

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER P2022-07**

June 30, 2022

**ASSOCIATION OF PROFESSIONAL ENGINEERS AND  
GEOLOGICISTS OF ALBERTA**

Case File Number 012415

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to the Association of Professional Engineers and Geoscientists of Alberta (APEGA or the Organization) requesting all records and communications within APEGA departments, or between APEGA and third parties, related to or referring to the Applicant.

APEGA located responsive records; it provided some records to the Applicant but withheld the majority. The Applicant requested a review of APEGA's response. Subsequent to the review, the Applicant requested a review of APEGA's refusal to provide one particular record, comprised of a transcript of an appeal proceeding.

The Adjudicator found that section 24(2)(c) (information collected for an investigation or legal proceeding) applied to the Applicant's personal information in the records.

**Statutes Cited:** **AB:** *Engineering, Geological and Geophysical Professions Act*, SA 1981, c. E-11.1, *Engineering and Geoscience Professions Act*, RSA 2000, c. E-11, s. 51, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 52.

**Authorities Cited:** **AB:** Orders P2006-004, P2006-005, P2007-002, P2015-10

**Cased Cited:** *Friends of Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107, *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 (CanLII)

## **I. BACKGROUND**

[para 1] The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to the Association of Professional Engineers and Geoscientists of Alberta (APEGA) requesting “all records and communications within APEGA departments, or between APEGA and third parties (including CNRL, investigation experts, etc) related to me or referring to me (without specifically mentioning my name).”

[para 2] APEGA located responsive records; it provided some records to the Applicant but withheld the majority. The Applicant requested a review of APEGA’s response. Subsequent to the review, the Applicant requested an inquiry into APEGA’s refusal to provide one particular record, comprising pages 2632-2852 of the responsive records.

[para 3] APEGA is a professional regulatory association, governed by the *Engineering and Geoscience Professions Act*, RSA 2000, c. E-11 (EGPA). APEGA is responsible for licensing of professional engineers and geoscientists in Alberta. Complaints can be made to APEGA about the professional conduct of its members, as well as organizations that are permit holders. The EGPA sets out the process by which those complaints are investigated, including establishing an Investigation Committee, a Discipline Committee, and an Appeal Board. The Applicant is a member of APEGA. He made a complaint to APEGA under the EGPA about another member, and a permit holder. The complaint was investigated under section 51 of the EGPA; the investigation was terminated by the Investigation Committee, under section 51(3). The EGPA permits a complainant to appeal such a decision to the Appeal Board, which the Applicant did. The Applicant attended the Appeal Board proceedings and provided sworn testimony. The records at issue are a transcript of that appeal proceeding.

## **II. INFORMATION AT ISSUE**

[para 4] The information at issue consists pages 2632-2852 of package 2020.

## **III. ISSUES**

[para 5] The Notice of Inquiry, dated April 13, 2022, states the issue for inquiry as the following:

1. Did the Organization (APEGA) properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to the information?

## **IV. DISCUSSION OF ISSUES**

[para 6] Under PIPA, an applicant has a right of access only to their own personal information. APEGA argued that while the transcripts contain the Applicant’s personal information, they are

not comprised entirely of his personal information. It cited Order P2006-005, in which former Commissioner Work stated (at paras. 46-47).

In Order P2006-004, I considered the meaning of “personal information about an individual” within the meaning of the Act:

The Act defines “personal information” as “information about an identifiable individual”. In my view, “about” in the context of this phrase is a highly significant restrictive modifier. “About an applicant” is a much narrower idea than “related to an Applicant”. Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily “about” that person.

This reasoning applies equally to an individual’s work, which may be associated with an individual, but is not necessarily about the individual who performed the work.

[para 7] In that Order, former Commissioner Work considered whether information generated or collected to address a complaint was the personal information of the individual who made the complaint (the applicant). He found that information about the persons named in the complaint, information about other third parties and their dealings with the applicant, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process, were not personal information of the applicant. This was so, even though this information was generated as a result of the applicant’s complaints (see para. 18).

[para 8] APEGA states that as the Applicant attended the Appeal Board proceeding and gave testimony, the transcripts contain the Applicant’s personal information. However, much of the information in the transcript is not about the Applicant.

[para 9] The transcript is approximately 220 pages long; around half of the transcript is comprised of the Applicant’s testimony and closing remarks. Some of the Applicant’s testimony is interrupted by other participants and Appeal Board members, asking questions or discussing procedural matters. The remainder of the transcript is comprised of procedural discussions, and testimony of other witnesses. Other witnesses spoke about the Applicant in a few instances; primarily about his employment at the company and relationships with coworkers.

[para 10] The Applicant’s testimony includes his opinions about the professional competence of other professionals in his field, as well as his opinions about actions taken by those other professionals, and the company involved in the matter. The Applicant’s testimony also includes a significant amount of technical information about a project undertaken by the company and the other professionals, including the actions taken and the Applicant’s opinion of those actions.

[para 11] In Order P2007-002, the Director of Adjudication considered whether an opinion given by an individual A about individual B is the personal information of A or B (or both). She concluded that an opinion can be the personal information of both the giver of the opinion as well as the individual the opinion is about. This will depend upon the context in each case (at para. 22):

That the fact a person holds or gives an opinion about another conveys something personal about the maker will not be true for all opinions. In some circumstances, an opinion held by a person may be abstracted from their personal life to such a degree that it does not seem to have the quality of personal information. An example is where the opinion is a professional one – for example, a psychologist’s opinion from interpreting a psychological test that B has a particular personality disorder. However, for situations where the opinion that is held, or the fact it is given, does reflect something personal, and especially something sensitive, about the person making it, it is, in my view, commonly and quite properly regarded as also being information about that person.

[para 12] In this case, in the transcript of the Appeal Board proceeding, the Applicant is making statements of fact and providing his opinion about the appropriateness of actions taken by certain individuals in their work capacities. Given the context – that the Applicant was alleging that work was performed in a substandard manner – his opinions about the other individuals is best characterized as personal information about them.

[para 13] Many of the Applicant’s opinions appear to rely on his professional work experience. A significant portion of the Applicant’s testimony consists of technical aspects of a project undertaken by the company participating in the proceeding, which the Applicant participated in. It may be argued that the Applicant’s professional opinion does not have a personal dimension and is therefore not his personal information.

[para 14] In Order P2007-002, the Director of Adjudication discussed factual statements, at para. 25 (footnote omitted):

A final issue relative to ownership of information is as to statements about the Applicant by others that are statements of fact rather than of opinion. A statement that B was in a particular place at a particular time, that he is a member of a particular profession, or that he is six feet tall, unless its maker is deluded or mistaken, is a statement of fact. In my view, purely factual statements made by one person about matters such as the activities or attributes of another are the personal information of the person about whom they are. However, if the statement reveals something about A, for example, the reason A knows the thing about B – that he was told it, observed it, or had some experience with it - the entire statement may, at the same time, if A is identifiable, also be the personal information of A. Thus, for example, A’s statement that B assaulted him, or gave him a ride home, is the personal information of both of them.

[para 15] Following this analysis, and given the context of the records – that the Applicant brought forward a complaint about the professional conduct/actions of another individual and a company – I accept that the Applicant’s testimony is his personal information. It is worth noting that the Applicant brought his complaint as a concerned individual, and not in his work capacity or as an expert witness.

[para 16] The Applicant also provided his opinion about the decision of the Investigation Committee, arguing that it erred in its decision to terminate the investigation. The Applicant’s opinions about the members of the Committee are not about the members’ personally, but about their work product. Therefore, the Applicant’s opinions about the Committee members’

investigation and decision is not *about* them, and it not their personal information. The Applicant's opinions about the Committee are his personal information.

[para 17] The same can be said about the Applicant's testimony regarding the actions of the company, where specific individuals were not singled out or identified. For example, the Applicant often referred to the company's practices, which are not about other individuals.

