

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-003

March 12, 2001

UNIVERSITY OF CALGARY

Review Number 1810

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant complained that the Public Body failed to provide her with access to all records she requested. The Inquiry Officer found that the Public Body did not fulfil its duty to respond openly, accurately and completely, as it did not properly clarify the request and therefore could not conduct a proper search. The Inquiry Officer ordered the Public Body to clarify the records that are responsive to the access request and to conduct a further search. In addition, the Public Body was ordered to provide the Applicant with an explanation of how it conducted the search for responsive records and why certain records could not be located.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, s. 9(1)

Authorities Considered: AB: Orders 96-022; 97-003; 97-006; 98-012; 2000-30

I. BACKGROUND

[para 1.] In the Winter term of 1999, the Applicant attended a graduate level course at the University of Calgary. She disputed the grade she received and in April 1999 contacted her faculty for records relating to the course. On July 27, 1999, the Applicant contacted the Public Body's Information and Privacy office (the "Public Body") which offered to assist her to obtain some records. At that time, post-secondary institutions were not yet subject to the *Freedom of Information and Protection of Privacy Act* (the "Act").

[para 2.] On September 1, 1999, post-secondary educational institutions became subject to the Act.

[para 3.] According to the Public Body, in early September 1999, the faculty provided the Applicant with copies of all records in the instructor's file.

[para 4.] However, on September 15, 1999, the Applicant informed the Public Body that she had not received copies of all the records she requested from the faculty. On that date she made an access request under the Act to examine records. The access request reads as follows: *All records in the custody of [instructor] relating to performance in [course]. All course work submitted to [instructor]. Final exam written for [course].*

[para 5.] On October 8, 1999, the faculty reported it was unable to contact the instructor who was on leave, but had retrieved the Applicant's portion of one assignment. That record was available for the Applicant to view; however, she chose to wait until all records were available. On October 29, 1999, the Applicant was asked to meet with the Public Body and the faculty to review all the located records before photocopies were made.

[para 6.] According to the Public Body, on November 1, 1999, the Applicant left a message that she would call back when she had time; however there was no further contact. On January 7, 2000, the Public Body informed the Applicant by letter that, as there was no contact, her file was closed. The Applicant was informed the records were available by contacting the faculty. The Applicant subsequently examined the records and was provided with photocopies or originals.

[para 7.] On January 18, 2000, the Applicant wrote to the Commissioner to request a review of her access request. She alleged the Public Body failed to provide her with all the records.

[para 8.] The Commissioner authorized mediation, however the parties were unable to reach a resolution. In a letter dated October 13, 2000, the Applicant requested an inquiry and the matter was set down for written inquiry.

[para 9.] Pursuant to section 59 of the Act, the Commissioner, on October 17, 2000, delegated to me authority to hear this inquiry and render a decision on all matters at issue.

[para 10.] In her initial submission, the Applicant raised a new issue alleging that the Public Body altered copies of certain records. As this issue was not raised previously, I decided to limit myself to the issue set out in the Notice of Inquiry.

II. RECORDS AT ISSUE

[para 11.] As the issue is whether the Public Body fulfilled its duty under section 9(1), the records themselves are not directly at issue.

III. ISSUE

[para 12.] The single issue identified in the Notice of Inquiry was:

Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond openly, accurately and completely as provided by section 9(1) of the Act?

IV. DISCUSSION

[para 13.] Section 9(1) of the Act reads:

9(1) The head of a public body must make every reasonable effort to assist an applicant and to respond to applicants openly, accurately and completely.

[para 14.] The issue under section 9(1) is the adequacy of the Public Body's search for records.

[para 15.] The Commissioner stated that in order to properly discharge its obligation under s. 9(1), a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request (Order 97-003).

[para 16.] In Order 97-006, the Commissioner said that the public body has the burden of proving it fulfilled its duty under section 9(1). In other words, the Public Body must provide the inquiry with sufficient evidence to show that it has meet its duty under section 9(1).

[para 17.] To fulfil its duty under section 9(1), a public body must show that it conducted an adequate search. There are two components to an adequate search: (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 (Order 98-012).

[para 18.] The Applicant says that the Public Body did not locate originals and photocopies of course assignments, two exams, answer keys, discussion questions and a draft list of class grades. I infer from her submissions that she believes the Public Body deliberately withheld records. However, from the submissions of the parties, the problem appears to be a failure on the part of the Public Body to properly clarify the access request.

[para 19.] This case is complicated as the Applicant submitted unsolicited multiple versions of the same assignment to the course instructor. There were a number of assignments. The access request included a request to examine the original copies of the various multiple versions of assignments submitted to the instructor. However, at different points in time, the Applicant received photocopies and original copies of various records. A further complication is that the Applicant's descriptions of the responsive records in her submissions are lengthy and lack clarity.

[para 20.] From the information provided in the submissions of the Public Body, it was not possible to clearly identify the responsive records. Nor was it possible to clearly identify which version of the record the Public Body located and when it was provided to the Applicant. As well, I found a number of discrepancies in the parties' descriptions of the records that were part of the access request.

[para 21.] The Public Body did not provide sufficient information regarding what it did to clarify the Applicant's access request. Nor, did the Public Body provide sufficient information refuting the Applicant's claims that various versions of the responsive records exist or explanations regarding the discrepancies. In view of the discrepancies and confusion regarding

the responsive records, I have no alternative but to conclude that the Public Body failed to adequately clarify the Applicant's access request.

[para 22.] With respect to the search, the Public Body's submissions show that the instructor was asked for records on two occasions and that on one occasion, a portion of one of the Applicant's assignments was retrieved from another unspecified location. There was no explanation as to why this record was elsewhere rather than in the instructor's file. However, the Public Body did submit correspondence from the faculty stating that all records relating to the request have been provided. No further information or evidence was provided.

[para 23.] In my view, a public body can not properly search if it has not first properly identified the responsive records. As I have found that the Public Body did not properly identify all the responsive records, it follows that a proper search could not have been conducted.

[para 24.] I appreciate that this was a complex access request and I am mindful that it was received shortly after the Public Body became subject to the Act. I also find the Public Body's willingness to assist the Applicant prior to coming under the Act commendable. However, in the absence of sufficient evidence showing what it did to clarify the request, I find that the Public Body has not fulfilled its burden to prove that it properly discharged its obligation under section 9(1) of the Act to respond openly, accurately and completely.

V. CONCLUSION

[para 25.] For the reasons stated, I find that the Public Body did not fulfil its duty to respond to the Applicant openly, accurately and completely, as required by section 9(1).

VI. ORDER

[para 26.] Under section 68(3)(a) of the Act, I make the following Order.

[para 27.] I order the Public Body to clarify with the Applicant those records that are responsive to her access request and to conduct a further search. In addition, I order the Public Body to provide to the Applicant an explanation as to how it conducted its search for responsive records and why certain records could not be located or do not exist. I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with this Order.

Valerie Kupsch
Inquiry Officer

