

**ALBERTA**  
**OFFICE OF THE INFORMATION AND  
PRIVACY COMMISSIONER**

**ORDER 2001-024**

November 21, 2001

**TOWN OF OKOTOKS**

**Review Number 2083**

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

**Summary:** The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Town of Okotoks (the “Town”) for records relating to the Applicant, or a named organization, if the Applicant’s name was included in the records. The Town released some records, but said that it could not release Town bylaw records held by the R.C.M.P., because they were not in the custody or under the control of the Town. The Applicant asked the Commissioner to review whether the Town had custody or control of the records for the purposes of the Act, and whether the Town discharged its duty to assist the Applicant. Before the inquiry, the Town obtained the bylaw records from the R.C.M.P. and released them to the Applicant. The Acting Commissioner found that the Town had control of the bylaw records sought by the Applicant. He also held that the Town had discharged its duty to assist the Applicant.

**Statutes Cited:** *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss.1(1)(i)(i), 1(1)(j)(iii),1(1)(p)(vi), 1(1)(q), 4(1), 6(1), 9(1), 10(1), 29.

**Orders Cited:** AB: Orders 96-022, 98-003, 98-012.

**I. BACKGROUND**

[para. 1.] On December 1, 2000, the Town of Okotoks (the “Town” or the “Public Body”) received an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) from the Applicant for records relating to the Applicant, or a named organization, if the Applicant’s name was mentioned in the records. In the request, the Applicant referenced the records of specific Town committees and committee members; records relating to bylaw complaints (the “bylaw records”); a letter written by a Special Constable (the “Special Constable’s letter”); and information in the possession of past and present Town councillors and officers.

[para. 2.] In a letter dated December 15, 2000, the Town advised the Applicant that records relating to the Applicant's request for personal information were available for review. The Town said that the Applicant had to apply to another public body to obtain the Special Constable's letter, because that correspondence originated from another public body. The Town indicated that its bylaw records, created by Okotoks Protective Services personnel (also referred to as bylaw officers or Special Constables), were in the possession of the Royal Canadian Mounted Police (the "R.C.M.P."). The evidence shows that the Town shared a records systems with the local unit of the R.C.M.P. Information about municipal bylaw complaints were recorded on R.C.M.P. forms and inputted to the R.C.M.P. Personal Information Retrieval System (P.I.R.S.).

[para. 3.] After a phone call from the Applicant's spouse, the Town made a further search for the Special Constable's letter. In a letter dated January 5, 2001, the Town indicated that the Special Constable's letter had been located in the Town's records, and third parties, whose information was in the records, had been notified under the Act. The Applicant was told that the Town would make a decision on disclosure by February 4, 2001, as required under section 29 of the Act. The Town took the position that the bylaw records the Applicant wanted were subject to the federal *Access to Information Act* ("ATIA"), and not the Act. The R.C.M.P. agreed with this view.

[para. 4.] The Applicant viewed released records on January 12, 2001. On January 18, 2001, the Applicant asked the Commissioner to review the Town's response to the request.

[para. 5.] The following facts are material to the inquiry. On May 1, 2001, a Notice of Inquiry was issued. On May 8, 2001, the Town's Municipal Manager wrote the R.C.M.P. to ask for the bylaw records:

[I]t is my understanding that the outstanding issue [in the Applicant's access request] remains access to Bylaw files currently included in the R.C.M.P. filing system ... I am requesting that files generated by the Town of Okotoks Bylaws Officers and subject to the applicant's request be released for appropriate review by the applicant.

[para. 6.] By letter dated May 9, 2001, the R.C.M.P. released responsive bylaw records to the Town. The R.C.M.P. advised that it was not releasing records created by its officers to the Town. By letter dated May 10, 2001, the Town sent the Applicant a severed copy of the bylaw records.

[para. 7.] The inquiry was postponed. On June 11, 2001, an amended Notice of Inquiry was issued to the Town, the Applicant, and the R.C.M.P. A written inquiry was held in which I considered submissions from all of the parties.

## II. RECORDS AT ISSUE

[para. 8.] There are three files of Town bylaw records at issue for the purposes of section 4(1) of the Act. There are no records directly at issue for the purposes of section 9(1) of the Act.

## III. ISSUES

[para. 9.] There are two issues in this inquiry:

A. Does the Town have custody or control over the records the Applicant requested (the “records”), as provided by section 4(1) of the Act?

B. Did the Town conduct an adequate search for the records and in doing so meet its duty to assist the Applicant under section 9(1)?

[para. 10.] In a submission at inquiry, the Applicant alleged that the Town violated her privacy. That issue is not part of this inquiry, which is concerned with the Applicant’s access request.

## IV. DISCUSSION

### **ISSUE A. Does the Town have custody or control over the records the Applicant requested (the “records”), as provided by section 4(1) of the Act?**

[para. 11.] Section 4(1) of the Act states:

*4(1) This Act applies to all records in the custody or under the control of a public body...*

[para. 12.] From the outset, the parties agreed that the Town is a public body that is subject to the Act. This issue was set down because the Town had taken the position that it did not have custody or control over the bylaw records for the purposes of the Act. The Town and the Applicant agree that the Town has custody or control over the rest of the responsive records. Therefore, under this issue I will only deal with the bylaw records.

[para. 13.] The evidence is that the Town did not have physical custody of the bylaw records held by the R.C.M.P. before the Applicant’s request. It later obtained the bylaw records from the R.C.M.P. and provided them, in severed form, to the Applicant before the inquiry. As the Town demanded and obtained the bylaw records from the R.C.M.P., the Town in effect admitted that it had control of the bylaw records at the time of the request, bringing the bylaw records within the scope of the Act. In that sense, the dispute underlying this issue no longer exists between the parties. However, as this jurisdictional issue was set down, I will deal with it. I find that the Town is a public body for the purposes of the Act, looking to the Act’s definitions of a “public body”, a “local public body” and a “local government body”: see sections 1(1)(i)(i), 1(1)(j)(iii), 1(1)(p)(vi). I

further find that the Town has control over the records the Applicant requested, as provided by section 4(1) of the Act.

**ISSUE B. Did the Town conduct an adequate search for the records and in doing so meet its duty to assist the Applicant under section 9(1)?**

**1. General**

[para. 14.] Section 9(1) of the Act reads:

*9(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.*

The Act is silent on who bears the burden of proof in an inquiry under section 9(1). As the Town is in the better position to provide evidence on what it did to respond to the Applicant's access request, it has the burden of proof for this issue: Order 96-022.

**2. Summary of the Arguments of the Parties**

[para. 15.] I have no authority to deal with the Applicant's expressed concerns about potential damage to the Applicant's reputation, or how the Town responded to requests for information outside of the Act. The matters that I can deal with under section 9(1) of the Act go to the Town's general duty to assist and respond to the Applicant, which includes testing the adequacy of the Town's search to find the requested records. I will summarize the major arguments of the parties on those matters.

[para. 16.] The Applicant's position is that the Town failed to maintain accurate and complete records, and provide access to them in a proper and timely fashion. The Applicant says that the Town's original response to the request, dated December 15, 2000, was backdated and hand delivered to her on December 28, 2000. The Applicant says she was denied access to the Special Constable's letter to protect another municipality. The Applicant is unhappy about the length of time it took to obtain records after the request was made. The Applicant says that there may be missing records in several areas, including committee records, Town administrative records, and council records. The Applicant says that no records were provided to her from the former Mayor, who "appeared to have copious information" about her. I will not detail the Applicant's arguments on the remaining missing records, to avoid indirectly identifying her. The Applicant says that she was told that the Town intentionally destroyed correspondence before the Act applied to municipalities. She believes that this alleged destruction was illegal.

[para. 17.] The Town argues that all responsive records in its custody or control were provided to the Applicant. The Town also argues that it did an adequate search, as shown by the affidavits it filed in the inquiry, as well as its detailed response to the Applicant's concerns. The Town says that its records are managed according to a retention and destruction schedule. By implication, if any records were destroyed, it was in accordance

with that schedule. The Town denies any knowledge of the allegedly backdated correspondence.

### **3. Discussion**

[para. 18.] Section 9(1) of the Act requires a public body to make every reasonable effort to assist an applicant and respond openly, accurately, and completely to an applicant. How a public body responds to a request varies according to the fact situation of each request: Order 98-003.

[para. 19.] Under section 9(1), the Town must conduct an adequate search for records that are responsive to the Applicant's request. An adequate search includes: 1) every reasonable effort is made to search for the actual record requested; and 2) the applicant is informed in a timely fashion of what the public body has done: Orders 96-022 and 98-012. The applicable standard is not perfection, but what is reasonable in the circumstances.

[para. 20.] Before I consider the substance of the Town's conduct under section 9(1), I will deal with the Applicant's argument that Town officials may have more information about her than the records released. Section 6(1) of the Act states that an applicant's right of access under the Act only applies to records in the custody or under the control of a public body:

*6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[para. 21.] The Town need only search for records, because the access provisions of the Act apply to a "record", as defined in section 1(1)(q) of the Act as it was before it was amended effective April 25, 2001:

*1(1)(q) 'record' means a record of information in any form and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner....*

If information is not reduced to a record, it cannot be produced under the Act.

[para. 22.] The Applicant also suggested that some records may have been unlawfully destroyed before the Act applied to the Town. The Town gave evidence that it purged records in 1996 when it was setting up a new records system. I accept this evidence, and think that this purge may well be the event raised by the Applicant. I am satisfied that there is no evidence that the Town improperly destroyed records or information with the intent to avoid disclosure under the Act.

[para. 23.] The Town's evidence shows that it searched for records in its electronic database and its paper records, including archived records. A total of 16 affidavits were submitted at inquiry detailing the searches done. The FOIP Coordinator who oversaw the searches swore an affidavit. The Municipal Manager's office and the Legislative Services

Coordinator's office were searched, as were several other areas, including taxes, property, finances, the fire department files, and community services. Three incumbent council members swore affidavits indicating they had searched their council material for records. Two Special Constables who did bylaw work swore affidavits on their searches. After reviewing the initial evidence, I asked the Town for a further submission on the searches done in the offices of the incumbent Town council members. By letter dated September 13, 2001, the Town submitted affidavits from the 4 remaining incumbent council members, indicating that each one had searched their council materials. I am satisfied with the adequacy of the search for responsive records in so far as past and incumbent Town councillors are concerned.

[para. 24.] The Town's error about control of the bylaw records, which it later corrected, raises the issue of whether the Town's initial failure to search for those records breached section 9(1).

[para. 25.] The evidence discloses honest confusion on the part of the Town (a small municipality) and the R.C.M.P relating to the control of the bylaw records. The Town's position on control was initially mirrored by the R.C.M.P.'s own assessment of the matter. There is nothing that suggests the Town wanted to hide those records--or any other responsive records--from the Applicant. There was a reasonable basis for making a mistake about which body (or bodies) had control of the records. Because the Town reasonably believed at the time of the request that it did not have custody or control of the bylaw records, I find that it was reasonable not to conduct a search for those records. In other circumstances, where evidence of the good-faith basis of a public body's error is lacking, I may not come to the same conclusion. I note too that the Town reconsidered its position on the Special Constable's letter, and took steps to comply with the Act. On balance, considering all the evidence, I am satisfied with the adequacy of the searches performed by the Town. I am also satisfied that the Town informed the Applicant in a timely fashion about what it had done.

[para. 26.] The Applicant also raised other issues that do not fall within section 9(1). I will still comment on them. Section 10(1) of the Act directs the head of a public body to make every reasonable effort to respond to a request within 30 days. The Applicant alleges that the Town's initial response was backdated, but there is no cogent proof of this. In any event, that response was within the timelines set down by the Act. The Town kept the Applicant informed of the processing of her request, including the issuance of third party notices. Third party notices will delay a public body's decision about whether to release a record, because a public body must receive and consider third party views about whether or not that party's information should be released. The Town met the timelines for releasing records where third party notice had been issued; it did not improperly delay the release of the Special Constable's letter. I am satisfied that the Town's communications to the Applicant were timely.

#### **4. Conclusion under section 9(1)**

[para. 27.] I find that the Town conducted an adequate search and met its duty to assist the Applicant under section 9(1) of the Act.

**V. ORDER**

[para. 28.] I make the following Order under section 68 of the Act:

1. I find that the Town has control over the records the Applicant requested, as provided by section 4(1) of the Act.
2. I find that the Town conducted an adequate search and met its duty to assist the Applicant under section 9(1) of the Act.

Frank J. Work, Q.C.  
Acting Information and Privacy Commissioner