

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2014-47**

November 12, 2014

**ALBERTA JUSTICE AND SOLICITOR GENERAL**

Case File Number F6661

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made a request to Alberta Justice and Solicitor General (the Public Body) for “any and all information enclosed about me at my past work place at the EDMONTON REMAND CENTER held by the center & Alberta Justice and Solicitor General human resources in the Brownlee building in relation to my employment.” The Public Body responded but severed information under sections 4(1)(g) (question that is to be used on a test), 17 (disclosure harmful to personal privacy), and 26 (testing procedures, tests and audits) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

The Applicant asked this Office to review the Public Body’s response; he also argued that the Public Body did not perform an adequate search for responsive records. During the inquiry, the Public Body provided the Applicant with the information initially withheld under section 17.

The Adjudicator found that the Public Body properly applied section 4(1)(g) to questions on exams, and section 26 to the answers provided by the Applicant on the exams. However, the Adjudicator concluded that the Public Body unduly narrowed the scope of the Applicant’s request and therefore did not conduct an adequate search for records.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 10, 17, 26, 72.

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

## **I. BACKGROUND**

[para 1] The Applicant made a request to Alberta Justice and Solicitor General (the Public Body) for “any and all information enclosed about me at my past work place at the EDMONTON REMAND CENTER held by the center & Alberta Justice and Solicitor General human resources in the Brownlee building in relation to my employment.” The Public Body responded but severed information under sections 4(1)(g) (question that is to be used on a test), 17 (disclosure harmful to personal privacy), and 26 (testing procedures, tests and audits) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

[para 2] The Applicant requested a review of the Public Body’s decision to withhold information, and also requested a review of the adequacy of the Public Body’s search for records, and its decision to “omit” records from its response.

[para 3] The Commissioner authorized an investigation into the matter but this was not successful in resolving the issues between the parties so the Applicant requested an inquiry.

## **II. INFORMATION AT ISSUE**

[para 4] The information at issue in this inquiry consists of the severed portions of the records that were responsive to the Applicant’s request.

## **III. ISSUES**

[para 5] The Notice of Inquiry dated May 29, 2014, sets out the issues in this inquiry as follows:

1. Are records that were located excluded from the application of the Act by section 4(1)(g) (questions on a test)?
2. Did the Public Body meet its obligations under section 10(1) of the Act (duty to assist)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.
3. Did the Public Body omit records it had located from the list of responsive records?
4. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
5. Did the Public Body properly apply section 26 (information relating to tests) to the information in the records?

[para 6] I will consider issues 2 and 3 first, and then move on to issues 1, 4, and 5.

#### **IV. DISCUSSION OF ISSUES**

**Did the Public Body meet its obligations under section 10(1) of the Act (duty to assist)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.**

[para 7] Section 10(1) of the 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.*

[para 8] 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).

[para 9] 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. (See Order F2009-017, at para. 53)

[para 10] The Applicant's submissions indicate that he is concerned with the first step described above. 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

[para 11] The Public Body states that it interpreted the Applicant's request to be for records in his personnel file. It states that it sent a records request to the Remand Centre's personnel department, as well as to the Public Body's own human resources department (for the Applicant's pay and benefit information). The Public Body states that it obtained all the records responsive to the Applicant's request by searching these two areas.

[para 12] The Applicant's request encompassed "any and all information" related to his employment within two areas: records at the Remand Centre, and records at the Public Body's human resources area. In my view, this could encompass more than the Applicant's personnel file. In particular, it seems possible that there could be records at the Remand Centre that related to the Applicant's employment that didn't make their way into his personnel file (for example, records of conversations between the Applicant and a supervisor). In other words, the Public Body unduly narrowed the Applicant's request by searching only for his personnel file.

[para 13] In this case, the Applicant argues that the Public Body failed to search for Instant Messenger conversations. The Public Body has told me that instant messages are not automatically saved; in order to save an instant message it would have to be copied and saved into a new format, such as an email or word processing document. It states that this would be done if, for example, the instant message contained information related to a business transaction or decision. The Public Body further states that "[h]ad there been instant messages that involved a decision about the Applicant's employment, they would have been saved and added to his personnel file."

[para 14] However, it seems possible that messages could have been sent that related to the Applicant's employment but did not include a decision about the Applicant such that they would have been placed in his personnel file. A coworker or supervisor of the Applicant at the Remand Centre (for example), could have had a conversation via instant message that related to the Applicant's employment. If so, it is possible (if unlikely) that one of those individuals copied the instant message conversation into another format in order to save it.

[para 15] It might be the case that a search for "any and all" information related to the Applicant's employment might turn up only his personnel file. However, because it also seems possible that other responsive records, which would not have been placed on his personnel file, might have been located, I find that the Public Body did not fulfill its duty to conduct an adequate search.

