ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-21

August 25, 2015

NORTHWEST ALBERTA CHILD AND FAMILY SERVICES AUTHORITY REGION 8

Case File Number F7468

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Northwest Alberta Child and Family Services Authority Region 8 (the Public Body) for "all records and documentation from / for the Watch Me Grow Agency (the agency) of Grande Prairie Alberta, surrounding the placement, care, and termination of care of [his son], with the [agency] in Grande Prairie."

The Public Body provided some records in its custody to the Applicant, but initially refused to provide records from the agency as it took the position that it had no control over the agency's records. Subsequently, the Public Body reviewed the Family Day Home Standards Manual (the manual) and decided that this document gave it control over some of the agency's records. It requested these records from the agency and provided them to the Applicant.

The Applicant requested review on the basis that the Public Body had not provided him with all records at the agency containing responsive information.

The Adjudicator reviewed the contract between the agency and the Public Body and determined that the Public Body had control over any recorded information created or received by the agency in the performance of its duties under the contract and had the right to demand the information from the agency. She determined that if records of this kind had not been produced but existed and were located at the agency, the Public Body would have control over them within the terms of the FOIP Act. She ordered the Public

Body to conduct a new search for responsive records and to prepare a new response to the Applicant regarding the search she ordered it to conduct.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 72; *Child Care Licensing Act*, S.A. 2007, c. 10.5, ss. 2, 25

Authorities Cited: AB: Orders 2001-016, F2007-029, F2009-030, F2010-023

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89

I. BACKGROUND

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Northwest Alberta Child and Family Services Authority Region 8 (the Public Body) for "all records and documentation from / for the [the agency] of Grande Prairie Alberta, surrounding the placement, care, and termination of care of [his son], with [the agency] in Grande Prairie."

[para 2] The Public Body responded to the Applicant on July 15, 2013. The Public Body stated:

> Some of the Child Intervention records which you requested contain information that is excepted from disclosure under the Act. Excepted information was severed so that the remaining information in the document could be disclosed to you. The severed information is excepted from disclosure under Section 17 of the Act. Severing was necessary because Section 17 states that the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. We have noted on the record disclosed to you which section(s) of the Act we have relied on to sever the information. A copy of the records that may be disclosed [55] pages is enclosed.
>
> It has been determined that day-today [sic] operational records in the control and / or custody of Watch Me Grow Agency are not subject to the access provisions of the FOIP Act, but rather are subject to private sector privacy legislation, specifically the *Personal Information Protection (PIPA) Act*.

[para 3] The Applicant requested review of the Public Body's response by the Commissioner. The Commissioner authorized mediation to resolve the dispute. The Public Body subsequently determined that some of the requested records located at the agency were in its control and it released records 56 – 107, with some information severed from them under section 17 of the FOIP Act. The Public Body stated:

> These records, relating to your son, from the Watch Me Grow – Family Child Care Program, and consisting of such documents as Attendance Records, Incident / Accident Reports and Authorizations for Medication, are being released as part of the review process with the Office of the Information and Privacy Commissioner (OIPC).

As mediation did not resolve the dispute, the matter was scheduled for a written inquiry.

II. ISSUE

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

[para 4] 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 5] 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 6] 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 7] When the Applicant originally made his access request, he was told by the Public Body that records located at the agency were not in the custody or control of the Public Body. It was suggested that he make an access request to the agency to obtain the personal information he requested. The Applicant made a request to the agency and received some records. That request is not before me. However, during the mediation process conducted by this office, the Public Body reconsidered its position that it did not have custody or control over the agency's records, based on its review of a document entitled the "Family Day Home Standards Manual for Alberta" (the standards manual).

[para 8] The Applicant's submissions primarily address his dissatisfaction with the Public Body and with the agency in relation to matters other than the Public Body's response to his access request. However, the Applicant challenges the adequacy of the Public Body's response to him for the following reasons:

1. The Public Body did not initially realize that it had jurisdiction over some of the agency records;
2. The Public Body has not produced all the records he received from his request to the agency; the Public Body should have produced some of the records provided by the agency in his request to the agency, as these records would contain information required to be kept by an agency under the program standards manual;

3. With the exception of one record, he has not received any records documenting contact with him by the child care provider or the agency even though the Family Day Home Manual requires such contact to be documented and maintained;
4. He has not been provided with two letters, one written by the program director of the agency, and one written by a child care provider.

[para 9] In its initial submissions, the Public Body stated:

> 3. On October 4, 2013, the Public Body received written notification dated September 30, 2013 that the Applicant had requested a review by the Office of the Information and Privacy Commissioner (OIPC). It was the Public Body's understanding that the request for a review was relating to Watch Me Grow record[s] only and did not include the Child Intervention record that had been disclosed. On June 13, 2014 the Public Body was advised by OIPC via letter dated June 12, 2014 that the Public Body had fulfilled its duty under s. 10(1) of the Act by conducting a thorough search for records responsive to the Applicant's request and that the review was concluded.
>
> […]
>
> **Specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request.**
>
> 7. The *IPO* [the Public Body's information and privacy office] had numerous telephone conversations with the Agent to identify and locate records responsive to this request received May 27, 2013 (access to *Watch Me Grow Family Child Care* records and *Child Intervention* records) and a previous request 2013-P-0746 (access to *Day Care Subsidy* records – 23 pages disclosed) received April 29, 2013. Our June 17, 2013 fee estimate letter confirmed our understanding of the request and no information was received from [the Applicant] to indicate otherwise and the fee estimate was accepted.
>
> **The scope of the search conducted (eg. Physical sites, program aras, specific Databases, off-site storage areas).**
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> 8. The *Child Intervention* record was provided by the *Grande Prairie District Office* of the then *Northwest Child and Family Service Authority* and the *Watch Me Grow Family Child Care Program* record was provided by the agency. It was not deemed necessary to seek further for records.
>
> **The steps taken to identify and locate all possible repositories of relevant records (e.g. keyword searches, records retention and disposition schedules).**
>
> 9. As noted above, the *IPO* [the Public Body's information and privacy office] was satisfied it had located all responsive records and did not search further.
>
> 10. During mediation the Public Body reviewed the April 2013 Family Day Homes Standards Manual [that] is attached. It outlines the records that must be maintained on pages 20-21. The Public Body realized it was in error when it initially determined that the *Watch Me Grow* record was subject to *PIPA* rather than *the Act* and subsequently released the *Watch Me Grow* record [52 pages] to the Applicant on June 11, 2014. Once the error was discovered, the Public Body contends that it responded in a timely and forthright way by disclosing the *Watch Me Grow* record – although the record, consisting of such things as Attendance Records, Incident/ Accident Reports, Authorizations for Medication, contained only those records required by the Family Day Homes Standards Manual. Any other records that may exist would **not** be subject to

the Act and therefore the Public Body was not required to search for any such records. It is those other records that the Applicant appears to be seeking. [emphasis in original]

[para 10] After I reviewed the Public Body's submissions, I asked it to provide more information regarding its search. I stated:

> Past orders of this office state that a public body's evidence regarding the adequacy of a search should cover the following points:
>
> 1. The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> 2. The steps taken to identify and locate all possible repositories of records responsive to the access request: keyword searches, records retention and disposition
> 3. Who did the search
> 4. Why the Public Body believes no more responsive records exist than what has been found or produced.
>
> This is in addition to the question of the scope of the search conducted, which you addressed in your submissions.
>
> The reason I request that public bodies address these points in their submissions is so I can evaluate the quality of the search they conducted. Submissions on the foregoing points need not be lengthy, but must be sufficient to enable me to understand the Public Body's reasons for believing the search it conducted was sufficient. In your submissions, you state that "any other responsive records would not be subject to the Act", but you have not explained what kinds of records you considered would be responsive, or explained why you believe that the Public Body does not have custody or control of any other responsive records than you produced to [the Applicant].

