ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-D-002

June 9, 2011

SERVICE ALBERTA

Case File Number F5443

Office URL: www.oipc.ab.ca

Summary: The Public Body challenged the jurisdiction of the Adjudicator to conduct an inquiry on the basis that the issues for inquiry had previously been decided in Order F2009-024.

The Adjudicator determined that the issues for inquiry had not been decided in Order F2009-024 and that she had jurisdiction to conduct the inquiry. However, she determined that the issues set out in the notice of inquiry did not properly reflect the issues between the parties, and she reframed them.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 6, 10, 12, 17, 24. 27, 65, 72

Authorities Cited: AB: Orders 96-017, F2004-026, F2009-024, F2010-023

Cases Cited: *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848; *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23

I. BACKGROUND

[para 1] On October 30, 2003, the Applicants made an access request for records under the *Freedom of Information and Protection of Privacy Act* ("the FOIP Act") to Alberta Government Services, now Service Alberta, ("the Public Body").

[para 2] On August 31, 2006, September 22, 2006, March 15, 2007 and March 26, 2007 the Public Body responded to the Applicants' access request. The Public Body gave access to records but withheld information under sections 17, 24, and 27 of the FOIP Act. It also indicated that it considered some records to be exempt from the application of the FOIP Act under sections 4(1)(a) and 4(1)(l)(ii), or on the basis that they were not responsive to the Applicants' access request. The Applicants requested review of these decisions by this office on May 11, 2007.

[para 3] On March 30, 2010, I issued Order F2009-024 to dispose of the issues under section 72 of the FOIP Act. I ordered the following:

> I make this Order under section 72 of the Act.
>
> I confirm that record 1551 is not subject to the FOIP Act by virtue of section 4(1)(l)(ii).
>
> I confirm the decision of the head of the Public Body to withhold personal information under section 17(1) of the FOIP Act.
>
> I confirm that section 24(1)(a) applies to the information in records 2780 – 81 and 2883 – 2884; however, I require the Public Body to provide its reasons for doing so in a new response to the Applicants in accordance with section 12 of the FOIP Act.
>
> I confirm the decision of the head of the Public Body to withhold information from records 001470, 001471, 001472, and 00147 under section 27(1)(a).
>
> I confirm the decision of the head of the Public Body to withhold the following information from records 000017, 00018, 000020, 000021, the email dated April 10, 2001 9:48 AM on records 000026 – 000027, the email dated Friday, November 24, 2000 at 8:49 AM on records 000028 – 000029 and on records 000070 and 000071, the email dated Wednesday, November 22, 2000 at 3:13 PM on records 000028 – 000029 and 000030, the notes appearing on record 000030, the email dated Tuesday, April 10, 2001 at 9:48 AM on records 000068 – 000069 and 001352 – 001353, the memorandum appearing on records 000081, 000082, 000107, 000108, 001544, 001545, 002925, 002926, 002927, the email dated Thursday, June 05, 2003 at 10:31 AM on record 000360, and record 001047 under section 27(1)(b).
>
> I require the Public Body to meet its duties under sections 10 and 12 of the Act to the Applicants in relation to the following records, which I have found do not contain information subject to section 27(1)(b) by making a new response that includes its decision regarding the application of section 27(1)(a): the information on record 000019 it withheld under section 27(1)(b), the email dated April 03, 2001 at 11:20 AM on records 000026 – 000027, the email dated November 22, 2000 at 3:14 PM on records 000028 and 000029, the email dated Wednesday, November 22, 2000 at 3:02 PM on records 000028 and 000029, the email dated November 22, 2000 at 3:14 PM on record 000030, the email dated Wednesday, November 22, 2000 at 3:02 PM on record 000030, the email dated April 03, 2001 at 11:20 AM on records 000068 – 000069, the email dated November 22, 2000 at 3:14 PM on records 000070 – 000071, the email dated Wednesday, November 22, 2000 at 3:02 PM on records 000070 – 000071, notes on records 0001895 and 000196, an email on record 000344, the email dated Thursday, June 05, 2003 at 9:25 AM on records 000360, the notes on record 000707, the email on record 001048, the email dated Monday, October 27, 2003 at 8:44 AM on record 00115, the email dated Monday, October 27, 2003 on records 001117 – 001118, the email dated October 27, 2003 at 8:44 AM on records 001121 – 001122, the sentence it withheld from the memorandum on record 001312, the

