

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-29

March 3, 2017

ALBERTA ECONOMIC DEVELOPMENT AND TRADE

Case File Number 000479

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Summary: An individual made two identical access requests under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated May 6, 2014, to two public bodies. Both requests were ultimately received by Alberta Economic Development and Trade (the Public Body) as the public body that would have custody or control of responsive records. The requests related to the Applicant and her employment with the Government of Alberta.

The Public Body did not provide a response as required by the Act within the timeline provided in the Act. The Applicant requested a review by this Office, during which time the Public Body provided a response to the Applicant.

The Applicant subsequently requested an inquiry into the Public Body's response.

The Adjudicator determined that the Public Body failed to provide evidence that it complied with its obligations set out in sections 10(1), 11 and 12(1) of the Act (duty to assist applicants, timelines for response, and contents of response).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 11, 12, 72.

Authorities Cited: AB: Orders 97-006, F2007-029, F2009-009.

I. BACKGROUND

[para 1] An individual made two identical access requests under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated May 6, 2014. One request was to Municipal Affairs and one request was to International and Intergovernmental Relations. In each case, the request was for:

All records pertaining to me, my work and employment including emails, letters, memos, statistics and tables, including typed documents with handwritten notes, record of phone calls, outlook meeting requests, office communicator including records [a named individual, T] had copied onto diskette by [a named individual, C] at the end of May 2012.

[para 2] The request also specified nine records (or types of records) sought by the Applicant, related to the above. The timeframe for all items is September 2011 to February 28, 2013.

[para 3] By letter dated May 16, 2014, Municipal Affairs acknowledged receipt of the Applicant's request. In that letter, Municipal Affairs informed the Applicant it did not have custody or control of the records sought by the Applicant, so her request would be transferred to International and Intergovernmental Relations, which is now part of Alberta Economic Development and Trade (the Public Body).

[para 4] The Applicant provided copies of emails between herself and the FOIP office of the Public Body, regarding her request. These emails are dated between May 2014 and October, 2014.

[para 5] The Applicant requested a review of the Public Body's response, including the adequacy of the search conducted by the Public Body, the time taken by the Public Body to provide the requested records, and the contents of its response. The Commissioner authorized an investigation; this was not successful and the matter proceeded to an inquiry.

II. RECORDS AT ISSUE

[para 6] As the inquiry relates to the Public Body's obligations under sections 10(1), 11 and 12(1), there are no records at issue.

III. ISSUES

[para 7] The issues as set out in the Notice of Inquiry dated September 26, 2016, are 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 Adjudicator will *also* 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 comply with section 12 of the Act (contents of response)?

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.

[para 8] A public body's obligation to respond to an applicant's access request is set out in section 10, which 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 9] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 10] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

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 (at para. 66)

[para 11] As a result of the investigation conducted by this Office, the Public Body responded to the Applicant by letter dated December 29, 2015.

[para 12] A public body's duty under section 10(1) includes a duty to *inform the applicant* of the steps taken by the public body to conduct an adequate search. As the Adjudicator in Order F2009-009 stated:

A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). 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 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50). (At para. 45, emphasis mine)

[para 13] Therefore, in order to meet its duty under section 10(1) of the Act, the Public Body must prove:

- that it made every reasonable effort to search for responsive records, and
- that it told the Applicant, in a timely manner, what it did to search for responsive records.

[para 14] The Public Body's initial submission to this inquiry included a copy of the December 29, 2015 letter to the Applicant, which the Public Body sent during (or as a result of) the investigation process in this Office. That letter states:

On May 6, 2014, [the Applicant] filed a personal information request with both the former IIR Ministry and Alberta Municipal Affairs (AMA).

On May 16, 2014, AMA notified [the Applicant] of their transfer of her personal information request to IIR. IIR was also verbally advised that AMA did not have any records that were responsive to this request.

On May 20, 2014, I approached the various IIR staff identified by [the Applicant] with a request that these individuals undertake a search and retrieval of any records responsive to the events/actions identified within the request text.

