ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-R-001
(RECONSIDERATION OF ORDER F2009-005)

June 10, 2011

UNIVERSITY OF ALBERTA

Case File Number F4293

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Summary: In a previous order, (Order F2009-005), the adjudicator ordered the University of the Alberta ("the Public Body"), under the *Freedom of Information and Protection of Privacy Act* ("the FOIP Act"), to conduct an adequate search for responsive records. She also ordered it to include its backup records in its search, if it first determined that responsive records existed in its backup files and determined that such files could be restored. The Public Body applied for judicial review of Order F2009-005. The Court ordered the adjudicator to consider the factors set out in section 10(2) (duty to create a record from an electronic record) prior to ordering the Public Body to include backup records in its search.

The Public Body conducted a new search for responsive records as the Adjudicator had ordered. The Public Body created a program to enable it to conduct a keyword search of its backup server. The Public Body located a responsive record on its backup server and provided it to the Applicant.

The Adjudicator found that section 10(2) does not apply in situations where a public body is searching for a record in order to produce a copy of a record. She noted that the duty to conduct a search for responsive records is a function of section 10(1) of the FOIP Act, while reproducing a copy of a record is the function of section 13 of the FOIP Act.

The Adjudicator reviewed the new search conducted by the Public Body and found that it had conducted a thorough and reasonable search for responsive records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 10, 13, 72

Authorities Cited: AB: Orders F2009-005, F2009-023

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89; *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner)*, 2009 ONCA 20; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593

Resources Cited:
Access and Privacy Branch, Alberta Government Services. *FOIP Guidelines and Practices Manual 2009*. Edmonton: Government of Alberta, 2009.

I. BACKGROUND

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

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

[para 2] The Public Body located records it considered responsive to the Applicant's access request and provided them to him. However, the Applicant was not satisfied with the Public Body's response to his access request and requested that the Commissioner review the Public Body's response, including the adequacy of its search for responsive records.

[para 3] After an inquiry into the issue of whether the Public Body had met its duty under section 10(1) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), I made the following order under section 72 of the FOIP Act to dispose of this issue:

> I order the Public Body to conduct an adequate search for responsive records in relation to the first part of the Applicant's access request, including searching through its electronic back up files, if it is possible that responsive records exist in such files, and using keywords as described in paragraph 23, above, if it is possible that such keywords could locate further records.
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> I order the Public Body to expand its search to other employees in the department, if it determines that it is possible that other employees have responsive records.
>
> If, in the course of conducting the new search, the Public Body concludes that responsive records in relation to the first part of the access request, other than those it has already located,

> do not exist, or cannot be restored, the Public Body must communicate that conclusion and its basis to the Applicant. This response must contain the steps taken to locate additional records and the results of the new search.

[para 4] The Public Body sought judicial review of this order. In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89, the Court found that it was both unfair and unreasonable to order the Public Body to include its electronic backup files in its search if it determined that responsive records existed. The Court said:

