

[REDACTED]



October 28, 2022

[REDACTED]



[REDACTED]

Dear Mr. De Souza and Ms. McPhail:

**RE: Request for Review File #: 019769
Alberta Energy Regulator (AER) File #: 2020-G-0037**

I am writing in response to Mr. Mike De Souza (the Applicant) asking this Office to review a decision made by the Alberta Energy Regulator (AER) regarding an access request he made under the *Freedom of Information and Protection of Privacy Act* (FOIP or the Act). The Commissioner accepted the review request under section 65 of the Act and assigned me to investigate and try to settle this matter. My findings follow.

Background

The Applicant submitted an access request on October 9, 2020 to the AER requesting the following information:

Copies of the last draft or available copy of any report, watch list and/or analysis that was used to support a statement on slide AER 7 of a May 14, 2020 presentation by Martin Foy to the AER board (entitled "AER Industry Relief COVID-19 Response – an overview") that indicated AER believed operators were shutting down facilities and equipment without following proper suspension and decommissioning procedures.

The AER responded to the Applicant in a letter dated December 2, 2020 indicating that three records/pages were responsive to his request, however some of the information was being withheld pursuant to sections 24(1)(a) and 24(1)(f) of the Act.

Request for Review

The Applicant submitted a Request for Review form on January 20, 2021 indicating he disputed the decision to withhold the information requested.

Response to Request for Review

[REDACTED]

On September 16, 2021 the AER provided me with redacted and unredacted copies of the records. On August 29, 2022 the AER provided submissions and further information reviewed below.

Issue

The following issue was addressed:

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

Findings

For the reasons which follow, I find the AER properly applied section 24(1) to some records but not others and did not properly exercise its discretion under section 24;

Analysis

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

Section 24(1) specifically refers to “advice from officials” and contemplates the non-disclosure of information generated during the decision-making process but not the decision itself. Section 24(1)(a) applies to a record which reveals advice, proposals, recommendations, analyses, or policy options. The person with authority to take an action or implement a decision needn’t necessarily have received the advice or been part of every consultation or deliberation for section 24(1) (a) to apply. (The FOIP Act may be accessed online at: <https://www.qp.alberta.ca/documents/Acts/F25.pdf>)

Section 24(1)(a) is meant to ensure internal advice and information may be developed for the use of a decision maker without interference. In order for section 24(1)(a) to apply, the information must show there is advice, proposals, recommendations, analysis or policy options ("advice") developed by or for a public body, and the "advice" must be:

- a) sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- b) directed toward taking an action or making a decision; and
- c) created for the benefit of someone who can take or implement the action.

(Order F2018-14 Para. 58) (Copies of Orders referred to can be found on the OIPC website at: <https://oipc.ab.ca/decisions/orders/>.)

As noted in Order F2020-16 (see Paras. 51-52) section 24(1)(a) applies only to information in records which reveal substantive information about which advice was sought or consultations or deliberations were being held. Information of names of individuals involved in the advice or consultations, or information which involve bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) unless the information is so interwoven with the advice, proposal or recommendations that they cannot be separated.

Past Orders of this Office have said that, advice, proposals, recommendations, analyses, and policy options are largely synonymous terms, and describe the information employees of a public body may provide to an individual empowered to make decisions on behalf of a public body, such as a member of the Executive Council, in order to assist that individual or individuals, to make decisions on behalf of a public body. The information in question will put forward a course of possible action or evaluate various courses of action, in relation to an area or issue where an individual or individuals

courses of action, in relation to an area of issue where an individual or individuals responsible for making decisions on behalf of a public body, or a member of the executive council, is considering taking action or could consider taking action.

The second part of the test requires a nexus between the advice and the taking of some action. In order to satisfy this part of the test the advice must contain more than mere factual information and must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

The third branch of the test is met if the information described in section 24(1)(a) was developed by a public body, or for the benefit or use of a public body or a member of the Executive Council, by someone whose responsibility it was to do so. The information falls under section 24(1)(a) regardless of whether the individual or individuals ultimately responsible for making a decision receives that information. The third branch of the test requires the information was "created for the benefit of someone who can take or implement the action".

In Order 97-010, the former Commissioner defined the term "substance" as "*having its normal dictionary meaning of essence, the material or essential part of a thing.*" In Order F2018-14 at para 41, the Adjudicator stated:

"The Public Body's arguments confuse "substance of deliberations" with the topic of deliberations or issues being deliberated. The latter is much broader than the former. The disclosure of factual statements or document headings would reveal the subject-matter of the deliberations; however, the test is whether the information would reveal views, advice, recommendations, pros and cons, reasons, rationales, etc. ..."

Section 24(1)(f) 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 (f) the contents of agendas or minutes of meetings"

In Order 96-012, our Office has found that under section 24(1)(f) a public body may refuse to disclose information which could reasonably be expected to reveal the contents of agendas or minutes of meetings, which includes both information revealing those contents as well as the contents themselves (see Paras. 59-60). However, Order 96-012 also states section 24(1)(f) applies only to the minutes and not to attachments to the minutes:

"... I do not think that the definition of "minutes" should be extended to include attachments. If attachments are to be severed, it should be because an exemption applies to the information contained in those attachments..." (Para. 63)

Discretion

Section 24 is a discretionary provision so a public body can still decide to disclose the information. In exercising its discretion a public body must show it considered the objects and purposes of the Act (one of which is to allow access to information) and did not exercise its discretion for an improper or irrelevant purpose. A public body must weigh all relevant considerations for and against disclosure, including the purposes of the Act and section 24, the public interest in disclosure and the applicant's interest in the information in the context of the specific information at issue.

The burden of showing the appropriate exercise of discretion lies on the public body. Its reasons for refraining from disclosure are subject to review by the Commissioner. If disclosure is not properly exercised, a public body will be asked to reconsider its exercise of discretion to withhold the information. The following factors are relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;
- the decision took into account irrelevant considerations; and
- the decision failed to take into account relevant considerations.

If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, degrade, or impair identified interests of the public body (*Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, [2020 ABQB 10](#) Para. 419). As noted in Order F2018-36:

"...The Public Body manages these records for the benefit of the public. If it decides to withhold records from an applicant, it must find that doing so benefits the public interest, rather than the private interests of its representatives, such as their personal expectations. ..." (Para. 232)

The AER redacted information under section 24(1)(a) on pages 1 and 2 and redacted information under 24(1)(a) and (f) on page 2.

On the face of the record I find that the following information withheld under section 24(1) is information which is advice, proposals, recommendations, analysis prepared by the AER:

- Page 1 - information redacted after in section titled "*Alternative 3*"
- Page 2 - information redacted after in section titled "*Alternative 1*"; and
- Page 3 - all redacted information

As such, I find the AER properly applied section 24(1)(a) to the information noted above.

I asked the AER for submissions regarding the application of section 24(1)(a) and (f) to the remaining redactions and to its exercise of discretion for all redactions. The AER responded that in regard to the information it redacted pursuant to section 24(1)(f), it would drop the application of section 24(1)(f) but would continue to apply section 24(1)(a).

Regarding its application of 24(1)(a) to the remaining information it submits the following:

- *Two bullets under the heading "Highlights": The two bullets withheld were not factual; it was advice and professional opinions of AER subject matter experts provided to an AER Executive to support a recommendation for a decision to be made, who was in a position to make a decision and implement it. The information falls into the category of advice and analysis and if revealed, would have a negative effect on subject matter experts (i.e. being less candid when providing advice).*
- *Two bullets under the heading "Statistics": The statistics redacted are confidential information; it was used and provided by specific AER subject matter experts to support a recommendation for a decision to be made by an AER Executive, who was in a position to make a decision and implement it. Even though the*

information is itself statistics, it is confidential, as set out in s. 12.152(1)(2) of the Oil and Gas Conservation Rules, as follows:

12.152(1) A licensee shall provide financial and reserves information to the Regulator as and when directed by the Regulator for the purpose of

- (a) assessing licensee eligibility,*
- (b) administering the liability management programs set out in Directives published by the Regulator, or*
- (c) otherwise to ensure the safe, orderly and environmentally responsible development of energy resources in Alberta including closure.*

(2) The information provided under this section must be kept confidential by the Regulator as follows: (a) in the case of financial information, for a period of 5 years;

- I am advised by the appropriate AER subject matter experts that information related to [redacted]* and assessments arising out of that information, falls under the confidentiality protection of s. 12.152(1)(2) of the Oil and Gas Conservation Rules. The last bullet pertaining to [redacted]* is internal advice created and used to inform an AER Executive who was in a position to make a decision and implement it. The AER considers the information under those two bullets to be s. 24(1)(a) advice and recommendations, supported by s. 12.152(1)(2) of the Oil and Gas Conservation Rules and if revealed, would have a negative effect on future decision making to resolve issues.*
- Four points under the subheading “Examples”: The four points withheld are advice and professional opinions of AER subject matter experts, provided to an AER Executive to support a recommendation for a decision to be made, who was in a position to make a decision and implement it. The information falls into the category of advice and analysis. You will note the heading of that section is “Analysis”. If that information is revealed, it would have a negative effect on subject matter experts (i.e. being less candid when providing advice).*

The AER’s submissions lack information as to how the redacted information, if disclosed, would reveal advice, proposals, recommendations, analyses, and policy options and how the information is directed toward taking an action or making a decision. It is not clear to me the information would reveal substantive information or would reveal information regarding a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberation process.

Regarding the information which AER claims falls under the confidentiality protection of s. 12.152(1)(2) of the *Oil and Gas Conservation Rules*, the need for confidential protection on its own does not automatically engage section 24(1)(a). There are other sections of FOIP which may apply to information which a public body has been provided confidentially, however section 24(1)(a) is about advice from officials and not about confidentiality of the information at issue.

Discretion

Regarding its exercise of discretion, the AER provided no submissions on how it considered and weighed relevant factors for and against disclosure, including the

purposes of the Act and that it did not exercise its discretion for an improper or irrelevant purpose.

Based on my review of the redacted information and the lack of submissions from the AER I find that AER did not properly exercise its discretion to withhold all the information at issue.

Conclusion and Recommendations

In my opinion the AER properly applied section 24(1) to some records but not others (as noted above). As well, given it has not provided any submissions regarding its exercise of discretion and given the nature of the information at issue, I cannot find that the AER properly exercised its discretion in applying section 24(1) to all of the information at issue.

I recommend the AER reconsider its application of section 24(1)(a) to the information noted above and reconsider its exercise of discretion in withholding the all of the information at issue. I ask the AER to inform the Applicant in writing, with a copy to me, by **November 14, 2022**, as to whether it has accepted the recommendations and if so provide an expected timeline for disclosing the information.

Findings & Recommendations

If the Applicant believes this investigation did not resolve all of the issues, the Applicant may request that the Commissioner hold an inquiry into the matter under section 69 of the FOIP Act.

- The Commissioner's decision to hold an inquiry is **discretionary**, meaning the Commissioner may or may not decide to hold an inquiry.
- My analysis and conclusions are not used in the inquiry process. The inquiry process is a new evaluation of the issues.
- The background information provided by the Applicant and the AER during this investigation will be used in the inquiry process.
- If the inquiry request is accepted by the Commissioner, you will be required to provide a separate submission for the inquiry process to our Adjudication Unit.
- The Commissioner or a delegate will consider submissions of both parties and then decide questions of fact and law independent of the mediation and investigation process.

The mediation/investigation phase of this file will conclude on November 21, 2022.

If you wish to request an inquiry, I must receive a completed "Request for Inquiry" form, by **November 21, 2022**. **Failure to submit a Request for Inquiry form by this date may require you to provide an explanation to the Commissioner. It will be at the Commissioner's discretion to accept the request for inquiry.**

Further information about the inquiry process and form can be found at:

- Inquiry Procedures: <https://oipc.ab.ca/resource/inquiry-procedures/>
- Inquiry Forms: <https://oipc.ab.ca/resource/inquiry-forms/>

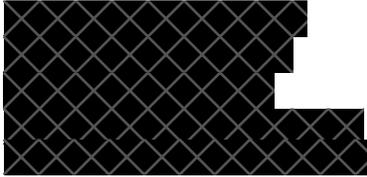
Sincerely,



Senior Information and Privacy Manager

*This information has been redacted to ensure the nature of the records at issue is not inadvertently released.

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