

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-53

November 4, 2022

CALGARY POLICE SERVICE

Case File Number 026912

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Summary: An individual made three access requests under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Calgary Police Service (the Public Body) for records of named Public Body officers that relate to the Applicant. The request at issue in this inquiry relates to one of the access requests.

The Public Body informed the Applicant that it did not locate records responsive to this request. The Applicant requested a review of this response.

The Adjudicator found that the Public Body conducted an adequate search for 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 96-022, 97-003, 97-006, 2001-016, F2003-012, F2007-007, F2007-029, F2019-32, H2005-003

I. BACKGROUND

[para 1] An individual made three access requests under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Calgary Police Service (the Public Body) for records of named Public Body officers that relate to the Applicant. The Public Body provided one response to the Applicant for all three requests. The Public Body withheld all responsive records under section 20(1)(f).

[para 2] The Applicant requested a review of the Public Body’s response. A senior information and privacy manager was authorized to investigate and attempt to settle the matter.

[para 3] In the review, the Public Body confirmed that all responsive records related to two Professional Standards investigations undertaken by the Public Body. These investigations have since been closed. One of the investigations had been closed by the time of the review; the Applicant made a new request for records in relation to that investigation. The Public Body’s response to that request is not at issue in this inquiry.

[para 4] The Public Body confirmed that the remaining access request relates to records relating to Sgt. M and Cst. C, which the Public Body states “relate to PSS 20-1018 and were originally denied as 20(1)(f).” The Public Body also confirmed that the Professional Standards Section (PSS) investigation has been completed, and provided a new response to the Applicant without relying on section 20(1). In its new response, dated July 21, 2022, the Public Body informed the Applicant that it did not locate records that were responsive to the request at issue in this inquiry.

[para 5] The Applicant requested a review of this response. Given the history of this file, the Commissioner decided to bypass mediation with respect to this new response and conduct an inquiry.

II. RECORDS AT ISSUE

[para 6] As this inquiry relates only to the adequacy of the Public Body’s search for responsive records, there are no records at issue.

III. ISSUES

[para 7] The issue for this inquiry set out in the Notice of Inquiry, dated August 10, 2022, is 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 ISSUES

[para 8] 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 9] 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).

[para 10] 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).

The access request at issue and the Public Body's response

[para 11] The access request at issue in this inquiry states:

[Sgt M] badge number #[...] is the officer that I am mentioning in the access request. Please screen and thoroughly search his email inboxes of [...]@calgarypolice.ca and [...]@calgarypolice.ca for any information and emails whatsoever involving or in any way related to me, including that he has had with Constable [G] and Constable [C].

Please also screen Constable [C]'s email inbox as well. Please also screen his note book, chest cameras, and personal email inboxes and Facebook. Also, please ensure you review any emails that he may have deleted with respect to me or in any way connected to me, or any other information he may have deleted or removed. Please ensure you keep a copy of all of this information and provide it to me and/or to the office of the information and privacy commissioner. Thanks.

[para 12] The Public Body's response to the Applicant (July 21, 2022) states:

We requested file 20-1018 from the Professional Standards Section as we were informed the investigation had been discontinued and closed. We obtained the investigative file for review in order to obtain any records that they may have had in relation to the request made above in Access Request 20-P-3501. In addition, we reviewed the responses already provided in Access Request 21-P-0487 and 20-P-3198 as they both related to the records being requested in 20-P-3501.

We were unable to do a search for deleted items as emails are considered transitory and have no retention. Emails are to be either deleted or moved to the file that they pertain to and then take on the retention of the file that they form part of. At the time of your initial request, we would have been unable to search for the deleted emails as they would have been destroyed. We can only search deleted emails for 30 days after they are deleted.

Regarding [Cst. C], she was requested to provide any notes, emails or any other records that she may have regarding her interactions with you in Access Request 21-P-0487. [Cst. C] indicated that she did not have any emails and did not have any notes in relation to file CA19406776 or yourself as she only attended as an assisting officer. There were no additional emails, notes or other records located within the PSS file regarding your interaction with [Cst. C]. Body Worn Camera was searched by the Professional Standards investigator regarding your complaint and for the above-mentioned Access Requests. There were no Body Worn Camera videos for [Cst. C] or [Sgt. M] in relation to you located.

All emails and records for [Cst. G] were preserved and searched, and no emails were located between [Cst. G] and [Sgt. M] in relation to you. No further records were located by Professional Standards regarding notes or emails. We would like to note that [Sgt. M] had no direct interaction with you in relation to the investigation. His only role was to review and approve the warrant application and the Report to Prosecutor. We further clarified the process regarding the review and approval of the warrant and were informed that this is primarily a verbal discussion, and no records relate to this. In addition, the process of reviewing the Report to Prosecutor is completed without email communication. Therefore, we have no records of your interactions with [Sgt. M].

Did the Public Body conduct an adequate search?

[para 13] 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 14] The Notice of Inquiry instructed the Applicant to “set out their reasons for believing more records exist than were located and provided to them and/or should describe as precisely as possible records/kinds or records they believe should have been located and provided” in their submission.

[para 15] The Applicant’s submission states that he is relying on his request for review and attachments, as well as several additional documents attached to the submission. The submission did not include a discussion of the attached documents.

[para 16] In his request for review, the Applicant raised the concern about the adequacy of the Public Body’s search for records, but didn’t specify any records he expected to receive or why he believed records should have been located.

[para 17] The additional documents attached to the Applicant’s submission are:

- a copy of an online complaint form of the Public Body filled out by the Applicant on September 13, 2020 with respect to a Cst. G;

- a 15-page timeline of complaints apparently made by or about the Applicant, including PSS complaints, CPS investigations and Government of Alberta complaints. The document indicates that it was authored by two PSS officers of the Public Body and an Acting Director of Corporate Security within the Government of Alberta;
- a document entitled “Recommendation for Complaint Dismissal Under s. 43(8) *Police Act* (Frivolous, Vexatious and/or Bad Faith)”, wherein the Chief of the CPS recommends that the Calgary Police Commission dismiss the allegations made by the Applicant against Cst. G set out in the document;
- a Professional Standards report relating to the complaint made by the Applicant against Cst. G and Sgt M;
- a ‘contact note’ relating to the Applicant’s complaint against Cst. G;
- a Professional Standards memo relating to the Applicant’s complaint against Cst. G;
- a link to a podcast for East Side City Church;
- a briefing note from the Public Body to the Calgary Police Commission dated January 11, 2022 regarding the recommendation from the Public Body to the Commission to dismiss a complaint made by the Applicant about Cst. G and Sgt. M;
- a decision from the Calgary Police Commission dismissing the Applicant’s complaint about Cst. G.

[para 18] The Complainant’s submission did not discuss how the above-described documents support his belief that responsive records ought to have been located in response to his access request. I have briefly reviewed these documents.

[para 19] The online complaint form relates to a complaint the Applicant made against Cst. G. It is filled out by the Applicant.

[para 20] The 15-page timeline of complaints lists the dozens of complaints made by the Applicant against CPS officers and other public body employees between 2011 and 2020; civil or criminal proceedings the Applicant has initiated or attempted to initiate against public body employees; the steps taken by several public bodies to restrict the Applicant’s ability to contact employees directly, due to inappropriate communications from the Applicant; steps taken by various public bodies in response to concerns from employees for their safety, due to the Applicant’s conduct; the Applicant’s escalating behaviour in response to limitations placed on him or his complaints being dismissed; steps taken by the Human Rights Commission to restrict or limit the number of complaints the Applicant can file; and steps taken to have the Applicant declared a vexatious litigant. This timeline does not mention Cst. G, Cst. C or Sgt. M. It is unclear how it relates to the issue in this inquiry.

[para 21] The Recommendation for Complaint Dismissal details the complaints made by the Applicant against Cst. G. Cst. C and Sgt. M are not mentioned.

[para 22] The Professional Standards Report also details the complaints made by the Applicant against Cst. G and Sgt. M. The complaints primarily relate to conduct of Cst.

G; the Applicant also alleges that as Cst. G's supervisor, Sgt. M was negligent in reviewing Cst. G's work. Cst. C is not mentioned in this document.

[para 23] The contact note details allegations made against Cst. G by the Applicant. Cst. C is mentioned as having attended the relevant incident with Cst. G. This is the only mention of Cst. C in the documents provided by the Applicant. Sgt. M is not mentioned in this document.

[para 24] The Professional Standards memo also relates to the Applicant's complaints against Cst. G and argues that several of the complaints are frivolous, vexatious and/or made in bad faith. This document does not mention Cst. C or Sgt M.

[para 25] The podcast is referenced in some of the documents listed above; it is described as a public speech delivered by Cst. G, in his personal capacity. The Applicant had made a complaint that Cst. G made unprofessional comments in the podcast. This complaint was considered under the *Police Act* and was dismissed. As this inquiry relates only to the existence of records responsive to the Applicant's access request and not the merits of the Applicant's complaint against Cst. G, this podcast is not relevant and I did not listen to it in its entirety.

[para 26] The briefing note outlines recommendations to dismiss several of the nine complaints made by the Applicant against Cst. G and Sgt. M. Cst. C is not mentioned in this document.

[para 27] The decision of the Calgary Police Commission dismisses several of the Applicant's complaints against Cst. G as well as the complaints against Sgt. M. Cst. C is not mentioned in this document.

[para 28] Presumably the Applicant has submitted the documents described above to support his belief that responsive records should exist. The Applicant is seeking emails of Sgt. M that mention the Applicant, including communications between Sgt. M and Cst. G or Cst. C. The Applicant is also seeking emails, notes, or video from body-worn camera of Cst. C that relate to the Applicant. I assume that the Applicant believes such records exist in relation to the various complaints the Applicant made against Cst. G and Sgt M.

[para 29] The Public Body states:

When this file was initially received by the Sr. Disclosure Analyst, they were informed that there was an Active PSS investigation (File 20-1018) and all records were denied as per section 20(1)(f). Once the investigation had been closed, we requested all records that were collected for the purpose of that investigation which would have included all Officer's Notes and emails. When we received the records, there were no emails from Sgt. [M] pertaining to the Applicant. In addition, there were no emails between Sgt. [M] and Cst. [G] and Cst. [C].

[para 30] The Public Body states that Cst. C was asked to provide any responsive notes, emails or other records relating to their interactions with the Applicant. Cst. C did not have responsive records. Cst. C explained that they did not have notes from the interaction with the Applicant as they were involved only as an assisting officer. The

Public Body further stated that there were no body-worn camera videos for Cst. C in relation to the Applicant. The Public Body notes that it has body-worn camera footage in relation to the incident that led to the Applicant's complaints about Cst. G but none for Cst. C (the Applicant's request for body worn camera footage relates only to Cst. C).

[para 31] Regarding Cst. G and Sgt. M, the Public Body states:

All emails and records for Cst. [G] were preserved from a previous access request and searched, and no emails were located between Cst. [G] and Sgt. [M] in relation to the Applicant. No further records were located by Professional Standards regarding notes or emails. We also spoke to Cst. [G] and asked about his interactions with Sgt. [M] for file CA19406776 and they indicated that there were no emails as it was all done in person. We also spoke directly to Sgt. [M] about his involvement in the file and reviewed his statements and the PSS investigation regarding his involvement with the Applicant and CA19406776. We would like to note that Sgt. [M] had no direct interaction with the Applicant in relation to the investigation. His only role was to review and approve the warrant application and the Report to Prosecutor. We further clarified the process regarding the review and approval of the warrant and were informed that this is primarily a verbal discussion, and no records relate to this. In addition, the process of reviewing the Report to Prosecutor is completed without email communication.

[para 32] The Public Body states that Sgt. M was specifically asked about emails between them and Csts. G and C relating to the Applicant's complaints. Sgt. M stated that their interactions with Cst. G regarding the complaints were all in-person and not via email. Sgt. M further states that they did not speak to or email Cst. C in relation to the complaints.

[para 33] The Public Body also provided information about where it searched for responsive records (e.g. which databases), and the search terms used. Sgt. M, Cst. G and Cst. C were asked to search their email accounts and were specifically asked if they had emails to/from the specified officers or notes about the Applicant. The Professional Standards Section also completed its own search for responsive records. Two records were located but they do not fall within the scope of the Applicant's request as they are not emails or information located in emails of the named officers.

[para 34] As the Public Body informed the Applicant in its response to him (cited above), the Public Body states that deleted emails are considered transitory records and are not retained. The Public Body states that deleted emails can be searched for only 30 days after they are deleted from the 'deleted items' folder. It further states that emails stored in the inbox, sent, or deleted folders are viewable to the employee conducting the search and can be provided. I understand from this that the Public Body included the 'deleted' folder in the scope of its search for records, but that emails that were 'double-deleted' more than 30 days prior are not retrievable and were therefore not included in the scope of the search.

[para 35] The incident between the Applicant and Cst. G occurred in September 2019. The Applicant filed his complaints in September 2020. The Applicant made his access requests in December 2020. As stated in Order F2019-32, public bodies are not required to keep copies of transitory records indefinitely. I accept the Public Body's explanation

that emails residing in a deleted folder are searched, but that ‘double-deleted’ emails are not retained by the Public Body longer than 30 days, and therefore cannot be searched beyond that time.

[para 36] The Public Body clarified that its records retention schedule complies with section 35 of the Act, which requires a public body to retain personal information used to make a decision about an individual for at least one year after using it. The Public Body states that if records has existed and had been used within the terms of section 35, they would have been retained on the relevant file.

[para 37] The Public Body’s explanation of its search for records appears reasonable. I understand that the Applicant had an interaction with Cst. G, which led to the complaints made by the Applicant against Cst. G. I understand that Sgt. M was also named in the complaints, as they are (or were) Cst. G’s supervisor. I understand that Cst. C was not named in the complaints, but was also present at the interaction between Cst. G and the Applicant, as an assisting officer. I understand the Applicant’s reasons for believing that records may exist; however, nothing before me indicates that responsive records were created. The Public Body’s explanations for why records weren’t located are reasonable. Further, as stated in past Orders, the issue is not whether responsive records ought to exist, but whether the Public Body conducted an adequate search for the records (see Orders F2003-012, H2005-003).

[para 38] Nothing in the documents provided with the Applicant’s submission indicates that the Public Body ought to have located responsive records.

[para 39] Lastly, the Applicant has requested records from the personal email account and Facebook account of Cst. C. There is no indication that Cst. C uses a personal email account or Facebook account in the course of their job duties. Therefore, records from such accounts would not be in the custody or control of the Public Body such that they could be searched in response to an access request.

[para 40] Given the above, I find that the Public Body conducted an adequate search for records, fulfilling its duty to assist the Applicant.

V. ORDER

[para 41] I make this Order under section 72 of the Act.

[para 42] I find that the Public Body conducted an adequate search for records.

Amanda Swanek
Adjudicator