> email dated April 03, 2001 at 11:20 AM on records 001352 – 001353, and the email on record 1359.
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> I order the Public Body to make a response to the Applicants in accordance with its duty under section 10 that explains why the Public Body does not believe that the Applicants requested the information it has withheld as "unresponsive". If the Public Body alternatively decides that the information is responsive, the Public Body must include its decisions in relation to that information for the purposes of section 12 of the FOIP Act.
>
> I further order the head of the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with the Order.

[para 4] I confirmed that the Public Body had conducted an adequate search for responsive records and had properly withheld some, but not all, records under sections 27(1)(a) and (b) of the FOIP Act. However, I found that the Public Body had not explained how it had exercised its discretion to withhold information under section 24(1)(a) of the FOIP Act and ordered it to comply with its duty to provide reasons under section 12 of the FOIP Act.

[para 5] I also ordered the Public Body to make a new response to the Applicants in relation to the records to which it had improperly applied section 27(1)(b), which would include a making a decision as to whether section 27(1)(a) applied to these records.

[para 6] I ordered the Public Body to make a decision as to whether the records it had withheld were responsive and to communicate this decision to the Applicant. If the Public Body were to decide that the records contained responsive information, then it was to provide decisions in relation to the information in the records complying with section 12 of the FOIP Act. If it decided that the records were nonresponsive, it was to provide its reasons for making that determination.

[para 7] On May 14, 2010 the Public Body wrote the Applicants and stated:

> This letter is in reference to the OIPC Order 2009-024 issued in the matter of the inquiry F4095.
>
> In this Order, the Adjudicator ordered Service Alberta to undertake the following:
>
> 1. Provide the applicant with reasons for withholding records 2780-2781 and 2883-2884 pursuant to s. 24(1)(a). It was left to Service Alberta's discretion the degree of specificity to include.
> 2. Respond to the applicants regarding our decision re the application of s. 27(1)(a); and
> 3. Respond to the applicant why records withheld as non-responsive were not responsive to their request.

The Public Body provided reasons in support of withholding information under section 24(1)(a). The Public Body made a decision to apply section 27(1)(a) to some records, but decided it did not apply to others and provided the records it found were not subject to section 27(1)(a) to the Applicants. The Public Body also reviewed the records it had previously withheld as non-responsive and determined they were non-responsive. The

Public Body provided reasons for considering these records to be outside of the Applicants' access request.

[para 8] On June 23, 2010, the Applicants requested review by the Commissioner of the Public Body's decision of May 14, 2010. Specifically, the Applicants requested review of the decision of May 14, 2010 to withhold records under section 27(1)(a) and requested review of the Public Body's compliance with Order F2009-024.

[para 9] The matter was scheduled for written inquiry. The Notice of Inquiry sets out the following issues for inquiry

1. Did the Public Body meet its duty to the Applicant, as provided by section 10 of the Act (duty to assist)?

2. Did the Public Body comply with section 12 of the Act (contents of response)?

3. Did the Public Body properly apply section 27 (privileged information) to the records/information?

[para 10] In their initial submissions, the Applicants, in addition to making arguments regarding the issues set out for inquiry, also made arguments as to whether the Public Body had properly exercised its discretion to withhold information under section 24(1)(a). The Applicants do not challenge the application of section 24(1)(a), which was decided in Order F2009-024, only whether the Public Body's reasons for withholding information under section 24(1)(a) demonstrate that it exercised discretion appropriately.

[para 11] In its initial submissions, the Public Body argued that I lack jurisdiction to conduct this inquiry because, in its view, Order F2009-024 decided the issues for the present inquiry. As I issued a formal order deciding the issues in the previous inquiry, it reasons that my role is *functus officio* in relation to the issues proposed for the current inquiry.

[para 12] I elected to decide the jurisdictional issue raised by the Public Body prior to considering the issues set out in the notice of inquiry. The Applicants were also provided the opportunity to make submissions regarding the jurisdictional issue.

II. ISSUE

Issue A: Do I have jurisdiction to decide the issues raised in the Applicants' letter of June 23, 2010?

III. DISCUSSION OF ISSUE

[para 13] As noted in the background above, the Public Body takes the position that my role is *functus* and I lack jurisdiction to conduct this inquiry for that reason. It suggests that conducting the hearing is properly characterized as a "back-door re-hearing" of Order F2009-024. It argues:

> First, if the suggestion is that the Notice of Inquiry F5443 relates to the entire original access request of the Applicants, it is clear that the Commissioner is functus officio on the issues raised under that access request. Indeed, in F2009-024, the Adjudicator found that the Public Body had met its duties under s. 10 and 12 of the Act, other than in relation to the decision to withhold records under sections 24 and 27 and some of the records deemed non-responsive.
>
> If the Applicants were not satisfied with the manner in which the issues were addressed, the appropriate recourse would be to apply for judicial review of the order. The Commissioner has no authority to provide a "back-door" re-hearing of the matter.
>
> The second way to interpret the notice of inquiry is that consideration of ss. 10 and 12 relate to the Public Body's further responses provided in relation to the records dealt with under s. 24 (1)(a) and as non-responsive.
>
> As discussed below, there is no reasonable interpretation or "recharacterization" of the Applicants' request for review that could turn the additional responses of the Public Body, relating to the records dealt with under s. 24(1)(a) and as "non-responsive", into new decisions that are reviewable under s. 65(1) of the Act.
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> In Order F2009-024 the Adjudicator determined that the Public Body had properly applied s. 24(1)(a) to certain records and that those records were properly excluded. However, the Adjudicator did require the Public Body to provide a further response to the Applicants with the reasons for withholding the information… (my emphasis)
>
> …
>
> The Public Body provided its response to the Applicants in compliance with the Order. The Registrar of Inquiries provided confirmation of the receipt of the Public Body's compliance with the Order.
>
> The Public Body's decision and actions with respect to the record under s. 24(1)(a) was considered and finally determined by the Adjudicator in Order F2009-024. The Commissioner is functus officio respecting these records.

The term "*functus officio*" refers to the situation when an official has discharged his or her official duty or function in relation to a matter, and lacks authority to take further steps in relation to the same matter.

[para 14] The Public Body appears to take the position that it is an applicant's access request that determines the Commissioner's jurisdiction to decide issues at an inquiry, given that it refers to the Commissioner being "*functus officio"* on issues raised by the Applicants' access request.

[para 15] The Public Body relies on *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848 in support of its view that the Commissioner is *functus officio* in relation to the issues set out in the notice of inquiry with the exception of the application of section 27(1)(a). The Public Body argues that *Chandler* stands for the proposition that once a tribunal has rendered a final decision in a matter, it cannot make any further orders respecting that matter except to correct clerical mistakes, or where there has been an error in expressing the manifest intention of the tribunal.

[para 16] In *Chandler*, the Supreme Court of Canada held that the doctrine of "*functus officio*" should be applied flexibly, rather than rigidly, in relation to tribunal decisions. The Court said at paragraphs 21 - 23:

> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp*. (1981), 41 N.R. 214 (F.C.A.)

The Public Body is of the view that I would be deciding issues previously decided in Order F2009-024 if I were to review whether the Public Body's reasons for withholding information under section 24(1)(a) demonstrated that it had appropriately exercised discretion to withhold information under this provision. In making this argument, the Public Body appears to understand that I confirmed its discretion to withhold information under section 24(1)(a) in Order F2009-024.

