

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-012

September 27, 2011

ALBERTA SUSTAINABLE RESOURCE DEVELOPMENT

Case File Number F5404

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked Alberta Sustainable Resource Development (the “Public Body”) for information pertaining to himself, his company and certain gravel leases. The Public Body withheld some information under section 24 of the Act, and the Applicant requested a review. The only information at issue consisted of portions of a Briefing Note.

The Adjudicator found that the Public Body properly applied section 24 to the information in the Briefing Note, as the information could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), as well as consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b).

Under section 72(2)(b) of the Act, the Adjudicator confirmed the decision of the Public Body to refuse the Applicant access to the information at issue.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2(a), 4(1)(q)(ii), 10(1), 17(1), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(c), 24(2), 25(1)(c), 66(2), 71(1), 72 and 72(2)(b).

Orders Cited: **AB:** Orders 96-006, 96-019, 99-013, F2004-026, F2005-004 and F2009-009.

I. BACKGROUND

[para 1] In a form dated November 12, 2009, the Applicant asked Alberta Sustainable Resource Development (the “Public Body”) for information under the *Freedom of Information and Protection of Privacy Act* (the “Act”). He asked for all of his personal information, information of his numbered company, and information relating to certain gravel leases, including information to, from or between various offices of the Public Body and outside agencies.

[para 2] By letter dated March 24, 2010, the Public Body refused to disclose some of the information requested by the Applicant, on the basis that it was excluded from the application of the Act under section 4(1)(q)(ii) (record created by or for a Member of the Legislative Assembly), was excepted from disclosure under section 17(1) (disclosure harmful to personal privacy), or was excepted from disclosure under section 24(1) (advice, etc.).

[para 3] In a letter received by this Office on May 21, 2010, the Applicant asked the Commissioner to review the Public Body’s decision to withhold the information that it withheld under section 24. He did not request a review of the Public Body’s reliance on sections 4(1)(q)(ii) and 17(1). Mediation was authorized but was not successful. The Applicant then requested an inquiry, in a form dated September 15, 2010. The matter was set down for a written inquiry.

II. RECORDS AT ISSUE

[para 4] In the course of the inquiry, the Public Body decided to release to the Applicant all of the information that it had previously withheld under section 24, with the exception of information on two pages. The information that remains at issue consists of portions of a Briefing Note dated March 13, 2009, which is found at pages 126 and 127 of the package prepared by the Public Body.

III. ISSUE

[para 5] The Notice of Inquiry, dated March 7, 2011, set out the issue of whether the Public Body properly applied section 24 of the Act (advice, etc.) to the records/information.

[para 6] The Applicant raises several concerns about the Public Body’s decisions regarding his Surface Mineral Lease (“SML”) Application, the terms and requirements of the *Alberta Aggregate (Sand and Gravel) Allocation Policy for Commercial Use on Public Land*, and what he considers to be the Public Body’s unfair treatment of him. My jurisdiction is limited to reviewing these concerns insofar as they are relevant to the Public Body’s decision to withhold the information in the Briefing Note, as discussed later in this Order.

[para 7] In his rebuttal submissions, the Applicant acknowledges receipt of the additional information that the Public Body disclosed to him in the course of the inquiry,

but says that he cannot confirm that these are indeed all of the documents that he requested. He also says that attachments to some e-mails are still missing. The foregoing concerns relate to the adequacy of the Public Body's search for records responsive to the Applicant's access request, which is part of its duty to assist him under section 10(1) of the Act.

[para 8] An issue regarding the Public Body's search for responsive records was not set out in the Notice of Inquiry, given that the Applicant alluded to this issue after receipt of the additional information from the Public Body partway through the inquiry. The Applicant acknowledges the single issue set out in the Notice of inquiry, and focuses his submissions on the Public Body's application of section 24 to the information in the Briefing Note. As the Applicant only briefly alludes to the possibility of missing records, I am not sure whether he wishes to pursue any issue regarding the Public Body's search for records.

[para 9] In any event, the Public Body's decision to release the additional information to the Applicant is a new decision in respect of which the Applicant should formally request a review by the Commissioner, which would then follow this Office's usual processes, beginning with mediation and possible settlement. If the Applicant wishes to formally request a review in relation to the Public Body's additional disclosure, he may do so. If he does, he should draw the Commissioner's attention to the fact that the Public Body disclosed the additional information with its initial submissions of May 2, 2011, and that he, the Applicant, raised the possibility of missing records in his rebuttal submissions received by this Office on May 17, 2011. The Commissioner will then have the facts necessary to decide whether to accept the request for review in view of the time requirements set out in section 66(2) of the Act.

IV. DISCUSSION

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

[para 10] Section 24 of the Act reads, in part, as follows:

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,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) *the staff of a member of the Executive Council,*

...

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

[various types of information, none of which exist here]

...

[para 11] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 24.

[para 12] Section 24(2) states that section 24 does not apply to certain information, meaning that the Public Body cannot withhold that information in reliance on section 24(1). I considered whether any of the provisions of section 24(2) were relevant in this inquiry, but found that none of them were.

1. Does the information fall within the terms of section 24(1)?

[para 13] In its response of March 24, 2010 to the Applicant, the Public Body cited only sections 24(1)(a) and 24(1)(b) as grounds for withholding the information in the Briefing Note. In its inquiry submissions, the Public Body additionally cites section 24(1)(c) (positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations of a public body) as well as section 25(1)(c) (disclosure harmful to contractual or other negotiations of a public body) as reasons for withholding the information. It is not necessary for me to consider the Public Body's application of section 24(1)(c) or section 25(1)(c), as I find that it properly applied sections 24(1)(a) and 24(1)(b) in any event.

[para 14] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options, the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2009-009 at para. 100).

[para 15] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council. A "consultation" occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order F2009-009 at para. 101). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the

consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2009-009 at para. 101).

[para 16] Part (ii) of the test under both sections 24(1)(a) and 24(1)(b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order F2009-009 at para. 102). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2009-009 at para. 102). However, sections 24(1)(a) and 24(1)(b) do not protect a decision itself, as they are only intended to protect the path leading to the decision (Order F2005-004 at para. 22; Order F2009-009 at para. 102).

[para 17] I find that the information that the Public Body withheld in the Briefing Note falls within the terms of sections 24(1)(a) and 24(1)(b) of the Act. The portions withheld by the Public Body consist of information from officers or employees of the Public Body regarding their processing of the Applicant's SML Application, and the information is directed to the Deputy Minister and Minister, the latter of which is also a member of the Executive Council, so that they can decide and direct how to proceed with the SML Application and the Applicant's concerns in relation to it. The withheld information consists of a recommended course of action and alternative proposals for consideration by the Deputy Minister and Minister. It sets out the appropriateness of the action and proposals and the reasons for and against them.

[para 18] Because the information at issue falls within the terms of section 24(1)(a) and 24(1)(b), the Public Body had the discretion to refuse to disclose the information to the Applicant in reliance on those sections.

2. Did the Public Body properly exercise its discretion not to disclose?

[para 19] A public body exercising its discretion relative to a particular provision of the Act should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 20] The Public Body says little about its exercise of discretion, apart from noting that section 24 is intended to protect the deliberative process involving senior officials and heads of public bodies, and that the purpose of the provision is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The Public Body should normally have more fully explained its decision not to disclose, in specific reference to the information at issue. Having said this, I am satisfied that the Public Body properly exercised its discretion, in this particular case, on my review of the information that it withheld in the

Briefing Note and on my consideration of the Public Body's statements regarding the intent and purpose of section 24.

[para 21] A general purpose of the Act, as set out in section 2(a), is to allow the Applicant a right of access to the information that he has requested, subject to limited and specific exceptions, which are those set out in sections 24(1)(a) and 24(1)(b) in this particular case. As noted by the Public Body, the purpose of section 24(1) is to protect the deliberative process of government officials, allow them to freely discuss issues, and to promote well-reasoned decisions. On my review of the information at issue in the Briefing Note, I find that the purpose of the Act and the purpose of section 24(1) were met when the Public Body exercised its discretion to withhold the information. The withheld information consists of a recommendation and alternatives presented to the Deputy Minister and Minister in relation to the Applicant's SML Application and his concerns about it. The Applicant is entitled to know the final decision in relation to the matter, which would have been conveyed to him by the way in which the Public Body ultimately processed his SML Application, but he does not have a right of access to the information setting out all of the possibilities that were considered and/or rejected. The Public Body's officers and employees presented the various alternatives so that the Deputy Minister and Minister could consider them and arrive at their decision. Disclosing the withheld information to the Applicant would enable him to "second guess" the ultimate decision that was made, which is a result that a public body's exercise of discretion under section 24(1) justifiably avoids, in my view.

[para 22] In reaching my conclusion, I considered the Applicant's submissions suggesting that the Public Body did not properly exercise its discretion to withhold the information under section 24(1) in his particular case. He writes that, in processing his SML Application, the Public Body "provided us with bad advice, modified their policy, generated misinformation, used underhanded measures, invented special resource wasting hurdles, to deceitfully expropriated [sic] an entire discovery [of gravel] and that is their reason for not allowing the documents". He believes that the Public Body presented administrative obstacles and imposed impossible conditions that hindered his ability to explore the area of gravel that he discovered, select a parcel of land and complete his SML Application, and that a new *Alberta Aggregate (Sand and Gravel) Allocation Policy for Commercial Use on Public Land*, implemented partway through his Application, contained terms and requirements that were unfair to him and that discourage exploration for gravel generally. The Applicant alleges that various facts disclosed to him in the Briefing Note are errors or half-truths, suspects that the withheld information is also "imaginatively crafted", and submits, in effect, that there was an improper decision made by the Deputy Minister and Minister in relation to him. He argues that section 24(1) is not properly applied to advice where that advice is "a conjecture based on misinformation".

[para 23] I am not in a position to assess or evaluate all of the facts relating to the Applicant's SML Application and the Public Body's processing of it, or to determine whether the Public Body treated the Applicant unfairly. Indeed, doing so would be outside my jurisdiction, except to the extent that the Applicant's submissions mean that

the Public Body improperly exercised its discretion when it withheld the information in the Briefing Note. On consideration of the latter possibility, I still find that the Public Body properly exercised its discretion to withhold the particular portions of the Briefing Note. I do not believe that the factual inaccuracies and mistreatment alleged by the Applicant have any overall bearing on the content of the withheld information, or the decision that was made in his case. Even if the facts presented to the Deputy Minister and Minister were revised or clarified so as to fully reflect the Applicant's version of events, I believe that the alternative courses of action set out in the Briefing Note would have been the same, and that the decision reached by the Deputy Minister and Minister would also have been the same. In other words, I do not see a degree of "misinformation" in the Briefing Note, as alleged by the Applicant, that affected the outcome of the decision of the Deputy Minister and Minister in such a way that the Public Body is now improperly exercising its discretion to withhold the advice that was given or the substance of the consultations and deliberations.

[para 24] I conclude that the Public Body properly applied section 24 of the Act to the records at issue, as the information could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for the Public Body under section 24(1)(a), as well as consultations or deliberations involving officers or employees of the Public Body under section 24(1)(b).

V. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I find that the Public Body properly applied section 24 of the Act to the information that it withheld in the Briefing Note. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to it.

Wade Riordan Raaflaub
Adjudicator