

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2012-19

July 31, 2012

**ALBERTA ENVIRONMENT AND SUSTAINABLE
RESOURCE DEVELOPMENT**

Case File Number F5758

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to Alberta Environment (the Public Body) for “the contents of File #85250-W01 (Water Management Projects – Water Levels)” for the time period of 1979-1989. The Public Body responded that there were no records that were responsive to the Applicant’s request. The Public Body then informed the Applicant that the file would be closed.

The Applicant sent a follow-up letter on September 15, 2010, clarifying that the information he was seeking, which he described, was not necessarily in file #85250-W01. The Public Body responded more than a month later, reminding the Applicant that his file had been closed and stating that the Public Body would look into his latest inquiry, but that any further response would be outside the FOIP Act.

The Applicant requested a review of the Public Body’s response, arguing that the Public Body ought to have had responsive records.

The Adjudicator found that the Public Body had conducted an adequate search for records pursuant to the Applicant’s initial access request, but that it had not responded to the Applicant openly, accurately and completely, as required under section 10(1), with respect to his follow-up letter to the Public Body of September 15, 2010.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 7, 10, 11, 72.

Authorities Cited: AB: Orders 97-006, F2007-029, F2009-017.

I. BACKGROUND

[para 1] An individual made a request to Alberta Environment (the Public Body) dated August 17, 2010, for access to “the contents of File #85250-W01 (Water Management Projects – Water Levels)” for the time period of 1979-1989. The Public Body confirmed with the Applicant that he was requesting only records from that specific file.

[para 2] The Public Body informed the Applicant by letter dated September 3, 2010, that no records meeting the Applicant’s terms were found, and closed the file. The Applicant responded by letter dated September 15, 2010, asking if the file #85250-W01 had been reorganized and filed under a new number; he also indicated that the file would include strategy and planning, at the Ministerial level, of how to stabilize Lake Wabamun water levels. The Applicant also asked if he needed to make a new access request for this information.

[para 3] The Public Body contacted the Applicant on October 25, 2010 and informed him that the file relating to his August 17, 2010 request had been closed, and offered to help the Applicant find information outside of the FOIP process. Subsequent contact from the Public Body included a letter to the Applicant indicating that information that might be of interest to the Applicant may be in the Provincial Archives. The Public Body included the name of a contact person in the Archives and file numbers that may have been of interest. The Public Body’s FOIP Advisor also met with the Applicant in April 2011.

[para 4] The Applicant requested a review from this office. The Commissioner authorized a portfolio officer to investigate and to try to settle the matter. This was not successful, so the matter was set down for a written inquiry.

II. RECORDS AT ISSUE

[para 5] As this inquiry addresses the adequacy of the Public Body’s response under section 10 of the Act, there are no records directly at issue at the present time.

III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry are as follows:

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

2. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

IV. DISCUSSION OF ISSUES

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

[para 7] The Applicant states in his initial submission that

In August 2010 I requested access to File #85250-W01, Water Management Projects – Water Levels for the time period of '1979-1989'. Alberta Environment and Water responded on September 3, 2010 and indicated that they had found no records responsive to the request in the specified file. I provided more specific clarification of what I was looking for in a letter dated September 15. Despite this letter, further correspondence, and mediation mandated by the Office of the Information and Privacy Commissioner, no further records have been provided.

[para 8] A few pages further into the same submission, the Applicant describes his access request as being "for DM file # 85250-W01 Water Management Projects-Water Levels, or any other files that would include strategy and planning of how to stabilize Lake Wabamun water levels at the Ministerial level" (my emphasis).

[para 9] The Applicant's access request of August 17, 2010, indicates that he requested only "File # 85250-W01 Water Management Projects-Water Levels" for the time period of 1979-1989. The Public Body has provided me with a copy of a letter sent to the Applicant, dated August 19, 2010, in which the Public Body clarified that the request was only for File # 85250-W01 Water Management Projects-Water Levels. The Public Body also provided me with a Chronological Summary of the processing of the Applicant's request. This Chronological Summary indicates that the Public Body's FOIP Advisor also spoke with the Applicant and confirmed that the scope of the request was limited to the named file for the years indicated.

[para 10] The Public Body responded to the Applicant's request by letter dated September 3, 2010. In this letter the Public Body indicated that no records were found that matched the request. The letter also indicated that the file would therefore be closed.

