

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-33

September 24, 2019

ALBERTA LABOUR AND IMMIGRATION

Case File Number 002278

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Jobs, Skills, Training and Labour (the Public Body). He requested access to the following:

[...] a copy of the Ombudsman's final report to Employment Standards in the aforementioned matter. I am also requesting any internal Public Body records verifying whether or not Employment Standards (ES) made any changes to their procedure of handling compliance complaints against employers as a result of the Ombudsman's findings and recommendations. I am also requesting any records verifying whether or not any disciplinary action (transferred to another department?) was taken against [...] former ES Compliance Officer, [...] former Calgary ES Manager and / or any other Calgary ES employees that had violated procedure and their responsibilities during their involvement in ES file #54131. I would like all public body records verifying what if anything was accomplished and or changed by the Ombudsman's involvement / investigation into ES handling of a compliance complaint against an oilfield service employee.

The Public Body located responsive records and applied exceptions to disclosure to them.

The Applicant requested that the Commissioner review whether the Public Body had met its duty to assist him, as required by section 10 of the FOIP Act.

The Adjudicator concluded that the Public Body had met its duty to assist the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 16, 24, 27, 72

Authorities Cited: AB: Orders F2007-029, F2015-29

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

I. BACKGROUND

[para 1] On January 7, 2015, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Jobs, Skills, Training and Labour (the Public Body). He requested access to the following:

[...] a copy of the Ombudsman's final report to Employment Standards in the aforementioned matter. I am also requesting any internal Public Body records verifying whether or not Employment Standards (ES) made any changes to their procedure of handling compliance complaints against employers as a result of the Ombudsman's findings and recommendations. I am also requesting any records verifying whether or not any disciplinary action (transferred to another department?) was taken against [...] former Calgary ES Compliance Officer, [...] former Calgary ES Manager and / or any other ES employees that had violated procedure and their responsibilities during their involvement in ES file #54131. I would like all public body records verifying what if anything was accomplished and or changed by the Ombudsman's involvement / investigation into ES handling of a compliance complaint against an oilfield service employee.

[para 2] The Public Body responded to the request on January 19, 2015. The Public Body refused access, citing section 4(1)(d) of the FOIP Act, which excludes records in the custody or control of an officer of the Legislature from the scope of the FOIP Act.

[para 3] On March 4, 2015, the Applicant requested review by the Commissioner of the Public Body's response to his access request.

[para 4] The Commissioner opened case file 000436 and authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, on November 6, 2015, the Public Body provided a new response to the Applicant that addressed those portions of the access request relating to its own records, rather than those that would be in the custody or control of the Ombudsman. The Public Body stated that it was providing 26 pages of responsive records; however, it severed information from them under section 4(1)(d), 16 (disclosure harmful to business interests of a third party), 17 (disclosure harmful to personal privacy), 24(1)(a) and (b) (advice from officials) and 27 (privileged information).

[para 5] On December 23, 2015, the Applicant requested review of the adequacy of the Public Body's response of November 6, 2015 and its search for records. The Commissioner opened case file 002278 and authorized a senior information and privacy

manager to investigate and attempt to settle the matter. At the conclusion of this process, on June 14, 2017, the Applicant requested an inquiry.

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

[para 6] 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 7] 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 8] In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 9] In *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII), the Alberta Court of Queen's Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

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 added 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.* [My emphasis]

[para 10] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional responsive records are likely to exist.

[para 11] The Public Body made the following submissions for the inquiry:

Orders F2009-012{5} said that there are two components to an adequate search:

1. The Public Body must make every reasonable effort to search for the requested records responsive to the access request (adequate search);
2. The Public Body must inform the Applicant in a timely fashion about what has been done in response to the access request (inform in a timely manner). Orders F2007-029{14,15} and F2013-43{3} identified the following as consideration for determining whether the Public Body conducted an adequate search:

3. Did the Public Body identify all the possible locations where responsive records might be located?

4. Did the Public Body search all the locations as identified?

The public body reviewed their search actions and can defend that they met their duty to assist the applicant.

1. The Public body made every reasonable effort to search for the requested records. A request for records search was sent to point people in the Public body. These point people distribute the request for records to all of their respective staff. These staff provide responsive records to the point person, who in turn bundle these records and provide them to the FOIP Office.

Specifically, a search for responsive records was conducted via an email from the FOIP office requesting records from:

1. Assistant Deputy Minister's Office, Alberta Labour Safe, Fair and Healthy Workplaces Division
2. Executive Director of Employment Standards;
3. Alberta Labour's Ministerial Correspondence Unit.

Our point of contact in each of these areas fanned the request for records to their respect staff to search for and provide records.

A copy of these requests for records are provided in evidence. Each individual searched their respective emails and office files for responsive records using key word searches and manual review of any paper files. In addition, a search of the ARTS database of action requests and briefing notes using key word searches was completed.

2. The Public body made an adequate search and informed the Applicant in a timely fashion, providing the applicant with the responsive records.

The Public Body identified all possible locations where responsive records might be located. The locations where responsive records were located are in the Assistant Deputy Minister's office of Alberta Labour and Immigration's Safe, Fair and Healthy Workplaces Division; Employment Standards division, and the Deputy Minister's Ministerial Correspondence Unit.

3. The Public Body did search all locations.

4. A search was sent to the point people in Assistant Deputy Minister's office of Alberta Labour and Immigration's Safe, Fair and Healthy Workplaces Division; Employment Standards division, and the Deputy Minister's Ministerial Correspondence Unit.

The Public body made an adequate search and informed the Applicant of the result in a timely fashion, thus having met its duty under Section 10(1). No additional records exist beyond the records provided to the applicant on November 6, 2015.

[para 12] In its rebuttal submissions, the Public Body noted:

On page seven of the Applicant's rebuttal, the Applicant stated that the Public Body did not inform him of their search efforts.

It is not the practice of the Public Body to provide copies to the applicant of record searches sent to program areas requesting records.

On page eight of the Applicant's rebuttal, the applicant states that the Public Body did not inform him why records related to disciplinary actions and changes to compliance investigations were not provided.

The Public Body does not provide comment to an applicant on records provided or not provided as responsive to a FOIP request. When records are not provided, it is because they do not exist or have been withheld under the *Act*.

[para 13] The Applicant believes that additional responsive records exist. He suggests that the Public Body should have contacted employment standards personnel who might have corresponded with the Ombudsman during the Ombudsman's investigation, as part of its search. He also believes that the Director of Employment Standards should have been contacted in the course of the search. He states:

It is possible that E.S. ignored the Ombudsman's office or only co-operated to a limited degree. Regardless of what transpired the ONUS is on the Public Body (E.S.) to explain why records do not exist.

Did the Public Body conduct a reasonable search for responsive records?

[para 14] The submissions and evidence of the Public Body establish that the various program areas considered likely to have responsive records were contacted. In addition, it provided evidence that it followed up with these program areas to confirm that they were using appropriate search parameters and had located responsive information. The Public Body's submissions establish that it considers no additional responsive records exist because it looked in all the areas where responsive records were likely to be located, and could not find anything other than the records it included in its response.

[para 15] The Applicant does not provide a credible reason for believing further records exist than those the Public Body has located. He asserts that the Ombudsman's investigation took place over a long period of time; however, the length of the investigation does not mean that the Public Body would create more records in relation to any changes recommended by the Ombudsman. There is also no reason to assume that the Public Body took disciplinary actions against employees. In this case, I do not know whether the Ombudsman made recommendations, as there is no evidence before me as to the Ombudsman's findings and recommendations. As a result, I have no reason to assume that the Public Body made any particular changes to its procedures as a result of the Ombudsman's investigation.

[para 16] On the evidence before me, I conclude that the Public Body conducted a reasonable search for responsive records.

Did the Public Body meet the informational component of the duty to assist?

[para 17] As noted above, the Public Body has provided an explanation of the search it conducted and has established that this search was reasonable. The Public Body explains that it does not "comment to an applicant on records provided or not provided as responsive to a FOIP request. When records are not provided, it is because they do not exist or have been withheld under the *Act*." In cases where there is no credible reason to believe that a responsive record exists, I agree that the Public Body's approach is reasonable. However, as noted in Order F2015-29, when there is a credible reason to believe that a record exists, and the Public Body does not produce it, the informational component of the duty to assist may require the Public Body to provide further explanation.

[para 18] In this case, the Applicant has not provided a credible reason to believe that additional responsive records exist. As a result, the Public Body need not provide any further explanation to satisfy the informational component of the duty to assist.

[para 19] For the reasons above, I find that the Public Body conducted a reasonable search for responsive records and met its duty to assist the Applicant under section 10 of the FOIP Act.

III. ORDER

[para 20] I make this Order under section 72 of the Act.

[para 21] I confirm that the Public Body met its duty to assist the Applicant.

Teresa Cunningham
Adjudicator