

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2017-65

August 14, 2017

ALBERTA LABOUR

Case File Number 004351

Office URL: www.oipc.ab.ca

Summary: The Adjudicator considered whether section 24 applied to records (emails) being withheld by the Public Body at the final stage of the present matter. She concluded that many of them contained information which the Public Body used to make decisions, and on this account they could be withheld as integrally related to the decisions that were made. However, she asked the Public Body to take into account in exercising its discretion that some of the emails conveyed information about events in which the Applicant was involved and of which he would be aware, and therefore, it was not clear what interest recognized in the statute would be served by withholding them. As well, other emails contained information that was not used for the purpose of making decisions. The Adjudicator also held that emails that contained instructions for Public Body employees to follow did not constitute advice, but rather consisted of the communication of decisions already made. The Adjudicator held that the information in the latter two categories should be disclosed to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17(1), 24, 24(1)(a), 24(1)(b), 24(2)(f), 27(1), 72.

Authorities Cited: AB: Orders 96-006; F2004-026; F2010-007; F2012-15; F2015-29.

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

I. BACKGROUND

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act) for records from the Public Body that documented the Public Body's dealings with him over a specified time period. The Public Body supplied some records, but withheld others. Much of the withheld information, as well as the issue of adequacy of the Public Body's search for records, has already been dealt with in earlier orders and directions to the Public Body (some of these did not involve the Applicant since they dealt with the Public Body's submissions which the Adjudicator accepted *in camera*).

[para 2] This inquiry relates to a number of records that remain outstanding, which the Public Body continues to withhold under section 24 of the Act.

II. RECORDS AT ISSUE

[para 3] The Index of Records the Public Body provided on February 1, 2017 states that it severed information under provisions of section 24(1) on records 70-71, 77, 78, 81-88, 90, and 91. (As the Public Body notes, of these, records 87 and 88 were dealt with in Order F2015-29.) As well, in a more recent response to questions I had put to it concerning records it had labelled as 'unresponsive', the Public Body said that it also applied section 24(1) to records 67-69, 72, 73, and 78 (many portions of these latter records duplicate one another). Finally, the Public Body relied on the idea that part of records 71 and 72, which largely duplicate one another, are 'unresponsive'.

[para 4] Given the foregoing, the records still at issue are 67-69, 70-73, 77, 78, 81-86, 90 and 91.

III. ISSUES

[para 5] The issues are:

- Issue 1: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
- Issue 2: Did the Public Body properly withhold one paragraph on pages 70 and 71 on the ground that it is unresponsive to the Applicant's request?
- Issue 3: Must any of the information at issue be withheld under section 17(1) (unreasonable invasion of privacy)?

IV. DISCUSSION OF ISSUES

[para 6] Section 24 states, in part:

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

...

(f) is an instruction or guideline issued to the officers or employees of a public body...

[para 7] In Order 96-006, former Commissioner Clark established a test to determine whether information is advice, recommendations, analyses or policy options within the scope of section 24(1)(a). He said:

Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)] will be applicable to information, the advice, proposals, recommendations, analyses or policy options (“advice”) must meet the following criteria.

The [advice, proposals, recommendations, analyses and policy options] should:

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

[para 8] A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker’s request for advice or views to assist him or her in making the decision, and information that would otherwise reveal the considerations involved in making the decision.

[para 9] Previous orders of this office have held that sections 24(1)(a) and 24(1)(b) do not apply so as to protect the final decision, they protect the process by which a decision maker makes a decision. (See, for example, Order F2012-15 at para 175.) Neither, by reference to section 24(2)(f)¹, does section 24 apply to instructions or guidelines issued to employees.

¹ *This section does not apply to information that*

(f) is an instruction or guideline issued to the officers or employees of a public body,

[para 10] In Order 96-006, on which the Public Body relies in its submissions, former Commissioner Clark noted:

In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that “factual material” (among other things) cannot be withheld as “advice and recommendations”. As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either “advice etc” under [section 24(1)(a)] or “consultations or deliberations” under [section 24(1)(b)].

[para 11] In some circumstances, factual information can be conveyed that makes it clear a decision is called for, and what is recounted about the facts provides background for a decision that is to be made. Such a case involves more than merely “a bare recitation of facts”. Rather, what is recounted about particular events or the way in which they are presented may be said to constitute part of the ‘consultations or deliberations’ a decision maker uses to develop a decision. This may be so whether the decision maker specifically requests the information, or it is provided unsolicited having regard to the responsibilities of both the provider and receiver.

[para 12] The Public Body applied section 24(1)(a) to records 70, 71, 77, 90 and 91 (as well as to records 87 and 88, which have already been dealt with). It said:

Pages 70-71, 77, 87-88 and 90-91 were reviewed with the program area and the information within the records were considered against the criteria of the three part harm test; it was determined that the information meets the criteria in the three part test as follows:

Part A – These records form part of the advice and recommendations made by Government of Alberta employees whose responsibilities, in the context of their role, required them to provide advice.

Part B – These records were prepared as advice, analysis and recommendations relevant to future action and decision making regarding the processes for the department. As there is factual information that is contained within the advice, analysis and recommendations of these records and it cannot reasonably be considered separate or distinct, the public body is withholding all information in these records. Support for this approach is provided by OIPC Order 99-001 [18] which states “*if the factual information is sufficiently interwoven with other advice, proposals, recommendations, analyses, or policy options so that it cannot reasonably be considered separate or distinct*” the public body may withhold the information in the records.

Part C – The advice and recommendations are specifically intended for other Government of Alberta employees whose role would require them to take the relevant action or make the relevant decision.

The advice, analysis and recommendations were expected from the employee as part of the responsibilities and as a requirement of their position and were directed toward employees who can and could take an action or make a decision and therefore can take or implement the action. After weighing all the relevant facts and circumstances outlined above, including the objectives of the FOIP Act, it was recommended that the information identified as

advice, recommendations be withheld; therefore, Section 24(1)(a) can reasonably be applied to the information on pages 70-71, 77, 87-88 and 90-91.

[para 13] The Public Body applied section 24(1)(b) to records 70, 71, 77, and 81-86 (as well as to records 87 and 88, which have already been dealt with). It said:

The application of Section 24(1)(b) on pages 70-71, 77, 81-88 and 90-91 must meet the same three-step process as with Section 24(1)(a), as noted in Order 2004-026, to determine the information meets the criteria to apply the exception. In the review of these records, it was determined that they meet the criteria in the three part test as follows:

Part A – These records are part of the responsibilities of Government of Alberta employees, in the context of their role, requiring them to participate in the consultation and deliberation as it relates to their position. Withholding information that includes the reasons behind advice, the reason for and against an action as well as the advice itself and the presentation of possible available alternatives is permitted under the legislation, as such information falls within the policy rationale that persons must be able to freely express the reason why they are choosing a particular course. In addition, deliberations can include comments that indicate or reveal reliance on the knowledge or opinions of particular persons, including those of the person making the communication.

Part B – These records were directed toward taking an action. The consultation and deliberation statements have a substantive element and could conceivably be inhibited if they were subject to disclosure.

Part C – These records were specifically intended for other Government of Alberta employees whose role would require them to take the relevant action or make the relevant decision.

The participation of the public body employees in the consultation and deliberation for the discussion in these records was a requirement of their position and were directed toward employees who can and could take an action or make a decision and therefore can take or implement the action discussed. After considering all the relevant details and conditions outlined above, including the objectives of the FOIP Act, it was recommended that the information identified as being reasonably being expected to reveal consultations and/or deliberations be withheld; therefore, Section 24(1)(b)(i) can reasonably be applied to the information on pages 70-71, 77, 81-88 and 90-91

[para 14] The first set of records (pages 67, 68, 69, 72, 73, 77, and 78) consists of a chain of related emails that were created in October 2008. Pages 90 and 91 are an email chain from February 2008. Another set of emails (pages 70, 71, 81 to 86) was created on November 5, 2009. The final set of emails (pages 87, 88 and 89) are from April-May 2011.

[para 15] My observations and decisions about the remaining withheld records are as follow.

[para 16] Page 67, first email: The first paragraph of this email conveys information about a factual situation that was used as part of the basis for a decision, and the information reveals some of the considerations involved in making the decision. As such, it falls under

both sections 24(1)(a) and (b). The same is true for words 11 to 14 of the first line of the second paragraph, and of the bracketed portion of the sixth line of the second paragraph. However, the remainder of the second and the whole of the third paragraph, in my view, do not contain advice in the sense of the provision of information on which a decision maker can base the making of their decision. Neither does this information involve consultations or deliberations in the sense that a decision maker is consulting with others or weighing the factors for making a decision. Rather, the emails communicate a decision already made, which directs employees how to respond in particular circumstances. Accordingly, most of the second paragraph and all of the third paragraph fall under section 24(2)(f), and cannot be withheld under section 24(1)(a) or (b).

[para 17] Page 67, second e-mail (this email is the same as the second one on page 78): This email falls into the category discussed at para 10 above. It conveys information about a factual situation that is subsequently used as part of the basis for a decision, and the information reveals some of the considerations involved in making the decision. As such, it falls under both sections 24(1)(a) and (b).

[para 18] Page 67-68, third email (this email is replicated on: page 69, third email; page 72-73, fourth email on page 72 which concludes on page 73; and page 78, third email): This email also falls into the category discussed at para 10 above. It conveys information about a factual situation that is subsequently used as part of the basis for a decision, and the information reveals some of the considerations involved in making the decision. As such, it falls under both sections 24(1)(a) and (b).

[para 19] Page 69, first two emails; page 72, second and third emails, page 78, first email: All of these emails merely convey other emails, without including any substantive content, other than the subject line, which has already been disclosed, and the single line in the first email on page 78. As to the latter (first email page 78) the line does not seem to contain any advice, and can be disclosed. As to the remaining emails, since they contain no substantive information, they cannot, in accordance with the rules set out in Order F2004-006, be withheld under section 24(1).

[para 20] Pages 70 and 71: In my view, these two pages (which are very nearly duplicates), do not contain advice in the sense discussed in paragraph 13 above. Rather, they contain a decision already made, which gives instructions to employees about what to do both in general circumstances, and in certain specific ones (the subject line seems to relate to the former). These pages fall under section 24(2)(f), and do not, in my view, fall within the terms of either section 24(1)(a) or 24(1)(b), and cannot be withheld on this basis.

[para 21] However, some of the redacted portions are not responsive to the Applicant's request for information about him, as they do not relate to the Applicant specifically, but are a more general directive to deal with a wider range of situations.

[para 22] The last sentence in the second email and the second paragraph in the third email are responsive to the Applicant's request, however, and as they convey a decision that has been made, they must be disclosed. The contents of the box in the lower right hand corner of each of these pages can be withheld as personal information for which there are no

factors favouring disclosure (nor is this information responsive to the Applicant's access request). The remaining information on pages 70 and 71 can be withheld as unresponsive.

[para 23] Page 72, first email: This email falls into the category discussed at para 10 above. It conveys information about a factual situation that is subsequently used as part of the basis for a decision, and the information reveals some of the considerations involved in making the decision. As such, it falls under both sections 24(1)(a) and (b). (The remaining withheld information on this page and page 73 has already been addressed above.)

[para 24] Page 77: The part of this record that continues to be withheld falls within the category of information discussed in para 10 above. It conveys information about a factual situation that is subsequently used as part of the basis for a decision, and the information reveals some of the considerations involved in making the decision. As such, it falls under both sections 24(1)(a) and (b).

[para 25] All withheld information on page 78 has already been addressed above.

[para 26] Pages 81 to 86 (these emails pertain to a time period in 2009; they contain much information that is replicated throughout): the content of some, or some parts of, these email messages falls within the scope of section 24(1)(b), insofar as an issue is identified that requires a decision (the way to answer a question), people are involved in the discussion that raise the question or can contribute to the decision, and the various factual and legal questions at play are raised and discussed. Some parts of this discussion involve the recounting of facts; however, in some cases, these facts provide the context and background for developing the decision, and are integrally related to it. Although the functions of the employees and the relationships between them are not always clearly apparent, it is apparent from the discussions either that they are in a position to raise questions to be answered by others, or that they are mutually involved in decision making relative to the matter at hand.

[para 27] However, other parts of these emails include information which, while part of the same general discussion, has no obvious connection to the decisions to be made.

[para 28] I will deal with the emails on these pages in sequence; where emails are replicated, the decision about whether they may be withheld that I make with respect to the first appearance applies for every case in which the same emails appear on subsequent pages:

- page 81, first email: I accept this may be withheld as subject to legal privilege (the Applicant has not contested this)
- page 81, second email: the first paragraph raises the issue regarding which a decision is to be made as to how a response is to be given, and thus falls within section 24(1)(b); the balance is merely a recitation of facts which have no bearing on any decision to be made that is revealed by the records, and cannot be withheld under section 24(1)
- page 81, third email: the first two paragraphs raise issues regarding which decisions are to be made as to how a response is to be given, and thus fall within section 24(1)(b); the third paragraph is merely a recitation of facts which have no bearing on

any decision to be made that is revealed by the records, and cannot be withheld under section 24(1)

- page 82, first email: this email raises a question that relates to a decision that is to be made, and can be withheld under section 24(1)(b)
- page 82, second email: this is the same as the second email on page 81 and is to be treated accordingly
- page 82, third email: this is the same as the third email on page 81 and is to be treated accordingly
- page 83, first withheld email: this discusses reasons for making a decision in a particular way and falls within section 24(1)(b)
- page 83, second withheld email: this mail was withheld under section 27(1) (legal privilege); the Applicant has not contested this
- page 83-84, third withheld email beginning on page 83: this is the same as the second email on page 81 and is to be treated accordingly
- page 84, second email: this is the same as the third email on page 81 and is to be treated accordingly
- page 85, first email: this email asks questions and raises factors potentially relevant to a decision to be made
- page 85, second email: this email provides comments and makes suggestions related to a decision to be made
- page 85, third email: this is the same as the first email on page 82 and is to be treated accordingly
- page 85-86, fourth email beginning on page 85: this is the same as the third email on page 81 and is to be treated accordingly
- page 86, second email: this is the same as the third email on page 81 and is to be treated accordingly.

[para 29] Pages 90-91: the withheld information consists of a description of events involving the Applicant which were conveyed from a person involved in the events to another employee and ultimately to a group of other employees, including a Department of Justice lawyer. The sequence is such that the same information may have been supplied for the purpose of obtaining a legal opinion (this is possibly suggested by the first email on page 90). If this was the case, the withheld information is properly withheld on the basis it is protected by solicitor-client privilege. If it was not the case, the information nevertheless appears to be conveyed for the purpose of furthering a discussion as to what further action need be taken, if any, and falls within section 24(1)(b)(i).

[para 30] The second sentence of the second withheld paragraph on page 90 is the personal information of the sender which has no relevance to the Applicant, and must be withheld under section 17(1).

Exercise of discretion

[para 31] As I have found that section 24(1)(a) applies to some of the information in the records, I must now consider whether the Public Body has demonstrated that it appropriately exercised its discretion when it elected to withhold this information.

[para 32] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 33] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 34] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 24(1)(a) applies means that the public interest in ensuring that public bodies obtain candid advice may trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 35] The Public Body provided the following explanation for its decision to exercise its discretion under section 24(1)(a) as follows:

After weighing all the relevant facts and circumstances outlined above, including the objectives of the FOIP Act, it was recommended that the information identified as advice, recommendations be withheld; therefore, Section 24(1)(a) can reasonably be applied to the information on pages 70-71, 77, 87-88 and 90-91.

It explained its exercise of discretion under section 24(1)(b) as follows:

Withholding information that includes the reasons behind advice, the reason for and against an action as well as the advice itself and the presentation of possible available alternatives is permitted under the legislation, as such information falls within the policy rationale that persons must be able to freely express the reason why they are choosing a particular course.

... These records were directed toward taking an action. The consultation and deliberation statements have a substantive element and could conceivably be inhibited if they were subject to disclosure.

...

The explanation quoted above that was given relative to withholding records under section 24(1)(b) refers to both advice and recommendations as well as to consultations and deliberations, and I believe that the Public Body meant that the same rationale (that requiring disclosure could inhibit the free exchange of ideas about decisions to be made) pertains to withholding records under both these provisions. I accept this reason as generally applicable to discussions about decisions to be made about a course of action to be taken, including a discussion of the facts where the nature of the facts is integral to the decision.

[para 36] However, this reasoning applies with less force where what is being discussed are facts which, though they provide background information about which a decision is to be made, are already fully known to the access requestor because he was a participant in the events that are described, and the facts have a neutral quality. I acknowledge that in some cases it would inhibit a discussion about events in which a third person was involved even though that person was present during the events. Examples might be where the discussion was critical of him or her or would be upsetting to the person for some other reason, or where it would give the person some sort of advantage as against those carrying on the discussion.

[para 37] However, it is not apparent to me that such an inhibitory effect would arise from release of the following information: the first paragraph of the second email and the first paragraph of the third email on page 81 (as well as the same information where this is replicated on pages 82, 83, 84, 85 and 86). (Possibly there is some element in the above-listed information that would have such an inhibitory effect which is not apparent to me, however.)

[para 38] I have a similar view with respect to the withheld information on pages 90 and 91. Unless this information was forwarded for the purpose of obtaining a legal opinion (in which case it can be withheld on this account, and the appropriate exercise of discretion can, in accordance with earlier decisions of this office², be assumed) the information is already known to the Applicant and may have a neutral quality such that its release would not have an inhibitory effect on further such discussions. (This would not apply to the second sentence of the second paragraph on page 90, which must be withheld in any event under section 17(1).)

[para 39] In view of the foregoing, I will ask the Public Body to reconsider its decision with respect to the items of information described in the two foregoing paragraphs, taking into account the possibility of that there may be no inhibitory effect on the free flow of information from the prospect of disclosure of neutral information that is already known to the requestor because the person participated in the events being described.

² See, for example, Order F2010-007.

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] I confirm the Public Body's decision to withhold the following information:

- page 67, first email: first paragraph; words 11 to 14 of the first line of the second paragraph; bracketed portion of the sixth line of the second paragraph.
- page 67, second e-mail (duplicated by the second email on page 78)
- pages 67-68, third email (replicated on: page 69, third email; page 72-73, fourth email on page 72 which concludes on page 73; and page 78, third email)
- the withheld information on pages 70 and 71, other than the last sentence in the second email and the second paragraph in the third email on each of these pages
- page 72, first email
- the withheld information on page 77
- page 81, first email
- page 82, first email
- page 83, first withheld email
- page 83, second withheld email
- page 85, first email
- page 85, second email
- page 85, third email.

[para 42] I order the Public Body to provide the following information to the Applicant:

- page 67: first email, second paragraph (other than words 11 to 14 of the first line and the bracketed portion of the sixth line); first email, third paragraph
- page 69, first two emails
- page 72, second and third emails
- page 78, first email
- pages 70 and 71, the last sentence in the second email and the second paragraph in the third email
- page 81, second email, second and third paragraphs
- page 81, third email, third paragraph
- page 82, second email, second and third paragraphs
- page 82, third email, third paragraph
- pages 83-84, fourth email beginning on page 83, second and third paragraphs (which are at the top of page 84)
- page 84, second email, third paragraph
- pages 85-86, email beginning on page 85, second and third paragraphs (which are at the top of page 86)
- page 86, second email, third paragraph.

[para 43] I ask the Public Body to re-exercise its discretion having regard to the factor discussed at paras 36 to 37 above in deciding whether to withhold the following information:

- page 81, the first paragraph of the second email and the first and second paragraphs of the third email (as well as the same information where this is replicated on pages 82, 83, 84, 85 and 86), and;
- the withheld information on pages 90 and 91 (unless subject to solicitor-client privilege because conveyed for the purpose of obtaining a legal opinion).

I ask the Public Body to inform the Applicant of the resulting decisions and to attach any of the information previously withheld that it has decided to disclose. If the Public Body decides to continue to withhold this information or some of it, I reserve jurisdiction to decide whether discretion was properly exercised with respect to information withheld under section 24 in the event the Applicant objects to the continued withholding. If the Public Body decides to disclose the information on pages 90 and 91, or some of it, it should not disclose the second sentence of the second paragraph of page 90, which is personal information of a third party that would be of no interest to the Applicant, hence falls under section 17(1).

[para 44] I order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with it. If the Applicant objects to the manner in which the Public Body has re-exercised its discretion, he may notify me and the Public Body, and I will review the Public Body's new decision.

Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication