Office of the Information and
Privacy Commissioner of Alberta

Sent by email
November 8, 2022

Mr. Mike De Souza
[redacted]

Ms. Reta McPhail
FOIP Coordinator
Alberta Energy Regulator (AER)
Suite 1000 Centennial Place
250 - 5th Street SW
Calgary, AB T2P 0R4

Dear Mr. De Souza and Ms. McPhail:

RE: Request for Review File #: 019771
Alberta Energy Regulator (AER) File #: 2020-G-0014

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 May 12, 2020 to the AER requesting the following information:

> *"All formal correspondence (i.e. signed letters) between the AER and the Canadian Association of Petroleum Producers between March 1, 2020 and May 11, 2020, that are related to the COVID-19 crisis and requests for relief from existing regulations and legislation, including any presentations delivered during meetings.*
>
> *All formal correspondence (i.e. signed letters) between the AER and the Explorers and Producers of Canada between March 1, 2020 and May 11, 2020, that are related to the COVID-19 crisis and requests for relief from existing regulations and legislation, including any presentations delivered during meetings.*
>
> *Specifically, records that lead to decisions 20200505A, 20200501A, 20200501B, 20200501C, 20200429A, 20200429B, 20200429C, and 20200429D. These consist of four decisions on April 29 that changed the conditions of approvals of projects operated by Suncor, CNRL, Imperial Oil and Syncrud (and subsidiaries or affiliates). These four decisions were later amended on May 1 and May 5."*

The AER responded to the Applicant in a letter dated December 11, 2020 stating that it had compiled and reviewed 36 records/pages plus one Excel spreadsheet. Of these 36 pages:

- 26 pages were withheld in their entirety under sections 24(1)(a) and (g) (pages 2-10 and 14-30);
- the Excel spreadsheet was withheld in its entirety under sections 24(1)(a) and (g);

- two pages were excluded as non responsive (pages 31-32); and
- eight pages were released.

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. The Applicant also raised the issues of delays in processing his access request noting:

> *"There were extraordinary delays to provide a complete response, stretching out by more than six months, related to my requests for information about a unilateral regulatory decision with serious public health, environmental and safety concerns, that was conducted based on private discussions with industry stakeholders and no consultation with members of the public or First Nations."*

Response to Request for Review

On September 16, 2021 the AER provided me with a copy of the records at issue. On August 26, 2022 the AER provided submissions and further information reviewed below.

Issues

1. Did the AER comply with section 11(1) of the Act when responding to the Applicant's access request?
2. Did the AER properly apply section 24(1) of the Act (advice from officials) to the information in the records?
3. Did the AER properly redact information as non responsive?

Findings

For the reasons which follow, I find the AER:

1. did not comply with section 11(1) of the Act;
2. properly applied section 24(1) to some records but not others and in applying redactions in a blanket fashion did not properly exercise its discretion under section 24; and
3. properly applied non responsiveness to the records at issue.

Analysis

1. Did the AER comply with section 11(1) of the Act when responding to the Applicant's access request?

Section 11[1] of the Act requires a public body to respond to an access request no later than 30 days after receiving it, unless that time limit is extended under section 14. Failure to respond within the 30 day period or any extended period is treated as a decision to refuse access to the record. Section 14 recognizes it may take longer than 30 days to respond to an applicant under certain circumstances. Under section 14(1), a public body may extend the time limit by another 30 days for a total of 60 days.

[1] The FOIP Act may be accessed online at: https://www.qp.alberta.ca/documents/Acts/F25.pdf

Anything longer than this timeframe requires the Commissioner's permission. In addition section 14(3) states:

> *"(3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31."*

On April 9, 2020, the Government of Alberta issued *Ministerial Order No. SA:009/2020* (MO). Section 1(1) of the MO modified section 11 of FOIP to extend the legislative timeline for responding to an access request from 30 days to 90 days. Section 1(2) of the MO modified section 14(1) of FOIP to allow a public body to extend the time for responding to an access request to 60 days or, with the Commissioner's permission, for a longer period if, in the opinion of the head of a public body, the pandemic COVID-19 unreasonably interferes with the operations of the public body. Therefore, the MO changed the usual 30-60 day time period to respond to a request to 90-150 days.