> The question of backup records was dealt with by Nielsen J. in *Edmonton Police Service*. There the EPS sought to quash a portion of a Commissioner's decision that required it to conduct a search of the Backup Records (internal and external emails). EPS led evidence regarding the nature of its backup systems and the time and expense involved in searching for responsive records within the system. The evidence was that the recovery and search process for external emails could not be accomplished using the EPS existing hardware and software; the evidence was unclear as to whether this was the case in regards to internal email. The Commissioner concluded that the EPS evidence was that it had the ability to access and search its backup records, but had chosen not to do so. Nielsen J. noted that this conclusion did not completely address s. 10(2) factors regarding when a public body had a duty to "create a record". Further, he concluded that this was an unreasonable finding (at paras. 83-84):
>
> > With respect, in my view, this was an unreasonable conclusion, at least with respect to some of the records which Cassels was seeking. Section 10(2) imposes on public bodies a duty to "create a record" only in certain circumstances. It requires creation where a record can be created "from a record that is in electronic form ... using its normal computer hardware and software and technical expertise". From a reading of the Jenkins Affidavit, it is obvious that at least with respect to the External Emails, creating a record from the Backup Records was not possible using the EPS normal computer hardware and software. It may be, as stated previously, that this was also the case in respect of creating a record of an Internal Email from the Backup Records.
>
> In addition, it may be that Jenkins was deposing in paragraph 5 of his Affidavit that the process to uncompress the data and electronically recreate the EPS email exchange server was also not possible using the EPS normal computer hardware and software. Clearly, s. 10(2) of FOIPP was intended to address those situations in which the public body was unable to create the record using its existing computer system.
>
> Nielsen J. therefore quashed that portion of the Order and remitted it back to the Commissioner for reconsideration of the extent of EPS' obligation to create a record from the backup files, having regard to the exceptions contained in s.10(2).
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> Similarly here, the Adjudicator did not address the s.10(2) factors as they relate to the backup records. Moreover, in this case, not only was s.10(2) not addressed in the Adjudicator's decision, the University had no notice that the backup records were in issue and it led no evidence in regards to whether it could create a record from the backup files using its normal computer hardware and software and technical expertise, and whether doing so would unreasonably interfere with its operations. Thus the decision is unreasonable and also breaches procedural fairness.

[para 5] The issue of whether the Public Body has a duty to create records under section 10(2) of the FOIP Act in this case was therefore scheduled for reconsideration. To assist me to determine whether section 10(2) applies, the notice contains the following questions:

1. whether anyone in the employ of the Public Body had responsive emails or other electronic records in their possession
2. if yes, whether any such person deleted or may have deleted any such records (intentionally or otherwise) in such a manner that they themselves could not retrieve them
3. if yes, whether there was a backup system on which any such records may have been stored
4. if yes, whether, having regard to the Public Body's information management policies, it is possible that any such records are still stored on the system
5. if yes, whether it is possible to determine whether such records are stored on the system without the creation of records from electronic records
6. if yes, whether any such records exist on the system
7. if yes, whether it is necessary to create records from electronic records in order to provide access to the records to the Applicant
8. if yes, whether such records must be created having regard to the factors in section 10(2).

   If the answer to question 5 is no,

9. whether the creation of such records from electronic records [is] required in order to determine whether any responsive records exist on the system must be done having regard to the factors in section 10(2) [*sic*]
10. if yes, whether such records exist, etc. (as in questions 6 to 8).

[para 6] Prior to the reconsideration, the Public Body conducted a new search for responsive records, as I had ordered it to do. The Public Body also performed a keyword search of its backup server. On November 4, 2010, the Public Body wrote the Applicant and advised him that it had conducted a new search for responsive records and had located responsive records. The Public Body provided these to the Applicant.

[para 7] The Public Body provided submissions for the inquiry while the Applicant did not.

II. ISSUE

Issue A: Does the duty to create records under section 10(2) of the Act apply in this case?

III. DISCUSSION OF ISSUE

Issue A: Does the duty to create records under section 10(2) of the Act apply in this case?

[para 8] As noted in the background above, the Court stated the following:

> Similarly here, the Adjudicator did not address the s.10(2) factors as they relate to the backup records. Moreover, in this case, not only was s.10(2) not addressed in the Adjudicator's decision, the University had no notice that the backup records were in issue and it led no evidence in regards to whether it could create a record from the backup files using its normal computer hardware and software and technical expertise, and whether doing so would unreasonably interfere with its operations. Thus the decision is unreasonable and also breaches procedural fairness.