[para 11] Although the Applicant appears to believe that his access request included "any other files that would include strategy and planning of how to stabilize Lake Wabamun water levels at the Ministerial level", he added this element (by letter dated September 15, 2010) only after he had been informed that his file had been closed. The Public Body's Chronological Summary states that the FOIP Advisor called the Applicant on October 25, 2010, after receiving a reminder letter from the Applicant that referred to the Applicant's September 15 letter, which contained the reference to additional files. The Chronological Summary indicates that the FOIP Advisor reminded the Applicant that his access request had been closed and that any further information the FOIP Advisor could find for the Applicant would be provided outside the FOIP process.

[para 12] In my view, the Public Body took appropriate steps to clarify the Applicant's request in his letter of August 17, 2010 before responding on September 3, 2010. Therefore, the Public Body's duty to assist the Applicant relative to this initial letter relates only to his request for file #85250-W01, and not to "any other files that would include strategy and planning of how to stabilize Lake Wabamun water levels at the Ministerial level".

[para 13] Section 6 of the FOIP Act establishes an applicant's right to access information. It states in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

[para 14] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 15] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7). In this case, the Public Body clarified the scope of the Applicant's request both via letter and during a telephone call.

[para 16] There are two components of an adequate search:

- a) Every reasonable effort must be made to search for the actual record requested; and
- b) The applicant must be informed in a timely fashion about what has been done.

[Order F2009-017, at para. 53.]

[para 17] 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:

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

[Order F2007-029, at para. 66]

[para 18] The Public Body's FOIP Advisor stated in an affidavit that

A search was conducted within Alberta Environment and Water in a program area where it was believed there may have been even a remote possibility of existing responsive records within the control of the Public Body. A search request was sent to the program areas set out in Exhibit "C" to this my affidavit.

The search followed the procedures as set out in "FOIP Line Contact (Records Search & Retrieval) Guidelines" ("Guidelines document"), developed by the Public Body's FOIP Office. A copy of the Guidelines document is attached as Exhibit "D" to this my affidavit.

[para 19] The Public Body states that the Applicant made a similar request in 2004 for the contents of the same file (#85250-W01) with no time frame specified. It says that all relevant records were released to the Applicant at that time. I do not have any specific information as to what records were included in response to that request.

[para 20] The Applicant has provided me with many pages of records he has obtained from "previous research." Some of these records are records of the Public Body (i.e. written on letterhead of the Public Body) and several are dated after 1980; at least one record from the Public Body is specifically dated between 1979-1989. These records include correspondence to and from senior public body staff, as well as Ministers. The Applicant argues that these records should have been provided to him in response to his current request.

[para 21] The records submitted to me by the Applicant may well have been responsive to a request, had such been made, for all "files that would include strategy and planning of how to stabilize Lake Wabamun water levels at the Ministerial level"; however, I have found that this was not the scope of the Applicant's current request, which was limited to records in file #85250-W01. The Applicant has not provided me with evidence to lead me

to conclude that the records he has obtained by other means existed specifically in file #85250-W01.

[para 22] The Applicant also provides arguments for the existence of other records that he does not have, which would relate to the water levels of Lake Wabamun for the time period requested. However, the Applicant has not provided me with evidence to lead me to conclude that such records exist in file #85250-W01.

[para 23] The Applicant argues that the records he has provided to me show that there is a history of misleading information being presented by the Government of Alberta on the issue of water levels at Lake Wabamun, and that this indicates that the Public Body has an interest in withholding contrary information. However, the fact that the Applicant holds a particular view on an issue is not evidence that a public body is improperly withholding information contrary to that view in response to an access request.

[para 24] The Applicant had made a request for records relating to the same file in 2004. He alleges that records relating to Lake Wabamun exist from 1900 to 1980, and that thereafter records relating to Lake Wabamun, at the Ministerial level, appear to cease. I noted above that the Applicant has provided me with copies of records in his possession and that some of these records are records of the Public Body and are dated after 1980. I presume that when the Applicant states that no records exist past 1980 at the Ministerial level, he is referring to records from file #85250-W01.

[para 25] I do not know specifically which records the Applicant received in response to his previous request for the contents of file #85250-W01, but the Public Body's submissions indicate that records were disclosed to the Applicant in response to that request. Obviously, since the Applicant states that he has not received any records past 1980 (presumably in response to his previous request for file #85250-W01), there were no responsive records in that file dated after 1980 in the Public Body's response to the 2004 request. In the Chronological Summary provided to me by the Public Body, it shows that during the course of this inquiry, the Public Body investigated the possibility of whether the file #85250-W01 was a continuation of another file. The investigation confirmed that file #85250-W01 was the only volume created, with no volumes coming before or after that particular file. It is not clear to me why, if the Public Body believed this to be an appropriate question to ask in order to properly respond to the Applicant's request, the Public Body did not ask this question during its initial search for responsive records, but instead waited until an inquiry was underway. Regardless, I am satisfied that the Public Body has taken steps to confirm that file #85250-W01 is not a continuation of another file, nor is there a subsequent file that is a continuation of it.