I was immediately advised by [T], that "anything and everything" relating to [the Applicant] would have been provided to [the Applicant] and if necessary, placed on her personal file. Given that [T] was no longer an employee of IIR, I was advised by [T] that she had no records relating to [the Applicant] and that once again, that "anything and everything" relating to [the Applicant] was in the possession of IIR. I was also advised by [T], that she was not in the habit of taking lunch time notes of conversations with friends and that not every lunch is an actual "meeting to discuss HR matters". In addition, I was advised by [T] that there were no records pertaining to [the Applicant] copied and taken by [T] on her departure from IIR and that she took exception to the suggestion that a long serving HR professional would do such a thing.

On May 22, 2014, I contacted [the Applicant] to discuss her personal request and to update her on my activities to date.

On May 28, 2014, I was provided access to all records in the possession of [ADM – IIR] pertaining to [the Applicant]... the entire file consisted of records relating to [the Applicant's] termination of employment-severance settlement during the June — December, 2013 time period.

Given that [the Applicant] explicitly noted in our email exchange of October 6, 2014 that she was not interested in any records relating to her termination, I did not provide such records to her.

During various telephone conversations with [the Applicant] -- [approximately] one year ago -- I advised that there were no responsive records located that pertained to the events identified within her request. I was advised at that time by [the Applicant] that this matter was by no means concluded and that further actions would possibly unfold.

In addition to the events described above I wish to also note the following:

- a) There are no records relating to the April 16, 2012 meeting between [ADM – IIR] and [the Applicant].
- b) There are no records relating to the [Public Body employee] meeting of April 27, 2012.
- c) There are no records of the May 3, 2012 lunch between [T] and [Public Body employee] or of the May 25, 2012 lunch between [ADM – IIR] and [T] — in fact these two participants specifically recalled that [the Applicant] name was not even mentioned as the discussion pertained to an entirely different matter.
- d) Records relating to the May 4, 2012 workplace harassment complaint (filed by a Third Party) and the May 24, 2012 Harassment Report (in response to the complaint filed by a Third Party) are the property of the former IIR Ministry — as the employer of record, and are only made available to HR staff on a need to view basis.
- e) There are no records relating to various meetings (May 28, 2012 and June 4, 2012) between [the Applicant] and [ADM – IIR].
- f) Given the passage of time from the dates of termination (various times during 2013) of specific individuals identified by [the Applicant] and the date of her personal information request (May, 2014), the Ministry's IT system is not capable of retrieving records for the individuals identified by [the Applicant]. I would also note that should [the Applicant] wish to retrieve a hard copy of her personnel file, she would have to contact Service Alberta — Pay and Benefits. The personnel files of all former employees are no longer retained by individual Ministries and are consolidated within Service Alberta.

In closing, I apologize for my lateness in responding to both [the Applicant] and the Office of the Information & Privacy Commissioner on this matter, but frankly, the situation as described to [the Applicant] during our telephone conversations in October 2014 has not changed.

[para 15] In her initial submission to the inquiry, the Applicant notes that the Public Body indicated she did not want records relating to her termination; she clarified that she told the Public Body she did not want records relating to a *severance* payment. The

October 6, 2014 email from the Applicant to the Public Body, referenced in the Public Body's December 29, 2015 letter (excerpted above) was provided to me by the Applicant. It states, in part:

I am looking for all records as listed on the Request to Access Information form and the attachment for the time periods listed. I am not looking for any documents with respect to severance.

[para 16] In its initial submission the Public Body states:

In addition, to clarify any misunderstanding, there is no Termination File relating to [the Applicant] and my reference to a Severance File relates to financial-benefit calculations...

[para 17] The Applicant's October 6, 2014 email clearly states that she was not interested in seeking records relating to her severance; however, it also seems clear that records relating to her termination fall within the scope of her request. The Public Body's initial submission, stating that there is no "Termination File" does not clarify matters, since responsive records might refer to the Applicant's termination without being in a "Termination File". It is not clear from the Public Body's response to the Applicant or its submissions to this inquiry whether it searched for responsive records relating to the Applicant's termination that may have existed but were not included in a "Termination File".

[para 18] The Public Body's search, as set out in its December 29, 2015 letter to the Applicant, appears reasonable in terms of the places searched and the individuals who were asked to search their files. The letter also addressed why many of the specific records the Applicant was seeking were not located. However, due to the foregoing confusion regarding records relating to the Applicant's termination, I cannot conclude that the Public Body conducted an adequate search for responsive records.

[para 19] Further, the Public Body's response indicates that the time lapse between the Applicant's termination and her access request means that certain electronic records of former employees cannot be retrieved, but does not provide any reasons why this is so.

[para 20] In her rebuttal submission, the Applicant objected to the Public Body's statement in item (d) from the Public Body's December 29, 2015 letter to the Applicant (cited in full, above), which states:

Records relating to the May 4, 2012 workplace harassment complaint (filed by a Third Party) and the May 24, 2012 Harassment Report (in response to the complaint filed by a Third Party) are the property of the former IIR Ministry — as the employer of record, and are only made available to HR staff on a need to view basis.

[para 21] The Applicant argues that she was interviewed by a Public Body employee about the workplace harassment complaint, and that the Public Body has withheld these records without authority or explanation.

[para 22] If records relating to a May 4, 2012 workplace harassment complaint and the resulting report are responsive to the Applicant's request, the Public Body cannot refuse to search for and/or provide them to the Applicant for the reason that these records "are only made available to HR staff on a need to view basis." The Public Body may only withhold responsive records as authorized under the FOIP Act.

[para 23] Regarding the second part of conducting an adequate search – informing the applicant in a timely manner – the Public Body does not seem to have provided the Applicant with an explanation of its search until the Applicant requested a review by this Office. Her request for review is dated January 12, 2015; her access request precedes that request for review by seven months. Given this, I cannot conclude that the Public Body responded to the Applicant in a timely manner.

[para 24] I will order the Public Body to conduct a new search that includes records relating to the Applicant's termination (but not her severance). The Public Body is also to determine whether electronic records relating to the new search can be retrieved. If they cannot, the Public Body should include in its response to the Applicant why those records cannot be retrieved.

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

[para 25] Section 11 of the Act requires a public body to respond to an access request within a specified period of time. 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 26] The Applicant's access request is dated May 6, 2014. As stated above, the Public Body appears not to have provided a response as required by the Act until December 2015.

[para 27] The Public Body states in its initial submission:

As was noted to the Applicant on numerous occasions during the processing of her request, 2014 was a noteworthy year for the unprecedented FOIP Access Request activity that placed significant pressure upon limited FOIP resources and negatively impacted the processing times for this specific Personal Request and prevented the timely response in accordance with the FOIP Act.

[para 28] While I appreciate the Public Body may have faced resourcing challenges, this is not an adequate reason for failing to meet legislated timelines. I find that the Public Body failed to meet its duty under section 11.

3. Did the Public Body comply with section 12 of the Act (contents of response)?

[para 29] Section 12 of the FOIP Act sets out a public body's obligations as to what a response under the Act must contain. It states, in part:

12(1) In a response under section 11, the applicant must be told

- (a) whether access to the record or part of it is granted or refused,*
- (b) if access to the record or part of it is granted, where, when and how access will be given, and*
- (c) if access to the record or to part of it is refused,*
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
 - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
 - (iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 30] The Public Body states that it updated the Applicant during the processing of her request, but I do not have evidence of what was told to the Applicant in those conversations.

[para 31] As noted above, the Public Body's first written response to the Applicant appears to have been the December 29, 2015 letter provided by the Public Body in the course of the investigation conducted by this Office. That response does not include all of the elements set out in section 12(1). Because of this, I cannot find that the Public Body met its obligations under section 12(1) of the Act.

[para 32] I note that the Applicant's Request for Inquiry indicates that the Public Body has withheld responsive records, specifically, records regarding a workplace harassment complaint. If the Public Body is withholding such responsive records, there is no indication that it has told the Applicant why those records aren't being provided to her. In any event, as I am ordering the Public Body to conduct a new search for records, the Public Body will be required to respond to the Applicant anew, and comply with the obligations set out in the Act, including section 12(1).

V. ORDER

[para 33] I make this Order under section 72 of the Act.

[para 34] I find that the Public Body did not meet the obligations set out in sections 10(1), 11, and 12(1) of the Act. I order the Public Body to conduct a new search for records, and respond to the Applicant as required by the Act and as specified in this Order.

[para 35] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator