ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-014

July 22, 2002

MUNICIPALITY OF CROWSNEST PASS

Review Number 2256

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Summary: The Applicant applied under the *Freedom of Information and Protection of Privacy Act* to the Municipality of Crowsnest Pass for records containing specific technical information related to the municipal water system. The Municipality conducted a search of its records and interviewed its employees, but did not locate any responsive records. Commissioner Work held that the Municipality had failed to meet its duty to the Applicant under section 10(1) [previously 9(1)] of the Act. He ordered the Municipality to conduct a further search, focusing specifically on records in the control of the Municipality that may be in the hands of a third party.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss**.** 6(1), 10(1) [previously 9(1)], 59(4) [previously 57(4)], 72 [previously 68].

Orders Cited: AB: 98-002, 2001-033.

I. BACKGROUND

[para. 1.] On July 26, 2001, the Crowsnest Pass Ratepayers' Association (the "Association") made an access request (the "request") under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Municipality of Crowsnest Pass (the "Municipality" or the "Public Body"), for specific technical information about elevations related to the Municipality's water system, from 1960 to the date of the request.

[para. 2.] On August 2, 2001, the Municipality told the Applicant that a search failed to reveal any records relating to the request. The employee responsible wrote to the Applicant:

> I am satisfied that reasonable efforts have been made by interviewing our resource personnel in the Public Works department and going through the Municipal records system; however, to no avail.

[para. 3.] By letter received on August 15, 2001, the Applicant requested a review of the Municipality's response. Mediation was authorized, but failed. A Notice of Inquiry was issued on March 18, 2002, setting down this issue:

> Did the Public Body conduct an adequate search for responsive records under section 10(1) [previously section 9(1)] of the Act?

[para. 4.] A written inquiry was held in May 2002, in which I considered submissions from the Applicant and the Municipality.

[para. 5.] On January 1, 2002, the Revised Statutes of Alberta 2000 came into force. Although this did not result in substantive changes to the Act, various sections of the Act were renumbered. The submissions of the parties refer to the previous section numbers of the Act, as those were the section numbers in use at the material times. As such, for ease of reference, in this Order I will refer to both the current and the previous applicable section numbers of the Act.

II. RECORDS AT ISSUE

[para. 6.] Since the inquiry pertains to a duty under the Act, there are no records directly at issue.

III. ISSUE

Did the Public Body conduct an adequate search for responsive records under section 10(1) [previously section 9(1)] of the Act?

IV. DISCUSSION OF THE ISSUE

1. Summary of the arguments of the parties

[para. 7.] The Municipality argued that it had conducted an adequate search for records. It submitted that it had conducted a "full review," which included interviewing resource personnel in the Public Works Department and going through the Municipality's records systems relating to municipal water projects and water storage facilitates. The submission noted:

> After a considerable amount of time devoted by Municipal Staff to locate any detailed information … the applicant was advised in a timely manner that this information does not exist. We did however offer the applicant viewing of construction drawings in an effort to respond to the request for information.

[para. 8.] The Applicant argued that the Municipality failed to make an adequate search for records containing the information requested. The Applicant argued that the original engineering firm or design engineer must have provided the elevation information to the Municipality, and this information must have been submitted to bidders in the tendering process for subsequent construction on the water system.

[para. 9.] As well, in February 2000, UMA Engineering ("UMA") produced a report (the "report") on the Municipality's water systems. The Applicant argued that the report could not have been produced without the elevation information: either UMA obtained the information from the Public Body, or UMA developed the information through a survey paid for by the Public Body. In either case, the Public Body has control of that information. The Applicant also argued that a UMA employee had told him that it needed the authorization of the Public Body to release the responsive information it had. The Applicant then asked the Chief Administrative Officer of the Municipality to authorize the release. The CAO allegedly did not respond to the request. The thrust of the Applicant's argument was that there must be more responsive records that the Municipality had not located.

[para. 10.] The Applicant argued that the Municipality "knowingly and deliberately frustrated our attempts to obtain the requested information" and breached section 10(1) [previously section 9(1)] of the Act. The Applicant asked that I apply section 59(4) [previously section 57(4)] of the Act and disclose evidence of the alleged offence by the Municipality to the Attorney General.

2. My decision

a. General

[para. 11.] An applicant has a general right of access to records in the custody of a public body under section 6(1) of the Act, which reads:

> 6(1) An applicant has a right of access to any record in the custody or under the control of a public body…[my underlining]

[para. 12.] Under the Act, custody and control are distinct concepts. "Custody" refers to the physical possession of a record, while "control" refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

[para. 13.] A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

[para. 14.] As a public body subject to the Act, the Municipality must meet its duty to applicants set out in section 10 of the Act:

> 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. 15.] The duty to applicants requires a public body to make an adequate search for responsive records. An adequate search has two components. A public body must: 1) make every reasonable effort to search for the record requested; and 2) the applicant must be told, in a timely fashion, what the public body has done to respond to the request.

[para. 16.] The Act requires a public body to "make every reasonable effort" to search for the record requested. The standard for an adequate search is not perfection, but what is "reasonable." In Order 98-002, Commissioner Clark 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." In this case, "every reasonable effort" includes searching for all records in the custody or under the control of the Municipality.

b. Did the Municipality make an adequate search for responsive records?

[para. 17.] The Applicant's submission indicated that in May of 2001, its President was told by a UMA employee that UMA held at least some of the information sought, but that municipal authorization was required to disclose that information to the Applicant. The President subsequently passed on that information to the CAO of the Municipality in May 2001.

[para. 18.] The Public Body did not address the Applicant's claim that a third party, UMA, had potentially responsive records which UMA believed were in the control of the Municipality, and could only be released with the authorization of the Municipality. The evidence of the Public Body is that it conducted a purely internal search of its records. There is no evidence that the Municipality took any steps to contact third parties to determine if there were responsive records in the control of the Municipality, but in the custody of a third party, such as UMA.

c. Conclusion

[para. 19.] Since the President of the Applicant association had alerted the Municipality that UMA might have responsive records before it made the request, it would have been reasonable for the Municipality to search for responsive records in its control in the hands of third parties, such as UMA. Therefore, I intend to order the Municipality to make a further search for responsive records in the control of the Municipality that may be in the hands of third parties.

d. Should I apply section 59(4) [previously section 57(4)] of the Act?

[para 20.] In its submission, the Applicant argued that the Public Body "knowingly and deliberately frustrated our attempts to obtain the requested information" and deliberately breached section 10(1) [previously section 9(1)] of the Act. The Applicant asked me to apply section 59(4) [previously 57(4)]. This provision gives me the discretionary power to disclose to the Minister of Justice and the Attorney General information that comes to me relating to the commission of an offence against an enactment of Alberta or Canada, if I consider there is evidence of an offence.

[para. 21.] In Order 2001-033, I said that I would not apply section 59(4) of the Act [previously 57(4)] in the absence of sufficient evidence of an offence under an enactment. The provision does not operate on allegations, conjecture or assumptions. It requires adequate evidence of an offence under an enactment before I can exercise my discretion. I am not persuaded that there is sufficient evidence that the Municipality deliberately and knowingly breached its duty to assist the Applicant under the Act. The evidence before me here suggests that the Municipality wrongly read the Act to mean that it did not have to search outside of its record systems, and acted accordingly. Therefore, I will not engage this provision.

V. ORDER

[para. 22.] I make the following Order under section 72 [previously section 68] of the Act:

1. I find that that the Public Body did not make an adequate search for records, and so did not meet its duty to the Applicant, as required under section 10(1) [previously section 9(1)] of the Act.

2. I order the Municipality to conduct a further search for records in its control that may be in the custody of third parties, including UMA.

3. 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.

Frank Work, Q.C.
Information and Privacy Commissioner