

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-45

September 21, 2018

ALBERTA HEALTH

Case File Number 002690

Office URL: www.oipc.ab.ca

Summary: A representative of the Alberta Opposition (the Applicant) requested records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) from Alberta Health (the Public Body). He requested:

[...] a copy of the contents of briefing binders for ministry representatives attending the debate of the budget estimate for Budget 2015.

To be clear, I'm not asking for a briefing binder solely created for the Minister preparing for a legislative session. I'm asking for a copy of the binder created for anyone from the Deputy Minister down to Executive Director level that would be attending the debate of the ministry's budget estimate.

The Public Body denied the Applicant's access request on the basis of section 6(4)(b) of the FOIP Act. Section 6(4)(b) establishes that there is no right of access to records created for the sole purpose of briefing the Minister in preparation for a sitting of the Legislative Assembly.

The Adjudicator determined that the record at issue was created to in order to brief the Minister in preparation for a meeting of the Committee of Supply and that it also served to enable employees of the Public Body to brief the Minister for this meeting. She found that the requirement that the record be created for the sole purpose of briefing the Minister was met.

The Adjudicator determined that meetings of the Committee of Supply are a traditional part of a sitting of the Legislative Assembly and she found that the records were therefore created in preparation for a sitting of the Legislative Assembly. The Adjudicator determined that the Public Body was authorized to refuse access.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 72

I. BACKGROUND

[para 1] On November 27, 2015, a representative of the Alberta Opposition (the Applicant) requested records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) from Alberta Health (the Public Body). He requested:

[...] a copy of the contents of briefing binders for ministry representatives attending the debate of the budget estimate for Budget 2015.

To be clear, I'm not asking for a briefing binder solely created for the Minister preparing for a legislative session. I'm asking for a copy of the binder created for anyone from the Deputy Minister down to Executive Director level that would be attending the debate of the ministry's budget estimate.

[para 2] On March 30, 2016, the Public Body denied the Applicant's access request on the basis of section 6(4) of the FOIP Act. (If section 6(4) applies to a record, there is no right of access to the record.)

[para 3] The Applicant requested that the Commissioner review the Public Body's decision to deny access to the record he had requested. The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. Following this process, the Applicant requested an inquiry. The Commissioner delegated her authority to conduct the inquiry to me.

II. RECORD AT ISSUE

[para 4] The content of binders prepared for the use of senior employees of the Public Body in relation to a meeting of the Committee of Supply on Monday, November 16, 2015, are at issue.

III. ISSUE: Is the requested record excluded from the right of access by the application of section 6(4)?

[para 5] Section 6(4) of the FOIP Act, removes the right of access to a record that is created solely for the purpose of briefing a member of cabinet in respect of assuming responsibility for a ministry, or for a record created solely for the purpose of briefing a cabinet minister in preparation for a sitting of the Legislative Assembly. It states:

6(4) The right of access does not extend

(a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or

(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.

[para 6] In this case, section 6(4)(b) is the provision on which the Public Body relies to deny access to the record at issue. As noted above, the records in this case are “briefing binders” prepared for the use of employees of the Minister of Health in relation to a meeting of the Committee of Supply.

[para 7] The Applicant takes issue with the Public Body’s position that a briefing binder is a single record. He argues that each page of the binder should also be considered a record and meet the test of section 6(4)(b) on its own.

[para 8] Section 1(q) establishes that a record is a record of information in any form. It states:

I In this Act,

(q) “record” means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters vouchers and papers and any other information that is written, photographed, recorded or stored in any manner but does not include software or any mechanism that produces records.

[para 9] In my view, a briefing binder meets the definition of “record”, as may the documents inside it. I say this because a “book” is included in the definition of record, as are notes and papers. A briefing binder is essentially a book assembled to brief the Minister in respect of assuming responsibility for a ministry, or in preparation for a sitting of the Legislative Assembly.

[para 10] I agree with the Public Body’s position that a briefing binder is, in this case, one record. If it were otherwise, copies of the documents forming the binder could be withheld under section 6(4)(b), regardless of whether they are in the binder, and regardless of whether they meet an exception to disclosure. Under the Public Body’s interpretation, a requestor does not have a right of access to a briefing binder, unless section 6(6) applies, but the requestor may have a right of access to some of its content if a copy exists elsewhere in the Public Body and it is not subject to an exception to disclosure. For example, a requestor would be entitled to statistics that may appear in the briefing binder, if the statistics are stored in another location.

[para 11] I note that the Public Body states in its submissions that section 6(4)(b) protects the process by which records are selected for the briefing binder, and also applies

to information that would *reveal* the contents of a briefing binder, despite not being part of the briefing binder. In my view, this interpretation may be overly broad, given that section 6(4)(b) does not use the word “reveal” and does not refer to the process of creating the briefing binder, only the finished result. Nevertheless, as nothing turns on the question of whether information revealing the content of a briefing binder or referring to the process of creating a briefing binder in this inquiry, I will leave the question for another day.

