

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-09

January 30, 2014

ALBERTA HEALTH SERVICES

Case File Number F6254

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for copies of any documentation to or from a coordinator (the coordinator) of the Environmental Public Health area of Alberta Health Services (the Public Body), or any other person, in respect of environmental health, tenant complaints, health inspections or correspondence, messages, or email of any kind, related to the Applicant's name or to his property.

The Public Body conducted a search for responsive records and provided them to the Applicant. The Applicant was dissatisfied with the search conducted by the Public Body and sought review by the Commissioner.

The Adjudicator found that the Public Body had not demonstrated that it conducted an adequate search for responsive records. In making this determination she noted that the Public Body had excluded from its search records where the "only way to determine if a topic or an individual is included, would be to read every page or every line". The Adjudicator found that such records should have been included in the search. The Adjudicator also noticed that the records the Public Body had located referred to potentially responsive records that had not yet been located or produced.

She ordered the Public Body to conduct a new search for responsive records and to make a new response to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 17, 72

Authorities Cited: AB: Orders 2001-016, F2007-029

I. BACKGROUND

[para 1] On February 12, 2012, the Applicant made a request for the following records: copies of any documentation to or from the coordinator, or any other person, in respect of environmental health, tenant complaints, health inspections or correspondence, messages, or email of any kind, related to his name or to his property.

[para 2] The Public Body conducted a search for responsive records. On April 18, 2012, the Public Body responded to the Applicant, and provided records it had located. The Public Body severed some personally identifying information severed under section 17(1) of the FOIP Act.

The Applicant requested review by the Commissioner of the adequacy of the Public Body's search for responsive records.

The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. ISSUE

Issue A: Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

III. DISCUSSION OF ISSUE

[para 3] Section 10 of the FOIP Act 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 4] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, the Commissioner said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two

components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 5] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable or adequate search for responsive records.

[para 6] In its submissions, the Public Body stated:

In this instance, given the parameters of the access request Information and Privacy contacted the principal area involved with the request: Environmental Public Health in Calgary. In particular individuals holding the following positions were sent the call for records: the Coordinator-Safe Built Environment, the Supervisor-Safe Built Environment, the Calgary Manager for Environmental Public Health and the Calgary Program Secretary for Environmental Public Health. The individuals searched computer systems and site inspection databases such as Hedgehog database, EH Lookup Archive files and SHIP database going back as far 2003. AHS has no records of inspection reports for the applicant's property before 2003. The AHS retention period for records related to site inspections is 11 years.

[para 7] The Public Body provided the affidavit of an information access and privacy coordinator who directed the search for records responsive to the Applicant's access request. This affidavit describes the search that was conducted in the following terms:

On March 20, 2012 an Urgent Call for Records was sent to the Program Secretary of Environmental Public Health in Calgary (Exhibit "A"). In a Call for Records specific instructions are given at point 2 that "All record systems organized by name or individual identification number or description of the topic should be searched to locate responsive records. This would include hospital charts, clinic records, ADT systems, electronic databases, divisional file systems, office and administrative records."

[para 8] Exhibit "A", to which the foregoing excerpt refers, is the letter the information access and privacy coordinator sent to notify employees of the Public Body of the Applicant's access request and to instruct them as to how the search should be conducted. This letter states:

What needs to be searched?

All record systems organized by name or individual identification number or description of the topic should be searched to locate responsive records. This would include hospital charts, clinic records, ADT systems, electronic data bases, divisional file systems, office and administrative records.

There is no requirement to search records where the only way to determine if a topic or an individual is included, is to read every page or every line. For example, manual clinic bookings that consist of a book with a page for each day's appointments do not need to be searched. However, if the booking system is computerized and has a search function, it should be searched. [my emphasis]

"The Call for Records" document (Exhibit "B" of the Affidavit) establishes that the only areas searched by the Public Body are the following: The Hedgehog Database, EH Lookup Archives files, SHIP database, the coordinator's emails and another employee's emails. All of these records management systems were searchable by keyword.

[para 9] On its face, the search described by the information access and privacy coordinator in her affidavit of December 17, 2013 is overly narrow. The Public Body did not provide the source of the idea that there is no requirement to search for records that might contain information responsive to an access request but that have not been labelled or organized by a public body in a way such that an employee need not read the records to determine their contents.

[para 10] Section 6 of the FOIP Act creates the right of access to records in the custody or control of a public body. It states:

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

(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.

(4) The right of access does not extend

(a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or

(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.

(5) Subsection (4)(a) does not apply to a record described in that clause if 5 years or more has elapsed since the member of the Executive Council was appointed as the member responsible for the ministry.

(6) Subsection (4)(b) does not apply to a record described in that clause if 5 years or more has elapsed since the beginning of the sitting in respect of which the record was created.

(7) The right of access to a record does not extend to a record relating to an audit by the Chief Internal Auditor of Alberta that is in the custody of the Chief Internal Auditor of Alberta or any person under the administration of the Chief Internal Auditor of Alberta, irrespective of whether the record was created by or for or supplied to the Chief Internal Auditor of Alberta.

(8) Subsection (7) does not apply to a record described in that subsection

(a) if 15 years or more has elapsed since the audit to which the record relates was completed, or

(b) if the audit to which the record relates was discontinued or if no progress has been made on the audit for 15 years or more.

