

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2009-022

February 24, 2010

UNIVERSITY OF CALGARY

Case File Number F4618

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the University of Calgary (the Public Body) for email communications containing his personal information sent and received by a professor in relation to the Applicant's Social Sciences and Humanities Research Council (SSHRC) grant application. When it responded to the Applicant, the Public Body explained that the professor had not created or received any responsive email communications.

The Applicant requested that the Commissioner review the Public Body's response on the basis that it had not conducted an adequate search for records. The Adjudicator found that the evidence of the Public Body confirmed that records responsive to the access request had never existed. She confirmed that the Public Body had met its duty to the Applicant under section 10(1) of the Act.

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

Authorities Cited: AB: Orders 2001-016, F2007-029

I. BACKGROUND

[para 1] On April 30, 2008, the Applicant made an access request to the University of Calgary (the Public Body) for email communications containing his personal

information sent and received by a Professor in relation to his Social Sciences and Humanities Research Council (SSHRC) grant application.

[para 2] The Public Body responded to the Applicant's access request on June 5, 2008. The Public Body stated:

I am responding to your request of April 30, 2008 for copies of e-mail correspondence sent or received by [a professor] in which your name is mentioned. I understand that this is in reference to a grant application submitted by you to a SSHRC selection committee of which she was a member.

I have reviewed your request with [the professor] and she has indicated that she does not have any records responsive to the request. According to her, the grant applications are sent by regular post, whereupon she reads them and faxes her scores to the SSHRC office. The committee members do not e-mail each other and e-mail is only used to communicate with the chair of the committee when there is a point to be clarified. As far as she can recall, no issues arose in the latest cycle.

[para 3] On August 29, 2008, the Applicant requested review by the Commissioner of the Public Body's response to his access request. In particular, he requested review of the adequacy of the search conducted by the Public Body for responsive records. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The parties exchanged initial and rebuttal submissions.

II. RECORDS AT ISSUE

[para 5] As the issue for this inquiry is whether the Public Body met its duty to assist the Applicant, there are no records at issue.

III. ISSUE

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

IV. DISCUSSION OF ISSUE

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

[para 6] The Applicant argues that the Public Body did not conduct a reasonable search for responsive records and therefore did not meet its duty to assist him under section 10(1) of the FOIP Act. He argues that the search was not reasonable as "reasonable search would involve not only the consultation with the university representative who sat on Committee No 15 but also the search on back-up e-mail servers."

[para 7] The Public Body argues that it is reasonable to rely solely on the statements made by the professor whose emails formed the basis for the access request for the following reasons:

The University submits that it is justified in limiting its search to the employee's response in circumstances particular to this case, that is, where the employee has:

- a) described a process which negates the possibility of the creation of such records,
- b) indicated that no responsive records exist, and
- c) asserted that she did not ever create or received such records, and
- d) where the employee is the sole source for responsive records, and
- e) where there is no reason for the University to doubt the truthfulness of the employee's response.

The Public Body provided the affidavit of the professor who served on the SSHRC committee in support of its position.

[para 8] Section 6 of the FOIP Act establishes an applicant's right 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 FOIP 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] The affidavit of the professor who served on the SSHRC committee states the following:

THAT I am a faculty member at the University of Calgary and have a personal knowledge of the facts sworn to here.

THAT I was a member of SSHRC Standard Research Grants Selection Committee #15 in 2007 – 2008.

THAT, as a member of SSHRC Standard Research Grants Selection Committee #15, I received large boxes of grant applications to review in mid to late December 2007.

THAT I read those applications and assigned them a score which I faxed to the SSHRC programme officer in February before heading to Ottawa for a full committee meeting.

THAT between December 2007 when I received the applications and February 2008 when the full committee met to determine final recommendations, I did not have any email correspondence with any committee member regarding any application.

THAT further, I have not had any email correspondence with any committee member regarding any application at any time since the full committee met in February 2008.

[para 15] The evidence of the affiant establishes that she did not create emails in relation to her work on the SSHRC committee and that there are no records responsive to the Applicant's access request. Further, the Applicant does not challenge the affiant's evidence. I accept the evidence of the affiant that she did not create or receive any emails relating to evaluations of SSHRC candidates.

[para 16] Through the affidavit evidence of the professor, the Public Body has established the steps it took to locate records responsive to the access request. In effect, the Public Body asked the professor, the person whose records were requested, whether she had created or received responsive records. She explained that she did not send or receive emails in relation to the Applicant's SSHRC application, or the SSHRC application of any other candidate. In effect, the affiant explained that responsive records had never existed. From the way in which the Applicant framed his access request, only emails containing his name created by the professor for the purposes of the SSHRC committee would be responsive. The evidence of the Public Body supports a finding that these records never existed. As a result, all evidentiary requirements referred to by the Commissioner in Order F2007-029 are met.

[para 17] As the Public Body has established that responsive records were never created, it is unnecessary for the Public Body to search for backup files for responsive emails. As responsive emails never existed, they cannot have been deleted.

[para 18] The Public Body conducted a reasonable search for responsive records. In addition, it explained the steps it took to locate responsive records and the results of its search to the Applicant when it responded to him. I find that in the circumstances of this case, section 10(1) does not require anything further from the Public Body.

V. ORDER

[para 19] I make this Order under section 72 of the Act.

[para 20] I confirm that the Public Body met its duty to assist the Applicant as required by section 10(1) of the FOIP Act.

Teresa Cunningham
Adjudicator