[para 26] In my view, the fact that some records relating to the water level of Lake Wabamun in the time from of 1979-1989 existed in some location (as evidenced by the Applicant's possession of records fitting that description) does not necessarily indicate that the Applicant's narrow access request should have elicited records. It may be that the Public Body's filing system changed such that file #85250-W01 was no longer an active

file after 1980, and that the records the Applicant has relating to Lake Wabamun, in the relevant time period, were obtained from a different file.

[para 27] I am satisfied that the Public Body conducted an adequate search for records, and fulfilled its duty to assist the Applicant, with respect to his request for file #85250-W01 made on August 17, 2010, as required under section 10(1).

[para 28] However, in my view, the Public Body did not appropriately respond to the Applicant's letter dated September 15, 2010, indicating that the file the Applicant was seeking would include strategies and planning regarding Lake Wabamun water levels. In that letter, the Applicant specifically asked the Public Body if he should make a separate request under the FOIP Act regarding his clarification.

[para 29] Section 7 of the Act states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

...

[para 30] The Applicant's letter of September 15, 2010 fulfills the above requirements for a request under the Act; specifically, it was in writing and provided sufficient detail of the information the Applicant was seeking. Since the Applicant was not clear whether he had to make a new request, he did not include the \$25 dollar fee for a general request. Nevertheless, as the Applicant fulfilled the requirements for making an access request, the Public Body was obligated to respond to the Applicant openly, accurately and completely under section 10.

[para 31] I am not satisfied that the Public Body fulfilled this obligation with respect to the Applicant's September 15, 2010 letter. The Chronological Summary provided to me by the Public Body indicates the Public Body received the Applicant's letter on September 20, 2010; therefore Public Body took 35 days, after the receipt of that letter, to respond to the Applicant. The response from the Public Body to the Applicant at that time was that the Applicant's request had been closed, and that any further response from the Public Body would be outside the FOIP Act process.

[para 32] In my view, this response on the part of the Public Body did not meet the requirements of section 10(1) for responding to an access request openly, accurately and completely. The Public Body had closed the file in relation to the initial letter of August 17, 2010, and therefore was refusing to consider the additional material requested as part of that initial request. The Applicant was entitled to make an additional request for the material he described in his letter of September, 15, 2010 that was not in the specified file. It was not open to the Public Body to decide that its response to the Applicant's September 15, 2010 letter would be "outside the FOIP Act." An open and complete

response, that conformed with the Applicant's right to make such a further request, required the Public Body to inform the Applicant that it would treat his modified request as a new access request on payment of the appropriate fee, or alternatively, that it required a new request together with a fee payment. In other words, the Applicant's question as to whether he needed to make a new access request should have been answered by reference to his right to do this, setting out what further steps he needed to take, and thereby making his new request subject to the Act's duties and timelines, and to the review procedures of this office.

[para 33] Further, though the Notice of Inquiry did not raise the issue of timing under section 11 of the Act, and the Public Body has not had an opportunity to comment (and I will therefore not make a finding as to whether the Public Body also breached section 11), it is certainly arguable that the response to the September 15, 2010 letter should have been made within the 30-day time period set out in that provision (even though no fee had been paid).

[para 34] Similarly, though the Notice of Inquiry did not raise the question of whether the Public Body should have exercised its discretion as to whether to transfer the request to a different Public Body (the Provincial Archives), possibly, depending on whether the Public Body thought that information responsive to the modified request might be located there, it ought to have exercised its discretion as to whether to so transfer the request. Again, however, as the Public Body had no opportunity to comment on this question, I will make no finding about it.

[para 35] I find that the Public Body did not properly respond to the Applicant's letter to the Public Body dated September 15, 2010 and as such, failed to meet its duty to assist the Applicant as required by section 10(1).

2. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 36] I accept the Public Body's arguments that it did not locate any records in response to the Applicant's request. I also determined above that the Applicant's clarification of his request in his September 15, 2010 letter did not form part of his initial FOIP request dated August 17, 2010. There is no evidence that the Public Body withheld records as non-responsive to the Applicant's request.

V. ORDER

[para 37] I make this Order under section 72 of the Act.

[para 38] I find that the Public Body did not meet its duty to assist the Applicant under section 10(1) of the Act. Under section 72(3)(a), I order the Public Body to comply with its duty to respond to the Applicant openly, accurately and completely by informing him that it will accept his letter of September 15, 2010 as a new access request on the payment of the appropriate fee.

[para 39] 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.

Amanda Swanek
Adjudicator