The AER provided the following submissions regarding the extension it took to process the access request and providing the Applicant with the records:

- *May 12, 2020: The AER received four FOIP requests from this FOIP applicant.*
- *June 10, 2020: AER letter to the FOIP applicant, extending the time period to respond to the four FOIP requests to August 10, 2020, (i.e. 90 days from May 12, 2020) pursuant to Service Alberta temporary extensions because of COVID-19 and public bodies working remotely.*
- *July 29, 2020: AER letter to the FOIP applicant, extending the time period 60 days to respond to this FOIP request to September 28, 2020 for consultations with affected Third Parties and other public bodies … pursuant to Service Alberta's temporary extensions because of COVID 19 and public bodies working remotely.*
- *September 15, 2020: AER letter to the FOIP applicant with the AER's access decision. The AER withheld records pending an affected Third Party's opportunity to request an OIPC Review of the AER's access decision. The hold period was 20 days, expiring on October 5, 2020.*
- *August 31, 2020 to December 7, 2020: The AER consulted with [another Public Body] on a different FOIP request regarding similar records to those at issue in this OIPC Review. After having compared the similar records in the two FOIP requests (two different FOIP applicants), the AER felt it was prudent to wait for [the Public Body's] response before releasing records in this FOIP request. The AER expected a prompt response and followed up several times with [the Public Body]. [The Public Body] finally responded to the AER on December 7, 2020 that it objected to the disclosure of portions of the records provided for consultation (on the other FOIP request). The AER provided a courtesy to [the Public Body] not to release records of similar nature but did not expect to wait three plus months for a response. Based on [the Public Body's] recommendation and request to withhold information on the other FOIP request, the AER changed its September 15, 2020 access decision to the FOIP applicant (i.e. to withhold the records that are now the records at issue on this FOIP request). The AER wishes to ask the OIPC to comment on a public body's obligation to withhold or redact records based on the recommendations and requests from other public bodies. The AER provided a courtesy to [the Public Body], at the expense of responding to the FOIP applicant within the extended timeframe*

provided at the time by following [the Public Body]'s recommendation and request to withhold records, which has now resulted in the AER having to explain its delay in responding to the FOIP applicant.

- *December 10, 2020: AER letter to the FOIP applicant with its revised access decision and released partial records.*

As extenuating circumstances, the AER also noted that during the time period it had received numerous FOIP requests from different individuals, including this Applicant.

Under the MO, the AER could take a maximum of 150 days to respond to an access request, before being required to come to our Office for an extension. The access request was submitted on May 12, 2020 and the response was provided on December 10, 2020 which is well beyond the 150 days timeline. As such, I find that the AER failed to comply with section 11 of the Act. However, my only recommendation would have been for the AER to provide a response which it obviously has done. As such there is nothing further I can recommend regarding this issue. I can say that it remains unclear to me why it would take 150 days (regardless of the extra time to consult with another public body) to process an Excel spreadsheet and 36 pages of records even with the limitations COVID-presented.

The AER indicates it was dealing with numerous access request at the time it was processing this access request. As noted in Order F2021-46, Para. 3, staffing is within the control of a public body and as such can not be relied upon to justify delay in regards to complying with section 11. However, I also note that under section 14(2), a public body may apply to the Commissioner to extend the time to respond to an access request if multiple concurrent requests have been made by the same applicant or have been made by 2 or more applicants' who work for the same organization. The Public Body did not do that.

In its submission, the AER asked our Office to comment on "*…on a public body's obligation to withhold or redact records based on the recommendations and requests from other public bodies."* There is nothing in the legislation which requires the AER to consult with another public body. Section 30 requires a public body to notify a third party if it is considering giving access to information which may affect the interest of a third party (section 16) or which may unreasonably be an invasion of a third party's personal privacy (section 17). However, further to section 1(r), a public body is not third party[2] and as such section 30 requirements do not apply in regards to consultation with public bodies.

Section 14(1)(c) is a discretionary provision and as such it is up to the AER to decide whether or not to consult with another public body. However, regardless of its decision to consult with the Public Body, the records at issue are under the custody and control of the AER and it is its responsibility to respond according to the timelines of the Act and to ensure its decision to withhold or redact information is authorized by the Act. It cannot rely on the recommendations/requests of another public body to justify withholding information in regards to an access request it is responding to. To be clear, the AER must

[2] A third party is defined in section 1(r) as "*a person, a group of persons or an organization other than an applicant or a public body".*

base its decisions regarding the redactions or withholding of information on FOIP and not on requests or recommendations of another public body.[3]

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

Section 24(1)[4] 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.