[para 11] The Public Body stated in its reply submissions:

> 5. Subsequent to FOIP request# 2013-P-0747, received April 29, 2013, with 23 pages of *Child Care Subsidy* records released and 12 pages withheld, the *Information and Privacy Office (IPO),* received an email from the Agent [the Applicant's agent] on May 21, 2013 stating "this is for informational purposes so you may be informed from whom it is we are requesting further FOIP requested information. ([The program director] Watch Me Grow Family Child Care Program, Grande Prairie, Alberta)." The email goes on to state that "any and all information from the Watch Me Grow Agency, including documentation of phone contact and calls, all particulars regarding billing, placement and care of the child ... with that agency, and the eventual removal of that child from the mentioned agency Watch Me Grow."
>
> There were also two lengthy telephone conversations with the Agent on May 21, 2013 and May 27, 2013. During the first conversation the Agent clarified that it was the *Child Care Subsidy* record that was being requested. During the second conversation the Agent identified that the Applicant wished to access additional records from other program areas. He was advised that he would need to submit another FOIP request for records from other program areas.
>
> 6. A second FOIP request # 2013-P-0872 was received May 27, 2013 for a copy of "all records @ WMG surrounding daycare for [the Applicant's son] while at Watch Me Grow Agency, Grande Prairie, Alberta." On June 3, 2013 the record was requested via fax (our usual procedure) to [the program director], Watch Me Grow and was subsequently received at IPO on June 10, 2013. A fee estimate letter was mailed June 17, 2013 and a written fee acceptance was received via fax July 4, 2013. The *IPO* subsequently denied the Applicant access to the record, in error advising the Applicant the record was subject to the PIPA rather than the FOIP Act.

During the review process, the Public Body subsequently agreed to release those records to the Applicant, subject to applicable exceptions to disclosure. The record [52 pages] was released June 11, 2014.

Specific steps taken to locate all repositories of records:

7. The Public Body believed it had been provided the entire responsive record, as per the standards set out in the **Family Day Home Standards Manual** (pages 19-21: Part 2 Agency Standards Standard 6C - Records and page 26: Part 3 - Family Day Home Standards- Standard 2- Children's Information Records). The Public Body provided a copy of this manual with its initial submission (Tab 5). It was not deemed necessary to search further. The records were not in the Public Body's custody and were not identified in the Manual as records that must be maintained as part of the contract, but rather were in the custody of the contracted […] agency - WATCH ME GROW Family Child Care Program.

Standard 6C noted above sets out *in detail* the records an agency must maintain, in three specified areas (agency staff records, provider records & parent records), and as well specifies records must be maintained on the agency premises for a period of two years. Standard 2 noted above specifies *in detail* the records to be maintained by a family day home providers, and further specifies that information updates are to be kept by a day home provider no longer than one month, and must then be submitted to the agency. Records must be kept by the agency a minimum of two years. [emphasis in original]

Who did the search:
8. The request for records was faxed to the agency to the attention of [the program director] on June 3, 2013 and the record was subsequently received at IPO on June 10, 2013. As the Public Body received the record from the agency when requested, it had at that time no need to question who conducted the search, as it did not appear relevant. During the OIPC review process the Portfolio Officer by letter to the Public Body on October 15, 2013 posed numerous questions concerning the adequacy of the search, which the Public Body responded to by letter dated January 29, 2014. Who conducted the search was *not* one of the questions. It is not part of our normal procedure to dictate who should conduct a search for records responsive to a FOIP request, as program areas, or in this instance, a contracted agency, best know how to search their own records. This was not a request to a large sophisticated public body, with many possible places to search for a record, but rather to a small contracted agency with one business premise only. [emphasis in original]

Why the Public Body believes no more responsive records exist:

9. It was not deemed necessary to search for further records, based on the content of the record, and based on the program manual standards.

[para 12] The Public Body’s response to my questions regarding its search reveals some confusion as to what I was asking and why I was asking it. As it may be useful for the Public Body to understand how the questions are usually answered, and how answers are helpful to an adjudicator in determining whether a search is adequate or not, I have decided to explain why these questions are asked in my analysis and how they may be answered.

