

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-04

January 22, 2014

CITY OF CALGARY

Case File Number F5895

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Summary: The Applicant made an access request to the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Public Body transferred parts of the access request to another public body. The Applicant requested a review of that decision as well as a review of the adequacy of the Public Body’s search for responsive records and its general duty to assist him.

The Adjudicator found that the Public Body had met its duty to assist the Applicant under section 10(1) of the Act, including its obligation to conduct an adequate search for records. He also found that the Public Body had properly transferred parts of the Applicant’s access request under section 15.

Statute Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 10(1), 12, 15, 15(1), 15(2)(a) and 72.

Authority Cited: AB: Orders 98-012, 99-038, 2000-021, 2001-016, F2003-001, F2004-008, F2005-018, F2005-019, F2007-029, F2009-001 and F2012-19.

I. BACKGROUND

[para 1] In a form dated April 12, 2011, the Applicant requested eight items of information from the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). They were as follows:

1. *Further to a disclosure in May 2007 as to the type and category of personal information the City presently holds on me, I seek access to the full contents of a file entitled Possible Breaches of Security. I am requesting to have sight of police information, investigation reports, witness statements and on site photographs in connection with a criminal complaint secretly raised against me.*
2. *Personal information connected with a decision taken not to provide me with any medical assistance when a personal injury was reported to a City employee via an intercom within Chinook Station LRT on the morning of March 31, 2000.*
3. *Personal information related to a decision taken not to contact me further to an injury caused to me when an individual smashed the window of a bus on which I was travelling. I would ask to be provided with an opportunity to learn of the logic for the reasoning as to why Calgary Police Service (CPS) never contacted me so as to provide me with an opportunity to participate in the criminal proceeding against this individual.*
4. *Personal information related to a decision taken to misplace the file, if any, regarding a Calgary Transit ticket violation. I would seek to have access to the full contents of this very file, if any.*
5. *Personal information related to an attempted hit and run of me within the parking lot of the Canadian Superstore (matter previously brought to the City's attention).*
6. *Personal information related to a disclosure of any kind to persons with whom the City holds contractual business relations within its corporate registry.*
7. *All other disclosures of my personal information to persons unknown to me I positively seek to access, and to learn of the manner in which my personal [information] has been processed in turn and used by these third persons.*
8. *Personal information related to representations made by the City before Alberta Justice and Attorney General concerning me I seek to access.*

[para 2] By letter dated April 19, 2011, the Public Body told the Applicant that it had transferred his requests set out in items 1, 3, 5, 7 and 8 to the Calgary Police Service (the "CPS"), as contemplated by section 15 of the Act. The letter stated that items 1, 3, 7 and 8 would be addressed "partially" by the CPS and "partially" by the Public Body, meaning that the Public Body would still search for any records that it might have in relation to those items. The letter indicated that item 5 would be addressed entirely by the CPS.

[para 3] By letter dated May 26, 2011, the Public Body provided the Applicant with six pages of information in response to item 2 of his access request, and one page in response to item 4. It indicated that it had no records responsive to the remaining items. The Public Body added that the Applicant could likely expect a response in relation to items 1, 3, 5, 7 and 8 from the CPS, further to the transfer of those requested items from the Public Body to the CPS.

[para 4] The CPS responded to the Applicant by letters dated May 5 and 19, June 1 and August 5, 2011. It informed the Applicant that, short of a police report regarding the bus

incident described in item 3 of the access request, a copy of which the Applicant already had – and unless the Applicant were to provide clarification or additional information as to what he was seeking in each item – the CPS had no information responsive to any of the requests that had been transferred to it.

[para 5] In a form dated July 31, 2011, with attached correspondence, the Applicant requested a review of the Public Body’s decision to transfer parts of his access request to the CPS, a review of the adequacy of the Public Body’s search for responsive records, and a review of its duty to assist him generally. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant requested an inquiry in a form dated January 17, 2012. A written inquiry was set down.

[para 6] The Applicant also requested a review of the Public Body’s decision to withhold information from him, given that the Public Body’s letter of May 26, 2011 stated that “[s]ome of the records requested contain information that is exempted from disclosure under the Act”. However, in a subsequent letter dated January 4, 2012, the Public Body informed the Applicant that the foregoing template statement was included in error, and clarified that no information had been withheld from him. In correspondence received by this Office on January 19, 2012, the Applicant indicated that he was not satisfied with the Public Body’s clarification, and requested an inquiry into the matter. I dealt with this as a preliminary issue, and my decision, to the effect that the Public Body’s two responses to the Applicant were appropriate, was set out in respective correspondence to the parties dated February 11, 2013.

