# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2019-34

October 4, 2019

# THORHILD COUNTY

Case File Number 003435

**Office URL:** www.oipc.ab.ca

**Summary:** An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated May 25, 2016, to Thorhild County (the Public Body). The request was for copies of "[two named Public Body employees'] emails between the Deputy and Assistant Deputy Minister of Municipal Affairs."

The Public Body responded to the request, stating that it did not locate any responsive records. The Applicant requested a review of the Public Body's search for responsive records. The Applicant subsequently requested an inquiry into the Public Body's search.

The Adjudicator determined that the Public Body conducted an adequate search for responsive records.

**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 97-006, F2007-028, F2007-029, F2009-023, F2011-R-001

## I. BACKGROUND

[para 1] An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated May 25, 2016, to Thorhild County (the Public Body). The request was for copies of "[two named individual's] emails between

the Deputy and Assistant Deputy Minister of Municipal Affairs." The date range is November 1, 2015 to December 31, 2015.

[para 2] The Public Body responded to the request, stating that it did not locate any responsive records.

[para 3] The Applicant requested review by the Commissioner of the adequacy of the Public Body's search, and subsequently an inquiry.

## II. RECORDS AT ISSUE

[para 4] As the inquiry relates to the Public Body's obligations under section 10(1), there are no records at issue.

## III. ISSUES

[para 5] The issue set out in the Notice of Inquiry dated July 4, 2019, is as follows:

> 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 responsive records.

## IV. DISCUSSION OF ISSUES

[para 6] In his request for inquiry, the Applicant states that "[t]he County's statement that they do not have the capability to recover the records from the server may be correct but the service supplier does. This would fall under records controlled by the County." As the request for inquiry focusses on the search of backup files for responsive records, that is the issue I will address.

[para 7] A public body's obligation to respond to an applicant's access request is set out in section 10, which 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 8] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 9] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> 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 (at para. 66)

[para 10] By letter dated June 10, 2016, the Public Body informed the Applicant that it did not locate responsive records. With its submission, the Public Body provided me with an affidavit sworn by a Legislative Services Manager with the Public Body (Manager) regarding the Public Body's search and response to the Applicant. Attached to this affidavit, the Public Body included copies of correspondence between the FOIP Coordinator and the employees named in the access request regarding the search for records, as well as correspondence between the FOIP Coordinator and the Public Body's IT consultant, regarding the possibility of searching for deleted emails.

[para 11] The Applicant pointed out what appears to be a typo in the Manager's affidavit, at paragraph 4. In that paragraph, the Manager states the time frame of the Applicant's access request as November 1 – December 1, 2015. In fact, the time frame is November 1 – December 31, 2015. The FOIP Coordinator's call for records (attached to the affidavit) shows that the Coordinator correctly described the timeframe for the request. Therefore, this typo does not reflect the Public Body's search for records.

[para 12] The Applicant questioned the credibility of the Manager's affidavit. The Manager states that both employees named in the access request responded to the FOIP Coordinator, saying that responsive records were not located. The Applicant argues that the Manager's evidence indicates a response from only one of the employees and that there is no evidence that the other employee responded. However, the correspondence attached to the affidavit confirms that *both* employees searched their emails for responsive records but did not locate any (exhibits B and C). One employee states that they might have deleted a responsive record but couldn't be sure (i.e. a responsive record *might* have existed at some point).

[para 13] The correspondence with the IT consultant also confirms that if responsive emails existed, they would only be found in the backups. This indicates that the employees searched not only inboxes but recoverable deleted files (i.e. the 'recycle bin' or trash folder).

[para 14] The Applicant states that the Manager was not employed by the Public Body at the time of his access request. He argues that the Manager could not have knowledge of the conversation between him and the FOIP Coordinator. I do not know the Manager's

employment history with the Public Body; however, it is clear from the affidavit and the Public Body's submission that Public Body FOIP Coordinator who responded to the request is no longer with the Public Body. The Manager swore the affidavit based on a review of the Public Body's files "except where otherwise stated to be based upon information and belief." The Manager did not purport to have direct knowledge of the phone conversation between the Applicant and the FOIP Coordinator; she explicitly stated that she *believes* certain issues to have been discussed.

[para 15] In the affidavit, the Manager states that following the letter to the Applicant, the FOIP Coordinator and Applicant further discussed the possibility of searching backup email files and the cost for doing so, in communications between June 10 and 13, 2016. The FOIP Coordinator then asked its IT consultant how long it would take to conduct a search of the Public Body's backup files to retrieve any responsive emails (should they exist) and how much it would cost. The consultant responded on June 16, 2016 (exhibit E attached to the affidavit).

[para 16] The Applicant argues that the Manager's statements about his conversation with the FOIP Coordinator cannot be correct. He argues that the Coordinator could not have discussed the costs with him between June 10 and June 13 because the Coordinator did not receive the costs from the contractor until June 16.

[para 17] The affidavit does not state that the FOIP Coordinator discussed the actual cost with the Applicant; it may be the case that the Coordinator indicated that a search of backup files would be reflected in the cost of responding to the request. As the Applicant pointed out, the Manager was not privy to the conversation and explicitly based that part of her affidavit on belief. I do not see an inconsistency in her evidence on this point.

[para 18] Both parties discussed whether the Applicant expressed interest in paying additional fees; this is not relevant here, as the Public Body did not present the Applicant with a fee estimate to search backup files. As will be discussed, the Public Body determined that searching the backup files fell outside its duty to assist under section 10.

[para 19] In the response to the FOIP Coordinator's questions, the IT consultant stated that the cost would be approximately $1700 - $2000 to search for and produce any responsive records, which includes the cost for a required software program, and eight hours of work (at $130.00/hr). A general account of the steps required to perform the search were given (Tab E of the affidavit provided with the Public Body's submission):

1. Mount each backup during the time frame
2. Mount Exchange Store
3. Use StorageCraft Granular Recovery for Exchange to search for and extract any found messages from the backup.

[para 20] In Order F2007-028, a public body was ordered to search a backup system for responsive records. In that Order, the public body had stated that searches of backup electronic records are conducted occasionally for the public body's own purposes. The adjudicator found that since the public body had the ability to access and search its

backup tapes for its own purposes, it was required to do so in response to the access request (at para. 42). In this case, the Public Body argued that the facts in Order F2007-028 are different from the facts in this case such that the result in Order F2007-028 is not applicable here.

[para 21] Specifically, the Public Body states that excessive efforts were not required to retrieve backup files in Order F2007-028. It states that in this case, any responsive emails are not readily retrievable from the backup files; rather, excessive efforts would be required to search. Further, the Public Body states that the search conducted by the employees named in the access request did not locate any responsive records, or any indication that responsive records existed but were deleted such that they could be found on the backup files.

[para 22] In my view, it is beyond the scope of an adequate search to require a public body (or its contractor) to purchase software in order to make backup files searchable in a situation where it can't be said whether responsive records ever existed. An adequate search includes making "every reasonable effort" to search for responsive records. The required steps outlined by the Public Body to search its backup files fall outside of what is reasonable in this case.

[para 23] I distinguish this from a situation in which a particular records management or filing system used by the Public Body to maintain its records makes a search difficult or time consuming – in that case, an applicant's right of access under section 6 trumps "difficult" or "time consuming". To say otherwise would be to say that a poor filing system could thwart an applicant's right of access under section 6 of the Act. In comparison, maintaining a backup file that is not readily searchable is not a poor records management system. Backups are often maintained to restore records in the event of a catastrophic event; such backups are often not readily available and are not meant to be accessed for regular operational purposes (in contrast to Order F2007-028, in which the public body acknowledged it used backup files for its own operational purposes).

[para 24] I am also distinguishing this case from a case in which there is reason to expect that a responsive record does exist in a backup file. In such a case, there may be a requirement for a public body to search that file, depending on the particular circumstances. In this case, it is not clear that the emails the Applicant requested ever existed. As noted, the Public Body employees named in the request searched for responsive records and didn't find any. They acknowledged that responsive emails might have been deleted, but they couldn't say for sure if there ever were responsive records. The employees did not find any particular indication that responsive emails existed, nor has the Applicant provided evidence that responsive emails existed.

[para 25] The Public Body has also referred to Order F2009-023, in which the adjudicator referred to creating a record from a backup under section 10(2) of the Act. That section states:

> *10(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 26] Section 10(2) requires a public body to create a record if that record can be created from another record that is in electronic form using the public body's normal computer hardware and software and its expertise. This requirement is subject to limits in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as "electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants" (see Order F2011-R-001, at para. 19).

[para 27] The reference to section 10(2) in F2009-023 was later clarified by the adjudicator in F2011-R-001, also cited by the Public Body. In the latter Order, the adjudicator noted that "[c]onverting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist" falls within the scope of section 10(1), and not 10(2) (at para. 19). She went on to say (at paras. 42 and 44):

> Having now further considered whether converting or reproducing a copy of a file located on a backup server amounts to creating a record from an electronic record for the purposes of section 10(2), I believe the better view is that it does not. To the extent that Order F2009-023 suggests that a public body must consider whether it is necessary to create an electronic record by reference to the limitations in section 10(2), once it discovers that there are responsive records located on its backup tapes, I do not now regard this as the best interpretation of the scope of section 10(2). Rather, I would take the view that once a public body determines that it may have responsive records located on its backup tapes, and it determines that there is no other means of locating and reproducing these records in order to provide them to an applicant, it must take all reasonable steps, including any necessary and reasonable steps to convert them into a searchable format so as to locate responsive records, as well as all reasonable steps to reproduce copies so as to provide them to the applicant. The Public Body may charge the fees established by the Regulation to offset the costs incurred for doing these things.
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> …
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> However, I believe the better view is that this kind of search [of backup records], whether involving backup records or not, does not amount to the creation of a record for the purposes of section 10(2). This is because the record that is the subject of a search already exists in the form requested by the applicant.

[para 28] I agree with the reasoning in Order F2011-R-001. If the public body is being asked to look for a particular record, the assumption is that record already existed (and may or may not continue to exist). That record therefore does not need to be *created*; it needs only be found. This falls squarely within section 10(1).

[para 29] Even if section 10(2) applied in this case *and* the requested emails exist on the backup file, the evidence provided by the Public Body discussed above, shows that the emails could not be reproduced with the Public Body's normal computer hardware and software and technical expertise, as set out in section 10(2). Therefore, the Public Body would not be required to produce the emails for the Applicant, if they existed.

## V. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I find that the Public Body met its duty under section 10 of the Act.

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A. Swanek
Adjudicator