

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-43

September 14, 2018

PEACE RIVER SCHOOL DIVISION NO.10

Case File Number 003043

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the Peace River School Division No. 10 (the Public Body) that it correct information in its records. The Public Body decided to annotate the Applicant's requests, rather than correct the information.

The Public Body's decision to annotate, rather than correct, information was confirmed in Order F2017-40.

The Applicant then made an access request to confirm that the Public Body had provided notice of the annotations to public bodies and organizations under section 36(4) of the FOIP Act.

The Public Body did not initially respond to the access request within the terms of the FOIP Act but subsequently conducted a search for responsive records and provided them to the Applicant.

The Applicant then requested review by the Commissioner of whether the Public Body had complied with its duty under section 36(4) to provide notice of the annotation to public bodies or organizations who had been provided with the information that was the subject of the annotation in the one year prior to receipt of the correction request.

The Adjudicator found that the Public Body's initial response to the Applicant was deficient, but that it had subsequently brought itself into compliance with its duties under section 10 of the FOIP Act.

The Adjudicator determined that where the Adjudicator in Order F2017-40 had held that the Applicant had not requested correction of personal information, the Public Body had no duties under section 36 in relation to that information.

With respect to the other information for which annotations had been made, the Adjudicator found that the Public Body had complied with any duties to provide notice of the annotations imposed by section 36(4) of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 36, 72

Authorities Cited: AB: Orders 98-010, F2007-29, F2009-001, F2009-005, F2015-36, F2017-40

Case Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89 (CanLII)

I. BACKGROUND

[para 1] On December 26, 2014, the Applicant made a correction request. On March 25, 2015, the Public Body made the decision to annotate, rather than correct, the information that was the subject of the correction request. It summarized the correction request as follows:

1. [The Applicant] wants records to show that her references were supportive in her being hired when contacted by Deputy Superintendent [...] on January 8, 2014.
2. [The Applicant] wants an admission that a proper investigation was not performed as required by the Harassment and Discrimination Policy 10.51 of Peace River School Division No. 10
3. [The Applicant] wants an admission that a proper investigation into the following of the Instructional Staffing Policy 10.11 was not performed up to the policy standards of Peace River School Division No. 10
4. [The Applicant] wants the statement noting discord between the principals of Springfield and herself retracted from the report to dismiss her complaint against Superintendent [...] to the Board of Trustees
5. [The Applicant] wants the following statements removed from the report to dismiss her complaint against Superintendent [...] to the Board of Trustees:
 - Removal of statement referring to notes taken by Deputy Superintendent [...]
 - Removal of statement of Superintendent offering to have Deputy Superintendents participate in the interview process
 - Removal of statement of Deputy Superintendent offering to provide pointers to [the Applicant] to improve her interview skills

- Removal of statement of Superintendent informing [the Applicant] as to problems with her teaching practices or pedagogical beliefs
- Removal of statement saying that [the Applicant's] references were not supportive
- Admission that bullying did occur at Springfield

6. [The Applicant] wants the record to show that Superintendent [...] did not personally contact any of [the Applicant's] [references].

7. [The Applicant] wants the record to show that the principals were informed of bullying occurring at Springfield by the I-Coach at her meeting with them on August 21 and 23, 2013

8. [The Applicant] wants the record to show that she tried her best to find a resolution to this matter at the school level and divisional level first, before contacting higher authorities.

[para 2] The Public Body responded to the Applicant's request on January 16, 2015. In its letter of January 16, 2015, it stated:

In response to your request dated December 26, 2014 and received in our offices on January 5, 2015 for correction to personal information contained in your FOIP requests FOIP 2014-01, FOIP 2014-02, FOIP 2014-03 and FOIP review of 2014-01, this is to advise that your request for correction of errors has been refused by Peace River School Division #10, but the records above have been annotated recording the correction that you requested and the fact that it was not made has been linked to the records. [...]

The following public bodies, to which the information has been disclosed over the last year, have been informed of the fact of annotation – Office of the Information and Privacy Commissioner of Alberta.

[para 3] On March 25, 2016, the Applicant made a request to the Public Body for “verification that both annotations of two files (2014-01, 02, 03 FOIP PR and 2014-07 FOIP PR) were sent to the following public bodies and organization: 1) Board of Trustees [...] 2) Human Rights Commission 3) Office of the Registrar (Department of Education, 4) ATA, 5) OIPC”.

[para 4] On April 18, 2016, the Public Body responded to the Applicant's access request. It stated:

In response to your request dated March 25, 2016, and received in our offices on March 30, 2016 requesting verification that Annotations for files 2014-05 and 2014-07 were provided to the following organizations: Board of Trustees; Human Rights Commission [name of employee]; Office of the Registrar (Department of Education); ATA and OIPC, please be advised as follows:

The Board of Trustees are kept informed on a regular basis during their In-Camera session with respect to any personnel and legal issues. The information is also appended to the files in question. In-camera information is not part of our files.

