

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-023

February 28, 2011

EDMONTON POLICE COMMISSION

Case File Number F4783

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Summary: On December 5, 2005, the Applicant requested records under the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act), relating to a Chief of Police competition, from the Edmonton Police Commission (the Public Body). The Public Body located responsive records and responded to the Applicant. The Applicant was dissatisfied with the search conducted by the Public Body and requested that the Commissioner review the matter.

The Commissioner issued Order F2007-029 disposing of the issues between the parties. In that order, he directed the Public Body to conduct a new search for responsive records, and to include records in the possession of Conroy Ross, an executive search firm, in that search. He also ordered the Public Body to respond to the Applicant openly, accurately, and completely.

The Public Body conducted a new search and made a new response to the Applicant. The Applicant requested review by the Commissioner.

At the inquiry, the Public Body and Conroy Ross challenged the jurisdiction of the adjudicator to conduct the inquiry on the basis the Applicant's request for review was more properly characterized as a request to review the Public Body's compliance with Order F2007-029. In addition, Conroy Ross argued that the Public Body did not have custody or control of the records in the possession of Conroy Ross, and that the Adjudicator lacked jurisdiction to make an order in relation to them for that reason as well.

The Adjudicator determined that the Applicant's request for review was reasonably interpreted as a request that the Commissioner review the new search and the new response made by the Public Body and decided that the requirements of section 65(1) of the FOIP Act were met. She therefore found that she had jurisdiction to review the Public Body's compliance with section 10 of the FOIP Act.

The Adjudicator determined that the contract between the Public Body and Conroy Ross established that any records in the possession of Conroy Ross, created as a result of performing its duties under the contract, were the absolute property of the City of Edmonton, acting on behalf of the Public Body. She found that the Public Body had control over the records because the contract gave the City of Edmonton, acting on its behalf, both proprietary and contractual rights to the records and the right to demand them.

The Adjudicator found that the Public Body had not met its duty to assist the Applicant under section 10(1) of the Act, as it had not taken any steps to obtain the records in the possession of Conroy Ross. Moreover, she found that the Public Body's new response to the Applicant was not complete or accurate.

The Adjudicator ordered the Public Body to take all reasonable and necessary steps, including legal measures, to obtain the records from Conroy Ross and to include these records in its response to the Applicant. She also ordered the Public Body to respond to the Applicant openly, accurately, and completely.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 4, 6, 10(1), 15, 65, 69, 72; *Police Act*, R.S.A. 2000, c. P-17, s. 36
CA: *Access to Information Act* R.S.C. 1985, c. A-1, s. 4

Authorities Cited: **AB:** Orders 2001-016, F2002-014, F2007-029, F2008-023, F2009-030, P2010-007

Cases Cited: *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] FCJ 241; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89

I. BACKGROUND

[para 1] On December 5, 2005, the Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Commission (the Public Body) to the following information:

All information regarding [the Applicant] on all Edmonton Police Commissioner records including all paper and electronic records on-line, off-line, archived, held, received or distributed between January 1, 2004 to November 17, 2005. This must include minutes of any meetings, correspondence with any third party involved in the selection of candidates for the (employment position) as it relates to [the Applicant], the ranking of candidates as it relates to [the Applicant], communications regarding inquiries about (the Applicant) either within the

Edmonton Police Commission or externally and all e-mail messages received or distributed internally or externally and all records regarding the [employment position] competition leading to the appointment of [a police chief] and the most recent selection of a new Chief of Police completed in November of 2005.

The Public Body located responsive records and responded to the Applicant. However, the Applicant was dissatisfied with the Public Body's response and requested review by the Commissioner.

[para 2] On June 12, 2008, the Commissioner issued Order F2007-029. In that order, the Commissioner determined that the Public Body had not conducted an adequate search for responsive records and had not responded to the Applicant openly, accurately, and completely as required by section 10(1) of the FOIP Act. The Commissioner ordered the Public Body to meet its duty to assist the Applicant by conducting an adequate search for responsive records and by responding to the Applicant openly, accurately and completely regarding the steps taken to locate records and the results of the search. The Commissioner also directed the Public Body to conduct a search for any responsive records in the custody of Conroy Ross, an executive search firm that had been hired by the Public Body to screen candidates in competition for the Police Chief position.

[para 3] On November 10, 2008 the Public Body wrote the Applicant and advised him of the steps it had taken and the progress it had made to locate responsive records following the Commissioner's order. It noted that it Conroy Ross did not have responsive electronic records in its possession, but continued to search for responsive paper records that were potentially within the Public Body's control.

[para 4] On December 1, 2008, the Public Body wrote the Applicant as a follow up to its letter of November 10, 2008 and to provide the result of Conroy Ross's search to locate responsive paper records. The Public Body stated:

The Commission wishes to advise that it has received written confirmation from Shores Jardine LLP that Conroy Ross has not additional records in its possession which are in the control of the Commission and which are responsive to the FOIP Request other than those documents which were previously provided to your counsel on September 21, 2006 by Shores Belzil Jardine. (Additional copies of the documents provided by Shores Belzil Jardine on September 21, 2006 were also provided to you under cover of the Commission's November 10, 2008 correspondence.)

In making this determination, the Commission has been advised that Conroy Ross searched its electronic records as well as its physical records. The Commission has further been advised that this search was initially conducted by Conroy Ross back in March 2006 (in response to the FOIP request) and September 2006 (in response to the Rule 209 application which had been brought by your counsel in connection with the Litigation Proceedings).

Having carefully reviewed the FOIP request and the actual records from Conroy Ross which have previously been provided, the Commission is satisfied that these records represent all the records Conroy Ross would reasonably be expected to have in its possession which would be in the control of the Commission regarding the 2004 and 2005 Chief of Police competitions as they relate to [name of the Applicant].

...

As previously stated in our November 10, 2008 correspondence, you have the right under section 65 of the *Freedom of Information and Protection of Privacy Act* to ask the OIPC to review any decision, act or failure to act of the public body (in this case, the Commission) that relates to the FOIP request. A request for review must be made in writing and must be within 60 days from the date of your receipt of this letter...

[para 5] On January 28, 2010 the Applicant wrote the Commissioner regarding the Public Body's search and response to him. The Applicant takes the position that he requested review in this letter of the Public Body's response to his access request following Order F2007-029, while the Public Body argues that he requested that the Commissioner review its compliance with Order f2007-029. As the Public Body disputes the purpose and the effect of this letter, I will address its contents in relation to the issues it raises as a preliminary issue, below.

[para 6] The Commissioner authorized mediation to resolve the issues raised by the Applicant in the letter of January 28, 2010. As mediation was unsuccessful the matter was scheduled for a written inquiry.

[para 7] A Notice of Inquiry was sent to the parties on May 28, 2010. The Notice provides the following background. It states:

The Public Body conducted a new search and made a new response to the Applicant. The Applicant requested a review of the adequacy of the new search and the new response. The Commissioner authorized mediation of these issues and file #F4783 was opened.

[para 8] The Notice of Inquiry also states that the Information and Privacy Commissioner has decided to conduct a written inquiry in relation to the following issue:

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

[para 9] In its initial submissions, the Public Body did not make arguments in relation to the issue in the Notice of Inquiry, but stated that the issue for the inquiry is the following:

Does OIPC have the jurisdiction to deal with matter as framed by [the Applicant], and, if so, what is the appropriate scope of the Inquiry?

The Public Body addressed the above issue in its initial submissions. It also added the following issue in the alternative:

Has the Commission complied with the terms of the Order?

The Public Body made submissions and submitted evidence regarding its compliance with Order F2007-029 in its arguments under this issue.

[para 10] On review of the Public Body's submissions for this inquiry, which included a copy of Conroy Ross's letter of November 10, 2008, it became clear that it takes the position that it did not have custody or control of records in the possession of

Conroy Ross, an executive search firm it had hired in relation to the police chief competition. If a public body lacks both custody and control over records, there is no right to request access to them from the public body under the FOIP Act. I therefore gave notice that this issue had been added to the inquiry, and I determined that Conroy Ross was an affected party for the inquiry in relation to this issue.

[para 11] As the Public Body and Conroy Ross made arguments referring to the legal relationship between them and their understanding of their rights in relation to the records created under that legal relationship, I requested that these parties provide me with a copy of the contract between them. The Public Body provided a copy of the contract on January 14, 2011.

[para 12] The Public Body challenges the jurisdiction of the Commissioner to make a determination as to whether the Public Body has met its duty to the Applicant under section 10(1) of the FOIP Act, as it takes the position that its compliance with section 10(1) was not raised by the Applicant in the Applicant's request for review. Conroy Ross also challenges the jurisdiction of the Commissioner for this reason. I have therefore decided that I will answer the following question as a preliminary issue for the inquiry:

Does the Commissioner have jurisdiction to decide whether the Public Body met its duties to the Applicant under section 10(1) of the FOIP Act?

II. ISSUES

Issue A: Does the Commissioner have jurisdiction to decide whether the Public Body met its duties to the Applicant under section 10(1) of the FOIP Act?

Issue B: Does the Public Body have control over the records in the possession of Conroy Ross?

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

III. DISCUSSION OF ISSUES

Issue A: Does the Commissioner have jurisdiction to decide whether the Public Body met its duties to the Applicant under section 10(1) of the FOIP Act?

[para 13] As noted above, the Public Body argues that the Commissioner has misstated the issue for inquiry and challenges my jurisdiction to conduct this inquiry on that basis.

[para 14] In its submissions, the Public Body characterizes the Applicant's letter of January 28, 2009 in the following way:

On January 28, 2009, [the Applicant's] legal counsel sent a further letter to the OIPC and again articulated [the Applicant's] position "that [the Commission had] not complied with the Order."

As a result, the OIPC was asked to review “the manner in which the [Commission had] complied with this Order.”

[para 15] The Public Body concludes its submissions by stating:

[The Applicant] has requested the Review on the basis that the Commission has not complied with the terms of the Order. The Act does not give the OIPC the authority to determine if a party has or has not complied with the terms of an Order issued under section 72. That is for the Courts to consider.

The OIPC cannot purport to acquire jurisdiction by framing the issues in a way that is different from that articulated by [the Applicant’s] legal counsel in its letters to the OIPC dated January 5, 2009 and January 28, 2009.

In the alternative, if the Act gives the OIPC the jurisdiction to determine if a party has or has not complied with the terms of an Order issued under section 72, the scope of the review must be restricted to determine that single issue. (By its correspondence dated December 9, 2008, the OIPC has previously confirmed that it has received the Commission’s compliance with the Order.)

The Commission states that it has fully and completely complied with the terms of the Order.

[para 16] Conroy Ross notes that the Applicant requested a review of Order F2007-029 in his letter of January 28, 2009. Conroy Ross argues:

It was the Commissioner who chose to characterize it as something else:

I have been asked by [counsel for the Applicant] to review the Edmonton Police Commission’s response to the request for access to information.

Respectfully, however, [counsel for the Applicant] has not asked for a review of the EPC’s response to the “request for access to information”. He has asked for a “review of the manner in which EPC has complied with the Order and asserted in the same paragraph: “It is the position of [the Applicant] that the EPC has not complied with this Order.

The Notice of Inquiry, dated May 28, 2010 provided background as follows:

[Following the Order] the Public Body conducted a new search and made a new response to the Applicant. The Applicant requested a review of the adequacy of the new search and the new response.

and framed the issue as this:

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

However, there was no “new” request leading to a “new” search and “new” response – there was a search conducted and response made by the EPC solely for the purposes of complying with the Order. Simply put, the Inquiry is inquiry into whether there was compliance with the Order.

[para 17] Both the Public Body and Conroy Ross are correct that the Applicant’s letter states the following:

[The Applicant] now seeks a review of the manner in which the EPC has complied with this Order. It is the position of the Applicant that the EPC has not complied with the Order.

[para 18] However, these sentences are immediately followed by the following:

Specifically, the EPC has failed to conduct an adequate search for responsive records. [my emphasis] Paragraph 66 of the Order provides that 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 site, program area, 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.

The EPC has failed to conduct an adequate electronic search of electronic records. Instead it simply instructed individuals to review their files.

Further, it is [the Applicant's] belief that the EPC has failed to disclose information pertaining to [the Applicant] in the possession and control of the EPC, including the documentation held by Conroy Ross on behalf of the EPC, without justification under the Act or as directed by your Order. Particulars of such information may include, but are not limited to, documentation with respect to the selection of candidates for the employment position as it relates to [the Applicant]. The Applicant has received no information as to who ranked him (Conroy Ross or the EPC), what factors were considered and how he was ranked in comparison to all other applicants / candidates. He is not seeking information as to the other candidates but only as to his application and the factors considered.

[The Public Body's counsel], on behalf of the Edmonton Police Commission, advised on November 13, 2008 he was reviewing the Conroy Ross documents; however, we have not received the results of that review. In the EPC's own documents, they state that each member of the Chief of Police Search Committee... was to study independently all of the applicants who applied. This would include [the Applicant]. Their process was to rate and rank the top 15 applicants. The Committee was to meet and do a qualitative assessment to rank the top 8 to 10 applicants. In the Rating Criteria, the concluding paragraph states that, "the criteria is designed for the individual use of each committee member to assist them in a logical and systematic analysis of each applicant." This is their form, yet no information or records are provided regarding [the Applicant]. [my emphasis]

The letter concludes with a request that the Commissioner review the Public Body's compliance with Order F2007-029.

[para 19] Clearly, the Applicant takes issue with the steps the Public Body took to comply with Order F2007-029. However, the reason he puts forward for being dissatisfied with the Public Body's compliance with Order F2007-029 is his view that the Public Body had failed to conduct an adequate search for responsive records and to respond to him openly, accurately, and completely by failing to disclose records to him.

[para 20] Section 65(1) empowers a person who makes a request to the head of a public body to ask the Commissioner to review the Public Body's actions relating to the request. It states:

65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.

[para 21] In my view, in asking for a review of the manner in which the ordered search was conducted, the language "reviewing compliance with the order" can be used reasonably to make this request, even though that language would equally apply to a request, in a different fact situation, that the Commissioner review a refusal to comply with an order. The Commissioner would not necessarily conduct an inquiry to review compliance, but would instead address non-compliance by filing the order and making an application for the public body to be found in contempt. Certainly, I do not interpret section 65(1) as stating that compliance with the Commissioner's orders cannot be reviewed under its authority or that the Commissioner lacks jurisdiction to review compliance with his orders.

[para 22] In any event, the Applicant's letter of January 28, 2008 raises more issues than those cited by the Public Body and Conroy Ross, and those issues relate to the Public Body's response to his access request following the Commissioner's order. The Applicant states that he believes that the Public Body has not conducted an adequate search for responsive records and is not in compliance with the FOIP Act in its response to him. These issues are certainly within the ambit of section 65(1) on any interpretation. Moreover, given that the Applicant included these issues in a letter to the Commissioner and provided reasons to support his view that the Public Body is not in compliance with the FOIP Act, both in its search and its responses to him, it is reasonable to assume that he did so with the intention that the Commissioner would review this matter. I find that the proper interpretation of the Applicant's request for review is that he is not asking for an order to direct the Public Body to do what it has already done; he is taking issue with how the Public Body did it.

[para 23] In the circumstances of this case, the arguments that would be made in support of an argument that the Public Body has not complied with a Commissioner's order, and the arguments that the Public Body has not conducted an adequate search for responsive records or responded openly, accurately and completely, would be the same, given that the Commissioner ordered the Public Body to meet its duties to the Applicant under section 10(1). A contempt finding or a prosecution of the Public Body for failure to comply with a Commissioner's order would not result in the Applicant obtaining further records from the Public Body; however, an inquiry addressing the adequacy of the Public Body's search and its response could potentially have this effect, if the Commissioner were not satisfied by the Public Body's efforts to search and obtain responsive records in its custody or control. The Applicant's arguments in the letter of January 28, 2008 are clearly made for the purpose of obtaining further records, which supports a finding that

the purpose of this letter is to request an inquiry into the adequacy of the Public Body's response of December 1, 2008.

[para 24] I note that section 2(e) of the FOIP Act creates a right to an independent review of decisions made by public bodies. This provision states:

2 The purposes of this Act are

- (e) *to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

To ensure that this purpose of the Act is not unreasonably undermined, requests for review must be considered in their entirety and interpreted fairly and liberally.

[para 25] I am satisfied that the Applicant's letter of January 28, 2008 is reasonably interpreted as a request that the Commissioner review a decision, act, or failure to act of the Public Body in relation to the Applicant's access request. In particular, it can be interpreted as a request that the Commissioner review whether the Public Body conducted its new search for records and responded to him in compliance with section 10(1) of the FOIP Act. This is clearly an issue contemplated by section 65(1) of the FOIP Act and I am therefore satisfied that I have jurisdiction to address it. To hold otherwise would be to deny a perfectly legitimate request for review by reference to the manner in which the Applicant expressed himself, and the fact that the same language could also cover a request that would be more appropriately dealt with by means other than an inquiry.

[para 26] Moreover, determining whether the Public Body has met its duties under section 10 of the FOIP Act does not require determining whether the Public Body has complied with Order F2007-029.

[para 27] In Order F2007-029, the Commissioner ordered the Public Body to do the following:

I order the Public Body to meet its duty to assist the Applicant by responding to the Applicant openly, accurately and completely. The response must contain reference to all responsive records in its possession, including those that are also subject to the discovery process. The response must also contain the provisions of the Act on which the Public Body relies to withhold records, if any, and its reasons for doing so.

I order the Public Body to conduct an adequate search for responsive records, including those in the custody of Conroy Ross, and to communicate to the Applicant the steps it took to locate records and the results of that search.

Essentially, the Commissioner ordered the Public Body to do things that he found that the Public Body had not established had been done: conduct an adequate search for responsive records and respond to the Applicant openly, accurately, and completely. The

Commissioner also provided directions regarding the steps the Public Body was to take when conducting the new search and in making a new response.

[para 28] I am conducting an inquiry relating to the search and response conducted by the Public Body following Order F2007-029, and will base my decision as to whether it has met its duty under section 10 on the evidence before me. In contrast, the Commissioner decided Order F2007-029 based on the evidence before him documenting the Public Body's previous search and response to the Applicant. If the Public Body did not comply with the conditions of the Commissioner's order it could still satisfy me that it met its duty under section 10 of the FOIP Act in relation to the new search and response. Alternatively, it is possible that even if the Public Body did comply with the Commissioner's Order, I would find it had not met its duty under section 10 in relation to the new search, depending on the weight I assign to evidence before me. Deciding whether the Public Body complied with Order F2007-029 would not necessarily assist me to decide whether the Public Body's new search and response meet the requirements of section 10, although the Public Body's evidence regarding its compliance may assist me to assess the quality of its search and its response.

[para 29] There is therefore no benefit to answering the question posed by the Public Body for the inquiry regarding its compliance. However, I will review its evidence in relation to its compliance as this will assist me to learn how it conducted its search and to decide whether its new response is open, accurate and complete as required by section 10 of the FOIP Act.

[para 30] Alternatively, if, as the Public Body argues, section 65(1) does not empower a person to ask the Commissioner to review a public body's compliance with his orders and the Commissioner lacks jurisdiction to review whether a public body has complied with an order, I find that the Applicant's request for review remains within the jurisdiction of the Commissioner to address.

[para 31] If one were to consider only the passages in the letter of January 28, 2008 to which the Public Body and Conroy Ross refer in their submissions, it would be possible to conclude that the Applicant was not requesting a review under section 65 of the FOIP Act, as those passages request that the Commissioner review the Public Body's compliance with an order. However, the FOIP Act does not impose any requirements as to the form of a request for review, other than that it be in writing, and none of the FOIP Act's provisions support the position that issues properly falling under section 65(1), and which are raised in a request for review, may be ignored because other, severable, aspects of the request are beyond the powers of the Commissioner to address. Otherwise, an applicant who is entitled to a remedy under the FOIP Act, could lose the right to an independent review of issues within the Commissioner's jurisdiction, for the sole reason that one of the issues brought to the Commissioner's attention, in this case the Public Body's compliance, is outside his jurisdiction. In my view, this would be an unsatisfactory result, given the purposes of the FOIP Act, and given that the processes under the FOIP Act for bringing complaints and resolving them are intended to enable parties to pursue their issues without legal representation. This is established by section

69(5), which indicates that parties to an inquiry may be represented by counsel *or* agent, but does not require parties to be represented by either.

[para 32] I find that the Applicant's request for review contains passages clearly indicating that the purpose in writing them was to request that the Commissioner review the reasonableness of the Public Body's new search for responsive records and its response to him. I find that I have jurisdiction to review those issues, as a complaint that a public body has not met the requirements of section 10(1) in response to an access request is properly within the ambit of section 65(1) on any interpretation of this provision.

[para 33] For these reasons, I find that I have jurisdiction to determine whether the Public Body complied with its duty to assist the Applicant under section 10 of the FOIP Act, and to address the included issue of whether the Public Body has control over potentially responsive records in the control of Conroy Ross.

Issue B: Does the Public Body have control over the records in the possession of Conroy Ross?

[para 34] Section 4 of the FOIP Act establishes that the Act applies to only those records in the custody or control of a public body. It states, in part:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following...

[para 35] Section 6 of the FOIP Act creates a right to access to records either in the custody or the control of a public body. It states:

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.

[para 36] The right of access does not extend to records that a public body does not have any custody or control over; however, the FOIP Act does not define the terms "custody" or "control". Previous orders of this office have considered various factors as indicative of custody or control.

[para 37] 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 38] 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 39] In Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term "custody" was defined as the physical possession of a record, whereas the term "control" was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody *and* control (Order F2002-014). A recent Order of this Office also held that "bare" possession of information does not amount to custody, as the word "custody" implies that there is some right or obligation to hold the information in one's possession (Order F2009-023).

[para 40] The Applicant argues that the Public Body has control over records created by Conroy Ross in relation to the executive search it conducted for the police chief position. The Applicant argues that a large and liberal interpretation should be applied when interpreting the phrase "custody or control" in order to ensure that legislature's purpose in enacting the FOIP Act is attained.

[para 41] This point is also made by the Federal Court of Appeal in *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] FCJ 241. In that case, Letourneau

J.A., speaking for the majority, discussed the meaning of “control” within the context of the federal *Access to Information Act* and said:

The notion of control referred to in subsection 4(1) of the *Access to Information Act* (the Act) is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature as "it is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act*, "to give section 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature. As a general rule, "in reading a statute words should not be added or deleted and the reader should not try to fill the gaps he thinks he sees." It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information...

[para 42] The Federal Court of Appeal decided that the word “control” within the context of the *Access to Information Act*, should be given its broad, usual meaning. This approach is consistent with prior orders of this office addressing the issue of custody or control, and which have held that control refers to the right of a public body to manage what is done with a record.

[para 43] In section 6 of the FOIP Act, the word “custody” implies that a public body has some right or obligation to hold the information in its possession. “Control,” in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

[para 44] I find that the question “Does the Public Body have a right to obtain the records?” must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

The parties’ arguments

[para 45] In its initial submissions, Conroy Ross argues that the Public Body has no legislative or common law authority to obtain the records relating to the executive search. It makes references to the factors referred to in Order F2008-023, and argues that a proper consideration of these weighs in favor of finding that the Public Body does not have control over the records created during the executive search. In particular, it notes that Conroy Ross is an independent contractor. It also argues that its employees would

not have provided the information in the records to the Public Body because they have a practice of protecting the confidentiality of their records. It notes that it has possession of potentially responsive records, but also states that these remain in existence only as a result of an inadvertent failure to destroy them. Conroy Ross states categorically:

The Edmonton Police Commission does not have a right of possession of the Records. The Records were created for the use of Conroy Ross or its employees and were never intended to be shared with or provided to the Edmonton Police Commission. The Records were transitory, working materials of Conroy Ross.

[para 46] Conroy Ross also drew my attention to Order F2009-030, in which the Adjudicator determined that Alberta Corporate Human Resources (ACHR) did not have control over records created by Great-West Life. In arriving at this determination, one of the factors the adjudicator considered was a contractual term that established the rights of ACHR and Great-West Life in relation to records obtained or created by Great-West Life under the contract.

[para 47] In that case, the particular contractual provision is Article IV and is cited at paragraph 26 of the Order and states:

The Company [Great-West Life] agrees to furnish The Government on request all records relating to the contracted administrative services including access to individual claim files with the appropriate authorizations, for the purposes of reviewing adjudication and rehabilitation services.

The Company acknowledges that information and records compiled or created under this Agreement and provided to The Government are subject to the Freedom of Information and Protection of Privacy (FOIP) Act.

The Company acknowledges that information and records compiled or created under this Agreement which are in the custody of The Company, and are not provided to The Government, are subject to the Personal Information Protection and Electronic Documents Act (PIPEDA) or to the Personal Information Protection Act. The Company shall respond to the request.

[para 48] As there were limited circumstances in which the public body in that case could demand the records, and those circumstances were not present, the adjudicator found that the contractual provision weighed against a finding of control in the public body.

[para 49] The Public Body also draws my attention to Order F2009-030. It notes that records created by an employee of Conroy Ross are not records created by an employee of the Public Body for the purposes of reviewing the control factors.

[para 50] The Applicant argues that the Public Body has control over the records in the possession of Conroy Ross. The Applicant points out that it does not matter if a public body does not have possession of responsive records; the question is whether it has control over them. The Applicant points to section 36(1) of the *Police Act* as providing statutory authority to the Edmonton Police Commission to appoint a police chief. The

Applicant therefore reasons that the records relate to the Public Body's mandate for the purposes of the factors set out in Order F2008-023. In addition, the Applicant argues:

At all material times, Conroy Ross was under contract and direction of the Edmonton Police Commission. They received payment for its functions in relation to the selection process of the Chief of Police. It is respectfully submitted that the public body, has the right to regulate the records used for the purpose stated, the maintenance of the records and the ultimate destruction of the records. It paid for the services of Conroy Ross.

[para 51] All three parties referred to contractual rights in their initial submissions, but did not submit a copy of the contract addressing the rights between Conroy Ross and the Public Body for the inquiry. I therefore requested a copy of the contract between these parties and informed the parties that they would have the opportunity to provide additional submissions regarding the contract. The Public Body provided a copy of the contract.

[para 52] The contract states that it is between the City of Edmonton, acting on behalf of the Edmonton Police Commission, and Conroy Ross. The contract is signed by a representative of the Public Body, a representative of the City of Edmonton, and a representative of Conroy Ross. The contract indicates that the Public Body and Conroy Ross mutually covenant and agree to the following terms of the agreement: a) the agreement form, b) description of work, c) payment terms, and d) general terms. References to the City of Edmonton in the agreement, are therefore references to the City of Edmonton acting on behalf of the Public Body.

[para 53] As noted above, Conroy Ross referred me to Order F2009-030, an order in which an adjudicator determined that a public body did not have custody or control over the records in the possession of Great West Life, a third party organization. In that case, the contract between the public body and Great West Life contained a provision that limited the right of the public body to request records from Great West Life, a fact that the adjudicator considered decisive on the issue of control. As discussed above, Article IV of that contract contemplated limited circumstances in which the public body could obtain records from the organization. In addition, the clause established that records within the custody of the organization were subject to personal information protection legislation governing the private sector. The adjudicator noted:

The presence of Article IV is a relevant circumstance in determining whether the Public Body has custody or control of the records, regardless of differences between Article IV and comparable provisions in other government contracts. In Order F2006-028 (at para. 34), the Commissioner found that the Workers' Compensation Board (WCB) did not have the right to possess treatment records held by the Columbia Rehabilitation Centre because of a contractual clause stating that the WCB could only request the records for specified and limited purposes. Similar to the present matter, the clause further stated that the records "shall be the property of and under the control of the Contractor".

[para 54] In contrast, the contract between the City of Edmonton, on behalf of the Public Body, and Conroy Ross, states, in part:

13.0 Intellectual Property Rights

13.1 The Consultant agrees that all base materials, research results, computer programs, drawings, documents and notes or materials of any type whatsoever developed or prepared by the Consultant (the "Documents") in performance of the Consultant's services shall vest in and become the absolute property of the City, including assignment of all copyright.

13.2 Upon completion of the Services or termination of this Agreement, the Consultant shall deliver all of the Documents to the City on demand by the City. The Consultant may keep copies of the Documents. Once the City has possession of the Documents, the City is solely responsible for the use that the City makes of the documents in other projects.

13.3 Without prejudice to any rights which may exist in the City by virtue of any prerogative rights and powers or by virtue of the Copyright Act, R.S.C. 1985, c. C-42, the Consultant agrees that all present and future rights in the copyright in the Documents will vest absolutely and immediately in the City.

13.4 The Consultant warrants that the Consultant is the only person who has or will have moral rights in the Documents and the Consultant waives in favour of the City, all of the Consultant's moral rights, as provided for in the law of copyright, in the Documents.

13.5 The Consultant agrees to confirm Articles 13.3 and 13.4 by executing a written assignment and waiver in any form requested by the City and delivering the assignment and waiver to the City on or before the end of the term of this Agreement.

14.0 Freedom of Information and Protection of Privacy

14.1 The Consultant [Conroy Ross] agrees that all data, information and material provided to the Consultant by the City will be confidential, both during and after the term of this Agreement. The Consultant acknowledges that this is a fundamental term of this Agreement.

14.2 The Consultant acknowledges that, in adherence to the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 ("FOIP), the Consultant is required to comply with the provisions of FOIP pertaining to all information and records relating to, obtained, generated, collected or provided under or pursuant to this Agreement.

14.3 With respect to this Agreement, "record" means a record of information in any form, including books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.

14.4. With respect to this Agreement, a "transitory record" is a record that is either a duplicate record, temporary information that has only immediate or short-term value, or draft documents and working materials.

14.5 The Consultant must (except for a transitory record):

- a) notify the City that a record is about to be destroyed;
- b) receive written authorization from the City prior to actually destroying the record; and
- c) notify the City that the destruction has taken place.

14.6 The Consultant will provide to the City, at the Consultant's expense, any records required to be created, obtained and maintained pursuant to this Agreement within 7 calendar days of notification by the City.

14.7 If the Consultant retains a copy of the records created under this Agreement after the date on which the City has destroyed its copies of the records (pursuant to its records retention and

destruction guidelines) the Consultant will provide the City with a copy of the records within 7 days of the City requesting those records as a result of a request for information under FOIP. This article 14.7 shall survive the termination of this Agreement. [my emphasis]

[para 55] Conroy Ross objects to my considering the contract for the following reasons:

There was no contractual dispute between Conroy Ross and the EPC in relation to the November 10, 2008 response provided by Conroy Ross. The EPC was satisfied with the response. The agreement is spent on this issue. Contractually, the matter was closed. The agreement is irrelevant. All time limits for disputing the matter in contract law are long past.

The Adjudicator has now advised, more than 2 years later, that if she finds that she has jurisdiction to proceed, she wishes to consider the terms of the agreement between Conroy Ross and the EPC in assessing the issue of control of documents in Conroy Ross's possession.

If the Adjudicator finds that she has jurisdiction to proceed with her Inquiry and does review the agreement, her jurisdiction remains limited. She cannot second guess the parties and assert that they should have had a contractual dispute. She cannot compel the parties to have a contractual dispute.

[para 56] In relation to the contract, Conroy Ross argues the following:

Conroy Ross has complied with the agreement with the EPC. Conroy Ross has produced all documents that it is required to produce under the agreement.

Alternatively, if Conroy Ross has not produced all documents that it is required to produce, all limitation periods for requiring access to documents has passed.

The scope of work under the agreement contemplates a limited number of documents being provided to the EPC and does not include any of the documents in categories in issue in the instant case.

The duty of Conroy Ross to exercise skill, care and diligence normally provided in the performance of its services of this type includes the obligation to maintain confidentiality and discretion of certain information even as against the EPC – its client.

Reference to FOIPPA establishes a regime solely between the EPC and Conroy Ross, who are privy to the contract. Significantly, the reference to FOIPPA, interpreted in accordance with the contractual principles applicable to incorporation by reference of other documents, in fact allows Conroy Ross to resist requests for access to documents or disclosure by the EPC where for example Conroy Ross is concerned about disclosures of information provided in confidence or harmful to personal privacy. The documents in issue are transitory and therefore not in the control of the EPS.

These defenses are drawn to the Adjudicator's attention simply to alert the Adjudicator to the fact that merely obtaining the agreement and reading it without more would not be appropriate.

[para 57] The Public Body made no submissions in relation to the contents of the contract.

[para 58] In relation to its argument that the contract permits Conroy Ross to resist requests for access made by the Public Body, Conroy Ross clarifies:

If there were to be a legal dispute about whether the EPC had a right of access to a document, it would have to be resolved by a court not the OIPC. Parenthetically, it is important to note that incorporation by reference in a contract to a statute does not and cannot create a regime where bodies or individuals who are not privy to the contract have any rights or duties under it. Parties cannot clothe the OIPC, a statutory body, with jurisdiction by contract.

[para 59] My role is neither to adjudicate a contractual dispute nor to compel the parties to embark on one. In addition, my role is not to consider whether Conroy Ross's response to the Public Body regarding records in its possession complied with the terms of the contract. No order I may make under section 72 of the FOIP Act could have that effect. Rather, my role is to conduct an inquiry into the Applicant's complaint, and to decide all matters of fact and law arising in the course of that inquiry. The question is not whether the Public Body exercised its control, but whether it had control to exercise should it have chosen to do so. If it did, and continues to, have control over the records, the records are subject to section 6 and 10(1) of the FOIP Act. Conroy Ross's arguments obscure this question, which is a simple one. If the Public Body has control, I can order the Public Body to obtain the records, and it is bound by my order to exercise its control so as to comply with my order.

[para 60] The terms of the contract are relevant to the issue of whether the Public Body has control over the records that Conroy Ross withheld. The issue of control is relevant to the issue of whether the Public Body conducted an adequate search for all responsive records within its custody or control. If I find that the Public Body has control over the records withheld by Conroy Ross, and that the duty to assist would include obtaining and reviewing those records, then I will order the head of the Public Body to take all reasonable and necessary steps to obtain and review the records. There are circumstances when a public body must take legal steps to obtain records in its control. However, any contractual litigation resulting from the Public Body's decision to take legal steps to obtain the records would be within the jurisdiction of the courts.

[para 61] Turning to the terms of the contract, I note that term 13.1 establishes that all research, documents, and notes of any kind, created by Conroy Ross in providing services under the contract are the absolute property of the City of Edmonton acting on behalf of the Public Body. Moreover, on completion of the services or termination of the contract, all research, documents, and notes, are to be provided to the City of Edmonton on demand by the City of Edmonton.

[para 62] Term 2.2 of the contract (not reproduced) establishes the services Conroy Ross was retained to provide to the Public Body. These services include conducting research of target organizations, pre-search analysis, providing candidate information, reference checks, support selection, candidate summaries, and lists of candidates.

[para 63] Term 14 of the contract between the Public Body and Conroy Ross differs on several key points from the contract the Adjudicator considered in F2009-030. Term 14.2, states that Conroy Ross acknowledges that it must comply with all provisions of the FOIP Act in relation to all information and records relating to, obtained, generated,

collected or provided under or pursuant to the agreement. Term 14.5 states that Conroy Ross must notify the City of Edmonton if a record is about to be destroyed, receive written authorization from the City prior to actually destroying the record, and notify the City once destruction has taken place. Term 14.6 states that the Conroy Ross will provide to the City of Edmonton, at its own expense, any records that the City of Edmonton requires it to create, obtain, and maintain pursuant to the contract within 7 days of receiving notification from the City. Term 14.7 states that if the Consultant retains a copy of the records created under the contract after the date on which the City has destroyed its copies of records, that Conroy Ross will provide the records within 7 days, if the City is to request the records in order to comply with an access request. Moreover, this term survives the termination of the contract.

[para 64] The contract defines “transitory records” as records that are duplicates, temporary information that has immediate or short-term value, or draft documents and working materials. Transitory records are excluded from the application of term 14.5. While Conroy Ross argues that the records it withheld are transitory records, its evidence does not establish that they are transitory records as defined in the contract. Moreover, even if they are transitory records, transitory records are not excluded from the application of terms 13.1, 13.2, 14.6 and 14.7 of the contract between Conroy Ross and the City of Edmonton acting on behalf of the Public Body.

[para 65] Terms 13.1 and 14.2 of the contract contemplate that Conroy Ross will create records in order to fulfill its obligations to the City. The records referred to by counsel for Conroy Ross, in the letter of November 10, 2008, all contain information that the City of Edmonton, on behalf of the Public Body, retained Conroy Ross to provide. Moreover, as noted above, under section 13.1 of the contract, records of this kind are the absolute property of the City of Edmonton, i.e. they are records over which it, on behalf of the Public Body, has complete control, and are to be provided on demand to the City of Edmonton acting on behalf of the Public Body.

[para 66] In my view, the effect of terms 13.1, 13.2, 14.2, 14.6 and 14.7 is that all records created by Conroy Ross in performance of its duties under the contract are a) subject to the FOIP Act (14.2) and to access requests received by the City of Edmonton (14.7), b) the absolute property of the City of Edmonton (13.1), and c) to be provided on demand to the City of Edmonton (13.2, 14.6, and 14.7). As a result, the only conclusion I can reasonably arrive at in considering the terms of the contract, is that the Public Body, through the City of Edmonton, has absolute proprietary rights and has a contracted right to obtain possession of them. The contract also provides the Public Body, through the City of Edmonton acting on its behalf, the right to demand the records, if it has not already done so, once services have been completed or the contract has terminated.

[para 67] Terms 13.1 and 13.2 fall under the heading, “Intellectual Property,” a term that describes interests and rights in commercially valuable products of human intellect. I find that the scope of terms 13.1 and 13.2 is not limited by the fact that they appear under the heading “intellectual property”. Term 13.1 applies to base materials, research results, computer programs, drawings, documents and notes or materials of any type used

by Conroy Ross to provide services, which indicates that this provision is not restricted to addressing such interests as copyright. Moreover, as section 13.1 states that all documents, notes, and materials of Conroy Ross become the *absolute property* [of the City of Edmonton], *including any assignment of any copyright*, once Conroy Ross creates them, it is clear that the clause contemplates proprietary interests broader than those of copyright. “Absolute property” typically refers to property that one has full and complete title to and control over, which also suggests that term 13.1 is not limited to intellectual property interests. In addition, term 13.2 establishes that once the contract is completed or terminated, the City of Edmonton has the right to demand the records and the Conroy Ross must provide them. This clause also implies that the proprietary rights of the City of Edmonton acting on behalf of the Edmonton Police Commission are greater than copyright interests, which do not typically include the right to demand and possess records created by another. However, absolute property rights do include the right to demand production and the right to possession. Reading term 13 as a whole, the reference to intellectual property rights is intended to express that Conroy Ross will not be able to assert intellectual property rights over the records it creates under the contract, as these will be the absolute property of the City of Edmonton, acting on behalf of the Public Body.

[para 68] While Conroy Ross argues that the contract cannot be taken at face value, it has not provided any argument or evidence to establish that the contract says anything other than what it appears to say on a plain reading: that the records it has withheld are the absolute property of the City of Edmonton, and by implication, the absolute property of the Public Body. While Conroy Ross argues against the Public Body having any interests in the records in its possession, the executed contract establishes that Conroy Ross agreed to term 13.1 in exchange for consideration it considered satisfactory. In my view, there can be no greater indicia of control over a record by a public body than a contractual provision establishing that the record is the absolute property of a public body, as this property right, by definition, refers to full and complete control over property. In addition, I find that the plain wording of terms 13.1, 13.2, 4.6 and 4.7 of the contract establish that the Public Body, or the City of Edmonton acting on its behalf, has rights to demand the records, and therefore, control over the records for the purposes of the FOIP Act.

[para 69] Given that the Public Body is assigned the duty of appointing the Chief of Police under section 36 of the *Police Act*, it is reasonable to expect that it would maintain control over what was done in the fulfillment of its legislative duties, as it is ultimately responsible for performing them. Assigning the terms 13 and 14 their plain ordinary meaning accords is consistent with the statutory function of the Public Body.

[para 70] Whether the Public Body, or the City of Edmonton acting on its behalf, can successfully exert legal rights to obtain the records in the event that Conroy Ross refuses to provide the records, as counsel for Conroy Ross states that it intends to do, is a matter for a court to decide. My finding of control means only that the Public Body has duties in relation to those records under the FOIP Act and that those duties include

making all reasonable efforts to obtain them for the purposes of responding to an access request.

[para 71] For the reasons above, I find that the Public Body has control over the records withheld by Conroy Ross.

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

[para 72] Section 10 states:

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.

(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 73] As the Applicant has not requested that the Public Body create electronic records, only section 10(1) is at issue. Therefore, the question I must decide in this inquiry is whether, in its responses of November 10, 2008 and December 1, 2008 to the Applicant, the Public Body responded openly accurately and completely, and has demonstrated that it made every reasonable effort to assist him.

[para 74] The Public Body has the burden 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 75] 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.

Adequacy of search

[para 76] 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 77] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89, the Court found that duty to assist reasonably includes, as part of its informational component, a public body's reasons for concluding that it cannot locate or produce any more responsive records. The Court said at paragraphs 42 and 43:

The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and **why the Public Body believes that no more responsive records exist than what has been found or produced.** [emphasis in original]

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.

[para 78] The Applicant argues that the Public Body did not conduct a reasonable search for responsive records because it did not provide the following:

- The rank order of the top fifteen applicants

- The quantitative assessment and ranking order of the top eight to ten applicants
- The systematic analysis of each applicant and the forms used by the Search Committee
- The Selection / Short listing criteria with respect to the Applicant
- The preparation of the shortlist criteria or the selection criteria
- Citizen review panel review of the shortlist
- Analysis of Applications of the five – ten short listed candidates
- Names of the citizen review panel
- Weekly written updates between Conroy Ross and the EPC
- The process or criteria used to further narrow the short list
- Secretarial notes taken at open, regular closed and special meetings between January 1, 2004 to November 17, 2005

[para 79] The Applicant argues that the Public Body has not conducted an adequate search for records in the possession of Conroy Ross as it did not provided any or detail the steps it took to search for them. He notes:

[The Applicant] has not received any of the documents either held by Conroy Ross or as provided to the EPC by Conroy Ross. The EPC has referenced additional records that may be forthcoming from Conroy Ross. These documents have yet to be provided.

[para 80] The Public Body provided affidavit evidence from an executive assistant to establish the search it conducted for records in its possession. The search involved asking Commission members and staff whether they were aware of responsive paper and electronic records. The FOIP Coordinator also followed up with staff members in order to retrieve these records. The central filing system was also searched. The Public Body states that the Applicant has been provided with all responsive records from that search.

[para 81] The affiant states:

It is my understanding that [the Applicant] has never made a request under the Act for general information or for information about anyone other than himself. It is also my understanding that [the Applicant] has never expanded the scope of his original request beyond that which is set out in his FOIP request.

Notwithstanding the foregoing, following the Commission's receipt and review of [the Applicant's] written submissions and, in particular, his assertion that handwritten notes were taken at all Commission meetings, the Commission compiled additional extracts from the minutes of its meetings, and to the extent available, from the corresponding handwritten notes, of all general references to the 2004 and 2005 Police Chief competitions and to the litigation which ensued.

While these additional extracts are outside the scope of [the Applicant's access request] and copies of the same are also being provided to [the Applicant].

[para 82] While the affiant states that to her knowledge, the Applicant did not request anything other than his personal information, I note that the Applicant also requested general information in his access request. The access request states:

All information regarding [the Applicant] on all Edmonton Police Commission records including all paper and electronic records on-line, off-line, archived, held, received or distributed between January 1, 2004 to November 17, 2005. This must include minutes of any meetings, correspondence with any third party involved in the selection of candidates for the (employment position) as it relates to [the Applicant], the ranking of candidates as it relates to [the Applicant], communications regarding inquiries about (the Applicant) either within the Edmonton Police Commission or externally and all e-mail messages received or distributed internally or externally and all records regarding the [employment position] competition leading to the appointment of [a police chief] and the most recent selection of a new Chief of Police completed in November of 2005. [my emphasis]

[para 83] In addition to requesting his own personal information, I note that the Applicant requested all records regarding the police chief competition and the selection of a police chief completed in November, 2005. Had the affiant not expanded her search to include records regarding the general competition, then I would have found that the Public Body had not conducted an adequate search for responsive records in relation to the records in its possession. However, I note that the affiant did expand the search to include records containing general information about the police chief competition and did include this information in a response to the Applicant.

[para 84] I find that the search for records in the possession of the Public Body was reasonable and that the Public Body has provided a satisfactory explanation of the steps it took to locate them. I therefore find that Public Body met its duty to assist the Applicant in relation to the records in its immediate possession.

[para 85] I turn now to the records in the possession of Conroy Ross. In a letter to the Applicant of December 1, 2008, counsel for the Public Body states:

The Commission wishes to advise that it has received written confirmation from Shores Jardine LLP that Conroy Ross has no additional records in its possession which are in the control of the Commission and which are responsive to the FOIP request other than those documents which were previously provided to your counsel on September 21, 2006 by Shores Belzil Jardine. (Additional copies of the documents provided by Shores Belzil Jardine on September 21, 2006 were also provided to you under cover of the commission's November 10, 2008 correspondence.)

In making this determination, the Commission has been advised that Conroy Ross searched its electronic records as well as its physical records. The Commission has further been advised that this search was initially conducted by Conroy Ross back in March 2006 (in response to the FOIP Request) and September 2006 (in response to the Rule 209 application which had been brought by your counsel in connection with the litigation proceedings.)

[para 86] The written confirmation to which the Public Body refers in the passage above is a letter written by counsel for Conroy Ross dated November 10, 2008. This letter was included in the Public Body's initial submissions. It states:

You have drawn to my client's attention an order of the Office of the Information and Privacy Commissioner. As you are aware, my client has not been a party to any proceedings before the Information and Privacy Commissioner. As I have advised you, my client is not willing to allow the Edmonton Police Commission to undertake a search of my client's records.

In order to provide a formal response to you, I needed to again obtain documents from my client, review them and obtain instructions. I was not able to review the documents as quickly as I would have liked. My client also has been extremely busy. No disrespect is intended to you or the Edmonton Police Commission.

I can advise:

1. Conroy Ross does not have any electronic records that are responsive to the request of [the Applicant]. All electronic records in relation to this matter are long since deleted. The records were deleted in the ordinary course following conclusion of this executive search. It had been Conroy Ross's intent to destroy all records at the conclusion of the process.
2. Some paper records, which were scheduled to be shredded in the ordinary course, continue to exist as a result of happenstance. They were in [an employee's] office and not picked up for shredding by oversight. At the time of the Rule 209 application in the fall of 2006, Conroy Ross, through [the employee] undertook a review of the physical records in Conroy Ross's custody and control to find any document in which [the Applicant's name] appeared. Those were then analyzed by my office in the context of the Rule 209 application that was live at the time.
3. I have reviewed those documents again in the context of the FOIPPA application. The documents that mention [the Applicant] fall into the following categories.
 - a) Meeting notes dated March 29, 2005 between Commission members and [two employees] of Conroy Ross. This document has never been provided to the Edmonton Police Commission.
 - b) A number of documents that include leads, referrals, expressions of interest and references from the executive search process undertaken by Conroy Ross. While these documents do include some notes which refer to [the Applicant] they relate to the executive search process as a whole and contain notes relating to numerous other individuals as leads, referrals, expressions of interest and references. These documents have never been provided to the Police Commission.
 - c) 2 binders of materials that were provided to the Police Commission that included information relating to each candidate on the long list of candidates. The tab relating to [the Applicant] was provided to his counsel and to the Police Commission in the context of the Rule 209 application. These binders were provided to the Police Commission in June 2005.
 - d) An index for the binders referred to above that was hand annotated by [an employee]. The annotations reflect her personal notes relating to each of the long list candidates derived from the materials in (b). This annotated document has never been provided to the Police Commission.
 - e) A number of telephone notes of telephone discussions between [an employee] and [the Applicant] and [the employee] and [the Police Commission] made after the short list was determined. These documents have never been provided to the Police Commission.

To understand the position taken by Conroy Ross and its high degree of concern regarding the disclosure of any of its records, it is useful to understand something about the nature of Conroy Ross's work. By its nature the work is highly confidential. Conroy Ross is retained to assist clients in high level executive searches because of its expertise and discretion. In the course of an executive search like this one, Conroy Ross approaches individuals to seek leads, referrals and interest in the position. It also obtains references. The individuals to whom Conroy Ross speaks in the course of an executive search hold senior positions (in this case, many would be senior police officers in other jurisdictions.) Individuals will only speak to Conroy Ross because

they know that Conroy Ross will not reveal the information they supply to anyone, including Conroy Ross's client, without their consent. Release of such information will make it extremely difficult for Conroy Ross to obtain similar information in the future. Release of that information may damage the individuals who supplied it (e.g. it may reveal that an individual is interested in seeking employment elsewhere. Conroy Ross takes the position that it will not release that information to anyone, including their own client.

[para 87] Following order F2007-029, the Public Body asked whether Conroy Ross had any responsive records that it had not previously been provided. Conroy Ross reviewed records in its possession and confirmed that it did, but stated that it would not provide them to the Public Body should the Public Body ask for them. The Public Body took no further action following this response.

[para 88] As noted above, the Applicant did not confine his access request to his own personal information, but requested all records regarding the chief of police competition leading to the appointment of a chief of police and the most recent selection of a new chief of police in November, 2005.

[para 89] In the letter of November 10, 2008, counsel for Conroy Ross describes records as containing the name of the Applicant and falling into any of three categories: meeting notes between commission members and Conroy Ross, notes made regarding the Applicant in the context of the executive search process, personal notes of an employee of Conroy Ross derived from the executive search process, and notes of telephone conversations between an employee of Conroy Ross, the Public Body and the Applicant. I find, on the basis of the description provided by counsel for Conroy Ross, that these records are all responsive to the Applicant's access request.

[para 90] Moreover, the Applicant did not limit his access request to only those records containing his personal information. The Applicant also requested "all records regarding the Police Chief competition leading of the appointment of [a police chief] in 2004 and the most recent selection of a new chief of police completed in November of 2005." Given the services Conroy Ross was retained to provide, I find that it is probable that Conroy Ross has records responsive to this aspect of the Applicant's request, even though Conroy Ross did not refer to them specifically in the letter of November 10, 2008. I make this finding because counsel for Conroy Ross states:

I have reviewed those documents again in the context of the FOIPPA application. The documents that mention [the Applicant] fall into the following categories... [my emphasis]

This statement possibly implies that there are records in the possession of Conroy Ross regarding the Police Chief Competition created within the timeframe of the access request that do not mention the Applicant. However, these records would also be responsive to the access request, given that the Applicant requested all records regarding the police chief competition.

[para 91] As explained above, I have found that the Public Body has control under the FOIP Act over the records held by Conroy Ross, which were created as part of Conroy Ross's contractual obligations to the City of Edmonton acting on behalf of the

Public Body. As a consequence, the Applicant has a right of access to these records, and the Public Body's duty to assist the Applicant in relation to his request for them also arises.

[para 92] I find that the steps taken by the Public Body to obtain the records in the possession of Conroy Ross are wholly inadequate. At the very least, given the contractual terms negotiated by the City of Edmonton its behalf and to which it agreed, it should have considered whether it had control over the records. Instead, it accepted the arguments of Conroy Ross presented in its letter of November 10, 2008, and which run counter to a plain reading of the contract.

[para 93] The Public Body has given no indication that it has taken steps, legal or otherwise, to obtain the records in the possession of Conroy Ross. However, as it has control over the records, section 6 gives the Applicant a right of access to them, and section 10(1) imposes a duty on the Public Body to assist the Applicant in relation to his request for them. The Public Body must therefore take all reasonable steps to obtain the records, including any necessary legal steps, in order to assist the Applicant for the purposes of section 10(1), and I will order it to do so.

[para 94] I find that the December 1, 2008 response of the Public Body regarding the records in the possession of Conroy Ross is not open, accurate and complete, as required by section 10(1). As noted above, this letter states:

The Commissioner wishes to advise that it has received written confirmation from Shores Jardine LLP that Conroy Ross has no additional records in its possession which are in the control of the Commission and which are responsive to the FOIP request other than those documents which were previously provided to your counsel on September 21, 2006 by Shores Belzil Jardine...

In making this determination, the Commission has been advised that Conroy Ross searched its electronic records as well as its physical records. [my emphasis]

[para 95] Reading this letter in the light of Conroy Ross's letter of November 10, 2008, it appears that the Public Body's reference to a "determination" in the second paragraph, despite the reference to searching that follows it, is really a reference to a determination that the Public Body has no control over the records. However, the Applicant was not provided a copy of Conroy Ross's letter at that time. Absent the context created by that letter, and reasons for deciding that the Public Body had no control, these paragraphs invite the interpretation that a further search was conducted and no additional records were located. In addition, this letter states that Conroy Ross searched through its electronic records. However, Conroy Ross's letter of November 10, 2008 states that any responsive electronic records had been destroyed. For these reasons, I find that the Public Body's response is not open, or accurate.

[para 96] For the reasons above, I find that the Public Body has not met the duty to respond to the Applicant openly, accurately, and completely. I will therefore order it to respond openly, accurately, and completely, once it obtains the records in the possession of Conroy Ross.

[para 97] Given that the contract was entered by the City of Edmonton on behalf of the Edmonton Police Commission, it is possible that the Public Body may not be able to take legal action acting in its own capacity to obtain the records at issue from Conroy Ross unless the City of Edmonton itself makes the request. I note that section 15(1) of the FOIP Act states:

15(1) Within 15 days after a request for access to a record is received by a public body, the head of the public body may transfer the request and, if necessary, the record to another public body if

- (a) the record was produced by or for the other public body,*
- (b) the other public body was the first to obtain the record, or*
- (c) the record is in the custody or under the control of the other public body.*

(2) If a request is transferred under subsection (1),

- (a) the head of the public body who transferred the request must notify the applicant of the transfer as soon as possible, and*
- (b) the head of the public body to which the request is transferred must make every reasonable effort to respond to the request not later than 30 days after receiving the request unless that time limit is extended under section 14.*

[para 98] Consequently, in the event that the Public Body is unable to take legal action in its own capacity under the contract to obtain the records at issue, it would be reasonable and necessary for it either to ask the City of Edmonton to do so on its behalf, or to transfer the request for access to the City of Edmonton under section 15.

IV. ORDER

[para 99] I make this Order under section 72 of the Act.

[para 100] I order the Public Body to issue a written direction to Conroy Ross to provide the Public Body with all records responsive to the applicant's request that have not yet been provided. The Public Body's written direction should be issued no later than 50 days from receiving a copy of this order. The Public Body must require that the records be delivered to the Public Body within seven days of receiving the written direction.

[para 101] In the event that Conroy Ross carries out its stated intention of refusing to provide the records to the Public Body, I order the Public Body to immediately take all necessary steps, including legal proceedings, if necessary, to obtain the responsive records from Conroy Ross.

[para 102] I order the Public Body to issue an access decision to the Applicant, openly, accurately and completely, upon receipt of the records, in accordance with Part I of the Act.

[para 103] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator