

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-031

March 30, 2010

ALBERTA EMPLOYMENT AND IMMIGRATION

Case File Number F4307

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Summary: The Applicant made an access request to Alberta Employment and Immigration for records of telephone calls made to him by an employment standards officer. The Public Body responded that it had not located any responsive records. It indicated that it had searched for calls made on particular telephone lines, and argued that its duty to search for records extended only to telephone calls made on its own system, and not to calls that may have been made on the home phone of a staff member.

The Adjudicator found that the Public Body had not established that it had conducted an adequate search for responsive records. She ordered the Public Body to conduct another search, to try to ensure that records related to all telephones that may have been used to contact the Applicant would be located. She stated that if the Public Body were able to determine that the employment standards officer contacted the Applicant from a home telephone, it was to then determine whether it had control of any records relating to those telephone calls.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 72

Authorities Cited: **AB:** Orders 2000-021, 2001-016, F2007-029

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593

I. BACKGROUND

[para 1] On September 17, 2007, the Applicant made an access request to Alberta Employment and Immigration (the Public Body) for records of telephone calls made to him by an employment standards officer.

[para 2] On October 17, 2007, the Public Body responded that it had not located any responsive records.

[para 3] On December 4, 2007, the Applicant requested that the Commissioner review the Public Body's response to his access request. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The parties provided initial and rebuttal submissions. As it was unclear from the Applicant's submissions whether he wished the inquiry to proceed on the issues set out in the notice of inquiry, I asked the Applicant to confirm the issues.

[para 5] The Applicant responded to my request for confirmation on November 16, 2009. His response indicates that he is dissatisfied with the response he received from the Public Body. He also indicated that he is dissatisfied that an employment standards officer made telephone calls from his home and that the Public Body did not provide records of these calls. When deciding whether a public body has met its duty to assist an applicant, I must consider whether the public body has made all reasonable efforts to locate responsive records under its custody or control. I am satisfied that conducting an inquiry as to whether the Public Body met its obligations under section 10(1) will address the issues the Applicant has raised. The inquiry will therefore address the following issue, which was set out in the notice of inquiry: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the FOIP Act?

II. RECORDS AT ISSUE

[para 6] 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 assist the Applicant as provided by section 10(1) of the FOIP Act?

IV. DISCUSSION OF ISSUE

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

[para 7] Section 10 of the Act explains a public body's obligations when an applicant makes an access request. 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 8] Previous orders of this office have established that the duty to assist includes the duty to conduct an adequate search for records. For example, 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 section 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 9] A public body has the onus of establishing that it has made every reasonable effort to assist an 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). In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593, Nielsen J. noted at paragraph 53 that a public body must be in a position to establish with evidence that reasonable efforts were taken to search for records in order to meet its duty under section 10:

As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by FOIPP. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.

[para 10] In his letter of November 16, 2007 to the Public Body, the Applicant provided an explanation as to why he believes the Public Body did not conduct an adequate search for responsive records. He points to telephone calls he remembers receiving that were not included in the records he received from the Public Body.

I am requesting your assistance as I do not wish to contact [the employment standards officer] directly. To obtain the phone records of phone calls from [the officer] to my home phone, I would need to know the phone numbers of the phones he used. I feel that I should be able to have access to this information as he was acting in a public service capacity enforcing Alberta's employment legislation regarding my claim.

[The officer's file records only show two phone calls that he made to me. The first on April 14, 2004 (start of claim) and the next documented call is on September 24, 2007. I am attaching the file records of these calls. His premature closing the file voicemail in early September 2004 is not documented.

My Telus long distance phone records show three calls to [the officer]. One call was 28 minutes long and two days later I made another 12 minute call to [the officer]. The lack of file documentation regarding phone correspondence or my concerns is what prompted me to make [a] Personal Information Request on September 4, 2007 and then a General Access Information Request on September 17, 2007.

[para 11] In his December 4, 2007 letter requesting review, the Applicant made the following points:

I attempted to obtain the long distance phone records without involving your office. It was just a matter of questioning [the employment standards officer]. Did he use a government phone? Which one? If not was he working from home? When an Officer is working in a public service capacity enforcing Employment Legislation, I feel they should be accountable and transparent. I should be able to have access to his phone records.

[para 12] The Public Body describes its handling of the Applicant's access request in the following way:

On November 6, 2007, the Applicant once again came to the IPO. The Coordinator met with the Applicant to relate the information that we had reviewed the results of our search and that the records were for all long distance calls made from the Officer's business office telephone and business cellular telephone, regardless of the duration of the calls. The Applicant then wanted to know the telephone numbers that we used for our search. He requested the cellular number of the Employment Standards Officer. The Applicant was advised that as the Officer's business cellular number is not a publicly available number, the Coordinator was unable to give it out to him but did confirm the office business number that was searched for records...

On November 22, 2007, the IPO received a copy of a letter dated November 16, 2007 from the Applicant to the Director of Employment Standards. In the letter, the Applicant requested that the Director question the Officer as to which phones the officer used when calling the Applicant's home phone.

On November 27, 2007, the Coordinator telephoned the Applicant to notify him that we had received his November 16, 2007 letter to the Director and would be responding.

On November 28, 2007, the Applicant telephoned to say that his access request was for a search of "all the numbers not just the Officer's business numbers and that all the Director of Employment Standards had to do was ask the Officer what telephone he used and match up the documented calls on the records." The Applicant was told that we would respond to him in writing. He indicated that it was his intent to ask the OIPC for a review as the matter cannot be resolved informally.

On November 28, 2007, the IPO wrote to the Applicant to advise that any records of telephone calls made from a non-government telephone number are not under the control of the Public Body. The Applicant was reminded in this letter that he had been previously advised in a letter to him, dated October 17, 2007, and in discussions with him at the IPO on October 24, 2007 and November 6, 2007 related to his access request, if we are unable to resolve his questions or concerns about any decision made during the processing of his request, he has the right to ask the OIPC to conduct a review.

The Public Body provided copies of the letters to which it refers under Tab 7 of its submissions.

[para 13] The Public Body argues the following:

The Public Body submits that it met its duty to assist by conducting a thorough search for records and responding to the Applicant openly, accurately and completely.

The Public Body submits that its duty to assist was limited to searching records only of telephone calls made on its own phone systems. Records relating to the home phone numbers of staff are not deemed to be within the control of, nor are they within the custody of the Public Body.

[para 14] Having reviewed the evidence and submissions of the parties, I find that the Public Body has not established that it made all reasonable efforts to locate responsive records.

[para 15] 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 16] The Applicant has described a telephone call he received in September 2004 terminating his claim. A record of this telephone call was not included in the Public

Body's response to him. The Public Body did not contest his evidence on that point. I therefore accept that the employment standards officer made this telephone call. The question becomes whether the Public Body has made all reasonable efforts to locate records of this telephone call.

[para 17] In its submissions, the Public Body explained who conducted the search for responsive records, the steps it took and the scope of its search; however, it has not provided evidence or explanation in relation to the other criteria set out by the Commissioner in Order F2007-029, cited above. In particular, the Public Body has not explained why it limited its search to only the records of calls made from the employment standards officer's direct line and cell phone or why it believes no other responsive records of calls made exist. While the Public Body asserts that it cannot search for records of calls made from an employee's home phone number, no evidence has been presented to establish that the employment standards officer in question made, or is likely to have made, the telephone call of September, 2004 to the Applicant from his home.

[para 18] As set out in the Public Body's submissions, the Applicant contacted the Public Body on November 28, 2007 to clarify that his access request was for a search of "all the numbers not just the employment standards officer's business numbers". The Applicant also indicated that he was of the opinion that a search should include asking the employment standards officer which telephones he used to contact the Applicant and to match up the documented calls on the records. I agree with the Applicant that a reasonable search could include asking the employment standards officer which telephones were used to make calls to the Applicant. However, it does not appear that the Public Body took this step when it conducted its search.

[para 19] While contacting the employment standards officer may have been the simplest way of determining which phones were used to make telephone calls, and providing the officer's affidavit evidence the best way to establish which telephones were used, I accept that it is not always possible for a public body to contact witnesses. Witnesses are not always available. However, if questioning the employment standards officer at the time of the search was not possible, then it was necessary for the Public Body to investigate whether there were any other telephones on its system accessible to the employment standards officer that may have been used to make the telephone calls and to check the records of calls made on those telephones. The submissions and evidence of the Public Body are silent as to whether this was done.

[para 20] Although the Public Body notes in its submissions that it has a duty to search for records of calls made on its own telephone systems, it has not provided evidence to establish that this was done. Rather, the Public Body appears to have assumed that the employment standards officer made all calls from his direct line or cell phone, or from home. It may be the case that all calls to the Applicant were made from these three telephones, but the Public Body has not provided its reasoning or any evidence on which to base a finding that this was the case. The Public Body does not appear to have considered or ruled out the possibility when it conducted its search that

the employment standards officer used telephones on its system other than his direct line or cell phone.

[para 21] As I find that the Public Body has not established that it conducted a reasonable or adequate search for responsive records, I intend to order it to conduct another search, this time ensuring that records relating to all telephones that may have been used to contact the Applicant have been located.

[para 22] If, as a result of the search, the Public Body determines that the employment standards officer did contact the Applicant from a home telephone, it should then determine whether it has control of any records relating to those telephone calls. In Order 2000-021, the former Commissioner noted that several factors are considered when determining whether a Public Body has control of records. He said:

In Order 99-032 I considered some non-exhaustive criteria developed by the Ontario Information and Privacy Commissioner to help evaluate whether a public body has custody or control of records. These criteria are the following:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the records used?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have authority to dispose of the record?

Many of these criteria, particularly numbers 5, 7, and 10, imply that a public body has the legal authority to exercise a degree of control over the records in question.

[para 23] The Public Body asserts that it does not have legal rights to obtain copies of an employee's telephone records. However, it did not provide any evidence or reasons to support this statement. Determining the degree of control, if any, the Public Body has over records relating to calls made by an employment standards officer from a home telephone will depend on the circumstances, including, the nature of the records relating to the calls and the terms of the employment standards officer's employment contract with the Public Body. For example, if the records are notes of a telephone conversation made by the employment standards officer in the course of employment as a representative of the Public Body, then the Public Body may have a high degree of control. If the records are logs of the home telephone usage of the employment standards officer created by a telephone service provider, then the Public Body may have less

control. However, it may be open to the Public Body to ask the employment standards officer whether he will provide this information voluntarily.

V. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] I order the Public Body to conduct a new search for responsive records. The new search is to include records relating to any telephones on its telephone system, other than the employment standards officer's direct line and cell phone, that may have been used by the employment standards officer to contact the Applicant.

[para 26] If possible, the search should include contacting the employment standards officer to determine from which telephones he made calls to the Applicant, and whether any additional notes of telephone calls exist.

[para 27] If the Public Body determines that the employment standards officer made telephone calls from home, the Public Body must determine whether it has control of these records under the Act.

[para 28] After performing the new search, the Public Body must respond to the Applicant openly, accurately and completely, documenting the new search and its results.

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

Christina Gauk, Ph.D.
Director of Adjudication