

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2015-36

December 3, 2015

PEACE RIVER SCHOOL DIVISION NO. 10

Case File Number F8298

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Peace River School Division No. 10 (the Public Body). She requested all the information that the Public Body had gathered in relation to a bullying complaint she had made. She also requested records containing information provided by individuals who had provided references for her.

The Public Body conducted a search for responsive records, but was unable to locate any records regarding the bullying complaint (aside from a written decision dismissing the complaint which had already been provided to the Applicant). The Public Body provided records relating to her references.

The Applicant requested review of the Public Body's response to her access request.

The Adjudicator found that the Public Body had conducted a reasonable search for responsive records and had responded openly, accurately, and completely. The Public Body was unable to produce records containing information gathered in relation to the bullying complaint, as no such records had been created.

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

Authorities Cited: **AB:** Orders 2001-016, F2007-029, F2015-29

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

I. BACKGROUND

[para 1] The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Peace River School Division No. 10 (the Public Body). She requested all the information that the Public Body had gathered in relation to a bullying complaint she had made. She also requested records containing information provided by individuals who had provided references for her.

[para 2] The Public Body responded to the Applicant's access request. The Public Body provided records regarding the Applicant's references, but stated that it was unable to locate records in relation to an investigation into the bullying complaint.

[para 3] The Applicant requested that the Commissioner review the Public Body's response to her access request. The Commissioner authorized mediation to resolve the issues. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. ISSUE

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

[para 4] Section 6 of the FOIP Act authorizes applicants to make access requests for records in the custody or control of a public body.

[para 5] Section 10 of the FOIP Act creates a duty in a public body to assist an applicant who has requested access to records. This provision 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.

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[para 6] 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 7] 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 8] In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 9] 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 has 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.* [My emphasis]

[para 10] The Applicant explains the remedy she is seeking in requesting an inquiry:

Therefore, I am requesting the Commissioner to verify that these documents [a report referred to in a decision document] do not exist and that my references' responses clearly show they were supportive in my hiring. I'm hoping that after an inquiry, the Commissioner will make a recommendation or order that due to the information I have provided, a review of the Board of Trustees' decision is warranted under these circumstances and that all falsified documents will be corrected.

[para 11] In her letter to the Applicant regarding her decision to conduct an inquiry, the Commissioner stated:

In your Request for Inquiry, you have asked that I order a review of the Board of Trustees' decision regarding an investigation into complaints, and to verify that the responses of your references were supportive of you being hired. These matters are outside the scope of the *Freedom of Information and Protection of Privacy Act* and my authority under that Act. As such, these matters will not be addressed in the inquiry.

[para 12] The Commissioner agreed to conduct an inquiry as to whether the Public Body has met its duty to assist the Applicant by conducting a reasonable search for responsive records and by responding to her openly, accurately, and completely. Because the duty to assist an applicant has an informational component, the Applicant's request for verification as to whether a report she believes should have been produced exists or not, is a request within the jurisdiction of this office to address.

[para 13] The Applicant points to a paragraph of a decision dismissing her bullying complaint. This paragraph states:

With respect to the allegations of bullying, the investigated employee stated that in [the deputy superintendent] report to him, after she met with several staff members, the [deputy superintendent] reported finding no information to support allegations of harassment or bullying behaviours. The investigated Employee relayed that he was informed by the Deputy Superintendent that there was discord as between both the Complainant and two principals of [the school].

[para 14] This paragraph suggests the existence of a report and information about discord between the Complainant and two principals of a school, and could be taken as suggesting that the report was in written form.

[para 15] The Public Body provided the affidavit evidence of its FOIP Coordinator regarding the search she conducted for responsive records. She states:

Relative to each formal request for records as matter of practice, I personally conduct or supervise the electronic and physical search of the public body's database and physical files.

I also personally speak to each individual identified as having possibly generated or received responsive records, along with speaking with any clerical staff that may have knowledge about the possible physical or electronic location of responsive records.

The following areas are part of each search for responsive records: the physical and electronic files on site in our records management and personnel filing system, each named [employee's] individual personal filing system and notebooks.

As a matter of course I often direct a further search by the Board IT department of all e-mail accounts to determine if any transitory records have been stored in various staff members e-mail as there could be responsive records. This further search is based on search strategies involving both key individuals identified as possibly having information and [...] with key words that would pull records from the e-mail accounts of all school board staff.

With respect to the specific request of locating an investigation report into a bullying complaint by the Applicant, I followed my general practice as described above. I reviewed the personnel files located at central office - in both electronic and hardcopy form - of the individuals identified by the Applicant as having been involved in the harassment or bullying behaviour, which included four current staff members of [the school] and a former principal. I also conducted an electronic search of our e-mail system using various search strategies including by topic, and subject. In addition, I contacted both the [deputy superintendent] and [the principal] to determine if either person had or was aware of any records in any form electronic or hardcopy. Both [the deputy superintendent] and [the principal] confirmed that they were unaware of any records pertaining to harassment or bullying behaviour investigation such as report resulting from the Applicant's complaint of harassment or bullying behaviours that related to [the school].

I personally conducted the physical and the electronic search of the public body's records and electronic database. As FOIP Coordinator, I have the authority to search or direct a search for any record on the public body's servers including e-mail stored on the database.

In order to ensure that my electronic email searches were thorough, I directed the IT department to search emails of the principal and former principal and pull any records with references to the Applicant's harassment complaint or discord as between the Applicant and the principals.

I am confident based on my knowledge of our system and record storage practices, that I completed a thorough and complete search of the public body's database in order to locate responsive records to the Applicant's access to information request.

By way of e-mail correspondence dated July 8, 2014, (see tab #I) I informed the Applicant that I was unable to locate any responsive record. I informed the Applicant at that time that I had checked personnel records and our general records management file system and also informed the Applicant that I had spoken to both [the deputy superintendent] and [the principal].

[para 16] After I reviewed the Public Body's submissions, I asked the following questions:

1. Was the report referred to in the excerpt from the subcommittee's decision verbal or written?
2. If the report was written, why has it not been produced?
3. Did [the deputy superintendent] make any notes of interviews in order to prepare the report? If so, why have the notes not been produced?
4. Were [the superintendent's] records included in the search? If not, why not?

[para 17] The Public Body provided the following answers to my questions:

1. The report was verbal.
2. See response above.
3. [The deputy superintendent] did not create any notes to prepare her report to the Superintendent of Schools.
4. The search by [the FOIP Coordinator] involved all records at Central Office which would have included any records sent to or created by the Superintendent respecting the initial complaint of the applicant.

[para 18] The Public Body confirmed that the report referred to in the decision of the subcommittee was verbal. It also confirmed that the deputy superintendent did not make notes in order to prepare the oral report. Finally, it confirms that all records created or received by the superintendent are located at its central office. It confirms that when it searched this area, the Superintendent's records would also have been searched. As set out in the FOIP Coordinator's affidavit, no responsive records were located in the central office.

[para 19] The Public Body has explained that it cannot produce the information the Applicant has requested because this information was verbal and not recorded.

[para 20] As discussed above, applicants may make access requests for recorded information in the custody or control of a public body; however, there is no ability to make an access request for information that is not recorded in some form.

[para 21] 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?

[para 22] The affidavit of the FOIP coordinator addresses the first four questions in detail. The response of the Public Body to my questions in combination serves to answer the fifth question.

[para 23] From the evidence of the Public Body, I find that the FOIP Coordinator searched all likely repositories of responsive records. She spoke with the people who were likely to have created responsive records to determine whether they had created responsive records. She also contacted I.T. staff to conduct an electronic search for responsive records. This aspect of the search involved using the names of persons likely to occur in responsive records as search terms. The FOIP Coordinator also searched the central office. The Public Body determined that the report referred to in the subcommittee decision dismissing the Applicant's bullying complaint was verbal, and therefore could not be located or produced to the Applicant. The Public Body also explained the steps it took to locate responsive records to the Applicant in its response to her, as well as the individuals it had contacted in order to locate responsive records. Based on the evidence, I find that it is unlikely that other methods of searching, or searches of other locations, would result in any responsive records being located.

[para 24] I find that the Public Body met its duty to assist the Applicant. The reason it has been unable to produce records responsive to the Applicant's request for records relating to her bullying complaint is because no responsive records were created.

III. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I confirm that the Public Body met its duty under section 10(1) of the Act to the Applicant by responding openly, accurately, and completely.

Teresa Cunningham
Adjudicator