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)[5].

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 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.

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[3] In addition, taking into account another public body's requests/recommendations could be considered an inappropriate exercise of discretion as the AER would be taking into account 'irrelevant considerations' (see discussion of the exercise of discretion below).

[4] The FOIP Act may be accessed online at: https://www.qp.alberta.ca/documents/Acts/F25.pdf

[5] Copies of Orders referred to can be found on the OIPC website at: https://oipc.ab.ca/decisions/orders/.

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 Counsel, 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 to have been "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 art 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)(g) 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*
>
> *…*
>
> *(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision,*

This section applies to information which could reasonably be expected to result in the disclosure of a pending policy or budgetary decision. In Order F2008-008, the Adjudicator considered the scope of this provision. He stated *"[i]n referring to a decision that is pending, I believe that the intent of section 24(1)(g) of the Act is to protect a decision that has already been made – and not merely any number of possible decisions"*.

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 that it 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.[6] 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)

Additionally, as noted in Order F2020-23 (Para. 196) applying a blanket approach to redacting information under a discretionary provision results in a fettering of discretion and, therefore, demonstrates applying it improperly.

The AER responded that in regard to the information it redacted pursuant to section 24(1)(g), it would drop the application of section 24(1)(g) but would continue to apply section 24(1)(a).

Regarding its application of section 24(1)

> *"The records are working documents used to provide advice, recommendations and analyses of a multi-stakeholder working group, information which falls within one or more of the classes of information to which the s. 24(1)(a) exception of the Act to disclosure applies. The AER believes the release of the information would reveal those classes of information and have a negative effect on future development of strategies. The information was provided by subject matter experts in positions to speak to the issues at hand, was directed toward taking an action to resolve issues and made to AER personnel, in positions to implement the recommendations. The AER believes the withheld information meets the three-part test to withhold."*

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. There is some limited amount of information in the records at issue which are clearly recommendations to which 24(1)(a) would apply. However, I do not believe that the majority of information redacted on the records at issue would reveal substantive

[6] *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 Para. 419.

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, and I find that section 24(1)(g) was not properly applied by the AER.

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. As well, the AER applied section 24(1)(a) in a blanket fashion in regards the information at issue. As such, 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.

3. Did the AER properly redact information as non responsive?

"Responsiveness" means anything which is reasonably related to an applicant's request for access. Therefore, when determining "responsiveness," a public body is determining what information or records are relevant to the request. It follows that any information or records which do not reasonably relate to an applicant's request for access will be "non-responsive" to the request (Order F2018-35 Para. 11). A public body is only required to provide a response in relation to information which reasonably relates to the access request.

The Applicant's access request is for formal correspondence between the AER the Canadian Association of Petroleum Producers and the Explorers and Producers of Canada related to the COVID-19 crisis and specifically records that lead to decisions 20200505A, 20200501A, 20200501B, 20200501C, 20200429A, 20200429B, 20200429C, and 20200429D.

The AER provided further submissions on how it determined pages 31-32 to be non responsive, including information on how it determined that the two pages were not related to the decisions noted in the Applicant's access request. Based on the submissions and a review of the records at issue I agree and find the AER properly applied non responsiveness to these two records.

Conclusion and Recommendations

In my opinion I find the AER:

- did not comply with section 11 of the Act;
- did not properly apply section 24(1)(a) to the information at issue and did not properly exercise its discretion when deciding to withhold the information at issue; and
- properly applied non responsiveness to the information at issue.

I recommend the AER reconsider its application of section 24(1)(a) to the information noted above as well as reconsider its exercise of discretion in withholding all information withheld under section 24(1)(a). I ask the AER to inform the Applicant in writing, with a copy to me, by **November 22, 2022** as to whether it has accepted the recommendations and if so provide an expected timeline for their implementation.

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 29, 2022.

If you wish to request an inquiry, I must receive a completed "Request for Inquiry" form, by **November 29, 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,

[redacted]

Senior Information and Privacy Manager