

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-22

April 22, 2022

UNIVERSITY OF ALBERTA

Case File Number 005994

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Summary: The Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the University of Alberta (the Public Body). The Public Body provided responsive records, but withheld some information under sections 17, 19, and 24(1) of the Act, as well as on the basis that it was non-responsive.

The Adjudicator found that the Public Body properly withheld information as non-responsive. The Adjudicator ordered the Public Body to reconsider its use of discretion to withhold information under sections 19 and 24(1). The Adjudicator did not consider section 17 since the Public Body released all information initially withheld under section 17 during the Inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 19, 19(1), 19(2), 24(1), 24(1)(a), 24(1)(b)(i), 24(1)(d), 72.

Authorities Cited: AB: Orders 96-006, 2000-029, F2002-008, F2018-36, F2019-17, F2007-022.

Cases Cited: *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

I. BACKGROUND

[para 1] On January 24, 2017, the Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to the University of Alberta (the Public Body). The Applicant sought the following information:

...a copy of all documents in my file at the Department of Oncology, including all documents pertaining to my application as Assistant Professor, all documents pertaining to my interviews by Faculty Evaluation Committee members, and all documents pertaining to meetings by Faculty Evaluation Committee members in regards to my application as Assistant Professor.

[para 2] On February 3, 2017, the Public Body verbally clarified the access request with the Applicant. After clarification, the Public Body understood that the request for information was focussed on documents held by two employees of the Public Body:

Records held by [Employee 1] and [Employee 2], and your file within the Department of Oncology regarding your 2015 application and appointment as Assistant Professor.

[para 3] On March 24, 2017, the Public Body responded to the access request. It provided the Applicant with 109 pages of records. The Public Body withheld entire pages, and severed information from other pages of the records under sections 17, 19, and 24 of the Act, and on the basis that information was non-responsive.

[para 4] On May 23, 2017, the Applicant filed a request for review of the Public Body's response to the access request. Investigation and mediation were authorized to try to resolve the issues but did not do so. On February 6, 2018 the Applicant requested an inquiry into the response to the access request.

II. RECORDS AT ISSUE

[para 5] The records at issue are those from which the Public Body withheld information. The applicable page numbers are identified throughout this Order.

III. ISSUES

[para 6] Initially, the only issues identified for this Inquiry were the withholding of information under section 19 of the Act and as non-responsive. In the course of the Inquiry the Applicant clarified that withholding information under sections 17(1) and 24 of the Act remained issues as well, and those matters were added. Thus, the issues are as follows:

ISSUE A: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?

ISSUE B: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

ISSUE C: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

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

IV. DISCUSSION OF ISSUES

Preliminary Matter – Allegations in the Applicant's Submissions

[para 7] The Applicant's submissions contain various serious allegations against several individuals associated with the Public Body without providing a foundation for them. Among the allegations is an assertion that these individuals are involved in a conspiracy to intentionally kill or seriously harm Albertans who engage certain parts of the health care system. In respect of the Applicant's allegations, the Public Body requested that I discontinue this Inquiry on the grounds that the Applicant's request for Inquiry amounted to an abuse of process. I explained my reasons for denying that request in a letter to the parties dated January 10, 2022.

[para 8] While the Public Body's request was denied, I cautioned the Applicant against making any similar allegations in this Inquiry, and advised that I would disregard the ones already made since they were made without any supporting foundation. I have taken that approach, and considered only the portions of the Applicant's submissions germane to whether the Public Body properly withheld information under the Act.

ISSUE A: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?

[para 9] Section 19 of the Act states,

19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation

process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.

(3) For the purpose of subsection (2), “participant” includes a peer, subordinate or client of an applicant, but does not include the applicant’s supervisor or superior.

[para 10] The Public Body withheld information under sections 19(1) and (2) of the Act from pages 3, 37, 54, 59, and 68.

[para 11] In order for section 19(1) to apply, the information:

- a. must be evaluative or opinion material;
- b. must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for:
 - i. employment; or
 - ii. for the awarding of contracts or other benefits by a public body; and
- c. must be provided explicitly, or implicitly in confidence (Orders 2000-029, F2002-008).

[para 12] All of the information withheld under section 19 is personal information that is evaluative or opinion material as described in section 19(1). It appears on forms titled “Candidate Evaluation” and “Evaluation for [the Applicant]”. The information consists of the evaluations made by several employees of the Public Body about whether the Applicant is a suitable candidate for a Special Assistant Continuing Professor Position. The information partially consists of numerical scores in six categories used to evaluate candidates. The remainder of the withheld material is written opinion information about the Applicant’s suitability for the position. The evaluative information was expressly compiled for the purpose of determining the Applicant’s suitability. The “Candidate Evaluation” form is expressly labelled as confidential. The “Evaluation for [the Applicant]” form contains a summary of the confidential information on the “Candidate Evaluation Form” and thus is confidential as well.

[para 13] Since section 19 is a discretionary exception to disclosure, the Public Body must demonstrate that it properly exercised discretion when withholding information under it.

[para 14] The Public Body did not explain how it exercised discretion in respect of applying section 19. It merely asserts that its application of section 19 is “unassailable.” Since the Public Body did not explain how it exercised discretion, I cannot conclude that

it exercised discretion properly, and cannot conclude that information has been properly withheld under section 19.

ISSUE B: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 15] The Public Body withheld information on the following pages as non-responsive: 32 - 34, 69, 70 - 75, and 105 - 109.

[para 16] The Applicant's access request specifically seeks information about his application for and appointment as Assistant Professor. None of the information withheld as non-responsive relates to the Applicant's application and appointment. I find that the Public Body properly withheld information as non-responsive.

[para 17] I note the Applicant argues that the Public Body has no reason to withhold non-responsive information since much of it consists of minutes and agendas of meetings at which he was present. While there may be no harm in releasing information to the Applicant that he is already aware of, there is no requirement under the Act for a Public Body to provide non-responsive information.

ISSUE C: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

[para 18] After withholding information under this provision was added as an issue to this Inquiry, the Public Body determined that it was permitted to disclose all information it had previously withheld under section 17(1) to the Applicant. Accordingly, I do not consider this issue.

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

[para 19] The Public Body withheld information under sections 24(1)(a), (b)(i), and (d), those sections 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,

...

(d) plans relating to the management of personnel or the administration of a public body that have not yet been implemented,

[para 20] The scope of information captured under sections 24(1)(a) and (b) was summarized in Order F2019-17 at paras. 161-166, as follows:

In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) 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 made to someone who can take or implement the action. (See Order 96-006, at p.9)

In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

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. (At para. 115)

In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

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. (At para. 37)

Further, 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).

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, proposal, recommendations etc. such that they cannot be separated (Order 2007-013 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 paras. 31 and 37).

[para 21] I agree with the Adjudicator in Order F2019-17.

[para 22] The Public Body withheld information under section 24 from pages 4, and 55.

[para 23] The information withheld from page 55 is information captured under section 24(1)(a). It is advice regarding the evaluation of the Applicant's suitability for the Assistant Professor role, made to the Department of Oncology.

[para 24] Some of the information withheld on page 4 is essentially the same as that withheld from page 55, and is also captured under section 24(1)(a). The remainder of the information withheld on page 4 is information that is captured under section 24(1)(d). The information relates to future plans for the management of personnel within the Department of Oncology in light of the advice regarding the evaluation of the Applicant.

Exercise of Discretion

[para 25] Since section 24(1) is a discretionary exception to disclosure, I must consider whether the Public Body properly exercised discretion to withhold information under it.

[para 26] Exercising discretion was considered in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Ontario Public Safety and Security*). Numerous orders of this office have confirmed that the reasoning therein is applicable to the exercise of discretion under the Act. At paragraph 71 of *Ontario Public Safety and Security*, the following factors were identified as relevant to the question of whether or not a public body has properly exercised its 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 27] In exercising discretion, a public body must balance both public interest and private interests (*Ontario Public Safety and Security* at paras. 47 and 48). Private interests are those of requestors, citizens, and affected third parties, in contrast to employees of public bodies who create records in their role as representatives of a public body (Order F2018-36 at para. 232).

[para 28] In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at para. 416, Justice Renke elaborated on what *Ontario Public Safety and Security* requires, as follows:

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 29] With regard to consideration of harmful effects of disclosure, Justice Renke stated, at para. 420:

...In my view, that is the implication of the *Ontario Public Safety and Security* passages quoted above. A public body is entitled to show that disclosure could have other adverse effects (whatever those might be) – but the public body must indicate what those adverse effects are and that the negative consequences of disclosure outweigh the interests in the disclosure, the “interest in open government.”

[para 30] When exercising discretion, public bodies should also consider the particular purpose of the exception to disclosure being considered. The purpose of section 24 in general was described by former Commissioner Clark in Order 96-006 as follows:

When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, “looking bad” or appearing foolish if their frank deliberations were to be made public.

[para 31] Regarding section 24(1)(d), the Adjudicator in Order F2007-022 stated, at para. 45,

As the notes indicate that these records relate to a personnel matter, it appears that the Public Body is relying on section 24(1)(d), which permits a public body to withhold records that could reveal plans relating to the management of personnel or the administration of a public body that have not yet been implemented. This provision recognizes that a public body's ability to manage personnel and administration would be compromised if information about its plans was released prior to implementation.

[para 32] The Public Body provides a brief description of the factors it considered when exercising discretion under section 24(1):

To subject these speculative discussions to public review would interfere with the frank and open exchange of ideas and have a chilling effect on the participation of those employees in the public body whose duties and functions require them to develop recommendations and proposals for management. This would ultimately impact the ability of the public body to govern itself.

[para 33] I find the Public Body did not properly exercise discretion to withhold information under section 24. The Public Body appears to have considered only the negative effect that disclosure may have on its operations. There is no indication that it considered the interest in open government, the interests of the Applicant in receiving the information, or benefits of disclosing or withholding information. I also note that the Public Body's statements that disclosure will have a chilling effect and impact governance are bald assertions, without explanation of how or why that would be the case. I cannot see from the information withheld that either would likely be the case.

V. ORDER

[para 34] I make this Order under section 72 of the Act.

[para 35] I confirm that the Public Body properly withheld information as non-responsive.

[para 36] I order the Public Body to reconsider its exercise of discretion to withhold information under sections 19 and 24 of the Act, and to release to the Applicant any further information that it finds it should. When reconsidering the exercise of discretion, the Public Body should consider both public and private interests, the interest in open government, as well as both harms and benefits of disclosure, and balance them against each other.

[para 37] I order the Public Body to inform the Applicant of the resulting decisions regarding reconsideration of sections 19 and 24(1). If the Public Body decides to continue to withhold the same information or some of it, I reserve jurisdiction to review its

decision to continue withholding information, in the event the Applicant objects to the continued withholding. If the Applicant objects to the manner in which the Public Body has re-exercised its discretion, he must notify me and the Public Body within 60 days of receiving notice of the Public Body's decisions following its reconsideration of its withholding of information.

[para 38] I order the Public Body to confirm to me in writing that it has complied with this Order within 50 days of receiving it.

John Gabriele
Adjudicator