ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-35

December 3, 2015

University of Calgary

Case File Number F7544

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request for records relating to an offer of employment from the Public Body. The Public Body provided some records and severed information from some of the records. The Applicant believed that the Public Body did not conduct an adequate search for records. The Adjudicator ordered the Public Body to explain its search in greater detail. If the Applicant is not satisfied with the explanation, he may bring forward a review on an expedited basis.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.10, 19.

Authorities Cited: AB: Orders 97-003, 98-003, 2001-016, F2007-027, F2007-028, F2007-029, F2009-001, F2009-029, F2009-031, F2010-022, F2012-26, F2013-23.

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 (CanLII),.

I. BACKGROUND

[para 1] This inquiry arises from the Applicant's request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the University of Calgary (the Public Body) in July 2013 for records relating to an offer of employment and the rescinding of that offer. In particular, the Applicant was seeking the identity of person(s)

who he believed provided negative assessments about the Applicant and the details of those negative assessments.

[para 2] The Public Body provided some records, but withheld information from them in reliance on sections 17 (disclosure harmful to personal privacy), 19 (confidential evaluations) and 24 (advice from officials). The Applicant requested a review of the Public Body's response. Mediation and investigation did not lead to a resolution and the Commissioner decided to hold an Inquiry.

II. RECORDS AT ISSUE

[para 3] The Applicant believes that further records exist which were not located or provided to him.

[para 4] For reasons given at para 14, the other records at issue are pages 1-38 and 1-39.

III. ISSUES

[para 5] Initially, the Notice of Inquiry set out the following issues:

1. Did the Public Body meet its duty to the Applicant under section 10 of the Act to respond to him openly, accurately and completely, and did it conduct an adequate search for responsive records?
2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
3. Did the Public Body properly apply section 19(1) of the Act (confidential evaluations) to the information in the records?
4. Did the Public Body properly apply section 24(1) of the Act (advice for officials to the information in the records)?

[para 6] This office, upon review of the records submitted by the Public Body, issued third party notice to people whose information appeared in the records.

[para 7] The Applicant became aware of that and sent an email to this Office expressing concern. He stated the following:

> I am being informed that "you" or someone on your behalf is contacting Faculty who wrote recommendation letters for me to U Calgary. Please refrain from causing me further harm by harassing these people. Please contact me whenever you are going to take such actions that would affect me and my reputation first to get my approval…
> In other words, there is no reason to harass people I rely on for recommendation letters, essentially telling them that their "confidentiality" may be at risk. That only harms me further.

[para 8] The Applicant sent a further email on July 30, 2015 that appeared to indicate that he did not believe that the Public Body had disclosed, or withheld under exceptions in the Act, the specific record he was seeking. He stated the following:

> Given the timing of the rescinding action (i.e. after the offer and after the fly-out interview – and, doubtlessly, after the hiring committee having completed some due diligence and read all of the reference letters), it is very likely that the negative recommendation was in email or telephone form, occurring near when the rescinding action was taken.
> Therefore, any information about the reference letters and committee discussions would not be relevant, as the offer had been made based on this. So, harassing my references (or the committee members) was not welcome. In fact, **I would greatly appreciate it if your office would contact all those you did harass and apologize and make it very clear that your actions were not my fault, and that I was not interested in having their identities exposed nor any of the contents of their letters.** PLEASE do this.

[para 9] In response to this correspondence, I wrote to the Applicant and the Public Body explaining the process by which affected parties had been identified. I asked specifically for names of individuals that the Applicant wished to be excluded from the Inquiry. He responded with a list of names. One of the affected parties was notified that they had been excluded.

IV. DISCUSSION OF ISSUES

[para 10] The Applicant, in his rebuttal submissions, makes it clear that the sole issue for determination in this Inquiry is whether or not the Public Body met its duty to him under section 10 of the Act.

[para 11] The Applicant clearly indicates that he is looking for a particular record (that he calls the focal record). He believes it is in the custody and control of the Public Body. He is certain that the record would have been created by a third party and sent to the Public Body sometime between November 22, 2012 and December 3, 2012. He asserts the following:

> The facts suggest that the negative recommendation was provided *after* the offer was made and *before* the rescinding of the offer and, thus, that the focal record was *not* part of the Applicant's letters of recommendation and *not* part of the deliberations of the hiring committee up until the offer was made. If it is assumed that decent due diligence was done in a timely manner – i.e., that the letters were read and the deliberations were concluded prior to the offer being made – then those records are *not* of concern, and the applications of the Act's sections to make exceptions to disclosures of them are then also *not* relevant. (my emphasis).