[para 11] Section 6 contains exceptions to the right of access to a record in the custody or control of a public body. None of these exceptions includes the circumstance in which it is not possible to determine whether a record is responsive without first reading or reviewing it. The Public Body may have excluded potentially responsive records from its search on the basis that they may not have been organized in a particular way or searchable by keyword. For example, if the coordinator, or another employee of the public body responsible for inspecting the conditions of rental units, took notes of inspections and organized inspections by date, such notes would be excluded from the search, even though any such records would be responsive to the Applicant's access request.

[para 12] If an appointment was entered manually in an appointment book, as in the example provided by the information access and privacy coordinator, and information about the appointment is responsive to an access request, then the applicant has a right of access to the information under section 6 of the FOIP Act, and a public body has a duty to search for it under section 10. It might simplify the search if the public body in such a case were to obtain clarification of the time frame of the appointment with the applicant so that it could search more efficiently; however, if the applicant is unable to do so, the duty to search through any likely repositories of records remains, regardless of how they are organized.

[para 13] There is evidence before me that supports finding that there are, or may be, records that would be responsive to the Applicant's access request that have not been located or produced.

[para 14] The Applicant argues:

The principle material upon which the inquiry rests is the email statement by [the coordinator] of Alberta Health Services, and formerly of Calgary Regional Health, sent to [a fire safety codes officer] and her team member on SHIP –Safe Housing Inspection Program, in which she states that if he wants to go for warrants and fines, she has all the documents.

In the FOIP materials we have received to date from Alberta Health Services, we do not see any such comprehensive documentation.

[para 15] I understand the Applicant's reference to be to record 82, which contains an email dated January 30, 2012 written by the coordinator and sent to an employee of the City of Calgary and to an employee of the Calgary Police Service. This email states:

Yes, I'm sure you were so warm and friendly towards [the Applicant]! He has always been a real piece of work – I dealt with him going back to 2006-2007. [my emphasis]

[...]

If you got to legal action [...] remember you can always get documentation from us, eg. SHIP notification letters, reports, etc. [...] and I will discuss further AHS actions as well.

[para 16] There are no records among those located by the Public Body documenting any inspections or dealings with the Applicant occurring between December 11, 2006 and April 23, 2008. Although the coordinator refers to dealings with the Applicant in 2007, the Public Body has not produced any records created in 2007 or explained the absence of such records.

[para 17] I note that an entry on an inspection schedule appearing on record 37 dated October 20, 2011 states that the Applicant is “confrontational”. This comment appears on subsequent SHIP inspection schedules. However, there is no documentation of a confrontation involving the Applicant taking place prior to the October 20, 2011 entry. There are accounts of dealing with the Applicant, but nothing that could be termed a “confrontation”. I acknowledge that there is an account of a confrontation taking place on January 30, 2012 among the records. However, this confrontation cannot be the basis for the October 20, 2011 note, given that the note precedes the event. It seems likely that the employee who entered the description of the Applicant as “confrontational” on October 20, 2011 had access to a record or records containing information that led the employee to draw this conclusion and record it. However, no such records have been produced.

[para 18] Record 9 refers to photographs of a basement bedroom belonging to the Applicant. Record 16 also refers to attached photographs of the shingles of a property belonging to the Applicant. However, there are no photographs among the records the Public Body has located.

[para 19] In addition, I note that Exhibit “B” of the affidavit, the “Call for Records” document, establishes that the databases and emails were the only areas searched. I also note that the “Log and Review of Records Located” document that employees prepared and submitted to the information access and privacy coordinator refers only to having searched databases and the emails of two employees. While it is possible that other repositories of records were searched without finding responsive records, I cannot find this to be the case in the absence of evidence. As discussed above, the records themselves support finding that the Public Body has not yet produced all the responsive records in its custody or control to the Applicant.

Conclusion

[para 20] The records the Public Body has produced in response to the Applicant’s access request point to the possible existence of records that have not been produced, but that would be responsive to the Applicant’s access request. In my view, the possibility that the Public Body has not yet produced all the records in its custody or control that are

responsive to the Applicant's access request, would likely be due to the direction in the "Call for Records", which can be interpreted as excluding repositories of potentially responsive records from the scope of the search that were not electronic, or were electronic, such as employees' hard drives, but indexed in a certain way. The Public Body has not established that it conducted an adequate search for responsive records, as it has not established that it has searched all areas where responsive records are likely to be located. I must therefore require the Public Body to conduct a new search for responsive records so that it may meet its duty to assist the Applicant.

[para 21] In Order F2007-029, former Commissioner Work explained the kinds of evidence that must be adduced in order to establish that a search was conducted in a reasonable way. He said:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 22] The Public Body has provided evidence as to the scope of the search it conducted and the individuals who conducted the search. However, the Public Body has not explained the steps it took to identify and locate responsive records, or to identify and locate all possible repositories of records, or explained why it believes no more responsive records exist than what has been found or produced. When the Public Body conducts the new search for responsive records, considering the points set out in Order F2007-029, which I have cited above, and which describe the types of evidence necessary to establish that it has conducted a reasonable search, will assist it to meet its obligations to the Applicant as required by section 10 of the FOIP Act.

IV. ORDER

[para 23] I make this Order under section 72 of the Act.

[para 24] I order the Public Body to conduct a new search for responsive records. The new search for responsive records must include all areas where responsive records are likely to be located, including repositories of paper records.

[para 25] Once the Public Body has conducted the new search, it must prepare a new response to the Applicant and explain the new search it conducted with reference to all the evidentiary requirements set out in Order F2007-029, cited above.

[para 26] I order the Public Body to notify me and the Applicant in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator