

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2005-004

July 22, 2005

ALBERTA HEALTH AND WELLNESS

Review Number 2950

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Summary: The Applicant applied to Alberta Health and Wellness (the “Public Body”), for information under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Applicant requested copies of correspondence between the Regional Health Authorities Alberta Council of Chairs and the Public Body. The Public Body responded by providing the Applicant with severed records.

The Applicant argued that the Public Body did not properly sever the records under sections 24(1) of the Act (advice from officials) and 25(1) of the Act (harm to the economic interests of a public body or government). The Commissioner concluded that the Public Body properly applied section 24(1) of the Act when it severed the records.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24(1)(a), 24(1)(b)(i)(ii), 24(1)(d), 24(1)(e), 24(1)(g), 25(1), 72.

Authorities Cited: AB: 96-006, 96-012, 97-007, 97-010, 98-011, 99-006, 99-013, 2001-002, 2001-010, 2001-025, F2002-028 and F2003-016.

I. BACKGROUND

[para 1] Alberta Health and Wellness (the “Public Body”) received a request for information from the Applicant under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Applicant asked for copies of correspondence between the Regional Health Authorities Alberta Council of Chairs (“ACC”) and the Minister responsible for the Public Body. The letters concerned the possibility of ACC’s meeting with the Minister and challenges in the health system.

[para 2] The Public Body severed the records under section 24(1) (advice from officials) and section 25(1) (harm to the economic interests of a public body or government) of the Act and the remaining records were disclosed to the Applicant.

[para 3] The Applicant was not satisfied with the severed records and requested a review under the Act. When mediation did not resolve the issue, the matter was set down for a written inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of 11 partially and completely severed pages from a total of 13 records, consisting of correspondence between the Minister for the Public Body and the ACC. I note that pages 000009 and 000010, although included in the *in camera* submission, are not at issue.

III. ISSUES

[para 5] The Notice of Inquiry set out the issues as follows:

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

Did the Public Body properly apply section 24(1)(b)(i)(ii) (consultations or deliberations) of the Act to the records/information?

Did the Public Body properly apply section 24(1)(d) (plans relating to the management of personnel) of the Act to the records/information?

Did the Public Body properly apply section 24(1)(e) (contents of draft legislation) of the Act to the records/information?

Did the Public Body properly apply section 24(1)(g) (proposed plans) of the Act to the records/information?

Did the Public Body properly apply section 25(1) (harm to the economic interests of a public body or government) and section 25(1)(c)(iii) (interfere with contractual or other negotiations) of the Act to the records/information?

[para 6] I intend to consider the issues in a different sequence than the sequence set out in the Notice of Inquiry. I have renumbered the sequence accordingly, as set out below.

IV. DISCUSSION OF THE ISSUES

Preliminary matter

[para 7] Prior to my review of the stated issues, I wish to address a question raised by the Applicant regarding a matter associated with the application of the Act.

[para 8] The Applicant argued that on pages 000001 and 000010 of the records there are two handwritten notations within the records that reference briefing notes prepared for the Minister. The Applicant believes that aforementioned briefing notes should be part of the records, or at least reported as severed.

[para 9] The Applicant's access request was very specific. In this case, anything not specifically requested by the Applicant would properly not be part of the Applicant's access request. I find that the briefing notes referenced in the handwritten notes were not specifically requested by the Applicant and therefore do not form part of the records at issue.

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

[para 10] Section 24(1)(a) of the Act reads:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,....

[para 11] The Public Body applied section 24(1)(a) of the Act to all of the records at issue. Specifically, the Public Body applied section 24(1)(a) to pages 000001 to 000008 and to pages 000011 to 000013. I will consider pages 000011 to 000013 under section 24(1)(g) of the Act and page 000012 under section 24(1)(e) of the Act, respectively, instead of section 24(1)(a) of the Act.

[para 12] The Public Body argued that, as the purpose of the correspondence was to supply the Minister of the Public Body, a member of the Executive Council, with

analyses, recommendations and advice on the current relationship between the Public Body and challenges in the health care system, the records meet the criteria specified in the section.

[para 12] Order 96-006 sets out the criteria for the application of section 24(1)(a) of the Act. Advice here includes proposals, recommendations, analyses and policy options. Order 96-006 required that the advice should be:

1. sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. directed toward taking an action, and
3. made to someone who can take or implement an action.

1. Sought or expected, or be part of the responsibility of a person by virtue of that person's position

[para 13] Orders 96-006, 2001-002, 2001-025 and F2002-028, have provided guidelines for providing an overall analysis as to whether or not a public body has properly applied the criteria of section 24(1)(a) of the Act to the records. It has been established that the "advice" must be sought or expected or be a part of the responsibility of a person by virtue of a person's position. In this case the advice comes from the Regional Health Authorities Alberta Council of Chairs (ACC) or the Regional Health Authority (RHA). The Public Body provided me with the terms of reference for the ACC. The ACC is an association that has been established by the RHA and Provincial Boards. The RHA established the ACC to identify issues affecting the health system, to communicate these issues to the Minister for the Public Body and to work collaboratively with government and other stakeholders as necessary to develop policy and action plans aimed at resolving issues.

2. Directed toward taking an action

[para 14] The ACC has a mandate to communicate the needs, expectations and interests of the RHA and the communities they serve to the Minister of the Public Body and other government members. The ACC's responsibilities also include providing input and advice to the Minister of the Public Body on matters brought to the ACC by the Minister of the Public Body.

3. Made to someone who can take or implement an action

[para 15] The Public Body contended that the records at issue were to supply the Minister of the Public Body with advice, policy options and an analysis of the funding shortfalls, and advance efforts to improve access to Alberta's health system. The Minister is a member of the Executive Council as required by section 24(1)(a) of the Act and is a person who can implement an action: see Orders 96-006 and 99-013.

[para 16] Further, the Public Body noted that the Minister, through the Public Body, provides funding to the RHA in order that they meet their obligations under the *Regional Health Authorities Act*, and therefore it is reasonable to accept that the ACC's providing the Minister with advice and recommendations is within the mandate of the ACC.

4. Other arguments

[para 17] The essence of the Public Body's contention is that the records at issue were not finalized at the time of the request. The Public Body considered that as the records at issue are in "draft" and as the Minister had not yet considered the recommendations and advice in the report, the final report might differ from the draft report. If the Public Body were to allow early or draft disclosure, such a disclosure could lead to a reader arriving at erroneous conclusions.

[para 18] The Applicant, like the Public Body, referenced Order 96-006 and argued that when a public body failed to meet the criteria specified in the Order, it had improperly withheld information. The Applicant argued that there is no evidence that the advice was sought or expected, that provision of the information was not part of the responsibility of a person by virtue of that person's position and that section 24(1) is to protect the decision-making process, not the result.

[para 19] The Applicant argues that section 24(1) of the Act cannot apply to a record of an action or decision that has already been taken. For example, Order F2003-016 states that outlining the department's decision is not advice under section 24(1)(a) of the Act and generally disagrees with the application of any provision of section 24(1) of the Act.

[para 20] The Public Body, guided by the key interpretations of section 24(1) of the Act found in Order 96-006, responded that the severed portions of the records contain advice, recommendations and policy options regarding funding shortfalls and regarding opportunities to advance efforts to improve access to health services in the face of funding shortfalls.

[para 21] The Public Body argued that the section allows government officials to freely discuss the issues before them and arrive at well-reasoned decisions without fear of being subjected to public examination if the discussions were to now be made public: see Orders 96-006, 99-006 and 99-013. The Public Body also argued that when applying section 24(1)(a) of the Act criteria (advice, proposals, recommendations, analyses or policy options) to all of the records, it must be remembered that if the criteria are met the Public Body has the option as to whether or not it should exercise its discretion to withhold the records.

5. My decision

[para 22] I note that section 24(1) of the Act does not protect the decision itself; it only offers to protect the path leading to the decision: see Orders 96-012, 97-010. If the records being considered under section 24(1) of the Act reveal only that a decision has been made, the records should not be withheld: see Orders 97-010 and 2001-010. However, Orders 97-007 and 98-011 also specify that where a record contains advice or consultations that would reveal the basis for the action or decision, the public body may decide to withhold that information. I am satisfied that the advice found in pages 000001 to 000008 includes the provision of information where it relates to a suggested action that will ultimately be accepted or rejected by its recipient during the deliberative process: see Order 96-006.

