

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-001

February 13, 2009

LETHBRIDGE REGIONAL POLICE COMMISSION

Case File Number F4174

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant requested information from the Lethbridge Regional Police Commission (the “Public Body”), and it granted partial access. In a follow-up letter to the Public Body, the Applicant asked the Public Body whether particular records did or did not exist. The Public Body returned the letter, taking the position that it had been received in error.

Section 10(1) of the Act requires a public body to make every reasonable effort to assist applicants and to respond to them openly, accurately and completely. This duty to assist includes the obligation to conduct an adequate search for responsive records, and to inform an applicant in a timely fashion about what has been done to search for the requested records.

The Adjudicator found that the Public Body conducted an adequate search for responsive records. However, he found that the Public Body did not meet its obligation of informing the Applicant about what had been done to search for the records, especially given that he specifically asked whether particular records existed. Although the Applicant’s follow-up letter contained some information that confused the Public Body, it was not reasonable for the Public Body to believe that the letter was received in error, given its overall content. The Adjudicator ordered the Public Body to inform the Applicant about who conducted the search for responsive records, the scope of the search, the steps taken to

identify and locate all records and possible repositories of them, and why it believes that no more responsive records exist than what has been found or produced.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 15, 17(1), 65(1), 68, 72, 72(3)(a) and 72(4).

Authorities Cited: AB: Orders 96-022, 97-003, 98-003, 2001-016, F2007-007 and F2007-029.

I. BACKGROUND

[para 1] In a letter dated June 13, 2007, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Lethbridge Regional Police Commission (the “Public Body”). He asked for any records relating to background checks on a particular individual prior to the individual’s appointments to the Public Body in two capacities, the individual’s applications for the appointments, including all supporting material, and any letters or communications from another public body (for whom the individual previously worked) that were provided in the context of the applications.

[para 2] By letter dated July 12, 2007, the Public Body gave the Applicant access to some of the requested information, withholding other information under section 17(1) of the Act (disclosure harmful to personal privacy).

[para 3] In a letter dated July 23, 2007, the Applicant asked the Public Body to confirm that there were no records indicating anything about the prior employment of the individual in question with the other public body, the circumstances of the individual’s departure, or what the other public body had to say about its experience with the individual.

[para 4] By letter dated August 2, 2007, the Public Body returned the letter of July 23, 2007 to the Applicant, saying that it believed that it had received the letter in error.

[para 5] By letter dated August 8, 2007, the Applicant requested that this Office review the Public Body’s responses of July 12 and August 2, 2007. Mediation by a portfolio officer was authorized but was not successful. The matter was then set down for a written inquiry.

II. RECORDS AT ISSUE

[para 6] As this inquiry addresses the adequacy of the Public Body’s search for responsive records, rather than its refusal to grant access to information, there are no records directly at issue. The Applicant indicated to this Office that the Public Body’s decision to withhold information under section 17(1) of the Act was not an issue.

III. ISSUE

[para 7] As set out in the Notice of Inquiry dated November 19, 2008, the issue in this inquiry is whether the Public Body met its duty to assist the Applicant under section 10(1) of the Act. The Notice of Inquiry specifically indicated that the issue included whether the Public Body conducted an adequate search for responsive records.

[para 8] The Public Body has questioned whether the foregoing issue may properly be addressed in this inquiry. It argues that the Applicant did not raise an issue under section 10(1) in his initial request for review, the portfolio officer did not review the adequacy of the search for responsive records, and the Public Body has therefore not had an opportunity to respond.

[para 9] The Applicant's letter of August 8, 2007 to this Office, a copy of which this Office provided to the Public Body shortly thereafter, requested a review of the Public Body's responses of both July 12 and August 2, 2007. The Public Body's August 2, 2007 letter responded to the Applicant's request for a confirmation of whether particular records did or did not exist. This raised the issue of the adequacy of the Public Body's search for responsive records. An applicant is not required to cite a section of the Act or use particular language in his or her request for review. The Applicant's letter of August 8, 2007 asked for a review of a decision, act or failure to act on the part of the Public Body, which related to his access request, within the meaning of section 65(1) of the Act.

[para 10] Matters before this Office do not necessarily have to be the subject of investigation or mediation by a portfolio officer before proceeding to an inquiry. Section 68 of the Act states that the Commissioner "may" authorize someone to investigate and try to settle any matter that is the subject of a request for review. Even if a public body has not specifically been given an opportunity to respond to an issue in the context of an investigation or mediation, it will be given that opportunity during the inquiry.

[para 11] Finally, in October 2007, the Public Body was given a copy of a letter from this Office to the Applicant, in which the Public Body's duty to assist under section 10(1) and the adequacy of its search for responsive records were identified as comprising the issue that would be addressed in the inquiry.

[para 12] Given the foregoing, the issue in this inquiry has been properly identified.

IV. DISCUSSION OF THE ISSUE

Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act, and in particular, conduct an adequate search for responsive records?

[para 13] Section 10(1) of the Act reads:

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 14] 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).

1. Did the Public Body make every reasonable effort to search for the requested records?

[para 15] The decision as to whether an adequate search was conducted must be based on the facts relating to how a public body conducted a search in the particular case (Order 98-003 at para. 37). In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; 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 (e.g., 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 (e.g., keyword searches, records retention and disposition schedules, etc.); and why the public body believes that no more responsive records exist than what has been found or produced (Order F2007-029 at para. 66).

[para 16] The Public Body submitted four affidavits sworn by individuals who participated in the search for the records requested by the Applicant. They are from the Public Body's FOIP coordinator who is also the information manager, a city clerk, a legislative coordinator, and the secretary to the Public Body who is also the executive assistant to the Chief of Police. The affidavits indicate, variably, that the following was searched: e-mails, records centre data repositories, file schemas, city web site, document management system, physical and paper files, computer files, committee and board files, storage, records collected during the candidate selection process, *in camera* agendas, and all of the Public Body's minutes and records during the tenure of the individual about whom information was requested by the Applicant. The affidavits also indicate the keywords that were used for searches.

[para 17] The Public Body's evidence sets out who conducted the search, the scope of the search, and the steps taken to identify and locate all records and possible repositories of them. The Public Body also explains why it believes that no more responsive records exist than what has been found or produced. It indicates in its submissions that the individual about whom the Applicant requested information did not list the other public body as a reference in the application for appointment, and that the Public Body therefore had no consent to request a reference from the other public

body. It further states that no notes were taken during the Public Body's interviews with the individual, meaning that if the individual verbally conveyed information about previous employment with the other public body, this is not found in any record that can be provided to the Applicant.

[para 18] I find that the Public Body has established that it made every reasonable effort to search for the records requested by the Applicant.

2. Did the Public Body inform the Applicant in a timely fashion about what was done to search for the requested records?

[para 19] What is required of a public body, in order to meet its obligation of informing an applicant about its search for responsive records, will depend on the circumstances of the particular case. Here, the Applicant specifically asked the Public Body, in his second letter of July 23, 2007, to confirm whether or not there were records indicating anything about the prior employment of the individual in question with the other public body, the circumstances of the individual's departure, or what the other public body had to say about its experience with the individual.

[para 20] The Public Body returned the Applicant's second letter to him, stating that no further action would be taken in response to it. The Public Body's letter of August 2, 2007 indicates that it believed that the letter was received in error, as the Applicant referred to an unfamiliar individual in the subject line, and the text of the letter mentioned another public body. The individual mentioned in the subject line appears to be the Applicant's client, who was not mentioned in the initial access request. I note, however, that the text of the Applicant's second letter also referred to the individual about whom the Applicant initially requested information. Moreover, the Applicant's second letter was received and answered by the same FOIP coordinator who had been dealing with the Applicant's access request only a few weeks earlier, the Applicant's letter of July 23, 2007 referred to the FOIP coordinator's previous letter of July 12, 2007, and the FOIP coordinator was aware that the earlier request had something to do with the other public body, being the one for which the individual in question previously worked.

[para 21] Given the overall content of the Applicant's letter of July 23, 2007, I find that it was unreasonable for the Public Body to believe that it had been received in error. Even if the Public Body honestly failed to understand the letter, the proper step was to seek clarification, not return the letter with an indication that "no further action in regards to your request in your letter will be taken". The letter was still sent by an applicant in the context of an access request, meaning that the Public Body had a duty to assist, even if it may have received the letter in error. If the Public Body believed that it received a request that was intended for a different public body, it could have transferred the request to the other public body, in accordance with section 15 of the Act.

[para 22] In its submissions, the Public Body adds that the Applicant's letter did not refer to the Public Body's file number to collaborate that the letter was meant for the Public Body. I am still not persuaded that the Public Body was reasonable in returning

the Applicant's letter to him. An applicant is not required to refer to a public body's file number. In any event, I do not believe that such a reference was needed in order for the Public Body to know that it was the intended recipient of the letter in this case. I note that the Applicant's letter of July 23, 2007 included his own office's file number, which had been previously referenced in both the Applicant's initial access request and the Public Body's response of July 12, 2007. Even without any file number at all, the Public Body could have used the Applicant's name as a cross-reference in order to see whether the second letter related to an earlier access request that had been received by the Public Body.

[para 23] When the Applicant asked, in his second letter of July 23, 2007, for an indication of whether the Public Body did or did not have particular records that he previously requested, he was effectively asking whether he had been provided with all responsive records. Because I find that the Public Body unreasonably believed that it received the letter in error, the Public Body should have advised the Applicant whether or not the particular records existed and, if not, why they did not exist. In the circumstances of this case, the Public Body failed to meet its obligation of informing the Applicant in a timely fashion about what it did to search for the requested records.

[para 24] Even on a more basic level, the Public Body failed to comply with section 10(1) of the Act. Regardless of the content of the Applicant's letter of July 23, 2007, it was still from an applicant. In returning the letter without a further response, the Public Body failed to make every reasonable effort to assist the writer of the letter and to respond openly, accurately and completely. The Public Body essentially did nothing to assist and did not respond at all.

[para 25] I conclude that the Public Body failed to fulfill its duty to assist the Applicant under section 10(1) of the Act. I intend to order the Public Body to comply with its duty by informing the Applicant about what was done to search for responsive records. Although the Public Body has informed this Office of what was done through its submissions in this inquiry, section 10(1) requires the Public Body to respond to the Applicant. This means informing the Applicant, directly, about the search that was conducted. 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. These details will provide confirmation to the Applicant that the Public Body does not have the records that he noted in his letter of July 23, 2007.

[para 26] While it may not be necessary in every case for a public body to give an applicant all of the foregoing information in order to meet its obligation of telling the applicant what was done to search for responsive records, a public body should provide greater detail about the search that it conducted when the applicant, as here, specifically asked it for a confirmation of whether particular records did or did not exist.

V. ORDER

[para 27] I make this Order under section 72 of the Act.

[para 28] I find that the Public Body failed to make every reasonable effort to assist the Applicant and to respond to him openly, accurately and completely, as required by section 10(1) of the Act. Under section 72(3)(a), I order the Public Body to comply with its duty to assist under section 10(1). Under section 72(4), I specify that the Public Body inform the Applicant about what it did to search for the requested records by advising him 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 it believes that no more responsive records exist than what has been found or produced.

[para 29] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator