ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-34

November 12, 2024

ENERGY AND MINERALS

Case File Number 030318

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request to Energy and Minerals (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records created in response to a previous access request.

The Public Body responded to the Applicant, providing records with information withheld under several exceptions. The Applicant requested an inquiry into the Public Body's application of section 24(1), including its exercise of discretion in applying that provision.

The Adjudicator found that section 24(1) applied to some of the information withheld under that provision. The Adjudicator ordered the Public Body to disclose to the Applicant the information not properly withheld under that provision.

The Adjudicator also ordered the Public Body to re-exercise its discretion to withhold information to which section 24(1) applies.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 12, 24, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-012, 96-022, 97-003, 2001-016, F2004-026, F2007-007, F2007-013, F2007-029, F2010-036, F2012-06, F2013-13, F2013-17, F2015-29, F2016-16, F2018-36, F2022-20, F2022-45

Cases Cited: *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198, *Canada* (*Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69, *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *John Doe v. Ontario (Finance)*, 2014 SCC 36, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2

I. BACKGROUND

[para 1] The Applicant made an access request to Energy and Minerals (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for

> All records created, generated or reviewed by the ministry… in response to a request made on March 8 for the following: "Emails sent or received by [DL, WC, EG, and/or TM] (or any of their successors from the position they held in June 2021), that include meeting agendas, minutes, presentations, and proposals that mention, refer or relate to meetings with representatives of the Canadian Association of Petroleum Producers and/or the Pathways Alliance." … please note that a record could take any form, including emails, personal notes, briefing notes, instant messages sent on mobile devices or software such as Slack, logs of phone calls or text messages. Please also ensure that the search extends to every person who was tasked with retrieving information from that original request as well as any person with whom they discussed the original request.
>
> Time Frame: March 7, 2023 to March 15, 2023

[para 2] The Public Body responded, providing records with information withheld under sections 17, 20, 24 and 25 of the Act.

[para 3] The Applicant requested a review of this response. Subsequent to the review, the Applicant requested an inquiry regarding the Public Body's application of section 24(1), including its exercise of discretion in applying that exception.

[para 4] The arguments provided with the Applicant's request for review and request for inquiry were attached to the Notice of Inquiry, sent to both parties. The Public Body provided an initial submission, and both parties provided a rebuttal submission.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the portions of pages 1, 2-3, 35, 36-37, 38, 39-40, 41, 42-43, 55-58 of the responsive records withheld in part or in whole under section 24(1).

[para 6] The Public Body has withheld some information as non-responsive, including duplicate copies. As the Applicant did not raise a concern about the Public Body's

characterization of information as non-responsive, this information is not at issue in this inquiry.

III. ISSUES

[para 7] The issue for this inquiry was set out in the Notice of Inquiry dated August 14, 2024, as follows:

> Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/records?
>
> *In any inquiry addressing the application of discretionary exceptions, the Public Body's initial submission should include a discussion of its exercise of discretion.*

IV. DISCUSSION OF ISSUES

[para 8] The index of records provided with the Public Body's initial submission indicates that the Public Body applied both sections 24(1)(a) and (b) to pages 2-3, 36-37, 39-40, 42-43, 55-56 and 57-58 in their entirety.

[para 9] The Public Body also applied sections 24(1)(a) and (b) to the names of attachments to emails on pages 1, 35, 38, and 41, although these pages are not listed in the Public Body's index of records as pages to which section 24(1) was applied. Sections 24(1)(a) and (b), and section 24(2)(f) are relevant to this inquiry. These provisions state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> *...*
>
> *(2) This section does not apply to information that*
>
> *...*
>
> *(f) is an instruction or guideline issued to the officers or employees of a public body,*
>
> *...*

[para 10] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 24.

[para 11] The test for sections 24(1)(a), as stated in past Orders, is that the 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 created for the benefit of someone who can take or implement the action (see Order F2013-13).

[para 12] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

> It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.

[para 13] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 14] Sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the

advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 15] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 16] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice" (section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

Parties' arguments

[para 17] The Public Body states that

> FOIP Advisors, Coordinators, and Directors provide advice and recommendations over their own operations and to Ministry stakeholders. The deliberations undertaken by FOIP Advisors, Coordinators, and Directors inform decision making when processing FOIP requests.