[para 12] The Applicant argues that the records were created for multiple people, and not merely for the Minister, and that a sitting of the Committee of Supply is not the same thing as a sitting of the Legislative Assembly. Finally, he argues that he has been provided the same kinds of records by the Public Body in the past. He argues that withholding these records undermines government openness and transparency.

[para 13] The Public Body indicates that employees of the Public Body were provided the record in order to brief the Minister and that the Committee of Supply is an integral part of a sitting of the Legislative Assembly. It also argues that past decisions to provide records it now believes were subject to section 6(4)(b) is irrelevant to whether section 6(4)(b) applies in this case.

[para 14] In order to answer the question of whether section 6(4)(b) applies, I must consider what the purpose of the Public Body was in preparing the record.

[para 15] The Public Body did not provide any affidavit evidence from anyone involved in the creation of the record as to the purpose of the Public Body in creating the record. Doing so would have assisted it in making its case. However, I have decided not to ask it for further particulars, as I am able to infer from the content of the record, that the purpose of the Public Body in assembling the record at issue was to advise and instruct the Minister of Health in presenting the department budget for approval to the Committee of Supply.

[para 16] The Applicant requested copies of the record made for employees, and not the Minister’s own record. However, if the purpose of providing a copy to an employee was to enable the employee who received it to brief the Minister in preparation for a sitting of the Legislature, then section 6(4)(b) would apply to the record, even though the copy was not intended for the Minister.

[para 17] Based on the content of the record, I am satisfied that the reason copies were made for the employees for whom the Public Body made copies, was to enable them to brief the Minister in preparation for a meeting of the Committee of Supply.

[para 18] The next question to consider is whether briefing the Minister in preparation for a meeting of the Committee of Supply is briefing the minister in preparation for a sitting of the Legislative Assembly within the terms of section 6(4)(b).

[para 19] The Committee of Supply consists of *all* the members of the Legislative Assembly. The Legislative Assembly, by tradition, resolves into (forms by resolution) the Committee of Supply once the Lieutenant Governor has read the Speech from the Throne to introduce the new legislative session. The Legislature resolves into the Committee of Supply in order to consider interim and supplementary supply (funding) estimates arising from the Speech from the Throne. (An example of this process is found in Alberta Hansard, March 13, 2018 on page 41.)

[para 20] Resolving into the Committee of Supply in order to review interim supply estimates is a practice drawn from parliamentary tradition. The Committee of Supply in Alberta is chaired by the Deputy Speaker and follows the procedure set out in Standing Orders for the Committee of Supply.

[para 21] It is not constitutionally necessary that the Legislative Assembly resolve into the Committee of Supply in order to review and approve supply estimates. For example, the federal government reviews supply estimates by a motion of the Minister serving as President of the Treasury Board, “that the business of Supply be considered at the next sitting of the House [of Commons].”¹ The Legislative Assembly of Alberta follows a process by which it resolves into the Committee of Supply in order to review and approve supply estimates subject to different rules of order and debate; however, it could also perform the same function without resolving into the Committee of Supply if it adopted another means of bringing interim supply estimates before itself. In either case, ensuring that supply estimates are reviewed is a function of the Legislative Assembly that takes place when the Legislative Assembly is in session.

[para 22] Section 6(4)(b) authorizes withholding a record created solely for the purpose of briefing a Minister in preparation for a sitting of the Legislative Assembly. There is no requirement in the provision that the Minister actually sit as a member in the Legislative Assembly, although doing so is also encompassed by the provision. When the Minister submits an interim supply estimate, she may be seen as acting on behalf of the executive branch of government in seeking funds from the Legislature. This activity is also caught by section 6(4)(b), given that submitting interim supply estimates is a necessary and traditional aspect of a sitting of the Legislative Assembly.

[para 23] I agree with the position of the Public Body that where the FOIP Act refers to a “sitting of the Legislative Assembly” it includes all the things that must necessarily take place in the course of a sitting of the Legislature, such as the business of supply.

[para 24] Finally, I agree that it is irrelevant that the Public Body may have disclosed similar records in the past. It is open to the Public Body to give access to records that are subject to section 6(4) to an applicant in order to promote transparency

¹ Robert Marleau and Camille Montpetit eds., *House of Commons Procedure and Practice*
<https://www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Sec=Ch18&Seq=2&Language=E>

and increased accountability, even in a circumstance where the FOIP Act does not create a right of access. That it did so in the past, does not mean it must do so now.

[para 25] As the record at issue contains information the Public Body considered necessary for the Minister to know in preparation for a meeting of the Committee of Supply, and as it contains the information that its employees needed in order to brief the Minister in preparation for that meeting, and, as I find that a meeting of the Committee of Supply is a process that is part of a sitting of the Legislative Assembly, it follows that I find that section 6(4)(b) applies to the record at issue. I will therefore confirm that the Public Body is authorized to refuse access to the records.

IV. ORDER

[para 26] I make this Order under section 72 of the Act.

[para 27] I confirm that the Public Body is authorized to refuse access to the record at issue.

Teresa Cunningham
Adjudicator