ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-023

February 26, 2010

UNIVERSITY OF ALBERTA

Case File Number F4619

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Summary: The Applicant made a request to the University of Alberta (the Public Body) for email communications between a member of the SSHRC Selection Committee No. 15 and other members of a SSHRC committee. The Public Body conducted a search for responsive records. On May 16, 2008 it responded to the Applicant and stated that it was unable to locate records relating to the subject of his request.

The Applicant requested review of the Public Body's response on the basis that it had not conducted an adequate search for responsive records. The Public Body challenged the jurisdiction of the Adjudicator to conduct an inquiry, as it was of the view that the Commissioner had exceeded his jurisdiction when he extended the time for completing the review.

The Adjudicator decided that the appropriate forum for determining whether a decision of the Commissioner should be declared a nullity is the Court of Queen's Bench. She noted that the time for seeking judicial review of the decisions to extend the time had passed. She determined that the Public Body had conducted an adequate search for responsive records. However, she found that the Public Body's response to the Applicant did not meet the requirements of section 10(1) (duty to assist) as it did not explain its search process adequately. Nevertheless, as the Public Body provided this explanation in its submissions, the Adjudicator decided that she would not order the Public Body to prepare a new response.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 10, 69, 72, 74; Alberta Rules of Court, Alberta Regulation 390/68, s. 753.11

Authorities Cited: AB: Orders 2001-016, F2002-014, F2007-029, F2008-023, **ON:** Orders PO-2836, PO-2842

Cases Cited: *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26

I. BACKGROUND

[para 1] On April 23, 2008, the Applicant made a request to the University of Alberta (the Public Body) for email communications between a member of the SSHRC Selection Committee No. 15 and other SSHRC officials.

[para 2] The Public Body responded to the Applicant's access request on May 16, 2008. The Public Body stated the following:

> I am writing about your request, which was received by our office on April 23, 2008, for access to information under the *Freedom of Information and Protection of Privacy Act*.
> A search by the University of Alberta has failed to retrieve any records relating to the subject of your request.

[para 3] In a letter dated August 26, 2008, the Applicant requested review by the Commissioner of the Public Body's response to his access request on the ground that the Public Body had not conducted an adequate search for responsive records. The date stamp on this letter indicates that the request for review was received by this office on August 28, 2008.

[para 4] In a letter dated September 3, 2008, the Commissioner confirmed receipt of the Applicant's request for review and advised the Applicant and the Public Body that the anticipated date of completion was November 26, 2008.

[para 5] On November 13, 2008, the Commissioner advised the parties that he was extending the time to complete the review under section 69(6) of the FOIP Act until February 24, 2009, as the mediation process required more time.

[para 6] The parties completed the mediation process. However, mediation was unsuccessful. On November 28, 2008, the Applicant requested that the Commissioner conduct an inquiry. On January 29, 2009 the Director of Adjudication wrote the parties to advise that the Applicant's request for inquiry had been received. Her letter to the Public Body states:

> This file, in which your organization is the respondent, has been received by the Adjudication Unit, and will now be prepared for Inquiry. This involves resolution of a number of procedural matters, including confirmation that the matter is appropriate for an Inquiry a decision as to

> whether the Inquiry will be oral or written, assignment of an Adjudicator, and the formulation of the issues that will be dealt with in the Inquiry.
>
> If the Commissioner decides to proceed with an Inquiry, a Notice of Inquiry will be sent to all Parties giving details on the issues and about the process. This will occur 2 ½ to 3 months before the scheduled inquiry date.
>
> As this matter will take longer than 90 days to complete, the Commissioner has authorized me to notify you that he is extending the time for completing the review in this case, in accordance with section 69(6) of the Freedom of Information and Protection of Privacy Act. The anticipated date for completion of the review is March 1, 2010. An Order will be issued thereafter, which normally happens approximately 6 months later.

[para 7] A notice of inquiry was sent to the parties on September 24, 2009. This letter states that the issue for inquiry is the following:

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

[para 8] The notice of inquiry requested that the parties provide initial submissions by noon on November 9, 2009.

[para 9] On October 23, 2009, the Public Body requested a one-month extension to prepare submissions and consider the issues.

[para 10] On October 30, 2009, I determined that the Public Body had provided insufficient grounds to justify extending the time for submissions. However, I gave it the opportunity to provide grounds for its request.

[para 11] On November 2, 2009, the Public Body explained that it had been unable to contact an agent of a third party body to obtain affidavit evidence on the matter of custody and control but that the Public Body anticipated that it would obtain the evidence and be in a position to provide submissions on November 23, 2009. I decided to grant the Public Body's extension request. The Applicant objected to this extension. The parties were given until December 8, 2009 to provide rebuttal submissions. I note that the initial and rebuttal submissions provided by the Public Body do not contain the affidavit of an agent of a third party body, even though this was its purported reason for seeking an extension. The Public Body's submissions did not explain why it did not provide an affidavit of this kind, although I had specifically granted the request for extension on the basis of its explanation that it was seeking more time to provide such an affidavit.

[para 12] On November 24, 2009, I posed questions for the Public Body. The Public Body requested a further extension to provide rebuttal submissions as it was of the view that it could not provide rebuttal submissions or answer my questions by December 8, 2009. I extended the deadline for submissions until December 15, 2009.

[para 13] On January 7, 2010, the Applicant provided *in camera* objections to decisions I had made regarding extending the time for making submissions and decisions I had made regarding his *in camera* submissions. He also made submissions in relation to

the issue for inquiry. These submissions were returned to the Applicant as I decided not to accept them *in camera*. The Applicant resubmitted these submissions and they were shared with the Public Body on January 21, 2010. The Public Body was provided an opportunity to make submissions in relation to the Applicant's new submissions if it chose.

[para 14] The Public Body objected to my acceptance of the Applicant's submissions and argued that I should not consider them. It did not explain the basis for this position, but stated that it would not comment further on the Applicant's submissions.

[para 15] The Public Body challenges my jurisdiction to conduct the inquiry on the following grounds:

- that this office has failed to comply with section 69(6) as it takes the position that extending the time for parties to complete mediation cannot be a reason for extending the time under section 69(6)

- that this office did not complete the inquiry by February 24, 2009 and has lost jurisdiction to conduct the inquiry, as the Public Body is of the view that that jurisdiction is lost if a review is not completed before the anticipated date of completion expires

I have therefore added these issues to the inquiry.

II. RECORDS AT ISSUE

[para 16] As the issue for inquiry is whether the Public Body met its duty to assist the Applicant, there are no records at issue.

III. ISSUES

Issue A: Did the Commissioner extend the time under section 69(6) for an improper purpose?

Issue B: Did the Commissioner exceed his jurisdiction by extending the time for completing the review on January 29, 2009?

Issue C: 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 ISSUES

Issue A: Did the Commissioner extend the time under section 69(6) for an improper purpose?

[para 17] Section 69(6) of the FOIP Act states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*
>
> *(2) An inquiry under subsection (1) may be conducted in private.*
>
> *(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*
>
> *(4) The Commissioner may decide whether the representations are to be made orally or in writing.*
>
> *(5) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review may be represented at the inquiry by counsel or an agent.*
>
> *(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*
> *(b provides an anticipated date for the completion of the review.*

[para 18] The Public Body argues that the Commissioner was not entitled to extend the time limit so that the parties could continue to mediate. In its rebuttal submissions, it states:

> In relation to (a), the Commissioner has often stated that "mediation" and "inquiry" are entirely different and has divided the operations of the OIPC accordingly. In the Procedures attached to Exhibit "B", this very point is reinforced on page 2: "The mediation process is separate and distinct from the inquiry process".
>
> However, the extension provision in section 69(6) of FOIPPA permits extension for the purpose of completing a review, not for the purpose of completing a mediation process. Therefore, the purported extension described in Exhibit "C" is unlawful and a nullity.

As I understand the Public Body's argument, mediation is not part of the review process under the FOIP Act because this office separates the mediation process from the inquiry process. Therefore, it reasons that the Commissioner is not entitled to extend the time for completing the inquiry for the purposes of enabling parties to mediate and possibly resolve their issues.

[para 19] The extension letter of November 13, 2008 explains that the Commissioner is extending the time under section 69(6). In my view, the reference to mediation is simply the reason for extending the time. In essence, the Public Body requests that I review the decision of the Commissioner to extend the time for completing the review and his reasons for extending the time. I note that this extension was made within 90 days from the date the Commissioner received the Applicant's request for review.

[para 20] The Public Body requests that I declare the Commissioner's decision a nullity. In other words, the Public Body asks me to "quash" the Commissioner's decision, which is essentially a judicial remedy. I lack the jurisdiction to quash a decision of the Commissioner, as this remedy is within the sole jurisdiction of the Courts to grant, and is not within jurisdiction of the Commissioner or his delegate to grant. I also note that the Commissioner's decision was made on November 13, 2008, and the Public Body did not raise this issue before the Commissioner until it presented its submissions for the inquiry on November 23, 2009.

[para 21] If the Public Body disagreed with the Commissioner's reasoning in regard to the decision of November 13, 2008, it could have brought this issue to the Commissioner in a timely way. In addition, it was open to the Public Body to apply to the Court of Queen's Bench for judicial review of this decision. It did not do so and the period for applying for judicial review of this decision has ended in any event. I therefore find that I have not lost jurisdiction on this ground.

[para 22] After the parties provided their submissions, the Alberta Court of Appeal decided *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26. In my view, this judgment confirms that the approach I have decided to take in relation to the Public Body's jurisdictional challenge is appropriate.

[para 23] In this judgment, Watson J.A., speaking for a majority of the Court of Appeal, held that decisions of the Commissioner to extend the time limit are reviewable by the Court. He said at paragraph 37:

> The principles I would propose can be summarized as follows:
>
> (1) The Commissioner has no power to extend the time after the time limit as expired. If he does extend the time within the time limit, the exercise of that discretion will be subject to judicial review. Blanket or routine extensions seem unlikely to be regarded as reasonable if they cannot also be justified in the specific circumstances of the case. Because the points were not argued, I need not say whether the time can be extended more than once or whether in light of the possibility of prejudice from inactivity it would be appropriate for the Court to presume prejudice after a certain period of time: see, by analogy, *S. (D.B.) v. G.(S.R.)*, [2006] 2 S.C.R. 231, [2006] S.C.J. No. 37 (QL), 2006 SCC 37at para. 123 (see also dissent at para. 173). For example, a delay beyond double the 90 day period might be unreasonable for the case.
>
> (2) Breach of the time rules creates a presumptive consequence, namely termination of the inquiry process when the default is raised. There is no "loss of jurisdiction" involved.

> (3) An objection to the process should be raised at the earliest opportunity, either before the Commissioner or the adjudicator. It is not acceptable to await the outcome and then raise the objection. The Commissioner or adjudicator will have to consider whether or not the presumptive consequence should apply, and will be expected to provide reasons for the decision then made. The decision of the Commissioner or adjudicator will be subject to judicial review. As noted above, it is not necessary in the circumstances of this case to offer an opinion as to the standard of review applicable to such situations.

[para 24] As noted above, in essence, the Public Body challenges my jurisdiction to conduct the inquiry on the basis that it disagrees with the Commissioner's decisions and reasons for extending the time under section 69(6). Under the procedure set out by the Court of Appeal in *ATA* a public body who disagrees with the reasons of the Commissioner for extending the time must first raise a timely, particularized objection to the extension. Once the Commissioner responds to the objection, the Public Body may then apply to the Court of Queen's Bench for review of that decision. If the Public Body disagreed with the November 13, 2008 decision of the Commissioner to extend the time under section 69(6), it was open to the Public Body raise this issue with the Commissioner and then to apply to the Court of Queen's Bench for Judicial Review of that decision and request a judicial remedy. Further, if the Public Body objected to the Commissioner's reasons for extending the time, it should have done so when the time was extended. As noted above, the Public Body did neither of these things.

[para 25] Whether one considers the applicable time period for commencing a judicial review application to be that contained in section 74 of the FOIP Act or that under rule 753.11(1) of the Alberta Rules of Court, the time for applying for judicial review of the Commissioner's decision of November 13, 2008 has expired. The Public Body cannot therefore challenge the jurisdiction of this office to conduct an inquiry on the basis that it disagrees with the Commissioner's November 13, 2008 decision when it did not make a timely, particularized objection to the decision or apply for judicial review of that decision.

Issue B: Did the Commissioner exceed his jurisdiction by extending the time for completing the review on January 29, 2009?

[para 26] The Public Body also challenges a letter written by the Director of Adjudication communicating the decision of the Commissioner to extend the time for completing the review. This letter was written prior to the original anticipated date of completion of February 24, 2009 and provides a new anticipated date of completion of March 1, 2010.

[para 27] Again, I cannot review a decision of the Commissioner or quash it. If the Public Body objected to this extension, then it was open to the Public Body to make a timely, particularized objection, await a decision and then, if it disagreed with the decision, to seek judicial review of that decision. However, the Public Body did not do so and the time for applying for judicial review has ended. It cannot now challenge the jurisdiction of this office to conduct the inquiry on the basis that it disagrees with the Commissioner's January 29, 2009 decision, when it did not make a timely, particularized objection and seek judicial review of that decision

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

[para 28] 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 29] 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 30] "Custody" and "control" are not defined in the legislation. However, previous orders of this office have considered various factors as indicative of custody or control.

[para 31] In Order F2002-014 (at paragraphs 12 and 13), the Commissioner considered the concepts of custody and control and said:

> 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.
>
> 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 32] In Order F2008-023, following previous orders of this office, the Adjudicator considered the following questions when determining whether a public body had control over records.

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?

- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 33] While the parties were preparing submissions for the inquiry, the Office of the Information and Privacy Commissioner of Ontario issued Orders PO-2836 and PO-2842. These orders find that Wilfrid Laurier University and the University of Ottawa respectively have custody or control of records created or received by academic staff members in relation to the evaluation of SSHRC applications. Like the Public Body, Wilfrid Laurier University and the University of Ottawa challenged the application of provincial freedom of information legislation to these kinds of records on the basis that they lacked custody or control of records relating to SSHRC committee work. In finding that Wilfrid Laurier University had custody or control of records of this kind, the Adjudicator stated in Order PO-2836:

> I accept the evidence of the University that the named professor was not sitting on the SSHRC committee at the direction of the University, or as part of his "assigned workload" under the Collective Agreement. However, it does not follow, in my view, that any email records created incidentally through the faculty member's voluntary participation on the SSHRC committee are outside of the University's lawful custody and, therefore, removed from the reach of the *Act.* Moreover, while it is true that "bare possession of the information" does not amount to custody or control for the purpose of the *Act*, there is, in my view, ample evidence in this appeal to support a finding that the University has "some right to deal with the records and some responsibility for their care and protection" [Order P-239]. [My emphasis]
>
> According to the University's enabling statute, *The Wilfrid Laurier University Act, 1973* [as amended by *Wilfrid Laurier University Amendment Act, 2001* S.O. 2001, c. 12], the objects of the University are "the pursuit of learning through scholarship, teaching and research within a spirit of free enquiry and expression." In my view, this purpose statement may be viewed as representing the University's "mandate." Moreover, on the face of it, faculty involvement in SSHRC activities would appear to fit within that mandate. The University acknowledges that engaging in research and scholarly activities is a "core function"' of the University and the work of its faculty members and also admits that faculty members are obligated under the Collective Agreement to engage in "scholarly activities, including research, as well as to engage in academic, professional and University community service." However, the University then argues that research and scholarly activities involving "peer review for an external agency" are somehow removed from the realm of scholarly activities that fall within the core function or mandate of the University. In my view, this distinction between internal and external peer review activities is without merit. Rather, I find that the named professor's SSHRC committee participation represents an activity going to the core or central function of the University notwithstanding the fact that it may be with an agency external to the University. I am similarly satisfied that the content of any records created incidentally

> through faculty participation on a SSHRC adjudication committee is related to the University's scholarship and research mandate.

