

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2016-27

July 15, 2016

UNIVERSITY OF CALGARY

Case File Number F7544

Office URL: www.oipc.ab.ca

Summary: In Order F2015-35, the Adjudicator ordered the University of Calgary (the Public Body) to provide greater detail regarding its search for responsive records. The Adjudicator found the Public Body had complied with the order and that the Public Body conducted an adequate search for responsive records.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, sections 10, 35, 72

Authorities Cited: **AB:** Orders 2000-020, 2001-033, F2015-35

I. BACKGROUND

[para 1] Order F2015-35 provides background information regarding the Applicant's request for information from the University of Calgary (the Public Body). In that order, I determined the Public Body had correctly withheld information pursuant to the Act. However, I was not satisfied with the Public Body's explanation regarding its search for records. Instead of ordering the Public Body to conduct a new search, I ordered the Public Body to provide the Applicant greater detail regarding its search for responsive records having regard to questions I had raised in that order. If the Applicant was not satisfied with the response, I said I would review the matter of the search again.

[para 2] The Public Body informed me by letter dated January 25, 2016, it had complied with my Order F2015-35. This office received an email from the Applicant dated February 26, 2016 indicating he was not satisfied with the response of the Public Body that outlined the steps it had taken to conduct the search for responsive records.

[para 3] I wrote to the parties on March 3, 2016 and requested the Public Body to provide me with affidavit(s) from the person(s) conducting the search for records. I asked the Public Body to consider addressing certain issues.

[para 4] I received three affidavits from the Public Body. The Public Body located further records and disclosed them to the Applicant subject to redactions. The Applicant made submissions to this Inquiry.

II. INFORMATION AT ISSUE

[para 5] The Applicant is seeking the identity of person(s) who he believes provided negative assessments about the Applicant and the details of those negative assessments.

III. ISSUE

Did the Public Body meet its duty to the Applicant under section 10 of the Act to respond to him openly, accurately and completely, and did it conduct an adequate search for responsive records?

[para 6] In my previous order in this inquiry (F2015-35) at para 24, I reviewed prior decisions establishing principles for section 10:

In previous orders of this office, the following principles have been established under section 10 of the Act:

1. A Public Body's duty to assist an applicant includes the obligation to conduct an adequate search (Order 2001-016 at para.13, Order F2007-029, at para. 50).
2. The Public Body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken to assist the Applicant within the meaning of section 10 (Order 97-003 at para. 25, Order F2009-027 at para, 46).
3. 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 2001-016 at para.13, Order F2007-029 at para. 50).

4. A Public Body must make every reasonable effort to locate responsive records; this does not require perfection (Order F2012-26 at para. 27, Order F2013-23 at para.18).
5. 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).
6. In general, evidence as to the adequacy of a search should cover the following points:
 - a. Who conducted the search
 - b. The specific steps taken by the Public Body to identify and locate records responsive to the applicant's access request
 - c. The scope of the search conducted (e.g. physical sites, program areas, specific databases, off-site storage areas, etc.)
 - d. The steps taken to identify and locate all possible repositories of records relevant to access request (e.g., keyword searches, records retention and disposition schedules, etc.)
 - e. Why the Public Body believes that no more responsive records exist than the ones that have been found or produced (Order F2007-029 at para. 66).
7. While it may not be necessary in every case for a Public Body to give an applicant all of the information about its search, as described in point 6, it should provide greater detail when an Applicant specifically raises questions or concerns (Order F2009-001 at para. 26).

[para 7] I also noted prior decisions that outline the burden placed on the Public Body to establish an adequate search had been conducted (paras 26-27):

In Order F2007-028 (at para. 46), the Commissioner said:

Section 10 places the duty to assist an applicant on the head of the public body, not simply employees of the public body, or the public body in general. As a result, the head, or the person to whom the head has delegated authority, must be in a position to establish that he or she did in fact conduct an adequate search for records as part of the duty to assist an applicant. In a situation where the head or the delegate does not have direct knowledge of the steps taken to search for records, the head will be unable to establish that the search for records was adequate. I do not mean that the head of a public body is required to seek out every record personally. However, the head, or the head's delegate, should take a supervisory role and be aware of exactly what steps have been taken to locate records, as the head is accountable for the quality of the search under section 10.

The foregoing was upheld in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 (CanLII) (at paras. 53 and 54), in which the Court agreed that sufficient evidence must be presented in order to establish the adequacy of a search:

As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by *FOIPP*. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.

In this case, [a disclosure analyst] was tasked with organizing the search. Her letter of January 18, 2006 does not detail the steps taken to search for records. It simply asserts that she conducted searches with various individuals and categories of individuals and located the records itemized in the letter. There is no evidence from [the disclosure analyst] as to the steps which she took to supervise the search.

[para 8] The Public Body provided me with three affidavits: one from the FOIP analyst who directed the search for responsive records, another from the Dean of the faculty and the third from a named employee who was the head of the recruitment committee.

[para 9] In the analyst's affidavit, I am told she directed the search of the Dean and the head of the recruitment committee by providing them with the Applicant's request and the relevant date range. She instructed both individuals "to search any and all repositories where responsive records could potentially be found, including but not limited to: University email accounts, shared electronic University directories, personal hard drives, physical paper files, voicemail records, and notebooks or handwritten notes in addition to any other repositories that they felt may contain potentially responsive records."

[para 10] The analyst tells me she initially identified the Dean and the chair of the recruitment committee as the two appropriate individuals to search for records. She spoke to the chair of the recruitment committee and he advised her, as chair of the committee he was solely responsible for summarizing committee meetings which he did by email. He also advised her the role of the committee members was to participate in frank verbal discussions and not to create records.

[para 11] The analyst attached to her affidavit, a copy of the University Records Retention Rule 2010.04 entitled "Academic Recruitment and Selection process". Pursuant to this rule, members of a recruitment committee have secondary responsibility for record retention and must keep records only for the duration of the recruiting process. The Chair of the recruitment committee has primary responsibility for records and must retain records for two years after the end of the recruitment process.

[para 12] In light of the concerns I expressed in my order, the analyst contacted the six members of the recruiting committee on March 7, 2016 and instructed them to search for any records potentially responsive to the Applicant's FOIP request. She provided each of the committee members with the exact wording of the Applicant's request. She instructed the committee members to search as broadly as possible. Her specific instruction was as follows:

FOIP defines a record as “a record of information in any form ... that is written, photographed, recorded or stored in any manner:.. Please search as broadly as possible – email, voicemail, handwritten or typed notes on a meeting or conversation or a phone call, minutes, summaries, letters, spreadsheets, tables ... If you kept any records of any sort related to [the Applicant’s] candidacy, I must collect copies.

[para 13] She explained the scope of the search as follows:

Any repository in which you may have kept relevant records must be searched. In particular, I ask you to search your email (inbox, outbox, deleted folder, any relevant subfolders); any relevant file shares (aka share drives); your personal file share; your hard drive; any hard copy files you may keep; voicemail (if you keep it); notebooks and handwritten notes including any notes on telephone conversations or meetings. If you are aware of any other relevant material, kindly include it as well.

[para 14] The analyst tells me three of the six committee members confirmed they had located records. Copies of those records with portions redacted in reliance on related provisions of the Act were provided to the Applicant. The remaining committee members informed the analyst they had not located any records responsive to the Applicant’s access request.

[para 15] In my review of the records provided to the Applicant as a result of the search by committee members, I noted one of the records was an email sent to the head of the recruitment committee from the Dean. The email was copied to other members of the committee. I considered this email to be responsive to the Applicant’s request for information. The email contained the Applicant’s name. This email was not included in the search results of either the Dean or the head of the recruitment committee.

[para 16] In the affidavit of the Dean, I am told he searched his email records in the following manner:

In conducting my search for records potentially responsive to the Applicant’s FOIPP Requests within my email inbox and “sent” folder, I searched for any emails containing the word [Applicant’s last name]; which identified any emails containing the word [Applicant’s last name] either in the email subject line or in the body of the email itself. I verily believe that this captured all potentially responsive emails as it was necessary to reference the Applicant’s name in all communications regarding his candidacy for the [specified] position as the candidacy of other candidates for the [specified] position was (*sic*) also being discussed via email during that time.

Due to storage limitations within the University’s email system, I regularly delete my “sent” emails. Accordingly, I also searched my email trash folder for any potentially responsive records using the term [Applicant’s last name].

[para 17] The Dean also states he provided all records that were potentially responsive in any way to the FOIPP Requests to the FOIP analyst in July and August 2013.

[para 18] The head of the recruitment committee, in his affidavit, described his search for records in his email account as follows:

I searched for any emails potentially responsive to the Applicant's FOIPP Request in both my University email inbox and outbox folders and work emails saved and stored on my personal hard drive. My practice is to regularly download and save all work-related emails onto my personal hard drive. I do not delete work-related emails. I searched for potentially responsive emails using the search term [Applicant's last name] or [Applicant's first and last names] which identified any emails sent or received with the word [Applicant's last name] or [Applicant's first and last names] in either the subject heading or main text of the email. I verily believe that these search terms captured all potentially responsive emails in my possession as all communications regarding the candidacy of the Applicant for the [specified] Position would have included his name somewhere in the communication so that other Recruiting Committee members would be aware which candidate was being discussed.

[para 19] In reviewing the new records released to the Applicant (these records were obtained from members of the recruitment committee), I noted there was an email (mentioned earlier in para. 15) sent from the Dean to the head of the recruitment committee and copied to members of that committee. I asked the Public Body to provide an explanation for why this email was not included in the initial response to the applicant. I also asked the Public Body to consider whether the Dean and the head of the recruitment committee would need technical assistance to recover other potentially responsive emails.

[para 20] The Public Body responded by indicating that it was reasonable to conclude that the Dean would have deleted the email he sent during one of his regulars purges of the sent folder. Further, the Public Body asserted the Dean was not obliged to retain the email as it was a courtesy notification to the recruiting committee, not a required step in the selection process. The Public Body characterized the email as a transitory record.

[para 21] The Public Body indicated that according to the University's records retention schedule records that document routine transactions of temporary and insignificant purpose that are required for a very limited period of time do not have a lasting value and can be deleted as soon as the purpose is served.

[para 22] The Public Body also indicated that the head of the recruitment committee was at a loss to explain why that particular email was not found when he searched in August 2013, considering he regularly downloads his work emails onto the hard drive of his laptop. He told the Public Body he did not remember deleting the email. He wrote to the Public Body to confirm

This email from [the Dean] was not on my old laptop either, though I have emails from him the week before and the week after. I have no idea what happened with this particular email, because the email address is correct.

[para 23] The Public Body indicated that it was arguable that the email in question was transitory given the role of the recruiting committee. The Public Body, in submissions, stated:

Once the Chair of the recruiting committee [name] sent the Dean the recommendation regarding the chaired [specified] position on November 14, 2012, the work of the committee was done in regard to that particular academic position.

[para 24] However, the email of November 14, 2012 sent by the head of the recruitment committee makes clear the work of the committee was not done. It states, in part,

Each of the two candidates received strong support from at least one Committee member, but the Committee agreed by consensus that we should look at other candidates first before coming to a final conclusion (my emphasis).

[para 25] The email was a notification to the committee that further negotiations with the Applicant were halted. The email clearly stated that the next step in the selection process would be the upcoming meeting with another candidate and that halting negotiations with the Applicant made that meeting more important.

[para 26] Exhibit A of the FOIP analyst's affidavit is a copy of the Public Body's retention rule 2010.04 regarding records for recruitment and selection process for academic and senior administration staff. That rule makes clear that certain records are to be retained by the Chair of the Academic Selection Committee for two years from the end of the search process and if the hire is anyone other than a Canadian or permanent resident of Canada, records relating to unsuccessful applications must be kept for 6 years after the employee is hired.

[para 27] I am not certain I agree with the Public Body that the email in question was a transitory record and that the record retention policy has been complied with. However, it is not within my jurisdiction under the Act to make decisions regarding the Public Body's record retention policy.

[para 28] The Act does provide for a retention policy for personal information used by a Public Body to make a decision that directly affects the individual. 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, or for any shorter period of time as agreed to in writing by

(i) the individual,

(ii) the public body, and

(iii) if the body that approves the records and retention and disposition schedule for the public body is different from the public body, that body.

[para 29] The email in question clearly contains the Applicant's personal information and was used in making a decision regarding the Applicant. It was only after requests from this office that the email was located in the hands of individuals under no obligation to retain such records. It would appear that section 35 may not have been heeded in the Public Body's retention and disposition policies and I strongly urge the Public Body to review its policies with a view to compliance with section 35.

[para 30] The Applicant suggests that this particular email is a "smoking gun". He asserts the Dean surprised the committee and that the real reason the Dean discontinued discussions regarding employment with him is the Dean received very negative information about the Applicant from an external source.

[para 31] The Applicant also suggests that it is within the jurisdiction of this inquiry to force the Public Body to have the Dean provide the identity of the external source.

[para 32] The Applicant is mistaken. In Order 2001-033 former Commissioner Work (at para 9) stated:

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.

[para 33] The Applicant also suggests I have the jurisdiction to order the Public Body to produce the Dean's personal emails and phone records. Again, that is not within my jurisdiction. The Applicant is only entitled to records that are within the custody and control of the Public Body.

[para 34] The Dean, in his affidavit, indicates he exclusively uses his work computer and University email address for all work related matters including correspondence related to the consideration of the Applicant's candidacy. His personal emails and telephone records are not therefore under the Public Body's custody or control and neither the Public Body nor I have the jurisdiction to order the Dean to conduct such a search for information in those locations.

[para 35] From the Applicant's submissions, it appears he believes I made an order that compels the Public Body to reveal the name of the external source. My order was as follows:

I order the Public Body to provide the Applicant with greater detail regarding its search for responsive records having regard to the the questions raised above in paragraphs 33, 34 and 36 and why it believes that no further records responsive to the Applicant's request exist.

My order was to require the Public Body to provide greater details of the search for information. After my request for details in the form of affidavits, the Public Body also conducted a fuller search for information by requesting members of the recruitment committee also search for records and by searching telephone records.

[para 36] I considered whether the Public Body's initial response to the Applicant where it did not locate one email that was found during the second search meant that it failed to conduct an adequate search. I have decided otherwise. The Public Body did not ask the members of the search committee to search for responsive records as it was the duty of the head of the search committee to retain records. The standard for conducting an adequate search is not perfection, but what is reasonable (Order 2000-020, at para. 17). I find it reasonable the Public Body requested a search for records only from the Dean and the head of the recruitment committee. I feel it necessary at this point to repeat my admonition to the Public Body to review its records retention policies to ensure compliance with section 35 of the Act.

[para 37] I am satisfied with the Public Body's response to my order. The Public Body provided three affidavits that outline the search procedure. The affidavits indicate the repositories searched, how the search was conducted and the reasons to believe no further responsive records exist.

[para 38] From the evidence before me, I find the Public Body conducted an adequate search for responsive records and fulfilled its duties under section 10 of the Act.

IV. ORDER

[para 39] I make this Order under section 72 of the Act.

[para 40] I find the Public Body met its duties under section 10 of the Act and conducted an adequate search for responsive records.

Neena Ahluwalia Q.C.
Adjudicator