ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-07

March 5, 2024

ALBERTA ENERGY REGULATOR

Case File Number 019768

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to the Alberta Energy Regulator (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for a briefing note prepared by named individuals.

The Public Body provided responsive records with information withheld under section 24(1).

The Applicant requested an inquiry into the Public Body's decision to withhold information in the records.

The Adjudicator found that the information withheld in the records consists of the type of information to which section 24(1)(a) applies, but that some of the information had been disclosed to the Applicant elsewhere in the records at issue. The Adjudicator ordered the Public Body to review the withheld information in the context of the records in their entirety, to determine what information has already been disclosed elsewhere in the records. The Adjudicator ordered the Public Body to disclose those portions of the withheld information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24, 71, 72, *Responsible Energy Development Act*, S.A. 2012, c.R-17.3, Designation and Transfer of Responsibility Regulation (AR 11/2023)

Authorities Cited: AB: Orders 96-006, 96-012, Decision F2014-D-01, F2004-026, F2007-013, F2008-008, F2010-036, F2013-13, F2013-17, F2022-12, F2022-44

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *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 *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Alberta Energy Regulator (the Public Body) for the following:

> A copy of the first available draft and final version of a Briefing Note prepared by [JM], [AL] and [MB], drafted between September 1, 2019 and October 15, 2019, that was sent to other officials within the Government of Alberta. This briefing note would have included a summary of insolvency volumes as an attachment.

[para 2] The Public Body responded to the request, providing partial access to the records, with information withheld under sections 24(1)(a) and (g). The Applicant requested a review of the Public Body's response. During the review, the Public Body made multiple new decisions regarding access, applying different exceptions to information in the records. In its most recent response, the Public Body continued to apply only section 24(1) to information in the responsive records.

[para 3] The Public Body's submissions and its index of records refer only to section 24(1)(a); therefore, I conclude that the Public Body is no longer relying on any other subsection of section 24(1) to withhold information in the responsive records.

II. RECORDS AT ISSUE

[para 4] The record at issue is comprised of a Briefing Note with attachments, totaling 37 pages. The specific information at issue is the information withheld on pages 1, 5-7, and 25-26 of the Briefing Note.

III. ISSUES

[para 5] The issue as set out in the Notice of Inquiry, dated November 15, 2023, is as follows:

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

IV. DISCUSSION OF ISSUE

[para 6] The Public Body applied section 24(1)(a) to information in the records at issue. This section states:

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,

...

[para 7] The test for section 24(1)(a), as stated in past Orders, is that the advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice, recommendations, etc.") 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. (See Order 96-006, at p. 9)

[para 8] In Order F2013-13, the adjudicator stated that the third arm of the above test was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 9] In addition to the requirements in those tests, section 24(1)(a) applies only to the records (or parts thereof) that reveal substantive information about which advice, recommendations, etc. was sought. Information such as the names of individuals involved in the advice, recommendations, etc., dates, and information that reveals only the fact that advice, recommendations, etc. is being sought on a particular topic (and not the *substance* of the advice etc.) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 10] Bare recitation of facts or summaries of information also cannot be withheld under section 24(1)(a) unless the facts are interwoven with the advice, recommendations, etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).

[para 11] As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at para. 31).

[para 12] The first step in determining whether section 24(1)(a) was properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options.

Applicant's arguments

[para 13] The Applicant argues that the content of the withheld information, specifically the information withheld on pages 5-7, is not secret. The Applicant argues that information in the Briefing Note that has been disclosed to him mirrors information

in the 2023 Report of the Auditor General of Alberta[1], which references a 2019 risk analysis of the Public Body's liability management system. The Applicant argues that some of the withheld information likely also appears in the Auditor General's Report.

[para 14] The Applicant argues that even if some of the withheld information is advice or recommendations, the Government of Alberta has already made a decision regarding that information. Specifically, the Applicant points to the 2020 Liability Management Framework[2] published by the Government of Alberta, which states:

> The Alberta government is improving its liability management framework – which includes a series of mechanisms and requirements to improve and expedite reclamation efforts – to enable industry to better manage clean-up of oil and gas wells, pipelines and facilities at every step of the process, from exploration and licensing, through operations, reclamation, and post-closure. Taken together, the new framework will shrink the inventory of inactive and orphaned wells across the province, ensure more timely restoration of land to its original state, and protect future generations from experiencing a backlog of sites needing clean-up.

[para 15] The Applicant further states (rebuttal submission, at para. 10):

> The public body will not be relying on four-year old advice to act on the oil and gas liability issue. The situation has changed significantly since these records were released, largely because a new policy framework was brought in in 2020. This information is now too out of date for there to be a realistic possibility this advice will be used.

[para 16] Similarly, the Applicant argues that any advice in pages 25-26 relates to additional authorities granted to the Orphan Well Association (OWA) in the *Liabilities Management Statutes Amendment Act, 2020*, which was introduced and passed in the spring 2020 sitting of the Legislature. I understand the Applicant's argument to be that decisions about advice appearing in pages 25-26 have been made via the Act that was passed in 2020.

[para 17] The Applicant further argues that the withheld information on pages 25-26 appears to relate to changes proposed by the OWA, the Canadian Association of Petroleum Producers (CAPP), and the Explorers and Producers of Canada. The Applicant argues that these groups are primarily lobby groups, and that recommendations from lobby groups are not prepared by or on behalf of a public body within the terms of section 24(1)(a).

[para 18] The Applicant also argues that the withheld information has not been kept confidential by the Public Body but rather that it has been shared with private industry and not the public.

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[1] https://www.oag.ab.ca/wp-content/uploads/2023/03/Liability-management-oil-gas-mar2023.pdf
[2] https://www.alberta.ca/system/files/custom_downloaded_images/energy-liability-management-framework.pdf

[para 19] The Applicant has also made arguments regarding the Public Body's exercise of discretion to apply section 24(1)(a). The Applicant argues that the public interest in disclosure weighs in favour of disclosing the information.

Public Body's arguments

[para 20] The Public Body states that the Briefing Note was created by three Public Body employees, who work in the Closure and Liability group within the Public Body. The Public Body states that the Government of Alberta routinely requests information in the form of briefing notes, and the record at issue was created in response to such a request.

[para 21] The Public Body states that Alberta Energy created a Steering Committee to discuss policy considerations relating to liability management. I presume that liability management in this context relates to orphaned and inactive wells.

[para 22] The Public Body further states that in 2019, the issue of 'a liability narrative' was addressed in Steering Committee meetings, as well as meetings relating to the Integrated Resource Management System (IRMS). The Public Body states that IRMS meetings include senior management from the Public Body, as well as employees of the Government of Alberta including the Deputy Minister of Energy and Minerals (formerly Alberta Energy). The Public Body states that the record at issue was created "in response to a request for a liability narrative by the Steering Committee and the Deputy Minister through the IRMS."

[para 23] The Public Body states that the Briefing Note was provided to the Government of Alberta through the Steering Committee. The title of the Briefing Note, which has been disclosed to the Applicant, is "Liability Narrative". It is dated September 2019.

[para 24] The Public Body further states that the Public Body commonly seeks policy direction from the Government of Alberta.

[para 25] The Public Body states that the withheld information in the Briefing Note consist of advice, recommendations, analysis, etc. made by the Public Body for the benefit of policy decisions to be made by the Government of Alberta. The Public Body further states that some decisions may have been made based on the Briefing Note, and further action may be contemplated.

[para 26] With respect to the Liability Management Framework referenced by the Applicant, the Public Body states that while some recommendations in the Briefing Note appear to have been considered in the creation of the Framework, other analyses and recommendations in the Briefing Note are outside the scope of that Framework.

[para 27] The Public Body argues that the information withheld in the records is not merely factual information but rather it reveals the Public Body's analysis on particular

topics. It argues that should the Public Body have been wrong in its analysis, disclosure could make the Public Body "look bad or foolish".

[para 28] Regarding the Applicant's arguments that some information was provided by other parties, such as the OWA, the Public Body agrees that pages 25-26 of the Briefing Note contain information provided by OWA and CAPP. It cites Order F2008-008 in support of its position that advice, as contemplated under section 24(1)(a), can be given by a third party. In that Order, the adjudicator concluded that section 24(1)(a) does not preclude the possibility that advice, recommendations, etc. can be provided to a public body by a third party in certain circumstances (at paras. 42-44):

> In my view, for information to be developed by or on behalf of a public body under section 24(1)(a) of the Act, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. I do not believe that general feedback or input from stakeholders or members of the public normally meets the first requirement of the test under section 24(1)(a), as the stakeholders or members of the public do not provide the information by virtue of any advisory "position". This is even if the public body has sought or expected the information from them.
>
> To put the point another way, the position of the party providing information under section 24(1)(a) – or the relationship between that party and the public body – should be such that the public body has specifically sought or expected, or it is the responsibility of the informing party to provide, more than merely thoughts, views, comments or opinions on a topic. General stakeholders and members of the public responding to a survey or poll are not engaged by the public body in a sufficient advisory role. They have simply been asked to provide their own comments, and have developed nothing on behalf of the public body.
>
> I distinguish the foregoing, however, from situations where a public body might ask a specific stakeholder – who has a particular knowledge, expertise or interest in relation to a topic – to provide advice, proposals, recommendations, analyses or policy options for it, thereby engaging the stakeholder to develop information "on behalf of" the public body. In other words, I do not preclude the possibility of a stakeholder providing advice, etc. by virtue of its position, and therefore within the meaning of section 24(1)(a) of the Act. In such a case, the stakeholder (again, even if not paid) would be specifically engaged in an advisory role and therefore have a sufficiently close connection to the public body. This may be what occurred in the context of the inquiries that gave rise to some of the previous orders of this Office, which are discussed above.

[para 29] In its rebuttal submission, the Public Body further clarified that the information withheld on pages 25-26 is not factual information provided by OWA or CAPP, but rather that it consists of analyses and assessments conducted by the Public Body of information provided by OWA and CAPP.

Analysis

[para 30] The Public Body is an agency of the Government of Alberta. According to the Public Body's 2019/2020 Annual Report, which relates to the time period in which the Briefing Note was created, the Public Body was accountable to the Minister of Energy (now Alberta Energy and Minerals) and the Minister of Environment and Parks.

[para 31] The Public Body was established under the *Responsible Energy Development Act*, S.A. 2012, c.R-17.3. The Designation and Transfer of Responsibility Regulation in force at the time the record at issue was created assigns responsibility of the *Responsible Energy Development Act* to both the Minister of Energy and the Minister of Environment and Parks.

[para 32] Section 67 of the *Responsible Energy Development Act*, S.A. 2012, c.R-17.3 authorizes the Minister responsible for that Act to given directions to the Public Body for the purposes of providing priorities and guidelines to the Public Body, as well as ensuring the work of the Public Body is consistent with the Government of Alberta's programs and policies. The Public Body is required to comply with these directions.

[para 33] This relationship is reflected in the 2020 Liability Management Framework published by the Government of Alberta, which states:

> Under the liability management framework, the Alberta government sets the policy direction and provides oversight, while the Alberta Energy Regulator (AER) is responsible for administration – including monitoring progress, working with industry, and enforcement.

[para 34] This relationship is also set out in the Auditor General's Report, cited above, at page 13:

> Alberta Energy [now Energy and Minerals] and Alberta Environment and Protected Areas set the overall policy for Alberta's liability management programs. Alberta Environment and Protected Areas implements provincial policies and sets standards for how the land is used and once any development occurs, how it is remediated and reclaimed.
>
> The ministers of Energy and Environment and Protected Areas are responsible for working with AER to set its long-term objectives and its short-term targets and advise AER of any government policies applicable to AER or its activities or operations.

[para 35] I accept that the Government of Alberta, specifically the Ministers of Energy and Minerals, and Environment and Parks, are responsible for providing policy direction to the Public Body. Therefore, with respect to the third part of the test for applying section 24(1)(a), I accept that the recipients of the Briefing Note are in a position to take or implement the advice or recommendations contained in that record.

[para 36] I also accept that the authors of the Briefing Note were in a position to provide the advice or recommendations, and that the advice and recommendations contained in the Briefing Note were directed toward taking an action.

[para 37] Lastly, although information in the Briefing Note may have been used by the Government of Alberta to make decisions, such as creating the Framework, none of the withheld information in the Briefing Note can be characterized as a decision that has been made. As stated above, there is a principle that section 24(1)(a) does not apply to decisions. However, section 24(1)(a) can continue to apply to the advice, analysis, recommendations etc. that led to the decision.

[para 38] Most of the information withheld on pages 1, 5-7, 25 and 26 of the Briefing Note consists of advice, analyses, recommendations etc. such that section 24(1)(a) would generally apply. However, some of the information withheld on these pages was disclosed to the Applicant elsewhere in the records. Withholding information in one record that has already been disclosed elsewhere can no longer *reveal* the type of information to which section 24(1) applies (see Order F2022-44, at para. 42).

Pages 1, 5-7

[para 39] While only pages 1, 5-7 and 25-26 of the Briefing Note are at issue in this inquiry, I have a full copy of the Briefing Note.

[para 40] Some of the information withheld on pages 1 and 5-6 was disclosed elsewhere in the records. The information primarily appears under the "Highlights" heading on page 1, and the "Analysis" heading that applies to the information on pages 5-6. I cannot provide a detailed account of where the withheld information has been disclosed to the Applicant in the Briefing Note without revealing the substance of the withheld information. Presumably if I can find the duplications the Public Body will also be able to locate them. The following are some examples:

- On page 1, the last main bullet and much of the information in the sub-bullets appears to have been disclosed elsewhere in the records;
- On page 5, much of the information relating to "Issue 3" withheld on that page appears to have been disclosed elsewhere in the records.

[para 41] The above list is not exhaustive. Given the somewhat technical nature of the information in the Briefing Note, the Public Body is in a better position than I am to review the Briefing Note to determine what information withheld on pages 1, and 5-6 has already been disclosed elsewhere in the records. Therefore, I will order it to do so, and disclose to the Applicant the information currently withheld that has been disclosed elsewhere in the record.

[para 42] This does not apply to the information under the "Recommendations" heading on pages 6-7. The actual recommendations under this heading fall within the scope of section 24(1)(a), and have not been disclosed elsewhere in the record. Some information that accompanies the recommendations (i.e. items of analysis) may have been disclosed to the Applicant elsewhere in the record. However, in this case, disclosing those items of analysis under the "Recommendations" heading would likely reveal the

recommendations that have not been disclosed elsewhere. Therefore, section 24(1)(a) applies to all of the information under the "Recommendations" heading on pages 6-7.

[para 43] The Public Body has also applied section 24(1)(a) to withhold information under the heading "Next Steps" on page 7. This information consists of steps the Public Body is intending to take. This information does not consist of advice to the Public Body or recommended steps for the Public Body to take. The Public Body has not explained how section 24(1)(a) applies to this specific information. Past Orders have noted that merely mentioning planned steps or providing a status update is not information to which section 24(1)(a) applies (see Orders F2013-17, at para. 151, F2022-12, at paras. 58, 61). I find that section 24(1)(a) does not apply to this information.

Pages 25-26

[para 44] The information withheld on pages 25-26 appears under the heading "Context - OWA Authority Augmentation". The disclosed portion of page 25 states that the OWA, CAPP, and another organization have been briefing the Government with respect to changes to the liability management framework, including OWA augmentation changes.

[para 45] The Public Body cites Order F2008-008, cited above, in support of its argument that stakeholders, such as the OWA, can provide advice to the Public Body within the terms of section 24(1)(a).

[para 46] For the following reasons, I do not need to consider whether the OWA provided advice to the Public Body within the terms of section 24(1)(a). The Public Body's rebuttal submission states that the information withheld on pages 25-26 consists of analysis and assessment of information by the Public Body of information that had been provided by OWA and the CAPP. The heading of pages 25-26 could be interpreted as indicating that the withheld information in these pages consists of information from the OWA only. However, having reviewed these pages, I agree that the information withheld under section 24(1)(a) is properly characterized as analyses and recommendations drafted by the Public Body. That the analyses or recommendations may have incorporated or relied upon information provided by the OWA or CAPP does not mean that section 24(1)(a) cannot apply. Advice, recommendations and analyses will often incorporate information provided by external sources.

[para 47] As this information consists of recommendations and analyses, I find that section 24(1)(a) applies. While pages 25-26 also contain background or merely factual information, this information has been disclosed to the Applicant.

Exercise of discretion

[para 48] Section 24(1) is a discretionary exception to disclosure. 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.

[para 49] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 50] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 51] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 52] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would

> neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 53] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 54] I have discussed above the Applicant's arguments regarding the public interest in disclosure, as well as their belief that the withheld information has been shared with industry and therefore ought to also be shared with the public. The Applicant has also argued that the age of the information is a factor.

[para 55] In its rebuttal submission, the Public Body states that there are ongoing discussions about the liability management framework with respect to unfunded legacy liabilities. The Public Body states that it has withheld information that exceeds the scope of the Framework to protect ongoing advice, and deliberations between the Public Body and the Government of Alberta.

[para 56] The Public Body states that it considered the public interest in disclosure, and disclosed most of the Briefing Note, withholding only what relates to ongoing deliberations, to avoid discouraging full and frank discussions. The Public Body states that it is not seeking to protect its reputation but rather the dialogue between public bodies on policy matters.

[para 57] The Commissioner's role with respect to a public body's exercise of discretion is to determine whether it was reasonable. I agree that the Public Body considered appropriate factors in exercising its discretion to apply section 24(1)(a). The Public Body has considered the public interest in disclosure, and the particular purposes of section 24(1)(a). The Public Body has exercised its discretion to withhold information that relates to ongoing discussions on the relevant matter. The Applicant may disagree with the conclusion the Public Body came to, but I find that it was reasonable.

V. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I find that section 24(1)(a) applies to the information withheld in the Briefing Note, with the exception of the information appearing under the heading "Next Steps" on page 7, and any information that has already been disclosed elsewhere in the records. This latter exception comprises much of the information withheld on pages 1, and 5-6, as discussed at paragraphs 40-42 of this Order. I order the Public Body to review the withheld information in the context of the entire Briefing Note to determine what information withheld on pages 1, and 5-6 has already been disclosed elsewhere in the records. As section 24(1)(a) cannot apply to that information, the Public Body is to disclose it to the Applicant.

[para 60] I uphold the Public Body's exercise of discretion to withhold information to which I found that section 24(1)(a) applies.

[para 61] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator