

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-35

August 22, 2018

ALBERTA COMMUNITY AND SOCIAL SERVICES

Case File Number 003421

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 Alberta Human Services, now Alberta Community and Social Services (the Public Body). He stated:

I would like a copy of ALL AISH Policy and Procedure Manuals that have been or are used between January 1st 1979 to January 1, 2016 to determine or evaluate ALL ELIGIBILITY issues or matters for applicants applying for AISH. Because AISH ELIGIBILITY is assessed or evaluated in multiple cities or towns – there must be written policies and procedures covering exactly how ALL eligibility issues are to be dealt with. Please note: The AISH Program Policy document currently available on the Human Services website is far too vague or general & is definitely not the Policy & Procedure Manual document that I am seeking.

After the Public Body informed him it would not search for the records unless he paid a \$405 deposit, the Applicant modified his access request:

Here is what I would ask for under the circumstances: please send a copy of the CURRENT AISH Manual ONLY which covers full, complete, and detailed policies and procedures for evaluating ALL matters of eligibility about an individual applying for AISH.

The Public Body provided copies of its policy and procedure manual. The Applicant requested review by the Commissioner of the Public Body's response to his access request. He argued that the Public Body had not included the records he was seeking in its response, but had provided nonresponsive records.

The Adjudicator determined that any recorded information used by employees as policies, guidelines, directions or procedures for making current decisions would be responsive to the Applicant's access request. Because the Public Body did not explain the steps it took to clarify the access request or to search for responsive records, it was unclear whether it had conducted an adequate search for responsive records. The Adjudicator directed the Public Body to conduct a new search for responsive records that included records that have been used by, or are to be used by, employees, as directions, guidelines, or policies in order to make current adjudicative decisions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 72; *Assured Income for the Severely Handicapped Act*, S.A. 2006, c. A-45.1, ss. 3, 7, 10

Authorities Cited: AB: Orders F2004-026, F2007-029, F2011-016

I. BACKGROUND

[para 1] On March 29, 2016, the Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Human Services, now Alberta Community and Social Services (the Public Body). He stated:

I would like a copy of ALL AISH Policy and Procedure Manuals that have been or are used between January 1st 1979 to January 1, 2016 to determine or evaluate ALL ELIGIBILITY issues or matters for applicants applying for AISH. Because AISH ELIGIBILITY is assessed or evaluated in multiple cities or towns – there must be written policies and procedures covering exactly how ALL eligibility issues are to be dealt with. Please note: The AISH Program Policy document currently available on the Human Services website is far too vague or general & is definitely not the Policy & Procedure Manual document that I am seeking.

[para 2] The Public Body decided that it would not begin searching for the requested records unless the Applicant paid a deposit of \$405. This figure was based on an estimate that it would take 30 hours for a total of \$810 to search for the records the Applicant had requested.

[para 3] The Applicant revised his access request. He stated:

Here is what I would ask for under the circumstances: please send a copy of the CURRENT AISH Manual ONLY which covers full, complete, and detailed policies and procedures for evaluating ALL matters of eligibility about an individual applying for AISH.

In response, the Public Body provided the Applicant with 90 pages of the Policy and Procedure Manual.

[para 4] The Applicant requested review by the Commissioner of the Public Body's response to his access request. In his request for review, he stated:

When I received the letter of April 20th from [an employee of the Public Body] – I had NO reason to understand that she had completely NOT understood the request. I had taken such extraordinary measures to precisely show what I didn't want (and what I wanted) -- given all of

the information above as well as the actual copy of the on-line manual that I CLEARLY stated I did not want. I also clearly stated that I wanted ALL policy and procedure manuals “to determine or evaluate ALL ELIGIBILITY issues or matters for applicants applying for AISH. Because AISH ELIGIBILITY is assessed or evaluated in multiple cities or towns – there must be written policies and procedures covering exactly how ALL eligibility issues are to be dealt with.”

When someone asks for ALL written policies – in other words anything and everything that is written that would constitute a manual or serve as a manual – I cannot even begin to fathom HOW on earth my request was so completely **not** grasped. [...] And I never once indicated that the information I was seeking had to be all in one manual per period of usage. For all I know there could be a bound manual or not. There could be several booklets with appendices and updates. I was clear about the ALL part and the policies and procedures had to be written down & what they are specifically about. I never ever asked for ALL AISH policies or procedures, just the documents which would be used to determine eligibility matters or issues. [Emphasis in original]

[para 5] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. In the course of this process, the Public Body agreed to search for additional policies and it located additional records.

[para 6] Following this process, the Applicant requested an inquiry. The Commissioner delegated her power to conduct the inquiry to me.

II. ISSUE

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

[para 7] The Applicant’s request for review raises two issues. First, he states that the records he was provided in response to his access request are not responsive. Second, he indicates that he believes the Public Body has responsive records that it has not yet produced.

[para 8] 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 9] 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 F2007-029, the Commissioner noted:

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

Whether the duty to conduct a reasonable search for responsive records is met is, in some cases, dependent on the manner in which a public body interprets an applicant's access request. If a public body adopts an overly narrow interpretation of an access request, it may fail to search for records otherwise falling within the scope of the request. If it interprets an access request overly broadly, it may spend time and expense locating records that an applicant has not requested.

[para 10] In Order F2004-026, former Commissioner Work noted that public bodies may have to clarify access requests in some circumstances in order to meet the duty to assist. He said:

Finally, in its oral submission, the Applicant argued that the Public Body failed in its duty to assist by failing to clarify with the Applicant what it meant by "implementation" in the context of its original request. The Public Body suggested it did not do this because it assumed that it already understood the request. It explained that it thought it would not be reasonable for the Applicant to ask for the numbers of records that would be involved on the other understanding (that the request included all records in 2003 created by the Public Body relative to Bill 27 after the Bill's passage - which the Public Body described as "11 cubic feet of records"). While I have some sympathy with the Public Body's point, I have also been advised by the parties that the Applicant has since clarified this aspect of the request, which suggests that clarification was possible, and that there is indeed some further information relative to this aspect that is being sought. Thus I agree that the Public Body should have asked for clarification as to the part of the request that was ambiguous in its wording, rather than relying on its assumption, and that its failure to take this step was a failure to assist the Applicant.

[para 11] In Order F2011-016, the Adjudicator considered previous orders of this office commenting on the duties of public bodies to interpret access requests reasonably. He said:

The Applicant submits that the Public Body was too restrictive in its interpretation of the information that he requested and therefore overlooked responsive records. Previous Orders of this Office have said that a record is responsive if it is reasonably related to an applicant's access request and that, in determining responsiveness, a public body is determining what records are relevant to the request (Order 97-020 at para. 33; Order F2010-001 at para. 26). The Applicant argues that applicants should be given some latitude under the Act when framing their access requests, as they often have no way of knowing what information is actually available. I note Orders of this Office saying that a broad rather than narrow view should be taken by a public body when determining what is responsive to an access request (Order F2004-024 at para. 12, citing Order F2002-011 at para. 18).

[para 12] In that order, the Adjudicator found that Alberta Health Services had taken too restrictive an approach in its interpretation of the kinds of information requested by the applicant. As a result, the Public Body had failed to meet its duty to assist the applicant because it had not searched for the records the applicant had requested.

Because the Public Body took an overly restrictive view of the information that the Applicant was seeking, in view of both the wording of his initial access request and the clarification subsequently provided by him, I find that the Public Body did not adequately search for responsive records and therefore did not meet its duty to assist the Applicant under section 10(1) of the Act. I intend to order it to conduct another search for responsive records, bearing in mind the scope of the information that the Applicant actually requested, as discussed above.

[para 13] In the present case, the Applicant's position in his request for review is that the Public Body has misunderstood his access request, despite his attempts to narrow and clarify it.

[para 14] The Public Body provided the following interpretation of the Applicant's access request and description of its response:

The Respondent undertook the following processes:

April 20, 2016 the Respondent sent an acknowledgement letter to the Applicant with a fee estimate for search fees only. The Respondent summarized the understanding of the request to be:

"Full, complete, and detailed policy and procedures, manual(s) for evaluating ALL Matters of eligibility' about an individual applying for AISH from January 1, 1979 to January 1, 2016".

May 4, 2016 the Applicant wrote a response to the April 20, 2016 letter stating, "You absolutely understood what my request was about."

The Applicant also requested, "Here is what I would ask for under the circumstances: please send a copy of the CURRENT AISH Manual ONLY which covers full, complete, and detailed policies and procedures evaluating ALL matters of eligibility' about an individual applying for AISH".

Regarding the other policy and procedure manuals the Applicant questioned whether there would be an offer to waive the search and locate fee.

- May 20, 2016 the Respondent acknowledged the request for a fee waiver under Section 93(3.1).
- June 7, 2016 the Respondent sent a letter to the Applicant advising a fee waiver was denied. However, a copy of the current Policy and Procedures Manual (March 2014) which included additional policy and procedures that were not included in the Policy and Procedures Manual available on the Human Services' website were released June 23, 2016 to the applicant free of charge on a memory stick.

[para 15] The Public Body argues:

The Respondent is of the opinion that the Senior Manager conducted an adequate search for current records as a result of the mediation process. The Notice of Inquiry states that the Applicant is stating that "what they received was unfortunately useless and obviously terribly incomplete, given what I requested".

The Respondent is of the opinion that within the additional 90 records provided to the Applicant the records do provide information that is used by Adjudicators to determine eligibility and

support their decisions. The records, specifically the Framework for Adjudicator Rationale — Approvals, provide a framework for the Adjudicators to support writing up their decision; Summary and Medical Review, Approvals, Denials, Appeals and Additional Reviews. The records also contained the process and templates for facilitating referral for applicants/appellants for assessments, medical consults. The records contain a checklist tool for the AISH Generalists as a guideline for determining which forms to send to the applicant and also includes supporting medical information that maybe relevant to the medical condition.

The Respondent is of the opinion that the Applicant is making assumptions as to what they believe a program area should have in place in writing to perform their duties. The Respondent submits the Policy and Procedures Manual and the additional records outline the processes used to support decisions on a case by case basis made in the performance of duties.

[...]

The Respondent submits that it made every reasonable effort to assist the Applicant and to respond openly, accurately and completely and therefore met its obligation required by section 10(1) of the Act.

The Respondent submits that an adequate search for responsive records was not conducted for the original request as the Respondent is not obligated to perform a search when the fee waiver request was denied and the fees to perform the search were not accepted by the Applicant.

The Respondent submits that an adequate search for additional records requested through the mediation process was adequate and that the 90 pages of records were responsive to the Applicant's request for current information.

The Respondent has not provided affidavits for the search as the Access Specialist responsible for the Request for Access to Information and the mediation process is no longer with the Ministry. As well the Senior Manager, Employment and Financial Program Policy who coordinated the search is no longer with the Ministry.

[para 16] In his submissions for the inquiry, the Applicant drew my attention to an October 2016 report of the Auditor General of Alberta which was critical of the way decisions are made regarding AISH entitlement. In the report, the Auditor General stated:

- AISH workers have to use considerable judgment in their assessment of applications and receive inadequate training and guidance
- The department treats applicants and clients differently in respect to “earning a livelihood”

Here, the Auditor General may be viewed as being critical of a lack of official policy guidelines to ensure consistency in decision making. As a result, in the Auditor General's view, the Public Body's entitlement decisions do not have consistent outcomes.

[para 17] The Public Body takes the position that it has provided records sufficient to satisfy the access request. It argues that the Applicant has unrealistic expectations as to the policies it has created and which are applied in making decisions.

[para 18] The Auditor General's report highlights the fact that the Public Body does not have one official policy manual or guidance document by which all entitlement decisions are made. As a result, if the Applicant had confined his access request only to an official policy manual or policies, I would agree with the Public Body that it has met

its duty to assist the Applicant. However, the Applicant's access request, as written, is not necessarily confined to "official policy manuals" or "official policies" but to any full, complete, and detailed policies and procedures currently used to make entitlement decisions.

[para 19] While it is true that the Applicant used the descriptor, "policy manual" to refer to records he was requesting, he also indicated that responsive manuals would be used by the Public Body "to determine or evaluate ALL ELIGIBILITY issues or matters for applicants applying for AISH".

[para 20] In his request for review to this office, the Applicant stated:

When someone asks for ALL written policies – in other words anything and everything that is written that would constitute a manual or serve as a manual [...]

[para 21] The Applicant is consistent in his communications with the Public Body and with this office that he is seeking records used to determine or evaluate all eligibility issues. The Applicant considers a policy manual to be any written record that *serves* as a manual or guideline in making AISH entitlement decisions. Records employees use as guidelines, regardless of whether they are official in nature, would be responsive to this aspect of the access request.

[para 22] The Applicant's access request is ambiguous, given that he refers to what he is seeking as a policy manual or policy, but also explains that in asking for a policy manual or policy he wants "anything and everything that is written that would constitute a manual or serve as a manual". As noted above, prior orders of this office have held that a reasonable step to assist an applicant under section 10 of the FOIP Act is to clarify an ambiguous access request. As it was clear from the Applicant's correspondence that the Public Body's policy manual did not contain the information he was seeking when he made the access request, a reasonable step would have been for the Public Body to ask the Applicant what kinds of records he was seeking, if not the policy manual. Further, once the Applicant explained that he was looking for any written information that was being used to evaluate AISH eligibility, it would have been reasonable for the Public Body to consider what written resources its employees use to issue eligibility decisions and to confirm whether the Applicant was seeking that information.

[para 23] The records the Public Body provided to the Applicant in response to his access request are primarily concerned with the *form* a decision should take, or the process that should be followed in making a decision, rather than the substance of the decision. With the exception of the portion of the policy manual dealing with the timing of benefits, the records do not address the criteria to be applied in making entitlement decisions.

[para 24] As an example, there are instructions in the records the Public Body included in its response that require an adjudicator to consult a supervisor. For example, on record 70, it states:

Q. How do we address decisions when there are ongoing letters of advocacy from the physician with limited supporting medical information?

A. If there is conflicting medical evidence or the application is a 3rd or 4th review and the decision is going to be denied, consideration for a medical consult and/or psychological assessment may be warranted. These situations are to be reviewed with the Supervisor.

The foregoing passage does not explain the criteria on which a decision to deny entitlement is based or describe how a decision finding supporting medical information to be insufficient is made. The records refer to consulting a supervisor once the decision to deny entitlement has already been made. The information in the records does not discuss what factors are considered relevant to such a decision, or explain how those factors are to be weighed.

[para 25] The Public Body has not explained the process by which it decided that the 90 pages it provided to the Applicant were responsive or how it determined that there were no other responsive records in its custody or control, other than to indicate it conducted a new search during the mediation process.

[para 26] It may be the case that the Public Body's AISH entitlement decisions are usually made on an *ad hoc* basis by employees or by employees in discussion with their supervisors. The Auditor General's report suggests this may be the case, where it concludes that the Public Body's employees are required to use too much judgment in making entitlement decisions and that inconsistent entitlement decisions were being made as a result. However, in my view, it would be unlikely that the Public Body does not have *any* written guidelines, policies, or precedents with which its employees make entitlement decisions.

[para 27] Section 3 of *Assured Income for the Severely Handicapped Act* (AISHA) authorizes a director to make entitlement decisions. Section 7 of AISHA authorizes a director to reverse an entitlement decision if the director considers the individual who was provided benefits is not entitled to them. Section 10 of AISHA creates a right of appeal to an appeals panel. Decisions of the appeals panel, or decisions of a director for which there is no right of appeal to an appeals panel, may be subject to judicial review by the Court of Queen's Bench.

[para 28] Given that the Public Body's decisions under AISHA may be overturned by someone in authority in the Public Body, by an appeals panel, or by the Court, it would seem likely that staff are directed to follow leading cases in order not to be overturned, when the leading case is on point. It may also be the case that supervisors, or other persons in authority in the Public Body, bring precedential cases to the attention of employees and direct them to follow these cases or instruct them to follow a particular set of criteria in specific cases to promote consistency. In addition, it is possible that supervisors direct their employees to decide certain types of cases in a particular way; alternatively, employees may follow criteria consistently that they have developed for themselves, and which is documented in decisions they issue. A precedential decision that is followed, or directions to apply a precedential decision when making an entitlement decision, or a direction to use particular criteria in a given case or cases, or

criteria that are applied consistently, are all examples of written guidelines or policies that would be responsive to the Applicant's access request, even if they appear in emails, decisions, notes, or other informal media. If an employee is expected to follow a guideline or direction in making an adjudicative decision, or chooses to do so, the guideline or direction could be responsive to the access request.

[para 29] Despite conducting a new search for records in the course of mediation, the Public Body has not yet addressed the aspect of the Applicant's access request for written records that may *serve* or be used as guidelines, policies or rules for making eligibility decisions. In addition, it has not yet clarified the exact nature of the records the Applicant is seeking.

Did the Public Body meet its duty to assist the Applicant?

[para 30] The Public Body has not clarified the kinds of records the Applicant is seeking. As it appears that the Applicant's access request is broader in scope than the Public Body has interpreted it, it appears that it has not yet searched for potentially responsive records that may serve as directions, guidelines or policy for its employees. Further, the Public Body has not documented the steps it took to determine whether records would be responsive or the steps it took to search for them. I am therefore unable to find that it conducted an adequate search for responsive records.

[para 31] As the Public Body has not yet demonstrated that it took steps to clarify the access request or conducted an adequate search for responsive records that could reasonably be expected to exist, it follows that I find it has not yet met its duty to assist the Applicant. I will therefore order the Public Body to conduct a new search for responsive records that will include records used by staff as guidance in making current AISH entitlement decisions would be responsive. Given that the Public Body must assess many different circumstances in adjudicating AISH entitlements, the Public Body will not be precluded from seeking clarification from the Applicant in order to ensure that it is only searching for records on topics that the Applicant is interested in obtaining.

III. ORDER

[para 32] I make this order under section 72 of the Act.

[para 33] I order the Public Body to conduct a new search for responsive records that includes any records that have been used by, or are to be used by, employees, as directions, guidelines, or policies in order to make current adjudicative decisions under AISHA. The Public Body is not precluded from seeking further clarification from the Applicant as to the specific kinds of directions, guidelines or policies he is interested in obtaining. Once it has completed the new search, the Public Body is required to provide a new response to the Applicant.

[para 34] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator