

COMPLAINT INVESTIGATION REPORT

TRAX FILE 1473

FEBRUARY 3, 1999

INTRODUCTION

The Office of the Information and Privacy Commissioner received a complaint regarding the Executive Council Office's response to an access request. The Applicant believed that the Executive Council Office erred in its response when it stated that "a search of the records in Executive Council has failed to reveal any records relating to the subject of your request".

The Applicant requested that the Office of the Information and Privacy Commissioner investigate and determine if there was a violation of section 9 (1) of the *Freedom of Information and Protection of Privacy Act* (the Act). Section 9(1) states:

9(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.

A file was opened pursuant to section 51(2)(a) of the Act. Section 51(2)(a) states:

51(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed by section 9 has not been performed.

INVESTIGATION

The original request submitted to the Executive Council Office was for "Copies of all memoranda, backgrounders, briefing documents and studies prepared for the Premier of Alberta by the Executive Council, the Department of Economic Development and Tourism and the Alberta Treasury Branches, between January 1, 1993 and December 31, 1995, in the possession of Executive Council, pertaining to the refinancing of the West Edmonton Mall (WEM)".

Subsequent to the response from the Executive Council Office that there were no records responsive to the access request, an article appeared in the Globe

and Mail claiming that the Premier of Alberta had written a memorandum to the Provincial Treasurer and the Minister of Economic Development and Tourism, which specifically dealt with the refinancing of the West Edmonton Mall. It was after information about the memorandum became public that the Applicant requested the Office of the Information and Privacy Commissioner to investigate why the initial search did not locate any records.

As investigator, I held interviews with two staff from the Executive Council Office and two staff from the Office of the Premier. I will deal with these two public bodies separately in this report.

The interview questions are attached to this report. The questions were used only as a guide during the interviews and, on occasion, went off in a different direction depending on the responses. All the staff that were interviewed were cooperative and prepared to answer all the questions. Consequently, I did not find it necessary to require the submission of evidence by way of an affidavit.

DISCUSSION

On December 22, 1997, the FOIP Coordinator at that time for the Executive Council Office received the Applicant's access request. The FOIP Coordinator then sent the request to various persons in the organization for them to search their files to determine if there were any records that were responsive to the request. It appears that, due to the Christmas break, the actual searching of the files commenced around January 5, 1998. The Executive Council Office had to respond to the Applicant by January 19, 1998 to adhere to the time requirements of the Act. This did not allow a lot of time for the staff to complete their search for records. However, it must be mentioned that the Act allows a public body under section 13 to give itself a 30-day extension to respond to a request if the extra time is needed. The Executive Council Office did not extend the time.

When the Act came into force, the government, through the Information Management and Privacy Branch, now a part of Alberta Labour, published a document entitled *Freedom of Information and Protection of Privacy – Policy and Practices*. This manual was first published in 1995 and reissued in 1998. The access request predated the second edition of this publication.

In the manual that was in force at the time of this access request, it is stated that "The Policy Manual and the Implementation and Procedures Guide are comprehensive tools which provide government-wide policy direction for the application of the *Freedom of Information and Protection of Privacy Act* in public bodies." It goes on to state that:

The policies and procedures are intended to:

- reflect and interpret the principles of openness and privacy protection in the Act;
- integrate interpretations that have been adopted in other jurisdictions, while adjusting these interpretations to the Alberta environment;
- emphasize that the Act is the avenue of last resort for obtaining access to records and information from public bodies;
- **establish clear procedures for making and processing formal requests for information under the Act** (emphasis added);
- provide ways to meet the privacy protection requirements established by the legislation;
- provide consistent cross-government policy direction, wherever possible; and
- minimize the costs of complying with the Act.

I have made a special note of those policies and procedures here because the evidence before me leads to the conclusion that the FOIP Coordinator for these Public Bodies either was unaware of the government policy in dealing with applicants or otherwise did not follow it. For example, the Policy Manual states that if a record does not exist, the Public Body “informs the applicant of that fact and the steps taken to find the records”. This was not done. The Applicant was told only that there were no records responsive to the request.

Another example of the Public Body’s failing to follow the Policy Manual was the manner in which it referred the request to persons within the Executive Council Office and the Office of the Premier who were to conduct a search. The manual states that “The requester’s name and other personal information not necessary to locating information and processing the request should be severed from the request before transmittal to the program area. This is done to assure that all requests are treated as impartially as possible.” Again, it is clear from the evidence that this was not done. It is my view that any request should be anonymized to ensure impartiality.

Office of the Premier

When the staff from the Office of the Premier received the referral from the FOIP Coordinator, they conducted a search of the correspondence log using the key words “WEM” and “Ghermezian”. The system at that time only logged in-coming correspondence and not out-going correspondence. I understand that the system has been changed now to include the logging of correspondence sent out from the Office of the Premier.