With respect to the Human Rights Commission, the Office of the Registrar (Department of Education) and the ATA, our legal counsel is involved in responses to your files. Our legal counsel has received annotations and if the documents were provided to these organizations, your annotation also would have been. I do not have access to our counsel's files.

[para 5] The Applicant requested review by the Commissioner on May 1, 2016. She stated:

According to the FOIP Act, Annotations should be sent to the individual and all public bodies and organization to which the information was disclosed in the year preceding the date of the Request for Correction of Personal Information. I requested that the PRSD No. 10 send me proof that my Annotations were actually sent to these public bodies or organizations and on what dates. I only knew it was sent to the OIPC but not the Human Rights Commission, the Board of Trustees, Alberta Education or the ATA to aid in their decision-making processes concerning this public body and the false information provided to them.

The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. In the course of this process, the Public Body conducted a search for records responsive to the Applicant's access request. It provided the Applicant with copies of the annotation that it had provided to this office, to the Alberta Human Rights Commission. The Public Body explained that the Board of Trustees was informed on a regular basis of personnel and legal issues, but that the Board of Trustees does not keep records of information shared at *in camera* meetings. The Public Body also explained that it was not a party to any proceedings in relation to Alberta Education and did not provide notice of the annotation to Alberta Education. Finally, the Public Body confirmed that it did not provide notice of the annotation to the Alberta Teachers Association. However, it provided a copy of its correspondence of August 31, 2016 to the Alberta Human Rights Commission detailing the annotation.

[para 6] At the conclusion of the investigation process, the Applicant requested inquiries as to whether the Public Body had made the annotations appropriately and whether the Public Body ought to have provided the annotation to other public bodies or organizations, and also in relation to the Public Body's response to her access request.

[para 7] Order F2017-40 addressed the issue of whether the Public Body had appropriately annotated records in its custody or control in response to the Applicant's request of December 26, 2014. The Adjudicator concluded that the Public Body had fairly annotated records with the Applicant's concerns.

[para 8] The Commissioner delegated her authority to conduct an inquiry in relation to whether the Public Body's met the duty to assist and whether it had complied with section 36(4) in relation to the annotations to me. On learning that I would be the delegated adjudicator, the Applicant requested that I recuse myself on the basis of bias. On August 17, 2018, I issued a decision in which I found that the Applicant had not established a reasonable apprehension of bias and the inquiry continued.

II. ISSUES

Issue A: Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

Issue B: Did the Public Body notify every public body or third party to which the relevant personal information was disclosed during the one year before the

Applicant's correction request, that an annotation(s) was made, as required by section 36(4)?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 9] Section 10 of the FOIP Act states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 10] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order F2007-029, the Commissioner noted:

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 11] However, conducting an adequate search for responsive records is only one aspect of the duty to assist. Previous orders of this office (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 an applicant 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.** [emphasis in original]

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.

From the foregoing, I conclude that in addition to requiring that a public body conduct an adequate search for responsive records, the duty to assist includes the duty to explain why certain records have not been produced when it is reasonable to expect that a public body would have such records in its custody or control.

[para 12] In its original response to the Applicant, the Public Body failed to meet the duty to assist under section 10. Rather than search for records and provide any requested records in its response to the Applicant, the Public Body indicated that it had provided an annotation to this office, and then speculated as to whether it had informed other public bodies of annotations. However, in the course of the investigation process of this office, the Public Body conducted a search for responsive records, including records kept in the office of its former legal counsel, and provided information as to which public bodies or organizations it had provided information, and to which it had not. In addition, it provided copies of the annotations that had been sent to this office and to the Alberta Human Rights Commission. The Public Body explained that the Board of Directors did not keep records of any information it received *in camera*, such as the annotation information, and confirmed that it did not send an annotation notice to Alberta Education or to the Alberta Teachers Association. In other words, the Public Body confirmed that there were no responsive records in existence with regard to the aspects of the access request encompassing these three entities.

[para 13] Despite its failure to search for responsive records, I find that the Public Body has now met the duty to assist, as it has now searched for the records and established, with evidence, that the search was reasonable. Moreover, it has now satisfied the informational component of the duty to assist, as it has explained why it is unable to

produce annotation notices to the Board of Directors, Alberta Education, and the Alberta Teachers Association.

Issue B: Did the Public Body notify every public body or third party to which the relevant personal information was disclosed during the one year before the Applicant's correction request, that an annotation(s) was made, as required by section 36(4)?

[para 14] Section 1(n) of the FOIP Act defines personal information within the terms of the FOIP Act as information that is “recorded information about an identifiable individual”.

[para 15] Section 36 of the FOIP Act empowers an individual to request a correction of the individual’s personal information. It states, in part:

36(1) An individual who believes there is an error or omission in the individual’s personal information may request the head of the public body that has the information in its custody or under its control to correct the information. [emphasis added]

(2) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.

(3) If no correction is made in response to a request under subsection (1), or if because of subsection (2) no correction may be made, the head of the public body must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.

(4) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.

[...]

[para 16] In Order 98-010, former Commissioner Clark defined error or omission in the following way:

[...] As the terms "error" and "omission" are not defined in the Act, I have used the ordinary dictionary definitions to define these terms. The *Concise Oxford Dictionary*, Ninth Edition, defines “omission” as something missing, left out or overlooked. “Error” is defined to mean a mistake, or something wrong or incorrect. Furthermore, the *Concise Oxford Dictionary* defines “incorrect” to mean not in accordance with fact, or wrong, while the term “correct” is defined as meaning, to set right, amend, substitute the right thing for the wrong one.

Applying these definitions, an applicant may request correction of personal information under section 36 if the applicant considers information to be incorrect or missing from the record.

[para 17] The head of a public body is given the ability under section 36 of the FOIP Act to correct an error or omission in an individual's personal information, other than an opinion, at the individual's request. If the head does not make the requested correction, then it is mandatory for the head to either annotate or link the requested correction with the personal information that is relevant to the requested correction.

[para 18] The duty to annotate personal information in a record arises once an applicant requests correction of an error or omission in the applicant's personal information. However, if an applicant does not request correction of an error or omission in the applicant's personal information, the public body does not have a duty under section 36 to correct or annotate information, or to provide corrections or annotations to other public bodies or organizations.

[para 19] In Order F2017-40, the Adjudicator made the following finding at paragraph 16:

The Applicant's correction request points 2, 3, and 5 (subsection 9) are not the Applicant's personal information because they are not about her, they are about the investigation process and procedures and how those procedures were followed or not followed in the investigations relating to the Applicant's complaints.

As the second and third requests, and subsection 9 of the fifth request, were found not to be requests to correct personal information, these requests do not engage section 36 of the FOIP Act. Moreover, there is no provision in the FOIP Act that would authorize an applicant to make a request to correct information other than personal information. As a result, the FOIP Act is not engaged by these requests and the Public Body has no duties under the Act in relation to this aspect of the request, even if it chose to make an annotation.

[para 20] The Adjudicator in the foregoing case concluded that the Applicant's request of December 26, 2014 was a correction request under the FOIP Act in all other respects. Section 36 is therefore engaged in relation to the Public Body's decisions to annotate with respect to the request other than as it relates to the second and third requests and subsection 9 of the fifth request.

[para 21] I turn now to the question of whether the Public Body complied with its duty under section 36(4) in relation to the annotations resulting from the request other than the second and third requests and subsection 9 of the fifth request.

[para 22] The Applicant argues:

It is the Complainant's position that this public body only notified the OIPC and not any other public body or any third party to whom the information had been disclosed to during the one year before the correction was requested that a correction annotation or linkage had been made.

The Board of Trustees, ATA, Alberta Education and the Human Rights Commission were all supplied the **Falsified Reports**, but **NOT** the annotations as per section 36(4) [required] by law. This is a contravention of the FOIP Act. The Falsified Reports were used against the Applicant in other decision-making processes to deny her of her right to an administratively fair process. (Error of the Law). [emphasis in original]

[para 23] The Public Body argues that the Board of Trustees of the Public Body and the Public Body are the same legal entity. As a result, section 36(4) does not require it to provide the annotations to the Board of Trustees. In addition, it states:

The Public Body did not disclose any of the records subject to the First Annotation or the Second Annotation to the ATA or the Office of the Registrar Department of Education. As such, it is not obligated to provide notice of the First Annotation or the Second Annotation to these parties.

The Applicant suggests, but has not provided any clear evidence that the ATA or the Office of the Registrar Department of Education were provided with copies of the subject records within a year prior to her request for corrections.

Even if such evidence was provided, the Public Body was not responsible for disclosure of the subject records to the ATA or the Office of the Registrar Department of Education. As such, it has no obligation to provide notice of the Annotations to those parties.

[para 24] I agree with the Public Body that it was under no duty to provide separate notice of the annotation to its Board of Trustees, given that the Public Body and its Board of Trustees are one and the same entity. Further, on the evidence before me, I am unable to find that the Public Body disclosed any of the information for which it made annotations to the ATA, or to Alberta Education, within the year period before the correction request was made, as is required before the duty to provide the annotation to such an entity arises.

[para 25] As discussed in the background above, the Public Body informed the Alberta Human Rights Commission of the annotation on August 31, 2016. As a result, the Public Body met its duty to the Applicant in relation to this aspect of the Applicant's correction request.

IV. ORDER

[para 26] I make this Order under section 72 of the FOIP Act.

[para 27] While the Public Body did not initially meet its duty to assist the Applicant under section 10, I find that it subsequently brought itself into compliance by conducting a reasonable search for records and providing an explanation of the search results.

[para 28] The Public Body did not fail to meet any duties imposed by the FOIP Act in relation to the Applicant's request of December 26, 2014.

Teresa Cunningham
Adjudicator