[para 17] Finally, the Public Body argues that in Order F2009-024 I stated that the only relief available to the Applicants, should the Public Body decide, and provide reasons for its decision, that the records it had withheld as nonresponsive were nonresponsive, was to make a new access request for the records. It points to paragraph 110 of the Order in which I said:

> In this case, the Public Body has not explained why it believes that the Applicants have not requested the information it has withheld as unresponsive. I will therefore order the Public Body to respond to the Applicants and make a decision as to whether the records it has withheld fall within the parameters of the access request. As part of the duty to respond openly, accurately, and completely, the response should contain reasons as to why the Public Body does not believe the Applicants have requested the information. If the Public Body decides that information is unresponsive, then the Applicants may make an access request for that information under section 7 of the Act if they so choose. If the Public Body decides that information is responsive, it must decide whether to give access to the information to the Applicants or withhold it if an exception to disclosure applies. It must also communicate these decisions in accordance with sections 10 and 12 of the FOIP Act. (My emphasis)

To summarize, the Public Body argues that I previously upheld its decision to withhold information under section 24(1)(a) and that I restricted the options available to the Applicants if they disagreed with the Public Body's new decision regarding records it withheld as nonresponsive. Because of its view that I made final decisions disposing of all issues in relation to the Public Body's decision to withhold information in Order F2009-024, the Public Body reasons that this office is "*functus*" in relation to any new review of its decision to withhold information under section 24(1)(a), or its new decision that some records are outside the scope of the Applicants' access request.

[para 18] The Applicants argue the following:

> As noted above, in Order F2009-024, the Public Body was directed to provide a new, open, accurate and complete response: (a) setting out the Public Body's reasons for applying its discretion under subsection 24(1)(a) of the Act; (b) setting out the Public Body's decision on subsection 27(1)(a) of the Act; and (c) explaining why the Public Body believes certain records to be non-responsive to the Applicants' initial request.
>
> The Applicants have now requested a review to determine whether the Public Body complied with its obligations to respond openly, accurately and completely (i.e. whether the Public Body complied with its obligations under section 10 and 12 of the Act), and to determine whether the Public Body properly applied subsection 27(1)(a).
>
> These questions fall within the scope of section 65(1), as they clearly relate to a request to review the Public Body's "decision, act or failure to act". The Applicants submit that the Adjudicator has jurisdiction to determine whether the Public Body complied with sections 10 and 12 of the Act in setting out its reasons for applying its discretion under subsection 24(1)(a) of the Act and in setting out the Public Body's decision on subsection 27(1)(a) of the Act. The Applicants submit that the Adjudicator also has jurisdiction to determine whether the Public Body properly applied subsection 27(1)(a) of the Act.

[para 19] Section 65 of the FOIP Act sets out the issues for which a review may be requested. The relevant provision in this case is s. 65(1):

> *65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.*

While an applicant must have made an access request to fall under section 65(1), only the decisions, acts or failures to act made in response to the request are the subject of a request for review. In other words, the access request itself is not the subject of a review under section 65(1), but rather, the decisions, acts, or failures to act in responding to that access request. While I agree with the Public Body that the access request giving rise to the Public Body's letter of May 14, 2010 is the same access request that gave rise to my review of the Public Body's decisions, acts, or failures to act in responding to the access request in Order F2009-024, I cannot find that my duties under the FOIP Act have been performed, finally, by issuing that order, unless I find that the decisions, acts, or failures to act of which the Applicants have requested review in this inquiry are the same as those that were disposed of by Order F2009-024.

[para 20] I will therefore consider whether the issues the Applicants have raised for the inquiry were decided finally in Order F2009-024. If they have been, I will consider whether the doctrine of "*functus officio*" would prevent me from taking further action in relation to them. If they have not yet been decided, I will confirm that they are properly the subject of an inquiry.

Section 24(1)(a)

[para 21] The Public Body states that its decision to withhold information under section 24(1)(a) was disposed of in Order F2009-024. In that Order I said at paragraphs 44 – 45:

> The Public Body argues the following:
>
> > After careful consideration, the Head of the Public Body exercised the discretion afforded him in refusing to disclose records exempted by section 4(1)(l)(ii), excepted by section 17, excepted by section 24(1), maintaining legal privilege as contemplated by section 27(1) and in determining that certain records were not responsive to the Applicant's request.
>
> It may be that the head of the Public Body considered the purpose of section 24(1) and the consequences to the Public Body's deliberative process when discretion was exercised to withhold records under section 24(1)(a); however, this is not set out in its submissions. I note also that the Public Body's responses to the Applicants do not contain its reasons for withholding information under section 24(1)(a), although section 12 of the Act requires a Public Body to provide reasons for applying exceptions in its response to an Applicant.
>
> As a result, while I find that section 24(1)(a) applies to records 2780 – 81 and 2883 – 2884, I am unable to tell how the Public Body exercised its discretion. As there is no evidence that the Public Body withheld this information for an improper purpose or fettered its discretion in any way when it decided to withhold information under section 24(1)(a), I will not order it to reconsider its decision. However, I will order the Public Body to make a new response to the Applicant in which it provides its reasons for withholding information under section 24(1)(a), as required by section 12 of the Act. I will leave it to the Public Body to determine the degree of specificity it will include in the new response

[para 22] Section 24(1)(a) authorizes the head of a public body to withhold some kinds of information. Section 24(1)(a) is not a mandatory but discretionary. It 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*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

In Order F2009-024 I found that section 24(1)(a) applied to the information withheld by the Public Body under section 24(1)(a); in other words, I found that the information was of the kind contemplated by section 24(1)(a). However, a finding that section 24(1)(a) applies does not mean that a public body has properly withheld it under section 24(1)(a),

as a public body must explain why the public interests in withholding information subject to section 24(1)(a) were considered to outweigh the public interest in disclosing information in the circumstances of the case.

[para 23] 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) provides:

> *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 24] In Order 96-017, the former Commissioner reviewed the law regarding a Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in Rubin stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
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> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific. In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
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> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
> …
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.

> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.
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> In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 25] Similarly, in Order F2004-026, the Commissioner said;

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body.
>
> In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[para 26] Prior orders of this office establish that the Commissioner must review the head of a public body's exercise of discretion when determining whether information has been properly withheld under a discretionary exception.

[para 27] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. While this case came after Order F2009-024, and therefore does not inform this decision, it provides clarification as to the importance of weighing the exercise of discretion when a discretionary exception is applied to withhold information. The Supreme Court of Canada said:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
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> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as

> the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.
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> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
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> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
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> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above. Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The Supreme Court of Canada confirmed both the authority and the duty of the Information and Privacy Commissioner of Ontario to review a head's decision to exercise discretion to withhold information under a discretionary exception. The fact that the Court remitted the issue of whether the head of the public body had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 28] In Order F2009-024, I found that I was unable to review the Public Body's exercise of discretion because the Public Body had not provided any reasons for deciding to withhold information under section 24(1)(a), either to the Applicants or for the inquiry. I ordered the Public Body to provide its reasons for exercising discretion as it did by making a new response in compliance with its duties under section 12 of the FOIP Act. I made the following order:

> I confirm that section 24(1)(a) applies to the information in records 2780 – 81 and 2883 – 2884; however, I require the Public Body to provide its reasons for doing so in a new response to the Applicants in accordance with section 12 of the FOIP Act.

[para 29] While the Public Body argues that I confirmed its decision to withhold information, I find that I did not. Rather, I found that I confirmed that the information

met the requirements of section 24(1)(a), but found that I could not review the Public Body's exercise of discretion to withhold information under section 24(1)(a) because of its failure to provide reasons. I then ordered it to correct this failure. There is nothing in the Order to suggest that the new response made by the Public Body would not be reviewable, given that the Public Body's decision to withhold information under section 24(1)(a) had not been reviewed.

[para 30] Had I had confirmed the decision to withhold information under section 24(1)(a) without first reviewing the head's exercise of discretion, I would have failed to perform my statutory function even though the issue was fairly raised by the proceedings. As previous orders of this office and a recent decision of the Supreme Court of Canada establish, it would have amounted to a failure to perform my statutory function if I omitted to review a head's exercise of discretion to withhold information. Consequently, the principles set out in *Chandler* would have permitted me to reopen the previous inquiry in order to rectify this failure. However, as I was unable to review the Public Body's exercise of discretion in the absence of its reasons for exercising discretion as it did, I ordered the Public Body to provide reasons for exercising its discretion as it did. Now that the Public Body has complied with its duty to provide reasons, these reasons are reviewable under section 65(1).

[para 31] In relation to section 24(1)(a), I find that I have not yet decided whether the head properly exercised discretion to withhold information and that the Applicant has requested review of the Public Body's exercise of discretion in withholding information pursuant to section 24(1)(a). I will therefore review the reasons the Public Body has now provided and determine whether the Public Body has established that discretion was appropriately applied in favor of withholding information.

Nonresponsive Records

[para 32] In Order F2009-024, I was unable to decide whether records and information withheld by the Public Body for the reasons that they were nonresponsive were nonresponsive. I noted:

> The Public Body did not explain why it believes records pertaining to general corporate matters and corporate searches did not fall within the parameters of the Applicants' access request, given that the Applicants did not restrict their request in this way. In addition, it did not explain why reference letters for certain employees were outside the parameters of the access request. It may be that the records withheld as unresponsive do not have anything to do with decisions to lay charges or not to lay charges, and may not meet any of the requirements of (a) – (k) of the access request; however, the evidence as to whether they do or do not is in the possession of the Public Body and the Public Body has not provided this evidence for the inquiry. I cannot conclude that records are unresponsive unless there is evidence to satisfy me that the information in question does not relate to the Applicants or some of the Applicants and does not relate to charges either being laid or not being laid against the Applicants or some of the Applicants.
>
> While the Applicants invite me to make a decision as to whether information withheld as unresponsive is responsive, there is insufficient evidence for me to make this determination. I say this because I simply do not know on what basis the Public Body made its decisions to lay

> and not lay charges against the Applicants, which, as noted above, is the information requested by the Applicants.

[para 33] I made the following order in relation to nonresponsive information and records:

> I order the Public Body to make a response to the Applicants in accordance with its duty under section 10 that explains why the Public Body does not believe that the Applicants requested the information it has withheld as "unresponsive". If the Public Body alternatively decides that the information is responsive, the Public Body must include its decisions in relation to that information for the purposes of section 12 of the FOIP Act.

[para 34] The "non-responsiveness" of information in records is not an exception to the right of access created by section 6 of the FOIP Act. However, there is no duty for a public body to grant access to information under section 6 if an applicant has not first made a request for access to that information. A public body is not required to provide a response in relation to all information in its custody or under its control to an Applicant, but only information that reasonably relates to the access request. A Public Body's duties to an applicant in relation to responding to an access request are not engaged until an applicant asks for the information.

[para 35] In this case, rather than identifying only those records it considered to be responsive or that reasonably related to the Applicants' access request, the Public Body identified some records it considered to be nonresponsive, and included them in its response. It then also withheld information from these records as "nonresponsive". The Public Body also identified records it considered to be responsive and granted access to them subject to the exceptions in the FOIP Act.

[para 36] Given that I was unable to determine on the evidence why the Public Body had first selected and then withheld records it considered to be nonresponsive, I ordered the Public Body to make a new response fulfilling its duties under sections 10(1) and 12 that would assist the Applicants to understand why the Public Body had included these records in its response but had withheld the information they contained as "nonresponsive".

[para 37] The Public Body argues that because I indicated in Order F2009-024 that the Applicants "may" make an access request for information the Public Body considers to be nonresponsive in its new response, that I precluded the Applicants from requesting review of the new decision should they disagree with it.

[para 38] Section 72 of the FOIP Act, which restricts the orders I may make disposing of the issues for inquiry, does not empower me to restrict or take away the rights of applicants under section 65(1). This provision authorizes me to order the head of a public body to do things that the FOIP act requires the head to do, if I find they have not been done.

[para 39] In Order F2009-024 I ordered the Public Body to make a decision in relation to the nonresponsive records that conformed with its duties under sections 10 and

12, as I found that such a decision had not been made. However, I did not order the Applicants to do anything or restrict them from doing anything.

[para 40] The reference to making a new access request is simply a gratuitous suggestion that regrettably added some confusion to Order F2009-024. Given that the only apparent bar to disclosure of the ”nonresponsive” records seemed to be the Public Body’s view that the Applicants had not requested the records, it seemed to me that the Applicants could obtain the records classified as “nonresponsive” by clearing up any doubt that the records were the subject of an access request. However, the Applicants have a right under section 65 of the FOIP Act to request review of the Public Body’s new response to their access request if they are dissatisfied with it.

[para 41] Essentially, I did not make a decision regarding the responsiveness of records in Order F2009-024 because I found that the Public Body’s failure to provide adequate reasons prevented me from doing so. Consequently, I have not yet made a decision regarding the nonresponsive records and my role is not “*functus*” in relation to them.

Conclusion

[para 42] I find that the issues of whether the Public Body appropriately exercised discretion to withhold information under section 24(1)(a) and whether it has properly identified records as being nonresponsive to the Applicants’ access request have not yet been decided by this office. The issue of whether section 27(1)(a) applies to some of the records to which the Public Body had previously applied section 27(1)(b) has also not yet been decided by this office. I find that the Applicants requested review of the Public Body’s new decisions in their letter of June 23, 2010 and so these issues are properly the subject of the inquiry.

[para 43] However, I note that the “notice of inquiry” created by this office misstates the issues for inquiry to some degree. As noted above, the issues set out in the notice of inquiry are the following:

1. Did the Public Body meet its duty to the Applicant, as provided by section 10 of the Act (duty to assist)?

2. Did the Public Body comply with section 12 of the Act (contents of response)?

3. Did the Public Body properly apply section 27 (privileged information) to the records/information?

[para 44] Instead, the issues for inquiry are properly stated as the following:

1. Does the Public Body have a duty under the FOIP Act to the Applicants in relation to the records it has withheld as nonresponsive? If so, has this duty been met?

2. Did the Public Body properly exercise its discretion when it withheld information from the records under section 24(1)(a)?

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

On reviewing the Applicants' submissions, it appears that they understood the issues for inquiry to be as I have now stated them. However, given that I have now clarified and restated the issues for inquiry after they provided their initial submissions, the Applicants are entitled to reopen their initial submissions and provide any additional arguments or evidence if they choose. The Public Body will then be given the opportunity to provide submissions in relation to the restated issues. Both parties will then be provided the opportunity to provide rebuttal submissions in accordance with the procedures of this office.

IV. DECISION

[para 45] The following issues have not yet been heard by this office and I have jurisdiction to conduct an inquiry into them:

1. Does the Public Body have a duty under the FOIP Act to the Applicants in relation to the records it has withheld as nonresponsive? If so, has this duty been met?

2. Did the Public Body properly exercise its discretion when it withheld information from the records under section 24(1)(a)?

3. Did the Public Body properly apply section 27(1)(a) (privileged information) to withhold information from the records?

This office will contact the parties with the new timelines for providing submissions in due course.

_____

Teresa Cunningham
Adjudicator