ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-16

May 29, 2024

OFFICE OF THE PREMIER/ALBERTA EXECUTIVE COUNCIL

Case File Number 025390

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request to Alberta Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for communications between members of Cabinet and the Alberta Energy Regulator, for a specified time period.

The Public Body responded to the Applicant, informing them that it located nine pages of responsive records but that it was withholding all pages in their entirety under section 22(1) of the Act.

The Applicant requested an inquiry into the Public Body's response.

The Adjudicator determined that section 22(1) does not apply to the information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 22, 71, 72

Authorities Cited: AB: Orders 97-010, F2008-028, F2004-026, F2022-20; **Ont**: Order PO-3973

Cases Cited: *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198, *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4

I. BACKGROUND

[para 1] The Applicant, Northback Holdings Corporation, made an access request to Alberta Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for the following:

> *All communications and internal records related to such communications, between members of Cabinet and the Alberta Energy Regulator (AER) from May 15, 2020 to present.*
>
> *Date Range: May 15, 2020 to July 28, 2021.*

[para 2] The Public Body informed the Applicant that it located nine pages of responsive records, but that it was withholding the records in their entirety under section 22(1).

[para 3] The Applicant requested a review of the Public Body's response. Following the review, the Applicant requested an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the nine pages of responsive records, withheld in their entirety.

III. ISSUES

[para 5] The issue for this inquiry was set out in the Notice of Inquiry dated January 10, 2024, as follows:

> Does section 22(1) of the Act (cabinet and treasury board confidences) apply to the information/records?

IV. DISCUSSION OF ISSUES

Preliminary issue – scope of inquiry

[para 6] In its initial submission, the Applicant argued that the Public Body did not fulfill its obligation under section 12(1)(c) of the FOIP Act, which requires public bodies to provide applicants with the reasons for which information was refused in response to an access request.

[para 7] This issue was not previously raised by the Applicant in its request for review or its request for inquiry. As such, this issue was not considered in the review conducted prior to this inquiry, and is not listed in the Notice of Inquiry as an issue to be considered. Further, the Public Body has not addressed this issue in its submissions. For these

reasons, I am not adding this issue to the inquiry and will not be addressing the Applicant's arguments on this point.

Does section 22(1) of the Act (cabinet and treasury board confidences) apply to the information/records?

[para 8] Section 22 of the FOIP Act requires a public body to withhold cabinet confidences. It states:

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*
>
> *(2) Subsection (1) does not apply to*
>
> *(a) information in a record that has been in existence for 15 years or more,*
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> *(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or*
>
> *(c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if*
>
> *(i) the decision has been made public,*
> *(ii) the decision has been implemented, or*
> *(iii) 5 years or more have passed since the decision was made or considered.*

[para 9] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 10] The burden of proof lies with the Public Body to prove that section 22(1) of the Act applies to the records at issue.

Parties' arguments

[para 11] In its initial submission, the Applicant argues that past Orders of this office have found that information that does not reveal the substance of deliberations, such as dates, names, business contact information, and subject lines cannot be withheld under section 22(1) (citing Orders F2008-208, F2022-20, F2004-026). The Applicant further argues it is unlikely that all of the pages in their entirety reveal the substance of deliberations.

[para 12] In its initial submission, the Public Body argues that the Supreme Court of Canada "affirmed that the importance of protecting Cabinet confidence outweighs the need for access to information", citing *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (*AG Ontario*).

[para 13] The Public Body characterized the records at issue as a "Cabinet presentation on an AER matter, all of which contain information that would reveal the substance of deliberations of Cabinet." The Public Body further states that it included an email between Executive council staff with the records at issue, that is not itself responsive to the Applicant's request. The Public Body states that this email was provided because the records at issue were an attachment to this email.

[para 14] In its rebuttal submission, the Applicant argues that section 22(2)(c) may apply to information in the responsive records. The Applicant states that "the decision statement issued with respect to a proposed project of the Applicant was issued in August 2021. Accordingly, a final decision had already been made…" (at para. 10).

[para 15] The Applicant argues that *AG Ontario* is distinguishable from the current case, insofar as *AG Ontario* "is primarily predicated on the access of journalists to letters from the Premier of the Province of Ontario to their Ministers" (at para. 12). The Applicant further disagrees with the Public Body's characterization of the Supreme Court's decision in *AG Ontario* as stating that the importance of protecting Cabinet confidence outweighs the need for access to information. The Applicant argues:

> 14. Such a blanket statement by the Public Body is an oversimplification of *AG Ontario*. The Applicant rather puts forward the following from *AG Ontario*, wherein the Supreme Court of Canada supports an approach which mandates "… a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations … ."