[para 16] I will order the Public Body to determine whether it has custody or control of copies of instant messages that relate to the Applicant's employment, either at the Remand Centre or in the Public Body's human resources area.

[para 17] A starting place for this search might be to ask Public Body employees in the human resources area and at the Remand Centre, who could possibly have communicated via instant message about the Applicant's employment (for example, coworkers and supervisors), whether they saved any instant messages in another format within the

relevant timeframe. This seems like a logical first step, since taking the time to copy and save instant messages might be an uncommon activity such that individuals would remember whether they had ever done so.

**Did the Public Body omit records it had located from the list of responsive records?**

[para 18] The Public Body withheld the bottom of page 10 of the records, and page 11 in its entirety, as being unresponsive to the Applicant's request. The Public Body describes the information on these pages as relating to a procedural matter applying to all employees in general. This is an accurate description of the withheld information and I agree that it is not about the Applicant in any way. Therefore, it was properly omitted from the responsive records as it was not responsive.

**Are records that were located excluded from the application of the Act by section 4(1)(g) (questions on a test)?**

[para 19] Section 4(1)(g) of the Act states:

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

...

*(g) a question that is to be used on an examination or test...*

[para 20] The Public Body argues that it severed test questions from examinations on pages 51-59 of the records that "directly relates to the Edmonton Remand Centre staff orientation program." The Public Body states that these exams continue to be used by the Remand Centre to determine whether staff fulfill the requirements of the program.

[para 21] I have reviewed the portions of the responsive records which were severed by the Public Body relying on section 4(1)(g) of the Act. These records contain open-ended (written) questions that appeared on examinations taken by the Applicant during his participation in the Public Body's orientation program. Although the Applicant's answers to the written questions were also severed by the Public Body, its submissions indicate that they were not withheld under section 4(1)(g), but rather section 26 (which I will discuss later in this Order).

[para 22] Section 4(1)(g) applies to questions on exams that are *to be* given by the public body. The records at issue contain exams that the Applicant has already written; however, as the Public Body has stated that these exams continue to be used by the Public Body on an ongoing basis, I accept that section 4(1)(g) applies to the questions on the exams. I therefore do not have jurisdiction to review the Public Body's decision to withhold that information in the records.

**Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**

[para 23] Section 17 of the Act prohibits a Public Body from disclosing personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. In its rebuttal submission, the Public Body stated that it decided to disclose the personal information previously withheld under this provision; it included unsevered copies of the records with its submission (which was also provided to the Applicant). Therefore I do not need to consider the application of section 17.

**Did the Public Body properly apply section 26 (information relating to tests) to the information in the records?**

[para 24] Section 26 of the Act states:

*26 The head of a public body may refuse to disclose to an applicant information relating to*

*(a) testing or auditing procedures or techniques,*

*(b) details of specific tests to be given or audits to be conducted,  
or*

*(c) standardized tests used by a public body, including  
intelligence tests,*

*if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.*

[para 25] As I mentioned above, section 4(1)(g) of the Act applies to the questions contained in the exams on pages 51-59 of the records. The Public Body has severed the Applicant's written answers to the questions on pages 51-59 under section 26(c). It argues that because these exams continue to be used by the Public Body, disclosing the Applicant's answers would prejudice the future use of these exams. The Public Body states that the Applicant's answers were sufficiently detailed so as to reveal the nature of the questions.

[para 26] Having reviewed copies of the exams, I agree that the Applicant's answers are information relating to the exams, and that they contain sufficient information that an accurate inference could be drawn as to the question itself. Therefore, disclosing the answers could reasonably be expected to prejudice the future use of the exam. I find that section 26(c) applies to the Applicant's answers to the exam questions on pages 51-59.

*Exercise of discretion*

[para 27] The Public Body states that it considered all relevant factors in exercising its discretion to withhold the Applicant's exam answers under section 26, and that it decided to withhold the information to protect the integrity of the exams administered by the

Public Body. Although the Public Body's submissions on this point were minimal, I accept that the Public Body properly exercised its discretion to withhold the information on the basis that disclosing it would compromise the usefulness of the exams.

## **V. ORDER**

[para 28] I make this Order under section 72 of the Act.

[para 29] I find that the Public Body failed to meet its duty under section 10(1) of the Act. I order the Public Body to conduct a search for further records, as described at paragraph 16. Once the Public Body has conducted the new search, it must prepare a new response to the Applicant, including an explanation of the steps taken to locate further records.

[para 30] I find that the Public Body properly applied section 4(1)(g) of the Act to the records at issue.

[para 31] I find that the Public Body properly applied section 26 of the Act to the records at issue.

[para 32] 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.

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Amanda Swanek  
Adjudicator