

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-19

March 31, 2022

STRATHCONA COUNTY

Case File Number 005004

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to Strathcona County (the Public Body) for certain information. The Applicant revised the wording of his access request. The Public Body responded and provided the Applicant with 376 pages of records. The Applicant believed there were additional responsive records. The Public Body offered to conduct a second search based on the same wording and parameters of the Applicant's access request. The Public Body went ahead and conducted the second search. Subsequently, the Applicant submitted a second access request to the Public Body which was identical to the first access request, but with narrower date ranges. As the Public Body had already conducted a second search using the broader date ranges from the Applicant's first access request, it did not repeat the search a third time with the narrower date range. The Public Body provided the Applicant with 221 pages of responsive records located as a result of the second search.

The Applicant requested a review by this Office into whether the Public Body met its duty to assist the Applicant by conducting an adequate search for records. The Applicant sought a particular email (the Email), which he stated he was previously shown by an employee of the Public Body. The Public Body conducted a third search specifically for the Email but did not locate it. The Applicant requested an inquiry into the adequacy of the Public Body's search.

The Adjudicator found that the Public Body failed to meet its duty to assist the Applicant by not providing any explanation for not locating the Email the Applicant stated he was shown by an employee of the Public Body. Given the details the Applicant provided about who showed him the Email, when and where he was shown the Email, and the details he provided about the Email,

the Public Body should have provided the Applicant with not only details of the search it conducted but also an explanation for why the Email the Applicant stated he was shown could not be located.

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

Orders Cited: AB: Orders 97-003, 97-006, 98-003, 2000-020, 2001-016, F2007-029, F2009-012, F2013-23, F2014-08, F2017-59, F2019-34, F2021-11, F2021-23, and F2021-33.

I. BACKGROUND

[para 1] On July 29, 2016, an individual (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 Strathcona County (the Public Body) for “all records, paper and electronic, that includes my name or any personal information regarding myself”. The date range for his request was May 1, 2016 – July 29, 2016 (the First Access Request).¹

[para 2] On August 8, 2016, the Public Body’s Advisor, Access & Privacy, (the FOIP Advisor) corresponded with the Applicant to clarify his request. The Applicant reworded his request as follows:²

- All records of communication, including but not limited to, e-mails, lync or other messenger conversations, and text messages regarding [Applicant’s first name (Applicant’s first name that he goes by) Applicant’s last name] that are in the custody of the following Strathcona County staff members:
 - [Title, Name of Employee A]
 - [Title, Name of Employee B]
 - [Title, Name of Employee C]
 - [Title, Name of Employee D]
 - [Title, Name of Employee E]

The date range for the access request was:

- 1.) January 1, 2013 – December 31, 2013
- 2.) September 1, 2014 – December 31, 2014
- 3.) January 1, 2016 – August 8, 2016

[para 3] This reworded access request is referred to herein as the Revised First Access Request.

¹ Applicant’s Access Request dated July 29, 2016 attached to Applicant’s Request for Review/Complaint Form dated January 20, 2017 (Request for Review/Complaint).

² Affidavit of Advisor, Access & Privacy for the Public Body sworn January 16, 2020 (FOIP Advisor’s Affidavit) at para. 4.

[para 4] The Public Body assigned file number 2016-P-0019 to the Applicant's Revised First Access Request.³

[para 5] The Public Body conducted a search (the First Search) for responsive records. On October 7, 2016, it provided 376 pages of responsive records to the Applicant, severing some information under section 17(1) of the Act, and removing some information that was non-responsive to his request (the First Response).⁴

[para 6] On October 7, 2016, the Applicant received the responsive records and contacted the FOIP Advisor to inform her that he felt there were additional records that had not been provided to him.⁵

[para 7] On October 17, 2016, the Public Body was notified that the Applicant had requested a review by this Office of the adequacy of the Public Body's First Search.⁶

[para 8] On October 21, 2016, the Applicant met with the FOIP Advisor to discuss the Applicant's concerns with the search results. The FOIP Advisor offered to have the Public Body conduct a second search based on the same wording and parameters to the Applicant's Revised First Access Request.⁷

[para 9] On November 1, 2016, the Public Body's Coordinator, Access & Privacy (the FOIP Coordinator) initiated a second search based on the same wording and date parameters to the Applicant's Revised First Access Request (the Second Search).⁸

[para 10] On November 1, 2016, the Public Body was informed by this Office that the Applicant elected to proceed with his request for review of the adequacy of the Public Body's First Search (Public Body's file number 2016-P-0019).⁹

[para 11] On November 2, 2016, the FOIP Coordinator received the results of the Second Search.¹⁰

[para 12] On November 3, 2016, the Applicant informed the Public Body's FOIP office that he was going to withdraw his request for review of the Public Body's First Search (2016-P-0019).¹¹

³ FOIP Advisor's Affidavit at para. 3.

⁴ Public Body's Response Letter dated October 7, 2016, attached to Applicant's Request for Review/Complaint, and FOIP Advisor's Affidavit at para. 7.

⁵ Applicant's Request for Review/Complaint at page 1 and FOIP Advisor's Affidavit at paragraph 8.

⁶ FOIP Advisor's Affidavit at para. 9.

⁷ Applicant's Request for Review/Complaint at page 2 and FOIP Advisor's Affidavit at paras. 10 and 11.

⁸ Affidavit of Coordinator, Access & Privacy for the Public Body sworn January 16, 2020 (FOIP Coordinator's Affidavit) at para. 11.

⁹ FOIP Coordinator's Affidavit at para. 12.

¹⁰ FOIP Coordinator's Affidavit at para. 13.

¹¹ FOIP Coordinator's Affidavit at para. 14.

[para 13] The Public Body stated that on November 8, 2017, it was informed by this Office that the Applicant had decided to proceed with his request for review of the adequacy of the Public Body's First Search (2016-P-0019). The Public Body advised that processing the search results (for the Second Search) was placed on hold while the Public Body awaited further direction from this Office.¹²

[para 14] On November 23, 2016, the Applicant wrote to this Office. In his letter, he stated:¹³

On October 21, 2016 I had a meeting with Strathcona County FOIP Analyst [name] and we discussed a few options that could take place before my request for you [sic] review the file.

