of section 4(1)(q). Given the foregoing, I find that the first report (pages 1-17) is not excluded from the application of the Act.

[para 17] The second report (pages 18-28) shows, on its face, that it was created by an outside contractor for the Public Body. However, there is no evidence before me that record was created on behalf of the Minister rather than having been “destined for” or “intended to go to”, the Minister. Given the foregoing, I also find that the second report (pages 18-28) does not fulfill section 4(1)(q) and is not excluded from the application of the FOIP Act.

**B. Does section 22 of the Act (cabinet and treasury board confidences) apply to the records/ information?**

[para 18] Section 22 reads:

*22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

*(2) Subsection (1) does not apply to*

- (a) information in a record that has been in existence for 15 years or more,*
- (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or*
- (c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if*
- (i) the decision has been made public,*
  - (ii) the decision has been implemented, or*
  - (iii) 5 years or more years have passed since the decision was made or considered.*

[para 19] Section 22(1) is a mandatory provision that is intended to cover specific types of Cabinet documents. If information falls within this section, it must not be disclosed. In order to fulfill this section, the information must reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees.

[para 20] In Order 97-010, the former Commissioner defined the term “substance” to mean “of essence, the material or essential part of a thing”; while the term “deliberation” was defined to mean “the act of deliberating, the act of weighing and examining the reasons for and against a contemplated action or course of conduct or a choice of acts or means”.

[para 21] In that Order, the former Commissioner also said that information would “reveal” the substance of deliberations if its release would permit the drawing of accurate inferences with respect to the substance of deliberations. The former Commissioner held that if a release of information in a record would “explicitly or implicitly” reveal the substance of deliberations of Cabinet, then the information must not be disclosed. A release of information implicitly reveals the substance of Cabinet deliberations if it is reasonable to expect that the released information could be combined with other information to reveal the substance of Cabinet deliberations.

[para 22] In that Order, the former Commissioner also held that “submitted or prepared” refers to information that either went before Cabinet or one of its committees or that was incorporated into a Cabinet submission or used as the basis for developing a Cabinet submission.

[para 23] After a review of the records and all of the submissions before me I find that the first report (pages 1-17) fulfills the requirements of section 22(1). I find the information within those pages of records would reveal the substance of deliberations of the Agenda and Priorities Committee which is a Committee of the Executive Council. The information before me shows that the first report (pages 1-17) was submitted and placed on the agenda of this Committee which indicates that it was discussed at the Committee meeting.

[para 24] I also find that the second report fulfills the requirements of section 22(1). Although there is insufficient evidence before me that the second report itself was

submitted to this Committee, the evidence before me shows that the content of the second report was summarized in, and used as the basis for, the first report which was submitted to the Committee.

[para 25] Section 22(2) lists the exceptions to section 22(1). Section 22(1) will not apply to records if one of the following apply:

1. the information has been in existence for 15 years or more;
2. the information is in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
3. the purpose of the information in the record was to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision and
  - (i) the decision has been made public,
  - (ii) the decision has been implemented, or
  - (iii) 5 years or more years have passed since the decision was made or considered.

[para 26] After a review of the records and the submissions before me, I do not find that section 22(2) applies to the records at issue. The information in the records has not been in existence for 15 years or more, nor is it in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act. In addition, although the information contains some background facts that were presented to the Executive Council, there is insufficient evidence that the Executive Council made a decision in regard to the information presented before it and, if so, that the decision was made public or was implemented. Lastly, the date on the records indicate that five or more years would not passed since that type of decision would have been made or considered.

**C. Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?**

[para 27] As I have found that section 22(1) applies to the records, I do not find it necessary to determine whether the Public Body properly applied section 24 to the records.

**V. ORDER**

[para 28] I make the following order under section 72 of the FOIP Act.

**A. Are the records/information excluded from the application of the FOIP Act by section 4(1)(q)?**

[para 29] I find that the records at issue do not fulfill the requirements of section 4(1)(q) and are not excluded from the application of the FOIP Act pursuant to that section.

**B. Does section 22 of the Act (cabinet and treasury board confidences) apply to the records/ information?**

[para 30] I find that section 22(1) applies to the records at issue. I uphold the Public Body's decision to refuse to provide the Applicant with access to the records. I order the Public Body not to disclose the information to the Applicant.

**C. Did the Public Body properly apply section 24 of the Act (advice, etc.) to the records/information?**

[para 31] As I have found that section 22(1) applies to the records, I do not find it necessary to determine whether the Public Body properly applied section 24 to the records.

Lisa McAmmond  
Adjudicator