

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-19

April 29, 2014

ALBERTA HEALTH

Case File Number F6034

Office URL: www.oipc.ab.ca

Summary: A former employee of Alberta Health (the Public Body) had made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for information related to her employment with, and termination from, the Public Body. Upon receiving responsive records, the Complainant made a complaint to this office that the copy of her performance contract, which she had received from the Public Body in response to her access request, is different from the performance contract that she had signed. Specifically, she complained that the signature of her supervisor and executive director, as well as handwritten comments regarding her performance, were missing from the signature page of the contract that had been provided by the Public Body.

The Complainant made a complaint to this Office that the Public Body had altered her performance contract to omit the signatures and positive comments. The issues considered in the inquiry are whether the Public Body failed to perform an adequate search for the signed performance contract; whether the Public Body fulfilled its duty to ensure information used to make a decision about an individual is accurate and complete and whether it was retained for the required amount of time; and whether the Public Body made reasonable security arrangements to protect the information.

During the inquiry, the Public Body conducted a search of its human resources files maintained by Service Alberta. The Public Body found 190 pages of responsive records, which included the signed version of the Complainant's performance contract.

The Adjudicator determined that the Public Body failed to perform its duty to assist the Complainant under section 10(1) of the Act. The Adjudicator also determined that there was insufficient evidence upon which to conclude that the Public Body used inaccurate or incomplete information to make a decision about the Complainant.

The Adjudicator determined that there was no evidence that the Complainant's performance evaluation had been altered by anyone in the Public Body, and that the Public Body had not failed to make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 35, 38, 72.

Orders Cited: AB: Orders 97-006, F2009-017, F2009-041.

Authorities Cited: *The Law of Evidence*, Sopinka, Lederman and Bryant, 2nd edition, (Toronto: Butterworths Canada Ltd. 1999).

I. BACKGROUND

[para 1] A former employee of Alberta Health (the Public Body) had made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for information related to her employment with, and termination from, the Public Body. Upon receiving responsive records, the Complainant made a complaint to this office that the copy of her performance contract which she had received from the Public Body in response to her access request is different from the performance contract that she had signed. Specifically, she complained that the signature of her supervisor and executive director, as well as handwritten comments regarding her performance, were missing from the signature page of the contract that had been provided by the Public Body.

[para 2] The Commissioner authorized a portfolio officer to investigate and attempt to settle the matter; however, this was not successful in resolving the complaint, and the matter was set down for inquiry.

II. ISSUES

[para 3] The Notice of Inquiry sent October 1, 2013 lists the issues as follows:

- 1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**
- 2. Did the Public Body make every reasonable effort to ensure the Applicant's personal information was accurate and complete, as required by section 35(a) of the Act (accuracy and retention)?**
- 3. Did the Public Body retain the Applicant's personal information for at least one year, as required by section 35(b) of the Act (accuracy and retention)?**

4. Did the Public Body meet its obligations as required by section 38 of the Act (protection of personal information)?

III. DISCUSSION OF ISSUES

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

[para 4] 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 5] 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 6] There are two components of an adequate search:

- a) Every reasonable effort must be made to search for the actual record requested; and
- b) The applicant must be informed in a timely fashion about what has been done. (See Order F2009-017, at para. 53)

[para 7] In response to her request for information related to her employment with, and termination from, the Public Body, the Public Body provided (together with other records) an unsigned copy of the Complainant's performance contract. The Complainant believed that this contract had been "tampered with", as she remembered that the contract had been signed by her supervisor and the executive director, and had included a positive review of her performance. However, the positive review and the signatures were missing from the unsigned copy of the contract.

[para 8] In the course of the inquiry, the Public Body informed me that it had found a further 190 pages of records responsive to the Complainant's request. These records comprised the Complainant's "official" human resources file, which was stored by Service Alberta. The records included the signed version of the contract, including the positive review.

[para 9] An affidavit signed by a director of human resources of the Public Body states that "Human resources or employment records relating to an Alberta Health employee are entered into the electronic systems of Service Alberta which is considered by the Human Resources Branch of Alberta Health to be the definitive depository of an employee's human resources information or documents." The affiant further states that access to the records kept by Service Alberta must be approved by the Minister of the Public Body, and that Service Alberta retains the human resources records at the request of the Public Body. This indicates that while Service

Alberta has possession of the records, the Public Body has control of the records, for the purposes of the FOIP Act. The Public Body does not argue that it does not have control of these records.

[para 10] The Public Body does not explain why these additional records were not located in October 2011, when it located the records initially provided to the Complainant. The Complainant points out that the affidavit of the Public Body HR director indicates that it is the normal practice for the Public Body's official human resources records to be housed in Service Alberta. I agree with the Complainant that the records located in Service Alberta ought to have been part of the Public Body's initial search.

[para 11] The Public Body argues that as the records were eventually found, it has met its duty to assist under section 10(1). I disagree. As I have already found in companion Order F2014-18, by failing to search for the official human resources records, in the appropriate location, in conducting its initial search, the Public Body clearly failed to make every reasonable effort to conduct a thorough search. While the record at issue in this inquiry was eventually located, it was provided to the Complainant more than two years after the initial set of responsive records was provided.

[para 12] I find that the Public Body did not fulfill its duty to assist the Complainant.

2. Did the Public Body make every reasonable effort to ensure the Applicant's personal information was accurate and complete, as required by section 35(a) of the Act (accuracy of information)?

[para 13] Section 35(a) states:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete,

[para 14] The Complainant seems to argue that someone in the Public Body *created* an inaccurate document, by removing the page of the performance contract containing the signatures, positive comment, and performance evaluation score, and substituting a version of this page that was incomplete, in order to support the decision to terminate her employment.

[para 15] The Complainant asserts that she is not trying to have the Public Body's decision to terminate her employment revisited. She also states:

I never made the statement that [the unsigned performance contract] was used to terminate my employment. The reason I think the missing page is relevant is because the ADM was told I had performance problems which *supported* his decision to terminate me because of [another incident]. I believe that any information/documents in the office that demonstrated otherwise were manipulated in the event of an investigation into the matter. My termination letter did not indicate "Performance problems" however, the ADM was told I had performance problems.

[para 16] The Public Body argues that the performance contract (signed or unsigned) was not relevant to the decision to terminate the Complainant. Rather, it states that the decision to terminate the Complainant's employment was, rather, based on a particular incident involving the Complainant and her coworkers.

[para 17] There is nothing in the submissions to indicate that the unsigned version of the performance contract was used by the Public Body when it decided to terminate the Complainant's employment. The Complainant does not argue that the unsigned version was used; rather, she argues that it was altered in the event that it might become relevant in the future (should her termination be investigated). The Complainant's theory is entirely speculative. I therefore conclude that there is insufficient evidence to find that the Public Body used incomplete or inaccurate information to make a decision about the Complainant. (I will consider the Complainant's allegations that the unsigned version of the performance contract was altered, under Issue 4.)

3. Did the Public Body retain the Applicant's personal information for at least one year, as required by section 35(b) of the Act (retention of information)?

[para 18] As the Public Body eventually located the signed copy of the Complainant's contract, I find that the Public Body met its obligations under this provision.

4. Did the Public Body meet its obligations as required by section 38 of the Act (protection of personal information)?

[para 19] Section 38 of the Act states:

38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 20] The Complainant alleges that her information was at risk of unauthorized access, collection, use, disclosure or destruction (or similar risk). She also alleges that the unsigned copy of the contract had been tampered with by the Public Body. The Complainant bears an initial evidential burden of establishing that her personal information was at risk and/or was altered by the Public Body.

[para 21] Section 38 of the FOIP Act does not specifically address unauthorized alteration of records. However, when a record is altered by someone without authority to do so, or in a manner that it not authorized (such as the alteration alleged by the Complainant), the original record is, in a sense, destroyed and replaced with a new, altered record. Therefore, in my view, unauthorized destruction of a record, which is specifically listed in section 38, can encompass unauthorized alteration of a record.

[para 22] In Order F2009-041, the Adjudicator provided a useful overview of the burden of proof with respect to an alleged unauthorized disclosure of personal information under Part 2 of the FOIP Act (at paras. 25-29). She concluded that the complainant bears an initial evidential

burden of establishing a basis for the complaint. I believe this conclusion applies equally with respect to a complaint of a failure to meet the duty under section 38. The authors of *The Law of Evidence* 2nd Edition describe the evidential burden as follows:

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 23] The Complainant argued that statements made by the executive director in an affidavit, specifically that he found a copy of the unsigned performance contract in “the office,” means that the contract was found in the MDS office area and this area is not secured. I acknowledge that the Complainant was employed in this area of the Public Body and so she has some knowledge of the set-up of the office and the physical security of the area.

[para 24] By letter dated February 7, 2014 I asked the Public Body to address the Complainant’s allegations regarding its security arrangements. The Public Body responded that the executive director has confirmed that he had located the copy of the unsigned performance contract on his network account, which is password protected. He also states hard copies of personnel (and other sensitive) documents are maintained in a locked filing cabinet to which he keeps the key. These appear to be reasonable security arrangements with regard to the Complainant’s personnel records.

[para 25] As noted above, the Complainant also argued that an incomplete version of the performance contract had been created (by creating a version without the signatures and positive comments contained in the signed copy) in order to support her termination, should it be reviewed in the future.

[para 26] Section 38 addresses whether a public body has made reasonable security arrangements to safeguard personal information; it does not directly address situations in which a breach is alleged but the safeguards were reasonable. In other words, it is possible for a public body to have made reasonable security arrangements and yet personal information can be accessed, used, disclosed or destroyed in an unauthorized manner. For example, a “rogue” employee who is appropriately authorized to access information may access the information for unauthorized purposes. This is essentially the situation alleged by the Complainant. In such a case, it is not clear that section 38 is contravened.

[para 27] That said, the fact of a breach may undermine what would otherwise appear to be reasonable security arrangements; therefore I will consider the Complainant’s allegations regarding unauthorized alteration of her performance contract.

[para 28] The Complainant notes that every page of the unsigned version of the performance contract has the same footer except the assessment page, which included a space for comments and signatures. She also points out that the unsigned version of the performance contract is missing the word “confidential” in the footer of that same page. The signed version has a footer on every page (including the comments/signature page). The Complainant seems to believe that the word “confidential” was manually stamped on every page of the final version of the performance contract (as opposed to the word “confidential” having been inserted electronically

into the footer) and that because the unsigned version contains “confidential” in the footer (except on the page missing the footer), it must be a copy of the final version of the contract (rather than a previous draft version).

[para 29] The performance contract appears to be an electronic form; the employee and his or her supervisor fill in the various sections on the form. It appears to me that the word “confidential” is an element of the footer on each page of the electronic form, rather than being manually stamped on each page of the final version. The relevant page in the version of the performance contract that was initially provided to the Applicant is missing the word “confidential” because it is missing the footer entirely.

[para 30] I agree with the Complainant that it is unclear why there is no footer on the final page of the unsigned contract; however, given the many electronic versions of a document that can exist and be saved, the ease with which changes can be made, and the possibility of multiple printings, it is very hard to reach any clear conclusions from the existence of any particular version at an unknown point in time, whether electronic or printed.

[para 31] The executive director, in his affidavit, explained the process for completing performance contracts. He states that his recollection of the process for completing performance contracts for employees at the Complainant’s level in 2010-2011 were as follows:

- the Complainant would meet with her direct supervisor; they document successes and challenges for the year in the performance contract;
- the direct supervisor would meet with the executive director to complete the Complainant’s rating and include comments;
- the Complainant would meet with her direct supervisor to further review and discuss the performance contract and the assessment. Once both the Complainant and her supervisor were satisfied, the performance contract and assessment would be signed by the Complainant and supervisor;
- the executive director would then sign the contract and add comments;
- this final version of the performance contract would be provided to the Complainant and a signed copy would be forwarded to the division’s Assistant Deputy Minister’s office and then to the HR branch to be included in the Complainant’s file.

[para 32] As the unsigned draft of the Complainant’s performance contract has neither the executive director’s signature and comments, nor the Complainant’s comments, the draft was presumably sent to the executive director in between stages 1 and 2 outlined above. This would explain some differences between the signed and unsigned versions of the performance contract, such as spacing changes. I note as well that it is not surprising that there would be a version of the document that did not have a signature and the supervisors’ comments, as that was likely the final stage in the process.

[para 33] In addition, I take into account the evidence about the reasons for the Complainant’s termination, and that her performance contract appears to have had no role in that process. As well, the unsigned version of the performance contract was obviously incomplete, and the version with the signatures and positive comments had been kept and transferred to the usual

storage location at Service Alberta. Any attempt at fabrication would therefore very likely have been futile had a review of the termination (that called for performance contracts) ultimately taken place.

[para 34] In view of the foregoing considerations, the fact two different versions of this same document exist does not take me to the conclusion that the particular copy of the contract at issue here was the result of deliberate alteration, involving removal of the page with the signature and comments, and substitution of a page without these entries, undertaken as a safeguard in the event of a future review of the termination.

[para 35] Rather, I accept the affidavit evidence of the executive director, that the unsigned copy of the performance contract is a draft copy of that contract. It was provided to the Applicant presumably because it was located in the original search and is responsive to her request. The fact that the draft copy is incomplete (because the last page had not yet been filled in) does not mean that it had been altered by the executive director (or anyone else) for this purpose.

[para 36] I find that the Complainant's allegation that her performance contract was kept in an insecure location to be speculative. I likewise find that there is insufficient evidence for me to conclude that the Public Body deliberately altered the Complainant's performance contract.

[para 37] I find that the Public Body did not fail to make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

IV. ORDER

[para 38] I make this Order under section 72 of the Act.

[para 39] I find that the Public Body did not fulfill its duty to assist the Complainant under section 10. However, as the Public Body has found the requested document in the course of this inquiry, I do not find it necessary to order the Public Body to provide an adequate response to the Complainant in regard to her access request.

[para 40] I find that the Public Body did not fail to meet its obligations under sections 35 and 38 of the Act.

Amanda Swanek
Adjudicator