

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2016-02

January 26, 2016

OFFICE OF THE PREMIER/EXECUTIVE COUNCIL

Case File Number F8007/F8008/F8009

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Summary: The Applicant made three access requests pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) to the Office of the Premier/Executive Council (the Public Body) for records relating to a residential space being planned for the top floor of the Federal Building in Edmonton. Originally, the Public Body was unable to find any responsive records but eventually found a small number of responsive records which it provided to the Applicant. The Applicant believed that the Public Body failed to perform an adequate search for responsive records.

The Adjudicator found that the Public Body failed to meet its duty under section 10 of the Act when it did not search the Protocol Office for responsive records. As well, the Adjudicator found that the Public Body ought to search deleted email if it had not already done so. The Adjudicator also found that the Public Body failed to meet its duty under section 10 when it did not provide the Applicant with details about where it had searched for responsive records. Finally, the Public Body failed to meet its duty under section 10 when the Applicant was not advised that responsive records could be found in the custody and control of another public body.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 15, and 72.

Authorities Cited: AB: Orders 97-003, 99-039, F2007-029, F2009-009, and F2013-32

I. BACKGROUND

[para 1] Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), on January 31, 2014, the Applicant made three separate but related requests to the Office of the Premier/Executive Council (the Public Body) for records related to a proposed residence to be built for then Premier Redford in the Edmonton Federal Building (residential space).

[para 2] The first access request sought all records related to any reference to the residential space. The second request sought all records relating to changes to the construction of the Edmonton Federal Building involving accommodations on the top floor. The second request made particular mention of communications between two named employees. The third access request was for all records related to communications concerning the Edmonton Federal Building that named a specific employee.

[para 3] The Public Body initially responded that there were no responsive records relating to any of the requests. Later it found, and partially disclosed, some records that were responsive to the first request.

[para 4] On March 12, 2014, the Applicant requested a review of the Public Body's response stating that she did not believe that the Public Body had performed an adequate search for responsive records. There was an attempt made by our Office to resolve this matter but it was not successful. On November 13, 2014, the Applicant requested an inquiry, which was accepted. I received submissions from both the Applicant and the Public Body.

II. RECORDS AT ISSUE

[para 5] The records at issue in this inquiry are any responsive records requested by the Applicant on January 31, 2014 that were not found by the search conducted by the Public Body.

III. ISSUES

[para 6] The Notice of Inquiry dated August 17, 2015 states the issue in this inquiry as follows:

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

IV. DISCUSSION OF ISSUE

Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? 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 Public Body's duty under section 10(1) of the Act also includes a duty to perform an adequate search for responsive records (Order 97-003 at para 25). As the Adjudicator in Order F2009-009 stated:

A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). 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 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

(Order F2009-009 at para 45)

[para 9] Therefore, in order to meet its duty under section 10(1) of the Act, the Public Body must prove that it made every reasonable effort to search for responsive records and that it told the Applicant, in a timely manner, what it did to search for responsive records.

1. Evidence of the Public Body's search:

[para 10] What a public body ought to provide as evidence of an adequate search was set out in Order F2007-029 as follows:

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

(Order F2007-029 at para 66)

[para 11] The Public Body provided me with an affidavit stating that it sent the Applicant's requests to specific individuals in two program areas – the Office of the Premier and Executive Council's Corporate Service Branch. A former employee who was named in the access request was also specifically contacted. No records were located. The Public Body also contacted its IT department and determined that the former employee's emails were retained only for 90 days, and, therefore, had been destroyed in accordance with its retention policy.

[para 12] The Public Body also noted that, in an unrelated search performed on April 29, 2014, there was an indication that there may be records responsive to the Applicant's request in other program areas within the Public Body. Given this new information, the Public Body sent the Applicant's request to the Office of the Deputy Minister, the Cabinet Coordination Office and the Protocol Office. The Protocol Office found 5 pages of responsive records that were severed and provided to the Applicant.

[para 13] In its submissions, in response to specific information given in the Applicant's Request for Review, the Public Body stated that it had contacted a now former employee of the Public Body and asked him to search for responsive records. The now former employee's assistant advised that he did not keep emails going back to the dates mentioned in the search.

[para 14] The Public Body's affidavit and submissions lacked sufficient information to meet its burden of proof. For instance, it did not tell me why only two program areas were searched and where the individuals who did the search looked. Therefore, I asked the Public Body further questions. I was advised that all paper and electronic files (including email) have been searched. I asked if it was possible to search deleted email and was advised that it was possible. However, I am not clear if deleted email was ever searched by the Public Body. The process described to me did not appear onerous and so I find that if the Public Body has not already done so, it ought to search deleted email for responsive records.

[para 15] The reason given in response to my question as to why the search was limited to two program areas initially was because the Premier's Office was "...exclusively involved in the development of the potential residential space on the 11th Floor" (letter dated December 7, 2015 from the Public Body). The Public Body explained that the Protocol Office was involved in the development of office space on the 11th floor but not residential space, and so it decided that it likely held no responsive records and, as a result, it was not searched.

[para 16] I find that the fact that it was known that the Protocol Office was involved in the development of the 11th floor of the Federal Building at all should have led the Public

Body to search that program area. The Applicant's access request was broad. She was looking for any information that mentioned the residential space or that referred to changes in the construction of the 11th floor for accommodations. It seems reasonable and likely that at some point that program area would have been provided some records relating to the proposed residential space with which its office space would have shared a floor, even if simply to advise that program area of the part of the floor that it would be able to use for its space. Therefore, I find that the Protocol Office ought to have been searched by the Public Body when it received the Applicant's access requests.

[para 17] The Public Body's search of all of its paper and electronic records yielded surprisingly few records. Throughout its submissions, the explanation given by the Public Body for this was that Alberta Infrastructure was primarily responsible for the Federal Building project and therefore, most of the information that was provided to the Public Body relating to this project was considered transitory and not retained. In response to my specific question as to why the Public Body believes no other responsive records exist the Public Body stated:

The expectation is that departing employees and current employees ensure non-transitory records are saved and filed in accordance to the Records Management Regulation. From our perspective, any records received in our department relating to this project were likely records or communications of update notifications, progress and/or informational correspondence. The contracts, operational transactions and decision making correspondence would be in the custody and control of Alberta Infrastructure.

(Public Body's letter dated December 7, 2015 at pages 3-4)

[para 18] With regard to the Public Body's duty under section 10 of the Act to adequately search for responsive records, I find that the Public Body's original search was not adequate because the Protocol Office was not searched. In any event, the Protocol Office has now been searched and so I will not order a further search. Although I understand why the Applicant feels that there ought to be more responsive records, the Public Body has classified most of the records relating to 11th floor of the Federal Building as transitory and has destroyed them. As a result, there are simply no further responsive records to provide to the Applicant. Whether the Public Body properly classified records as transitory or not is beyond the scope of this inquiry.

2. Advising the Applicant what was done to search

[para 19] As cited above, the duty to assist an applicant with regard to conducting an adequate search has two parts. First a public body must make every reasonable effort to search for responsive records. Second, a public body must inform the applicant in a timely manner as to the steps taken to search for responsive records. I have already found that the Public Body initially failed to conduct an adequate search and for the reasons below, I find that it also failed to inform the Applicant of the specific steps it took to search for responsive records.

[para 20] In its submissions, the Public Body acknowledges that this is a part of its duty under section 10(1) of the Act. However, the Public Body's responses to the Applicant do not detail at all what steps it took to search for responsive records. Its responses to the Applicant's access requests stated:

A search by [the Public Body] has failed to retrieve any records relating to the subject of your request. A thorough search for records has been conducted by the department and did not yield any responsive records on the subject matter you are seeking.

(Public Body's letters dated March 6, 2014)

[para 21] The Public Body's response does not hint at what a "thorough search" might include. It did not even mention what program areas were searched, or the search parameters used. On receiving this response from the Public Body, the Applicant would not be aware, for instance, that only two of the Public Body's program areas were searched or if files held by the employee whom she named in her access request were ever searched. The duty to inform an applicant of the steps taken to locate responsive records exists for every access request but the need to fulfill this duty is particularly important where no responsive records are found or where an access request is more general. In this regard, I find the Public Body's response to the Applicant was not adequate to meet its duty to inform her of the steps taken to search for responsive records.

3. Additional duties under section 10(1) of the Act

[para 22] As part of its submissions, the Public Body advised that one of the reasons there are so few responsive records is because the renovation of the Federal Building was Alberta Infrastructure's project. The Public Body stated:

Finally, the Public Body would not have control over records that were the purview of Alberta Infrastructure, and any records that may have been provided by that public body to Executive Council would have been treated as transitory records and may have been disposed of as authorized by section 3(e)(i) of the Act, as Alberta Infrastructure would have been the holders of the bulk of the official records related to the Edmonton Federal Building.

In sum, there are few responsive records in the custody and control of the Public Body. The Public Body was not the lead ministry on the Edmonton Federal Building project and the majority of the official records related to the project would be held by Alberta Infrastructure. Further, the Public Body maintains that as the majority of Government of Alberta policies and projects are led by various ministries and not this Public Body, it is consistent with past experience that this Public Body may be the originator of a very small number of official records related to those policies and projects.

(Public Body's initial submissions at page 6)

[para 23] I am not certain that it is appropriate as a general policy for records provided to the Public Body by another public body to be considered “transitory”. However, as noted above, findings on this are beyond the jurisdiction of this inquiry.

[para 24] That being said, it is clear that the Public Body believes that there is another public body that likely has records responsive to the Applicant’s access request – Alberta Infrastructure. Section 15 of the Act allows the Public Body to transfer a request to another public body. Section 15 of the Act states:

15(1) Within 15 days after a request for access to a record is received by a public body, the head of the public body may transfer the request and, if necessary, the record to another public body if

- (a) the record was produced by or for the other public body,*
- (b) the other public body was the first to obtain the record, or*
- (c) the record is in the custody or under the control of the other public body.*

(2) If a request is transferred under subsection (1),

- (a) the head of the public body who transferred the request must notify the applicant of the transfer as soon as possible, and*
- (b) the head of the public body to which the request is transferred must make every reasonable effort to respond to the request not later than 30 days after receiving the request unless that time limit is extended under section 14.*

[para 25] The Public Body correctly points out that this Office has previously found that it is not mandatory to transfer an access request to another public body pursuant to section 15 of the Act and it chose not to transfer the request to Alberta Infrastructure. However, this discretion must be properly exercised, which it does not appear to have been in this case (see Order F2013-32 at para 15). That being said, it is my understanding that the Applicant has made access requests to Alberta Infrastructure, so I will not order it to properly exercise its discretion and transfer this request.

[para 26] Section 10(1) of the Act also includes the duty to advise an Applicant when it knows that another public body likely has responsive records (see Order 99-039 at para 109). The Public Body did not advise the Applicant of this and therefore failed to meet its duty in this regard. This duty is particularly important in this inquiry given that the Public Body retained few records but was well aware of where responsive records could be found. This is information that the Applicant may not be aware of and therefore, in order to assist the Applicant, the Public Body ought to have advised the Applicant that she should make a request to Alberta Infrastructure, if she had not already done so.

V. ORDER

[para 27] I make this Order under section 72 of the Act.

[para 28] I find that the Public Body failed to meet its duty to the Applicant under section 10 of the Act.

[para 29] I order the Public Body to search for deleted email responsive to the Applicant's request if it has not already done so and, subject to the exceptions in the Act, to provide the Applicant with any responsive records retrieved.

[para 30] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Keri H. Ridley
Adjudicator