

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-30

September 4, 2019

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number 004838

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Public Body for records created between June 25, 2013 and July 31, 2013 regarding the RCMP's authority to enter properties during a flood and seize weapons. The Applicant also made access requests for the same information giving different time frames, for which different case files were opened.

The Public Body informed the Applicant that it was unable to locate responsive records.

The Adjudicator confirmed that the Public Body had conducted an adequate search for responsive records and met the duty to assist in relation to the access request for which case file 004838 was opened.

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

Authorities Cited: AB: Orders 2007-029, F2015-29

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

I. BACKGROUND

[para 1] On August 17, 2015, the Applicant made an access request to Alberta Justice and Solicitor General (the Public Body). He requested

Reference is being made to Alberta Justice FOIP file: 2014-G-0180 and to the Information and Privacy Commissioner's Review File #F8655 dated July 14, 2015. On page 7 of the above Review File under Public Body Submission-Search it states in the sixth bullet point "Public Security Division estimated that they had 430 responsive records..."

Please provide copy of all 430 responsive records referred to above.

Reference is also being made to the Alberta Justice FOIP response to the above noted FOIP file dated August 8, 2014 where on Page 16 in the e-mail from [an Assistant Deputy Minister] to RCMP Assistant Commissioner [...] dated June 25, 2013 he asks: "[...]: I just received a call from [...]. Our Minister apparently had to [sic] questions for him. .. (2) What legal authority do the police rely upon to forcibly enter private property in the flood stricken area?"

In her e-mail response on the same page, Asst. Commissioner [...] states: "You do raise a good point on communicating the legal authorities we are using and on that point, we will get something on paper from the Crown counsel tomorrow morning to give to our folks speaking to media for their reference and confidence in speaking to this issue to the public.

For the period from June 25, 2013 to July 31, 2013, please provide copies of all follow-up correspondence, communications and documentation concerning the legal authority (referred to in the above-mentioned emails) that was sent to, from and between Asst. Commissioner [...] to [the Assistant Deputy Minister] and to, from and between [the Assistant Deputy Minister], [the Deputy Minister] and Minister Jonathan Denis including a copy of the "Crown counsel paper" and a copy of the information that was given to the RCMP "folks speaking to the media."

[para 2] The Public Body responded to the access request, stating:

Regarding your request point 1, [the Public Body] has provided a response on November 22, 2016 under reference number 2014-G-0335.

Regarding your request point 2, a thorough search for records has been conducted by [the Public Body] and it did not yield any responsive records on the subject matter you are seeking.

[para 3] The Applicant requested that the Commissioner review the Public Body's response. He provided the following reasons for believing that responsive records exist:

The no responsive records response by Justice is ridiculous. The e-mail exchange between ADM [...] and Asst. Commissioner [...] specifically indicate Minister Jonathan Denis himself asked Deputy Minister [...] for this information, the Deputy Minister in turn asked Asst. Deputy Minister [...] and he asked the RCMP's Asst. Commissioner [...]. It is impossible that the information requested by the Minister didn't also flow back up this same chain of command. All I'm asking for are copies of records documenting the replies to the Minister in response to his questions. This information was vital to his role as Minister of Justice and Solicitor General and would not have been transmitted verbally especially since a 'Crown counsel' paper' existed and talking points were prepared for front-line officers and staff working in High River. There also has to be notes taken at the time conversations were happening between the four parties involved in this information exchange.

There is one more reason I am convinced that these records exist in the Justice and SolGen files is that prior to being appointed to his ADM position in Justice and Solicitor General, [the Assistant Deputy Minister] was the Commanding Officer for "K" Division (Alberta). As a very

senior, dedicated, long-serving member of the RCMP he was very concerned about the image of the RCMP following the reports of them kicking in hundreds of doors in High River. I have attached a copy of an e-mail from [the Assistant Deputy Minister] dated September 18, 2013 with the Subject heading: “Forced entry in homes in High River — proposed way forward.”

In this e-mail [the Assistant Deputy Minister] states: “I was hoping the RCMP would take a leadership role to help with their image in High River but I just spoke to them and they prefer to be in a supportive role for this GOA led solution.” [emphasis added] Source: Justice and Solicitor General FOIP Response File: 2014-G-0335 —492 pages.

Given [the ADM’s] past RCMP experience and personal interest in the RCMP’s image following their door-kicking spree, unwarranted entries, searches and seizures, unlawful charges and convictions in High River during and following the 2013 flood, I believe his personal files on High River would contain the records I have requested.

ADM [...] and the rest of the Alberta Government should be very concerned about the RCMP’s image problem in High River. The fourth telephone poll of High River residents conducted on September 9, 2016 shows: “Less than half of High River residents trust the RCMP to protect their homes and property in the event of another emergency evacuation.”

[para 4] The Commissioner authorized a senior information and privacy manager [SIPM] to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry. He provided the following grounds:

I disagree with the findings of [the SIPM] as stated in his letter tome dated October 18, 2017. In fact, the response I received from Alberta Justice and Solicitor General to their FOIP file 2017-0-0570 dated July 28, 2017 citing solicitor-client privilege to withhold the actual document I requested in FOIP file 2015-G-0268 two years ago is documented proof of the inadequate search Justice conducted.

I believe staff at Alberta Justice and Solicitor General misled [the SIPM] during his investigation of my complaint and withheld knowledge of these existing records from him. It seems pretty obvious to me that the records I requested are all available in the files held by Assistant Deputy Minister and Director of Law Enforcement [...] or in files held by former Deputy Minister of Justice and Deputy Solicitor General [...] or his successor.

[para 5] The Commissioner agreed to conduct an inquiry and delegated her authority to do so to me.

II. ISSUE:

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

[para 6] 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 7] 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

[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 (CanLII), 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 9] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional responsive records are likely to exist.

[para 10] The Public Body made the following submissions for the inquiry:

On August 20, 2015, the Public Body received the applicant's access request for the following:

"For the period from June 25, 2013 to July 31, 2013, please provide copies of all follow-up correspondence, communications and documentation concerning the **"legal authority"** (referred to in the above-mentioned emails) that was sent to, from and between Asst. Commissioner [...] to [the Assistant Deputy Minister (ADM)] and to, from and between [the ADM], [the Deputy Minister] and Minister Jonathan Denis including a copy of the **"Crown counsel paper"** and a copy of the information that was given to the RCMP **"folks speaking to the media"**."

Request dated August 17, 2015

The scope of the applicant's request, as above, was provided to the following areas to facilitate a search for records:

- Minister's Office
- Deputy Minister's Office
- Alberta Crown Prosecution Service Division
- Public Security Division

The Public Security Division, the Minister's Office and Deputy Minister's Office each advised no records responsive to the request existed. The Alberta Crown Prosecution Service (ACPS) Division provided records in response to the search request that during processing, were deemed non-responsive to the request.

The Public Security Division conducted a secondary search for records, and again advised there were no responsive records to this request.

A final letter was sent to the applicant dated December 6, 2016 advising that there were no responsive records after the Public Body conducted a thorough search.

[...]

In Section I of the Notice of Inquiry, the Adjudicator identified one issue in this inquiry. The Public Body's response is outlined below.

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

Section 10(1) of the *FOIP 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.

There are several orders of the OIPC setting out a Public Body's duty to assist applicants and the obligation to conduct an adequate search for responsive records. Generally, to confirm an adequate search was conducted, the Public Body should provide evidence of: the steps taken by the Public Body to identify responsive records; the scope of the search conducted; the steps taken to identify and locate all possible repositories of records relevant to the request; who conducted the search; and why the Public Body believes no other responsive records exist.

The FOIP Office requested a search for records from the areas that may have had records pertaining to the request. To facilitate the search, the offices and divisions were provided with the applicant's request scope *verbatim*.

The areas contacted were the Minister's Office, the Deputy Minister's Office, the ACPS Division and the Public Security Division. Based on the request scope, no other divisions in Justice and Solicitor General (JSG) were identified as potentially having responsive records.

The Public Body has several FOIP contacts within JSG to circulate the records request to the relevant areas in order to effectively search and locate all responsive records. These contacts are subject matter experts in their areas and are knowledgeable about the work processes and various record keeping systems. They are the point of contact, and are responsible for providing any and all responsive records, or to confirm there are no records after conducting the appropriate searches.

The Public Body FOIP contacts for the Minister's Office, the Deputy Minister's Office, the ACPS Division and the Public Security Division circulated the records request to the relevant areas to search for responsive records pertaining to this specific request.

The respective Chiefs of Staff for the Minister's Office and the Deputy Minister's Office as well as the Issues Manager for the ADM, Public Security Division responded that these areas did not have records responsive to this request.

Project Counsel for the ACPS Division provided records. However, based on the scope and time frame provided of the request, it was determined that the records provided by the ACPS Division were nonresponsive to the request.

Further follow-up by the FOIP Office was made to the Public Security Division on December 2, 2016. Bill Sweeney, ADM, Public Security Division responded directly to the request:

"The RCMP never did provide us with a legal opinion with respect to the authority that they relied upon to seize firearms in High River. The only written communications that I am aware of are the e-mails that we have provided" [in response to previous FOIP access requests].

With respect to the applicant's allegation that *"staff at Alberta Justice and Solicitor General misled [the SIPM] during his investigation of my complaint and withheld knowledge of these existing records from him"*, the Public Body references paragraph 13 of this submission. The ACPS provided records; based on the request scope and time frame of the applicant's request (file 2015-G-0268, being the subject of this Inquiry), the records were deemed non-responsive to the request.

The FOIP request submitted by the applicant under file 2017-G-0570 was received in the FOIP Office on July 6, 2017. As a separate and distinct request, a record search was conducted. This yielded records correctly identified as non-responsive to request 2015-G-0268, but responsive to request 2017-G-0570.

The Public Body submits that it met its obligation under section 10(1) of the *FOIP Act*, further maintains a thorough and adequate search was conducted and no other responsive records exist regarding request 2015-G-0268.

The applicant's reference to request 2017-G-0570 has no bearing on this Inquiry. 2017-G-0570 was processed based on the request scope and time frame provided by the applicant and is a separate file currently under review by the OIPC (006614).

[para 11] The Public Body has provided an explanation of the search it conducted. It explained how it conducted the search, the results of the search, the locations searched, and the persons who conducted the search. Most importantly, it has explained why it believes no responsive records exist. First, its evidence indicates that it never received a legal opinion from the RCMP regarding the RCMP's powers of search. Second, the Public Body explains that the time frame for the access request giving rise to this inquiry was such that no responsive records existed. However, for the Applicant's other access requests, which had different time frames, the Public Body did locate responsive records.

[para 12] I accept that the Public Body conducted a reasonable search for responsive records. In addition, the Public Body has satisfied me that no responsive records are likely to exist, given the time frame set out in the access request. In addition, I find that the Public Body's explanation of its search satisfies the informational component of the duty to assist.

[para 13] I acknowledge that the Applicant expressed concern in his submissions over the adequacy of search in relation to other access requests for which case files 004947 and 006614 were opened. However, those concerns would be more properly addressed in an inquiry relating to those case files.

III. ORDER

[para 14] I make this Order under section 72 of the Act.

[para 15] I confirm that the Public Body has met the duty to assist in relation to the access request for which case file 004838 was opened.

Teresa Cunningham
Adjudicator