[para 7] Given this, I will not be addressing concerns that the Applicant continues to raise in relation to the differences between, and the adequacy of, the Public Body’s two responses to him, except to the extent that those concerns relate to the Public Body’s partial transfer of his access request and its search for responsive records. While the Applicant frames some of his concerns about the content of the two responses as a failure on the part of the Public Body to properly assist him under section 10 of the Act, those concerns are more properly addressed under section 12, which has already been done in my earlier decision of February 11, 2013.

II. RECORDS AT ISSUE

[para 8] As this inquiry involves the transfer of an access request, the duty to assist an applicant and the search for responsive records, there are no records at issue. For context, however, the information sought by the Applicant is set out above.

III. ISSUES

[para 9] The Notice of Inquiry, dated February 12, 2013, set out the following issues:

Did the Public Body properly transfer parts of the Applicant’s access request under section 15 of the Act?

Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

[para 10] For the purpose of discussion, I will address the second issue first. For clarity, this inquiry does not involve any issues regarding the adequacy of the CPS's response to the Applicant's requests for the items of information that were transferred to it.

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

[para 11] Section 10(1) of the Act reads as follows:

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.

The Public Body has the burden of proving that it fulfilled its duty to assist the Applicant under section 10(1) (Order 99-038 at para. 10; Order F2004-008 at para. 10). Having said this, I will limit my review of the Public Body's duty to assist to the particular concerns raised by the Applicant, which includes his concern about the adequacy of its search for records.

[para 12] The Applicant argues that the Public Body failed to exercise due care and attention when addressing its letter of April 19, 2011 to him. This letter informed him of the partial transfer of his access request to the CPS, but there was an error in the postal code. When the Public Body realized that the Applicant had not received the letter, the letter was resent on May 5, 2011.

[para 13] The manner in which a public body fulfills its duty to assist does not require perfection (Order F2005-018 at para. 12). Here, the clerical error in the postal code was an honest mistake and Public Body immediately corrected that mistake once it was noticed. The Applicant says that he did not receive the letter of April 19 regarding the transfer of his access request in time to provide clarification to the CPS as to what he was seeking. However, I find that his late receipt of the letter from the Public Body had no bearing on his ability to deal with the CPS. First, the CPS sent its own letters to the Applicant informing him that items set out in his access request had been transferred and seeking clarification in reference to each particular item. Second, even if the Public Body's letter of April 19 might have assisted the Applicant in his dealings with the CPS, he would have received the copy of that letter that was resent long before the CPS sent its final letter of August 5, 2011, which still gave the Applicant the option of providing clarification.

[para 14] Given the foregoing, I find that the Public Body's clerical error does not mean that it failed to meet its duty to assist the Applicant under section 10(1). I address, in the next part of this Order, whether it means that the Public Body was not timely in its transfer of parts of the Applicant's access request under section 15, including whether it was not timely in fulfilling its duty to notify the Applicant of the transfer.

[para 15] A public body's duty to assist an applicant under section 10(1) includes the obligation to conduct an adequate search of records responsive to an access request (Order

2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken (Order F2005-019 at para. 7; Order F2007-029 at para. 46).

[para 16] In May 2007, the Applicant apparently made an access request to the Public Body that was very similar to the one made in April 2011, being the one that is the subject of this inquiry. Both parties acknowledge this similarity, although neither provided me with a copy of the earlier access request. In any event, the Applicant notes that the Public Body located and disclosed an additional record in 2011, which it did not provide to him in 2007. He uses this fact to argue that the Public Body has not conducted an adequate search for records. However, section 10 requires that a public body make every reasonable effort to locate responsive records, which again does not require perfection (Order F2003-001 at para. 40). Moreover, it is the Public Body's search for records in 2011 that is the subject of this inquiry, not its search in 2007, which is when it overlooked the record in question.

[para 17] Conversely, the Applicant notes that, although the Public Body located no records responsive to items 1 and 6 of his 2011 access request, it located records responsive to similar items in 2007. However, both parties suggest that the 2011 access request was a continuation of the 2007 access request, in the sense that records provided in 2007 did not need to be reprovided in 2011. In particular, the Applicant submits that, given the reference in item 1 of his 2011 access request to information released to him following the 2007 access request, there can be no doubt that the 2011 request was meant to be a "follow on" from the 2007 request. Given this, I find that the fact that the Public Body provided records in 2007 that were not provided in 2011 does not point to a failure on its part to conduct an adequate search in 2011.

[para 18] In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; 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 (e.g., 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 (e.g., keyword searches, records retention and disposition schedules, etc.); and why the public body believes that no more responsive records exist than the ones that have been found or produced (Order F2007-029 at para. 66; Order F2009-001 at para. 15).