[para 18] The Public Body also states:

> Judge Evans J. stated the following in F2018-36, supporting the Public Body's argument:
>
> > It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31] (F2018-36) (para 124)

[para 19] I assume what the Public Body means to refer to in the above, is Order F2018-36, issued by this office, wherein Adjudicator Cunningham commented that the tests used by this office with respect to the application of sections 24(1)(a) and (b), set out above, are consistent with the Supreme Court of Canada's interpretation of "advice and recommendations" in *John Doe v. Ontario (Finance)*, 2014 SCC 36. In Order F2018-36, Adjudicator Cunningham quoted the Supreme Court's discussion of the rationale for Ontario's section 13, which is substantially similar to Alberta's section 24(1)(a). In that quote, the Supreme Court cited and adopted the rationale set out by Evans J. (as he then was) in a Federal Court decision. The quotation reproduced in the Public Body's

submission is a quote from that Federal Court decision, *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245.

[para 20] The Applicant argues that the above quote is not representative of the purpose of the exception to access for advice and consultations, as set out by the Supreme Court in *John Doe*. They state:

> 12) In *Supreme Court in John Doe v. Ontario (Finance*), the Supreme Court described the importance of the protections for advice and consultation by reference to the need to preserve the actual and perceived political neutrality of the civil service:
>
> > Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.
>
> 13) The reliance by the public bodies on the statement from Justice Evans as endorsed by the Supreme Court is misguided as it skips over the actual policy reason for protecting advice and consultations: the protection of the perceived and actual political neutrality of the civil service in formulating policy options. This incorrectly expands the scope of section 24 to issues where there are no substantive political issue at stake or real policy options to any situation where any kind of action must be taken.
>
> 14) For information to be rationally withheld under a public body's discretion under section 24, the advice or consultations must relate to an issue with political implications that would risk the neutrality of the public service and allow the public body to formulate different policy options.
>
> 15) Applying section 24 to routine issues that do not involve issues with political valence or different policy options throws a blanket of secrecy over all public service decision making without any connection to the justifications identified by the Supreme Court for the application of the protections for advice and consultations.
>
> 16) The information at issue in this case is the interpretation and processing of *FOIP* requests. This is not a political question with different possible policy options. It is a matter of routine compliance with the law of *FOIP*. The processing of *FOIP* requests is not government business in which the protections for advice or consultations make sense. There is no need to weigh policy options, hold free and frank discussions, have open and candid discussions, or consider different alternatives.

[para 21] The Applicant also argues that the information relates to the processing of FOIP requests, and that

> 17) *FOIP* requires the processing of *FOIP* requests to be done transparently. Under the duty to assist applicants in section 10 of the *Freedom of Information and Protection of Privacy Act* applicants are entitled to know:
>
> > a) The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> >
> > b) The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> >
> > c) The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> >
> > d) Who did the search
>
> 18) The topic of the advice, proposals, recommendations, analyses, consultations or deliberations in the information the public bodies have withheld is the information they have a duty to provide to applicants under section 10 of *FOIP*. It shows who processed the *FOIP* requests, how they decided to interpret the requests, and how they organized the search for records.
> …
>
> 20) Allowing public bodies to use section 24(1) to keep information about the processing of *FOIP* requests confidential would damage the operation of *FOIP* by preventing applicants and the public from understanding how public bodies interpret and respond to *FOIP* requests. It would undermine confidence in *FOIP* requests as a means of obtaining reliable information on government activities and multiply opportunities for public bodies to interfere in the correct processing of *FOIP* requests.

[para 22] The Applicant's arguments above appear under the heading "The Public Body Unreasonably Applied their Discretion under s.24" in their submission; I will address the Public Body's exercise of discretion later in this Order.

[para 23] However, the Applicant's arguments can be read to indicate that the scope of section 24(1) should be limited to information about which there is a "substantive political issue", or that section 24(1) cannot apply to information that relates to how an access request was processed. Nothing in the language of section 24(1)(a) or (b) indicates that these provisions apply only to information that has 'political implications'. Nor does the language of the provisions indicate that they cannot apply to information relating to the processing of access requests.