Ms. Jill Clayton or your designate I ask that your review of the FOIP File Number: 2016-P-0019 be withdrawn.

I am proceeding to have a [sic] another more detailed FOIP request done with Strathcona County.

[para 15] On November 23, 2016, the Applicant sent a second access request (the Second Access Request) to the Public Body which was identical to the Revised First Access Request, but for the following narrower date parameters:¹⁴

- 1.) July 19, 2013 – September 30, 2013
- 2.) September 3, 2014 – December 11, 2014
- 3.) May 9, 2016 – August 8, 2016

[para 16] The Public Body received the request on November 28, 2017 and assigned file number 2016-P-0033 to the Applicant's Second Access Request.¹⁵

[para 17] The Public Body's FOIP Coordinator stated that "as the second search was recently completed and covered the same parameters (time frame and individuals) requested by [the Applicant] I did not request SCES to conduct a third search, and the records provided through the second search were processed in response to [the Applicant's] request (2016-P-0033)".¹⁶

[para 18] On December 23, 2016, the Public Body responded to the Applicant (the Second Response) providing him with 221 pages of responsive information and informing him that some of the records he requested contained information that was withheld from disclosure under section 17 of the Act.¹⁷

¹² FOIP Coordinator's Affidavit at paras. 15 and 16. The reference to "2017" was likely a typographical error and should have been "2016".

¹³ Letter dated November 23, 2016 from Applicant to OIPC, attached to Applicant's Request for Review/Complaint.

¹⁴ Applicant's Access Request dated November 23, 2016 (Second Access Request) attached to Applicant's Request for Review/Complaint.

¹⁵ FOIP Coordinator's Affidavit at para. 18.

¹⁶ FOIP Coordinator's Affidavit at para. 19.

¹⁷ FOIP Coordinator's Affidavit at para. 20.

[para 19] On January 20, 2017, this Office received a request from the Applicant to review the adequacy of the search that was conducted by the Public Body with respect to file 2016-P-0033.¹⁸

[para 20] The Commissioner authorized a Senior Information and Privacy Manager (SIPM) to investigate and attempt to settle the matter.

[para 21] During the review, the SIPM requested that the Public Body conduct a third search, specifically for an email dated May 15, 2016 that contained profanity and the Applicant's name. The Public Body's search did not locate the email.¹⁹

[para 22] On October 30, 2017, the Complainant requested and the Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.²⁰

II. ISSUE

[para 23] The Notice of Inquiry, dated November 28, 2019, set out the issue for this inquiry as follows:

Did the Respondent meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

III. DISCUSSION OF ISSUE

Did the Respondent meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

[para 24] 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 25] In his Request for Inquiry, the Applicant stated (emphasis in original):²¹

I am requesting that this matter be further investigated on the basis that a complete and impartial investigation was not done and therefore full disclosure of applicable documents were not provided. There were documents missing some of those that were submitted had been altered.

¹⁸ Applicant's Request for Review/Complaint.

¹⁹ FOIP Coordinator's Affidavit at paras. 22 – 24.

²⁰ Applicant's Request for Inquiry dated October 30, 2017 (Request for Inquiry).

²¹ *Ibid.*

This is substantiated by the facts that:

- I am in possession of communications that were not included in the disclosure by relevant parties which further validates my concerns that communications that were withheld
- I was shown a copy of the original email containing the alleged complaint, which was not even close to that of the alleged email complaint that was disclosed in the FOIP request. The original email I was shown on June 24, 2016 by [Title, Name of Employee B] on his desktop computer in his office contained slanderous comments, profanity and my name (e.g. [profanity] [Title, last name of Applicant], he's [profanity] done this before). Just before he showed me the original email he put his hand on my shoulder and said "[First name Applicant goes by], just to let you know that by reading this email it's going to make you really, really mad. He also informed me that [Title, Last name of Employee D] was courtesy and blocked out whom the email was sent from.

This is a clear example that the FOIP disclosure was manipulated and that documents were intentionally altered and withheld.

The process had allowed for the individuals to self-select what is disclosed and the ability to alter what is disclosed.

On July 28th, 2016 Strathcona County Human Resources showed me another version of this email, which had the above profanity etc. deleted and I was told that this email was provided to Strathcona County Human Resources by [Title, Name of Employee B]. This is another example of inconsistent information. There are also apparent inconsistencies in the same communication provided by [Title, Name of Employee D] in the FOIP request whereby the format had been altered. The legal department at Strathcona County indicated that the individuals named in the FOIP request manually submitted the documents on their own accord. The documents were not produced by an objective party and were not retrieved from the server to ensure that both all-applicable and original documents were produced. This selective disclosure disregards the objective of a complete and impartial investigation to provide an accurate account of details and communications that took place.

I trust that this matter can be revisited and a thorough and impartial investigation be completed where ALL original and accurate communication relevant to this matter be made available through a proper search of the server to retrieve all relevant documents and communications including but not limited to deleted files.

[para 26] In the Applicant's initial submission he stated:²²

The purpose of my FOIP request is to retrieve an email sent May 15, 2016 from [Title, Name of Employee D] to [Title, Name of Employee B] and [Title, Name of Employee C]. I am satisfied that I was shown two different May 15, 2016 emails.

...

It is also the email [Title, Name of Employee B] showed me in his office, with one difference. When he showed it to me it referred to me as [profanity] [Title, Last name of Applicant]. He's [profanity] done this before.

[para 27] As the Applicant has indicated that it is the May 15, 2016 email containing the profanity and his name that he is seeking (the Email), this inquiry will focus on whether the Public Body met its duty to assist the Applicant under section 10(1) of the Act by conducting an

²² Applicant's revised initial submission dated February 19, 2020, received February 21, 2020, (Applicant's initial submission) at page 1.

adequate search for this particular Email, and by responding openly, accurately and completely to the Applicant regarding the Email.

[para 28] In his initial submission, the Applicant submitted:²³

[Title, Name of Employee D] was able to retrieve a copy of the email in question and provide in the FOIP request made on December 23, 2016, however, the other two Strathcona County Staff members ([Title, Name of Employee B] and [Title, Name of Employee C]) were unable to produce a copy of this email. All Strathcona County Staff Members are listed as recipients in the initial email.

I requested in my second request for a thorough search of all email correspondence either in inbox, deleted, folders etc. of all five Strathcona County Staff members listed, be completed, and this was not to the best of my knowledge and based on the evidence provided completed with 100% accuracy. I verily believe that the three members of the Strathcona County Staff are covering up any responsibility.

[para 29] As I understand the Applicant's submission, as part of the Public Body's Second Search, Employee D located a copy of the Email dated May 15, 2016 that the Applicant was seeking and the Public Body produced this to the Applicant in its Second Response to the Applicant's Second Access Request; however, the Email was not identical to the version that the Applicant was shown by Employee B, on Employee B's desktop in Employee B's office on June 23rd or June 24, 2016.²⁴ As I understand the Applicant's submission, the version of the Email that he received did not include the sentences containing the profanity and his name. It is the version of the Email that he was shown by Employee B, with the sentences containing the profanity and his name that he is seeking.

[para 30] The Applicant submitted:

I verily believe one or possibly both of these two high ranking members of my department altered the original email before disclosing it to Strathcona County Human Resources. I was not aware when I had originally submitted the FOIP request that the person(s) involved would be able to retrieve said information on their own and that there would be no oversight on the submissions.

[para 31] As I understand the Applicant's position, he believes that the Second Search was not adequate for the following reasons:

- the Public Body asked the five employees to search their own electronic and paper files for records responsive to the Applicant's Second Access Request rather than having someone other than the five employees search their records;

²³ Applicant's initial submission at page 2. The reference to December 23, 2016 appears to be in error as the Applicant's Second Access Request was dated November 23, 2016. The Public Body's response to the Applicant's Second Access Request, however, was dated December 23, 2016.

²⁴ In the Applicant's Request for Inquiry he stated he was shown the email on June 24, 2016 by Employee B; however, in the Applicant's Request for Review/Complaint Form dated January 20, 2017, he stated "5.) Falsified emails are knowingly submitted in FOIP File Number: 2016-P-0033, as I was shown the original on June 23, 2016 by [Employee B]".

- Employees B, C and D received the Email but only Employee D located a version (albeit not the version he is seeking) of the Email; and
- the Public Body did not have the five employees search their deleted email folders for the Email, nor did the Public Body itself (through someone other than the five named employees) search the deleted email folders of the five named employees for the Email.

[para 32] Finally, he questions whether Employee D or Employee B altered the Email he received from the Public Body since it did not match the version of the Email he states he was shown by Employee B.

[para 33] In support of his submission, the Applicant attached a statement by Employee D dated August 15, 2016 (the Statement) which the Applicant stated he received on August 26, 2016 from a Strathcona County Senior Human Resources Business Advisor.²⁵

[para 34] At pages 6 – 8 of the Statement, Employee D discussed receiving an unsigned email on May 15, 2016 from an anonymous source and forwarding it to Employee C and Employee B that same morning. At page 7 of the Statement, Employee D stated that he did not add anything, delete anything, or change anything in the original email with the exception of the format of its original attachments. Employee D stated at page 7 of the Statement that he deleted the original email to avoid any further risk of computer malfunction related to its content or format.

[para 35] Previous Orders of this Office have held that as part of its duty to assist an applicant under section 10(1) of the Act, a public body must conduct an adequate search for responsive records.²⁶

[para 36] It is the public body that has the onus to establish that it has made every reasonable effort to assist the applicant, as it is in the best position to explain the steps it has taken to assist the applicant.²⁷

[para 37] An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done to search for the requested record.²⁸

[para 38] In Order F2009-012, at paragraph 12, former Commissioner Work addressed the standard of proof with respect to the two components as follows:

...

It follows that, to successfully respond to the issue as to the adequacy of its search under section 10 of the Act, the Public Body must prove that (1) it made every reasonable effort to identify and locate records responsive to the Access Request, and (2) it informed the Applicant, in a timely fashion, of the steps it took in doing so. As found in Order F2002-016, those criteria must be proven on a balance of probabilities.

²⁵ Applicant's initial submission at page 2.

²⁶ See, for example, Orders 97-006 at para. 7, 2001-016 at para. 13, F2017-59 at para. 10, and F2021-11 at para. 9.

²⁷ See, for example, Orders 97-003 at para. 25, 2001-016 at para. 12, and F2021-11 at para. 9.

²⁸ See, for example, Orders 2001-016 at para. 13, F2009-012 at para. 12, and F2014-08 at para. 5.

[para 39] The decision as to whether an adequate search was conducted must be based on the facts relating to how a public body conducted a search in the particular case.²⁹

[para 40] Prior Orders of this Office have stated that an adequate search does not require perfection; a public body is required only to make every reasonable effort.³⁰ In Order 2000-020, former Commissioner Work stated in paragraph 17:

[para 17] . . . The standard directed by the Act is not perfection but what is “reasonable”. In Order 98-002, I adopted the definition of “reasonable” in Black’s Law Dictionary: “fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view.”

[para 41] In Order F2007-029, at paragraph 66, former Commissioner Work set out the evidence a public body should provide in an inquiry with respect to the search it conducted:

[para 66] In general, evidence as to the adequacy of 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 42] The Public Body has a duty to provide all records responsive to the Applicant’s access request, subject to any sections which permit or require it to withhold responsive information.

[para 43] The Public Body summarized its argument in its submission as follows:³¹

[1] In response to the Applicant’s access request, the Respondent has made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely.

²⁹ See, for example, Orders 98-003 at para. 37, and F2009-012 at para. 33.

³⁰ See, for example, Order F2013-23 at para. 18.

³¹ Public Body’s Initial Submission dated January 17, 2020 (the Initial Submission) at pages 1 – 2.

- [2] The Respondent has not only taken reasonable steps to conduct an adequate search, but has also communicated to the Respondent the steps that it has taken and has provided assistance during the course of the access request process.
- [3] The Applicant asserts that the Respondent did not conduct a sufficiently thorough search and that a new search should include deleted files.
- [4] However, the Respondent has in fact conducted three searches using parameters requested by the Applicant, and all responsive records were provided to the Respondent. The searches included deleted files. Therefore, the Respondent believes there are no additional records in existence.

[para 44] Although the Applicant withdrew his request for a review of the adequacy of the search the Public Body conducted in response to his Revised First Access Request (2016-P-0019), and filed a request for review of the adequacy of the Second Search the Public Body conducted in response to his Second Access Request (2016-P-0033), I understand the Public Body to be asking me to take into account the two searches it conducted for records responsive to the Applicant's Revised First Access Request and his Second Access Request, as well as the search it conducted at the request of the SIPM for the Email, in deciding whether it conducted an adequate search for responsive records and met its duty to assist the Applicant under section 10(1) of the Act.

[para 45] Given the facts in this case, I will consider the information the Public Body has provided me about the three searches it conducted, in determining whether it has conducted an adequate search for records responsive to the Applicant's Revised First Access Request, and his Second Access Request, and met its duty to assist the Applicant under section 10(1) of the Act.

[para 46] The Public Body provided information about the search it conducted for records responsive to the Applicant's access request.

[para 47] The Public Body's FOIP Advisor provided an Affidavit in which she described the steps she took after receiving the Applicant's July 19, 2016 access request. She stated: ³²

3. On July 29, 2016, Strathcona County received an access to information request under FOIP (2016-P-0019) from [Applicant's first name (Applicant's first name that he goes by) Applicant's last name], which was assigned to me. Attached hereto and marked as Exhibit "A" to this my Affidavit is the FOIP access request. [The Applicant] requested:

- "all records, paper and electronic, that includes my name or any personal information regarding myself. Between the dates of May 1, 2016 – July 29, 2016.

4. On August 8, 2016, I corresponded with [the Applicant] concerning clarification of his request. Attached hereto and marked as Exhibit "B" to this my Affidavit, is my email to [the Applicant]. The request was reworded as follows:

³² FOIP Advisor's Affidavit at para. 5.

- All records of communication, including but not limited to, e-mails, lync or other messenger conversations, and text messages regarding [Applicant's first name (Applicant's first name that he goes by) Applicant's last name] that are in the custody of the following Strathcona County staff members:
 - [Title, Name of Employee A]
 - [Title, Name of Employee B]
 - [Title, Name of Employee C]
 - [Title, Name of Employee D]
 - [Title, Name of Employee E]

- There are three separate date ranges for this request. As follows:
 - 1. January 1, 2013 – December 31, 2013
 - 2. September 1, 2014 – December 31, 2014
 - 3. January 1, 2016 – August 8, 2016

5. When clarifying and rewording request 2016-P-0019, I informed [the Applicant] that emails and other communications that were deleted in the past are outside of Strathcona County's ability to recover. Strathcona County has configured Outlook to only retain items in the Deleted folders for 90 days, after which they are permanently deleted. Back-up tapes retain deleted data for 30 days, after which the tapes are over-written. [The Applicant] did not request that backup files be searched in either request (2016-P-0019 and 2016-P-0033). However, as part of both searches, all Outlook folders, including the Deleted folder, were searched.

6. After [the Applicant] agreed to the revised wording of his FOIP request, I forwarded the search request to Strathcona County Emergency Services (SCES) and the individuals specified by [the Applicant] were directed to conduct their searches based on the parameters requested by [the Applicant]. Attached hereto and marked as Exhibit "C" to this my Affidavit is my request to SCES.

7. From SCES, I subsequently received a package of documents, resulting from the searches by the staff members specified by [the Applicant]. I forwarded all responsive records to [the Applicant] (376 pages).

8. On October 7, 2016, after [the Applicant] received his release package of 376 pages of responsive records, he contacted me and advised that he felt there were additional records that had not been provided to him.

9. On October 17, 2016, Strathcona County was notified that [the Applicant] had requested a review from the Office of the Information and Privacy Commissioner of Alberta (OIPC).

10. On October 21, 2016, I met with [the Applicant] to discuss the request and [the Applicant] advised me that he was withdrawing his request for review. Attached hereto and marked as Exhibit "D" to this my Affidavit is correspondence to the OIPC from [the Applicant].

11. I offered at the October 21, 2016 meeting with [the Applicant] to have Strathcona County do a second, or additional, search based on the same wording and parameters to his request 2016-P-0019.

12. This ends my involvement with respect this this matter and my colleague [Name] was assigned all further matters.

[para 48] The email the FOIP Advisor sent to SCES, which was attached to the FOIP Advisor's Affidavit as Exhibit "C", is dated August 8, 2016. In it, the FOIP Advisor reproduced the Applicant's Revised First Access Request and stated:

Please ensure that your Branch/Office does a complete records search for records that may be relevant to this request and forwards all original records and/or single sided print-out of electronic records to this office by noon August 12, 2016.

[para 49] I note that the FOIP Advisor did not include any general or specific instructions in the email to the SCES as to where SCES should search for responsive records, or any direction on the search terms SCES should use, and did not ask the recipient of the email to provide any details about the search SCES conducted for responsive records when providing the responsive records it located.

[para 50] The Public Body's response letter dated October 7, 2016, signed by the FOIP Advisor, did not contain any information about the search the Public Body conducted for records responsive to the Applicant's Revised First Access Request.

[para 51] At paragraph 5 of the FOIP Advisor's Affidavit, the FOIP Advisor stated:

[The Applicant] did not request that backup files be searched in either request (2016-P-0019 and 2016-P-0033). However, as part of both searches, all Outlook folders, including the Deleted folder, were searched.

[para 52] There is no information before me about the search that SCES conducted for records responsive to the Applicant's Revised First Access Request. There is no evidence that supports the FOIP Advisor's statement that all Outlook folders, including the Deleted folders of all five of the employees named in the Applicant's access request, were searched. It is also not clear to me how the FOIP Advisor can attest to what was done in the Second Search, when her Affidavit indicates that after suggesting the Public Body could conduct a second search, her involvement in this matter ended.

[para 53] As well, the FOIP Advisor stated that the Public Body did not search backup files because the Applicant did not ask it to search backup files. It is not an applicant's responsibility to tell the public body where to search. It is the responsibility of the public body to determine where responsive records may be located, and to search those locations. If there could have been records responsive to the Applicant's Revised First Access Request on the Public Body's back-up tapes, then the Public Body should have searched the back-up tapes for responsive records, or informed the Applicant as to why the back-up tapes were not searched.

[para 54] The information before me indicates that Employee D received the Email on May 15, 2016 and forwarded it the same day to Employees B and C. The Applicant states that Employee B showed him the Email, containing the profanity, on June 23 or 24, 2016. The

Applicant submitted his Revised First Access Request to the Public Body on August 8, 2016. The FOIP Advisor forwarded the access request on August 8, 2016 to SCES.

[para 55] The Applicant stated the Email contained his last name. His access request contained his last name. His last name should have been used as a search term by the named employees when conducting a search of all of their email folders. It is not clear why a search by Employees B, C or D of their Outlook folders, including their Deleted folders, did not produce the Email. Even if the Email had been deleted, according to the FOIP Advisor, the Public Body's Outlook was configured to retain items in the Deleted folders for 90 days. Ninety days had not expired between the May 15, 2016 and August 8, 2016.

[para 56] The FOIP Advisor further stated that "Strathcona County has configured Outlook to only retain items in the Deleted folders for 90 days, after which they are permanently deleted. Back-up tapes retain deleted data for 30 days, after which the tapes are over-written".³³ It appears that there is some possibility that even if the Email had been deleted from an employee's Deleted folder, it could still have been on the back-up tape; however the Public Body did not search its back-up tapes for responsive records.

[para 57] I am not suggesting that public bodies *always* have to search back-up tapes for responsive records. The failure to search back-up tapes will not always result in a finding that a public body has not conducted an adequate search (see, for example, Order F2019-34); however, if there was a reason to expect that responsive records could exist on back-up tapes, a public body would need to explain why it did not search the back-up tapes, and it is not a sufficient explanation to say that an applicant did not ask it to.

[para 58] Given the lack of information I have about the search the Public Body conducted for responsive records to the Applicant's Revised First Access Request, I am unable to conclude that the first search the Public Body conducted for responsive records was adequate. As this alone is enough for me to conclude that the first search was not adequate, I do not need to determine whether the Public Body's decision not to search its back-up tapes in this instance also meant the first search was not adequate.

[para 59] The Public Body provided an Affidavit sworn by the Public Body's FOIP Coordinator describing the steps the Public Body took after the FOIP Advisor offered that the Public Body could conduct a second search based on the same wording and parameters specified by the Applicant in his Revised First Access Request.

[para 60] The FOIP Coordinator provided the following information about the second and third searches that were conducted:³⁴

11. On November 1, 2016 I sent a request to SCES, attached hereto and marked as Exhibit "A" to this my Affidavit, to re-search their records according to the parameters provided, including documenting who did the search and where they searched. The search request was as follows:

³³ FOIP Advisor's Affidavit at para. 5.

³⁴ FOIP Coordinator's Affidavit at para. 11.

- All records of communications, including but not limited to, e-mails, lync or other messenger conversations, and text messages regarding [Applicant’s first name (Applicant’s first name that he goes by) Applicant’s last name] that are in the custody of the following Strathcona County staff members:
 - [Title, Name of Employee A]
 - [Title, Name of Employee B]
 - [Title, Name of Employee C]
 - [Title, Name of Employee D]
 - [Title, Name of Employee E]

- There are three separate date ranges for this request as follows:
 - 1. January 1, 2013 – December 31, 2013
 - 2. September 1, 2014 – December 31, 2014
 - 3. January 1, 2016 – August 8, 2016

12. On November 1, 2016, Strathcona County was informed by the OIPC that [the Applicant] had elected to proceed with his request for review.

13. On November 2, 2016, I received the results of the second search request from SCES[.] Attached hereto and marked, collectively, as Exhibit “B” to this my Affidavit, are the records documenting the search. The documents indicate, and I do verily believe, that the searches were concluded in accordance with the parameters as requested by [the Applicant], and all resulting documents forwarded to me.

14. On November 3, 2016, the Applicant informed the FOIP office that he was going to withdraw his request for review.

15. On November 8, 2017, Strathcona County was informed by the OIPC that [the Applicant] had decided to proceed with his request for review of 2016-P-0019.³⁵

16. Processing the search results from the second search was placed on hold while Strathcona County awaited further direction from the OIPC.

17. On November 23, 2016, [the Applicant] withdrew his request for a review of 2016-P-0019 from the OIPC, which letter of withdrawal is attached and marked as Exhibit D to [name of FOIP Advisor]’s Affidavit.

18. On November 28, 2016, Strathcona County received a new FOIP request from [the Applicant] (2016-P-0033). [The Applicant] requested that the information pertaining to this request be provided within a narrower time frame. Attached hereto and marked as Exhibit “C” to this my Affidavit, collectively, are FOIP Request 2016-P-0033, November 23, 2016 letter from [the Applicant] regarding his request, and the Acknowledgment Letter from [name of FOIP Coordinator] to [the Applicant] dated December 1, 2016. The request was for:

³⁵ The reference to “2017” appears to have been a typographical error and likely should have been “2016”.

- All records of communications, including but not limited to, e-mails, lync or other messenger conversations, and text messages regarding [Applicant's first name (Applicant's first name that he goes by) Applicant's last name] that are in the custody of the following Strathcona County staff members:
 - [Title, Name of Employee A]
 - [Title, Name of Employee B]
 - [Title, Name of Employee C]
 - [Title, Name of Employee D]
 - [Title, Name of Employee E]

- There are three narrowed down date ranges from the original FOIP File Number: 2016-P-0019 below:
 - 1. July 19, 2013 – September 30, 2013
 - 2. September 3, 2014 – December 11, 2014
 - 3. May 9, 2016 – August 8, 2016

19. As the second search was recently completed and covered the same parameters (time frame and individuals) requested by [the Applicant] I did not request SCES to conduct a third search, and the records provided through the second search were processed in response to [the Applicant]'s request (2016-P-0033).

20. Attached hereto and marked as Exhibit "D" to this my Affidavit, is my Final Letter to [the Applicant] dated December 23, 2016 regarding his request 2016-P-0033. In the letter I explained how the search was conducted, where the search was conducted and who conducted the search. I provided 221 pages of responsive records to [the Applicant].

21. On March 13, 2017, Strathcona County received notification that [the Applicant] had requested an OIPC review of 2016-P-0033, and this matter went to mediation.

22. On July 18, 2017, the mediator requested Strathcona County to conduct a search as follows:

"I now ask the Public Body to conduct another search, and in particular, that it search for emails containing very foul language (including the word [profanity] followed by the Applicant's name). The Applicant believes the email was dated May 15, 2016".

23. On July 26, 2017, I requested that SCES conduct a search based on the above criteria. The wording of the additional search requested by the OIPC Senior Information and Privacy Manager assigned to this mediation file is as follows:

- I now ask the Public Body to conduct another search, and in particular, that it search for emails containing very foul language (including the word [profanity] followed by the Applicant's name). The Applicant believes the email was dated May 15, 2016

24. I verily believe the above search was conducted, and as a result of this search, an additional record, not responsive to this specific search but responsive to FOIP request 2016-P-0033, was found which contains an email chain provided to [the Applicant] previously but had been forwarded to a Senior Human Resources Business Advisor. This record was provided to [the

Applicant]. No records related to the specific search criteria set out by the OIPC mediator were found.

25. Upon a review of all the documents received with respect to 2016-P-0019, 2016-P-0033, and the further mediation request, it is my belief that all documents within the parameters requested by [the Applicant] have been provided.

[para 61] The Public Body's response letter dated December 23, 2016 contains a description of the search that was conducted for records responsive to the Applicant's Second Access Request. It states, in part:

A search was conducted on the records of the 5 individuals you listed and in some cases includes records from EMS Administrative Assistants with access to the records of some of the individuals listed. The records search was conducted under the key words "[Name Applicant goes by]"; "[Applicant's first name]"; [Applicant's last name]". Responsive records found using those keywords were pulled according to the following date ranges: July 19, 2013 – September 30, 2013; September 3, 2014 – December 11, 2014; May 9, 2016 – August 8, 2016.

[para 62] The Public Body also included a table with a description of the locations that were searched for responsive records in relation to each of the five employees in its response letter. The Public Body noted in the table that each of the five employee's "computer workstation, including Outlook" was searched.

[para 63] In the email the FOIP Coordinator sent to SCES, which the FOIP Coordinator attached as Exhibit "A" to her Affidavit, the FOIP Coordinator provided the following instructions to SCES:

In order to demonstrate that Strathcona County is acting in good faith, we are requiring that Emergency Services conduct a secondary search for responsive records, and that each staff member involved in this search document how they searched and the locations (physical and electronic repositories) searched. For example – I searched my email using X, Y and Z as my key words; I searched my paper files by employee name; I searched (insert name of electronic file repository ___) using X, Y and Z as my keywords; I searched my text messages for keywords X, Y and Z and for reference to any issues or events I knew may be related to the above named individual.

...

Please ensure that your Branch/Office does another complete records search for records that may be relevant to this request and forward all original records and/or single sided print-out of electronic records to this office by noon on November 8, 2016. Do not be concerned if you find additional records during this search. This sometimes happens, and only shows the effectiveness of a secondary search.

[para 64] The FOIP Coordinator included the email an employee with SCES (the SCES Employee) sent to the five individuals named in the Applicant's access request, requesting them to conduct a search for responsive records. The SCES Employee attached a checklist they had created for the individuals to complete and return to the employee with the records they located.

The checklist provided direction regarding the search terms the individuals should use to conduct their search. The search terms included the Applicant's first name, the name the Applicant goes by, and the Applicant's last name.

[para 65] The FOIP Coordinator provided the responses she received from the five individuals to the Second Access Request as part of Exhibit "B" to her Affidavit.

[para 66] It is not a good practice for public bodies to conduct searches for records before an applicant has confirmed that the applicant wants a search to be conducted, and provides the terms of the search. However, in this case, because the date parameters the Public Body used for the second search were broader than the date parameters ultimately specified by the Applicant, and no other modifications were made to the language of the Applicant's Second Access Request, the fact that the Public Body conducted the search before the Applicant had asked it to is not a fundamental flaw and this fact alone does not render the Second Search inadequate.

[para 67] Leaving aside the question of whether the Public Body should have searched its back-up tapes, based on the information before me, the Second Search appears to be thorough; however, for reasons I will discuss below, I find that the Public Body did not meet its duty under section 10 to respond openly, accurately and completely.

[para 68] The Public Body did not provide any details about the third search that it conducted at the request of the Senior Information and Privacy Manager. In the absence of any information about the third search, I am unable to conclude that it was adequate.

[para 69] The Applicant has argued that the second search was not adequate because the Public Body had the employees the Applicant named in his access request conduct the search for responsive records. The crux of the Applicant's argument is that this is not a reliable or trustworthy way of conducting a search since the employees could have intentionally omitted responsive emails, or deleted them.

[para 70] A similar argument was addressed by the adjudicator in Order F2021-33. At paragraphs 8 - 14, the adjudicator stated (my emphasis):

[para 8] The Public Body has provided detailed explanations of the search it conducted. I agree with the Public Body that its approach to the search was reasonable. Asking employees who are named in access requests, or who work in areas likely to have responsive records, to search for responsive records on their computers is a sensible method of beginning a search for responsive records.

[para 9] The Applicant argues that the Public Body should have conducted a central search of its computer systems, rather than having employees search their emails and records. In Order F2007-012 I rejected an argument that a public body's response was flawed, simply because of the possibility of bias or conflict of interest. I said:

I do not agree with the Applicant's argument that a conflict of interest results in a failure to meet the Public Body's duty to assist. Under the Act, the head of the public body is accountable for any failures or omissions of the public body in responding to an access request. The head of a public body, by the very

nature of the position, will often have duties to the public body that may compete with the head's duties under the Act. Delegating the head's responsibility to respond to an access request to an employee such as a FOIP coordinator does not mitigate the potential for conflict of interest. For this reason, the Act provides individuals who have made access requests the right to an independent review of the head's decisions by a neutral third party, the Information and Privacy Commissioner. The independent review rectifies any issues of conflict of interest or potential bias. As the Applicant in this case has exercised his right to request an independent review, any miscarriage of natural justice he perceives will be remedied by the review. See *Harelkin* (supra).

[para 10] In the foregoing passage, I rejected the argument that bias alone was sufficient to call into question the adequacy of a public body's search for responsive records. I noted that the FOIP Act creates a right of independent review by the Commissioner to cure any defects in a search. In an inquiry by the Commissioner, a public body must establish the adequacy of its search through the introduction of evidence meeting the requirements of Order F2007-029. An applicant may test the public body's evidence, including by pointing to records that the applicant has reason to believe exist, but have not been produced. In this way, public bodies are held to account in relation to the searches they conduct under the FOIP Act.

[para 11] The Public Body has responded to the Applicant's specific concerns regarding Skype records and provided a detailed account of the search it conducted. It also provided detailed evidence as to how employees searched for responsive records.

[para 12] The Applicant has not pointed to records he believes to be missing from the search, or provided evidence regarding records he believes should exist, but were not produced. Instead, he argues that the search should have been conducted centrally, and he asserts, without foundation, that those employees who participated in the search for responsive records, lacked the skills to do so and may have deleted records.

[para 13] I find that the Public Body conducted a reasonable search for responsive records. It was open to the Public Body to search for responsive records using the process it did, and it has not been demonstrated in this inquiry that the central search proposed by the Applicant would have located any additional records beyond those the Public Body located. There is simply no evidence before me that the employees who searched for responsive records lacked competence, conducted inadequate searches, or deleted records.

[para 14] I confirm that the Public Body met its duty to assist the Applicant by conducting a reasonable search for responsive records.

[para 71] I concur with, and adopt the adjudicator's statements in Order F2021-33 above. It is reasonable for a public body to ask employees who an applicant has identified in an access request, to conduct a search for records the applicant has requested. In this case, however, the Applicant *has* pointed to a record – the Email with the profanity and his name - which he believes the Public Body's search should have located. He has provided information about when and where he was shown the Email, who showed him the Email, what they said when they showed him the Email, details about who received it, the date it was received, and the content. He advised that he received a copy of the Email from the Public Body, but it was not the version he was shown by Employee B.

[para 72] In Order F2021-23 the adjudicator dealt with a similar situation. Part of the applicant's access request in that case was for a specific record he had been shown by an individual with the Public Body:

[para 1] The Applicant made an access request dated April 18, 2017, to Rocky View County (the Public Body) for

...

4. A copy of the letter from County Administration written by [S.B.], Planning, to County Councillors respecting the Elbow Valley West Development. [Reeve B] and [Deputy Reeve S] referenced the letter during their on-site visit to our property on June 21, 2016. (They may have referred to the letter as an Administrative 'progress report' on EVW.) [Deputy Reeve S] also gave me a very brief look at the letter as they had a copy in hand. Thus, my understanding is that the letter would be dated on, or about, June 21, 2016. I trust both the Reeve and Deputy Reeve would be pleased to confirm the letter in question, and the date thereof.

[para 73] As the facts and the conclusions of the adjudicator in Order F2021-23 are helpful to the case before me, I have decided to reproduce them as follows:

[para 12] The Public Body states that it received the Applicant's access request on April 18, 2017. It asked the Engineering Services and Planning Services within the Public Body to search for responsive records on April 20, 2017. The Applicant was informed by letter dated May 16, 2017, that the first three items in the request were located but the fourth – the letter – was not.

[para 13] On July 13, 2017, the Applicant provided the Public Body with copies of emails between him and a Councillor to provide context for the letter he is seeking. The Public Body expanded its search for the letter, asking S.B., Reeve B and Deputy Reeve S, to conduct a search. The Public Body included additional information about the letter as provided by the Applicant: that Deputy Reeve S had the letter when the parties met at an on-site meeting on June 21, 2016. Deputy Reeve S allowed the Applicant to briefly review the letter. The Applicant believes it was written by S.B. as a result of a prior meeting between the Applicant and senior administration within the Public Body, on a given date.

[para 14] The Applicant also notes that when he asked Deputy Reeve S to make a copy of the letter on June 21, 2016, Deputy Reeve S refused, stating that perhaps he shouldn't have shared it with the Applicant.

[para 15] On July 21, 2017, Reeve B advised that he searched his office for the letter, spending 30 minutes on the task, and did not locate it. Deputy Reeve S advised that he searched his emails and all boxes of documents, spending six hours on the task, and did not locate the letter.

[para 16] On January 10, 2018, during the review by this Office, the Public Body asked Planning Services, Reeve B and Deputy Reeve S to search for the letter again, with the following instructions:

The letter, dated on or about June 21, 2016 from County Administration written by [S. B.], Planning, to County Councillors respecting the Elbow Valley West Development. The applicant has provided that [Reeve B] may have referenced the letter as an Administrative 'progress report' on EVW.

For the time period of:
March 1, 2016 to Sep 30, 2016.

[para 17] Deputy Reeve S responded that he had searched “all files in my possession” and did not locate the letter. Reeve B responded that he searched his home office and did not locate the letter. S.B. searched the SharePoint site for the Planning Services area, and did not locate the letter.

[para 18] With its submission, the Public Body provided a copy of the January 2018 letter it sent to Planning Services, Reeve B and Deputy Reeve S requesting the latest search. The Public Body noted in that letter that it is an offence under the FOIP Act to alter, falsify, conceal or destroy any record in order to evade an access request (Section 92 of the FOIP Act).

[para 19] The Public Body’s first search for records, in April 2017, did not include Reeve B or Deputy Reeve S. I do not think that search was sufficiently thorough. However, the subsequent searches that included these individuals, as well as S.B., who may have authored the letter, corrected that error.

[para 20] I understand that the Applicant believes the letter exists because he reviewed it, however briefly, in June 2016. I do not know why the letter was not located. No one has acknowledged having had the letter, or offered an explanation regarding what might have happened to the letter.

[para 21] In Order F2020-13, the Director of Adjudication considered a public body’s obligation in a similar situation, where the applicant had reason to believe particular records existed at some time; for example, records that had initially been provided to the public body by the applicant, and documents that were referenced in records that were provided to the applicant by the public body. The Director found (at paras. 79-80, footnotes omitted):

In some earlier orders of this office, the Adjudicator held that the fact a very thorough search had been conducted and records were not found was itself an adequate explanation for the belief that no further records exist. While I agree with the logic of this in the appropriate case, in circumstances such as the present, where the Applicant is able to demonstrate with certainty for some of the records she describes that the public body was once in possession of them, or that this is reasonably likely, I believe the duty under section 10 includes giving an explanation as to what happened to them or likely happened to them that would account for their no longer being in the public body’s possession.

If such explanations cannot be given due to the passage of time, a public body should explain why the passage of time impedes its ability to provide an explanation – for example, that there are no longer people employed by it who have knowledge of the related events, or if there are, that they no longer remember details about the particular case, or that records retention policies permitted or provided for the destruction of pertinent recorded information.

[para 22] I agree with this analysis. In many cases, evidence of a thorough search is a sufficient answer to the question why the public body believes no additional records exist.

[para 23] In this case, the Applicant recalls seeing a copy of the record he has requested. He has provided details about who had possession of the letter and on what day. The searches conducted by the Public Body appear thorough, but no one has acknowledged whether they recall the specific letter being sought, or what might have happened to it. In other words, the Applicant has provided sufficient reason to believe that the record exists (or existed) yet the Public Body has not provided any explanation as to why it was not located, other than to say that certain individuals within the Public Body searched for it.

[para 24] A similar situation was discussed in Order F2016-60, in which an applicant was seeking a copy of a letter written by a public body employee and sent to the applicant. The applicant had misplaced her own copy and wanted another. The letter had been written in 1993 and the access request was made in 2013. In that case, the public body had conducted a thorough search for the letter but did not locate it. The public body explained its records retention policy, and surmised that given the passage of time, the letter had likely been destroyed in accordance with that policy. The public body was found to have met its duty to assist the applicant under section 10, as its search and explanation were sufficient.

[para 25] As stated earlier in this Order, section 10 requires not only that an adequate search for records be conducted, but also that the Public Body respond to the Applicant openly, accurately and completely. Given that the Applicant seems to have first-hand knowledge of the record, and the amount of detail he was able to provide about the record, the Public Body's answer is not sufficient to meet its duty in section 10. My finding is not that the Public Body didn't conduct a thorough search; rather, the Public Body did not provide a sufficient explanation for not locating a particular record that the Applicant has previously seen in the custody of a Public Body employee.

[para 26] In this case, there may be many reasons why the record cannot be located. Possibly a satisfactory answer will not be found. In that case, the Public Body can, at minimum, tell the Applicant whether the relevant parties recall the record and whether they have any explanation for not being able to locate it. Some explanation is better than no explanation at all.

Conclusion regarding the duty to assist

[para 27] While the Public Body has conducted several searches, the facts of this case lead me to conclude that the duty under section 10 is not met until the Public Body provides additional information about the search for the letter the Applicant is seeking. Where possible, the Public Body should speak with Deputy Reeve S and S.B., as well as any other Public Body employees who may reasonably be expected to have knowledge of the letter. The Public Body should determine whether these individuals recall having had a copy of (or writing) the letter, and if they have any explanation for not being able to locate the letter now.

[para 28] If the individuals' answers indicate that another search may elicit results, the Public Body should conduct that search. If not, the Public Body is to respond to the Applicant with the information it was able to obtain from the individuals.

[para 74] I agree with the analysis and conclusions of the adjudicator in Order F2021-23 above regarding a public body's duty under section 10.

[para 75] Section 10(1) requires a public body to make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely. Given the Applicant's vivid recollection of being shown the Email with the profanity and his name by Employee B in Employee B's office, and the detail he was able to provide about it, the Public Body's answer is not sufficient to meet its duty in section 10.

[para 76] While the Public Body has conducted several searches, the facts in this case lead me to conclude that the duty under section 10 is not met until the Public Body provides additional information about the search for the Email dated May 15, 2016 with the profanity and the Applicant's name. Where possible, the Public Body should speak with Employees D, B and C, as well as any other Public Body employees who may reasonably be expected to have knowledge of the Email. The Public Body should determine whether Employees D, B, and C recall having received the Email dated May 15, 2016 with the profanity and the Applicant's name, and, if so, if they have any explanation for not being able to locate the Email now.

[para 77] If the individuals' answers indicate that another search may elicit results, the Public Body should conduct that search and provide a response to the Applicant. If not, the Public Body is to respond to the Applicant with the information it was able to obtain from the individuals. In addition, if the Public Body is able to determine that the Email with the profanity and the Applicant's name was received by Employees D, B and/or C, the Public Body should also determine, if possible, why the version of the Email that was provided to the Applicant did not contain the profanity and his name, and provide this information in its response to the Applicant. I have not been provided with the version of the Email that was produced to the Applicant. I do not know if the Public Body redacted any of it before it was produced, or what sections of the Act the Public Body might have applied to any redactions.

[para 78] The comments of the adjudicator at paragraph 26 of Order F2021-23 bear repeating here:

[para 26] In this case, there may be many reasons why the record cannot be located. Possibly a satisfactory answer will not be found. In that case, the Public Body can, at minimum, tell the Applicant whether the relevant parties recall the record and whether they have any explanation for not being able to locate it. Some explanation is better than no explanation at all.

IV. ORDER

[para 79] I make this Order under section 72 of the Act.

[para 80] I find that the Public Body did not fulfill its obligation under section 10 of the Act with respect to the specific Email sought by the Applicant. I order the Public Body to seek further information and respond again to the Applicant as set out in paragraphs 76 – 77 of this Order.

[para 81] I further order the Public Body to notify me, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Carmen Mann
Adjudicator