[para 19] In his affidavit, the Public Body's FOIP Disclosure Officer explains that he oversaw the search for records and sent record request forms to Calgary Transit and the Law Department, the latter of which includes the Legal Division, Corporate Security Division and Risk Management and Claims Division. Employees in these program areas conducted searches using keywords like the Applicant's name and the dates of the incidents cited by him, and they searched in various databases, shared network drives, electronic management systems and physical files recalled from storage. In view of the foregoing, and on review of the whole of the submissions and evidence of the Public Body, I find that it conducted an adequate search for records responsive to the Applicant's access request.

[para 20] I conclude that the Public Body met its duty to assist the Applicant under section 10(1) of the Act, including its obligation to conduct an adequate search for records.

B. Did the Public Body properly transfer parts of the Applicant’s access request under section 15 of the Act?

[para 21] Section 15 of the Act reads as follows:

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 22] As noted earlier, the Public Body informed the Applicant that it had transferred parts of his access request on April 19, 2011, but a clerical error in the postal code meant that the letter had to be resent on May 5, 2011. I therefore considered whether the Public Body failed to comply with any of the timelines set out in section 15. I find that it complied with them. Section 15(1) required the Public Body to transfer the parts of the access request that it chose to transfer within 15 days of receiving the Applicant’s access request, which was on April 14, 2011. The Public Body sent a copy of items 1, 3, 5, 7 and 8 of the access request to the CPS on April 19, 2011, along with a copy of its April 19 letter to the Applicant. The CPS received that correspondence.

[para 23] As for the Applicant’s late receipt of the April 19 letter, section 15(2)(a) requires notice to an applicant of the transfer of his or her access request “as soon as possible”. In keeping with my earlier finding that the Public Body’s clerical error was an honest mistake, I find that the error does not mean that the Public Body failed to comply with section 15(2)(a). It corrected the clerical error and resent the Applicant notice of the transfer of parts of his access request on May 5, 2011, which was immediately after realizing its error and satisfies the requirement of being as soon as possible.

[para 24] In terms of the transfer itself, the Applicant submits that the burden falls to the Public Body to demonstrate that it properly transferred portions of his access request to the CPS and that, in doing so, it acted in good faith with proper regard to the facts of the case and based on a reasonable belief that the CPS may hold records responsive to his access request. I agree. The Public Body similarly submits that, in considering whether to transfer a request, a public body may have regard to whether there are reasonable grounds to believe that another public body may have responsive records. Although the three circumstances in which an access request may be transferred under section 15(1) might suggest that it must actually be known that a record exists and is associated with the other public body – that is, the record “was” produced by or for it, the other public body “was” the first to obtain the record, or the record “is” in the other public body’s custody or under its control – it is appropriate to rely on a reasonable belief where, as here, it is not immediately apparent on receipt of an access request that a responsive record actually exists.

[para 25] In view of the foregoing principles, the Applicant argues that the Public Body has failed to fully explain the grounds giving rise to its belief that the CPS may hold records responsive to his access request. He submits that transferring an access request under section 15 is not a random, haphazard event but one that should be based on an informed decision that the public body receiving the access request may hold responsive records. The Public Body responds that it did have reason to transfer portions of the Applicant’s access request and explains why it did so. It also refers to its letter of May 5, 2011 to the Applicant, in which it told him why parts of his request were being transferred to the CPS.

[para 26] I find that the Public Body had reasonable grounds to believe that the CPS might have records responsive to items 1, 3, 5, 7 and 8 of the Applicant’s access request, being the items that were transferred. Item 1 requested “police information, investigative reports”, etc. in connection with a “criminal” complaint. Item 3 referred to the “reasoning as to why the Calgary Police Service” did not contact the Applicant in the course of a “criminal proceeding”. Item 5 requested information regarding a “hit and run”, which would be a criminal matter. Item 8 requested representations made to Alberta Justice, which is a body with which the CPS routinely deals. Finally, while item 7 referred generally to “all other disclosures of my personal information”, without any reference to the CPS or what would be criminal or police matters, I take it that the Public Body transferred that item because many of the other items referred to police or criminal matters. In other words, the overall context of the access request suggested that the Applicant sought records of disclosures of his personal information by the CPS, and not just by the Public Body.

[para 27] It is also important to remember that, in this particular case, the Public Body still opted to process four of the five requests that it transferred to the CPS. Indeed, this was appropriate for some of the items, as it was possible that the Public Body might have responsive records not held by the CPS. For example, item 1 requested a file pertaining to possible security breaches, which might have been held by the Public Body (e.g., a file created by its Corporate Security Division). As for item 5, which is the only item that was not processed by the Public Body, I find that it was reasonable for the Public Body to believe that the CPS, but not itself, may have responsive records. Item 5 requested records in relation to a hit and run on a store’s private property, which would be a police matter rather than a matter involving the Public Body.

This is in contrast to items 2 and 3, which refer to injuries suffered by the Applicant near a City transit station and on a City bus.

[para 28] The Applicant notes that, at the time of his May 2007 access request, he received a copy of the Public Body's *Corporate Records Classification and Retention Schedule*. He says that he asked for an up-to-date copy for the purpose of this inquiry, but the Public Body did not provide one. The Public Body says that the Applicant never made a formal access request for the current *Schedule*. In any event, the Applicant argues that the *Schedule* that he received in 2007 does not suggest that any of the records that he has requested would be in the custody or under the control of the CPS.

[para 29] The Public Body responds that the *Schedule* classifies records by type and provides a retention period for records that are in the custody or under the control of the Public Body, not those in the custody or under the control of other public bodies. While I do not have a copy of the *Schedule* before me, the foregoing makes complete sense to me. A records retention and disposition schedule assists in identifying records that a public body has, not records that it does not have.

[para 30] The Applicant submits that, in order to transfer an access request, a public body must first conduct an adequate and complete search for the requested records and there must be some discovery along the way pointing to the conclusion that another public body may or does hold responsive records. He essentially argues that, before being able to transfer an access request, a public body must search for the records in question to determine whether it has those records. I disagree. A similar argument was rejected, as follows, in Order 2000-021 (at paras. 36-37):

The Applicant argues that a public body cannot transfer a request until it finds all of the records in its custody or control. It must then consult with the public body to which it intends to transfer the request and ascertain that the responsive records in the custody or control of the first public body actually fall within one of the subsections interpreted above. Only after retrieval and consultation can a transfer be made.

There is no statutory basis for this argument. Further, it is practically unworkable within the fifteen-day timeline under section 14 [now section 15], especially where large and complex searches are required. In my view, a public body can often determine from its employees and its own records whether responsive records meet, or likely will meet, the criteria for transfer. [...]

Moreover, in this particular case, with the exception of records responsive to item 5 of the Applicant's access request, the Public Body did conduct its own search for the requested records.

[para 31] Having found that the Public Body reasonably believed that records responsive to parts of the Applicant's access request of April 2011 might be held by the CPS, and therefore met the criteria for transfer under section 15(1), I now turn to whether the Public Body properly exercised its discretion in transferring those parts of the request. In the very context of the transfer of an access request between two public bodies, Order 2000-021 (at paras. 49-50) noted that the delegation of a discretionary power to a public body gives it a degree of flexibility and the decision taken as a result of this flexibility may not please all concerned, but at the same

time, the course of action should be chosen for good reason based on the relevant facts and circumstances.

[para 32] Again referencing the similar access request that he made to the Public Body in May 2007, the Applicant argues that the Public Body improperly transferred parts of his April 2011 access request to the CPS because it did not do the same with parts of the previous request. While there is no mandatory requirement that a public body transfer an access request to another public body (Order 98-012 at para. 31), a public body must properly exercise its discretion in determining whether or not to transfer a request (Order F2012-19 at para. 34). In this particular inquiry, I must review the Public Body's decision in 2011 to transfer parts of the Applicant's request, as opposed to its decision in 2007 not to transfer parts of the access request. The relevant facts and circumstances that existed in 2007 are not before me, and they may or may not have been the same as the relevant facts and circumstances considered by the Public Body in 2011. Moreover, even where the relevant facts and circumstances are the same, it is possible for a public body to exercise its discretion in different ways, if both ways of doing so are reasonable.

[para 33] I find that the Public Body properly exercised its discretion to transfer parts of the Applicant's access request of April 12, 2011. As explained earlier, the very wording of the request contemplated that responsive records might be held, and only held, by the CPS. In the circumstances of this case, the Public Body's transfer of parts of his access request benefitted the Applicant in that both public bodies, as opposed to just one of them, conducted a search for some of the requested items.

[para 34] I conclude that the Public Body properly transferred parts of the Applicant's access request under section 15 of the Act.

V. ORDER

[para 35] I make this Order under section 72 of the Act.

[para 36] I find that the Public Body met its duty to assist the Applicant under section 10(1) of the Act, including its obligation to conduct an adequate search for records.

[para 37] I find that the Public Body properly transferred parts of the Applicant's access request under section 15 of the Act.

Wade Raaflaub
Adjudicator