

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2015-13**

April 30, 2015

**ALBERTA HEALTH SERVICES**

Case File Number F6949

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* for records that related to her employment with Alberta Health Services (the Public Body). The Public Body provided records; however, the Applicant believed that the Public Body had not met its duty to assist her. The Adjudicator considered this issue as well as whether records were destroyed contrary to section 35 of the Act and whether the Public Body complied with the request within the time limits outlined in the Act (section 11).

The Adjudicator found that the Public Body had met its duty to assist the Applicant. The Adjudicator also found that the records that were destroyed did not contain personal information and therefore did not engage section 35 of the Act. The Adjudicator found that the Public Body had not complied with section 11 of the Act. The Adjudicator ordered that the Public Body implement a protocol to ensure compliance with sections 11 and 14 of the Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 11, 14, 35, 72

**Orders Cited:** **AB:** Orders 98-002, 98-003, 98-012, F2006-022, F2007-012, F2007-029

## I. BACKGROUND

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) for human resources records relating to her employment with the Public Body. The request listed, in detail, the types of information and records that the Applicant expected to receive. She asked for the following:

All HR records for the period spanning March 30, 2009 to today's date (October 15, 2012) making reference to my [the Applicant's] performance or any evaluations, me [sic] investigations or comments reported to persons in the employ of AHS, or in a working relationship with AHS such as University of Alberta. Any reference to me about me, or involving me should be included. Copies of email from me or and returned to me, or forwarded to others. Copies of meeting notes or correspondence in which I am discussed. Copies of records kept in e-people. Copies of any files of any type that are kept outside of the usual record keeping methods. I have reviewed my HR files, and was told that it is a complete record, and that no additional information is kept elsewhere, save for some information that may appear on e-people.

On January 9, 2013, the Public Body wrote to the Applicant to confirm that the Applicant had agreed during a telephone conversation on the same date to narrow the time period of the requested records to March 28, 2012 to October 15, 2012 and that the records being sought were to include communications that occurred between a particular group of people.

[para 2] The Public Body provided records, but the Applicant believes that certain records regarding an investigation have not been disclosed. The records that relate to what the Applicant characterizes as an investigation could possibly be made available by "restoring" the email of an individual employed by the Public Body. The "restore" has a variable cost (depending on the number of "restores" needed to locate the record).

## II. INFORMATION AT ISSUE

[para 3] As this inquiry addresses the adequacy of the Public Body's search for responsive records, rather than refusal to grant access to information, there are no records at issue.

## III. ISSUES

[para 4] The Notice of Inquiry dated October 10, 2014 set out 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)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.**
- 2. Did the Public Body comply with section 11 of the Act (time limit for responding)?**

**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)?**

**In this case, the Commissioner will consider whether it can be determined if information the Public Body says it destroyed contained the Applicant’s personal information, and if this can be determined, whether the information was used by the Public Body to make a decision affecting the Applicant, hence was improperly destroyed.**

**IV. 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)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.**

[para 5] The Applicant argues that the Public Body has not located all records that would be responsive to her request. Specifically, she argues that the Public Body did not provide records relating to “investigations”, “mediation”, “mediation resolution” or “process” relating to a complaint made by the Applicant.

[para 6] In order to determine whether an adequate search for records was completed, I must consider whether the Public Body

- (1) [made] every reasonable effort to search for the actual record requested, and
- (2) [informed] the Applicant in a timely fashion of what it [had] done”.

(Order 98-012, para 13)

[para 7] In Order F2007-029 (para 66), evidence that should be adduced by the Public Body was discussed:

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

[para 8] In its submissions, the Public Body provided an affidavit sworn by the Information Access and Privacy Coordinator (Coordinator). She deposed the following:

