ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-37

November 12, 2024

ENVIRONMENT AND PROTECTED AREAS

Case File Number 030341

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request to Environment and Protected Areas (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 Environment and Protected Areas (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 [RG, LS, and/or BL] (or their successors in the positions 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 20 and 24 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 pages 1, 2-3, 10-11 and 12-13 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 Public Body applied sections 24(1)(a) and (b) to pages 2-3, and 12-13, in their entirety. The Public Body also applied sections 24(1)(a) and (b) to portions of pages 1, and 10-11.

[para 9] 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 appears 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 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):

[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

> 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 exception to access for advice and consultations applies 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] In its initial submission, the Public Body further argues (footnote omitted):

> The use of section 24(1) is discretionary. The Public Body determined that harm would result from the disclosure of deliberations, consultations and advice implicated in this cross-government request. Moreover, the Public Body determined that the harm of such release satisfied the three-part criteria for advice. The Public Body used section 24(1) to protect the integrity of the deliberative process, allowing employees to have meaningful discussions about the subject matter.

[para 33] The Public Body cited the three part test set out in Order 2001-002, which has since been revised into the test set out above, as the third part of the test set out in Order 2001-002 was determined to be unreasonably restrictive (see Order F2013-13, at para. 123).

[para 34] Unlike other exceptions in the Act, such as sections 16 and 18, section 24(1) does not include a harms test. For the purpose of determining whether sections 24(1)(a) or (b) can apply at all, the fact that harm may result from disclosure does not inform whether the tests for applying those exceptions is met. Whether disclosure of information to which section 24(1) applies could result in harm is an appropriate factor to consider in the exercise of discretion, which I will discuss below.

[para 35] The Applicant argues that the Public Body incorrectly applied section 24(1) to records of final decisions.

Analysis

[para 36] The Public Body withheld the name of a document attached to the email appearing on page 1, under section 24(1)(a) and (b). The remaining information in this email was disclosed to the Applicant. The Public Body states that it withheld the name of the attachment under section 24(1) because the attachment itself was withheld under that provision.

[para 37] As set out above, section 24(1) does not apply to information that merely reveals the topic of the consultation. The names of the attachment on page 1 does not reveal information other than the topic of the attachment. Moreover, the same information has already been disclosed to the Applicant elsewhere in the records at issue. Therefore, disclosing the attachment name on page 1 cannot be said to reveal any information to the Applicant and section 24(1)(a) and (b) cannot apply.

[para 38] The Public Body states that pages 12-13 consist of a draft letter that contains recommendations, and that these pages were shared across several ministries for deliberation. These pages were withheld in their entirety.

[para 39] In Order F2012-06, the adjudicator concluded that section 24(1) does not apply to drafts, merely for the reason that they are drafts. The adjudicator also 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. 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 40] 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. In the absence of evidence showing that the draft was circulated for deliberation 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 41] The Public Body has not provided specific arguments as to how the documents it characterizes as drafts fit 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.

[para 42] Pages 12-13 appear to have been attached to emails on pages 7-9, which were disclosed to the Applicant with discrete items of information redacted. These emails show that the document was sent to the various recipients for review. I am satisfied that the document at pages 12-13 is a draft document that was the subject of consultations within the terms of section 24(1)(b).

[para 43] The Public Body describes the records at 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.

[para 44] The Public Body describes the record at pages 10-11 as the final version of the ROD. It states:

> The ROD on pages 10-11 is the final version, containing the finalized documentation including the scope of the requests, timeframes, meeting attendees, and the name of the ROD.
>
> • The information pertaining to Environment and Protected Areas 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 45] Pages 2-3 were withheld in their entirety; pages 10-11 were withheld in part.

[para 46] As set out in the Public Body's initial submission, the different 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] With respect to the ROD at pages 2-3, this version was attached to an email appearing on page 1. 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.

[para 48] 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.

[para 49] 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 5 of the records, which was disclosed to the Applicant, the meeting was to take place the following day.

[para 50] The Public Body has stated that some information in this ROD 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 are two versions of the ROD, the first on pages 2-3 and the second on pages 10-11 of EPA's record package. EPA did not have the earlier version which other departments had in their release packages as it was transitory.
>
> 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 received further updates.

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

[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] Section 24(1)(a) can apply to advice that was created for the purpose of someone who can implement the action, regardless of whether that advice was ever ultimately given to the relevant person. Section 24(1)(b) is not as broad as (a), insofar as it does not apply to information that was included in a record with the possibility that it may be discussed. Section 24(1)(b) applies only to information that reveals the consultations or deliberations that actually took place.

[para 53] None of the above information in pages 2-3 described above 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 54] Both versions of the ROD contain 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 10-11 as standing items that "provide processing guidance developed for a general cross-governmental request." It is clear from the Public Body's description, quoted above in full, that the items under the "Decisions" heading are items that are to be considered, where relevant, in processing any cross-government request. The information under this heading is the same in all versions of the RODs.

[para 55] As stated above, sections 24(1)(a) and (b) do not apply to instructions or directions to employees. 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 56] 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 57] 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 58] The Public Body states that pages 10-11 consist of the final version of the ROD. Some of the information on page 10 was withheld by the Public Body as non-responsive; that is not at issue. All of the information withheld under section 24(1) on page 10 and the information at the top of page 11 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 11 contains more information than appears in page 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 59] The information in the "Recommendations" box on page 11 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 also 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 60] Following the decision 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.

Exercise of discretion

[para 61] 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 62] 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 63] 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 64] 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 65] 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 66] 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 67] 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 68] 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 69] 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 70] 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 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 71] 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 72] 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 73] 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 12-13 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 74] 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 75] I make this Order under section 72 of the Act.

[para 76] 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, and 2-3 that was withheld under section 24(1). I order the Public Body to provide additional information to the Applicant on pages 10-11 as set out in paragraphs 58-60 of this Order.

[para 77] I find that section 24(1) applies to the information in pages 12-13, and some of pages 10-11 as set out in paragraphs 58-60 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 61-74. If the Public Body continues to withhold responsive information under that provision, it is to explain its exercise of discretion to the Applicant.

[para 78] 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