ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2019-25

July 18, 2019

EDMONTON PUBLIC SCHOOL DISTRICT NO. 7

Case File Number 004934

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Edmonton Public School District No. 7 (the Public Body). He stated:

> All records as defined by section 1(q) of the Act related to communication between staff regarding myself. Start your search at Riverdale School because I sent an email to the principal.

The Public Body responded to the access request. It provided some responsive information, but applied sections 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 24(1)(b) (advice from officials) and 27 (privileged information) to sever information from the records. It also withheld information from the Applicant as "non-responsive".

The Applicant requested review of the Public Body's severing decisions with regard to "section 24(1)(b) only".

The Adjudicator confirmed the Public Body's decision to sever the information to which it had applied section 24(1)(b) only.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 20, 24, 27, 72

Authorities Cited: AB: Order F2015-29

Cases Cited: *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815

I. BACKGROUND

[para 1] On November 28, 2016, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Edmonton Public School District No. 7 (the Public Body). He stated:

> All records as defined by section 1(q) of the Act related to communication between staff regarding myself. Start your search at Riverdale School because I sent an email to the principal.

[para 2] The Public Body responded to the access request on December 22, 2016. It provided some responsive information, but applied sections 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 24(1)(b) (advice from officials) and 27 (privileged information) to sever information from the records. It also withheld information from the Applicant as "non-responsive".

[para 3] The Applicant made the following request to the Commissioner regarding the Public Body's response: I want everything redacted by 24(1)(b) only reviewed.

[para 4] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

II. INFORMATION AT ISSUE

[para 5] The information to which the Public Body applied section 24(1)(b) of the FOIP Act only is at issue.

III. ISSUE

Issue A: Did the Public Body properly apply section 24(1)(b) of the FOIP Act to the information it severed from the records under this provision?

[para 6] Section 24 states, in part:

> *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 to or guideline issued to the officers or employees of a public body […],*
>
> *[…]*

[para 7] 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 8] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action. I note too that this interpretation is consistent with *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) in which the Supreme Court of Canada commented on the purpose of the "advice and recommendation" exception in Canada's various freedom of information regimes. The Court held:

> In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and

recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:

> > To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
> >
> > 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]
>
> 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.

Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

[para 9] The Public Body provides the following explanation of its decision to apply section 24(1)(b):

> In the situation that was the subject of the records at issue, the principal, who is responsible for school safety, consulted with and sought advice from staff members at DSS, whose role it is to provide assistance to principals in emergent or difficult situations. The principal sought the information from DSS to determine what steps, if any, to take to deal with the situation that arose at Riverdale School.

[para 10] The Applicant argues that he was not at Riverdale School at the time of the incident regarding which he sought records. In his request for inquiry, the Applicant argues;

> While the Public Body has provided the job titles of the author and the recipient of the email dated 10 Nov 2016 11:42:18, it has not provided any details as to a decision that either employee was charged with making, or that an employee was consulted about a decision that the other was charged with making. The email on its own does not support a finding that it contains a consultation or deliberation.

[para 11] I infer the Applicant believes that the principal had no authority to make a decision, or to take advice regarding one, given his stated position that he was not at the school.

[para 12] I turn now to consideration of the information the Public Body severed from the records under the sole authority of section 24(1)(b).

[para 13] The Public Body applied section 24(1)(b) alone to two emails and a notation. These emails and the notation record strategies and advice that an employee of the Public Body had received and was considering in making a decision. Section 24(1)(b) applies to the information as the severed information documents consultations and deliberations of the Public Body's employees.

[para 14] I acknowledge that the Applicant believes that the Public Body should not have obtained advice or made decisions regarding him and that the principal had no authority to make a decision or consult or deliberate regarding one. However, the evidence provided by the records, and by the Public Body's submissions, establishes that the principal has the responsibility of ensuring a safe school environment and sought advice in the course of discharging that responsibility.

Exercise of Discretion

[para 15] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 (CanLII), [2010] 1 SCR 815, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 16] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 17] Applying the principles in *Ontario (Public Safety and Security),* a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public

bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 18] Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 19] The Public Body explained its decision to exercise its discretion to withhold the information it found to be subject to section 24(1)(b) in the following way:

> It is the District's position that section 24(1)(b) of the Act was properly applied to the records at issue. If principals cannot freely discuss complex issues with central office staff – whose role it is to provide advice and support – when seeking advice, they will be in a much poorer position to make decisions. Principals must be confident that when they seek advice regarding sensitive issues and school safety, they are not distracted by concerns that those interactions will be subject to disclosure and therefore, scrutiny.

[para 20] I find that the Public Body properly considered the purpose of section 24(1)(b) when it severed information under this provision, and that severing the information from the records served this purpose, in this case. I will therefore confirm the decision of the Public Body to sever the information to which it applied section 24(1)(b) only.

IV. ORDER

[para 21] I make this Order under section 72 of the Act.

[para 22] I confirm the decision of the Public Body to sever the information to which it applied section 24(1)(b) only.

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Teresa Cunningham
Adjudicator