[para 23] Further, I am satisfied that these records are not a mere recitation of facts or summaries of information. The records link to a recommended course of action that may be accepted or rejected. In addition, the Public Body provided evidence that the facts being withheld have been adequately interwoven with other advice, proposals, recommendations, analyses or policy options so that they cannot be reasonably considered separate or distinct.

[para 24] I have reviewed the arguments and records before me and I find that the records meet the criteria for section 24(1)(a) of the Act. I also find that the Public Body has properly exercised its discretion regarding the records at issue. I am satisfied that the Public Body, in exercising its discretion under section 24(1)(a) of the Act, did so in the interest of preserving free and frank deliberations when discussing issues and working towards arriving at decisions. I note that the Public Body did not withhold all of the records. Therefore, the Public Body properly applied section 24(1)(a) of the Act to pages 000001 to 000008 of the records.

ISSUE B: Did the Public Body properly apply section 24(1)(e) (contents of draft legislation) of the Act to the records/information?

[para 25] The Public Body said that section 24(1)(e) of the Act applies to page 000012 of the records. Section 24(1)(e) of the Act reads:

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....

(e) the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council,....

[para 26] I find that the severing on page 000012 addresses draft legislation regarding amendments to the *Nursing Homes Operation Regulation*. I therefore find that the contents clearly concern draft legislation and meet the criteria found in section

24(1)(e). I understand this record to be a significant component of the decision-making process and consequently I find that the Public Body properly exercised its discretion in withholding this page. Therefore, I find that the Public Body properly applied section 24(1)(e) of the Act to page 000012 of the records.

ISSUE C: Did the Public Body properly apply section 24(1)(g) (proposed plans) of the Act to the records/information?

[para 27] The Public Body said that section 24(1)(g) of the Act applies to pages 000011 and 000013 of the records. Section 24(1)(g) of the Act reads:

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....

(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision, or

[para 28] The Applicant argued against the application of section 24(1) of the Act based on the contention that the Government of Alberta has publicly stated that it currently does not wish to change the health care delivery system in Alberta and therefore cannot reveal a future course of action.

[para 29] The Public Body identified section 24(1)(g) of the Act as applying because these pages address proposed plans. I examined the records. I find that they address a pending policy decision and address establishing the scope of the project and securing resources to facilitate and guide the development of regulations. The records meet the criteria found in section 24(1)(g) of the Act. I further find that the Public Body properly exercised its discretion in withholding pages 000011 and 000013 of the records as the proposed plans factor significantly in the decision-making process. Therefore, I find that the Public Body properly applied section 24(1)(g) of the Act to pages 000011 and 000013 of the records.

ISSUE D: Did the Public Body properly apply section 24(1)(b)(i)(ii) (consultations or deliberations) of the Act to the records/information?

[para 30] Given my decisions set out above, I do not find it necessary to decide whether the Public Body properly applied this section.

ISSUE E: Did the Public Body properly apply section 24(1)(d) (plans relating to the management of personnel) of the Act to the records/information?

[para 31] Given my decisions set out above, I do not find it necessary to decide whether the Public Body properly applied this section.

ISSUE F: Did the Public Body properly apply section 25(1) (harm to the economic interests of a public body or the government) and section 25(1)(c)(iii) (interfere with contractual or other negotiations) of the Act to the records/information?

[para 32] Given my decisions set out above, I do not find it necessary to decide whether the Public Body properly applied this section.

V. ORDER

[para 33] I make the following Order under section 72 of the Act.

[para 34] I find that the Public Body properly applied section 24(1)(a) (advice from officials) of the Act to pages 000001 to 000008 of the records. I uphold the decision of the Public Body not to disclose these records.

[para 35] I find that the Public Body properly applied section 24(1)(e) (contents of draft legislation) of the Act to page 000012 of the records. I uphold the decision of the Public Body not to disclose this record.

[para 36] I find that the Public Body properly applied section 24(1)(g) (proposed plans) of the Act to pages 000011 and 000013 of the records. I uphold the decision of the Public Body not to disclose these records.

[para 37] I do not find it necessary to decide whether the Public Body properly applied the remaining provisions of the Act to the records.

Frank Work Q.C.,
Information and Privacy Commissioner