

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-04

February 7, 2022

ALBERTA ENERGY REGULATOR

Case File Number 010546

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Alberta Energy Regulator (the Public Body) for access to records relating to his employment. In particular, he requested a copy of his contract, personal health information, absence record, records with the Public Body's nurse, annual salary, adjustment, promotion and rating, incident report, request for accommodation and record, patient information, all records containing his name that related to his employment record, projects, and WCB, and his employment record. The time frame of the request was for records created between June 16, 2008 and August 1, 2018. The Public Body conducted a search for responsive records.

The Applicant requested review by the Commissioner of the Public Body's response to his access request. In particular, he questioned the adequacy of the Public Body's search for responsive records. The Adjudicator found that evidence established that the Public Body conducted a reasonable search for responsive records. She confirmed that the Public Body had met its duty to assist the Applicant.

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

Authorities Cited: **AB:** Orders 97-020, F2007-029, P2015-06

1. BACKGROUND

[para 1] The Applicant made an access request to the Alberta Energy Regulator (the Public Body) for access to records relating to his employment. In particular, he requested a copy of his contract, personal health information, absence record, records with the Public Body's nurse, annual salary, adjustment, promotion and rating, incident report, request for accommodation and record, patient information, all records containing his name that related to his employment record, projects, and WCB, and his employment record. The time frame of the request was for records created between June 16, 2008 and August 1, 2018.

[para 2] The Public Body conducted a search for responsive records and provided records to the Applicant.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to his access request. In particular, he questioned the adequacy of the Public Body's search for responsive records.

[para 4] The Commissioner assigned a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry. The request for inquiry contained allegations against the Public Body which the Commissioner decided would not be reviewed at the inquiry, as the FOIP Act contains no authority for the Commissioner to investigate such allegations. The Applicant also referred to records he expected to receive, but did not, in his request for inquiry. The Commissioner agreed to conduct an inquiry in relation to the Public Body's search for those records.

[para 5] In his request for inquiry, the Applicant described records he considered to be missing:

My record of annual adjustment and bonus between 2011 and 2012 were not provided, there was no legitimate excuse to have them held.

The record of my injury report to the AER nurse on September 25, 2013 and the instructions provided by the AER nurse were not provided by AER, there was no legitimate excuse to have them withheld.

[...]

The email between me and [three employees] and company nurse were not provided, while my email with my X-rays to another staff – [name of employee] were provided without being requested.

[para 6] Prior to the inquiry, the Public Body was asked to describe its search for the records and to explain why it had not produced the records the Applicant considered missing. The Public Body described the search it conducted for records and provided explanations as to why it had not produced the records the Applicant considered to be missing. The Applicant was then asked to address for the inquiry the search the Public

Body had conducted in his submissions and to explain why he believes further records that have not been produced, exist.

II. ISSUE

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 7] The Applicant provided the following submission for inquiry:

1. As to page 57, part 2, or 2018-P-0045, 350, I request the AER to provide the names of persons involved in document and that those names are not to be covered. FOIP Guidelines and Practices (2009) Chapter 1: Purposes and Scope of the FOIP Act

The Act does not prevent or limit the use of legal processes such as examination for discovery to gather information about a party in a lawsuit. It is relatively common for persons involved in a criminal or civil legal action to make a FOIP request to a public body for records relating to the case. Such a request should be processed as a FOIP request, applying the provisions of the Act.

2. My record of annual adjustment and bonus between 2011 and 2012 were not provided, there was no legitimate excuse to have them held. An inadequate search for record is not an excuse. (See IPC Order 99-032.)

In IPC Order 99-020, the Information and Privacy Commissioner considered whether certain records were under the control of the Auditor General. The Commissioner decided that the typewritten notes were created by the Auditor General and were under the control of that Officer. However, he decided that handwritten notations on a public body's copies of those records must be considered separate and distinct from the typewritten portions of the records. The notations changed the character of the records and provided additional information. They were neither created by the Auditor General nor in the Auditor General's custody or control.

3. The record of my injury report to the AER nurse on September 25, 2013, and the instructions provided by the AER nurse were not provided by the AER, there was no legitimate excuse to have them held. An inadequate search for record is not an excuse. (See IPC Order 99-025.) Section 4(1)(c)
4. The email between me and [three employees] and company nurse were not provided, while my email with my X-rays to another staff- [name of employee] were provided without being requested. An inadequate search for record is not an excuse.
5. The incident form, page 149-150 part 2. The AER had provided a different copy to another party. I request the AER to confirm it.
6. The AER failed to provide documents regarding to [name of employee] who was placed to replace me into my position. It's my right to inquire the real reason to offer my position to another one.
7. Page 435-437 are related to the incident I reported on September 24, 2013, the AER has no legitimate reason to cover them up. I find it abusive of the Section 10 to cover it up against me. You failed to provide any reason regarding your such mediation [*sic*], and the law you are to follow if any, which would be the law the AER had violated [in] the first place while you failed to indicate.
8. I request the AER to provide records they had refused to in 2018-P-0045: page 1-69, 72-80, 83-99, 257, 278, 313, 317, 428-434.

Time limit for responding.

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless (a), (b)

9. You are telling me there is law for you to follow and unfollow whichever you'd choose to, this is stunning abuse of power that deserves condemnation, and you ripped off the legitimacy that any public member may seek to trust you.
10. I was troubled to witness the stunning abuse of Section 10 by the FOIP in favor of the AER in both hiding and providing later the same records requested, it will be meaningless for me expect any reasonable unbiased response before the questions above being addressed.

[para 8] The Applicant asks that names of persons that appear in documents be uncovered and that records that were withheld be provided. The Applicant did not request an inquiry in relation to the Public Body's severing decisions and the Commissioner decided that this inquiry is limited to the adequacy of the Public Body's search for the records to which the Applicant referred in his request for inquiry.

Did the Public Body conduct an adequate search for responsive records?

[para 9] 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 10] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).

...

Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I 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) 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 what has been done.

...

In general, evidence as to the adequacy of 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

Section 10 includes a duty to conduct a reasonable search for responsive records. In an inquiry regarding the adequacy of the public body's search, the public body is required to provide sufficient details of its search to enable the Commissioner and the applicant to evaluate it. Order F2007-029 sets out the details a public body should provide in order to establish the quality of its search.

[para 11] A public body has the burden in the inquiry of establishing that it conducted a reasonable search for records; however, once it has provided detailed evidence to support finding that it conducted a reasonable search, the Applicant has the evidential burden of adducing, or pointing to evidence that suggests records, or categories of records, have not been searched for, or produced. The Applicant may do this by pointing to deficiencies in the Public Body's search, or providing evidence to support finding that additional records that have not been located or produced are likely to exist.

[para 12] In Order P2015-06 the Adjudicator explained how the evidential burden operates in inquiries where the adequacy of search is in issue:

As part of fulfilling its duties to the Applicant, the Organization must conduct an adequate search for records that respond to the Applicant's access requests. This means that the Organization must have made every reasonable effort to search for the records requested. The initial, or evidentiary, burden of proof lies with the Applicant to provide some evidence that the Organization failed to provide records in its custody or control. If the Applicant meets this initial burden, the onus then shifts to the Organization to prove, on a balance of probabilities, that it made every reasonable effort to conduct an adequate search for responsive records (Order P2006-012 at para 12).

[para 13] The burden described in Order P2015-06 also applies to inquiries in relation to searches conducted under the FOIP Act. Once the public body has completed a search for records and explained the search it conducted by addressing the points set out in Order F2007-029, the applicant then has the burden of pointing to some evidence to support the position that there may be records that exist that the public body has not searched for or produced. As examples of situations where the applicant's evidential burden is met, a public body's account of its search may reveal that likely repositories of responsive records were not searched, or the records the public body has located may refer to other responsive records that were not produced, or an applicant may have

personal knowledge that a responsive record exists beyond what a public body has located because the applicant created it or was shown it at one time. When the evidential burden is met in relation to particular records, the public body must then provide additional evidence to establish that it conducted a reasonable search for such records, despite not having located them. If the public body does not satisfy the Commissioner that it conducted a reasonable search for records, the Commissioner may direct the public body to conduct a new search for responsive records.

[para 14] As noted above, the Public Body provided an explanation of its search regarding the records to which the Applicant referred in his request for inquiry. It stated:

In response to your letter dated February 10, 2020 in which you requested further explanations of AER's search for records in response to [the Applicant's] FOIP request, I can confirm as follows:

- 25 AER personnel were consulted to search for records related to [the Applicant's] FOIP request, including all appropriate HR personnel (Manager, Director, Vice-President, Advisors (i.e. Pension and Benefits, Payroll, Total Rewards, Health and Safety), Occupational Health Nurse, Executive Vice-President Law and business area direct reports, Leaders/Managers (including those personnel specifically identified in your letter [...])).
- Upon review of the AER personnel Records Search forms, records searches included emails, electronic individual computer drives, electronic shared computer drives and physical files. The total hours spent searching for records by 25 AER personnel was 54 hours.
- In addition to AER personnel searches, an enterprise-wide electronic search for electronic records was conducted on AER's exchange servers. The keywords searched were "[the Applicant's first name" or "[the Applicant's first and last name]" or "[the Applicant's first initial and last name] within the applicable timeframe.
- With respect to the specific records that were not provided and are the subject of your February 10, 2020 letter, it is the position of the AER that it took adequate steps to locate those records pursuant to section 10 of the *Act*, as evidenced above, but could not find them or, in the case of [the Applicant's] "record of annual adjustment and bonus between 2011 and 2012", the AER HR Director has recently confirmed that that record never existed. With respect to emails, it is likely that, given the passage of time, they were deleted through normal records management practices.

[para 15] The Public Body has explained the search it conducted for responsive records with specific reference to the records the Applicant described in his request for inquiry and with reference to the factors set out in Order F2007-029. The Public Body has explained who conducted the search, the scope of the search, the methods used to search, the areas searched, the results of the search and its reasons for believing it cannot produce the records to which the Applicant referred in his request for inquiry and submissions.

[para 16] The Public Body explained that it never created a record "of annual adjustment and bonus between 2011 and 2012". It has also searched for the communications between the Applicant and the nurse to which the Applicant refers, but was unable to locate the records specified by the Applicant. I note that the Public Body did produce records from the AER nurse, so it is not the case that the Public Body did not search for the AER nurse's records. I also note record 439, created by the AER nurse,

indicates that she did not have any record of a workplace accident involving the Applicant taking place on September 24, 2013 (the date the Workers' Compensation Board provided as the date of the Applicant's accident), which indicates that the AER nurse searched for records of the incident, but could not find any. An email dated September 26, 2016 created by one of the employees to whom the Applicant asserts he sent an email appears on record 238. This email indicates that the employee had no recollection of being informed of the incident taking place on September 24, 2013.

[para 17] The Applicant has not addressed the Public Body's statement that it did not create a record of annual adjustment and bonus between 2011 and 2012 in his submissions. The Applicant has also not provided any further information regarding the communications he asserts he exchanged with the AER nurse on September 25, 2013 to support concluding that these records continue to exist. Public bodies are not required to maintain all records indefinitely. It is unclear on the evidence whether the emails the Applicant asserts he sent were received by the individuals to whom he sent them. The content of the records themselves suggest that the Public Body looked for records relating to the incident of September 24, 2013 in 2016, prior to receiving the access request, and was unable to locate any. In any event, the Public Body's unchallenged evidence is that it searched for these records when responding to the Applicant's access request and could not locate them.

Responsiveness

[para 18] The Applicant also indicates that he is dissatisfied with the search because the Public Body did not provide information regarding the employee who replaced him. The Applicant's access request is for records containing information about himself, and not that of other employees. The Public Body was under no obligation to search for or produce records that the Applicant did not request.

[para 19] The Applicant also argues that he should be able to review records 435 – 437 in their entirety. Records 435 – 437 are the minutes of an occupational health and safety meeting. Issues relating to the Applicant were discussed in this meeting in addition to issues unrelated to the Applicant. The Public Body provided information in the minutes relating to the Applicant, to the Applicant. Where the minutes refer to topics unrelated to the Applicant, the Public Body did not provide the minutes to the Applicant. As with records regarding other employees, issues discussed in the meeting unrelated to the Applicant are not responsive to the access request – in other words, the Applicant did not request the meeting minutes.

[para 20] Records that an applicant has not requested are referred to as “nonresponsive records”. In Order 97-020, former Commissioner Clark found that determining whether records are responsive is an important component to responding to an access request. He said:

In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about “responsiveness”:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, “relevancy” must mean “responsiveness”. That is, by asking whether information is “relevant” to a request, one is really asking whether it is “responsive” to a request. While it is admittedly difficult to provide a precise definition of “relevancy” or “responsiveness”, I believe that the term describes anything that is reasonably related to the request.

“Responsiveness” must mean anything that is reasonably related to an applicant’s request for access. In determining “responsiveness”, a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant’s request for access will be “non-responsive” to the applicant’s request.

[para 21] Former Commissioner Clark determined that sections 6 and 11 (now sections 7 and 12) of the FOIP Act provide the legislative authority for determining that records or portions of records are non-responsive.

[para 22] As the Applicant did not request information that does not relate to him or issues he raised, the Public Body was not required to provide this information in order to respond to the access request.

Conclusion

[para 23] From the evidence before me, I am satisfied that the Public Body conducted a reasonable search for responsive records and responded to the Applicant openly, accurately, and completely.

III. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] I confirm that the Public Body met its duty to assist the Applicant as required by section 10 of the FOIP Act.

Teresa Cunningham
Adjudicator
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