ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-016

July 28, 2003

THE CITY OF CALGARY

Review Number 2293

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Summary: The Applicant applied to The City of Calgary (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to records concerning an equal opportunity complaint the Applicant brought against the Public Body in November 1992. The Public Body responded that the records had been destroyed. Adamant that microfiche records must still exist, the Applicant questioned the adequacy of the Public Body's search and whether the Public Body otherwise met its duty to the Applicant, as required by section 10(1) of the Act. The Adjudicator found that the Public Body conducted an adequate search for responsive records and otherwise met its duty to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6(1), 10(1).

Authorities Cited: AB: Order 2000-021.

I. BACKGROUND

[para 1] In July 2001, the Applicant applied to The City of Calgary (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act) for access to records concerning an equal opportunity complaint the Applicant brought

against the Public Body in November 1992. In the access request, the Applicant also said:

> An investigation was conducted and a letter was issued to comment on the outcome. However, the information sent was rather abbreviated, amounting to no greater than two sentences. This information was not satisfactory and I need to be made aware of supporting information.

[para 2] The Public Body's initial search found 13 microfiche records related to the Applicant's employment history, which were not responsive to the Applicant's access request. A further search identified a file related to the Applicant's equal opportunity complaint, which the Public Body said had been destroyed in December 2000 in accordance with its records Classification and Retention Schedule. Consequently, the Public Body informed the Applicant that no responsive records had been found, and explained that the records requested had been destroyed.

[para 3] The Applicant believed that the information still existed within the Public Body and "…most definitely in the microfiche form". Consequently, the Applicant requested a review under the Act. When mediation did not resolve the issue, the matter was set down for a written inquiry.

[para 4] In the inquiry process, the Applicant requested that the Commissioner's Office "…refrain from opening for public inspection, all information presented in respect of the matter at hand. This includes a denial of permission to publish any judgment to a decision via the internet."

[para 5] The Commissioner's Office responded to the Applicant, as follows:

> The usual practice of this Office is that every decision (called an "Order") is publicly released and posted to our website. This Office will follow the usual practice for the decision (Order) in your case.
>
> However, an Order generally does not name an individual Applicant. In your case, the Order will name the Public Body only and you will be referred to as "the Applicant" without any disclosure of your name.

II. RECORDS AT ISSUE

[para 6] As the issue involves the Public Body's duties under section 10(1) of the Act, there are no records directly at issue.

III. ISSUES

[para 7] There are two issues in this inquiry:

A. Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act?

B. Did the Public Body conduct an adequate search for responsive records [subset of section 10(1)]?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act?

[para 8] Section 10(1) of the Act reads:

> *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 9] In fulfilling its general duty under section 10(1), the Public Body says it:

> (i) Contacted the Applicant to clarify the request and obtain the Applicant's employee number so that the search could be done more quickly and accurately;
>
> (ii) Sent a letter to the Applicant acknowledging the request, advising as to when a response would be received, and advising of the Applicant's rights under the Act;
>
> (iii) Sent a letter to the Applicant, within the time for a response, advising of the results of the search and giving the Applicant copies of the Classification and Retention Schedule, and record of destruction; and
>
> (iv) Continued to assist by searching on three subsequent occasions.

[para 10] The Public Body submitted that it made every reasonable effort to assist the Applicant and responded openly, accurately and completely.

[para 11] In the Applicant's request for review letter to this Office, the Applicant said:

> Kindly be advised that the City has requested that I contact your office both in the absence as well as in the presence of a contention. This has led me to believe that there has been a refusal from the very start to release the information requested even before due process was allowed.

[para 12] The Applicant was questioning the following part of the Public Body's August 2, 2001 response letter to the Applicant:

> Section 62 of the *Freedom of Information and Protection of Privacy Act* provides that you may make a written request to the Information and Privacy Commissioner to review this matter. Your have 60 days from the date of this notice to request a review by writing to the Commissioner at 410, 9925 – 109 Street, Edmonton, Alberta, T5K 2J8.

[para 13] Among other things, the Applicant questioned whether this standard wording used in the Public Body's response was intended to distract an applicant by making a premature request for review by the Information and Privacy Commissioner.

[para 14] The Public Body says:

> It appears from the Applicant's August 17, 2001 letter (Tab 2) that [the Applicant] was put off by the wording of the Public Body's August 02, 2001 letter and had concluded that the Public Body would not treat [the Applicant] fairly and had already decided that they would not respond to [the Applicant's] request. The facts indicate the opposite. The Public Body searched and responded in a timely manner and with full disclosure.

[para 15] I agree with the Public Body's assessment of the Applicant's reaction. The standard wording or any variation of it used in the Public Body's response does not mean that the Public Body is in breach of its duty to the Applicant under section 10(1).

[para 16] The Applicant argues that the Public Body had a duty to clarify the access request. As a result of not clarifying the request, the Applicant maintains that the Public Body searched for records, rather than information, thereby conducting a search for the wrong information.

[para 17] On the face of the Applicant's access request, it is clear that the Applicant wants access to records about the equal opportunity complaint and "supporting information" concerning the outcome of the investigation. Since the request is clear, I find that the Public Body did not have a duty to clarify the request.

[para 18] The Applicant also submits:

> A factual determination must be made as to when personal information contained within the requested records was disclosed in order to engage another possibility as to where they may exist. Where the possibility exist [sic] that this information may have been disclosed, and introduced into the security files to law enforcement agencies within and outside Canada, the City can best assist the Applicant by making this occurrence known.
>
> Similarly, if the information was disclosed to the province, it is incumbent upon the City to also make this known in order to satisfy the requirement of the Act, R.S.A. 2000, c. F-25, s.10(1). The duty to assist is that of a higher calling particularly in this instance.

[para 19] Given the Applicant's access request, I do not agree with the Applicant that the duty under section 10(1) extends to the foregoing.

[para 20] I find that the Public Body made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act.

ISSUE B: Did the Public Body conduct an adequate search for responsive records [subset of section 10(1)]?

[para 21] The Public Body says:

> Paragraph [68] of the Order #2000-021,…sets out the elements of an adequate search. It is submitted that the Public Body met both elements.
>
> Every reasonable effort was made to search for responsive records. The areas of the Public Body that might have records were identified and searched. The search was broader in scope than needed to ensure nothing was missed. More than one search was conducted.
>
> In fact, the search was successful. The Applicant's Equal Opportunity file was identified and records produced which clearly indicate the file was destroyed.
>
> As to the second element, the Applicant was advised of the results of the search within twenty eight (28) days of [the Applicant's] making the request.
>
> It is the Public Body's policy that a destruction notice be produced for the destruction of records and that the notice be signed by various individuals who ensure the destruction follows the Public Body's records policy. That notice was not produced in this instance. However, as can be seen by the Classification Schedule (Tab 1, Exhibit E) and the corresponding print out, retention and destruction policy was followed. The Applicant's Equal Opportunity file was retained for the appropriate period before destruction.

[para 22] The Applicant maintains that there has been an inadequate search, for the following reasons which I have summarized.

[para 23] The Applicant says that the Public Body did not search everywhere; it only searched the corporate head office and at the department level. The Public Body's evidence is that it also searched the General Manager's Office (the former City Engineer's Office), and recalled and searched a number of boxes from the Records Centre. I accept the Public Body's evidence of a more comprehensive search than the Applicant alleges.

[para 24] The Applicant believes the Public Body restricted its search to records in paper form only. The Public Body's evidence is that it searched for and found microfiche records, but those records were non-responsive to the Applicant's access request. During the review by this Office, the Public Body became aware that certain paper records had been transferred to a computer software program. It then searched that software program and found records, but those records were also non-responsive. I accept the Public Body's evidence that it did not restrict its search as the Applicant claims.

[para 25] The Applicant argues that the Public Body wrongly searched for records as opposed to searching for information. Also, the Public Body did not search a master copy and therefore searched the wrong record. However, there is no evidence before me to support the Applicant's arguments. Furthermore, the definition of record is a "record of information in any form". The Public Body cannot search for information in a vacuum. It must search for that information in records. It has to go through its records in whatever form, to find the information. Section 6(1) of the Act supports this approach, as it speaks of a right of access to a record. Moreover, the access form the Applicant filled out asks: "What records do you want to access?" Therefore, I cannot accept the Applicant's arguments.

[para 26] The Applicant argues that I cannot rely on the affidavit provided by the Public Body because the person who swore the affidavit was not the person who conducted the searches. The Applicant wants the affidavit struck. The Applicant also argues that those responsible for the search have to be "subjected to a sworn affirmation to the truth".

[para 27] The formal rules of evidence applicable in the court system do not apply to inquiries under the Act. Furthermore, an affidavit may be sworn on information and belief, provided that the person so swearing properly informs himself, as here. On the Applicant's view, I would have to ask for affidavits from all persons who conduct searches for records. There is the practical consideration that numerous persons have to conduct searches in large public bodies. In most cases, I do not find it necessary to ask for affidavits from all those persons. It is usually sufficient, as here, that someone responsible for the searches swears the affidavit on information and belief. Consequently, I will not strike the Public Body's affidavit.

[para 28] Finally, the Applicant argues that the Public Body has to prove beyond a reasonable doubt that it conducted an adequate search. "Beyond a reasonable doubt" is the criminal law standard of proof. The civil law standard of proof, which is applicable here, is proof "on a balance of probabilities". The Public Body has met that standard. I find that the Public Body conducted an adequate search for responsive records.

[para 29] The Applicant raises two other matters that the Applicant believes relate to the adequacy of the search. Because those issues are important to the Applicant, I have decided to respond to them, although I want to make it clear that those issues do not relate to the adequacy of the search.

[para 30] First, the Applicant says that the Public Body cannot decide in absolute terms that a record does not exist, based on the definition of "record" as a "record of information in any form". Consequently, just because the paper record was shredded, the Public Body cannot say that all the records were destroyed. The Applicant maintains that the microfiche records must still exist, for the following reasons.

[para 31] The Applicant says that the Public Body was required to microfilm the records, according to a 1990 administration manual of the Public Body. That manual

says that the Public Body's approval is needed to microfilm records, and that a strong business case is needed before approval will be given. However, there is no evidence that the records the Applicant is seeking were the kind of records that would be approved for microfilming or that the records were in fact approved for microfilming.

[para 32] The Applicant thinks that, since the records were essential documents, they were transferred to machine-readable format, based on requirements contained in the federal emergency preparedness legislation. However, assuming the federal legislation applies to a provincial public body, there is no evidence that the legislation requires that these particular records be retained in a machine-readable format or in any other form.

[para 33] Second, the Applicant says that the Public Body prematurely destroyed the records, without authority, in 1993 and 1994. However, the Public Body's evidence is that it retained the Applicant's equal opportunity file for the time required by the records Classification and Retention Schedule, and destroyed that file in December 2000. That date appears on the Public Body's record tracking sheet for shredded files, which the Public Body provided to the Applicant.

[para 34] Although the Disposition of Inactive Records form was not filled out for the destruction of the Applicant's equal opportunity file, as per the Public Body's policy, the Public Body says it followed the policy of retaining the file for the required time before destroying it. The Public Body says it is satisfied that the file was destroyed. On a balance of probabilities, it is likely that the file was destroyed, as the December 2000 destruction date set out on the Public Body's record tracking sheet for shredded files is a date beyond the retention period set out in the records Classification and Retention Schedule for those particular records.

[para 35] Finally, even if the records had been destroyed in 1993 and 1994, I would not have the authority to review that matter because the Act did not apply to the Public Body until October 4, 1999.

V. ORDER

[para 36] The Public Body made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act. The Public Body also conducted an adequate search for responsive records.

[para 37] As the Public Body has complied with the requirements of section 10(1) of the Act, I do not find it necessary to order the Public Body to comply.

Dave Bell
Adjudicator