

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-33

August 13, 2018

ALBERTA ENVIRONMENT AND PARKS

Case File Number F8348

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) to Alberta Environment and Parks (the Public Body) for

Any emails, correspondence, briefing notes or other documents concerning the eligibility of groups or individuals to appear at hearings of the Alberta Energy Regulator.

At issue in this third part of the inquiry were only pages 156-192, 217-219, and 226-260. The other issues have previously been dealt with in Orders F2018-20 and F2018-21.

The Adjudicator found that the Public Body properly applied section 24(1)(e) of the Act applies to pages 156-192 and 226-260 and section 27(1)(c) of the Act to pages 217-219.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, ss. 24, 27, and 72.

Authorities Cited: AB: Orders F2004-026, F2008-028, F2009-047, F2013-17, F2018-20 and F2018-21.

Cases Cited: *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114.

I. BACKGROUND

[para 1] Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), on November 1, 2013, the Applicant made an access request to Alberta Environment and Sustainable Resources Development (now Alberta Environment and Parks) (the Public Body) for:

Any emails, correspondence, briefing notes or other documents concerning the eligibility of groups or individuals to appear at hearings of the Alberta Energy Regulator.

[para 2] The Applicant requested these records for the timeframe of October 1, 2012 to present.

[para 3] On July 30, 2014, the Public Body responded to the Applicant. It noted that there was a package of 260 pages with “no disclosure”. The exceptions cited by the Public Body relating to the severing of information were sections 24(1)(a), (b)(i)(ii) and (e) and section 27(1)(a), (b)(iii), and (c)(iii) of the Act. The Public Body also withheld information on the basis that it was not responsive.

[para 4] On August 6, 2014, the Applicant requested that this Office review the Public Body’s response to his request. Mediation was authorized but did not resolve the issues between the parties and on March 11, 2016, the Applicant requested an inquiry. This request was accepted.

[para 5] As the inquiry on this matter proceeded, it became apparent that the Public Body was withholding information pursuant to section 27(2) of the Act because another public body, the Alberta Energy Regulator (the Affected Party), claimed solicitor-client privilege attached to the information. The Affected Party was invited to participate in this inquiry and provided submissions on the application of section 27(2) of the Act to the records at issue.

[para 6] Given the recent Court of Appeal decision, *Calgary (Police Service) v. Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114, I decided to hold this inquiry in two parts. The first part of the inquiry resulted in Order F2018-20. The second part of the inquiry resulted in Order F2018-21. In that order I found that the Public Body did not meet its burden to prove that solicitor-client privilege applied to some of the records to which it applied section 27(1)(a) and 27(2) of the Act. As a result, I ordered the Public Body to provide pages 156-192, 217-219, and 226-260 to me so that I could decide if sections 24, and 27(1)(b) and (c) of the Act applied to them. The Public Body disagreed with my findings but complied with the order and provided those records to this Office.

II. RECORDS AT ISSUE

[para 7] The records at issue for this inquiry are pages 156-192, 217-219, and 226-260 which were withheld or severed pursuant to sections 24 and 27 of the Act.

III. ISSUES

[para 8] The Notice of Inquiry dated July 21, 2017 states the issues in this inquiry as follows:

1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

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

3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 9] As stated above, this order will only make findings on whether sections 24(1)(e) and 27(1)(b) and/or (c) of the Act apply to the records at issue.

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly apply section 24(1)(e) of the Act to the information in the records?

[para 10] In its submissions, the Public Body argued that section 24(1)(e) of the Act applied to pages 156-192 and 226-260. Section 24(1)(e) of the Act states:

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

...

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

[para 11] Orders F2004-026 and F2008-028 state that this section applies to information that reveals the substantive contents of the draft legislation or regulations. I can confirm from reviewing these pages of the records at issue that disclosing these records would reveal the substantive content of draft legislation and regulations.

[para 12] Section 24 of the Act is a discretionary exception. As a result, the Public Body must prove that it properly exercised its discretion to withhold the information. The Public Body did not make submissions directly on its exercise of discretion relating to these pages but did say, in relation to its application of section 24(1)(e) of the Act to pages 221-225, that “[d]isclosing this record would reveal a significant component of the decision-making process in the development of the regulation.” I believe that this would equally apply to the records on pages 156-192 and 226-260. I find that this is a proper consideration to take into account and that the Public Body properly applied section 24(1)(e) of the Act to the information on pages 156-192 and 226-260.

2. Did the Public Body properly apply section 27(1)(b) and/or (c) of the Act to the information in the records?

[para 13] Sections 27(1)(b) and (c) of the Act state:

27(1) The head of a public body may refuse to disclose to an applicant

...

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or

(iii) an agent or lawyer of a public body, in relation to a matter involving the provision of legal services, or

(c) information in correspondence between

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

[para 14] In order for section 27(1)(c)(iii) of the Act to apply, the information must be in correspondence, the correspondence must be between an agent or lawyer of a public body and any other person, and the information must be “in relation to a matter involving the provision of advice or other services by either the Minister of Justice and Solicitor General or by the agent or lawyer” (see Order F2009-047 at para 53).

[para 15] In addition, because section 27 of the Act is a discretionary exception, the Public Body must show that it properly exercised its discretion in withholding the information from an applicant.

[para 16] The Public Body argues:

...pages 217 to 219 contains correspondence from another public body's lawyer to the Public Body in the provision of legal services, and section 27(1)(a),(b)(iii) and (c)(iii) of the FOIP Act is appropriately applied.

(Public Body's initial submissions at para 39)

[para 17] Having reviewed the records at issue, I find the information on pages 217-219 of the records at issue is correspondence between a lawyer of a public body and any other person in relation to a matter involving advice.

[para 18] The Public Body also stated in its initial submissions that it was withholding this information because it contained legally privileged information of the Affected Party. I take this argument to mean that it felt withholding the information protected legal privilege. Protecting the substance of advice by a lawyer of a public body is one of the purposes of this provision (see Order F2013-17 at para 27), therefore, I find that the Public Body's exercise of discretion was appropriate. Therefore, section 27(1)(c)(iii) of the Act applies to these records.

V. ORDER

[para 19] I make this Order under section 72 of the Act.

[para 20] I find that the Public Body properly applied section 24(1)(e) of the Act to pages 156-192 and 226-260 of the records at issue.

[para 21] I find that the Public Body properly applied section 27(1)(c) of the Act to pages 217-219 of the records at issue.

Keri H. Ridley
Adjudicator