

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-004

August 28, 2002

ALBERTA JUSTICE

Review Number 2236

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

Summary: The Applicant, who was dismissed from employment in the Court of Appeal of Alberta (the “Court”), sought access to employee complaints about the person who allegedly dismissed the Applicant. Alberta Justice could not find any responsive records in its own records system. Alberta Justice said that, if responsive records existed, those records were in the Court and may be in the custody or under the control of the Chief Justice of the Court. The Commissioner found that Alberta Justice itself did not have custody (possession) of any responsive records, nor did it have control of any responsive records that may exist in the Court. Therefore, the Act did not apply to those records.

Statutes Cited: *Constitution Act, 1867*, s. 96; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(p)(ix) [previously section 1(1)(p)(ix)], 4(1) [number unchanged by R.S.A. 2000, c. F-25], 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25], 4(3) [previously section 4(2)], 6(1) [number unchanged by R.S.A. 2000, c. F-25], 6(2) [number unchanged by R.S.A. 2000, c. F-25], 10(1) [previously section 9(1)], 72 [previously section 68]; *Public Service Act*, R.S.A. 2000, c. P-42.

Authorities Cited: AB: Order 99-021

I. BACKGROUND

[para 1] Alberta Justice (the “Public Body”) employed the Applicant under contract to work for the Chief Justice of the Court of Appeal of Alberta (the “Chief Justice”, an affected party in this inquiry). The Applicant reported to the Chief Justice for functional purposes and to the Registrar for the Court of Appeal of Alberta (the “Registrar”, also an affected party in this inquiry) for administrative purposes.

[para 2] The Registrar allegedly terminated the Applicant’s contract before the expiry of the term. The Applicant brought legal action against the Public Body and the Registrar.

[para 3] On April 2, 2001, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Public Body, for access to the following:

All available information pertaining to employee complaints made to Alberta Justice Court Services/Personnel/Human Resources respecting the conduct of [name] as Registrar of the Alberta Court of Appeal.

[para 4] On April 23, 2001, the Applicant also made the same access request to Alberta Human Resources and Employment (“AHRE”). AHRE told the Applicant that no records were located, and that the Public Body most probably held such records.

[para 5] The Public Body extended the time limit for responding to the Applicant. On May 28, 2001, the Public Body informed the Applicant that it was unable to locate any responsive records. A further query by the Applicant resulted in a similar answer by the Public Body on July 16, 2001.

[para 6] On July 23, 2001, the Applicant requested a review of the Public Body’s response. Mediation was authorized but was not successful. The matters were set down for a private oral inquiry.

[para 7] The Public Body and the Applicant provided advance written submissions for the inquiry. The Chief Justice and the Registrar did not provide written submissions and did not appear at the inquiry.

[para 8] During the inquiry, I asked the Public Body to confirm whether it had searched for responsive records in the office of the Assistant Deputy Minister of Alberta Justice, who is responsible for Court Services. The Applicant had allegedly complained to that person about the Registrar. If the Public Body had not searched that office, I asked the Public Body to search it and report back to me and to the Applicant. I also asked the Public Body to take a broad rather than a narrow view of what would constitute responsive records.

[para 9] The Public Body subsequently reported that it had searched that office. However, since there wasn’t a specific notation in the file as to that search, the Public

Body searched that office again. The Public Body said that it did not locate any responsive records in that office.

[para 10] On January 1, 2002, the revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, came into force. Most of the section numbers of the Act changed, but not the substance of the sections. In this Order, the previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 11] As the Public Body did not find any responsive records, there are no records before me in this inquiry.

III. ISSUES

[para 12] There are four issues in this inquiry:

- A. If responsive records exist, are the records in the custody or under the control of the Public Body?
- B. If the records are in the custody or under the control of the Public Body, are the records excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25]?
- C. Did the Public Body respond to the Applicant openly, accurately and completely, as required by section 10(1) [previously section 9(1)] of the Act?
- D. Did the Public Body conduct an adequate search for responsive records?

IV. DISCUSSION OF THE ISSUES

ISSUE A: If responsive records exist, are the records in the custody or under the control of the Public Body?

[para 13] For the Act to apply to records, the records must be in the custody or under the control of a public body, as provided by section 4(1) [number unchanged by R.S.A. 2000, c. F-25] of the Act, which reads:

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

[para 14] The Public Body says that there are no responsive records in its custody, which the former Commissioner defined to mean possession. The Public Body believes

that, if responsive records exist pertaining to employee complaints about the conduct of the Registrar, those records are in the Court of Appeal of Alberta (the “Court”), and may be in the custody or under the control of the Chief Justice. The Public Body argues that any responsive records that may be in the Court are not in the Public Body’s control.

[para 15] The Applicant argues that the Public Body is the employer and must maintain control over the records. The Applicant sees a failure of the Public Body to deal with records in its control. The Applicant also does not accept the Public Body’s assertion that it does not have responsive records.

[para 16] Furthermore, at paragraph 21 of the Applicant’s submission, the Applicant submits that the following question is also relevant and critical to the outcome of my inquiry:

In the event that records responsive to the Applicant’s request were, but are no longer, in the custody of Alberta Justice,

- i. when, under what circumstances, and to whom those records were transferred, and
- ii. whether, in light of the Applicant’s FOIP request, such transfer constitutes a breach of the spirit and intent of the FOIP Act.

[para 17] The Public Body’s evidence is that its records are scheduled and are subject to a records retention and disposition schedule. The Public Body says that no records are transferred except in accordance with that schedule, and that it did not transfer any records in this case.

[para 18] I accept the Public Body’s evidence that it did not transfer any records. I also accept the Public Body’s evidence that it does not have custody (possession) of responsive records.

[para 19] The issue before me then is whether the Public Body has control over any responsive records that may be in the Court. If the Public Body has control over responsive records, if any, in the Court, the Act applies to those records. The Applicant has a right of access to those records, subject to limited exceptions as provided by section 6(1) and section 6(2) [numbers unchanged by R.S.A. 2000, c. F-25] of the Act.

[para 20] The evidence set out in paragraph 14 of the Public Body’s submission is that the Public Body employs the Registrar and other employees of the Court. The Public Body says that the Registrar is appointed under the *Public Service Act*. Functionally, the Registrar reports to the Chief Justice. Administratively, the Registrar reports to the Assistant Deputy Minister responsible for Court Services, Alberta Justice. The duties of the Registrar are set out in the position description summary (Tab D of the Public Body’s submission), as follows:

The Registrar is the Chief Administrative Officer for the Court and as such is responsible for directing the financial, administrative and operational affairs of the Court...As the

Court of Appeal forms no part of the government, the Registrar is the link between the judiciary and the administrative body. In this respect, the Registrar promotes and affirms the special relationship between the Court, the judges and society in accordance with the principles of judicial independence.

[para 21] It is my view that, under the usual employment circumstances, the Public Body would have control over employment-related records of the Registrar and other employees of the Court, since those records would relate to the Public Body's mandate as employer. Those records would include any complaints made by an employee about the conduct of another employee.

[para 22] The Public Body says that employee grievances, which involve a formal process, will find their way from the Court to the Public Body. The Public Body gave evidence that it has employee grievance files in its records system.

[para 23] The Public Body also gave evidence that it has some employee complaint files in its records system. However, the Public Body says that not all employee complaints are recorded, nor is there is a requirement that all employee complaints be recorded.

[para 24] Furthermore, the Public Body maintains that not all employee complaints will necessarily find their way from the Court to the Public Body. The Public Body says that there is nothing to stop someone from going to a judge, such as the Chief Justice, to complain. If a complaint were raised with the Chief Justice or a judge of the Court, the Public Body may have no record of that complaint.

[para 25] The Public Body argues that it does not have control over any employee complaints that the Court might have, on the principle of independence of the judiciary from government. At paragraph 3 of its submission, the Public Body says:

The Constitution Act 1867 establishes section 96 courts. The Government of Canada appoints and pays the salaries of judges of these courts including the Court of Appeal of Alberta. The Province is required to provide and pay for support services for these courts. Section 96 courts are not created by the Province and the Province has no constitutional power to control these courts. This is consistent with the principle of judicial independence. In a free and democratic society judicial independence is critical because in its absence the court merely becomes an arm of the Executive Government.

[para 26] The Public Body provided me with some Supreme Court of Canada decisions upholding the principle of judicial independence. In keeping with the long-standing principle of independence of the judiciary from Government, the Public Body maintains that employee complaints in the custody or control of members of the Court (the judiciary) cannot be considered to be in the custody or control of the Public Body. During the inquiry, the Public Body was adamant that it had no ability to go to the Chief Justice and get anything in her office.

[para 27] I asked the Public Body how it knew it did not have control of employee complaints that the Court might have. The Public Body replied that it has a decentralized records system, containing only limited records. The Court has its own records system. The Public Body emphasizes that the Court is not a public body under the Act, as set out in section 1(p)(ix) [previously section 1(1)(p)(ix)] of the Act. Consequently, an access request to the Public Body would not compel it to seek records from a non-public body such as the Court.

[para 28] Furthermore, the Public Body says that it has no way of demanding records from the Court. It does not go to the Court to search, or request the Court to search. If a record does not find its way to the Public Body, the Public Body says it does not have any way to compel the record from the Court, nor would it check the Court for records. The Public Body maintains that it cannot control the relationship with the Court.

[para 29] I asked the Public Body how it can be sure it gets everything from the Court that it is supposed to get. The Public Body says that there are mechanisms in place for the records that must go to it to do so: for example, personnel evaluations. The Public Body says it must rely on the Court to provide it with records, and it makes the assumption that it has everything it needs from the Court, in its own files.

[para 30] In these unusual circumstances, I find that the Public Body does not have control over any responsive records that may exist in the Court. Whether the Public Body should have such control so as to be able to compel the Court to produce responsive records, if any, is another matter. I note here only the apparent gap that exists between the Public Body's mandate as employer and its ability to compel responsive records, if any, from the Court.

[para 31] I find that, if responsive records exist, the records are not in the custody or under the control of the Public Body. Therefore, as set out in section 4(1) [number unchanged by R.S.A. 2000, c. F-25], the Act does not apply to those records.

ISSUE B: If the records are in the custody or under the control of the Public Body, are the records excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25]?

[para 32] Given my finding set out above, I normally would not find it necessary to also consider whether the records are excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25]. However, I have decided to set out my views about section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] in this case.

[para 33] Section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause.

[para 34] The main focus of the parties' arguments was on that part of section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] pertaining to "a record relating to support services provided to the judges of any of the courts..."

[para 35] The Public Body says that records relating to support services provided to judges must not have the same meaning as judicial administration records, defined in section 4(3) [previously section 4(2)], on the basis of the presumption against useless repetition. I agree that the records, if they exist, are not judicial administration records. I also find that the records are not "court administration records", as set out in the opening words of section 4(1) [number unchanged by R.S.A. 2000, c. F-25], information in a court file, or a record of a judge.

[para 36] The Applicant maintains that the records do not meet any of the criteria of section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25]. The records are employee complaints in relation to the Registrar, which the Applicant argues are records pertaining to the support services provider, rather than the support services provided to the judges of the Court.

[para 37] Section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] refers to the support services provided to the judges. It does not refer to the persons employed to provide those support services. Indeed, the evidence is that the Court does not employ the persons who provide the support services. The Public Body is responsible for employing those persons. So section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] is not concerned with employment and records relating to employment of the persons who provide the support services.

[para 38] Records of employee complaints concerning the conduct of the Registrar would relate to the employment of the persons who provide the support services. Therefore, if those records were in the custody or under the control of the Public Body, the records would not be excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] because those records do not relate to support services provided to the judges of the Court. The Act would apply to those records.

ISSUE C: Did the Public Body respond to the Applicant openly, accurately and completely, as required by section 10(1) [previously section 9(1)] of the Act?

[para 39] The Applicant says that the Public Body's response to the Applicant indicated only that the Public Body could not locate responsive records. That response came after the Public Body had given itself a time extension for responding, on the basis that the Applicant's request could require "a significantly more complex" response than initially anticipated (paragraph 46 of the Applicant's submission).

[para 40] In Order 99-021, among others, the former Commissioner said that if a public body's response is that it cannot locate responsive records, the public body should inform the applicant about the steps taken to find records. The former Commissioner also said that providing that information in a submission for the inquiry did not satisfy the public body's duty, although the Commissioner would not then order the public body to comply with its duty.

[para 41] When it did not find responsive records, the Public Body did not inform the Applicant about the steps it took to find records. Therefore, I find that the Public Body did not respond to the Applicant openly, accurately and completely, as required by section 10(1) [previously section 9(1)] of the Act.

[para 42] It would serve no useful purpose now to order the Public Body to comply with its duty under section 10(1) [previously section 9(1)] of the Act. However, by this Order, I am bringing to the head's attention that the Public Body did not comply with its duty.

[para 43] There is one last matter. Upon evidence the Applicant presented about the existence of two grievances by employees of the Court, allegedly involving the Registrar, the Public Body said that it had come across those files in its records system. However, the Public Body says it decided that the information was not responsive to the Applicant's access request because the information concerned grievances related to employment matters, not complaints about the conduct of the Registrar.

[para 44] Although I agree with the Public Body's characterization of the information as being non-responsive, I caution the Public Body that it came close to taking too narrow a view of responsiveness. Had the Public Body informed the Applicant that it found the two files, and stated its reasons for treating the files as non-responsive, I believe that information would have gone a long way toward preventing section 10(1) [previously section 9(1)] from becoming an issue.

ISSUE D: Did the Public Body conduct an adequate search for responsive records?

[para 45] The Public Body says that it has paper-based files, and that it locates its files through a Cardex system. The Public Body described the categories under which

records are classified and filed concerning employees. A number of records are classified and filed by employees' names.

[para 46] The Public Body says it searched using the Applicant's name, the Registrar's name, and the name of the Court. It also searched its complaint/grievance files. It did not locate any responsive records.

[para 47] During the inquiry, I asked the Public Body to check whether it searched the office of the Assistant Deputy Minister to whom the Applicant complained. The Public Body searched that office again, but did not find any responsive records.

[para 48] I find that the Public Body conducted an adequate search for responsive records. My finding is supported by the evidence that the Public Body initially found the two grievance files mentioning the Registrar, which the Applicant brought to my attention during the inquiry. Those files were designated by the name of the grievor, not by the name of the Registrar.

V. ORDER

[para 49] I make the following Order under section 72 [previously section 68] of the Act.

A. Custody or control of records

[para 50] If responsive records exist, the records are not in the custody or under the control of the Public Body. Therefore, as set out in section 4(1) [number unchanged by R.S.A. 2000, c. F-25], the Act does not apply to those records.

B. Records excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25]

[para 51] If the records were in the custody or under the control of the Public Body, the records would not be excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25]. The Act would apply to those records.

C. The Public Body's response to the Applicant under section 10(1) [previously section 9(1)]

[para 52] The Public Body did not respond to the Applicant openly, accurately and completely, as required by section 10(1) [previously section 9(1)] of the Act.

[para 53] It would serve no useful purpose now to order the Public Body to comply with its duty under section 10(1) [previously section 9(1)] of the Act. However, by this Order, I am bringing to the head's attention that the Public Body did not comply with its duty.

D. Adequacy of the Public Body's search

[para 54] The Public Body conducted an adequate search for responsive records.

Frank Work, Q.C.
Information and Privacy Commissioner