A staff person stated that it was only when the Globe and Mail article appeared that they were alerted to the fact that records may very well exist. The records in question were retrieved from the vault located in the basement of the Legislature Building.

Another staff person who was not directly involved in the search stated that if they would have been asked directly about the memorandum they would have remembered it as they were responsible for the creation of the document.

The investigation also revealed that the staff of the Office of the Premier had received minimal training on "FOIP". It was indicated that refresher sessions are being organized.

Executive Council Office

When staff in the "Cabinet" office received the access request from the FOIP Coordinator, the staff used a computer search function to seek minutes for the time period of the request. The search located minutes from Cabinet, Agenda and Priorities Committee and all Standing Policy Committees. Once the minutes were identified using the terms "West Edmonton Mall" and "WEM", the hard copy files located in the 3rd floor vault were reviewed. The minutes were marked "Discussion", which indicated that no "Record of Decision" had been created. The agendas showed that no documentation had been provided so the search ended and the presumption was made that no other documentation would be found.

In August, 1998, staff were asked to search further because of the Globe and Mail article. That additional search was conducted both electronically and physically in the 3rd floor vault hard copy files. A search was also conducted in the basement vault where the meeting material files were examined. During this examination, it was discovered that for two meetings, documents had been brought distributed at the meeting for discussion on the requested subject matter. These agendas had been adjusted by hand rather than computer to reflect what had actually occurred at the meeting; consequently, the basement vault agendas were different from those stored on the 3rd floor.

It was around this time that the Complainant submitted another access request to the Executive Council Office which was identical to the first. No records were released by the public body not any confirmation that records existed but would not be released in response to the first request even after they determined that there were records responsive.

CONCLUSION

From the evidence presented during the investigation, it is clear that the response from the Executive Council Office to the Applicant that "a search of the records in Executive Council has failed to reveal any records relating to the subject of your request" is not correct. There were records that, while possibly not releasable due to the exclusions and exceptions in the Act, were clearly

responsive to the subject matter of the request. It is my view that the search conducted by the Executive Council Office and the Office of the Premier was not as thorough and complete as required by section 9 of the Act.

It is my view that this error was not intentional but based on an inadequate records management system. I am encouraged by the changes that have been incorporated into the Office of the Premier's correspondence logging system to allow for the recording of both incoming and outgoing correspondence.

RECOMMENDATIONS

Based on my investigation, I would make the following recommendations for the consideration of the head of the Executive Council Office:

1. Staff from the Executive Council Office and the Office of the Premier be given further training for responding to access requests pursuant to the *Freedom of Information and Protection of Privacy Act*.
2. The information system used to record information (minutes) from Cabinet, Agenda and Priorities Committee and Standing Policy Committees be adjusted to capture when changes are made to agendas, to ensure that documents handed out at the meetings are appropriately recorded. This would allow for a more efficient search for records when required.
3. The process used to locate records requested be reviewed to ensure that the appropriate persons are contacted when conducting a search.
4. Any initial fee paid by the Applicant be either refunded or applied to a subsequent request from the same Applicant.
5. When access requests are sent to various staff for action, only the text associated with the request is sent and the name of the applicant is kept confidential. While it is not my view that in this case the release of the Applicant's name had anything to do with the response received, in future, it would be advisable to keep this information private.
6. The Executive Council Office and the Office of the Premier undertake a thorough review of their records management

procedures to prevent a similar occurrence with future access requests.

7. The Executive Council Office and the Office of the Premier should ensure that in dealing with future access requests, the Policy and Procedures Manual produced as government policy be utilized as a source of information. All staff involved in processing access requests should have the Manual available for reference. This recommendation should be referred to all FOIP Coordinators in Public Bodies via the regularly scheduled Coordinators' meetings.

Submitted by,

Tom Thackeray
Portfolio Officer

TRAX FILE 1473**SECTION 51 INVESTIGATION****QUESTIONS TO BE ASKED**

The following are the general types of questions that I will be raising with the individuals involved in this file. Depending on the responses more questions may be posed in certain circumstances. The questions will include:

- 1) What was your involvement in responding to this request for information?
- 2) What did you actually do in determining if there were any records that were responsive to the request?
- 3) Where specifically did you search in trying to locate records?
- 4) How did you determine that there were no records responsive to the request?
- 5) Did you discuss this request with the Head of Executive Council?
- 6) When, if at all, did you become aware of the file that contained records that may be responsive to the request notwithstanding the fact that other sections of the *Freedom of Information and Protection of Privacy Act* may provide for exceptions to disclosure?
- 7) I will be asking questions as to the responsibilities of the individuals being interviewed both general in nature and specific to FOIP.

If you have any questions regarding the above, please feel free to contact my office.

Thanks for your assistance.

Tom Thackeray

