

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2009-005

May 7, 2009

UNIVERSITY OF ALBERTA

Case File Number F4293

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the University of Alberta (the Public Body) for access to written complaints about proposed changes to a course under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) and a TLEF grant application he had made. The Public Body responded to his access request and identified records it considered to be responsive to both portions of the request; however, the Applicant was dissatisfied with the search conducted for records relating to the first part of his request. He requested review by this Office of the Public Body's response to his request for complaints about proposed course changes.

The Adjudicator found that the Public Body had not established that it had conducted an adequate search for responsive records in relation to the first part of the access request, and consequently had not met its duty to assist the Applicant under section 10 of the FOIP Act. She made this finding because the Public Body had limited its search to records in the possession of two individuals, without explanation, and because the Public Body had conducted an inadequate key word search for electronic records and had not considered whether it was possible to restore deleted electronic records.

She ordered the Public Body to search through its electronic back up files, if the Public Body were to determine that it is possible that responsive records exist in such files, and to expand its keyword search of electronic records if it were to determine that expanding the keyword search could locate further records. She also ordered the Public Body to

expand its search to other employees of the department, if it were to determine that expanding the search to other employees could locate further records.

If, in the course of conducting the new search, the Public Body were to conclude that responsive records, other than those it has already located, do not exist, or cannot be restored, the Adjudicator ordered the Public Body to communicate that conclusion and its basis to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 17, 72

Authorities Cited: AB: Orders 2001-016, F2007-028, F2007-029 **BC:** Order 121-1996

I. BACKGROUND

[para 1] On September 7, 2007, the Applicant made a request for access to the following records from the University of Alberta (the Public Body):

1. In the spring of 2007 I submitted a proposal for changes to a course [name of the course]. In April I was called to a meeting with the Chair ... and Associate Chair... who informed me of numerous complaints about my proposal. I request copies of all written complaints, notes of oral complaints and any and all other documentation including any email between the Chair and Associate Chair or anyone else pertaining to this matter.

2. I request copies of all documentation pertaining to my applications for TLEF in the fall of 2006 and spring 2007.

[para 2] The Applicant provided a recording to establish why he believes the records exist. The Public Body located records relating to both portions of the Applicant's access request and responded to the Applicant's request on November 13, 2007

[para 3] The Applicant requested review by this Office of the Public Body's response to him. The Applicant took the position that the Public Body had not searched adequately for records relating to the first part of his access request, which is for records relating to a complaint about proposed course changes

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. A notice of inquiry was sent out by this Office on December 15, 2008. This notice indicated that the issue for the inquiry was whether section 17 (personal information) applied to the records relating to the second part of the Applicant's request.

[para 5] I reviewed the parties' submissions and the records at issue and determined that the issue identified in the notice of the inquiry did not reflect the dispute between the parties. I determined that the issue for the inquiry was the following:

Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 6] I gave notice of the new issue to the parties and provided them with the opportunity to make submissions. The Applicant relied on his original submissions and evidence, while the Public Body provided new submissions.

II. RECORDS AT ISSUE

[para 7] As this inquiry addresses whether the Public Body met its duty to the Applicant under section 10 of the Act, there are no records at issue.

III. ISSUE

Issue A: Did the Public Body meet its duty to assist the Applicant?

IV. DISCUSSION OF ISSUE

Issue A: Did the Public Body meet its duty to assist the Applicant?

[para 8] Section 6 of the Act establishes an applicant's rights to access information. It states, in part:

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.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

[para 9] An applicant has a right to access to information in the custody of or under the control of a public body unless an exception under Division 2 applies to the information.

[para 10] Section 10 of the Act explains a public body's obligations to respond to an applicant when an applicant makes an access request for records. It states, in part:

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 11] The Public Body has the onus of establishing that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the Applicant within the meaning of section 10(1).

[para 12] Previous orders of this Office have established that the duty to assist includes conducting an adequate search for records. In Order 2001-016, the Commissioner said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (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.

[para 13] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records. He said:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 14] In Order F2007-028, the Commissioner noted that the duty to assist could extend to searching through backup files when a public body determines that it has deleted electronic data. Similarly, in Order 121-1996 the former Privacy Commissioner of British Columbia said:

When a request for access is received, a public body has an obligation under section 6 of the Act to locate any records, manual or electronic, that are responsive to the request. For electronic records, this should include extant data that have been deleted from a system but are still readily retrievable, and records on archive or backup tapes that are also readily retrievable without excessive efforts.

[para 15] The Applicant provided an audio recording and documentary exhibits to establish why he believes that there are additional records relating to complaints about proposed course changes. Having reviewed the audio recording, I find that the recording does not establish that further responsive records exist. Instead, I find that the information on the recording provides background and explanation for the first part of the Applicant's access request.

[para 16] The Public Body provided evidence to establish that the Chair and the Associate Chair of a department searched for records in their possession. These two employees provided affidavits detailing the steps taken to locate responsive records. As the wording of the affidavits is identical on these points, I will cite only the affidavit of the Chair of the department. This affidavit states:

4. Upon clarification of the Request from the Access and Privacy Advisor, I searched my e-mail and paper-based files for any reference to written complaints, notes of oral complaints and any documentation including emails between the Chair and Associate Chair or anyone else pertaining to the proposal for changes to [course name] as proposed by [Applicant's name] in the spring of 2007.
5. Specifically, in relation to a search of my e-mail account including all folders, I performed a search of all the emails sent or received by me with keywords, [Applicant's last name] and [Applicant's first name].
6. In response to my searches for electronic records, I provided the email records found to be responsive to the request to the Office of the Information and Privacy Advisor on October 9, 2007.
7. I do not have a standard practice concerning the deletion of e-mails after sending or receiving them since an individual e-mail's importance can vary depending on the circumstances. I delete e-mails from my e-mail account on an ongoing basis.
8. Specifically, in relation to a search for physical (paper) documents in the files maintained in my office relating to proposals for course changes and in particular for any records relating to complaints in respect of the proposed course change to [course name] as proposed by [the Applicant], and I did not find any physical (paper) records relating to complaints relating to the request for records beyond the electronic records provided as referenced in item 6 foregoing.
9. I do not have a standard practice concerning the destruction of records after sending or receiving them since an individual document's importance can vary depending on the circumstances. I destroy paper based files on an ongoing basis.
10. I am not aware of any other reasonable way that I could have searched for records responsive to the Request.

[para 17] The Public Body noted the following in its submissions:

- b) The scope of the search conducted for records responsive to Part 1 of the request included the following physical and electronic information sites:
 - i. The electronic and paper-based files of the Chair...
 - ii. The electronic and paper-based files of the Associate Chair of the Department...
 - iii. Copies of any records or information between the Chair and Associate Chair pertaining to these matters.
- c) Steps taken to identify and locate all possible repositories of records relevant to the request included:
 - i. A search for all records relating to the proposal for "all written complaints, notes of oral complaints and any and all other documentation including any emails between the Chair and Associate Chair or anyone else pertaining to the matter course changes to [name of course] within

the date range of the applicant's request in the possession of the Chair of [the name of department] was conducted by the Department Chair and Associate Chair.

[para 18] In keeping with Order F2007-029, the Public Body has explained the specific steps it took to identify and locate records responsive to the first part of the Applicant's access request, the scope of the search it undertook, and who performed the search. However, the Public Body limited its search to only those records located in the offices of, or on the computers of, the Chair and the Associate Chair of the department.

[para 19] The Applicant's email of April 11, 2007, which invited comments about proposed course changes, was sent to the entire department for comment. Consequently, it is likely that any complaints or responses regarding the proposal in this email would come from members of the department. The Applicant's access request was made to the head of the Public Body. The Applicant requested "copies of all written complaints, notes of oral complaints and any and all other documentation *including* any email between the Chair and Associate Chair or *anyone else* pertaining to this matter [proposed course changes]." The Applicant did not limit his request to only those complaints that contained his name and were in the physical custody of the Chair and Associate Chair, as the Public Body appears to have done.

[para 20] If an email is sent by an employee of the Public Body from the employee's work computer, the sender may also have a copy of the email, unless the sender deletes it. In addition, if an email is forwarded or copied to other employees of the Public Body, then additional employees may also have a copy of the email. Consequently, even if the Chair and Associate Chair do not have copies, other employees of the department may have copies. However, other employees of the department were not asked to search for responsive records and were not asked whether they knew of responsive records.

[para 21] The Public Body has not explained why it believes no further records responsive to the first part of the access request exist in other locations, nor has it described the steps taken to identify the locations of responsive records. Assuming that responsive records exist, other employees may have copies of letters or notes responsive to the request or know where such records are located. It is reasonable to search for responsive records in the department on which the Public Body focused its search, as there is no reason to assume records would be located outside the department. However, it does not follow from the evidence or the terms of the access request that responsive records could only be in the possession of the Chair and the Associate Chair. Given the breadth of the first part of the access request, and given that the Public Body confined its search to the offices and computers of the Chair and the Associate Chair, a statement explaining its conclusion that responsive records could only be in the possession of those two individuals would be necessary to meet its obligation to respond to the Applicant openly, accurately, and completely.

[para 22] It may be that the Public Body did not extend its search beyond records in the possession of the Chair and the Associate Chair because the Public Body has satisfied itself that responsive records never existed or alternatively, that they could not be located anywhere other than where the Chair and the Associate Chair searched.

However, if that is the case, then section 10 of the FOIP Act requires the Public Body to communicate that belief and the basis for it in its response to the Applicant.

[para 23] I also note that the Chair and Associate Chair searched their electronic records using only the Applicant's first and last name as search terms. Given that the access request relates to information about proposed changes to a course, it would be reasonable to search for records using the name of the course, the course number, or the subject matter of the course, in order to locate responsive records that do not contain the Applicant's first and last names.

[para 24] As noted above, if electronic records have been deleted, the Public Body must determine whether it is possible to retrieve them. The affidavit evidence establishes only that the Chair and Associate Chair do not have a standard practice in relation to keeping or deleting electronic and paper records, but does not address whether they did delete email or paper correspondence. If responsive emails existed but were deleted, the head of the Public Body must take steps to see whether these emails can be retrieved. However, if the Public Body is satisfied after inquiring into the matter that responsive records were not deleted, then there is no need to search through electronic backup files.

[para 25] I find that the Public Body has not established that it conducted an adequate search for responsive records or responded to the Applicant, openly, accurately and completely in relation to the first part of the Applicant's access request. The search for responsive records was inadequate for three reasons: the scope of the search was either inadequate or inadequately explained, the search terms used for the electronic record search were too narrow, and the Public Body did not determine or explain whether there may have been any deleted electronic records, and if there were, whether it was possible to restore them.

[para 26] I find that the Public Body has not responded to the Applicant openly, accurately, and completely within the meaning of section 10, not only because the Public Body did not demonstrate that it conducted an adequate search, but because it did not explain to the Applicant the steps it took to identify all responsive records and did not explain the basis for the conclusion that no further records exist.

[para 27] For the reasons above, I find that the Public Body has not met its duty to the Applicant under section 10.

V. ORDER

[para 28] I make this Order under section 72 of the Act.

[para 29] I order the Public Body to conduct an adequate search for responsive records in relation to the first part of the Applicant's access request, including searching through its electronic back up files, if it is possible that responsive records exist in such files, and using keywords as described in paragraph 23, above, if it is possible that such keywords could locate further records.

[para 30] I order the Public Body to expand its search to other employees in the department, if it determines that it is possible that other employees have responsive records.

[para 31] If, in the course of conducting the new search, the Public Body concludes that responsive records in relation to the first part of the access request, other than those it has already located, do not exist, or cannot be restored, the Public Body must communicate that conclusion and its basis to the Applicant. This response must contain the steps taken to locate additional records and the results of the new search.

[para 29] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Teresa Cunningham
Adjudicator