- ii. “The FOIP and HIA Access Services unit of AHS received this request on Oct 17, 2012. A true copy of the request is attached as Exhibit “A” to this my affidavit. On October 31, 2012 AHS confirmed the Applicant’s request and divided it into two separate requests. One was for general information regarding the existence of an AHS policy on the maintenance of email access for employees on long term disability which was completed on November 29, 2012 (Request 2012-G-0223). Request 2012-G-0222 which is the subject of this inquiry was in relation to the Applicant’s request for her own personal information.
- iii. During November 2012 to January 2013 I engaged the Applicant on numerous occasions to define and clarify the scope of the request. On November 26, 2012 the Applicant confirmed to me that she did not want HR records as she had viewed them but wanted the records from e-people (an HR database used by AHS). On November 30, 2012 I followed up with an IT Lead Analyst to determine whether this was feasible. On December 6, 2012 I left a voicemail with the Applicant that the retrieval of such records was possible. On January 9, 2013 I had a telephone conversation with the Applicant wherein she informed me that she did not require records pertaining to KB, SV, RF,MS, JG, DD, and TJ. Subsequently a call for records was sent out on January 11, 2013 excluding those individuals but containing the remaining individuals listed in the Applicant’s access request. A true copy of the Call for Records is attached to my affidavit as Exhibit “B”.
- iv. On January 11, 2013 I was informed by SJK that SM was no longer on staff. On January 17, 2013 I resent the Call for Records and subsequently received the following responses:
  - DS: No records
  - DF: No records
  - BC: No records
  - KE: No records
  - LT: No records
  - KD: No records
  - TR: No records
  - JD: Received records
  - SJK: Received records
- v. Following up on the Applicant’s request for e-people records on January 17<sup>th</sup>, 2013 I sent a revised Call for Records to MB Director of Human Resources. I received a response from him requesting that I send the Call for Records to GS Executive Director, HR Client Services I resent the request that day. On January 22, 2013 I received a call from the Applicant requesting a fee estimate for retrieving the Mailbox contents for the individuals listed on the Call for Records. That day I emailed a Security Analyst in IT Security and Compliance requesting the estimate. On January 24, 2013 I was informed by him that the retrieval would take 8 hours. On January 29, 2013 I called the applicant and gave the fee estimate as \$216 (8 hours x \$27). The Applicant declined to pursue this option. During our conversation I informed her of the result of my search for records. The Applicant indicated that she would also like to receive a copy of the report that KD wrote and a copy of records from the search. Although the original Call for Records included KD I sent a revised Call for Records that cited the description of the investigation records from the Applicant’s original access request. Attached to this my affidavit as Exhibit “c” is a true copy of the Call for Records dated January 29, 2013. On February 1, 2013 I received an email from KD that she had no records related to this matter as it was standard practice with the work of Team Optimization to destroy records once the work of the team was completed...
- vi. On March 4, 2014 I sent a follow up email regarding the e-people records that I subsequently received on March 12, 2013. The records were released to the Applicant on March 13, 2013 the e-people records were released on March 20, 2013. Attached to this my affidavit and attached as Exhibit “D” is a true copy of the two letters sent to the Applicant.”

[para 9] In her reply to the Public Body's submissions on the adequacy of search, the Applicant asserts she was not given a fee estimate for the retrieval of mailbox contents. She indicates that she would have happily paid the money requested.

[para 10] The Applicant also asserts her conversations with the Coordinator can be remembered as

[S]essions in which I was discouraged from pursuing my FOIP requests because it would only produce similar information although I knew from previous FOIP'd email and documents that there were many documents still not shared with me. There were emails that said p.14 of 27 on Nurse Practitioner issues for example. When I get two pages, I immediately wonder where the rest are.

[para 11] Further, she states,

Really, much of our telephone conversations were spent in her questioning my requests and what I perceived was an attempt to discourage me from trying to get answers. Each time, I ended up acquiescing my initial requests because she was dismissive and led me to believe that my requests were next to impossible, as all records had already been searched. But, I am very angry that I was prevented from obtaining a computer search for documents I knew were missing of (sic) withheld.

[para 12] The Applicant also refers to email documents that originated from an email address not associated with the Public Body.

In one case,..., she used an AHS computer but a U of A email address...I did try to FOIP [her] email through the U of A, and they came back with zero records, although I was able to obtain a few on the AHS side.

[para 13] The Applicant also makes reference, in her submissions, to other documents that are not within the scope of this inquiry. Specifically, she requests records of scheduling in the department and copies of records from her computer desktop. While the Applicant did ask for records of scheduling in her original request for records, she did not ask for records from her computer desktop. In her request for an inquiry, the Applicant did not raise either of these as issues that had not been settled or resolved.

[para 14] In response, the Public Body's rebuttal submissions include another affidavit from the Coordinator. In this affidavit, the Coordinator deposes the following:

3. Contrary to the Applicant's allegations on two occasions I provided the Applicant with an estimate regarding IT searches for records. The first pertained to the Applicant's request to retrieve the Mailbox contents for the individuals listed in the Call for Records. On January 24, 2013 I received replies from the IT Security Analyst involved indicating the time required for such a search. On January 29, 2013 I called the Applicant and provided her the fee estimate for the search. At that time the Applicant indicated that she did not wish to proceed with the search but would like to receive a copy of the report written by [KD]. Attached to this my affidavit and marked as Exhibit "A" is a true copy of the emails I exchanged with the AHS Security Analyst regarding the cost of this search and the notes I made contemporaneously when I discussed the cost estimate with the Applicant. [The notes in Exhibit "A" show that the figure of \$216.00 (8hrs. X \$27) was given as a fee estimate on January 29.]

4. The second request was for a cost estimate for a search of the backup tapes to find the report written by [KD] that was destroyed. The IT Security Analyst indicated that the cost would depend on the timeframe between the record being created and it being deleted. It could take only one “restore” or many depending on the timeframe. The cost of each restore he indicated would be \$1000. This information was given to the Portfolio Officer who did the mediation in this matter. In her letter dated March 26, 2014 to the parties she indicated the Applicant considered the cost associated with this search to be prohibitive and did not wish not (*sic*) to proceed. Attached to this my affidavit and marked as Exhibit “B” is a true copy of the emails I exchanged with the AHS Security Analyst regarding this search.
5. Finally, the communications I had with the Applicant regarding this request were not intended to discourage the Applicant but rather to clarify the request. In April 2012 the Applicant had made a request to our office (Reference #2012-P-0048) for all documents relating to the Applicant’s claim of harassment and workplace bullying from March 2009 to March 27, 2012. That request produced 985 pages of records. Given the similarity of that request to the request now at inquiry (“All HR records for the period spanning March 30, 2009 to today’s date”(October 15, 2012) making reference to my performance” Exhibit “A” of my affidavit dated December 5, 2014) it was necessary to communicate with the Applicant so as to avoid duplication and the associated costs that would be incurred by the Applicant. I refer to my original affidavit regarding the changes to the original request made by the Applicant.

[para 15] In Order 98-003 (para 37), the former Commissioner said that “a decision concerning an adequate search must be based on the facts relating to how a public body conducted its search in the particular case”. There is no specific test for the adequacy of the search, as this is a question of fact to be determined in every case. The standard for the search is not perfection but rather what is reasonable in the circumstances.

[para 16] In this case, applying the FOIP Coordinator’s affidavit evidence to the criteria identified in Order F2007-029, I note the following:

- To identify and locate Responsive Records, the Coordinator sent a call for records to all 10 individuals that the Applicant identified. These individuals were to locate and return to the Coordinator the following records as requested by the Applicant:

All HR records for the period spanning March 28, 2012 to October 15, 2012 making reference to my [the Applicant’s] performance or any evaluations, me [*sic*] investigations or comments reported to persons in the employ of AHS, or in a working relationship with AHS such as University of Alberta. Any reference to me, about me, or involving me should be included. Copies of email from me or and returned to me, or forwarded to others. Copies of meeting notes or correspondence in which I am discussed. Copies of records kept in e-people. Copies of any files of any type that are kept outside of the usual record keeping methods. I have reviewed my HR files, and was told that it is a complete record, and that no additional information is kept elsewhere, save for some information that may appear on e-people.

- The call for records directs that all records (paper, electronic or other) that respond to the request are to be located. The term “record” is defined in the call for records as “information stored in any form including notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written,

photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records”.

- The call for records (Exhibit C of the Coordinator’s December 5, 2014 affidavit) directs the individuals to “...search [all] record systems organized by name or individual identification number or description of the topic ...to locate responsive records. This would include hospital charts, clinic records, ADT systems, electronic data bases, divisional file systems, office and administrative records.” Further it directs that “If an electronic system has the ability to create a paper record from the electronic information, that should be done if it can be accomplished using the normal computer hardware and software and technical expertise.”
- The Coordinator deposed that no more responsive records exist for the following reasons:
  - i. Both electronic and paper based records were searched.
  - ii. The initial response from the call for records was discussed with the Applicant and a further call for records regarding the investigation was sent to an individual identified by the Applicant.
  - iii. The Public Body provided the Applicant with information regarding the retrieval of mailbox records, but this option was not pursued by the Applicant at that time.

[para 17] I find, on the evidence before me, that the Public Body has searched all locations that might house responsive records. I also find that the Public Body kept the Applicant informed of the search and the results and modified its call for records after discussions with the Applicant. The Public Body sent another call for records regarding a specific report after discussing the results of the initial call for records with the Applicant. The Applicant’s assertions that the Public Body attempted to dissuade her from her request for information is not borne out by the evidence before me.

[para 18] Section 6 of the Act gives an Applicant the right of access to any record in the custody or under the control of a Public Body.

[para 19] The Applicant asserts that the Public Body did not conduct searches on email addresses that are not accounts of the Public Body. The Public Body maintains that those searches were not conducted because those accounts are neither under their control nor in their custody. The Public Body does not have a duty to search email addresses of accounts not within its custody or control. In this case, it did search for emails of individuals identified by the Applicant. Emails sent from outside accounts to accounts under the Public Body’s control and/or custody, if sent to the individuals that the Applicant had identified, would be included in the search.

[para 20] The search for emails entails a retrieval of mailbox contents. There is a cost associated with that search. The Public Body and the Applicant differ in their assertions

regarding when the cost estimate to search was given to the Applicant. The Applicant, in her rebuttal submissions indicates that she only learned of the estimate to search email box contents when she read the affidavit of the Public Body's Information and Privacy Coordinator.

[para 21] The rebuttal affidavit of the Coordinator attaches as Exhibit "A" email correspondence with an IT Security Analyst dated January 24, 2013 that gives an estimate of 7-8 hours of work required to search the email boxes of listed individuals.

[para 22] The same exhibit also contains a page of handwritten notes of the Coordinator that she indicates she made contemporaneously when discussing this with the Applicant. These notes show that the Coordinator called the Applicant on January 29 to specifically discuss the fee estimate. It also indicates that at that time, the Applicant informs the Coordinator that "she is not going to go through the process of IT searching for emails."

[para 23] I accept the evidence of the Public Body's Information and Privacy Coordinator on this point. The email correspondence and the contemporaneous notes corroborate her evidence. However, if this was a misunderstanding between the Applicant and the Public body, the Applicant may still advise the Public Body she wants to pay the fee and have the search performed.

[para 24] The Public Body has also provided the Applicant with a fee estimate to "restore" an email box that *may* (my emphasis) contain the report that the Applicant is seeking. This is a different process than described above. This cost is significantly greater than the cost associated with the email box content search. The report that the Applicant wants was deleted by the Public Body. Attempts to retrieve the deleted report entail a process called "restoring". Each "restore" would cost \$1000.00. The "restores" would pinpoint a specific time frame. If not successful, another attempt would be made.

[para 25] This information was provided to the Applicant. I have nothing before me from the Applicant suggesting she would be willing to pay this cost. Again, however, if she is willing to do this, she may indicate this to the Public Body.

[para 26] I find that the Public Body has met its duty to assist the Applicant.

**2. Did the Public Body comply with section 11 of the Act (time limit for responding)?**

[para 27] Section 11 establishes time limits for a public body to respond to an access request. It states:

*11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*

*(a) that time limit is extended under section 14, or*



*(b) the request has been transferred under section 15 to another public body.*

*(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[para 28] Section 14 of the Act states:

*14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period*

*...*

*(4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant*

*(a) the reason for the extension,*

*(b) when a response can be expected, and*

*(c) that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.*

[para 29] The Applicant's request for records from the Public Body is dated October 15, 2012 and is date stamped "received October 17, 2012". The records were sent to the Applicant on March 13, 2013 and March 20, 2013.

[para 30] Order F2007-012 (para 36) states the following:

Although the Public Body did not respond to the Applicant's access request within the time limit contemplated by section 11, if the Public Body can demonstrate that it took all reasonable steps to respond to the access request within the time limit, it would not be in breach of section 11, despite missing the time limit.

[para 31] In Order 98-002 (para 59), "every reasonable effort" is defined.

Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable. The use of "every" indicates that a public body's efforts are to be thorough and comprehensive...

[para 32] Order F2006-022 (paras 21, 22) describes the interplay of sections 11 and 14:

Section 11 of the Act requires the head of a public body to make every reasonable effort to respond to the applicant not later than 30 days from the date of receipt of an access request. If a public body can demonstrate that it made every reasonable effort to respond to a request within the time limit, but failed due to circumstances beyond its control, the public body would not be in breach of section 11. However, legislative provisions must be read in the context of other legislative provisions. To understand how section 11 of the Act operates, it is first necessary to examine section 14.

Section 14 contains specific reasons and requirements for extending the time to respond under section 11. Section 14 recognizes that it may take longer than 30 days in some cases to respond to an applicant, in part due to the complexity of a request or the nature and quantity of records requested. Section 14 balances the right of an applicant to obtain information in a timely manner with the operational requirements of a public body. Section 14 creates obligations to communicate and gives an applicant a right to make a complaint about an extension in order to ensure transparency of process and to prevent abuse of the provision. There is no requirement under section 14 that a public body communicate with the applicant in writing; however, it is clearly desirable to keep written records of this type of communication as it may be necessary to prove that it was made at a later date. (my emphasis)

[para 33] In this case, I have before me affidavit evidence from the Coordinator indicating numerous occasions in which she and the Applicant discussed the request for records. These discussions helped clarify the scope of the request. Indeed, on one occasion, a discussion of the results of a search gave rise to a new specific call for records (January 29, 2013).

[para 34] The evidence also shows that the Coordinator dealt with inquiries from the Applicant and sought information from various departments to locate and determine methods of retrieval of records.

[para 35] There is a plethora of evidence that shows that the Public Body was in communication with the Applicant on multiple occasions during the months of November and December of 2012 and January of 2013. In February, the Coordinator was away for two weeks and there was no communication at that time.

[para 36] There is however, no evidence of the Public Body notifying the Applicant that the time limit for response to her request was extended, nor can I find any evidence that the Public Body met its obligations under section 14(4) to inform the Applicant of the reason for an extension of the time limit, when a response could be expected and that she could make a complaint about the extension of the time limit to the Commissioner.

[para 37] I find that the Public Body did not comply with section 11 of the Act.

**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)?**

[para 38] Section 35 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, and*

*(b) retain the personal information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it...*

[para 39] In determining whether the Public Body met its duty under this section, I must consider whether the information was personal information and if so, whether it was used to make a decision that directly affects the individual.

[para 40] The Applicant, in her request for inquiry, asserted a belief that an investigation had been conducted with respect to an harassment complaint she had initiated. The Applicant refers to various emails and reports that use the terms “mediation”, “mediation resolution”, “ investigation(s)”, “process”, “...is doing work in the area” to lay the foundation for her belief.

[para 41] In particular, the Applicant believes that a particular workplace process that had been conducted by the Public Body was an investigation into her harassment complaint. The call for records quotes from the following part of the Applicant’s request for records:

[An individual] conducted an investigation and report. The investigation was done because of my complaint of “workplace” bullying and I was told that their expectation was that this intervention would address my concern, which it didn’t occur as I was intentionally kept from the process.

[para 42] Although there were emails and reports submitted by the Applicant that describe the report in various terms, the best evidence about the information contained in the report comes from an affidavit of a Senior Advisor involved in the process. In an affidavit provided to me, she deposes the following:

This request (for records) refers to the Team Optimization Process that I was involved in during 2010 and potentially moving into 2011...

The Team Optimization Process consisted of facilitation work within a given team regarding such issues as communication and behavior strategies employed within the workplace. For the process to be initiated Senior Advisors, workplace managers and HR representatives met to determine if the process was appropriate given the internal dynamics of the team in question. If there were formal employee/employer actions within the team itself such as human rights complaints, grievances or workplace investigations the Team Optimization Process would not become engaged. The Team Optimization Process was not intended to address individual employee grievances or complaints nor was it intended as a process in which to conduct individual performance reviews, investigations or assessments of individual functioning (my emphasis). Instead the purpose of the Team Optimization Process was to gain an understanding of interpersonal and other dynamics impacting a team and to identify opportunities to optimize work relationships within the current team. Given this, team members who were on leave did not participate in the process nor were any discussions focused on their past or possible future interactions with the team. As such, the process was not intended to nor did it collect personal information regarding the Applicant (my emphasis).

[para 43] I accept this evidence that the report in question was an outcome of this “Team Optimization Process”. The evidence is clear that this process occurred when the Applicant was on leave.

[para 44] The evidence in the affidavit goes further to explain that the people involved in the process were given a hard copy of the findings and recommendations to improve

the overall functioning of the collective team. The records were considered transitory and when the work was completed or deemed no longer necessary all electronic and hard copy records would be destroyed.

[para 45] While the individual cannot recall the specific date that she would have destroyed the documents, she believes it would be in the 3-4 years prior to the Applicant's request.

[para 46] From the evidence before me, I cannot find that the information contained the Applicant's personal information. Indeed, the process was designed specifically to deal with "teams" rather than individuals.

[para 47] I find that section 35 does not apply in this matter.

## **V. ORDER**

[para 48] I make this Order under section 72 of the Act.

[para 49] As I found that the Public Body did not comply with section 11 of the Act, I order the Public Body to develop a written protocol to ensure compliance with sections 11 and 14 of the Act. I further order the Public Body to provide me with a copy of that protocol within 50 days of being given a copy of this Order.

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Neena Ahluwalia Q.C.  
Adjudicator