

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-11

April 1, 2021

CITY OF EDMONTON

Case File Number 005506

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Summary: The Applicant made an access request to the City of Edmonton (the Public Body) for records relating to a decision to locate an LRT station at a particular site. The Applicant requested a review by this Office when the Public Body did not respond. During that review, the Public Body provided responsive records, with some information withheld under sections 24 and 25. The Applicant submitted a second request for a review of the Public Body's application of those exceptions, as well as the adequacy of the Public Body's search.

The Applicant subsequently requested an inquiry into the exceptions applied by the Public Body, and the adequacy of its search. In the course of the inquiry, the Public Body withdrew its application of sections 24 and 25 to the information in the records.

The Adjudicator found that the records of the searches conducted by the Public Body were insufficient to find that it conducted an adequate search for records. The tracking sheets used by employees conducting the searches were largely blank, such that the scope of the search was unclear. The Adjudicator ordered the Public Body to conduct another search for responsive records.

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

Authorities Cited: **AB** Orders 97-006, F2007-029, F2019-18, F2019-22

I. BACKGROUND

[para 1] The Applicant made an access request in April 2016 to the City of Edmonton (the Public Body) for records relating to a decision to locate an LRT station at a particular site. The request was clarified in August 2016 as follows:

All records related to the decision to locate an LRT station on the northeast corner of the intersection of 142 Street and Stony Plain Road.

[para 2] The Public Body informed the Applicant that this decision was made in 2010, so responsive records would be from around that time.

[para 3] The Applicant requested a review by this Office when the Public Body did not respond. During that review, the Public Body provided responsive records, with some information withheld under sections 24 and 25. The Applicant submitted a second request for a review of the Public Body's application of those exceptions, as well as the adequacy of the Public Body's search.

[para 4] The Applicant subsequently requested an inquiry into the exceptions applied by the Public Body, and the adequacy of its search. In the course of the inquiry, the Public Body withdrew its application of sections 24 and 25 to the information in the records.

II. RECORDS AT ISSUE

[para 5] As the issue relates to the duty to assist, there are no records at issue. However, as the inquiry related to the application of exceptions at the outset, I have a copy of the responsive records.

III. ISSUES

[para 6] The issues set out in the Notice of Inquiry, dated November 9, 2020, are:

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 Commissioner will consider whether the Public Body conducted an adequate search for responsive records.

2. Did the Public Body properly apply section 24 (advice from officials) to the information in the records?
3. Did the Public Body properly apply section 25 (disclosure harmful to economic interests) to the information in the records?

[para 7] As the Public Body is no longer applying sections 24 or 25 to withhold information in the records, only the first listed issue will be discussed.

IV. DISCUSSION OF ISSUES

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

[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] The Applicant has objected to the validity of the Public Body's arguments on the basis that they are not supported by a sworn document. The Notice of Inquiry states "it is helpful for the Public Body to include in its initial submission, direct evidence such as an affidavit regarding the search conducted..." However, an affidavit is not required.

[para 12] The Applicant further states (initial submission at para. 4):

Because the Public Body relies on unfounded assertions instead of affidavits from the employees involved, there is no reliable evidence from which to draw facts to support the

conclusion that the Public Body made every reasonable effort to search for the actual records requested. For example, there is no evidence of who identified the “Relevant Areas”, how they identified the “Relevant Areas”, and what the “Relevant Areas” were, or who reached out to employees, which employees were chosen, what instructions they were given about searching records and completing the Tracking Sheets, and why only three employees were involved in the secondary search.

[para 13] The Applicant has also raised a concern about the search terms used by the Public Body to locate responsive records. In her request for inquiry, she states (at page 8):

The Public Body has not shown that it consciously directed its search toward records relating to the way the decision was made, paying heed to the Public Body's internal methods of record-keeping.

On the contrary, the Public Body appears to have simply crafted its search parameters based on the Applicant's wording of the records request (Facts in OIPC Letter of Findings).

The Public Body's argument appears to be that it searched in accordance with the Applicant's wording; few records resulted; therefore, no further records exist. However, the initial premise is flawed - that the Applicant's wording provided the appropriate search parameters – therefore, the conclusion does not follow. An accurate conclusion cannot be drawn from a flawed premise.

Because the search parameters were not attaching to responsive records about the LR.T station decision, the Public Body ought to have recognized that the parameters might not accurately reflect words and phrases the Public Body might employ to describe the types of records the Applicant sought.

The Public Body ought to have revised its search terms and parameters in response to its failure to find responsive records.

[para 14] The Applicant states that the few pages of records that were related to the Public Body's decision-making process “hint at the existence of many more related records in the Public Body's care and control” (request for inquiry, at page 8).

[para 15] The Applicant also objects that the Public Body did not state why it believes no additional records exist. She states that the Public Body ought to explain why it believes its search was thorough, based on its organization, structure, record-keeping, and public responsibilities.

[para 16] Regarding its search, the Public Body states that it identified the key business areas that would have been responsible for the records. It states that it contacted employees in the relevant areas and requested they search their records. The Public Body asked the employees to fill out tracking sheets that record who performed the search, areas/locations searched, the time spent searching for records, keywords used and scope of the search request for each area.

[para 17] The Public Body states that it located approximately 243 pages of responsive records, which were provided to the Applicant in November 2016 with some information redacted. During the second review by this Office, it performed another search for records; it states (initial submission at para. 6):

...the Public Body performed a second search of its records to see if it would be able to locate any other responsive records as the Applicant believed that:

“...there are likely to exist internal municipal records regarding city staff’s decision to hire the consultant, direct the consultant, discuss the consultant’s advice, accept it and recommend it to City Council and the public. It seems unlikely that city staff took such a weighty decision without written record of internal discussions and evidence that they followed proper decision-making procedures.”

[para 18] The Public Body states that it located an additional 8 pages of records, which were provided to the Applicant in December 2017, which some information redacted. Some email attachments were missed, and were provided to the Applicant at a later date.

[para 19] The Public Body states that it believes no additional records exist (initial submission, at para. 17):

Other than the First Batch and Second Batch of responsive records already provided to the Applicant, the Public Body:

- a. is not aware of any other responsive records that would fit within the Applicant’s Request that were not located as a result of the Public Body’s internal retention or destruction schedules; and
- b. reasonably believes that there are no other responsive records, within the Public Body’s custody or control, that would fit within the Applicant’s Request as:
 - i. the Public Body keeps all records of this nature in the Relevant Areas; and
 - ii. the Public Body performed two thorough searches of the Relevant Areas, as described in paragraph 16 above.

[para 20] With its initial submission, the Public Body provided tracking sheets from both the first search (undertaken in November 2016) and the second search undertaken during the review by this Office, in October 2017. The Public Body states that the first page of the tracking sheet is from the initial search conducted in November 2016. The second search, undertaken during the review that preceded this inquiry, was conducted in October 2017. The Public Body states that pages 2-4 of the tracking sheets relate to that later search. The due dates provided to Public Body employees asked to locate records correlate to these timelines.

[para 21] The Applicant argues that these tracking sheets do not support the Public Body’s assertion that it conducted an adequate search. She points to the number of employees who did not record where they searched, or what terms were used to search for records. She states that some employees recorded using only “LRT” as a search term,

which seems unduly vague. Some employees referred only to where they searched, and not what terms were used.

[para 22] The Applicant also points out that one employee specifically mentioned another employee, RG, who should have responsive records. However, RG's name does not appear in the tracking sheets as someone who conducted a search for records.

[para 23] In its rebuttal submission, the Public Body states (at para. 4):

The Public Body confirms that [RG] is no longer an employee of the Public Body. The Public Body does acknowledge that it is unclear from the Tracking Sheets whether the Public Body contacted [RG] directly. The employee responsible for contacting areas/individuals identified in the 2016 search for having potential records is no longer with the Public Body, such that the Public Body is unable to confirm that this occurred. However, it is the Public Body's process to contact the areas/individuals identified as having potential records to confirm if they do have any such records in their possession. Also, during the Public Body's searches, the department, IIS (Integrated Infrastructure Services), was contacted along with several of its branches and sections (including the relevant remnants of the former Facility & Capital Planning (FCP) section) to determine if there were any responsive records available and the City provided same to the Applicant subject to the applicable redactions. Accordingly, the Public Body submits that based on the steps taken, the Public Body made all reasonable efforts to locate the responsive records.

[para 24] The Public Body further argues (at para. 2):

The Public Body submits that the Tracking Sheets provided in Schedule B of its Initial Submission (the "Tracking Sheets") are believed by the Public Body to be accurate records of the steps taken by the Public Body when it performed its searches for the subject records. The Public Body requests the Commissioner to accept the Tracking Sheets as appropriate evidence in this matter because:

- a. The employee that would be best able to provide the sworn evidence regarding the details of these searches are no longer employed by the Public Body;
- b. The complications in getting sworn evidence as a result of the current COVID-19 pandemic; and
- c. The Applicant has not provided any evidence to show that the information contained in the Tracking Sheets are not accurate.

[para 25] Regarding RG, it is on the first page of the tracking sheet – relating to the initial search – where a director notes that RG ought to have responsive records. The Public Body states that RG is no longer employed with the Public Body, nor is the person responsible for contacting all relevant employees to conduct a search. It notes that the area in which RG worked, FCP, was included in the search.

[para 26] The person from FCP who conducted the initial search is listed as an administrative clerk. The Applicant questions the thoroughness of this clerk's search, as they didn't list keywords searched but said "I went through a lot of documents." The clerk also listed where they searched: a particular network drive.

[para 27] In my view, that the clerk didn't list keywords is not necessarily fatal to finding they conducted a thorough search. The clerk noted that she took 9 hours to search for records. It seems likely that the clerk manually searched through files and documents rather than relying on search terms. Whether this is an efficient way of conducting a search, it is not less thorough. Further, this type of search addresses the Applicant's concerns that the search terms used by the Public Body were too narrow.

[para 28] However, there is no indication that RG, or anyone else in the FCP area, was asked to search their email or their own files/notes (as opposed to only the shared documents on shared drives). The clerk's notes show that only a particular network drive was searched; email was not listed.

[para 29] The director who identified RG as someone who ought to have responsive records also noted that the IIS area ought to have records. That area was not listed in the tracking sheet for the initial search. It is listed in the tracking sheet for the second search. Of the twenty-one employees listed in the tracking sheet from the IIS area, one person located records.

[para 30] Many employees did not list where they searched for records; of the thirty-four employees who conducted the second search, eight noted where they searched:

- One employee said they searched Gmail
- One employee said they searched local drives and staff email
- One employee said they searched Digital Archive Files
- One employee said they searched Google
- One employee said they searched local drives
- Three employees said they searched Google and local drives.

[para 31] It is not entirely clear what it means that an employee searched 'Google'. Presumably the employee did not conduct a general Google search; it seems more likely that the Public Body uses a Google-based product, which may include Gmail. It is possible that when an employee states they searched Google, they mean to include Gmail, but that is speculation. It is also not clear whether any of these employees searched their personal files or notes.

[para 32] It may be that some of the employees asked to conduct a search were involved in the relevant decision only to a minor extent, such that they did not maintain their own records of that decision. It may be that some employees regularly delete all transitory emails and file those that need to be maintained, such that it makes sense for that employee not to search their email (this explanation was accepted in Order F2019-22, at para. 17). However, reasons like this ought to be noted.

[para 33] The primary issue with these tracking sheets as evidence of the Public Body's search is not the absence of sworn statements. Rather, it is the lack of detail in the tracking sheets that indicate the Public Body's search may have lacked thoroughness.

[para 34] In Order F2019-18, the public body had provided search summaries filled out by each employee who searched for responsive records. These summaries included a list of areas or types of records searched to be checked off (not all will be relevant in every case) as well as a space for the employee to describe the search terms used. Some summaries were filled out in great detail and some were not. In that case, the public body had argued that the searches were thorough, but the search summaries were not properly filled out. I found (at para. 17):

Regarding the search conducted by particular Public Body employees, it may be that they performed an adequate search for records. However, in an inquiry, the Public Body must also be able to *show* that it performed an adequate search. In this case, some of the search summaries indicate minimal searches by some employees who the Applicant identifies as those who may have additional records. The Public Body alleges that the searches were thorough, and that only the forms were improperly filled out by those employees. That may be, but it is not sufficient to state that a search was adequate if the only evidence put before me indicates otherwise.

[para 35] In that case, I said that the search summary forms the public body used were a good starting point, but if the employees tasked with conducting the searches do not adequately fill out forms, *any* form would be inadequate.

[para 36] This seems relevant in this case as well. The employees tasked with conducting a search for records may have been appropriately thorough. The tracking sheet used by the Public Body to track the searches are a good tool but if they are not properly filled out, they are not particularly helpful in supporting the Public Body's argument that it conducted an adequate search. The tracking sheets here contain many blank spaces.

[para 37] Tracking sheets or similar forms are not *required* in order to show that a search was adequate, if the public body can otherwise meet its burden. In this case, it may also have been helpful if the Public Body had been able to show that it instructed the relevant employees how to conduct a thorough search (i.e. to include email accounts including deleted folders, transitory records, drafts, handwritten notes, records of conversations, etc.).

[para 38] In this case, the only indication of instructions provided to the employees is the access request stated on the tracking sheets. It is not clear whether the Public Body employee responsible for administering the search provided any additional instruction regarding how to conduct their searches or if they were left to their own devices. Employees from different program areas may not be sufficiently familiar with FOIP search requirements, in which case it would be helpful for the FOIP area to provide instructions with search requests, if they do not already. It may also be helpful to remind employees that the access request might end up in a review, where the FOIP area will be in the position of having to defend the adequacy of the search, and that properly filled out tracking sheets can be fundamental to that defense.

[para 39] In this case, if it wasn't clear from the outset that the Applicant was looking for internal documents, it was clarified during the review by this Office. Indeed, this clarification led the Public Body to conduct a second search for records. It is therefore reasonable to expect the employees conducting the search to include their email accounts and their own copies of notes and records in their searches. I understand that the search was conducted many years after the relevant records were created, and that records such as emails, handwritten notes, etc. may be considered transitory documents and not be kept for extended periods of time. However, emails were included in the responsive records, so clearly some employees maintained them.

[para 40] The Public Body has argued that the Applicant did not provide any evidence that the tracking sheets are inaccurate. It is not the Applicant's burden to show such inaccuracies; it is the Public Body's burden to show that it conducted an adequate search. Further, the *accuracy* of the tracking sheets is not the issue; rather, it is the paucity of information contained in the tracking sheets that is problematic.

[para 41] For the reasons above, the Public Body has not satisfied me that it conducted an adequate search for records. The appropriate remedy is to order that a new search be conducted.

[para 42] It has been over ten years since the decision about the 142 Street LRT station was made; it is entirely possible that some records may have been destroyed in accordance with records retention and destruction schedules. While public bodies are prohibited from destroying records that are subject to an access request – even transitory records – this may have happened where employees were not aware the records were responsive to an access request. If that has happened, it cannot now be rectified.

[para 43] The Public Body should note which areas will be involved in this new search, and why those areas were chosen. In its submissions, it has stated that it contacted all relevant areas that would have had responsive records and I have no reason to doubt this. But as I am ordering a new search, it would be helpful for the Public Body to note why it is choosing the particular areas it is, for this additional search.

[para 44] The Public Body should instruct employees in those areas regarding where to search for records, and should keep a note of these instructions. The Applicant has objected that the Public Body may have used only the language of her access request as search terms, which may have been too narrow. It is not apparent to me what other search terms would be appropriate, and the Applicant has not suggested any. The Public Body should ensure employees use whatever search terms are reasonably likely to result in locating the records the Applicant is seeking.

[para 45] The Public Body should ensure that the employees conducting the search make a record of where they searched, whether the search was by keywords, and if so, what keywords were used. Where several employees use one shared network drive, it is not necessary for each employee to search that drive. One employee might be tasked with the search of shared repositories but if so, this should be noted. Each employee should

search for their own copies of records they might have retained. Obviously employees who were not involved in the project need not search their own records.

[para 46] The Public Body should also note whether responsive records may have been destroyed in accordance with its records retention schedule.

[para 47] In addition to providing the Applicant with any additional responsive records if located (subject to exceptions in the Act), the Public Body is to provide the Applicant with an explanation of its search, as described above.

V. ORDER

[para 48] I make this Order under section 72 of the Act.

[para 49] I find that the Public Body failed to satisfy me that it conducted an adequate search for records. I order the Public Body to conduct an additional search, as described in this Order, and to provide the Applicant with any additional records located, subject to exceptions in the Act, along with an explanation of its search, as described in this Order.

[para 50] 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