[para 18] The information in the transcripts that is not the Applicant's personal information is not information to which he has a right of access under the Act. As stated by former Commissioner Work in Order P2006-004, "[i]nformation that is not the personal information of the applicant is not responsive to a request under PIPA. PIPA exceptions do not need to be applied to information that is unresponsive to a PIPA request" (at para. 17). Given this, I need only consider APEGA's decision to withhold the Applicant's personal information contained in the transcript. Somewhere less than half of the transcript could be characterized as the Applicant's personal information.

[para 19] APEGA also notes that the transcripts contain personal information of other individuals, which must be withheld under section 24(3)(b) of the Act. That exception is not listed as an issue in this inquiry. That said, it is a mandatory exception to access, which means that APEGA is required to withhold any information to which this exception applies. I agree that this exception applies to information in the records, including the Applicant's opinions about other individuals (with the exceptions noted above), and other individuals' opinions of the Applicant (except to the extent that those opinions were provided by an individual performing their job functions, such as counsel for another party). In most instances these opinions have a personal dimension such that they are the personal information of both the giver of the opinion, as well as the individual the opinion is about. In this case, I needn't identify specifically what information must be withheld under section 24(3)(b), as I find that section 24(2)(c) applies to the Applicant's personal information in the records.

[para 20] APEGA has applied section 24(2)(c) to the transcript at pages 2632-2852 in its entirety, arguing that the information in the transcript was collected for an investigation or legal proceeding. This provision states:

*24(2) An organization may refuse to provide access to personal information under subsection (1) if*

*...*

*(c) the information was collected for an investigation or legal proceeding;*

*...*

[para 21] Section 24(2)(c) of the Act permits an organization to withhold personal information that was collected for an investigation or legal proceeding. Section 1(1)(f) of PIPA defines "investigation", in part, as follows:

*1(1)(f) "investigation" means an investigation related to*

*(i) a breach of agreement,*

*(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*

*(iii) circumstances or conduct that may result in a remedy or relief being available at law,*

*if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;*

[para 22] “Legal proceeding” is defined at section 1(1)(g) of the Act as:

*(g) “legal proceeding” means a civil, criminal or administrative proceeding that is related to*

*(i) a breach of an agreement,*

*(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*

*(iii) a remedy available at law;*

[para 23] Section 51 of the EGPA states:

*51(1) The Investigative Committee may terminate an investigation at any time if it is of the opinion that*

*(a) the complaint is frivolous or vexatious, or*

*(b) there is insufficient evidence of unskilled practice of the profession or unprofessional conduct.*

*(2) On terminating an investigation, the Investigative Committee shall direct the Registrar to serve on the investigated person and on the complainant, if any, a notice in accordance with the bylaws that the investigation has been terminated.*

*(3) A complainant who is served with a notice under subsection (2) informing the complainant that the investigation has been terminated may, by notice in writing to the Registrar within 30 days after receipt of the notice under subsection (2), appeal that decision to the Appeal Board.*

*(4) On an appeal under subsection (3), the Appeal Board shall*

*(a) uphold the decision of the Investigative Committee to terminate the investigation if, in the opinion of the Appeal Board,*

*(i) the complaint is frivolous or vexatious, or*

*(ii) there is insufficient evidence of unskilled practice of the profession or unprofessional conduct,*

*or*

*(b) refer the matter to the Discipline Committee for a formal hearing.*

*(5) The Appeal Board shall notify the complainant, the investigated person and the Investigative Committee in writing of its decision under subsection (4).*

[para 24] APEGA states that the Court of Appeal considered a previous iteration of this provision in what was then the *Engineering, Geological and Geophysical Professions Act*, SA

1981, c. E-11.1 (section 49) in *Friends of Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107. In that decision, the Court of Appeal determined that an appeal of a decision to terminate an investigation under section 49(3) (now section 51(3)) was a continuation of the disciplinary investigation. It said (at para. 36):

Although called an “appeal”, the right conferred on a complainant by s. 49(3) [now s. 51(3)] is no more than a right to have the decision of the Discipline Committee terminating an investigation reviewed by Council. It is, in our view, simply an extension of the investigative process. The Act does not expressly or impliedly require a formal or even an informal hearing. A complainant who elects to seek review of the decision by Council is no doubt permitted to submit additional written or oral material by way of explanation or elaboration of the complaint. A complainant is not, however, entitled at this stage to be represented by counsel or to subject the investigated person to cross-examination in order to substantiate the complaint. Nor is a complainant entitled to reasons for Council’s decision to confirm the determination of the Discipline Committee.

[para 25] APEGA states that following this decision, the Appeal Board’s proceeding to which the transcript relates is an “investigation” within the meaning of s. 24(2) of PIPA.

[para 26] The language of the provision discussed in *Friends of Old Man River* is different from the current language of section 51 in the current EGPA. In the version discussed by the Court of Appeal, a preliminary investigation is conducted into a complaint, after which the findings are reported to the Disciplinary Committee, which can decide to terminate the investigation. A decision to terminate the investigation under the previous legislation could be appealed to the Council of APEGA.

[para 27] In the current legislation, the findings of the preliminary investigation are provided to the Investigation Committee, which has the authority to terminate an investigation. An appeal of the decision to terminate is made to the Appeal Board.

[para 28] Despite these differences, the process is substantially similar such that the Court of Appeal’s analysis, finding that the proceeding relating to the appeal of a decision to terminate is a continuation of an investigation, is applicable here.

[para 29] The investigation to which the records relate was an investigation into the Applicant’s complaint regarding the competence of a member of APEGA, and the management of a particular project by a permit holder (the company). APEGA has authority to investigate members and permit holders. The initial investigation either results in the termination of the investigation, in a referral to the Discipline Committee, or in a recommendation for an order against the investigated person, which must be affirmed by the Discipline Committee. The Discipline Committee has the authority to discipline a member or permit holder, including suspension or cancellation of the person’s registration. This meets the definition of “investigation” in section 1(1)(f) of PIPA, set out above.

[para 30] Even if the appeal to the Appeal Board were more properly characterized as a legal proceeding than part of the initial investigation, section 24(2)(c) would still apply to information

collected for the appeal, as the requirements in the respective definitions are substantially similar.

[para 31] The records at issue consist of the transcript of the appeal to the Appeal Board. The Appeal Board collected the information presented at the appeal for that investigation (or legal proceeding). The same must be said about the transcript of the appeal, which is a record of the collected information. Therefore, the information in the record was collected for an investigation or legal proceeding under section 24(2)(c).

[para 32] I find that section 24(2)(c) applies to the information in the records at issue.

### *Exercise of discretion*

[para 33] Section 24(2)(c) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant.

[para 34] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a public body's exercise of discretion under the *Ontario Freedom of Information and Protection of Privacy Act* (FOIP Act). The Court stated (at paras. 68-69, 71):

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

...

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[para 35] While this decision involved the exercise of discretion under FOIP legislation, in my view, the authority of the Commissioner to review an organization's exercise of discretion under PIPA is the same.

[para 36] Orders from this Office under the FOIP Act have given guidance regarding appropriate factors to consider in exercising discretion to withhold information under that Act, including the purpose of the Act, and the purpose of the particular exception being applied. Further, in Order P2007-002, the Director of Adjudication commented on factors that may be relevant to considering whether to withhold information subject to section 24(2)(c). She said (in footnote 34):

An example of a situation in which withholding information would achieve the policy goals of this heading is where an investigation was under way and providing an applicant's own personal information to him could compromise its effectiveness. This might happen where the investigation was into some wrong-doing on the part of the Applicant and providing the information could help him conceal evidence of the wrongdoing, or where providing to the Applicant some of the statements others were making about him relative to the matter being investigated would dissuade others who remain to be interviewed from providing information. In this regard, I note the parallel provision in British Columbia does not apply after an investigation or legal proceeding has been concluded, so that disclosure of information that was collected for such purposes, but can no longer harm the investigation or proceeding, cannot be withheld on the basis of this provision. The Alberta provision does not contain this restriction. However, in my view, there is still an implicit restriction that before information is withheld, it must be clear that disclosing the information would or likely would have some consequence that is contrary to the policy goals of the provision permitting withholding of information collected for an investigation or legal proceeding.

[para 37] APEGA also cites Order P2006-004, in which former Commissioner Work states (at para. 22):

I want to make it very clear that I am not ducking my responsibility in this case. The issue of when an individual can obtain information as part of an administrative or regulatory process and when they can obtain information pursuant to PIPA is a critical one. This issue has significant implications for a number of regulatory organizations. It should be understood that the provisions of PIPA were not intended to somehow interweave with, fetter, or form an overlay upon, the information sharing responsibilities of such organizations relative to their regulatory functions. There are provisions in PIPA that accommodate such separate processes, and each should be regarded as operating in its own sphere and having a separate, if sometimes complementary, purpose. As well, as noted, a request that both processes be run in a given case relative to overlapping information might not, depending on the circumstances, be "reasonable".

and Order P2015-10, which states with respect to the exercise of discretion to apply section 24(2)(c) (at paras. 33-34):

The Organization also argued that it is important that it be able to frankly and confidentially assess grievances and that this would be impeded if grievance summaries and related records (such as the file notes) were disclosed to members and/or other third parties.

I accept this explanation from the Organization regarding its exercise of discretion to withhold the Applicant's personal information in the grievance summaries and file notes.

[para 38] APEGA provided an affidavit sworn by its Director of Business Performance and Privacy Officer, who made the decision regarding access to the requested records. The Director states that they considered the following factors:

- a. The general purposes of PIPA as set out in s. 3 of PIPA, including the right of individuals to have their information protected and the need of APEGA to collect personal information for purposes that are reasonable;
- b. The purpose for which the information was collected: to process and investigate the Applicant's complaint in accordance with APEGA's governing legislation;
- c. The nature of the Appeal Board Hearing for s. 51 appeals, in that it is not an adjudicative proceeding and no final decisions are made at such hearings;
- d. That decisions issued by the Appeal Board following a s. 51 appeal are not published;
- e. That the Act does not mandate or permit participants to access Appeal Board transcripts;
- f. The Appeal Board's direction that the transcript of that proceeding is not to be disclosed to any party, as is evidenced in the Record;
- g. That the Applicant was provided with a copy of the Appeal Board Decision on August 4, 2017;
- h. That the Applicant stated that he needed the Record for another urgent case and to prepare court paperwork;
- i. That the timeline for any civil proceeding arising out of the Appeal Board Decision had lapsed by the time the Applicant made his Access Request;
- j. That much of the information sought by the Applicant is not his personal information because it was generated in the context of a professional regulatory complaint about third parties;
- k. That the information contained in the Record includes personal information about several other parties, including names and employment/work history;
- l. That the information that is not the Applicant's personal information is inextricably linked to the Applicant's personal information and it would be very difficult to sever such information from the Record; and
- m. The expectation of APEGA and members of APEGA that information gathered during the course of an investigation will be used to process the complaint in accordance with the governing legislation and will not be used for a collateral purpose.

[para 39] APEGA argues that these factors "outline a balanced and thorough consideration of all the factors relevant to the Applicant's request to disclose the Record" (submission, at para. 57).

[para 40] The factors listed above appear to apply to the disclosure of the transcript as a whole, as opposed to the disclosure of the Applicant's personal information in the transcript. Had the Applicant's personal information comprised a small portion of the transcript, or only discrete items of information in the transcript, not all of the above factors may have been applicable to the disclosure of that information to the Applicant. However, the Applicant's testimony and closing statement comprise a significant portion of the transcript, and surveys much of the arguments and evidence that was considered by the Investigation Committee in its investigation.

Therefore, I agree that the factors considered by the Director are relevant and appropriate. I find that APEGA properly exercised its discretion to withhold information under section 24(2)(c).

#### **IV. ORDER**

[para 41] I make this Order under section 52 of the Act.

[para 42] I find that section 24(2)(c) applies to the records at issue in their entirety.

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Amanda Swanek  
Adjudicator