In my view, the Adjudicator is correct that "bare possession" of information does not amount to custody. The word "custody" implies that there is some right or obligation to hold the information in one's possession. "Control" in the context of "custody" implies that a public body has some right to require or demand information that is not in its immediate possession. I therefore find that the question posed by the Adjudicator in Order PO-2836, that is, "Does the Public Body have some right to deal with the records and some responsibility for their care and protection?" would also apply when determining whether records are in the custody or under the control of a public body under the FOIP Act.

[para 34] The Adjudicator in Order PO-2836 also said:

> In my view, the following line of reasoning in Order PO-1725 provides a useful context for my findings in the present appeal:
>
> > My discussion will focus on whether or not the Premier's Office has custody of these records. If I determine that the Premier's Office has lawful custody of the records, that finding is sufficient to bring the records within the scope of section 10(1)(a) and under the jurisdiction of the *Act*.
> >
> > Two broad principles emerge from the Commissioner's orders dealing with the issue of custody. The first is that bare possession does not amount to custody, absent some right to deal with the records and some responsibility for their care and protection (Order P-239). The second principle is that "... physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession" (Order 41).
> >
> > In my view, there are a number of facts and circumstances surrounding the creation, possession and maintenance of the records at issue in these appeals which support the conclusion that they are in the custody of the Premier's Office. All entries, whether they contain personal or professional information, were created and stored in the same database. This database is owned and maintained by the government on behalf of the Premier's Office. This factor alone gives the institution both a right to deal with the records and a responsibility for their care and protection, in order to ensure the integrity of the database as a whole and of the information entered into it.
> >
> > In addition, it is clear that the purpose for which the database exists is for use by employees attending to the business of the Premier's Office. The capabilities of the database in permitting employees to make entries relating to personal matters… are normal features of most electronic calendar management databases and are not inconsistent with the institution's lawful custody of the database and its contents, or with its responsibilities in relation to its records management functions. If an employee of a government institution voluntarily chooses to place information, whether personal or professional in nature, into a government maintained database, it is difficult to conceive how the record containing that information would fall outside the institution's lawful custody, absent the most exceptional circumstances, which I do not find present here.
> >
> > It is not enough for an institution to assert simply that the named employee has sole authority over access to the records, that there is no protocol in place governing their disposition during the employee's tenure, or that the retention schedule does not

> specifically deal with these types of records. As the Divisional Court noted in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), [aff'd 47 O.R. (3d) 201 (C.A.)], for example, the absence of evidence that an institution has actually exercised control over particular records will not necessarily advance the institution's argument that it, in fact, has no control. If it were otherwise, government institutions would be in a position to abdicate their information management responsibilities under the *Act* by the simple device of failing to implement appropriate information management practices in respect of records in their lawful custody. So long as records are in an institution's custody, that body must deal with them in accordance with all applicable laws, including the provisions of the *Act*.

In answering the question of whether Wilfrid Laurier University had some right to deal with the records and some responsibility for their care and protection, the Adjudicator considered a list of questions from earlier decisions very similar to those set out in Order F2008-023. Drawing on this list, the Adjudicator developed two primary factors for deciding whether Wilfrid Laurier University would have custody or control of responsive records located on its server.

[para 35] First, she found that service on the SSHRC Committee was a scholarly mandate falling within the core function or mandate of Wilfrid Laurier University. Consequently, records created for the SSHRC Committee were created as part of the creator's duties to the University, and therefore, the University, as employer, had some right to possess the record. Second, she found that any responsive records would be located on a server owned and maintained by the University and were sufficiently integrated with its information management systems, given that there was no evidence that responsive records would be kept apart from other records on the server. She therefore found that the University had some responsibility for the care and protection of the records.

[para 36] I intend to take a similar approach to determining whether the Public Body would have custody or control of records created by a faculty member for the purpose of serving on a SSHRC Committee. I will therefore address the questions of whether the Public Body has some right to possess the record, and whether it has some responsibility for the care and protection of potentially responsive records.

Does the Public Body have some right to possess the record?

[para 37] I asked the Public Body the following questions relating to the Ontario order:

> 1. Is the mandate of the University of Alberta different from that of Wilfrid Laurier University such that Order PO-2836 can be distinguished?
>
> 2. Does the University of Alberta Faculty Agreement preclude or contemplate participation as a member of the SSHRC committee?
>
> 3. If the mandate of the University of Alberta is similar to that of Wilfrid Laurier University, and/or the University of Alberta Faculty Agreement contemplates participation as a member of the SSHRC committee, would this mean that the University

[para 38] The Public Body provided a copy of its mandate and argues that it is distinguishable from the mandate of Wilfrid Laurier University. This mandate states, in part:

> University of Alberta faculties, centres and institutes combine resources and talents for collaborative advantage through research partnerships with other academic institutions, business, governments and public agencies. The University actively transfers new knowledge and creative works to Alberta, Canada and the world for community benefit, including commercial development of intellectual property when appropriate and feasible.