[para 16] In its rebuttal submission, the Public Body responded to questions I had asked (letter dated April 5, 2024), as to how it determined that the records at issue are Cabinet presentations. The Public Body states that the records comprising pages 2-4 and 5-9 both include a stamp on the first pages that identifies them as official Cabinet records. The Public Body states that the records were created for the Priorities Implementation Cabinet Committee. The Public Body further states that "[t]he signed meeting minutes also confirm that the matter and the records were discussed at that Cabinet committee meeting, making these documents official Cabinet records" (at para. 1).

[para 17] The Public Body further states:

> 3. The nature of Cabinet decision-making is nuanced and complex. Even the disclosure of background materials, the fact that certain matters were before Cabinet at all, and the dates of certain discussions could allow accurate inferences to be made as to the substance of Cabinet deliberations. This is particularly true when coupled with external factors such as discussions in the media, stakeholder meetings, etc. As noted in *Ontario*

(Attorney General) v. Ontario (Information and Privacy Commissioner) at paras 36-37, the "when and how" to reveal Cabinet decisions is an important part of Cabinet deliberations.

Relevant case law

[para 18] In Order F2008-028, the adjudicator considered section 22 and said (at paras. 102-104, 108):

> Where the Public Body applied section 22 to records requested by the Applicant, it did so because it believed that the information would reveal the substance of deliberations of the Executive Council - i.e., Cabinet. To fall within section 22(1) on this basis, a record must be generated for or received by Cabinet members or officials while taking part in the collective process of making government decisions or formulating government policy (Order 97-010 at para. 52).
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> The Public Body states that it "consulted with Executive Council on the records [to which it applied section 22(1)] and confirmed that the records at issue were provided to Cabinet". I am prepared to accept this assertion, even where the record itself does not indicate that members of Cabinet or its officials were the recipients of it, or that the record was prepared for them. For example, some documents appear to have been prepared for, or to have arisen out of, meetings of a caucus. Although Cabinet members are members of the government caucus, they are not the only members. A caucus is not a committee of the Executive Council. The reason that I nonetheless accept the Public Body's assertion that the records in question were sent to or prepared for Cabinet is that it is possible for documents prepared by or for, or given to, the government caucus to have also been provided to Cabinet for its information or consideration.
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> Even where a record was submitted to Cabinet, section 22(1) only permits the withholding of information that would reveal the substance of deliberations by it. The term "substance" has its normal dictionary meaning of the essence, the material or essential art of a thing; "deliberation" means the act of weighing and examining the reasons for and/or against a contemplated action or course of conduct, or a choice of acts or means (Order 97-010 at para. 28). Section 22(1) does not extend to the withholding of information such as the names of persons who prepared the material, or the dates, or the topics of the deliberations, unless this information would in itself reveal the substance of the deliberations (Order F2004-026 at para. 33). I would add to this business contact information, as it does not normally reveal any substantive content.

[para 19] The adjudicator further said (at para. 127):

> Cabinet does necessarily deliberate over everything that is given to it; a public body's submissions or the record itself must establish that Cabinet actually deliberated.

[para 20] The Adjudicator in Order F2008-028 found that evidence establishing only that records were provided to cabinet was insufficient to ground the application of section 22. However, if it could be established that the information in question is advice intended for Cabinet, or some other information that reveals what was considered by Cabinet in making a decision, the requirement that information reveal the substance of Cabinet deliberations would be met.

[para 21] The Adjudicator also considered the application of section 22(2)(c), which provides circumstances in which section 22(1) cannot apply. He said (at paras. 105-108):

The Applicant raises the possibility that section 22(2)(c)(iii) of the Act applies, so as to make section 22(1) inapplicable to some of the information in the records at issue. Section 22(2)(c)(iii) states that section 22(1) does not apply to information in a record the purpose of which is to present background facts to Cabinet for consideration in making a decision if five years or more have passed since the decision was made or considered.

I thought about the possibility that section 22(2)(c)(iii) is not relevant in this inquiry because, at the time of the Public Body's response to the Applicant's access request in October 2003, five years had not yet passed since a relevant decision of Cabinet (as the decisions also date from 2003). I do not find that I have to address this, as the alternate section 22(2)(c)(i) applies in any event. Under section 22(2)(c)(i), section 22(1) does not apply to information the purpose of which is to present background facts to Cabinet for consideration in making a decision if the decision has been made public. At the time of the Applicant's access request, relevant decisions of Cabinet had already been made public.

In this inquiry, the relevant decisions of Cabinet to which section 22(2)(c)(i) applies are the decisions to formulate, draft and present Bill 27 and its related regulations in a set form with set content on behalf of the government. Bill 27 was made public when it was tabled as the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act* and received first reading in the Legislature on March 11, 2003. A regulation in relation to Bill 27 was the *Regional Health Authority Collective Bargaining Regulation*, which was made public when it was published in the issue of the *Alberta Gazette* dated April 15, 2003. The content of Bill 27 and its related regulations were a reflection of Cabinet's decisions regarding their formulation and drafting, and these decisions were the ones being deliberated when the background facts were presented.

Section 22(2)(c) promotes more accountability for the decisions actually taken by Cabinet, by exposing the background facts on which they were based; this exception for background facts is considered crucial in opening up the information which forms the general basis on which Cabinet acted without exposing its deliberations (Order 97-010 at para. 39). Accordingly, any information that constitutes background facts presented for Cabinet's consideration in the formulation and drafting of either Bill 27 or its related regulations may not be subject to the exception to disclosure under section 22(1). The Public Body submits that none of the records at issue constitute background facts, but I disagree in some instances, as noted below.

[para 22] In *AG Ontario*, the Supreme Court of Canada discussed the application of section 12(1) of the Ontario FOIP Act, which is similar to section 22 in Alberta's Act, to mandate letters provided to Ontario Ministers by the Ontario Premier. The Supreme Court overturned the decision of the Ontario OIPC (Order PO-3973), finding that the Commissioner "excluded 'outcomes' of the deliberative process, without regard for the impact that premature disclosure of policy priorities at an early state of the process may have on the efficient workings of government" (at para. 7).

[para 23] The Court discussed the purposes of Ontario's section 12(1) at paragraph 32 of that decision:

> [32] The IPC demonstrated appreciation for the import of the candour and solidarity rationales supporting Cabinet confidentiality, citing this Court's decision in *Babcock* (see para. 87). These rationales informed the IPC's articulation of the purpose of s. 12(1) as "promot[ing] the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating" (para. 86). But the IPC's engagement with the convention of Cabinet confidentiality essentially stopped there (see para. 87). Despite the submissions of Cabinet Office that disclosure of the mandate Letters could harm the efficacy of the Cabinet decision-making process (A.R., vol. III, at pp. 101-2), the Commissioner did not engage with a core purpose of Cabinet secrecy to promote the efficiency of the collective decision making, nor with the ultimate goal of this constitutional convention: effective government. This was critical context to interpreting s. 12(1).

[para 24] The Court found that "[t]he prerogative to determine when and how to announce Cabinet decisions is grounded in the harmful impact that premature disclosure of policy priorities can have on the deliberative process" (at para. 36). The Court disagreed with the Commissioner's finding that the mandate letters did not fall within the scope of section 12(1) for the reason that they reveal only a final outcome or decision; the Court noted that some of the priorities set out in the mandate letters were subsequently revealed in the Legislative Assembly, but other priorities were kept confidential. Further, of the priorities that were revealed, they were discussed "at a high level of generality not necessarily reflective of their description in the Letters" (at para. 38). The Court concluded that the deliberative process includes making decisions about when and how to make decisions public. The Court also concluded that the mandate letters from the Premier to the Ministers initiated Cabinet's deliberative process, rather than concluding it.

[para 25] The Court also disagreed with the Commissioner's characterization of the information in the mandate letters as mere topics, rather than substantive information, stating (at para. 57):

> As noted, the Letters are communications between the Premier and his Cabinet colleagues relating to policy priorities that are or will be before Cabinet; they cannot be written off as mere "topics" like general items on an agenda. The Letters reveal the Premier's initial views on priorities for the new government — priorities subject to change as the deliberative process unfolds. The communication of the Premier's initial views to other members of Cabinet are part of Cabinet's decision-making process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action. This context is crucial.

[para 26] In Order F2022-20, the adjudicator discussed the application of section 22(1) to similar records as those at issue in this case. In that Order, the public body (Alberta Energy) described the information withheld under section 22(1) as the name of a topic presented to a Cabinet committee, as well as information revealing the content of the presentation. The public body had argued that this information would reveal the substance of Cabinet deliberations. The adjudicator rejected this argument, stating (at para. 45):

> Even accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such deliberations.

[para 27] Order F2022-20 was upheld in *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 (*Alberta Energy*). In that decision, the Court rejected that public body's argument that the adjudicator erred in her decision regarding section 22(1), stating:

> [36] The Commissioner found that there is a distinction between information that was provided to Cabinet and information that would disclose the deliberations of Cabinet. It is the case that there are circumstances where the information and the deliberation would be inseparable but this must be proven.
>
> [37] The Public Body urges me to apply a "broad interpretation encompassing the subject matter of discussion." I disagree. As I have commented, the foundational premises of *FOIPP* contemplate limited and narrow restraint on access.
>
> [38] The Public Body argued that even the general title and topic of a presentation would be sufficient to invoke cabinet confidence. The Commissioner disagreed, saying, "Even accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such discussions." Having reviewed the disputed materials, I agree with the Commissioner's reasoning and conclusion. It is not only reasonable, but it is also correct.
>
> [39] There may be cases where the topic of discussion would be sufficient to reveal the deliberations of Cabinet, but again, that must be considered contextually and based on evidence. For example, if the Cabinet had an agenda item discussing the potential and previously unraised imposition of a provincial sales tax, it would be arguable that the item itself was sufficient to disclose protected deliberations. That said, an agenda item on an area of publicly disclosed policy, such as the proposed Alberta Pension Plan, may not attract the same concerns of disclosing deliberations.
>
> [40] Accepting the position of the Public Body would allow the government to shield the public access to records simply by their proximity to Cabinet. Cabinet Confidence is essential to ensure that the government can deliberate freely and unimpeded, but it does not exist to allow governing in secrecy. There is a balance here that the Adjudicator recognized and reasonably applied. I further find that she was correct in doing so.

[para 28] The Court of King's Bench had the benefit of the Supreme Court's *AG Ontario* decision in coming to its conclusions, above.

Analysis

[para 29] In *AG Ontario*, the Supreme Court of Canada recognized the importance of access-to-information legislation, as well as the importance of exceptions in access-to-information legislation to protect Cabinet confidences. The Court clearly acknowledged

that "[a]ll FOI legislation across Canada balances these two essential goals through a general right of public access to government-held information subject to exemptions or exclusions – including those for Cabinet records or confidences" (at paragraph 4). Given this, I disagree with the Public Body's argument that the Court determined that Cabinet confidences outweigh *any* need for access to information.

[para 30] Nothing in the records themselves indicates that they were prepared for or presented at a Cabinet meeting. By letter dated April 5, 2024, I asked the Public Body for additional arguments or evidence on this point.

[para 31] In its rebuttal submission, the Public Body refers to the records being stamped, and also refers to "signed meeting minutes [that] confirm that the matter and the records were discussed at that Cabinet committee meeting…" (at para. 1). By letter dated May 9, 2024, I informed the Public Body that I do not have copies of meeting minutes; I gave the Public Body another opportunity to provide evidence to support its claim.

[para 32] In response, the Public Body provided two pages of heavily redacted meeting minutes from a Cabinet committee; the date of the records at issue does not match the date of the committee meeting, though they are only one day apart.

[para 33] The unredacted portion of the meeting minutes includes the title of the relevant Cabinet committee, the date of the meeting, some headings, and one listed topic, which relates to the same topic discussed in the records at issue. The Public Body redacted the time of the meeting, the members present, the guests present, the other topics discussed, and any details relating to the one topic that was provided to me.

[para 34] Nothing before me, including the Public Body's submissions and the records at issue, shows that the records reveal the substance of any deliberations of Cabinet or one of its committees.

[para 35] The information in the records does not appear to relate to a decision or matter to be deliberated by Cabinet. The Public Body states that the records relate to a Cabinet presentation on an Alberta Energy Regulator (AER) matter. Having reviewed the records, it seems accurate to characterize the information therein as a status update on a matter before the AER. Indeed, the purpose statement of one of the records indicates as much. The body that may be said to be making a decision to which the content of the records relate is the AER, which is an independent agency. Again, it is possible that the committee deliberated on some matter with respect to AER's decision but nothing in the records themselves indicates as much and the Public Body has not provided any support for such a conclusion. In the absence of any evidence in the records that the committee deliberated on anything in relation to the records, the onus is on the Public Body to adduce some evidence that it did.

[para 36] From the redacted meeting minutes provided by the Public Body, I understand that the Cabinet meeting minutes include the same topic discussed in the records at issue. Because the portion of the minutes relating to that topic were redacted, I

do not know whether, or the extent to which, that topic was actually discussed at the meeting. The relevant topic is the last listed topic discussed; it is possible that the committee ran out of time and simply deferred the discussion to another day. Even if the topic was discussed, I cannot say whether the discussion related at all to the content of the records at issue.

[para 37] Section 22(1) does not apply to *any* information presented to Cabinet or one of its committees; it applies to information that could reveal the *substance of deliberations* of Cabinet or one of its committees. The Public Body cites *AG Ontario* as stating that "the "when and how" to reveal Cabinet decisions is an important part of Cabinet deliberations" but has not explained what decisions of Cabinet (or a committee of Cabinet) could be revealed by disclosing the information in the records.

[para 38] In Order 97-010, the former Commissioner said that information would "reveal" the substance of deliberations within the terms of section 22(1) if its release would permit the drawing of accurate inferences with respect to the substance of deliberations. The former Commissioner further stated (at para. 29):

> Accordingly, it is reasonable to assume that if a release of information in a record would 'explicitly or implicitly' reveal the substance of deliberations of Cabinet, then the information must not be disclosed. A release of information implicitly reveals the substance of Cabinet deliberations if it is reasonable to expect that the released information could be combined with other information to reveal the substance of Cabinet deliberations. The information, by itself may not reveal the substance of Cabinet deliberations.

[para 39] In other words, the information must reveal the substance of deliberations of Cabinet or one of its committees, either on its own or in combination with other information. The Public Body has stated that even disclosing dates and the fact that certain matters were discussed "could allow accurate inferences to be made as to the substance of Cabinet deliberations." Nothing in the records before me or the Public Body's submissions indicate how this could be the case. Having reviewed the records, it is not clear what deliberations could be revealed by their disclosure, or what other information may be combined with information in the records to reveal Cabinet deliberations. It is not sufficient to make mere assertions; the Public Body must provide some evidence to support such a finding and it has not.

[para 40] The Court in *Alberta Energy* confirmed that a public body has an evidentiary onus to support its application of exceptions to access; it said:

> [28] As I have commented, the more aggressively the public body is in redacting records, the more onerous its obligation is to defend these redactions with compelling and clear evidence. It was reasonable for the Adjudicator to find that Alberta Energy had not met its onus.

[para 41] The Court also noted that in some cases, merely revealing the topic could reveal the substance of Cabinet deliberations, but that this must be considered

contextually and based on evidence. The Court gave the example of a previously unraised provincial sales tax as an example of a topic that may, by itself, reveal the substance of Cabinet deliberations. In contrast, a previously raised issue may not attract the same concerns.

[para 42] By letter dated April 17, 2024, I gave the parties an opportunity to comment on the implications of *Alberta Energy*, as it had been issued after the parties had made their submissions. The Applicant provided a response but the Public Body did not.

[para 43] If the Public Body believes that the topic at issue in this case is more akin to a previously unraised issue such that revealing that the topic itself was presented to Cabinet or a Cabinet committee, it had an opportunity to say so but did not.

[para 44] An internet search reveals that the Government of Alberta website contains documents relating to the topic presented in the records at issue. This indicates that the fact that the topic may have been raised in a meeting of Cabinet or a Cabinet committee does not, by itself, reveal the substance of deliberations. In other words, if it is already known to the public that the Government is concerned with or keeping apprised of the topic, the fact that it was a topic presented to Cabinet does not itself reveal any deliberations.

[para 45] Disclosure of the information in the records at issue would appear to reveal only that the committee was made aware of a matter before the AER. That matter is public, and the decision made by the AER in relation to the matter is available on the AER's website. Possibly the committee deliberated actions that may be taken depending on the AER's decision, which had not been made at the time the records were created; however, this is mere speculation and is not supported by anything before me.

[para 46] Based on the records at issue, the Public Body's submissions, and the redacted meeting minutes provided by the Public Body, I cannot say on a balance of probabilities that the content of the records at issue was discussed by the Cabinet committee they were presented to. In my view, the rationale in Order F2022-20, and the Court's finding in the judicial review of that Order, apply equally in this case. The Public Body has not met its burden of showing that the records at issue reveal the substance of deliberations of Cabinet or one of its committees; as such, section 22(1) does not apply. As the Public Body has not applied any other exception to access, I will order the Public Body to disclose the records to the Applicant.

V. ORDER

[para 47] I make this Order under section 72 of the Act.

[para 48] I find that section 22(1) does not apply to the records at issue. I order the Public Body to disclose to the Applicant the information in the records that was withheld from the Applicant under that provision alone.

[para 49] I further order the Public Body to notify me 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