[para 9] In arriving at the decision to make this order, the Court cited with approval the following passage from *Edmonton Police Service v. Alberta (Information and Privacy Commissioner),* 2009 ABQB 593, in which Nielsen J. said:

> With respect, in my view, this was an unreasonable conclusion, at least with respect to some of the records which Cassels was seeking. Section 10(2) imposes on public bodies a duty to "create a record" only in certain circumstances. It requires creation where a record can be created "from a record that is in electronic form ... using its normal computer hardware and software and technical expertise". From a reading of the Jenkins Affidavit, it is obvious that at least with respect to the External Emails, creating a record from the Backup Records was not possible using the EPS normal computer hardware and software. It may be, as stated previously, that this was also the case in respect of creating a record of an Internal Email from the Backup Records

[para 10] The statement in the excerpt above notes the assertion of an affiant that "creating a record from the backup records was not possible using the EPS normal computer hardware and software." The Court regarded the Commissioner's conclusion as unreasonable because it apparently involved either rejecting or ignoring this assertion, but without any explanation for doing so. Similarly, in the present case, the Court notes my failure to "address the s. 10(2) factors as they relate to the backup records".

[para 11] The comments of the Court in both these cases might, arguably, be taken as an implicit interpretation of section 10(2), such that "creation of a record" within the terms of the provision happens when a record that exists in electronic form must be converted to a different format so that it may be read to determine its content – what the Court referred to as "recreating the record". This is suggested by the words of the Court, where it states:

> It may be that Jenkins was deposing in paragraph 5 of his Affidavit that the process to uncompress the data and electronically recreate the EPS mail exchange server was also not possible using the EPS normal computer hardware and software". [my emphasis]

One might take from this that if that were so, in the Court's view, this would negate the duty of the Public Body to try to determine if responsive records existed on the compressed email exchange server. If that was the Court's view, then possibly I am to understand my task in relation to backup records in this inquiry to be to make a determination as to whether recreating or reformatting existing records so as to find any responsive records in the backup system could or could not be done using the Public Body's normal computer hardware and software.

[para 12] I note another possible interpretation of section 10(2) is that "creating" a record from an electronic record within the terms of the provision does not happen when records stored electronically are changed into a different format in order to reproduce copies of them. Rather, creation occurs when a new record, that did not exist previously, is made from data in existing records. If this interpretation is correct, then section 10(2) would not apply to what the Court termed as "recreation," in a different format, of existing records, and would not apply to searches for records in the backup system that involved only recreating or reformatting existing records.

[para 13] It is not clear to me whether, when the Court said I am to "address the s. 10(2) factors as they relate to the backup records", it is open to me to interpret section 10(2) to decide which of these alternatives, or some other one, is the correct interpretation.

[para 14] Because I am not clear about this direction, I have decided to first treat the Court's decision as ordering me to address the Public Body's arguments as to the application of section 10(2), and determine whether section 10(2) applies in the circumstances.

[para 15] However, because that understanding may be incorrect, and the Court may already have determined that section 10(2) potentially negates a public body's duty to search for responsive electronic records because the section 10(2) factors apply to reproducing copies of existing records, I will consider whether section 10(2) would negate any such duty in this case.

What does it mean to create a record for the purposes of section 10(2)?

[para 16] The Public Body has now given evidence and made arguments in relation to the application of section 10(2) to its search for responsive electronic records. In order to decide whether section 10(2) has any application, I will first consider the interpretation of section 10(2) and then consider whether conducting an electronic search of the University's backup server for responsive records and reproducing copies of them for the purpose of locating responsive records amounts to "creating a record for an applicant from an electronic record" for the purposes of section 10(2).

[para 17] Section 10 of the FOIP Act 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 18] A number of prior orders of this office reflect the view that the duty to create records from electronic records applies in a situation where an applicant requests that a public body make a record that did not previously exist, using as a source electronic records in a public body's custody or control. In other words, the application of section 10(2) was thought to apply in situations where the information an applicant seeks

exists electronically and in the custody or control of a public body, but the applicant asks that the data be manipulated or reorganized so as to produce it in a format that will be more usable to him or less expensive to produce. The question I am now addressing is whether section 10(2) also places a limitation on the duty of public bodies under section 13 to reproduce copies of records in order to provide them to an applicant, as well as on their duty to "recreate" existing records in a different form to enable them to search for and locate responsive electronic records.

[para 19] The phrase, "created from a record from a record that is in electronic form" as it appears in section 10(2), could, in the abstract, refer to any of the following actions:

- Making a copy (reproducing) in the same medium (e.g. electronic to electronic) to give to the applicant
- Making a copy in a different medium (converting) - (e.g. electronic to paper) to give to the applicant
- Converting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist. (The applicant may ultimately be given all such records, only a part, or none, if no responsive records exist among the converted ones.)
- Electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants.

Thus, in the abstract, section 10(2) could be taken to limit the duty to produce copies for an applicant, as well as the duty to search for responsive records, if fulfilling either of these duties could not be done within the terms of section 10(2)(a). In my view, as explained below, the better interpretation of the legislative scheme in the FOIP Act is that section 13, (but not section 10(2)), speaks to the first two bullets, section 10(1), (but not section 10(2)), speaks to the third, and section 10(2) speaks only to the last bullet.

Does section 10(2) limit the duty to provide copies of records set out in section 13?

[para 20] Section 13 of the Act requires a public body that has decided to disclose records to provide a copy of the records to an applicant if the applicant has requested a copy, and a copy can *reasonably* be reproduced. It states:

> *13(1) If an applicant is told under section 12(1) that access will be granted, the head of the public body must comply with this section.*
>
> *(2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,*
>
> *(a) a copy of the record or part of it must be provided with the response, or*

(b) the applicant must be given reasons for any delay in providing the copy.

(3) If there will be a delay in providing the copy under subsection (2), the applicant must be told where, when and how the copy will be provided.

(4) If the applicant has asked to examine a record or for a copy of a record that cannot reasonably be reproduced, the applicant

(a) must be permitted to examine the record or part of it, or

(c) must be given access in accordance with the regulations.

[para 21] As set out above, in my view, section 10(2) should not be seen as limiting the duty to provide copies under section 13.

[para 22] Section 13 assumes that records are going to be disclosed, and specifies that the mode by which access is to be given, is the provision of copies. The provision has its own limitation, which is that copies are to be provided if they can "reasonably be reproduced", (and if they cannot, section 13(4) sets out what other steps are to be taken).

[para 23] In contrast, section 10(2), which is a subclause under the heading "the duty to assist", specifies one particular way in which assistance is to be given to the applicant. This particular duty is, in my view, superadded to the duty to provide access to records to which applicants have a right (which is to be done by providing copies). Even in situations in which there is no duty to give this particular type of assistance, because the terms of section 10(2) are not met, I do not believe this is meant to obviate the duty of public bodies to provide copies under section 13. If it were, the legislature would have made section 13 subject to section 10(2) – which it did not do. I do not believe the use of the term "create a record" in section 10(2) can be taken as intended to limit the separate duty in section 13 to reproduce copies just because the words "create a record" could be used to refer to reproduction of an original. The fact that "create a record" was used in one of the provisions and "reproduce a copy" was used in the other further supports the idea that there was no intention for the provisions to overlap.

[para 24] Further, the limitation of "reasonableness" in section 13 differs in kind from the limitation in section 10(2). The latter depends in part on objective facts as to what computer equipment and technical expertise the public body has, as well as on the nature of its particular operations. A conclusion as to whether or not records can be created depending on whether the terms in section 10(2) can be met may or may not coincide with whether it is "reasonable" to create them in the circumstances. (For example, even if the public body's computer resources were adequate to the task and performing it would not compromise the public body's operations, other factors might make it unreasonable to create records in particular circumstances. Conversely, one is not obliged to ask under section 10(2)(a) whether it is reasonable for a public body to not have resources adequate

for the task.) The fact that the tests are different for each provision is another indication that the two provisions address different questions.

[para 25] Section 13 contains a provision as to what is to be done if it is not reasonable to produce copies, while section 10(2) has no such provision. Again, this is an indicator that the two duties (producing copies and creating records) are different and do not overlap.

[para 26] In view of the foregoing considerations, I believe the better interpretation of the phrase "create a record" in the context of section 10(2) is that it does not relate to or limit the duty of a public body under section 13 to produce copies of records that it has decided to disclose. Rather, it creates a separate duty to assist applicants, when the terms of the provision are met, by manipulating data existing in electronic form so as to produce it in a form more usable or more economical for the applicant – for example, where a small data element is being sought from a larger database, or where unresponsive parts of documents could be removed electronically to reduce the size of the document that contains responsive data. However, even where this cannot be done because the limitations in section 10(2) do apply, this does not obviate the duty of the public body to provide copies of as much of the database or document as it is necessary to provide, in order to satisfy the request, subject to the "reasonableness" limitation and the payment of fees.

Does section 10(2) limit the duty to search for records (in electronic form) under section 10(1)?

[para 27] This question relates to situations in which the records that are to be searched are in an electronic format such that they must be converted to some different format before responsive records can be located. The question is whether the criteria in section 10(2) apply such that if they are not met, the search need not be conducted. My answer to this question is that sections 10(1) and 10(2) have distinct purposes, and do not overlap in the sense that the latter limits the duty found in the former. I reach this conclusion for some of the same reasons that were given in the preceding section.

[para 28] First, the basic duty to assist is set out in section 10(1), and it has been held that this duty includes the duty to search for responsive records. If subsection (2) were intended to be a limitation on subsection (1), this would, in my view, have been indicated expressly. Rather, the fact that it is a separate subsection (both subsections falling under the heading "duty to assist") suggests that it sets out a discrete aspect of that duty.

[para 29] Further, as with the duty to provide copies under section 13, the duty to search for responsive records under section 10(1) also has its own limitation – of "reasonableness". It requires that a public body make all *reasonable* efforts to locate responsive records. Again in contrast, the duty to create a record under section 10(2) is limited by the resources that happen to be available to a public body and the particular nature of its operations, and, again, the provision does not raise the question of whether it is objectively reasonable for a public body not to have the software, hardware, or

technical expertise necessary to create a record when considering whether the duty under section 10(2) arises. While in some circumstances the outcome from applying the two sets of criteria may coincide, in others, they may not. It would be clumsy to require the tests under both subsections 10(1) and 10(2) to be met for cases in which electronic records would have to be converted into a different format in order to conduct a search.

[para 30] Further support for the view that section 10(2) does not limit the duty to search for records is found in the fact that section 10(2) employs the phrase, "for the applicant." This phrase suggests that the product that is created will be given to the applicant, and is not something that is produced at an earlier stage and which the applicant may not ultimately be given. If the legislature had intended section 10(2) to apply to instances in which a public body reproduces copies of records to locate responsive records, the phrase "for the purposes of responding to the applicant's request" would have better conveyed this intent.

[para 31] The foregoing conclusions as to the relationship between section 10(2) on the one hand and sections 13 and 10(1) on the other are also supported by the Fee Schedule in the regulations, which reflects the manner in which the Lieutenant Governor in Council interpreted the FOIP Act. This schedule reflects the view that the cost for locating and retrieving records was regarded as distinct from the cost for producing a record from an electronic record, which is again distinct from producing various types of copies of records (including from electronic originals). This view is consistent with the interpretation of the three provisions as operating discretely.

[para 32] As well, I note that the *FOIP Guidelines and Practices 2009*, a manual created by the Government of Alberta to assist in the interpretation of the FOIP Act, provides the following analysis of section 10(2) on page 83:

> An applicant may ask a public body to create a record from a record in electronic form for the purpose of obtaining information in a form that does not currently exist within the public body. For example, a public body may have a database management system that generates certain reports, but not a report of the kind wanted by the applicant. If the public body is able to produce a report setting out the information in the form requested by the applicant, the public body must do so, provided this can be done using the public body's normal computer hardware and software and technical expertise. The public body can charge for this service in accordance with schedule 2 of the Regulation.

While the manual is intended to provide guidelines only, and is not binding on me, I find that the above passage accurately reflects the interpretation of section 10(2) that best accords with the scheme of the legislation.

[para 33] Thus, in my view, the duty to create a record under section 10(2) is not meant to limit the duty to search for responsive records under section 10(1). The result of this interpretation is that that the duty to search for records to which applicants have a right of access is limited only by reasonableness, and this duty will remain, even though in some circumstances the records that are found will not be provided in the format that best suits the applicant's needs. In my view this interpretation is more consonant with the goal of

the legislation of making information available to applicants than one that would hold the limitations in section 10(2) to apply to the duty to search for responsive records.

Creation of software as creation of a record

[para 34] I turn next to a more specific argument of the Public Body relating to searching for records, which focuses on the need to create software. There is some suggestion in the Public Body's submission that if software must be created in order to conduct a search of electronic records, the limitations in section 10(2) are engaged.

[para 35] The Public Body answered the question I posed as to whether it was possible to determine whether records were stored on its backup system without the creation of electronic records, in the following way:

> The records that are stored on the backup system are an exact copy of the records on the Math Server. These records are searchable without altering their existing format. However, in order to locate individual records by keyword, it is necessary to perform a computer search directed by a computer program such as that created by [an employee of the Public Body] in this instance.
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> Although it is arguably possible in this instance to determine whether the records are stored on the backup system without the creation of electronic records, it is submitted that nothing turns on this question in this Inquiry as the backup system was searched in any event.

[para 36] Given that it suggests performing a computer search is an alternative to performing a search that does not involve the creation of electronic records, this passage appears to assume that conducting a keyword search with a computer program created for that purpose involves creating a record from an electronic record,. However, this assumption is not supported by the definition of "record" in the FOIP Act.

[para 37] Section 1(q) of the FOIP Act defines the term "record" for the purposes of the FOIP Act as follows

> *1 In this Act,*
>
> > *(q) "record" means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, 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;*

A record, for the purposes of the FOIP Act, is information that is recorded or stored. Information stored on a backup server, or some other electronic data recovery system, would be a "record" for the purposes of section 1(q), given that such information is recorded or stored in some way. However, the definition of "record" specifically excludes software or mechanisms for producing records. Consequently, creating or designing a program in order to locate or reproduce a record would not amount to creating a record

from a record that is in electronic form, as programs are excluded from the definition of "record" under the FOIP Act.

[para 38] Moreover, it would strain the ordinary grammatical meaning of the phrase, "create a record from a record that is in electronic form," if this phrase is to be interpreted as encompassing "designing software in order to locate or reproduce a copy of an existing electronic record." The fact that the new record must be created *from* a record that is in electronic form indicates that the existing electronic record will form part of, or give rise to, the new record. Consequently, even if software were included in the definition of "record," creating a program to locate a record would not fall under section 10(2), as the program is not created from the original record.

Order F2009-023

[para 39] In light of my determination that section 10(2) is better interpreted as a stand-alone aspect of the duty to assist, rather than as a limitation on either the duty to produce copies of records or the duty to search for them, I will comment on statements I made in an earlier Order, F2009-023, which can be taken as expressing a contrary view.

[para 40] Order F2009-023 also involved the Public Body. In that order, I considered its argument that it should not be ordered to search for deleted electronic records, as it reasoned that it had no duty to do so on the basis of its interpretation of section 10(2). I said:

> From its arguments, I understand the Public Body to equate creating electronic records under section 10(2) with the duty to search for records created by sections 6 and 10(1) of the FOIP Act. In my view, the duty to create an electronic record is a duty separate and apart from the duty to conduct an adequate search for responsive records.
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> Searching for deleted electronic records does not involve creating or recreating records under section 10(2), but confirming, through inquiry, whether records ever existed, and if so, what happened to them. If the Public Body determines, through inquiry, that responsive records never existed, there is no need to search through backup tapes for deleted versions of the record. If the Public Body determines that a record existed and was deleted, then the Public Body must determine whether it is possible to retrieve and reproduce the record to the Applicant. Again this process does not require searching through backup tapes or creating records from them. Rather, this determination can be made by asking a technical support analyst, as the Public Body did, whether it is possible to restore a deleted record. If it is not possible to restore deleted electronic records, then the Public Body's search for these records is concluded. If it is possible to restore responsive deleted electronic records, then the Public Body must consider whether the duty under section 10(2) applies and whether it must create an electronic record from the backup tape.
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> In my view, the fact that it would be "burdensome" to create an electronic record may not necessarily negate the duty to create an electronic record, as section 10(2) requires the creation of an electronic record to interfere unreasonably with the operations of a public body before the duty to create records is negated. Further, the Regulation permits a Public Body to charge the actual costs of creating an electronic record. I also note that the evidence of the technical support analyst does not support a finding that it would be burdensome to require the Public Body to retrieve a deleted email within 28 days of deletion. However, I need not consider the

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

[para 41] In that case, I did not have to consider whether converting the format of, or reproducing a file located on a backup server amounted to creating a record for the purposes of section 10(2), as the Public Body's evidence established that it had conducted a reasonable search for responsive records, which had extended to its backup records, and that any potentially responsive records had been irretrievably destroyed. However, I did comment that if records could possibly be located by searching electronic backup files the limitations in section 10(2) would have to be considered.

[para 42] Having now further considered whether converting or reproducing a copy of a file located on a backup server amounts to creating a record from an electronic record for the purposes of section 10(2), I believe the better view is that it does not. To the extent that Order F2009-023 suggests that a public body must consider whether it is necessary to create an electronic record by reference to the limitations in section 10(2), once it discovers that there are responsive records located on its backup tapes, I do not now regard this as the best interpretation of the scope of section 10(2). Rather, I would take the view that once a public body determines that it may have responsive records located on its backup tapes, and it determines that there is no other means of locating and reproducing these records in order to provide them to an applicant, it must take all reasonable steps, including any necessary and reasonable steps to convert them into a searchable format so as to locate responsive records, as well as all reasonable steps to reproduce copies so as to provide them to the applicant. The Public Body may charge the fees established by the Regulation to offset the costs incurred for doing these things.

[para 43] Locating such records on backup tapes forms part of the duty to conduct an adequate search for responsive records under section 10(1), while reproducing a copy of that record is part of the duty under section 13. Both duties are subject to the requirement of reasonableness, and not the conditions of section 10(2).

[para 44] As I also noted in Order F2009-023, in many cases, a public body will be able to conduct a reasonable search of electronic backup records without conducting an electronic search for them, by determining through inquiry whether responsive records were ever created, and if so, what has happened to them. In cases where a public body confirms that a record has been "double deleted" from a computer system, the public body may determine whether this record still exists by finding out whether it has a backup system, and, if so, how long records are preserved on that system. In situations

where it is not possible or practical to ask employees whether they have created responsive records, it may be reasonable to conduct an electronic keyword search of its electronic backup records. However, I believe the better view is that this kind of search, whether involving backup records or not, does not amount to the creation of a record for the purposes of section 10(2). This is because the record that is the subject of a search already exists in the form requested by the applicant.

[para 45] When responsive records are located on backup servers, it may be necessary to create a program in order to locate the records and reproduce copies for an applicant; however, as the data the records contain is not being manipulated so as to satisfy an applicant's request, the duty to do so falls under sections 10(1) and 13 of the FOIP Act rather than by section 10(2), and is limited by such actions as are reasonable, rather than by the section 10(2) considerations.

Could the Public Body create electronic records from its backup files using its normal computer hardware and technical expertise?

[para 46] In case the foregoing analysis is wrong, or if the Court's ruling does not permit me to undertake it, I will consider the Public Body's arguments relating to its normal computer hardware and software and technical expertise.

[para 47] In its submissions of January 6, 2011, the Public Body advised me that it conducted an electronic search of its backup records in order to locate any responsive records. The Public Body noted that it created a program in order to reproduce copies of records on its backup server.

[para 48] An affidavit of a University of Alberta, Department of Chemistry, systems administrator and technical support analyst states:

> Searching the Storage Servers for an individual's data is not something we normally do with our computer hardware and software and technical expertise. The purpose of the back up system for the Math Server is to guard against the risk of the entire destruction of our main network by preserving everything from the servers which existed within the previous day in the event of a disaster. It is neither designed nor meant to be a "searchable" database.

The affiant states that searching the backup servers is not a use to which technical support analysts put their normal computer hardware and software and technical expertise. However, the duty to comply with section 10(2) is not negated by the uses to which a public body normally assigns its hardware, software, or technical expertise. Rather, it is negated if the public body *lacks* the necessary hardware, software, or technical expertise to create a record from an electronic record.

[para 49] The evidence of the Public Body is that it was able to ascertain that there were potentially responsive records on its backup server using either of two methods. First, by questioning the individuals most likely to have created responsive records, it located a responsive email that had not been deleted, and reasoned that this record would also exist on its backup system, given the parameters of the backup system. Through

further inquiry, the Public Body found that no one else knew of any further responsive records. It was therefore open to it to conclude that the only responsive record would be the email that had not been deleted. This search method did not require the use of hardware or software, or technical expertise. Second, the Public Body elected to perform a keyword search of its backup records. This search method did require creating a program and the use of software and technical expertise. However, the Public Body established that it was able to create this program and does have this software and technical expertise available to it, even if it does not normally use its software and technical expertise for this purpose. I say this because the technician who searched the backup server was able to draw on his own experience and training to develop the program necessary to search this server.

[para 50] Assuming that the duty to create a record from a record that is in electronic form applies to a public body's search of its electronic records, or to reproducing a copy of a record, I find that the Public Body has not established that it was unable to locate responsive records or to reproduce them using its normal computer hardware, software, or technical expertise.

If the Public Body could create electronic records from its backup files using its normal computer hardware and technical expertise, would creating an electronic record from its backup files unreasonably interfere with its operations?

[para 51] I note that the Ontario Court of Appeal considered the meaning of "normal computer hardware and technical expertise", and "interference with operations" in the context of Ontario's freedom of information legislation in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissione*r, 2009 ONCA 20. The Ontario Court of Appeal characterized the adjudicator's findings in relation to interference with a public body's operations in the following way:

> On the second issue of whether the process of producing the record would unreasonably interfere with the operations of the institution, the Adjudicator noted that the Police did "not identify how the extraction of the information would obstruct or hinder the range of effectiveness of the Police's activities." In the Adjudicator's opinion, the fact that "extracting the information would take time and effort" is not a sufficient basis for finding that the process would unreasonably interfere with the operations of the Police. In this regard, he observed by way of "an aside" that the "costs regarding the production of records are chargeable under the *Act*" (pp. 17-18).

The Court found the adjudicator's analysis to be reasonable.

[para 52] In my view, a public body must provide evidence that its operations would be interfered with unreasonably, in order to avoid the duty to create an electronic record under section 10(2). The "operations" of a public body in this provision, refer to its activities as a public body. In the case of the Public Body, its operations would include such things as providing instruction and conducting research. There is no evidence before me that the Public Body's operations in these areas, or any areas, were interfered with, or were likely to be interfered with, by performing an electronic keyword search of records stored on its backup server.

[para 53] In the event that performing a keyword search of the backup server amounts to creating a record from a record that is in electronic form under section 10(2), I find that the Public Body has not established that this search interfered, or was likely to interfere, with its operations.

Conclusion

[para 54] If section 10(2) applies to the Public Body's search of its backup records, I find that the application of this provision does not negate the Public Body's duty to conduct a reasonable search for responsive records.

[para 55] In relation to its duty to comply with section 10(1), the Public Body has established that it conducted searches of its backup records both through inquiry, and by performing an electronic keyword search. The Public Body has provided the additional responsive records it located to the Applicant, and has communicated the steps it took to locate these records.

IV. ORDER

[para 56] I make this Order under section 72 of the Act.

[para 57] I confirm that the Public Body complied with its duty under section 10(1) of the Act when it searched for responsive records located on its backup server.

[para 58] If it is correct to say the Public Body has a duty under section 10(2) in relation to the search it conducted of its backup tapes, I confirm that its duty has been met.

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Teresa Cunningham
Adjudicator