[para 13] In Order F2007-029, former Commissioner Work posed five questions that, if answered by a public body’s evidence, assist the adjudicator to assess the quality of the search a public body has conducted. Answering these questions will also assist a public body to ensure that it has conducted a reasonable search. The questions are the following:

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

What specific steps were taken by the Public Body to identify and locate records responsive to the Applicant's access request?

[para 14] The Public Body states that it had conversations with the Applicant to determine the kinds of records he was seeking. It initially determined that records from an "intervention file" would be responsive. Once it decided that it had control over records in the custody of the agency, the Public Body produced records it obtained from the agency.

[para 15] To answer the question as to the steps taken to identify and locate responsive records, a public body may describe the steps taken to clarify the access request (if necessary), list the areas the Public Body decided to search, and provide brief reasons why it thought searching in these locations would have the best chance for success in locating records.

[para 16] When a public body explains how it organized its search and why it chose to search for responsive records in some areas, but not others, it assists me to determine what the scope of the search was and whether the scope was appropriate.

[para 17] In this case, the Public Body has not, strictly speaking, explained how it identified and searched for responsive records, although it did explain that it contacted the Applicant to determine what kinds of records he was seeking. The Public Body's evidence suggests that it located responsive records in a child intervention file and then subsequently requested records from the agency. Presumably, the Public Body reasoned that any responsive records it could possibly have in its custody would be located in a child intervention file.

[para 18] Once the Public Body decided that it had control over some of the records located at the agency, it requested them from the agency, again, presumably because it reasoned that the requested records would be located at the agency and nowhere else.

What was the scope of the search conducted – for example: physical sites, program areas, databases, off-site storage areas, etc.?

[para 19] To answer this question, the public body will usually explain all the areas it searched and how it performed the search. For instance, it might say that it performed a keyword search of specific databases using particular search terms to locate electronic records, or, if it searched for physical records, it will tell me which program areas and / or workstations it searched.

[para 20] When a public body answers this question it assists me to evaluate the extent and scope of its search.

[para 21] The Public Body's submissions indicate that it located a child intervention file in its own custody, and that it requested records from agency. However, it has provided no information regarding the areas in which it searched, other than the child intervention file and the agency. I infer that these are the only places it searched.

What steps were taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.?

[para 22] The above question is designed to obtain information about the Public Body's search process and reasoning. When a public body answers this question it assists me to rule out the possibility that the public body has not searched all areas where responsive records are reasonably likely to be located or used a search method that might not turn up all responsive records. When a public body describes its records retention and disposition schedule, it assists me to determine the likelihood that responsive records have been destroyed or continue to exist.

[para 23] It is unclear from the Public Body's response to the question what steps it took to identify and locate all possible repositories of responsive records in its custody or control. However, the information it provided regarding the retention and disposition schedules applicable to the agency suggests that responsive records located at the agency would continue to exist.

Who did the search?

[para 24] To answer this question, a public body will normally provide the name or names of those involved in the search and their position or positions within the public body. Answering this question enables me to determine who should provide evidence of the search in the event that I need further information about the search. Normally, a public body will document who performed searches and when so that it can provide evidence that the search was completed on a particular date.

[para 25] The Public Body apparently did not document who performed the search for the records in its custody. However, it does indicate that the Grande Prairie District Office provided the records in its custody to the Applicant, while the agency located the records in its possession.

Why does the Public Body believe no more responsive records exist than what has been found or produced?

[para 26] This question enables a public body to explain why, given its knowledge of its own organization structure and systems, it believes it conducted a thorough search and no other responsive records are likely to exist. A public body might say, "Given that we keep all records on this topic in this area, and because we thoroughly searched this area, as detailed in our answers to the previous questions, we believe we have produced all the responsive records in our custody or control."

[para 27] The Public Body answered the final question by stating: "It was not deemed necessary to search for further records, based on the content of the record, and based on the program manual standards." I understand the Public Body to mean that it believes that any records it has not produced or searched for in responding to the Applicant are records outside its control. It takes this position because the standards manual requires agencies to keep specific categories of records and the records the Public Body has not produced may not fall among these categories.

[para 28] I turn now to the question of whether the Public Body would have control over the records the Applicant is seeking, should they exist, as answering this question will assist me to determine whether the Public Body has conducted a reasonable search for records in its control.

Would the Public Body have control over the records the Applicant is seeking?

[para 29] From the Applicant's submissions, I conclude that he is dissatisfied with the Public Body's search because it has not produced the same records that were produced to him by the agency, because he has not received records documenting contact between himself and the day home care provider or the agency, and because he has not received two letters, one written by the program director of the agency and one written by a day home care provider. The position of the Public Body regarding these records is that it does not have control of them. It takes this position on the basis of its standards manual, which it argues does not refer to these kinds of records.

[para 30] Section 6 of the FOIP Act creates a right of access to records in the custody or control of a Public Body. Previous orders of this office have considered what it means to have custody or control over information within the terms of the FOIP Act.

[para 31] In Order F2010-023, I reviewed cases in which the terms "control" and "custody" have been defined and said:

> In section 6 of the FOIP Act, the word "custody" implies that a public body has some right or obligation to hold the information in its possession. "Control," in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

[para 32] In Order F2009-030, the Adjudicator found that the fact that the public body only had the ability to obtain the records in limited circumstances under an arm's length contract it entered with Great West Life, and that these circumstances did not include responding to an access request under the FOIP Act, weighed strongly in favor of finding that the public body did not have control of the records. If the circumstances in which a public body may demand records that are not in its custody are not present in a given situation, then it cannot be said to have a right to obtain or demand them in that situation. In other words, it cannot be said to have control over the records.

[para 33] In this case, I find that the issue of whether the Public Body has control of the records in the possession of the agency can be determined by reviewing the Public Body's responsibilities and powers under the *Child Care Licensing Act*, its responsibilities under the FOIP Act, and its rights under the contract entered with the agency.

[para 34] Through the *Child Care Licensing Act* (CCLA) the Legislature assigns to the executive branch of government the authority to administer child care programs and facilities. Section 2 of the CCLA authorizes the Minister of Human Services to appoint a Director, who is an employee of the Government, to administer the Act. The Director is given express authority under section 2(2) to delegate any of the Director's administrative powers under the Act. Under section 25 of the CCLA, the Director may enter an agreement with an agency for the agency to administer a family day home program. An agency entering such an agreement is responsible for coordinating and monitoring the provision of day care in day homes. If the Director did not enter this agreement, the Director would retain the duty of coordinating and monitoring the provision of day care under the Act.

[para 35] As the Director is an employee of the government, any records obtained or created by the Director in the fulfillment of the Director's duties and the exercise of the Directors' powers under the Act are subject to the FOIP Act, as such records are in the custody or control of government. In addition, the Minister of Human Services, who appoints the Director, has duties and obligations under the FOIP Act in relation to the information and records produced by the Director in carrying out the CCLA. While the Director has the ability to delegate the Director's functions under the CCLA, there is no power for the Director to delegate the Minister's obligations under the FOIP Act to an agency. (The Minister may delegate the Minister's duties under the FOIP Act and it appears that these powers have been delegated to the Public Body in this case.) As a result, while the Director may enter an agreement with a private sector agency to monitor and coordinate the provision of day care, the government's responsibilities under the FOIP Act in relation to any recorded information that is created, collected, used, or disclosed in the course of the agreement remains the responsibility of the government.

[para 36] The Public Body refers to Standards 3 and 6c in its submissions. Standard 3 of the standards manual requires agencies to obtain criminal records checks from day home provider applicants. Standard 6C describes the records applicants must keep on their premises:

Agencies must have documented policies and procedures for their providers regarding the following:

[…]

information records (including establishment, maintenance, storage and disposal of records);

[…]

An agency must maintain the following records:

Agency staff records:
• a current first aid certificate for the Home Visitor/Consultant;
• evidence of certification or equivalent training;
• evidence that a criminal record check was provided including a vulnerable sector search as per Standard 3;
• job description; and
• resume.

Provider records:
• name and home address of each approved provider;
• written record of all contacts, using the prescribed form, between agency staff and providers;
• records of all complaints and incidents;
• records of each home visit or contact;
• evidence of a completed criminal record check as per Standard 4;
• evidence of submitted physician's note and three personal references;
• evidence of two completed home visits;
• written training plan for each provider;
• statement of each provider's regular hours of service;
• reports of incidents and follow up investigations;
• copy of insurance for provider;
• evidence of automobile insurance coverage for provider, if applicable;
• consent to administer medication, if applicable;
• consent to participate in off-site activities, if applicable; and
• performance assessments.

Parent records:
• name, address and contact information for each parent enrolled in the program;
• written records of all contact, using the prescribed form, between agency staff and parent(s);
• emergency contact information for each parent;
• names of children;
• birth dates of children;
• record of contacts with parent(s);
• records related to the placement process including parent contracts;
• records specific to a child or parent must be available to the parent with reasonable notice;
• records specific to a provider must be available to the provider with reasonable notice;
• consent to administer medication, if applicable; and
• consent to participate in off-site activities, if applicable.

All records must be available to the CFSA at all times. Records must be maintained on the agency premises for a period of two years.

[para 37] The contract between the agency and the Public Body, which I requested from the Public Body, sets out the rights and duties of the agency in the legal relationship

it has entered with the Public Body. The contract contains clauses specifically addressing records created by the agency and establishes the extent to which the Public Body has control over the records.

[para 38] Term 3.5 of Clause 3 of the contract states:

> The Agency must comply with the Standards; with all federal, provincial and municipal laws applicable to child care; and with the Agency's Service Plan.

[para 39] The term "Standards" is defined in the contract as:

> The policies, conditions, requirements and standards, including any amendments to them that are described in the Manual for the operation of a family day home service and the care of children, including but not limited to administration, personnel, facilities, programs, safety, care, and provision of food.

[para 40] The term "the Manual" is defined in the contract as:

> The *Family Day Home Standards Manual for Alberta* that describes policies and standards that govern the operation of family day home services in Alberta.

[para 41] Clause 3 of the contract establishes that the agency must comply with the standards set out in the standards manual. As a result, the agency is required by the contract to maintain the records described in Standards 3 and 6C of the manual, reproduced above, on its premises for a period of two years.

[para 42] The contract also contains provisions regarding the application of the FOIP Act to agency records. These provisions state:

> 5. Freedom of Information and Protection of Privacy
>
> 5.1 The Agency:
>
> 5.1.a shall ensure complete compliance by its employees and agents with all terms relating to the protection of privacy under this Agreement and shall immediately advise the Authority in writing should any breach occur;
>
> 5.1.b acknowledges that all documents submitted by the Agency to the Authority, become the property of the Province of Alberta, and as such become subject to the provisions of the *FOIP* Act;
>
> 5.1.c acknowledges that the *FOIP Act* applies to personal information created, obtained or collected from any source, including information received from the Authority and obtained by the Agency;
>
> 5.1.d agrees that the Agency shall collect no personal information unless it is collected to perform this Agreement, or is authorized to be collected by the Authority;
>
> 5.1.e shall not use or disclose any personal information about an individual for any purpose other than what is needed to carry out this Agreement, unless the Agency has received the consent of the Minister of Children's Services or of the individual's guardian;

5.1.f must provide to the Authority any records that are requested under the access provisions of the *FOIP* Act, within 7 days of receiving notification by the Authority;

5.1.g acknowledges that any person who willfully destroys any records subject to the *FOIP Act* with the intent to evade a request for access to records is guilty of an offence under the Act;

5.1.h agrees to make every reasonable effort to ensure that personal information that is used to make a decision that affects an individual is both complete and accurate;

5.1.i at the Authority's request, shall correct within 5 working days, any incorrect personal information that the Agency has created, obtained or collected about an individual;

5.1.j must protect personal information in its custody by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal of personal information.

[para 43] The terms of clause 5, above, serve to give the Public Body control over the agency's creation of a record and what the agency does with it. The contract also gives the Public Body the right to demand records when it receives an access request. The ability to demand records in relation to an access request is not limited to specific kinds of records, but appears to encompass all agency records that would be responsive to the access request.

[para 44] The contract also contains provisions requiring agencies to retain records according to particular standards:

[para 45] Clause 6 states:

1. MANAGEMENT OF INFORMATION

6.1 The Agency shall:

6.1.a keep separate from its other records and electronic systems, all personal information

6.1.a.i transferred to it by the Authority, and

6.1.a. ii obtained, created or collected pursuant to this Agreement;

6.1.b retain all records in accordance with the specified retention and disposition schedule as set out in Section 11 of Schedule A;

6.1.c notify the Authority of any loss or damage to the records referred to in clause (b) within 24 hours of discovery of the loss or damage;

6.1.d abide by all Authority direction to ensure the recovery and remedial actions required to stop or minimize further loss or damage.

[para 46] Section 11 of Schedule A, referred to in term section 6.1.b. states:

Files of children and providers registered in the program must be kept at the agency for a minimum of 2 years after the file is closed or the contract is ended.

The "Freedom of Information and Protection of Privacy" and "Management of Information" provisions in the contract are designed to assist the government in meeting its obligations under the FOIP Act with respect to the recorded information generated by the agency in carrying out its responsibilities under the contract. These provisions do so by ensuring that the agency maintains and secures information created or collected under the Act and will provide it immediately when an access request is made.

[para 47] The agency is required to keep personal information separate from its other records and is required to retain all records obtained, created or collected pursuant to the Agreement for at least two years on its premises. The agency is therefore not free to dispose of its records. It is not clear from the contract or the disposition schedule whether the agency may destroy records at the end of the two year period; the contract refers only to a requirement to keep particular records on its premises for a minimum of two years, which does not preclude the possibility that it may store the information for more than two years.

[para 48] The effect of the contract between the Public Body and the agency is to delegate the government's responsibilities for monitoring the provision of child care under the *Child Care Licensing Act* to the agency under section 25 of that Act. However, the contract also ensures that the government is able to perform its responsibilities under the FOIP Act in relation to any information created, collected, used, or disclosed by the agency in the course of monitoring the provision of child care under the contract. In other words, the Public Body has maintained control over the records created under the contract in the same way that it would if the government had not delegated its authority to monitor the provision of child care to the agency, and was itself monitoring the provision of child care.

[para 49] The Public Body states that there was no need to search for records other than those produced by the agency, "based on the content of the record and the program manual standards." As discussed above, I interpret this statement to mean that the Public Body views the kinds of records described in standards 3 and 6c of the standards manual as the only records that could be created by the agency over which it would have control. As some of the records requested by the Applicant are not records that the standards manual requires an agency to keep, it reasons that it has no jurisdiction over such records.

[para 50] I disagree with the Public Body's position that the standards manual is the source of its control over records and that the records it may demand are limited to those described in Standards 3 and 6c. In my view, it is the contract between the Public Body and the agency that gives the Public Body control over the records held by the agency referred to in Standards 3 and 6c.

[para 51] The control the Public Body exerts over records is not limited to those described in Standard 3 and 6c. Rather, the contract gives the Public Body the authority to demand *any* records from an agency when an access request is received. Moreover, term 5.1.c refers to personal information obtained or collected from any source, while term 5.1.d refers to the agency collecting information necessary to perform the

agreement. The responsibilities of the agency under the agreement exceed those established by standard 6c. Term 5.1.f makes the information contemplated under section 5.1.e producible to the Public Body in the event of an access request. Finally, term 5.1.h acknowledges that the agency makes decisions and requires accurate personal information to do so. Records surrounding decisions and the evidence supporting the decision is therefore information required for performing the contract that may be kept at the agency, despite not being referred to in standard 3 or 6c. The presence of term 5.1.h. in the contract supports finding that the Public Body has control over any such records.

[para 52] To summarize the foregoing, standards 3 and 6c refer to records that the agency *must* create and maintain under the contract; however, the contract contemplates that the agency may create and maintain other records in order to perform the terms of the contract. The Public Body has control over any recorded information created or obtained by the agency in the performance of the contract. Had the Public Body not created provisions in the contract to allow itself to obtain the records created by the agency in the performance of its duties under the contract, and had it not required the agency to comply with the FOIP Act, the government would continue to have duties and obligations under the FOIP Act but would be unable to fulfill them as it would have no control over the records or the actions of the agency. The contract is the government's means of ensuring that it has control over records in relation to which it has duties and obligations under the FOIP Act.

[para 53] If the two letters the Applicant seeks are in the possession of the agency, then these letters are records responsive to the access request and in the control of the Public Body, given that term 5.1.f of the contract requires the agency to provide to the Public Body any records that are requested under the access provisions of the FOIP Act. The Applicant has provided his reasons for believing the records exist; he previously saw copies of these letters in court. The Public Body has not challenged the Applicant's evidence on these points.

[para 54] As noted above, the Applicant questions why he has not received records documenting contact between agency staff and himself, which Standard 6c requires to be kept. He notes that there were many conversations that took place between himself and the agency, but that he received only one note documenting contact. Even under the Public Body's theory that it has control over only those records referred to in the standards manual, such records would be under its control. The Public Body has not challenged the Applicant's evidence that these conversations took place or explained why it is unable to produce records documenting these conversations. However, the terms of Standard 6(c) and the Applicant's evidence give rise to the possibility that such records exist, but have not been produced, given that Standard 6c requires notes of contact to be recorded and given the Applicant's uncontradicted evidence that contact took place on more than one occasion.

[para 55] The Applicant also questions the adequacy of the Public Body's search as its search did not produce all the records that the agency produced to him when he made a request for his personal information directly to the agency. I agree with the Applicant that the fact the Public Body did not produce all the records he received from the agency

is indicative that the scope of the Public Body's search may have been inadequate, given that the terms of the access request encompassed the records the agency produced to him, and those records would be located at the agency.

Conclusion

[para 56] To conclude, I find that the Public Body's search for records was deficient for the reason that it limited its search to only those records referred to in the standards manual. As discussed above, the Public Body has control over any recorded information collected or created by the agency in the performance of the contract. By limiting the scope of its search to only those records described in the standards manual, the Public Body failed to search for types of responsive records not described in Standard 6c over which the Public Body would have control, if such records exist or continue to exist. I must therefore order the Public Body to conduct a new search for responsive records including records not described in the standards manual.

[para 57] As I find that the Public Body did not conduct an adequate search for responsive records, it follows that I find that it has not met its duty to assist the Applicant under section 10(1) of the FOIP Act.

[para 58] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89, the Alberta Court of Queen's Bench confirmed that the duty to assist contains an informational component. Manderscheid J. stated:

> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission,* F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
>> In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced*. [Emphasis added in original]
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.

In this case, the Public Body did not search all areas of its own premises, and appears to have limited the records it requested from the agency to those records meeting the terms of Standard 6(c), rather than the terms of the Applicant's access request. The Public Body has not produced all the records the Applicant is seeking. However, the Public Body has not provides its reasons for concluding that an expanded search would not have produced more records.

[para 59] The Public Body's evidence regarding its search is deficient, as it has not explained the steps it took to locate responsive records and why it searched particular areas and not others. It has also not described the specific locations that were searched at the agency, the extent of the search performed at the agency, or the search methodology used at the agency. I must therefore require the Public Body to make a new response to the Applicant once it has conducted the new search and require that the new response explain the search that was conducted by addressing the questions set out in Order F2007-029, discussed above, if the search does not produce all the records the Applicant has requested.

III. ORDER

[para 60] I make this Order under section 72 of the Act. I order the Public Body to conduct a new search for responsive records. In conducting the new search, the Public Body is to obtain any responsive records from the agency that are in the agency's possession, as it is permitted to do by term 5.1.f of the contract between the Public Body and the agency.

[para 61] Once the Public Body has conducted the new search, if it is not able to locate all the records the Applicant has requested, it must prepare a new response to the Applicant that contains an explanation of the new search it conducted with reference to all the evidentiary requirements set out in Order F2007-029, cited above.

[para 62] If the Public Body locates additional responsive records, it must provide these to the Applicant subject to the application of any applicable exceptions to disclosure.

[para 63] 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.

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Teresa Cunningham
Adjudicator