[para 24] With respect to the reference to "political neutrality" in *John Doe*, the Court cited two court decisions[1], both of which addressed the constitutionality of statues that limit the type of political activity that public servants can participate in. Both decisions

[1] *Canada* (*Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69; and *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2

discussed the importance of the neutrality and impartiality of public servants. These decisions are referenced in the discussion in *John Doe* of the importance of ensuring full and frank discussions among public servants; the Court states (at para. 45):

> The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

[para 25] In referencing these decisions and discussing the importance of political neutrality, the Court in *John Doe* was emphasizing the importance of permitting full and frank discussions. I do not understand the Court to be saying that the exceptions to access for advice or consultations apply only to information that has an aspect of partiality or could be seen to impugn the impartiality of the public service. Rather, I understand the Court to be supporting the rationale of the provision more broadly, which is to enable full and frank advice and consultations among the public service.

[para 26] I agree with the adjudicator in Order F2018-36, that the purpose and interpretation of section 24(1)(a) and (b) set out in past Orders of this office and discussed above, is consistent with the Supreme Court's discussion in *John Doe*.

[para 27] With respect to the processing of access requests, section 10 of the Act requires a public body to assist an applicant. It states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 28] A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 29] When an applicant seeks a review by this office of a public body's search for records, specific evidence will be requested from the Public Body in order to determine whether the search was adequate. The bullet points set out in the Applicant's submission, quoted above, are the points generally requested in conducting that review, as specified in Order F2007-029.

[para 30] Section 12 of the FOIP Act sets out a Public Body's obligations as to what a response under the Act must contain. It states, in part:

12(1) In a response under section 11, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

[para 31] The Applicant seems to indicate that they are entitled, under section 10 of the Act, to all of the information relating to how their access request was processed. I disagree that a public body's duty to assist applicants under section 10, or its duty to respond under section 12, means that a public body is obligated to tell an applicant everything about how the request was processed, or that the public body cannot engage in consultations, within the terms of section 24(1), when processing an access request. For example, it would seem to be a usual step for a FOIP coordinator to seek input or advice from the program area responsible for requested records, in order to determine whether an exception to access could or should be applied to any information before providing those records to an applicant. Sections 10 and 12 do not require the public body to disclose those consultations to an applicant; they require the public body to explain whether access is granted and if not, what provision applies to permit the public body to refuse access.

[para 32] The Applicant also argues that the Public Body incorrectly applied section 24(1) to records of final decisions.

Analysis

[para 33] The Public Body withheld the name of documents attached to the emails appearing on pages 1, 35, 38 and 41. The remaining information in these emails was disclosed to the Applicant, except information withheld as non-responsive on page 41. The Public Body states that it withheld the name of the attachments under section 24(1) because the attachments themselves were withheld under that provision.

[para 34] The Public Body states that pages 36-37, 39-40, and 42-43 consist of draft letters that contain recommendations, and that these pages were shared across several ministries for deliberation. These pages were all withheld in their entirety.

[para 35] Pages 35, 38 and 41 are comprised of emails. The document comprising pages 36-37 was attached to the email at page 35. Pages 39-40 were attached to the email at page 38. Pages 42-43 were attached to the email at page 41.

[para 36] In Order F2012-06, the adjudicator concluded that section 24(1) does not apply to drafts, merely for the reason that they are drafts. She said (at para. 140):

> That a draft may differ from a final version of a report does not transform the information in a draft into advice, proposals, recommendations, analyses, policy options, consultations or deliberations: information must have that character to begin with. I acknowledge that the differences between a draft version and a final version may allow a reader to determine what was changed and to speculate about the reasons for the changes. However, it does not follow from this possibility that any changes that were made are the result of information subject to section 24(1)(a) or (b), or that such information would be revealed by disclosing the draft version. Further, in many instances, where the records indicate the reasons for changes in the drafts, such as in emails discussing the reports, the changes appear to be the result of an instruction from the recipient of the report to the contracted creator of the report, rather than advice. Instructions to employees cannot be withheld under section 24(1)(a) or (b), not only because they are not information meeting the requirements of these provisions, but because section 24(2)(f) specifically prohibits applying section 24 to information of this kind.

This has been applied in subsequent Orders (see Orders F2013-17, F2016-16, and F2022-20, the latter of which was upheld in *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198).

[para 37] Section 24(1) *may* apply to information in draft documents where advice is sought on the content of the draft or the content is being deliberated (see Order F2022-45, at para. 85). In other words, where the draft document *is the subject of the advice or consultation*, section 24(1) can apply. The body of the email at page 38 was disclosed to the Applicant; it shows that the author sent the attachment for the recipient's review. The body of the email at page 41 was also disclosed to the Applicant; it shows that the recipient of the first email was returning the attached document with some changes that had been discussed. I am satisfied that the document at pages 39-40 and 42-43 are draft documents that were the subject of consultations within the terms of section 24(1)(b).

[para 38] The body of the email at page 35 was disclosed to the Applicant; it states "[p]lease see attached my draft of the section 7 letter for this Energy submission. Feel free to review and revise as you see fit." The Public Body has not explained how this fits within the terms of sections 24(1)(a) or (b). Therefore, I must make my determination on the basis of the content of the records. Having reviewed the email at page 35, to which the document at pages 36-37 was attached, it appears that the author of this email created a template letter, and left some blanks to be filled in by the email recipient. There is no indication that the author was seeking input on how the blanks should be filled in. Rather, the email suggests that completing the letter was entirely at the recipient's discretion. This is not the same as a consultation or deliberation. As stated above, a consultation occurs when a person solicits advice, recommendations etc. regarding a decision or action. In this case, the email author was not seeking input or advice on the attached

document. Similarly, a deliberation occurs when decision-makers weigh reasons for or against a particular decision. There is no indication in the email at page 35 or the document at pages 36-37 that decision-makers were deliberating a decision. Given this, I find that neither sections 24(1)(a) nor (b) apply to the information at pages 36-37.

[para 39] Further, as set out above, section 24(1) does not apply to information that merely reveals the topic of the consultation. The name of the attachments in the emails on pages 35, 38 and 41 withheld under section 24(1) does not reveal information other than the topic. Moreover, in each case, the same information has already been disclosed to the Applicant elsewhere in the email. Therefore, disclosing the attachment name in pages 35, 38 and 41 cannot be said to reveal any information to the Applicant. As such, section 24(1) cannot apply to the information withheld on pages 35, 38 and 41 and I will order the Public Body to disclose this information to the Applicant.

[para 40] The Public Body describes pages 2-3 as a Record of Decision (ROD), and states that it is

> a draft created from a template in advance of the meeting, containing potential deliberation points and recommendations for staff. Under Decisions, the drafter recommended standard processing options which often form a part of the deliberation. This draft may contain inaccuracies or errors pertaining to the scopes, timeframes, and attendees as this document was a first draft and not yet reviewed. This draft was created for consideration prior to staff deliberation about the requests listed within and records no decision.

These pages were withheld in their entirety.

[para 41] The Public Body states that pages 55-56 consist of version 2 of the ROD, which was updated following the meeting and circulated for review. These pages were withheld in their entirety.

[para 42] The Public Body states that pages 57-58 contain the final version of the ROD. It has disclosed some information on these pages to the Applicant and withheld other information under section 24(1) or as non-responsive to the request. It states:

- The information pertaining to Energy and Minerals on this final version was provided to the Applicant.

- The standing items under Decisions provide processing guidance developed for a general cross-government request. These items assist decision-making and guide cross-government requests once accepted for processing. None of these four standing items applied to the outcome of this meeting as opening a request was not yet possible.

- The Questions and Clarifications, and the Recommendations sections contain both the deliberations and analysis amongst the FOIP Offices, as well as considerations for consistency. The outcome of this meeting was reflected in the

> Recommendations section, which includes a recommendation for further consultation on these requests.
>
> Additionally, section 24(1)(a) was applied to internal staff recommendations regarding internal process and information revealing analysis and recommendations. The information contains recommendations useful for processing the requests in a consistent manner.