[para 39] The Public Body provided the affidavit of a professor who is a special advisor with the Office of the Provost. In his affidavit, he made the argument that participating on a SSHRC committee is not contemplated by the Collective Agreement. He stated:

> As can be seen in Exhibit "B", an academic staff member's responsibilities consist of three areas: participation in teaching, research, and provision of service, as defined in Article 7.02(c). "Service" is further defined in Article 7.09. It is different from SPA [supplementary professional activities], described in Article 8. Confirming my statement in paragraph 5 of this my Affidavit is the fact that in Article 7.05, "research" includes "active participation in research", which does not encompass voluntary service on a SSHRC Selection Committee…

[para 40] Academic staff members' responsibilities to the Public Body are set out in the University of Alberta Faculty Agreement. This agreement states, in part:

> 7.01 A staff member shall be a scholar, active in teaching, in research, and in service.
>
> 7.02.1 The responsibilities of a staff member shall include:
>
> (a) participation in teaching programs, including classroom teaching, supervision of graduate students and personal interactions with and advising students;
>
> (b) participation in research (defined as including the preparation or performance of creative works and reflective inquiry) and the dissemination of the results of research by means appropriate to the discipline; and
>
> (c) provision of service to the discipline of the staff member; participation in the governance of the University, the Faculty and the Department; and dissemination of knowledge to the general public by making available the staff members expertise and knowledge of the discipline all of which shall be carried out according to the standards of professional conduct expected of a staff member. [my emphasis]
>
> …
>
> 7.09 The degree of participation in the governance of the University and other service responsibilities may vary from staff member to staff member and from time to time. Such responsibilities may be assigned by the Department Chair or may be the result of initiative by the staff member. [my emphasis]

[para 41] The Faculty Agreement indicates that the employment responsibilities of an academic staff member include providing service to the discipline of the staff member.

As the purpose of SSHRC is to fund and promote research in service of the social science and humanities disciplines, it follows that service on a SSHRC committee is also a service to a discipline. The professor, who may have created emails responsive to the Applicant's access request, is a professor of a humanities discipline, and therefore, his service on a SSHRC committee was service to his discipline. Therefore, this service was also a service to the Public Body under the Faculty Agreement. In addition, a staff member may provide service at the direction of the chair of a department or on their own initiative.

[para 42] Further, the affidavit of the professor who served on the SSHRC committee indicates that he cancels classes in order to attend SSHRC meetings with the knowledge of the Public Body. This statement suggests that the Public Body authorized the professor to attend a SSHRC committee meeting rather than teach scheduled classes.

[para 43] I find that article 7.02(c) of the University of Alberta Faculty Agreement contemplates service on a SSHRC committee, as service on this committee is a service to the discipline of the staff member and establishes requirements as to the conduct of a faculty member in relation to performing this service.

[para 44] I note that the mandate of the University of Alberta, cited above, includes a commitment to research similar to the mandate of Wilfrid Laurier University referred to in Order PO-2836. Further it expresses a commitment to partnerships with governments and public agencies and exchanging knowledge with these entities. In my view, the mandate encompasses service on a SSHRC committee. I also find that Section 7.02(c) has the effect of imposing control by the Public Body over a faculty member's service to the faculty member's discipline. If responsive records exist on the Public Body's server, I find that the Public Body would have some right to deal with them by virtue of articles 7.02 and 7.09 of the Faculty Agreement. The Public Body would have this right because they were created in part because of the professor's obligations to his employer, and because the Public Body has imposed the additional obligation of requiring service to the discipline to be conducted in a professional manner. The Public Body therefore has some authority to ensure that service is being performed to a faculty member's discipline, and that it is being performed in a professional manner, which implies that it has "some right to deal with the records."

[para 45] In his affidavit evidence, the technical support analyst states that the Public Body has created email conditions of use, entitled: "The University of Alberta Campus Computing Conditions of Use" (Conditions of Use). The Conditions of Use address permissible conduct of information technology users on campus. The technical support analyst also states:

> The University does not monitor email except in extraordinary circumstances of breaches of ethics or law…

In his affidavit, the technical support analyst also provides the opinion that any potentially responsive emails would have been made in accordance with the Conditions of Use policy. The fact that the Public Body has reserved the power to monitor emails of

system users supports a finding that it has some right to deal with emails on its server. The fact that any potentially responsive emails were to have been created in accordance with the Conditions of Use policy also supports a finding that the Public Body has some rights in relation to potentially responsive emails.

[para 46] As noted in the background, above, the Public Body originally responded to the Applicant's access request and asked a professor to conduct a search for responsive records. The professor searched for the records and provided the results of his search to the FOIP Coordinator. In my view, the actions of the professor and the FOIP Coordinator are consistent with both parties considering that the Public Body had some right to deal with potentially responsive records.

[para 47] For all these reasons, I find that the Public Body has some right to deal with any potentially responsive records that may be located on its server.

Does the Public Body have some responsibility for the care and protection of potentially responsive records?

[para 48] While it may not have stringent requirements as to the content of information on its email server, the Public Body cares for and maintains email records, regardless of the purpose for which the email was created. To illustrate this point, the affidavit evidence of the Public Body's technical support analyst states:

> Every 24 hours, beginning at approximately 7:30 P.M. the contents of the Mail Server are backed up in full. This back up captures everything that is on the mail Server in email accounts unless it had been received or sent and deleted and emptied within the particular 24 hour period between the "snapshots."

[para 49] The technical support analyst explains that the Public Body makes copies of emails on its servers and takes the additional step of backing them up so that emails are located both on its servers and on backup tapes. In my view, it is unlikely that the Public Body would both copy and destroy records unless it were satisfied that it had some authority to do so.

[para 50] The technical support analyst also states in his affidavit that the purpose of creating backup tapes is to protect the Public Body's main network from destruction. The evidence of the technical support analyst supports a finding that the Public Body takes responsibility for caring for and maintaining email records on its servers and that it does so in order to protect its main network.

[para 51] The Public Body argues that the Professor used his faculty email account to submit information to the SSHRC committee and that the faculty server is separate from the University server. I understand the Public Body to argue that because the professor used an account on the faculty email server, records he created are not integrated with University records, and as a result, the University does not have any responsibility for these records. This argument seems to imply that faculty members, when they use the faculty email system, are not acting as part of the Public Body and that

the faculty email server is not maintained or regulated by the Public Body. It is also at odds with the evidence of the technical support analyst, which establishes that this account is created and maintained by the Public Body and that users are required to comply with the Conditions of Use policy. Further, there is no evidence that emails relating to SSHRC committee work are kept separate from other kinds of records on the Faculty server or the backup tapes. I find the Public Body's arguments on this point, in view of its evidence, to be without merit.

[para 52] For these reasons, I find that the Public Body has some responsibility for caring for and protecting potentially responsive emails on its server.

Potentially responsive records that may exist elsewhere

para 53] The above analysis applies only to potentially responsive information on the Public Body's servers. However, a public body may have control over a record but not have possession. In this case, it is possible that there are potentially responsive emails in the possession of SSHRC, given that the professor states that he sent emails to SSHRC.

[para 54] In this case, I find that the Public Body would not have control of potentially responsive records it does not possess, such as records located at the offices of SSHRC. I make this finding because there is no evidence that the Public Body would have any responsibility for the care or protection of such records. Rather, the evidence of the Professor is that he was required by SSHRC to leave paper copies of records at SSHRC for destruction and to destroy records in his possession relating to his committee work. This evidence supports a finding that the Public Body does not have any responsibility for maintaining or protecting records relating to SSHRC committee work that are not located on its servers; but rather, SSHRC has custody and control over those records.

Conclusion

[para 55] I find that the evidence establishes that the Public Body would have custody or control of any potentially responsive records located on its servers. However, the evidence also establishes that it would not have custody or control over any records located in places other than its servers, such as SSHRC's offices.

Adequacy of Search

[para 56] 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 57] 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 58] 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 59] 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 60] The professor, who served on the SSHRC Committee and whose emails are the subject of the Applicant's access request, provided an affidavit on behalf of the Public Body to document the Public Body's search. According to his affidavit of March 26, 2009, he complied with the Public Body's request that he search for responsive records and provided the Public Body with the result of his search. This affidavit states:

> On May 1, 2008 I received a memo from [the FOIP Coordinator], apprising me of a formal request for records under the Alberta Freedom of Information and Protection of Privacy Act (the "Request"). The Request was to search for and provide a copy of records in my possession relating to "E-mail communications between [the affiant], a member of the SSHRC Selection Committee NO 15 (2007/8 Competition), and SSHRC officials, other members of this committee and other interlocutors in which [the Applicant] is mentioned…

> Upon notification of the Request from the Access and Privacy Advisor, I searched my e-mail folders and paper-based files for any reference [to the Applicant].
>
> Specifically, in relation to a search of my e-mail account, I performed a keyword search of my "inbox" "outbox", "admin" and "committees" folders for each of those names.
>
> 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.
>
> Specifically, in relation to a search for physical documents, I had taken all of my notes on the files to Ottawa with me, and left them to be shredded after the SSHRC committee meeting. I did not retain any other physical records relating to the request.
>
> I am not aware of any other reasonable way that I could have searched for records responsive to the Request.
>
> In response to my searches for responsive records, I did not locate any records that were related to the Request.
>
> In response to the Request, I communicated to the Office of the Access and Privacy Advisor of the university on May 16, 2008 that I held no records related to the Request.

[para 61] In his affidavit of November 17, 2009, the professor provides further details regarding emails relating to SSHRC committee work.

> After reviewing the applications, I sent from my e-mail address… my preliminary ranking of some 18 files that were assigned to me by SSHRC… This e-mail was sent directly to administrative personnel at SSHRC and would not have been sent to other members of the SSHRC Selection Committee. As directed by SSHRC personnel, these initial rankings consisted only of the name of the applicant and numerical rankings. These initial rankings serve as a preliminary basis from which the ultimate ranking process will later take place in a meeting of the SSHRC Selection Committee. The ranking process is at all stages a means of evaluating the merits of the individual applications.
>
> I do not recall specifically whether [the Applicant's] application was among the applications ranked in the Initial Ranking E-mail.
>
> In March 2008, I attended in Ottawa to meet with my fellow committee members on SSHRC Selection Committee No. 15 in order to deliberate about the ultimate ranking of the applications. As directed by SSHRC personnel and by the form attached as Exhibit "B", I left with SSHRC personnel any records that I had with me that related to the work of the Committee, under the understanding that SSHRC personnel would destroy these records. At this meeting, my recollection is that we were also directed by SSHRC personnel to destroy any additional records that we held that related to the work of the committee, including the deletion of any emails.
>
> …
>
> My recollection is that I deleted the Initial Ranking E-mail from my e-mail outbox shortly after my return from the SSHRC Selection Committee deliberations in Ottawa. I also believe that after deleting this initial ranking email from my e-mail outbox that I also emptied the deleted items folder for my e-mail. It was my intention to delete the e-mail fully.

[para 62] Essentially, the evidence of the professor is that he is uncertain whether he ever created or received emails responsive to the Applicant's access request, as he is uncertain whether he evaluated the Applicant's SSHRC application. He did not evaluate all SSHRC applications, but 18 of them, and the Applicant's may or may not have been one of them. However, the Professor believes that he deleted his initial rankings and he is also certain that when he was asked to search his email account for any records containing the Applicant's name, he did not find any. In addition, he believes that he deleted any emails contained in his "deleted items folder". He also indicates that all documentary records were left to be shredded at the SSHRC committee meeting.

[para 63] The Public Body also provided the affidavit of a technical support analyst of the Public Body regarding its technology, email system, and backup records. The technical support analyst explains that back up tapes are usually automatically overwritten after 28 days and the information cannot be retrieved much later than that:

> Users of the Mail Server, such as [the professor], are able to send, receive, delete, and empty emails from their Outlook accounts, as well as archive. Each user has a separate email account with 500 megabytes of mailbox storage. In order to avoid overextending their mailbox capacity, we encourage users to archive old email from their mailboxes or else to delete and empty their mailboxes. Archiving and deleting are two separate functions. If they want to save a particular email, they can archive it by selecting to do so. If, however, they push "delete", they do not archive it but send it to the deleted items folder, or "trash bin." If they empty their "trash bin", then the email is deleted from their mailbox altogether and they cannot retrieve it.
>
> …
>
> Every 24 hours, beginning at approximately 7:30 P.M., the contents of the Mail Server are backed up in full. This back up captures everything that is on the Mail Server in email accounts unless it had been received or sent and deleted and emptied within the particular 24 hour period between "snapshots".
>
> The back up tapes are encrypted files on a magnetic tape, wound around different reels, and the "words" of the emails take the form of long chains of 1's and 0's. The files can be recreated and restored on an individual mailbox basis by exporting them into an Outlook account from their storage in another state where they are translated back into words.
>
> We have a 28-day retention practice for back up tapes. On the 28th day, the Mail Server's system automatically marks the data encrypted 28 days previously as overridable on demand. That means that the space occupied by the date backed up 28 days before now becomes "unlocked" and is available for new storage, and the system can overwrite those areas on the tape drive, in part or completely. The system knows which sections of the tape can be overwritten, and will do so automatically. Whether that happens right away or not depends on how much storage capacity the Mail Server has at that moment.
>
> The data on the back up tapes can be re-created within the 28 day period or even beyond if they have not been overwritten. After the 28-day retention period, if any part of the now "unlocked" data is overwritten, the whole is unrecoverable. The longest time period in which I once was able to recover data a bit older than 28 days is at most an extra week.

[para 64] The technical support analyst states that once emails are deleted from an email account, they usually cannot be retrieved if 28 days have passed from the date of

deletion, as they will be overwritten. However, emails can be retrieved within 28 days from the date of deletion.

[para 65] The Public Body argues that section 10(2) addresses a public body's duty to search for backup copies of electronic records and that it has no duty to search for backup copies in this case. Section 10(2) states:

> *10(2) The head of a public body must create a record for an applicant if*
>
> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 66] The Public Body makes the following argument in relation section 10(2):

> Moreover, the purpose of University back-up tapes is disaster recovery. This evidence meets the criteria set out in Justice Nielsen's decision and in "Bulletin NO. 12: E-Mail Access and Privacy Considerations" for the application of section 10(2).
>
> In this matter, it would be especially burdensome to require the University to search its backup tapes to create record based merely on speculation that one email may have been responsive to a request.

From its arguments, I understand the Public Body to equate creating electronic records under section 10(2) with the duty to search for records created by sections 6 and 10(1) of the FOIP Act. In my view, the duty to create an electronic record is a duty separate and apart from the duty to conduct an adequate search for responsive records.

[para 67] Searching for deleted electronic records does not involve creating or recreating records under section 10(2), but confirming, through inquiry, whether records ever existed, and if so, what happened to them. If the Public Body determines, through inquiry, that responsive records never existed, there is no need to search through backup tapes for deleted versions of the record. If the Public Body determines that a record existed and was deleted, then the Public Body must determine whether it is possible to retrieve and reproduce the record to the Applicant. Again this process does not require searching through backup tapes or creating records from them. Rather, this determination can be made by asking a technical support analyst, as the Public Body did, whether it is possible to restore a deleted record. If it is not possible to restore deleted electronic records, then the Public Body's search for these records is concluded. If it is possible to restore responsive deleted electronic records, then the Public Body must consider whether the duty under section 10(2) applies and whether it must create an electronic record from the backup tape.

[para 68] In my view, the fact that it would be "burdensome" to create an electronic record may not necessarily negate the duty to create an electronic record, as section 10(2) requires the creation of an electronic record to interfere unreasonably with the operations

of a public body before the duty to create records is negated. Further, the Regulation permits a Public Body to charge the actual costs of creating an electronic record. I also note that the evidence of the technical support analyst does not support a finding that it would be burdensome to require the Public Body to retrieve a deleted email within 28 days of deletion. However, I need not consider the Public Body's arguments under section 10(2) for the purposes of disposing of the issues for this inquiry, as section 10(2) has no application to the issues before me.

[para 69] Despite its argument that being required to create a backup record from its backup tapes would be burdensome, which implies that restoring a backup record is possible, but oppressive, the affidavit evidence of the Public Body's technical support analyst is that it would actually be impossible to restore a deleted electronic record once the backup tape has been overwritten. As the Public Body has established through evidence that any potentially responsive deleted electronic records are now irretrievably lost, its search is concluded and there is no need to consider whether the duty under section 10(2) applies. Section 10(2) applies only when it is possible for a public body to create an electronic record, as opposed to situations when it is impossible to do so.

[para 70] The Applicant questions whether responsive records may have been deleted after he made his access request, given that his access request was received on April 23, 2008, and the professor was not notified of the request until May 1, 2008. Having reviewed the affidavit evidence of the professor, I am satisfied that he did not delete responsive records after the access request was received. His evidence indicates that he is not certain that he ever had responsive records, given that he is uncertain whether he created records relating to the Applicant's application. However, his affidavit of November 17, 2009 clarifies that he deleted his initial ranking email from his email outbox shortly after SSHRC selection committee deliberations which took place in March 2008. While he is not specific as to the timing of the deletion, which is understandable given the passage of time, it appears likely that the initial rankings were deleted prior to the Public Body's receipt of the Applicant's access request and were likely already irretrievable by that time.

[para 71] I accept the evidence of the professor who served on the SSHRC committee that he searched for email records containing the Applicant's name and found none. I also accept that he deleted his initial rankings, which may or may not have contained information responsive to the access request. In addition, I accept that all potentially responsive documentary records were left at SSHRC for shredding. I accept the evidence of the technical support analyst that emails deleted from the professor's email account cannot be retrieved. The Public Body's evidence therefore establishes that it conducted a search for records responsive to the Applicant's access request and found that such records either never existed or no longer existed. The evidence addresses the requirements set out by the Commissioner in Order F2007-029 for establishing that an adequate search was conducted. I therefore find that the Public Body has conducted an adequate search for responsive records, including backup records of deleted files.

Duty to Assist

[para 72] The duty to assist an applicant requires a public body to respond to an applicant openly, accurately, and completely. In my view, the Public Body's response to the Applicant of May 16, 2008 did not meet this standard. The response merely states: "A search by the University of Alberta has failed to retrieve any records relating to the subject of your request."

[para 73] The Public Body argues that its initial response addresses all the factors set out in order F2007-029:

> The University submits that, given the narrow parameters and clarity of the Request (a search for e-mails to and from a listed e-mail address for a specific time period), the University's prompt answer that there were no responsive records sufficiently indicated to the Applicant that the University had done the necessary search for records. Further, once the University was asked to provide additional information (in the form of an Affidavit) to the Applicant to explain further the process that it undertook to search for records, it did so in a timely manner.

[para 74] The FOIP coordinator provided an affidavit to explain the considerations behind his response to the Applicant's access request:

> In attending to the University's duty to assist the Applicant as required by section 10 of FOIPPA, I considered the factors and circumstances outlined above and in the Affidavits of [the professor] and the [technical support analyst]. In particular, I considered the following:
>
> (a) the fact that there was no reason to expect that potentially responsive records would be located in any locations other than those that relates to [the professor]; indeed, the access request did not indicate I should search elsewhere;
> (b) the fact that [the professor] intended to delete completely all communications relating to the SSHRC Selection Committee
> (c) the fact that there is no evidence from which it may be concluded that [the professor's] email actually referred to the Applicant, so that there may well not have been any records in existence that were responsive;
> (d) the fact that [the professor] does not believe that any records other than the one email could ever have existed;
> (e) the fact that there was no way of re-creating the one email from the back up tapes;
> (f) my conclusion that the email was never in the custody or under the control of the University in any event; and
> (g) the objectives of FOIPPA, including the right to access of applicants.

[para 75] While I accept that the Public Body may have considered some of the circumstances referred to in Order F2007-029 when it responded to the Applicant, it did not communicate its reasoning or the process by which it searched for records to the Applicant in its response. The duty to assist an Applicant requires more than an adequate search for records and consideration of factors: it requires an open, accurate, and complete response to the Applicant. I disagree with the Public Body that the May 16, 2008 response meets the requirements of Order F2007-029 or gave the Applicant sufficient information to determine what kind of search was done or by whom. An open, accurate and complete response to the Applicant in this case would address the requirements set out in Order F2007-029, as addressing these requirements would enable

the Applicant to learn how the search was conducted, the extent of the search, and why the Public Body believed it could not provide him with responsive records.

[para 76] Although I find that the Public Body's response of May 16, 2008 was deficient for the purposes of section 10(1), the Public Body presented evidence at the inquiry addressing the points set out in Order F2007-029. As a result, no benefit would be gained by ordering the Public Body to respond to the Applicant again to communicate this information. I will therefore not order the Public Body to respond to the Applicant to communicate the information it has already communicated through its submissions. However, I will draw to the Public Body's attention that an open, complete, and accurate response for the purposes of section 10(1) could have assisted the Applicant to learn how the search was conducted and to understand why the Public Body could not produce the records he sought without the need for the inquiry.

V. ORDER

[para 77] I make this Order under section 72 of the Act.

[para 78] I confirm that the Public Body met its duty to the Applicant under section 10(1) of the FOIP Act when it conducted its search for responsive records.

[para 79] Although the Public Body did not respond openly, accurately and completely, I make no order in that regard, for the reasons set out above.

_____
Teresa Cunningham
Adjudicator