[para 12] When I look at the dates of the records disclosed to the Applicant (both when they were created and when they were collected by the Public Body), none of them reveal a date within the time period that the Applicant has specified.

[para 13] Since the Applicant has determined that the records that the Public Body has disclosed to him are not relevant to his request, he has also asserted that the exceptions to the disclosure do not need to be reviewed in this Inquiry.

[para 14] I agree. However, the Applicant has also asserted, in correspondence to this Inquiry, that his request for access has been unduly delayed. For the sake of expediency (that is, to forestall any further delays should the Applicant decide to raise concerns as to the exceptions at a later time), I will also determine whether the Public Body properly applied section 19(1) to parts of pages 1.38 and 1.39. The Applicant will therefore have a decision not only on the issue of the adequacy of the search for records, but also whether or not the Public Body properly withheld portions of certain records. The other issues identified in the Notice of Inquiry will not be addressed.

1. Did the Public Body properly apply section 19(1) of the Act (confidential evaluations) to the information in the records?

[para 15] The records two which section 19(1) was applied are two pages of email correspondence dated November 19, 2012. The email is addressed to the chair of the recruiting committee.

[para 16] Section 19(1) of the Act states:

> ***19 (1)*** *The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.*

[para 17] In Order F2009-029, Commissioner Work stated a three part test for exception under this section (at para 107) as follows:

1. Information must be evaluative or opinion material
2. Information must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for
    - Employment, or
    - For the awarding of contracts or other benefits by a public body,
3. Information must be provided explicitly, or implicitly in confidence.

[para 18] Upon review of this record, it is clear that the information provided is evaluative or opinion material. It is compiled for and addressed to the head of the recruitment committee for the purpose of determining the Applicant's suitability, eligibility or qualifications for employment. From the Public Body's submissions to this Inquiry and the content of the information, it is clear the writer of the email had provided it in confidence, and objected to its disclosure.

[para 19] I find that the three part test for exception to disclosure has been met under section 19 and I find that the Public Body properly withheld portions of this record from the Applicant.

2. **Did the Public Body meet its duty to the Applicant under section 10 of the Act to respond to him openly, accurately and completely, and did it conduct an adequate search for responsive records?**

[para 20] The Applicant's access request states:

> Access to any records relating to the offer of employment and its rescinding (for me, [the Applicant]), for employment at [the named Faculty], for a contract in the amount of $250,000), including those from [the Dean]. Any emails, notes, letters, telephonic records related to the offer and its rescinding (that occurred in December, 2012 – January 2013). Especially the **identity** of the persons(s) who provided negative assessments of me to [the Dean](or to any member of his committee), and details of those negative assessments.

[para 21] The Applicant had initially requested records that had a date range from December 1, 2012 to January 13, 2013. The Public Body responded with only one email that was disclosed in its entirety. The date range was extended, after correspondence between the Public Body and the Applicant, to October 1 – November 30, 2012.

[para 22] The Public Body took the position that the Applicant had not received an offer of employment:

> It is the University's position that an offer of employment was never made to the Applicant and therefore never rescinded. Although the Applicant was under consideration for a position, the University never made him a formal offer of employment. The University's delegation of authority does not permit a Dean to make a formal offer of employment of this type.

[para 23] The Public Body did, however, process the Applicant's request for access "responsive to what he perceived as an offer of employment".

[para 24] In previous orders of this office, the following principles have been established under section 10 of the Act:

1. A Public Body's duty to assist an applicant includes the obligation to conduct an adequate search (Order 2001-016 at para.13, Order F2007-029, at para. 50).
2. 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 to assist the Applicant within the meaning of section 10 (Order 97-003 at para. 25, Order F2009-027 at para, 46).
3. An adequate search has two components in that every reasonable effort must be made to search for the actual records requested and the Applicant must be

informed in a timely fashion about what has been done to search for the requested records (Order 2001-016 at para.13, Order F2007-029 at para. 50).

4. A Public Body must make every reasonable effort to locate responsive records; this does not require perfection (Order F2012-26 at para. 27, Order F2013-23 at para.18).
5. The decision as to whether an adequate search was conducted must be based on the facts relating to how a public body conducted a search in the particular case (Order 98-003 at para. 37).
6. In general, evidence as to the adequacy of a search should cover the following points:
    a. Who conducted the search
    b. The specific steps taken by the Public Body to identify and locate records responsive to the applicant's access request
    c. The scope of the search conducted (e.g. physical sites, program areas, specific databases, off-site storage areas, etc.)
    d. The steps taken to identify and locate all possible repositories of records relevant to access request (e.g., keyword searches, records retention and disposition schedules, etc.)
    e. 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).
7. While it may not be necessary in every case for a Public Body to give an applicant all of the information about its search, as described in point 6, it should provide greater detail when an Applicant specifically raises questions or concerns (Order F2009-001 at para. 26).

[para 25] The Applicant has raised a concern that the Public Body did not conduct an adequate search for records. He asserts that the Dean and his search committee would have records relating to the rescinding of the offer of employment within emails, telephone records and the file relating to the search for a suitable candidate for the position in question.

[para 26] In Order F2007-028 (at para. 46), the Commissioner said:

> Section 10 places the duty to assist an applicant on the head of the public body, not simply employees of the public body, or the public body in general. As a result, the head, or the person to whom the head has delegated authority, must be in a position to establish that he or she did in fact conduct an adequate search for records as part of the duty to assist an applicant. In a situation where the head or the delegate does not have direct knowledge of the steps taken to search for records, the head will be unable to establish that the search for records was adequate. I do not mean that the head of a public body is required to seek out every record personally. However, the head, or the head's delegate, should take a supervisory role and be aware of exactly what steps have been taken to locate records, as the head is accountable for the quality of the search under section 10.

[para 27] The foregoing was upheld in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 (CanLII) (at paras. 53 and 54), in which the Court agreed that sufficient evidence must be presented in order to establish the adequacy of a search:

> As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by *FOIPP*. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.
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> In this case, [a disclosure analyst] was tasked with organizing the search. Her letter of January 18, 2006 does not detail the steps taken to search for records. It simply asserts that she conducted searches with various individuals and categories of individuals and located the records itemized in the letter. There is no evidence from [the disclosure analyst] as to the steps which she took to supervise the search.

[para 28] In this case, the Public Body's submissions regarding the search for records, are as follows:

> The University searched for records responsive to the Applicant's request by contacting University employees that would have had direct knowledge of the information being sought. The Applicant's initial request specified records in the possession of [the Dean]. [The Dean] searched for records in response to the Applicant's initial request, the date range of which was December 1, 2012 – January 31, 2013. Only one record, an email, was located and it was provided to the applicant in its entirety. The Applicant was dissatisfied, and asked to expand the date range of his request, adding October 1-November 30, 2012. [The Dean] searched a second time using the expanded date range and located several more responsive records. Due to the amended time frame, [named employee] who was head of the recruitment committee, was also asked to search his records. [Named employee] was involved in the hiring process which effectively ended by late November 2012. [Named employee] and [the Dean] searched their own records.
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> [Named employee] confirmed there were no separate meeting minutes or notes from the recruitment committee. [Named employee] emails served as the meeting minutes, which was common practice in that faculty. The recruiting committee discussed the candidates verbally, and [named employee] summarized the discussions in email. [The Dean and the named employee] confirmed verbally that they did not have any additional records from or to any of the committee members.
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> Human Resources was not involved in this phase of the recruitment process, so they were not asked to conduct a search for records. There are no other faculties or units in the University that would have been involved at this phase of the recruitment process. The University submits that it conducted a thorough and complete search for records, and that all responsive records, subject to redactions, were provided to the Applicant.

[para 29] The Public Body, in rebuttal submissions, addresses the Applicant's concerns regarding the search as follows:

> The University conducted a thorough search of records within the applicant's specified date range of October 1, 2012 to January 31, 2013. Responsive emails from the email accounts of [the Dean] and [named employee] were located, redacted according to the Act, and provided to the Applicant. Assessments of the Applicant's suitability for employment were among the records located. The assessments were provided to the Applicant, some with redactions in compliance with the Act.
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> The Applicant's rebuttal submission makes reference to telephone calls, suggesting that the University did not conduct an adequate search in that area. The University does not record telephone calls, not does it keep logs of telephone calls made or received. The University cannot search for telephone calls, much less by area code as suggested by the Applicant.

[para 30] The Public Body asserts: "Despite a comprehensive search, the University did <u>not</u> discover any records that could be categorized as 'negative assessments'."

[para 31] The Public Body indicated that initially, only the Dean of the particular faculty searched for records. When the search was extended, the head of the recruitment committee was also asked to search his records.

[para 32] I am not satisfied from the Public Body's submissions that it fully explained how the search for responsive records was conducted. The submissions indicate that two individuals were contacted and they reported back with certain records. The submissions do not indicate what steps were taken to locate records, and the scope of the search as outlined in Order F2007-029 referred to above.

[para 33] Particularly, the Public Body has not provided evidence of the search criteria for the emails (key word search, types of files searched) or where searches were conducted (what repositories).

[para 34] The Public Body has submitted that since it does not record telephone calls, and does not log received or made calls, there are no records to disclose. However, it is conceivable that notes may be made of telephone conversations, even though there is no policy or duty to "log" telephone calls. It is also conceivable that responsive information may be found in billing records or in cell phone records if a Public Body employee were using a cell phone to conduct the Public Body's business (Order F2009-031). I am not satisfied that the Public Body has fully explained why it believes there are no responsive records to be found with respect to telephone calls made or received.

[para 35] The Public Body determined that only two individuals were required to search their records. I assume this is because of the Public Body's determination that there were no separate meeting minutes or notes from the recruitment committee aside from the emails sent by the head of the committee. The Applicant however, asked for "[a]ccess to any records relating to the offer of employment and its rescinding (for me,

(the Applicant), for employment at [the named Faculty], for a contract in the amount of $250,000.), including those from [the Dean]. Any emails, notes, letters, telephonic records related to the offer and its rescinding (that occurred in December, 2012 – January 2013). Especially the **identity** of the persons(s) who provided negative assessments of me to [the Dean](or to any member of his committee).” (my emphasis)

[para 36] It is conceivable that another committee member may have received the record that the Applicant is seeking or recorded a telephone conversation containing responsive information, even though it is not recorded in the meeting minutes. If that were the case, that would be a responsive record to the Applicant’s request. However, other committee members were not asked to conduct searches. I am not satisfied from the Public Body’s submissions that it fully explained why it was not necessary to have other committee members search for responsive records.

[para 37] In Order F2010-022, para. 77, the adjudicator states the following:

> The point of conducting an adequate search under section 10 of the Act is two-fold, in that a public body must not only conduct an adequate search, but also fulfill the informational component by explaining what was done to conduct the search and why no more responsive records exist. In an inquiry like this one, where a public body does not adequately explain its search, it is difficult to know whether an adequate search was not conducted, or whether the public body conducted an adequate search but did not adequately explain what was done. Either way, the duty to assist has not been met, and the public body may be ordered to conduct an adequate search in all or certain respects, inform the applicant what was done in respect of the search, and explain why no more responsive information exists than what has been found or produced.

[para 38] The Public Body may have conducted an adequate search for records, but it has not provided a satisfactory explanation of the search and why it believes that no further responsive records exist. Rather than ordering the Public Body to conduct a further search, I will order it to provide greater details of the search to the Applicant. If the Applicant is not satisfied with the response of the Public Body, the matter can be reviewed by me on an expedited basis.

V. ORDER

[para 39] I make this Order under section 72 of the Act.

[para 40] I order the Public Body to provide the Applicant with greater detail regarding its search for responsive records having regard to the questions raised above in paragraphs 33, 34 and 36 and why it believes that no further records responsive to the Applicant’s request exist.

[para 41] If the Applicant is not satisfied with the Public Body’s response to this order, he may bring this matter forward for a review of the response and I will hear it on an expedited basis.

[para 42] 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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Neena Ahluwalia Q.C.
Adjudicator