

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-39

October 20, 2014

ALBERTA ENERGY REGULATOR

Case File Number F7014

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Alberta Energy Regulator. He requested records relating to residency audits conducted on individuals or companies believed to be located in British Columbia or records related to the scheduling of meetings with representatives of British Columbia to discuss residency requirements.

The Public Body searched for and produced responsive records. In answer to the Applicant's question as to how many residency audits the Public Body had conducted, the Public Body's FOIP Coordinator first answered "three" and subsequently corrected this answer and explained there were "five". The records indicated that five residency audits had been conducted.

The Applicant requested that the Commissioner review the Public Body's response on the basis that it was not open, accurate, or complete.

The Adjudicator determined that the Public Body had conducted a reasonable search for responsive records and had responded openly, accurately, and completely, as required by section 10 of the FOIP Act (duty to assist an applicant).

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

Authorities Cited: AB: Orders 2001-016, 2001-033, F2007-029

I. BACKGROUND

[para 1] The Applicant made a request for access to the Energy Resources Conservation Board (now the Alberta Energy Regulator) (the Public Body). He requested access to records relating to the residency audits conducted on individuals or companies believed to be located in British Columbia, or records related to the scheduling of meetings with representatives of British Columbia to discuss residency requirements.

[para 2] After consulting with the Applicant regarding the scope of the access request, the Public Body conducted a search for responsive records. The Public Body located 549 responsive records. It applied exceptions to disclosure to withhold 115 records from the Applicant, and provided the remaining 434 records to the Applicant. (The Public Body's application of exceptions is not at issue.)

[para 3] The Applicant requested review by the Commissioner of the adequacy of the Public Body's search for responsive records.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. ISSUE

Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants) and to respond openly, accurately and completely)?

III. DISCUSSION OF ISSUE

[para 5] Section 10 of the FOIP Act 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 6] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. The Applicant's argument that the Public Body has not located all records responsive to his access request can be addressed under section 10.

[para 7] In Order 2001-016, the Commissioner 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) [now 10(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 about what has been done.

[para 8] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable search for responsive records.

[para 9] In Order F2007-029, former Commissioner Work explained the kinds of evidence that a public body must produce or adduce in an inquiry in order to establish that a search was conducted in a reasonable way. He said:

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

Did the Public Body complete a reasonable search for responsive records?

[para 10] The Public Body submitted an affidavit sworn by its Manager of Liability Management in the Closure and Liability Branch. She states:

The LMG is responsible for ensuring that licensees and other holders of approvals issued by the AER comply with eligibility requirements set out in the legislation administered by the AER. These requirements are summarized in *Directive 067: Applying for Approval to Hold AER Licenses*, a true copy of which is attached as Exhibit A to this my affidavit. The residency requirements for companies and individuals are summarized in section 3.2, on page 5 of the directive.

The AER may audit a licensee or application for licensee status if it has concerns that the licensee does not meet the AER's residency requirements. Before conducting an audit the AER will make inquiries to attempt to determine the residency of a company. Such inquiries do not constitute an audit and the AER does not consider them to audits. A company or individual is only audited if it or he fails to respond to requests for information or if the responses provided are unclear, evasive, or otherwise indicate a potential issue meeting residency requirements.

LMG staff conducted the search for information that was requested in AER access request #F2012-G00037, relating to residency audits of B.C. companies. The LMG was confident that any responsive records would exist in AER databases used by LMG, or in the individual computers or paper files of staff members who may be involved in conducting residency audits, due to the relatively recent time period designated by the Applicant, i.e. responsive records would not have been archived or otherwise sent to off-site storage.

LMG staff members that were potentially involved in residency audits were contacted and asked to provide responsive records. LMG staff also searched in EDOCS (the electronic document repository that the AER uses to store electronic documents) and other folders and shared drives that are commonly used by LMG to store corporate information. Staff searched electronic databases using the search terms “Residency Audit”, “BC”, “British Columbia”, and “B.C”. These databases do not store or sort information by either the audit process or the location of companies. Initial searches did not retrieve any responsive records, however, a search of the term “B.C.” returned more than 5000 items. LMG staff then proceeded to compile responsive records from this search result. The end result of LMG’s search efforts was that more than 500 pages of information were provided to the AER’s FOIP Coordinator.

In addition, one LMB staff member who was not initially considered to have been involved in any residency audits identified and provided seven pages of email messages that were provided to the FOIP Coordinator.

In my opinion as Manager of the LMG, the LMG searched all of its databases, computer files and paper files for responsive records and generated a substantial return that included detailed information on residence audits for five B.C. Companies. The LMG has no other locations to search for responsive records and the results of the search the LMG conducted reflected what LMG anticipated it would have in its custody or control in terms of responsive information. The AER has no other work group that conducts residence audits and the AER does not contract that work out to non-LMG staff members. I do not believe that a further or a different search for the same information would identify additional responsive records.

[para 11] The Applicant did not make submissions for the inquiry. However, in his request for an inquiry he expressed three concerns regarding the Public Body’s search for responsive records. These concerns are:

1. Records 1 – 3 contain a list of companies whose directors reside outside Alberta. This list contains references to nine companies with directors who reside in British Columbia.
2. Records 134 – 156 indicate that a British Columbia company was contacted regarding residency issues. The Public Body has stated only five British Columbia companies were subjected to residency audits and this company is among the companies the Public Body states that it audited. The Applicant questions the accuracy of the Public Body’s response on this basis and states:

The five “confirmed records [were] only confirmed after I identified the companies with the ERCB. Coupled with the fact that the records provided apparently conflict with the ERCB’s contention, and the very large number of potentially non-responsive records provided, I am concerned that the ERCB has not provided an accurate or fulsome response.

3. The Applicant received email records created by only one employee and not emails created by other employees. However, there are references in the records to other employees and he reasons that the other employees would also have created responsive emails.

Records 1 - 3

[para 12] The Public Body states that records 1 – 3 are not responsive to the Applicant’s access request and were provided in error. It states that the list was consulted

to assist in identifying potentially responsive records and was inadvertently included in the response to the Applicant.

[para 13] The Public Body further argues:

The applicant contends that there are other responsive records not accounted for by the AER, however, he does not identify what those records are nor does he offer a reasonable basis for concluding that other responsive information exists. His contention is based on mistake and unfounded suspicion. The mistake relates primarily to a table listing the names of companies that have a connection to a jurisdiction other than Alberta. This table is not a list of companies that were audited by the AER for residency requirements, and the AER's FOIP Coordinator clearly stated that to the applicant in an email.

As noted above, the Applicant did not provide submissions for the inquiry and therefore did not challenge the Public Body's arguments or evidence.

[para 14] The list contained in records 1 – 3 appears to be a reference that could be consulted when determining where a company's board of directors is located and the steps the Public Body had taken to make that determination. The content of these records and the evidence and submissions of the Public Body support finding that records 1 – 3 do not contain a list of companies that were being or had been audited with regard to residency requirements, but is a list of companies connected to other jurisdictions.

[para 15] The question of whether records 1 – 3 are responsive is beside the point. The question that must be addressed in this inquiry is whether these records point to the existence of responsive records that have not yet been located or produced by the Public Body. In my view, they do not. The Applicant requested records "related to the residency audits conducted on individuals or companies believed to be located in British Columbia". As the Public Body has established that only one of the companies listed on records 1 – 3 is a British Columbia company that was the subject of an audit, and the Public Body has provided records relating to that audit to the Applicant, the contents of records 1 – 3 do not support finding that there are other responsive records in existence that have not been provided to the Applicant. Had the Applicant requested all records relating to companies residing outside Alberta, then the list would point to other responsive records. However, he confined his access request to records relating to companies that reside in British Columbia that were the subject of residency audits.

Records 134 – 156

[para 16] Review of these records indicates that the Public Body requested information from a company regarding the residency of its board members. The company complied with the request and provided evidence to address the Public Body's questions. The Public Body's Manager of Liability Management states that the process that generated records 134 – 156 was not a residency audit. Rather, an audit would only have been conducted in relation to the matter described in those records had this company failed to respond to the Public Body's questions and provide the information it required.

[para 17] In its submissions, the Public Body provided the following explanation for including records 134 – 156 in its response to the Applicant:

[Records 134 – 156] reflected a residency issue with a BC company that, if not addressed, may have led to an audit situation. The AER could have excluded these records from the return to the Applicant as being non-responsive, but it decided that the information in the records so closely resembled the information the applicant was seeking that they should be provided.

[para 18] The Public Body argues that it interpreted the Applicant's access request liberally in order to ensure that he received the kinds of information he was seeking.

[para 19] I find that records 134 – 156 do not point to the existence of other responsive records that have not yet been produced. The content of records 134 – 156 establishes that the company in question complied with the Public Body's requests for information and documents in order to satisfy the Public Body's requirements. It therefore appears that there would be no reason for any further action to be taken by the Public Body in relation to this company's residency in the form of an audit, and therefore, no likelihood that responsive records would be generated in relation to the company's residency in the time frame of the access request.

[para 20] The Applicant argues that because records 134 – 156 do not relate to a formal audit, and are strictly speaking, not responsive, the accuracy of the Public Body's response is called into question. I do not accept this argument. The Public Body included these records as they appeared to it to be related to the Applicant's access request, although not relating, strictly speaking, to a formal residency audit.

[para 21] The inaccuracy the Applicant points to appears to arise from the Public Body's clarification as to how many audits it has conducted and its explanation that records 134 – 156 do not pertain to an audit. However, a public body is under no obligation to answer questions regarding the number of audits it conducts or to explain the significance of its records, only to provide responsive records to an applicant. The ambiguity the Applicant perceives arises from the Public Body's answer to his questions regarding the matters under its purview, as opposed to the contents of the Public Body's responses.

[para 22] In Order 2001-033, former Commissioner Work considered whether section 10(1) incorporates a duty to answer questions. He concluded:

Section 10(1) also requires a public body to respond to each applicant openly, accurately and completely. One of a public body's duties in this regard is to tell an applicant whether there are records that respond to the applicant's access request.

The Applicant's access request consists partly of a series of questions he wanted the Public Body to answer. The Public Body attempted to answer those questions (the Applicant provided me with the Public Body's initial and subsequent responses). However, some of the Public Body's responses do not tell the Applicant whether there are records that respond to the Applicant's access request. Certain of those responses seem vague or evasive as to whether the Public Body has records.

The Applicant has a right of access to records (section 6(1) of the Act). The Applicant does not have a right to have the Public Body answer questions. Similarly, the Public Body does not have a duty to answer the Applicant's questions (it may do so if it wishes), but the Public Body does have a duty to respond to the Applicant about whether it has records that will answer the Applicant's questions.

In brief, the Public Body should have responded to the Applicant in the following manner: "You asked for (a)..., (b)..., and (c)... We searched.... Here's what we have... We don't have anything else."

Therefore, because the Public Body did not tell the Applicant whether it had records that would answer the Applicant's questions, I find that the Public Body did not respond openly, accurately and completely to the following parts of the Applicant's access request: (a)10 ((a)1, 3-9 are not at issue); (b)1, 2, 3, 5, 6, 7; (c)7.

I intend to order the Public Body to respond to foregoing parts of the Applicant's access request in the following way: "The Public Body does/does not have records that answer the Applicant's questions about (a) the Coleman Sportsplex...; (b) the Blairmore-Bellvue pipeline and the well drilled in Blairmore...; and (c) The Crowsnest Centre... I am telling the Public Body to be direct in its responses as to whether it has records, as opposed to answering the Applicant's questions.

The Public Body has a duty to answer questions as to whether it has responsive records in its custody or control. It does not have a duty to answer questions regarding its processes, unless that is the only way to answer the question of whether it has responsive records in its custody or control.

[para 23] In this case, the FOIP Coordinator initially told the Applicant that there had been three residency audits, and then subsequently called the Applicant back to tell him that there were five such audits. The Public Body has stated for the inquiry that it conducted five audits. The records provided to the Applicant answer the question of how many audits were conducted, as they contain information establishing that five audits were conducted. The FOIP Coordinator was not required to answer the Applicant's questions, but to provide records that would do so. The records she provided the Applicant served to answer his questions.

[para 24] I find that the Public Body's response to the Applicant satisfied any duty created by section 10 to address the Applicant's questions openly, accurately, and completely.

Email records

[para 25] The Applicant takes issue with the fact that he was provided email records created by only one employee and he surmises that other employees who took part in audits may have created responsive emails which have not been provided to him.

[para 26] I do not disagree that it is possible that other employees may have created emails relating to the audits. However, even accepting this to have been the case, the existence of such emails at one time would not necessarily mean that such emails continue to exist in the present. Emails may be deleted once more current information

replaces them, or when they are no longer necessary. There is no duty under the FOIP Act to maintain records, with the exception of section 35, which imposes a duty to retain certain types of personal information for up to one year after it is used. A public body does not fail to meet its duty under section 10 if it no longer has available all the potentially responsive records it may once have had. In this case however, there is no evidence before me to enable me to quantify the possibility that other employees created responsive records, and I am unable to find that the Public Body failed to meet its duty to assist the Applicant on the basis that no such records have been produced.

[para 27] In addition, the Applicant does not explain why emails of other staff members would be significant. Possibly, he means that if the Public Body searched for emails of other staff members, it would be likely to find records relating to other formal audits of companies with ties to British Columbia that have not yet been produced. However, the uncontested evidence of the Public Body's Manager of Liability Management establishes that the Public Body searched all of its databases, computer files and paper files for responsive records. No additional responsive records were located. The evidence of the Manager of Liability Management is a complete answer to the Applicant's argument that the Public Body has not taken steps to include all responsive records in its response to him.

Conclusion

[para 28] The Public Body has explained the steps it took to identify and locate responsive records and how it determined where such records would be located. It has also described the scope of its search and who conducted it, and explained why it believes no further responsive records can be produced. I am satisfied that the Public Body conducted a reasonable search for responsive records and did not fail to meet the duty to assist the Applicant imposed by section 10.

IV. ORDER

[para 29] I make this Order under section 72 of the Act.

[para 30] I confirm that the Public Body met its duties to the Applicant under section 10 of the Act.

Teresa Cunningham
Adjudicator