

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2016-56

November 2, 2016

CALGARY POLICE SERVICE

Case File Number F7427

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Summary: On July 16, 2012, the Criminal Trial Lawyers' Association (the Applicant), made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). The Applicant requested all records relating to the response of the Public Body to *R. v. Arkinstall* 2011 ABPC 23, a decision of the Provincial Court of Alberta, which was reported in the Toronto Star in a story entitled: *Police who lie: How officers thwart justice with false testimony*.

The Public Body conducted a search for responsive records and responded to the Applicant on August 21, 2012.

On February 20, 2013, the Applicant's representative wrote to the Public Body's FOIP Manager. He indicated that he had learned that the Chief and one of the police members involved in the *Arkinstall* case had played football together. He also asked whether the search for responsive records had included correspondence between the Chief and the police member. The Applicant's representative also wrote another letter on the same day which it addressed to several different parties: a lawyer who represented the Calgary Police Chief, the Public Complaints Director of the Alberta Solicitor General, the Alberta Justice Legal Services Division, and the Public Complaints Director of the Calgary Police Commission. The Applicant's representative stated in that letter that he had heard that the Chief of Police was a friend of one of the officers named in *R. v. Arkinstall* and suggested that the Calgary Police Service was in conflict in relation to the *Arkinstall*

matter. He concluded the letter stating, “I do not know what the Calgary Police Service PSB policy states in relation to this issue but I trust that it is not necessary to cite authority for the proposition that a police service should not be handling a complaint against the friend of the Chief of the same Police Service.”

The Chief of the Public Body directed counsel to respond to both letters. The responses denied all allegations.

The Applicant’s representative complained to the Commissioner that the Public Body failed in its duty to assist the Applicant by not responding to his letter of February 20, 2013 to the FOIP Manager.

The Adjudicator determined that the Public Body had responded to the Applicant when it denied all allegations. The Chief directed counsel for Bennett Jones, which represented the Public Body, to deny all allegations made by the Applicant’s representative. The Chief, who would have knowledge as to whether he communicated with any of the police officers involved in the *Arkininstall* matter or with anyone else, can be interpreted as denying that there were any responsive communications. As a result, the Adjudicator found that the Public Body had met any duty to assist the Applicant arising from his correspondence of February 20, 2013.

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

Authorities Cited: **AB:** Orders 99-021, 2000-023, F2009-001, F2009-005, F2015-36

Cases Cited: *R. v. Arkininstall* 2011 ABPC 23, *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89

I. BACKGROUND

[para 1] On July 16, 2012, (the request is dated July 9, 2012, but the date of receipt was July 16, 2012) the Criminal Trial Lawyers’ Association (the Applicant), made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). The Applicant requested all records relating to the response of the Public Body to the *R. v. Arkininstall* case, which was reported in the Toronto Star in a story entitled: *Police who lie: How officers thwart justice with false testimony*.

[para 2] The Public Body conducted a search for responsive records and responded to the Applicant on August 21, 2012.

[para 3] On February 20, 2013, the Applicant’s representative wrote the Public Body and stated:

Re: Request File #2012-G-0629

With reference to this FOIPPA request, I was recently advised by a police officer that [a name the writer believed to be associated with the Arkinstall matter] and [the former Chief] are close friends ever since they played high school together. The question I have arising out of this is whether the search for records extended to [the former Chief] having any records of communications with [the officer referred to in the first sentence] or anyone else about the Arkinstall matter.

[para 4] The Applicant's representative also wrote another letter on the same day to the Public Complaints Director of Alberta Solicitor General, a lawyer with the law firm Bennett Jones who represented the Calgary Police Chief, the Alberta Justice Legal Services Division, and the Public Complaints Director of the Calgary Police Commission. The Applicant's representative stated in that letter that he had heard that the Chief of the Public Body was a friend of one of the officers named in *R. v. Arkinstall* 2011 ABPC 23 and suggested that the Calgary Police Service was in conflict in relation to any disciplinary decisions it made in relation to the *Arkinstall* matter. The representative stated:

I was recently speaking to a police officer who expressed concerns about the integrity of the Calgary Police Service handling of [the *Arkinstall*] matter because Calgary Police Service Chief [...] and Sergeant [...] have been close friends since they played high school football together in Calgary.

There is every reason to believe this information because it comes from a reliable source.

If this is true, there is no way that the Calgary Police Service should have been involved in dealings with this matter. Instead, this matter should have been handled by ASIRT, and if not ASIRT, then at least another Police Service. This is another compelling reason why this matter should be referred to ASIRT now.

To the Calgary Police Commission

1. Were you aware that Chief [...] and Sergeant [...] were close friends?
2. If you were aware, did you take any steps to ensure that a completely independent and objective investigation was done?
3. If you were not aware, do you have any concerns that the Calgary Police Service did not inform you about that?

I now turn to questions of the Calgary Police Service which, since the Calgary Police Service has retained Bennett Jones, are posed to [a lawyer for Bennett Jones]. I have no illusions that [the lawyer] will not attempt to brush them off as "conspiratorial" just as he did previously, which seems to be the consistent approach of the Calgary Police Service but I pose the questions anyway:

1. Is it true that Chief [...] and Sergeant [...] are close friends and have been since playing high school football together?
2. Did Chief [...] and Sergeant [...] have anything to do with dealings with the concerns arising out of *R. v. Arkinstall*?
3. Were any of the employees of the Calgary Police Service who dealt with the concerns arising out of *R. v. Arkinstall* aware of the close relationship between [the Chief] and [the sergeant]?
4. If it is true that there is a close relationship, why was nothing done to have the concerns addressed by a body at [arm's length] from the Calgary Police Service?

The Applicant's representative concluded the letter stating, "I do not know what the Calgary Police Service PSB policy states in relation to this issue but I trust that it is not necessary to cite authority for the proposition that a police service should not be handling a complaint against the friend of the Chief of the same Police Service."

[para 5] On February 25, 2013, the lawyer from Bennett Jones to whom the Applicant addressed one of the letters of February 20, 2013 sent two letters to the Applicant. The first letter states:

Re: *R. v. Arkinstall*, 2001 ABPC 23

I have received a copy of the enclosed letter dated February 20, 2013 addressed to the Calgary Police Service FOIP Coordinator. It continues to spread gossip, supports your pet innuendo, and makes specific references to the *Arkinstall* matter.

On December 18, 2012 I wrote to you advising that we were retained by the [Public Body] in the *R. v. Arkinstall* matter.

On January 8, 2013 you sent a letter confirming your understanding that our office has been retained by the [Public Body] on this matter.

On February 20, 2013 you wrote to our office as well as 3 others again detailing on page 2, last paragraph, you understood that our office had been retained by the [Public Body] in the *R. v. Arkinstall* matter.

In light of this can you kindly explain on what basis you saw fit to write my client directly. An explanation detailing your reason for such conduct is in order.

This letter responds to the letter the Applicant sent to the FOIP Manager.

[para 6] The second letter states:

Re: *R. v. Arkinstall*, 2001, ABPC 23

We have your letter of February 20, 2013 addressed to ourselves and 3 other parties. We categorically reject your [ill-informed] "reliable" source's allegations, the gossip spread to others and innuendos.

As outlined in our letter of December 18, 2012 the [the Public Body] considers this matter closed and will not be responding to any further inquiries from your office.

This letter responds to the Applicant's letter to the lawyer from Bennett Jones, the Calgary Police Commission, Alberta Justice, and the Solicitor General.

[para 7] The Applicant's representative wrote the Commissioner on March 11, 2013. He provided the correspondence he had sent to, and received from, the Public Body. He stated:

In support of this I refer to Orders 99-021 and 2000-023.

I submit to you that this is very serious misconduct.

[para 8] The Commission authorized mediation. As mediation did not resolve the matter, the matter was scheduled for a written inquiry. The following issues were set for inquiry:

1. Did the Public Body have a duty under section 10(1) of the Act to assist the Applicant in relation to his letter, and if so, did it meet this duty?
2. Was the Public Body's response to the Applicant's letter a refusal within the terms of section 11(2)?

The Applicant's representative also wrote the lawyer from Bennett Jones on March 11, 2013. In that letter, he stated:

This is in response to your two letters of February 25, 2013:

I interpret your letters to mean that it is false that [the sergeant] and [the Chief] are close friends and have been ever since they played high school football together. I am taking this as a representation to me by the [Public Body].

II. ISSUES

Issue A: Did the Public Body have a duty under section 10(1) of the Act to assist the Applicant in relation to his letter to the FOIP Manager, and if so, did it meet this duty?

Issue B: Was the Public Body's response to the Applicant's letter to the FOIP Manager a refusal within the terms of section 11(2)?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body have a duty under section 10(1) of the Act to assist the Applicant in relation to his letter to the FOIP Manager, and if so, did it meet this duty?

[para 9] Section 10 of the FOIP Act creates the duty to assist. It 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.

Previous orders of this office (See Orders F2009-001, F2009-005, F2015-36) have held that the duty to respond openly, accurately, and completely includes explaining the steps taken to locate responsive records and to explain to why a public body believes no further records exist. In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89 (CanLII) the Alberta Court of Queen's Bench confirmed the reasonableness of this interpretation of section 10, stating:

The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.

The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, Lethbridge Regional Police Commission, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and why the Public Body believes that no more responsive records exist than what has been found or produced.

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.

The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.

In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

[para 10] The Applicant's position in the inquiry is that the letter of February 20, 2013 addressed to the Public Body's FOIP Manager was not a new access request but "a follow up on the original one." The Applicant's position is that its representative asked the FOIP Manager questions about the search that was conducted for records responsive to his access request.

[para 11] The Applicant also states:

It is submitted that the right of access of the CTLA to the records at issue is not subject to any limited or specific exceptions set out in the *Act* since none of the sections cited by the CPS can be reasonably interpreted to restrict the Applicant's right of access.

The Applicant states that the Public Body had a duty in relation to its representative's letter of February 20, 2013 and that this duty was not met.

[para 12] As noted above, the Applicant referred to two previous orders of this office in his request for review: Orders 99-021 and 2000-023. The Applicant did not cite

the parts of these decisions, or explain the support it believes these cases provide for its position, so it is not entirely clear what significance they have to this inquiry. However, former Commissioner Clark set out some views in these cases about the duty to assist, and whether it was reasonable for a public body not to conduct a search because its employee held the opinion that no records had been created. I will address the related portions of these decisions in my analysis, on the assumption that it is this reasoning on which the Applicant relies.

[para 13] In Order 99-021, former Commissioner Clark stated:

In my view, there would have to be very unusual circumstances for it to be reasonable for a public body to rely on an individual's opinion that no records were created, when deciding not to search.

[para 14] In Order 2000-023, former Commissioner Clark said:

However, after considering all of the evidence, I am not satisfied that the Public Body performed an adequate search for responsive records. The records produced for my review contain gaps in the chain of decision-making, particularly at the highest levels. These gaps frustrate the basic principles of transparency and accountability fundamental to the Act.

[para 15] As discussed above, the duty to assist has an informational component and a public body may be required to explain why it has not provided responsive records to an applicant that it may reasonably be expected to have in its custody or control.

[para 16] The Public Body argues:

On August 21, 2012, the Public Body responded to the access to information request, supplying the Applicant with 32 pages of records.

[...]

By letter dated February 20, 2013, the Applicant wrote to the Public Body's FOIP Coordinator, referencing the earlier request, and his corresponding file number [...] and asking a question about the Public Body's search for records relating to that request.

[...]

The head of the Public Body, the Chief of Police, directed the Public Body's counsel to respond to this letter on his behalf, which it did. Records were not provided and the Applicant's question was not answered.

In light of the manner in which the counsel replied, I interpret the final statement in the foregoing excerpt to mean that the Chief of Police, who had knowledge as to whether he had a friendship with a particular officer, whether he wrote correspondence to the officer in relation to decisions the Chief was required to make under the *Police Act* regarding the officer, and whether he had been influenced in making such decisions by the friendship, directed counsel to respond in a manner that made it clear that these suggestions did not have any basis in fact. It would follow from the denial of the facts that the Applicant's representative had alleged, that there would be no records documenting these facts.

Though the Public Body's counsel did not state this in terms, it was possible for the Applicant to infer that this was the position on the question which the Public Body was taking. In other words, it can be inferred from the denial of the Applicant's representative's allegations that the Public Body was, in effect, communicating to the Applicant that no search for such records was conducted (and no responsive records were produced) because in the circumstances no such records would exist.

[para 17] As quoted above, former Commissioner Clark has said that it will be only in rare circumstances in which the opinion of an employee as to the non-existence of records will be accepted.

[para 18] However, Order 99-021 also states the following:

All an individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records, but the individual cannot speak for others.

In this case, the reply to the Applicant's representative was made on the instructions of and on behalf of the person (the Chief of Police) who would have created any responsive records. The Chief was in a position to know whether a search for such records was merited. If the Chief did not create the records to which the Applicant's representative referred in the letter of February 20, 2013 (both correspondence with the police member with whom he allegedly had a friendship, and correspondence with anyone else about the *Arkininstall* matter), then none could exist.

[para 19] I acknowledge in saying this that the Public Body has not brought forward any evidence that refutes the Applicant's representative's suggestions. However, I do not believe that it needs to in this case. The information the Applicant's representative provided was a second-hand recounting of facts from an unknown source. It was not adequate to ground any reasonable likelihood that records of the kind the Applicant's representative was suggesting a search of the Chief's correspondence might reveal, would be found there. It would be unreasonable to expect a public body to search for records of the kind requested, unless the applicant provides evidence to establish such records were likely to exist.

[para 20] I also acknowledge that the Applicant's representative's letter of February 20, 2013 to the FOIP Manager does not in itself contain all of the allegations concerning impropriety that the Applicant's representative made in the accompanying correspondence. It also asks directly whether the Chief's office was searched for correspondence with an officer with regard to the *Arkininstall* decision.

[para 21] However, both items of correspondence were received by counsel from Bennett Jones who responded to them at the direction of the Chief of the Public Body, and the one containing further details (the second letter of February 20, 2013), created context to show that in the letter to the FOIP Manager the Applicant's representative was questioning whether the Public Body had searched for particular kinds of records – those

that would relate in some way to impropriety on the part of the Police Chief in connection with the *Arkininstall* case.

[para 22] In this case, I find that it was reasonable for the Public Body to determine, from the Chief's direction as to how to respond to the Applicant, that no correspondence between the Chief and the police member, or correspondence between the Chief and anyone else regarding the *Arkininstall* case existed, without searching for the records.

[para 23] With regard to Order 2000-023, to which the Applicant also refers, the Applicant has not pointed out any gaps in the decision making process in the records he received. I am therefore unable to determine that this case has any application to the facts before me.

[para 24] I have noted the Public Body's argument that it was under no duty to respond to the Applicant's correspondence and that it did not for that reason. I do not accept this argument. As discussed above, there is an informational component to the duty to assist. In some cases, it may be necessary for a public body to explain to an applicant whether it searched for particular records in a particular location, and if not, why not.

[para 25] That being said, as discussed above, I find that the Public Body did provide sufficient information, albeit in a terse and somewhat oblique manner, to answer the Applicant's representative's question as to whether the Public Body searched for the Chief's communications of the type to which the Applicant's representative was referring.

[para 26] For the foregoing reasons, I conclude that the Public Body did not fail to meet its duty to the Applicant with regard to his correspondence of February 20, 2013.

Issue B: Was the Public Body's response to the Applicant's letter to the FOIP Manager a refusal within the terms of section 11(2)?

[para 27] Section 11 establishes the time frame in which a public body must 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] The Applicant made its access request to the Public Body on July 16, 2012. I find that the Public Body responded to the access request on August 21, 2012. As the Public Body responded to the Applicant's access request, and provided responsive records, there is no reason to deem the Public Body as having refused to respond to the Applicant. While I note that the response of the Public Body appears to be outside the thirty days allowed by section 11, I accept that it is possible that the Public Body extended the time for responding. In any event, the Applicant does not take issue with the timing of the Public Body's response of August 21, 2012 to him.

[para 29] Both parties agree, and I find, that the Applicant's representative's letter of February 20, 2013 was not a new request, but was intended to ask questions regarding the search conducted in relation to records responsive to the July 16, 2012 request.

[para 30] As the Public Body responded to the Applicant, I conclude that section 11(2) has no application in this case.

IV. ORDER

[para 31] I make this Order under section 72 of the Act.

[para 32] I confirm that the Public Body met its duty to assist the Applicant in relation to his access request of July 16, 2012 and his follow up letter of February 20, 2013.

[para 33] I confirm that the Public Body met its duty to respond to the Applicant as required by section 11 of the Act.

Teresa Cunningham
Adjudicator