[para 43] The first version of the ROD at pages 2-3 was attached to an email at page 1. The attachment name on page 1 was withheld under section 24(1). As this name merely refers to a topic and as this information has already been disclosed to the Applicant elsewhere in the email, I find that section 24(1) cannot apply to that information on page 1 and will order the Public Body to disclose it to the Applicant.

[para 44] The body of the email on page 1, which was disclosed to the Applicant, states "Attached is for new set of x-gov requests. Let me know if you require anything else." There is no indication that the attached document was being circulated for consultations or advice. As stated above, it is not sufficient to label a record as a draft in order for section 24(1)(a) or (b) to apply; to apply either provision, the information in that record has to reveal the substance of advice or deliberations. Where a draft is circulated for discussion, the draft itself is the item being deliberated. However, in the absence of evidence showing that the draft was circulated for discussion or advice, section 24(1) does not apply to that record in its entirety for the mere reason it is characterized as a draft.

[para 45] It may be the case that *some* information in the record is or reveals the substance of deliberations but this requires a line-by-line assessment. I will discuss this in more detail, below.

[para 46] As set out in the Public Body's initial submission, the three versions of the ROD contain information about the scope of multiple access requests, timeframes, and meeting attendees. From the Public Body's submission, and the information already disclosed to the Applicant, I understand that several departments received FOIP requests that were similar in some manner, such that representatives from each department met to discuss the requests. The purpose of the RODs appears to be akin to that of meeting minutes.

[para 47] The ROD at pages 2-3 includes the date of the document, the general subject matter of the relevant access requests, the specific wording of each request, as well as the public body to which it was made and the associated file number. The document also lists the public body employees who are to attend the upcoming meeting; according to an email on page 4 of the records, which was disclosed to the Applicant, the meeting was to take place the following day.

[para 48] None of this information reveals the substance of any advice or consultation. It reveals only the subject to be discussed, and the background facts relevant to the

upcoming discussion. Following the precedent discussed above, none of this is information to which section 24(1)(a) or (b) can apply.

[para 49] The Public Body has stated that some information in the RODs is information that "often form[s] a part of the deliberation." In its rebuttal submission, the Public Body states:

> The Record of Decision (ROD) does not reflect a final decision. Instead, the record is a second version, set on a ROD template, reflecting a point in time when advice was provided to the Applicant on multiple requests. There were two 'version 2' RODs, one containing an error (pages 4-5 and 9-10), and one that was corrected and finalized (pages 16-17). The corrected document was the 'final' version 2, partially provided to the Applicant. Due to ongoing clarification procedures with the Applicant, there was potential for misunderstandings regarding record contents as the request was not yet clarified or accepted. The Applicant never clarified the request, meaning that the advice for processing the request did not apply. If the Applicant had accepted the guidance provided, the ROD would have been updated to a version 3.

The Public Body further argues that the RODs contain interim advice deliberations on a file.

[para 50] The page numbers cited in this argument do not correspond with the pages in the records at issue to which section 24(1) has been applied or the pages that have been identified in the Public Body's index of records as an ROD. Nevertheless, I understand that the above argument is intended to be applied to the records consisting of RODs.

[para 51] To the extent that the Public Body means to indicate that the RODs contain advice that was provided to the Applicant, section 24(1)(a) applies only to advice made to Public Body officials, not to external parties such as an applicant.

[para 52] All versions of the ROD contain the same information under a "Decisions" heading. It appears that these decisions consist of a set of initial steps that apply in every case of this type. In its initial submission, quoted above, the Public Body has described the information under the "Decisions" heading on pages 57-58 as standing items that "provide processing guidance developed for a general cross-governmental request." In other words, these are steps to be taken in processing all requests of a certain type.

[para 53] In the passage from Order F2012-06 reproduced above, the adjudicator concluded that section 24(1) does not apply to instructions or directions to employees, noting that not only do instructions or directions not fall within the scope of sections 24(1)(a) or (b) as set out in past Orders, but also that section 24(2)(f) prohibits the application of section 24(1) to instructions or guidelines issued to public body employees.

[para 54] I agree with that analysis. With respect to the information under the "Decisions" heading, this consists of steps that employees are expected to take when processing certain types of requests; this is not information to which sections 24(1)(a) and (b) can apply.

[para 55] The remainder of pages 2-3 consist of boxes that are not filled out, the date of the document, and the name of the person who created it. None of this is information to which section 24(1)(a) or (b) applies.

[para 56] I find that neither section 24(1)(a) nor (b) applies to the information in pages 2-3 of the records. I will order the Public Body to disclose this information to the Applicant.

[para 57] Version 2 of the ROD, at pages 55-56, is referred to in an email at page 54. That email shows that this version of the ROD was circulated among the relevant public body employees. The sender asked if any changes were required.

[para 58] I have discussed when sections 24(1)(a) or (b) may apply to circulated documents; I found that section 24(1)(b) applies to a draft letter where the relevant email chain showed that the document was circulated for the purpose of obtaining advice, or deliberating on the content of the draft. In contrast, I found that section 24(1)(a) and (b) did not apply to a template letter provided to an employee for them to fill in.

[para 59] I have also noted that the RODs seem to function in a manner akin to meeting minutes. It is routine for meeting minutes to be circulated among meeting attendees for the purpose of ensuring a correct accounting of meeting attendees and similar types of information. This is not the same as circulating a document for the purpose of obtaining advice or deliberating on the content of that document. Asking whether the list of attendees is correct, or whether other information was correctly transcribed, is not the same as asking for advice regarding an analysis contained in the record. Section 24(1) may be engaged where a document is circulated to ensure that deliberations that occurred in a meeting were correctly transcribed in the document; however, in that case, section 24(1) would apply because the document reveals the substance of the deliberations, and not simply for the reason that it was circulated.

[para 60] Whether a document is circulated for the purpose of obtaining advice or deliberating the content will depend upon the circumstances. In this case, taking into account the content of the ROD at pages 55-56, as well as the emails circulating this document, I conclude that this version of the ROD is circulated for the purpose of ensuring accuracy of information that isn't itself advice or deliberations. There is also no indication that the author of the email was seeking advice, or engaging in deliberations regarding the content of the ROD. As such, I find that sections 24(1)(a) and (b) do not apply to the ROD at pages 55-56 in their entirety just because it was circulated. However, those provisions may apply to portions of the ROD.

[para 61] All of the information on page 55 and the information at the top of page 56 is the same as the information on page 2 and the top of page 3. I have already found that neither section 24(1)(a) nor (b) apply to this information. Page 56 contains more information than appeared in the version at pages 2-3. Specifically, the boxes labeled "Questions and Clarifications" and "Recommendations" have been filled out. The

information in the "Questions and Clarifications" box reveals deliberations between the meeting attendees; I find that section 24(1)(b) applies to that information.

[para 62] The information in the "Recommendations" box on page 56 contains the decision reached by the meeting attendees, rather than recommendations. This is clear from the language used, which refers to a decision having been made. There is no indication that this decision was being presented to anyone else as a recommendation or advice. As stated above, neither section 24(1)(a) nor (b) applies to decisions. The Public Body has argued that the RODs do not contain *final* decisions. The Public Body did not explain what it means by "final decisions" as opposed to other types of decisions, and how that affects the application of section 24(1). If the Public Body is arguing that the principle that sections 24(1)(a) and (b) do not apply to decisions is only applicable where the decision *concludes* a matter or project, then I disagree. Over the course of a project or other matter, there may be many points at which decisions are made. The principle that sections 24(1)(a) and (b) do not apply to decisions is applicable to decisions made over the course of a project or other matter (for example, decisions about how to proceed in an ongoing matter).

[para 63] Following the decision in the Recommendations box on page 56 are multiple steps that are to be taken by identified employees. Nothing indicates that these steps are being presented to anyone as advice or recommendations, nor do they reveal the substance of deliberations. Rather, they reflect the decisions made, and provide instructions to relevant employees. Given this, I find that neither section 24(1)(a) nor (b) applies to this information.

[para 64] The Public Body states that pages 57-58 consist of the final version of the ROD. Aside from the manner with which the Public Body applied section 24(1) to these paged, I cannot locate any difference between the versions at pages 55-56 and pages 57-58. The findings above regarding pages 55-56 also apply to pages 57-58.

