

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-20

May 4, 2018

ALBERTA ENVIRONMENT AND PARKS

Case File Number F8348

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Alberta Environment and Parks (the Public Body) for

Any emails, correspondence, briefing notes or other documents concerning the eligibility of groups or individuals to appear at hearings of the Alberta Energy Regulator.

The Public Body responded but withheld some information citing sections 24(1)(a), (b)(i)(ii) and (e) and section 27(1)(a), (b)(iii), and (c)(iii) of the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body also withheld information on the basis that it was not responsive. Prior to this inquiry the Public Body also withheld records citing section 27(2) of the Act.

Given the recent Court of Appeal decision, *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114, the Adjudicator decided to hold this inquiry in two parts. This is the Order for the first part of the inquiry, which deals with the records to which section 27 was not applied and records were provided. Part two of the inquiry will deal with the records which were not provided to the Adjudicator.

The Adjudicator found that the Public Body properly applied section 24(1)(a) the Act to pages 60-62 of the records at issue; and section 24(1)(e) of the Act to pages 156-192, and 226-260 of the records at issue.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act* R.S.A. 2000. c. c. F-25, ss. 24, 27, 71, and 72.

Authorities Cited: AB: Orders Order 96-006, F2004-026, F2008-028, and F2015-029.

Cases Cited: *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114; and *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2017 ABQB 656.

I. BACKGROUND

[para 1] Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), on November 1, 2013, the Applicant made an access request to Alberta Environment and Sustainable Resources Development (now Alberta Environment and Parks) (the Public Body) for:

Any emails, correspondence, briefing notes or other documents concerning the eligibility of groups or individuals to appear at hearings of the Alberta Energy Regulator.

[para 2] The Applicant requested these records for the timeframe of October 1, 2012 to present.

[para 3] On July 30, 2014, the Public Body responded to the Applicant. It noted that there was a package of 260 pages with “no disclosure”. The exceptions cited by the Public Body relating to the severing of information were sections 24(1)(a), (b)(i)(ii) and (e) and section 27(1)(a), (b)(iii), and (c)(iii) of the Act. The Public Body also withheld information on the basis that it was not responsive.

[para 4] On August 6, 2014, the Applicant requested that this Office review the Public Body’s response to his request. Mediation was authorized but did not resolve the issues between the parties and on March 11, 2016, the Applicant requested an inquiry.

[para 5] Recently, the Alberta Court of Appeal issued a decision in the judicial review of Order F2016-35. One of the issues in the inquiry that led to Order F2016-35 included the public body’s application of section 27(1)(a) of the Act to some of the records at issue. The records to which the public body claimed section 27(1)(a) of the Act applied were not provided to the Adjudicator in the inquiry. The Adjudicator found that the public body had not met its burden to prove that section 27(1)(a) of the Act applied to the records and ordered the public body to disclose most of the records to the applicant. The public body complied with the order and disclosed several records to the applicant, but applied for judicial review of the decision to order disclosure of the remaining records. On judicial review, the Court of Queen’s Bench Justice decided that, although the records to which the public body applied section 27(1)(a) of the Act were not before the Adjudicator, the Court required them to make a finding regarding the applicability of section 27(1)(a) of the Act. However, this caused a problem as explained by Justice Hall as follows:

Here arises the conundrum. Except for particularized exceptions, such as alleged bias on the part of the tribunal, no new evidence is to be permitted at a judicial review, since it is a review on the

record only. Counsel for the Commissioner maintains, therefore, that this Court cannot review the records to determine whether in fact they are solicitor-client privileged.

That cannot be correct. If it is, then it puts the public body in a position where the Commissioner does not have the right to review the documents, but must decide, based on a description, whether they have been proven to be privileged. The question of privilege must be correctly determined. The only way to correctly determine whether the documents are, in fact, privileged, is to have the Court review those documents under its powers to do so. If the Court accepts the Commissioner's submissions that the Court cannot order the documents to be produced to it, to assess the claim of privilege, then the correctness of that assessment could never be determined, and therefore significant risk would arise that documents which are in fact solicitor-client privileged would have to be produced by the public body without ever having been reviewed.

(Calgary (Police Service) v Alberta (Information and Privacy Commissioner), 2017 ABQB 656 at paras 28 and 29)

[para 6] Justice Hall's solution was to make an exception to the rule where solicitor-client privilege (section 27(1)(a) of the Act) is being claimed and those records have not been reviewed by this Office to require the public body to provide to the Court a sealed copy of the records (see *Calgary (Police Service) v Alberta (Information and Privacy Commissioner), 2017 ABQB 656* at paras 30 and 31). Justice Hall's decision was upheld by the Court of Appeal, which said in part:

We are satisfied that on a judicial review application where the dispute centres on whether the documents in question are subject to solicitor client privilege, those documents should be put before the reviewing Court. It is this simple. The issue – whether solicitor client privilege exists with respect to the disputed documents – cannot be properly determined in these circumstances without examining the documents themselves...

Calgary (Police Service) v. Alberta (Information and Privacy Commissioner), 2018 ABCA 114 at para 3)

[para 7] As a result of these recent decisions and the new evidential rule on judicial review that applies to records over which section 27(1)(a) of the Act is being applied such that records were not provided to this Office for review, I have decided that this inquiry should be dealt with in two parts and result in two orders. This is the first part of the inquiry which will deal with the records to which section 27 was not applied and records were provided. Part two of the inquiry will deal with the records which were not provided to the Adjudicator.

II. RECORDS AT ISSUE

[para 8] In its initial submissions, the Public Body advised that it had reviewed the records at issue and additionally applied sections 24 and 27 to some of the non-responsive records. It also applied section 27(2) to some of the records. In addition it withdrew its claim of sections 24 and 27 over some responsive records. Finally, some of the records which the Public Body believes contained mostly non-responsive information were released to the Applicant in their entirety. As a result of this re-review of the records at issue, the Applicant was provided with additional

records. Therefore, the records at issue for this part of the inquiry are pages 60-62 which were severed pursuant to section 24 of the Act.

III. ISSUES

[para 9] The Notice of Inquiry dated July 21, 2017 states the issues in this inquiry as follows:

1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

2. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 10] In its initial submission, the Public Body stated that it had re-reviewed the records at issue and was now applying sections 24 and/or 27 to some records it previously determined were non-responsive. It also completely disclosed some other records it initially believed were not responsive to the Applicant's request. As a result, there are no records currently being withheld as non-responsive and so I will not make any findings in that regard.

2. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 11] The Public Body applied sections 24(1)(a) and (b)(i) of the Act to information on pages 60-62, and section 24(1)(e) of the Act to pages 156-192, and 221-260.

[para 12] The portions of section 24 of the Act that are applicable to 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,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

...

(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,

[para 13] As the Public Body also applied section 27 of the Act to the information on pages 156-192 and 221-260, I did not receive a copy of those unredacted records to review. I was provided with a copy of pages 60-62. Therefore, my findings in this order will be confined to the information on pages 60-62. The remaining records will be dealt with in the second part of this inquiry, under a separate order.

a. Section 24(1)(a) and (b)

[para 14] The Public Body cited Order 96-006 which established a test to determine if section 24(1)(a) of the Act was met. The three part test is as follows:

1. The information must 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 or making a decision; and
3. Be made to someone who can take or implement the action.

(Order 96-006 at page 9)

[para 15] Order F2015-029, explains the purpose of sections 24(1)(a) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. It states:

The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Council, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).

(Order F2015-029 at para 33)

[para 16] Therefore, it is not necessary that the advice actually be made to someone who can take or implement the action – it only needs to have been developed for that purpose.

[para 17] With regard to the records on pages 60-62 of the records at issue, the Public Body stated:

The information identified as recommendations and deliberations on pages 60 to 62 withheld under section 24(1)(a) and (b)(i) form part of a workshop amongst Government of Alberta employees whose responsibilities, in the context of that workshop, required them to discuss proposals and provide this advice and recommendation for further action in developing the legislation. The information was specifically intended for other employees, as the document says "used for advice and discussion among officials".

(Public Body's initial submission at para 14)

[para 18] As I did not think it was clear from the above passage how the test cited by the Public Body regarding section 24(1)(a) of Act was met, I asked the Public Body for more specifics. It stated:

[the workshop was] between Government of Alberta (“GoA”) employees and staff from the Energy Resources Conservation Board (“ERCB”) and the Environmental Appeals Board (“EAB”) to evaluate relevant facts and discuss outstanding issues in the development of the regulations to the *Responsible Energy Development Act* (“REDA”)...

This information was sought by the Executive Director of Policy and Regulatory Alignment, Policy Management Office...as part of his responsibilities within the Regulatory Enhancement Project team (“REP team”)...The purpose of the REP team was to provide key recommendations on creating a single upstream oil, gas, oil sands and coal regulatory body.

...

The intention of this workshop was to gather various employees and representatives to discuss some outstanding issues that needed to be addressed when developing the regulations to REDA, such as setting up a tribunal to hear appeals and filing statements of concern. Therefore, the proposals and recommendations generated from this workshop were intended for the development of legislation.

[para 19] Taking the information provided by the Public Body into account, the information from the workshop was sought by the Executive Director of Policy and Regulatory Alignment, Policy Management Office as part of his responsibility in the REP team and its responsibilities in development of legislation related to creating a regulatory body. I believe that this information meets the three part test set out above. I will now determine if the Public Body properly exercised its discretion to withhold pages 60-62 of the records pursuant to section 24(1)(a) of the Act. I believe that this information meets the three part test set out above.

[para 20] In its initial submissions, the Public Body stated:

These discussions and deliberations on pages 60 to 62 were intended to generate brainstorming of ideas among employees. The Public Body is withholding this limited information in order to safeguard the process by which government employees and officials provide necessary advice, through free and open discussion.

This is to allow the frank exchange of views among the individuals asked to provide their views in the consultation process.

After weighing all the relevant facts and circumstances outlined above, including the objectives of the FOIP Act, it is determined that the information identified as recommendations and deliberations on pages 60-62 be withheld from disclosure pursuant to section 24(1)(a) and (b)(i). The Public Body submits that the application of section 24(1)(a) and (b)(i) is appropriate.

(Public Body’s initial submission at para 15-17)

[para 21] As previously stated, the Public Body reviewed its initial response and decided to withhold only pages 60-62 of the records at issue from the Applicant because it believed doing

so would allow for a frank exchange of views necessary for the consultation process. I find that the Public Body's reasons for exercising its discretion to withhold the information on pages 60-62 of the Act were proper. Therefore, I find that the Public Body properly applied section 24(1)(a) of the Act to the records at issue.

[para 22] Because I have found that the Public Body properly applied section 24(1)(a) of the Act to the records at issue, I will not make any findings regarding its application of section 24(1)(b) of the Act to the same records.

3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 23] As stated above, because records to which the Public Body is claiming legal privilege (section 27(1)(a) and 27(2)) were not provided to me, I will make finding on this issue in the order that follows the second part of this inquiry.

V. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] I find that the Public Body properly applied section 24(1)(a) the Act to pages 60-62 of the records at issue.

Keri H. Ridley
Adjudicator