

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2020-11

May 28, 2020

ALBERTA ENVIRONMENT AND PARKS

Case File Number 007928

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) for records related to a respectful workplace investigation. The Applicant believed that further responsive records existed beyond what Alberta Environment and Parks (the Public Body) provided in response to the access request. Consequently, he sought a review of the Public Body's response to the access request, and whether the Public Body fulfilled its duty under section 10(1) of the Act.

The Adjudicator found that the Public Body failed to establish that it met its duty. He found that the Public Body's submission at inquiry was too general to establish that it properly searched for responsive records. He also found that the Public Body omitted to search for the records of an individual who likely had responsive records, and that it had truncated a search for other possible responsive records.

The Adjudicator ordered the Public Body to respond to the access request as required by s. 10(1).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 10(1), 72.

Authorities Cited: AB: Orders 97-006, 2000-030, F2004-008, F2007-029, F2009-043, P2012-07.

I. BACKGROUND

[para 1] On June 5, 2017, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to Alberta Environment and Parks (the Public Body). The Applicant sought the following information:

“All records, reports, emails, notes, and other information related to the Respectful Workplace Information Form and associated investigation filed against me to Environment and Parks on [date]. Name: [Applicant’s Name] ID: [Applicant’s Employee Number].”

[para 2] On June 13, 2017, the Applicant received a letter from the Public Body’s Access and Privacy Advisor acknowledging the access request.

[para 3] On November 27, 2017 the Public Body provided the Applicant access to 93 pages of records, with some redactions made under Part 1 of the Act. The letter accompanying the records was again signed by the Access and Privacy Advisor.

[para 4] In the request for review, the Applicant provided reasons for his belief that there are responsive records that were not provided by the Public Body.

[para 5] The Applicant was present at an investigation meeting concerning the Respectful Workplace Information Form. Also at the meeting were two of the Public Body’s Human Resources Consultants; one male and one female. (Human Resources Consultants A and B, respectively). The Applicant observed the Human Resources Consultants taking hand-written notes. Those notes were not included in the records provided in response to the access request.

[para 6] The records provided in response to the access request mentioned various other meetings, telephone calls, and discussions. The Applicant believes there should be records related to these communications as well.

[para 7] The Applicant filed a request for review of the response to the access request with this office. Investigation and mediation were authorized to resolve the matter, but did not. The matter proceeded to inquiry.

II. ISSUE

Issue A: Did the Respondent meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

III. DISCUSSION OF ISSUE

Issue A: Did the Respondent meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 8] Section 10(1) of the Act states,

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 9] The two parts of the duty to assist in section 10(1) were set out in Order F2004-008 at para 32:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?
- Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?

[para 10] The burden of proof falls on the Public Body to demonstrate that it met its duty under section 10(1). (See Order 97-006). A public body must provide the Commissioner with sufficient evidence to show that the public body has made a reasonable effort to identify and locate records responsive to the request. (See Order 2000-030). Former Commissioner Work, Q.C. described the general points that a public body's evidence should cover in Order F2007-029 at para. 66:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 11] The Public Body provided an unsworn statement from its FOIP Coordinator explaining its efforts to respond to the access request. The statement addresses each of the factors from Order F2007-029 listed above.

[para 12] The Applicant did not make a submission at inquiry.

Specific Steps Taken

[para 13] The response to the access request was coordinated by the Public Body's Manager of Human Resources Client Services. At the time of the access request, Human Resources was investigating the allegations in the Respectful Workplace Information Form. Since it was an active investigation, Human Resources was in position to locate and identify responsive records.

[para 14] The Public Body admits that it had difficulty determining exactly what steps it took to respond to the access request. The Public Body attributes the difficulty to a "major reorganization" of Human Resources Services since the time of the investigation. The Public Body does not provide any details of the reorganization, including who and what records were affected by it.

Scope of the Search

[para 15] Regarding the scope of the search, the Public Body states that it looked for responsive records in the following types of locations:

- Active files located in program area offices both hard copy and electronic records
- Electronic databases
- Staff (Offices/Emails)
- Shared drives
- SharePoint Sites

[para 16] The Public Body did not, however, specify which electronic databases, shared drives, or SharePoint Sites were searched. The actual locations it searched remain unknown, as do the identities of the staff whose offices or e-mails were searched.

The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.

[para 17] Here, it appears that the reorganization has substantially limited the Public Body's ability to respond.

[para 18] The Public Body does not specify what, if any, keyword searches it undertook.

[para 19] Similarly, it has not described specific steps taken. It states as follows:

The records requested were specific to the investigation of the Respectful Workplace complaint which was the responsibility of the Human Resources Branch Client Services of Alberta Environment and Parks. As this was an active investigation, the Human Resources Branch managed the search. It is difficult to determine what specific steps were taken as Government of Alberta Human Resources Services have undergone a major reorganization since the investigation.

As these were current records, only the Transitory Records Schedule would have been applicable.

[para 20] Later in its submission, regarding notes taken during investigation meetings, the Public Body describes Transitory Guidelines as follows:

The Government of Alberta Transitory Guidelines define a Transitory Record as “records in any format that are of short-term value, with no further uses beyond an immediate transaction” and “are only required for a limited period of time to complete a routine action or to prepare a subsequent draft or final version.”

[para 21] I take the Public Body to be stating that it considered notes from the investigation meetings to be transitory records, destroyed pursuant to the Alberta Transitory Guidelines. The Public Body did not provide these guidelines to me.

[para 22] There is no description of when or how transitory records are dealt with or destroyed generally, or who was responsible for that process in this case.

Who Conducted the Search

[para 23] In addition to coordinating the overall response to the access request, the Manager of Human Resources Client Services conducted the search for responsive records in the Human Resources part of the Public Body, along with Human Resources Consultant A, and the Human Resources Consultant who served as the lead investigator into the respectful workplace complaint [Human Resources Consultant C]. Other individuals conducted the search for responsive records in the Public Body’s policy and planning division. The search in this area was carried out by the Executive Director, Fish & Wildlife Policy Branch; the Director, Species at Risk/Wildlife Disease, Fish and Wildlife Policy Section; and the Section Head, Wildlife Policy Section.

[para 24] There is no indication that Human Resources Consultant B was involved in the search.

Why the Public Body believes no more responsive records exist other than what has been found or produced

[para 25] The Public Body addresses this consideration under three headings; each addressing documents that the Applicant believes may exist, but were not provided in response to the access request:

- Notes taken during Respectful Workplace Interviews
- Meeting minutes, notes, documents and calendar requests; requests for interviews; Notes associated with telephone conversations;
- Potentially Deleted Files

Notes taken during Respectful Workplace Interviews

[para 26] The Public Body states,

Fact-finding meetings were held and handwritten notes were taken. However, the HR consultant transcribed the notes from all fact-finding meetings into the final Summary of Fact-finding Report.

The Government of Alberta Transitory Guidelines define a Transitory Record as “records in any format that are of short-term value, with no further uses beyond an immediate transaction” and “are only required for a limited period of time to complete a routine action or to prepare a subsequent draft or final version.” Once the handwritten notes were transcribed into the final Summary of Fact-Finding Report, they became transitory as defined above and were properly disposed of according to the Transitory Records Schedule.

The final Summary of Fact-Finding Report was provided to the Applicant.

Meeting minutes, notes, documents and calendar requests; requests for interviews; Notes associated with telephone conversations

[para 27] The Public Body states,

Given the sensitive nature of the complaint and the investigation, the Complainants were contacted on their personal cell phones for interviews and, therefore, no calendar requests or requests for interviews were created.

Respectful Workplace Policy and Process Notes resulting from meetings with the Complainants were provided to the Applicant with some severing of personal information of the Complainants and other Government of Alberta employees who were not involved in the complaint.

Meetings were held to discuss the management of the personnel involved in the Respectful Workplace incident. As there was no confirmation in the records that the recommendations were implemented, the information was withheld in its entirety under Section 24(1)(b)(i)(d).

Where there are references in emails to telephone discussions, scheduling available time for meetings to discuss the investigation or directions to take specific actions, there is no indication from the context that any notes, calendar requests, meeting minutes or other documents would have been created.

Potentially deleted files

[para 28] The Public Body states,

The potentially deleted files refers to an email between [Human Resources Consultant C] and [Human Resources Consultant A] that discusses the next steps to finalize the investigation.

[Human Resources Consultant C] transferred to a different ministry effective [date], however, as he had been the lead HR consultant, [the Manager of HR Services] requested that he complete the complaint investigation. In an email dated May 15, 2017 to [Human Resources Consultant A], [Human Resources Consultant C] describes the technical difficulties that he experienced getting access to AEP network files and work email. In his email, [Human Resources Consultant C] notes that he “had to pull everything together again from scratch.”

[The other Human Resources Consultant] comment thanking [the Lead Investigator] for “pulling this together even after your original was deleted” is misleading. The original deleted file refers to the Summary of Fact-Finding and Executive Summary documents that have been provided to the applicant. No notes from the fact-finding meetings were lost.

[para 29] The e-mails referred to by the Public Body in the above passage were not provided to me in this inquiry.

Other Records

[para 30] The Public Body also indicates that upon the initial review of the access request, it located five additional pages of responsive records. However, as of the filing of its submission in this inquiry, they had not been provided to the Applicant.

Conclusions on section 10(1)

[para 31] For the following reasons, I find that the Public Body has not met the burden of proof, on the balance of probabilities, that it met its duty under section 10(1).

[para 32] In several places, the Public Body’s description of its response to the access request is written in general terms. It specified types of locations searched, but not any specific locations. Similarly, it did not identify what keyword searches, if any, were used to locate records, and, (by reason of the reorganization of Human Resources Services) was not able to fully describe specific steps it took in response to the access request.

[para 33] I have considered that a lack of specific details does not automatically mean that a public body has failed to establish that it met its duty under s. 10(1). For example, in Order F2009-043, the Adjudicator stated, at para 23:

I have carefully reviewed the submission of the FOIP Coordinator regarding section 10 of the Act. He says that he personally advised the Manager of the request, and that he personally watched her access the records on her computer. Possibly, it is implicit in this statement that he communicated to the Manager the search terms that would elicit all e-mails between herself and the Employee (for example, that she used the Employee’s name as a search term). He also stated that he asked her if there were any records responsive to the request that may have been deleted, to which she replied that there were not, and that in addition she reviewed the “deleted records” folder to find any such e-mails. Possibly, it is implicit in this statement that the Manager understood that he was asking if there were any

other responsive e-mails in addition to those located through the initial search, and that the answer was no.

[para 34] The Adjudicator continued at para. 25:

It would have been preferable if the FOIP Coordinator had indicated, if this were the case, either that the search terms used would necessarily have elicited all responsive records, or indicated the particular search terms that were used. Despite this, I would be prepared to accept the points that are arguably implicit in the statements the FOIP Coordinator did make, and to find that the initial search had elicited all responsive records in the manager's computer, if it were not for two things.

[para 35] The "two things" referenced in the above passage are not germane to this case.

[para 36] Similar comments were made by the Adjudicator in Order P2012-07 at para. 23:

The Organization provided affidavit evidence regarding who conducted the search and the scope of the search. It would have been helpful had the Organization included some further detail about the search, such as which databases were searched, keywords used, and why the Organization believes that no further records exist.

[para 37] I note that in Orders P2012-07 and F2009-043, the Adjudicators had the benefit of receiving information from someone who was directly involved in the search for responsive records, or had the opportunity to directly observe the pertinent part of the search as it was carried out. In Order P2012-07 the Adjudicator was also provided with affidavit evidence¹; something that the Adjudicator in F2009-043 found was preferable to an unsworn statement.²

[para 38] The circumstances in this case differ from those in Orders P2012-07 and F2009-043. The Public Body's submission is an unsworn statement that appears to have been prepared by its FOIP Coordinator, who was not involved in the response to the

¹ See Order P2012-07 at para 19:

The Organization provided an affidavit sworn by the Medical Records Coordinator, who was one of the two employees who conducted the search. The affiant states that she conducted "a number of searches of all [the Organization's] electronic and paper files, and no other records exist relating to the Applicant or any services provided by [the Organization] to the Applicant other than what was provided to the Applicant on April 2, 2011. Such search efforts have been made by me on more than one occasion to ensure that I have retrieved all of the Records pertaining to the Applicant", and "[f]urther, no information in the Records provided to the Applicant was altered in any way."

² See Order F2009-043 at para. 21:

Although the Public Body states that it cannot provide further evidence from the Manager as to the scope of the search, it did provide further evidence in the form of the statement above, written by an individual who was involved in the search and can state what was searched. Ideally, this information would be put into a sworn affidavit or statutory declaration.

access request. There is no indication that the FOIP Coordinator observed any part of the search and there is no description in the submission of how the FOIP Coordinator came by any of the information in it. There is no supporting affidavit of any kind.

[para 39] In the absence of any clarification of whether any of the information in the Public Body's submission is from those actually involved in the search, I cannot find that it supports any conclusion about the search for records beyond what is plainly written there. While it stands to reason that the FOIP Coordinator, as an employee of the Public Body, was in position to know or obtain some knowledge of what was done in response to the Applicant's access request, there is no basis to infer any particular piece of knowledge of the response unless it is clearly stated. I am not, as the Adjudicator in Order F2009-043 was, in position to consider accepting anything that might be implicit in the FOIP Coordinator's statement.

[para 40] In respect of the above, I cannot infer that the Public Body searched for records in any particular place, or used any particular keywords. A proper scope of the search has not been established by the Public Body, on balance of probabilities. Thus, I cannot find that the Public Body responded to the access request openly, accurately, and completely as require under s. 10(1).

[para 41] In reaching this finding I considered that the Public Body attributes difficulty determining what steps were taken in response to the access request, to a reorganization of Human Resources Client Services. Again, there is no description of the reorganization or how it affected the Public Body's ability to determine the steps it took in response to the access request. I am therefore unable to assess whether the reorganization would have substantially impacted the Public Body's ability to provide information about its response to the access request. Had there been a detailed description of the reorganization I may have considered that it could account for the lack of detail in the Public Body's submission. Without one, I am unable to do so, and cannot conclude that the reorganization accounts for the Public Body's lack of detail.

[para 42] Leaving aside the issues above, the Public Body's submission describes a response to the access request that is insufficient to discharge its duty under section 10(1).

[para 43] There is no indication that Human Resources Consultant B was involved in the response to the access request or that any of her records were searched. There is also no description of how the Public Body's Access and Privacy Advisor was involved in the search. It seems to me that since the Access and Privacy Advisor sent the responsive records to the Applicant, that person must have been involved at some point.

[para 44] The Public Body also appears to have conducted a truncated search for documents related to certain matters mentioned in other e-mails that were provided to the Applicant in response to the access request. As already noted, it states,

Where there are references in emails to telephone discussions, scheduling available

time for meetings to discuss the investigation or directions to take specific actions, there is no indication from the context that any notes, calendar requests, meeting minutes or other documents would have been created.

[para 45] Here, it appears that the Public Body concluded that some records did not exist by considering whether the context of other records suggests they exist. Unless there is some reason that one record would normally mention the existence of another, the absence of a suggestion in one record that another record exists, does not lead to the conclusion that there is no further record. Further records may exist, without mention. I consider that if the Public Body determined that records did not exist based only its review of other records, it likely did not search for them.

[para 46] Finally, I consider that the Public Body offers confusing statements regarding the existence of notes taken during investigation meetings at the time of the access request.

[para 47] The Public Body suggests that, as transitory records, such notes were transcribed into the “Summary of the Fact-finding Report” that was provided to the Complainant” and then destroyed. The Public Body also describes that at the time of the access request, the investigation that the records sought relate to was still active. It could be that the notes were transcribed and destroyed while the investigation was ongoing. However, in my view, it seems equally likely that the notes would not be destroyed until after the investigation was completed, once their use was exhausted. Without knowing when the documents were destroyed, or even the details of the Alberta Transitory Guidelines that the Public Body states governed their destruction, I am hesitant to conclude that the Public Body properly determined that these records were already destroyed at the time of the access request.

[para 48] The result is that the Public Body has failed to meet the burden of proof to establish that it met its duty under s. 10(1). In respect of the deficiencies of the Public Body’s search, I cannot conclude that it responded to the access request openly, accurately and completely.

IV. ORDER

[para 49] I make this Order under section 72 of the Act.

[para 50] I order the Public Body to respond to the access request as required under section 10(1). The Public Body shall search for responsive records, and, subject to its authority under the Act to withhold information in response to an access request, provide the Applicant any further responsive records found.

[para 51] The search for responsive records will include, but is not limited to, the following:

- A search for records prepared by or in the possession of Human Resources Consultant B
- A search for records of matters mentioned in other e-mails provided to the Applicant
- A search for records that may have been destroyed

[para 52] I order the Public Body' to confirm, to the best of its ability, when and by whom any responsive records were destroyed.

[para 53] I order the Public Body to provide the Applicant and me with written notice that it has complied with this order within 50 days of receiving it.

John Gabriele
Adjudicator
/bah