Exercise of discretion

[para 65] 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 66] 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 67] 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 68] 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 69] 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 70] 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 71] The Public Body has correctly identified the purpose of section 24(1)(a) and (b). The Public Body states that harm would result from disclosing deliberations, consultations and advice relevant to the cross-government access requests. It states that it

> …used section 24(1) to protect the integrity of the deliberative process, allowing employees to have frank discussions about the subject matter.

[para 72] In its rebuttal submission, the Public Body states:

> The Public Body asserts that it did demonstrate discretion by: (i) providing details not subject to deliberation, (ii) providing clear guidance to the Applicant, and (iii) releasing accurate information related to the request. Further considerations included:
>
> (i) would disclosure deter candid/comprehensive advice going forward;
> (ii) would disclosure undermine frank consultation and deliberation; and
> (iii) would disclosure prejudice the Government's interests?
>
> The use of discretion requires the Public Body to conduct a line-by-line review of the records. The Public Body agrees that establishing application of an exception, on its own, is insufficient. Rather, reasons supporting severance of the information at issue must exist. The exercise of discretion is based on the reasonably expected impact of disclosure on the Public Body's ability to carry out similar internal decision-making processes in the future.

[para 73] As set out earlier in this Order, the Applicant argues that the policy rationale for sections 24(1)(a) and (b) does not seem to relate to the information withheld under section 24(1). The Applicant has also argued that the Public Body's obligation to provide the Applicant with information under sections 10 and 12 preclude the application of section 24(1) to any information relating to the processing of their request. I have rejected the Applicant's arguments to the extent that they were presented as limitations on the scope of section 24(1)(a) and (b).

[para 74] However, these arguments are relevant factors with respect to the Public Body's exercise of discretion to apply these provisions. The Public Body has stated that it applied section 24(1) to protect the integrity of the deliberative process, but has not specified what interest is served by not disclosing *this particular information* to which section 24(1) applies. A public body does not properly exercise discretion by merely identifying that a deliberative process took place; it is not every deliberative process that requires protection. Rather, the proper exercise of discretion requires the Public Body to identify the benefits of protecting *this* deliberative process and determine whether those benefits outweigh the benefits of disclosure.

[para 75] The Public Body states that it exercised its discretion on a line-by-line basis, and that its reasons for withholding the information are "based on the reasonably expected impact of disclosure on the Public Body's ability to carry out similar internal decision-making processes in the future." It may be the case that the Public Body exercised its discretion on a line-by-line basis; however, the Public Body's submissions do not discuss its decisions on a line-by-line basis. The Public Body has listed only general factors weighing against disclosure, without specifying how those factors apply to the specific information at issue.

[para 76] Further, the Public Body has not stated whether it identified or considered any factors that weigh in favour of disclosure. It may be the case that disclosing the information could help the Applicant understand the outcome of their access request, and determine how to make a more effective or efficient request. This would seem to be an overall benefit.

[para 77] I will order the Public Body to reconsider its exercise of discretion with respect to its application of sections 24(1), following the guidance above. The Public Body should also consider whether all or some of the information withheld on pages 39-40, and 42-43 under section 24(1) is sufficiently similar to what the Applicant has already received, such that the benefits of applying section 24(1) are outweighed.

[para 78] If the Public Body continues to withhold information under section 24(1), I will order it to explain its exercise of discretion to the Applicant on a record-by-record basis.

V. ORDER

[para 79] I make this Order under section 72 of the Act.

[para 80] I find that section 24(1) does not apply to some information to which that provision was applied. I order the Public Body to disclose to the Applicant the information in pages 1, 2-3, 35, 36-37, 38, 41 that was withheld under section 24(1). I order the Public Body to provide additional information to the Applicant on pages 55-56 and 57-58, as set out in paragraphs 57-64 of this Order.

[para 81] I find that section 24(1) applies to the information in pages 39-40, 42-43, and some of pages 55-56 and 57-58 as set out in paragraphs 57-64 of this Order. I order the Public Body to re-exercise its discretion to withhold this information under section 24(1), following the direction set out at paragraphs 65-78. If the Public Body continues to withhold responsive information under that provision, it is to explain its exercise of discretion to the Applicant.

[para 82] 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.

_____
Amanda Swanek
Adjudicator