

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-21

June 17, 2021

ENVIRONMENT AND PARKS

Case File Number 006610

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Summary: An individual made a request to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the capture of wild horses under the *Stray Animals Act*.

The Public Body responded to the request, stating that it did not locate any responsive records. The Applicant requested a review of the Public Body's response and whether it met its duty to assist the Applicant under the Act.

The Adjudicator determined that the Public Body failed to meet its duty to assist the Applicant by not providing any explanation of its search for records. The Applicant had provided reasons to expect that records would exist; as such, the Public Body ought to have provided an explanation of its search to the Applicant, including why it believes that no responsive records exist.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 72, *Stray Animals Act*, R.S.A. 2000, c.S-20, s. 9, Horse Capture Regulation, Alta Reg. 59/1994, ss. 3

Authorities Cited: AB: Orders 96-022, 97-003, 97-006, 2001-016, F2007-007, F2007-029, F2009-009, F2017-29

I. BACKGROUND

[para 1] An individual made a request dated May 24, 2017 to Environment and Parks (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

1. The document by which the Minister designated any public land as public land for which a licence may be issued under s. 9 of the *Stray Animals Act*;
2. The document that grants the authority to the Minister to enter into the “Memorandum of Understanding”, attached to this request and dated October 20, 2014, with Wild Horses of Alberta Society; and
3. Any record that is or contains the Minister's opinion, as per s. 9 in the *Stray Animals Act*, that public lands be designated as public land for which a licence may be issued under s. 9 of the *Stray Animals Act*.

The timeframe for the request is January 1, 2013 to May 26, 2017.

[para 2] The Public Body responded to the Applicant by letter dated August 22, 2017, stating that it “has not identified any records relating to the subject of your request.”

[para 3] The Applicant requested a review of the Public Body’s response, including its search for responsive records. The Commissioner authorized an investigation to settle the matter. This did not resolve the issues between the parties and the Commissioner agreed to conduct an inquiry.

III. ISSUES

[para 4] The issues for this inquiry were set out in the Notice of Inquiry, dated October 17, 2019 as follows:

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

IV. DISCUSSION OF ISSUES

[para 5] 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 6] 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).

[para 7] 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).

Did the Public Body conduct an adequate search?

[para 8] 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 9] In their initial submission, the Applicant provides an explanation for their access request. They state (initial submission at paras. 2-5, footnotes omitted):

The Request seeks documentation related to the Minister's authority to enter into a memorandum of understanding dated October 20, 2014 with the Wild Horses of Alberta Society (WHOAS and the MOU, respectively).

The Applicant remains concerned about the Minister's authority to contract with a third party society or corporation for the capture of wild horses when that authority does not appear to have been delegated by legislation.

It is implausible that the Minister has no document relating to that authority.

The Request also sought documentation related to the Minister's opinion required under section 9(1) of the *Stray Animals Act*. The Applicant does not take issue with the substance of the Public Body's response with respect to these categories of record and

recognizes the temporal scope of the Request does not capture the last documented instance of the Minister's opinion or designation of public land.

[para 10] I understand that, with respect to the Public Body's search for responsive records, the Applicant is not concerned with the first and third item in their access request, but remains concerned with respect to the search conducted for the second item relating to a Memorandum of Understanding (MOU) between the Government of Alberta and the Wild Horses of Alberta Society (WHOAS).

[para 11] The Applicant attached a copy of the MOU, dated October 2014, with its access request. The Applicant also clarified their request with the Public Body, by letter dated June 22, 2017, stating:

The Ministry entered into an agreement on October 20, 2014 (Memorandum of Understanding), granting another party (Wild Horses of Alberta Society) the right to interfere with the horse population. My Request specifically requests documents that grant the Ministry the authority to enter into said agreement.

[para 12] The Applicant states the *Stray Animals Act* R.S.A. 2000, c.S-20 and Horse Capture Regulation grant authority to the responsible Minister to grant a licence to persons to capture wild horses on designated public land. They point to section 3 of the Regulation, which states that a licence to capture wild horses may be granted only to adult individuals.

[para 13] The Applicant states that the MOU commits the Minister to issue licences to WHOAS, to support that organization's adoption initiative and contraception initiative. They argue that the MOU does not clarify the Minister's authority to enter into the agreement or to issue licences to persons other than adult individuals.

[para 14] The Applicant also explains that the provincial government established the Feral Horse Advisory Committee established in 2013. They conclude (initial submission, at paras. 18-20):

The combination of the limited authority provided by legislation and the commitments in the MOU suggest the possibility of unauthorized action by the Minister.

Presumably, the Minister identified and solved that issue and in the process documentation was created; so the Request was made.

It is reasonable to expect that the source of the Minister's authority would have been identified or recorded in a memorandum, letter, ministerial order or some communication involving the Minister, or the Feral Horse Advisory Committee stakeholders.

[para 15] The Public Body provided details of its search for responsive records. It sent the records search request to the Deputy Minister's office, the Deputy Minister's Chief of Staff and Executive Director of Integration. The Deputy Minister's Office forwarded the search request to the Minister's office and the Executive Correspondence Unit.

[para 16] The search request was also sent to the Assistant Deputy Minister's Policy and Planning Division, and the Director of Rangeland Policy and Public Land Specialist.

[para 17] The Public Body states that each staff member in the Minister's office, Deputy Minister's office, Executive Correspondence Unit, and Assistant Deputy Minister's office were asked to search all databases, including email and share drives, all electronic and paper filing systems. The Director of Rangeland Policy and a Public Land specialist were asked to search all databases, including email and share drives, all electronic and paper filing systems.

[para 18] The Public Body states that all staff within the above areas were contacted, including all staff within the Rangeland Policy/Land Policy branch and Executive Director's office.

[para 19] Under the heading "The reasons the Public Body maintains no further responsive records exist", the Public Body states that no records were located by the Minister's office or the Deputy Minister's office. It states that the Executive Correspondence Unity and Rangeland Policy/Land Policy units located records that were found to be outside the scope of the request (outside the time frame and not the type of record requested).

[para 20] The Public Body did not explain why it chose these particular areas within the Public Body for its search. It also did not provide any details about keywords used in the search, records retention periods that may have applied, etc. The Public Body's submissions indicate that its search may have been sufficiently thorough; however, there are gaps in its explanation, such as why it limited its search to the program areas identified, or what search parameters the employees used to search for records.

[para 21] Because I do not know why the Public Body limited its search to particular program areas, or what search parameters were used, I cannot find the search to have been adequate. This is especially true when the Applicant has provided logical reasons to expect responsive records to exist, and Public Body has not provided any reason why they do not, aside from saying that none were found.

[para 22] I will order the Public Body to explain why it limited its search to the program areas identified, and provide a more comprehensive explanation for why responsive records do not exist. Details regarding why the Public Body believes no further records exist is discussed more detail in the next section of this Order.

[para 23] If, in obtaining and providing this additional detail, there is an indication that another search may elicit results, the Public Body should conduct that search. If not, the Public Body is to explain why not.

[para 24] I will retain jurisdiction to review the Public Body's explanation, in the event the Applicant asks me to do so.

Did the Public Body inform the Applicant in a timely fashion about what has been done to search for the requested records?

[para 25] The Public Body's response to the Applicant, dated August 15, 2017, states:

A search of Alberta Environment and Parks record holdings has not identified any records relating to the subject of your request, based on the search parameters you provided to this office.

[para 26] The Applicant argues that this response does not provide any detail about what steps the Public Body took to conduct its search, how it ensured it captured all responsive records, and why it believes no responsive records exist.

[para 27] The informational component of a public body's duty to conduct an adequate search for records was discussed in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89. The Court found (at paras. 41-45):

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 added)

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 28] The Order cited in this decision, Order F2009-001, concludes (at para. 26):

While it may not be necessary in every case for a public body to give an applicant all of the foregoing information in order to meet its obligation of telling the applicant what was done to search for responsive records, a public body should provide greater detail about the search that it conducted when the applicant, as here, specifically asked it for a confirmation of whether particular records did or did not exist.

[para 29] More recently, the Director of Adjudication said in Order F2020-13 (at para. 79):

In some earlier orders of this office, the Adjudicator held that the fact a very thorough search had been conducted and records were not found was itself an adequate explanation for the belief that no further records exist. While I agree with the logic of this in the appropriate case, in circumstances such as the present, where the Applicant is able to demonstrate with certainty for some of the records she describes that the public body was once in possession of them, or that this is reasonably likely, I believe the duty under section 10 includes giving an explanation as to what happened to them or likely happened to them that would account for their no longer being in the public body's possession

[para 30] In this case, the Public Body's response to the Applicant merely states that no responsive records were located.

[para 31] As stated in previous Orders, a public body is not required to explain its search for records in every case. An explanation may be required where a public body has failed to locate a *particular* record that an applicant has provided reasons to expect exists.

[para 32] An explanation may also be required is where there are logical reasons for expecting records exist, yet none are located. In such a case, a public body should provide an applicant with some explanation of the scope of its search, and it should also provide its best explanation as to why no records were located. In some cases, a satisfactory explanation may not be available; however, the public body should make an effort to provide the best explanation it can in the circumstances.

[para 33] In this case, the Applicant provided valid reasons to the Public Body when they initially made the access request, and in subsequent communications clarifying the request, for their belief that certain records should exist. The Applicant acknowledged the reasons why no records were responsive to its first and third requested items: it provided me with a copy of a Court of Queen's Bench decision considering a similar matter that states that designations of land under section 9 of the *Stray Animals Act* have been made

only three times. The three dates fall outside the scope of the Applicant's access request. (It is not clear how this case came to the Applicant's attention; there is no indication that the Public Body was the source of this information.)

[para 34] With respect to records relating to the Minister's authority to enter into the MOU with WHOAS, an adequate explanation for why the Public Body believes no records exist might include details about which area within the Public Body would be responsible for responsive records, and the efforts taken to locate records in that area. If responsive records were considered transitory and/or would likely have been destroyed in accordance with records retention schedules, such an explanation would be helpful. If Public Body employees in the responsible program area believe that requested records were never created, or would not be created in the usual course as the Applicant believes would be the case, that would also be helpful information for the Applicant.

[para 35] The Public Body did not provide *any* reason in its response to the Applicant for not locating responsive records. In these circumstances, where the Applicant has provided logical reasons for expecting at least some responsive records to exist, I find that the Public Body failed in its duty to assist the Applicant by not providing any explanation relating to its search for records.

V. ORDER

[para 36] I make this Order under section 72 of the Act.

[para 37] I find that the Public Body did not meet its duty to assist the Applicant under section 10 of the Act. I order the Public Body to provide additional details regarding its search, as set out in paragraphs 20-23 and 34 of this Order. I retain jurisdiction to review the Public Body's explanation, in the event the Applicant asks me to do so.

[para 38] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator