

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-49

December 8, 2021

ENVIRONMENT AND PARKS

Case File Number 006610

Office URL: www.oipc.ab.ca

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. In Order F2021-21, the Adjudicator directed the Public Body to provide additional details regarding its search for records, as set out in paragraphs 20-23 and 34 of that Order.

The Public Body conducted a new search for records, and provided a new response to the Applicant. The Applicant requested a review of the new response.

The Adjudicator determined that the Public Body 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. 10, 72

Authorities Cited: **AB:** Orders 96-022, 97-003, 97-006, 2000-021, 2001-016, 2001-033, F2003-012, F2007-007, F2007-029, F2009-001, F2014-39, F2020-13, F2021-21, H2005-003

BACKGROUND

[para 1] The Applicant made an access request to the Public Body for records relating to the capture of wild horses under the *Stray Animals Act* with the timeframe of January 2013 to the date of the request (May 24, 2017).

[para 2] On August 15, 2017, the Public Body responded to the access request, stating that no responsive records were located. The Applicant requested a review, and subsequently an inquiry into the Public Body's response to their access request. The inquiry was narrowed to one item from the Applicant's request: "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."

[para 3] On June 17, 2021, Order F2021-21 was issued, in which the following order was made (at 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 4] The Public Body conducted a new search for records, and provided a new response to the Applicant (letter dated August 26, 2021). The Public Body provided an additional response on September 16, 2021, responding to questions raised by the Applicant.

[para 5] By letter dated October 1, 2021, the Applicant informed this Office that they are seeking a review of the Public Body's response.

III. ISSUES

[para 6] The issues for this inquiry were set out in the Notice of Inquiry, dated October 8, 2021 as follows:

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's new response(s) to the Applicant fulfill its duty to assist the Applicant.

IV. DISCUSSION OF ISSUES

[para 7] 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 8] 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 9] 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 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 12] 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 13] 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 14] In Order F2021-21, I ordered the Public Body to respond again to the Applicant, as set out in paragraphs 20-23 and 34 of that Order. Those paragraphs state:

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.

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.

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.

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.

...

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 15] This inquiry is not about whether the Public Body complied with Order F2021-21. The Public Body complied with the above Order by conducting a new search for records and providing additional details about the search to the Applicant. This inquiry is about whether the Public Body's new search and response fulfills its obligations under section 10 of the Act. That said, the analysis of the Public Body's initial search for records and directions for its new response to the Applicant, cited above, is relevant. The analysis from that Order describes why I found the Public Body's previous response to be insufficient; if the questions identified in Order F2021-21 as unanswered remain unanswered, the Public Body may not have met its duty to assist the Applicant with its new search and response.

Arguments of the parties

[para 16] The Applicant's submission states that counsel writing the submission is not the Applicant. However, for ease of reference, I refer to the positions put forward by counsel as those of the Applicant.

[para 17] Order F2021-21 cited the Applicant's reasons for believing records should exist (at paras. 11-14):

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.

The Applicant states the *Stray Animals Act* 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.

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.

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 18] In its new response to the Applicant, the Public Body states that it conducted an additional search for records. It describes the search as follows:

1. AEP has completed a search of the Minister's, Deputy Minister's, and the Assistant Deputy Ministers' Offices for the Lands and Policy Divisions (MO/DMO/ADMO). Staff from each of these executive offices searched relevant databases, government email boxes, historical records repositories from the previous government, and active records

repositories where official records are kept. Additionally, the Executive File room was also searched for records.

2. A complete search of the Action Request Tracking System (ARTS) was committed by staff responsive for the ARTS file management system.

3. The Range Resource Stewardship and Coordination Branch-South program areas also completed searches of their relevant records areas. Email boxes, official record repositories, historical record repositories, and databases were thoroughly searched and all staff who could reasonably be expected to be in custody of responsive records participated in the search for records. These branches are the most relevant areas responsible for management of the wild horses portfolio.

4. When searching, the following keywords were tested against records repositories to identify records: “Wild horse(s)”, “feral horse(s)”, “feral horse management”, “Wild Horses of Alberta Society”, “WHOAS”, “Wild Horses of Alberta Society and Memorandum of Understanding/MOU”, “WHOAS and Memorandum of Understanding/MOU”. Digital and paper record repositories were searched in all cases.

5. AEP advises that it has been in contact with all relevant staff and program areas that could reasonably be expected to be in custody of responsive records to the scope of this access request. AEP FOIP is confident that no other contacts or program areas could reasonably be expected to have responsive records to this access request, and that is the reasoning behind the approach to this search.

[para 19] The Public Body responded to questions from the Applicant by letter dated September 15, 2021. In that letter the Public Body further clarified that the program areas involved in the search are the areas “where records relevant to the feral horses portfolio could reasonably be expected to be stored.”

[para 20] The Public Body states that it failed to locate responsive records. It provided possible explanations for the lack of records. It states that Ministerial Orders made under the Horse Capture Regulation are dated 1994, 1996 and 2005. These fall outside the timeframe of the Applicant’s request. There are no more recent Ministerial Orders.

[para 21] Sections 9(1) and (2) of the *Stray Animals Act* grant the Minister authority to issue licences to persons to capture horses on public lands designated under that Act. The Minister is also authorized to designate public land for which a licence may be issued. The Public Body states that this authority to issue licences had been delegated in May 1995; this delegation was amended in 2013. The 2013 delegation “does not mention or alter the designated area, established in the 1990s, for which a licence may be issued [under section 9(2) of the *Stray Animals Act*].” I understand the Public Body to mean that as there was no change to the lands for which licences may be issued, there would be no records relating to any change.

[para 22] In its September 16, 2021 letter to the Applicant, the Public Body further addressed reasons for why no responsive records were located. It states:

As described in our final response to this OIPC inquiry, the timeframe of your access request was years out of scope from when these ministerial orders (MOs) and MOUs were originally written. Since then, these MOs have been rewritten multiple times, and there have been multiple changes of government over the nearly 30 years' timeframe that AEP has been regulating the feral horse portfolio. The public body's records management processes allow it to disposition transitory records that are no longer operationally relevant to the current policies of the current government. It is reasonable to expect that any records that were not considered operationally required to retain were dispositioned as per the appropriate records retention schedules. As described in our inquiry response, these MOs were last amended in 2013, 4 years before the submission of your access request. Furthermore, as already said, the timeframe of your access request was years out of scope from the responsive records we provided to you as a courtesy in our inquiry response. Given all these factors, despite our thorough, detailed, and complete search for records, no responsive records in our official records repositories were identified and we are confident that everything that could be provided to you has been provided.

[para 23] The Applicant raised concerns about the Public Body's new search and response, in its letter of October 1, 2021 asking that it be reviewed. It states:

In sum, with respect to the explanation as to why the Public Body limited its search to particular program areas identified, our client remains concerned with the Public Body's response listing repositories searched and noting generally that those are where records would reasonably be expected to have been found.

Our client continues to reasonably expect (i) an explanation that includes whether the individual who signed the WHOAS MOU had a repository that was searched, or if the repositories listed as searched would cover any such records, and (ii) an explanation that the person that did or was likely to have authorized the WHOAS MOU had a repository that was searched, or if the repositories listed as searched would cover any such records.

While the answer may be apparent to the Public Body, it is not so from outside that organization.

With respect to a more comprehensive explanation for why responsive records do not exist, the Public Body has yet to explain why it believes responsive records do not exist, beyond the circular notion that because records could not be located they do not exist.

Our client continues to reasonably expect an explanation from the Public Body that it believes, or knows, that:

- No specific written authorization was created;
- Specific written authorization was created, but that was created prior to January 2013 (the early end of the original requests temporal scope), and why so long before October 2014;
- Specific written authorization was created, but was destroyed either in accordance with a document retention policy or otherwise;
- No specific written authorization was created;
- No general written authorization was created; or
- General written authorization was created, but it was destroyed, as set out above, or pre-dates January 2013.

If, by the Public Body's responses, our client is meant to understand that the Public Body believes the Ministerial Orders referred to and provided represent the only written documents related to the authorities sought, that needs to be made clear as it is not currently.

There is a lack of clarity on that not only from a plain reading of the Public Body's responses to OIPC Order at F2021-21, but also with reference to the Ministerial Orders themselves and the authority delegated by them, being the powers and duties listed under sections 9(2) and 9(3) of the *Stray Animals Act*. Those relate to the issuing of licences, not to entering into agreements.

[para 24] The Public Body's submission to this inquiry states:

The focus of the Applicant's interests appears to be their assertion that a record exists granting the authority to the head of the public body to enter an MOU with WHOAS or similar organization. AEP FOIP has worked extensively with program area contacts to clarify why no such document has been identified in the public body's search efforts, and our final response is that there is no such document. Furthermore, a review of the *Stray Animals Act* by subject matter experts confirmed that the public body is not aware of any legislative, regulatory, or policy requirements that prohibit the Minister of the Crown to enter into an MOU with any entity such as WHOAS to do a specific set of work.

[para 25] The Public Body further clarifies that the repositories identified in the Applicant's questions were encompassed in its search. It states:

All contacts with any level of delegated authority to enter such an agreement, past or present, conducted a search for records. Specifically, [...], Director, Rangeland Resource Stewardship coordinated the search for records at the program area level and ensured that all contacts and repositories that could reasonably be expected to yield records were subject to a thorough search. Likewise, [...], Manager of Operations, AEP Deputy Minister Office, coordinated the search of the relevant ADMOs, DMO, MO, and EFR and ensured a similarly thorough search of repositories and relevant contacts was completed. Our response has been consistent that our efforts have not identified any records responsive to the Applicant's request.

[para 26] Regarding the areas searched by the Public Body, the Applicant's submission states (at paras. 29-30):

In sum, given the Adjudicator's direction, the Applicant expected:

- Identification of what type of record the Public Body believed would contain a grant of authority;
- Identification by the Public Body of what repositories any such record could have been contained in and explaining why that is the case, including original locations and any updated locations as a result of transition or transfer;

- Identification of the repositories searched and persons consulted (which information was provided by the Public Body, albeit without any reference to the reason for such searches and consultations beyond the general sentiment that those are all the relevant repositories); and
- Confirmation that such searches yielded no results (which information was provided by the Public Body).

The Public Body's August and September 2021 compliance efforts in respect of explaining its searches are inadequate.

Analysis

Second search for records

[para 27] The Public Body's description of its second search for responsive records indicates a thorough search. The Public Body identified the program areas responsible for matters related to feral horses, and searched the repositories in which records might be located. The areas searched, and search terms used appear sufficient. I accept that the Public Body conducted an adequate search for records.

Public Body's new response to the Applicant

[para 28] In its first response to the Applicant, discussed in Order F2021-21, the Public Body merely informed the Applicant that responsive records were not located. This was not adequate, given the reasons provided by the Applicant to the Public Body with its access request, for believing that responsive records would exist.

[para 29] In Order F2021-21 I noted that the Public Body searched the Minister's office, Deputy Minister's office, Executive Correspondence Unit, and Rangeland Policy/Land Policy units, but that it was not clear why only these areas were chosen. In the Public Body's recent submissions, it clarified that it searched areas where records relating to feral horses could expect to be located.

[para 30] The Applicant argues that section 10 requires the Public Body to explain "why the repositories searched would hold the records requested and why the people consulted would know about the location of any such records and why no one else or no other repository would" (Applicant's submission, at para. 28).

[para 31] The Public Body has explained what areas could reasonably be expected to maintain responsive records and conducted a thorough search of those records. Explaining *why* no other repositories would contain responsive records, or *why* no other person would know about a responsive record seems to require an explanation about all repositories and employees (or program areas) within the Public Body. This is a higher standard than what is required under section 10.

[para 32] I find the Public Body's explanation of its search locations to be adequate.

[para 33] The Applicant raised concerns that the Public Body's response focussed on the existence of Ministerial Orders. The Applicant states that the authority it is seeking could be contained in a different type of record, and questions whether the Public Body searched for records other than Ministerial Orders.

[para 34] The Public Body's description of the search terms used in its search does not indicate that the search was narrowed to only Ministerial Orders. The search terms "Wild horse(s)", "feral horse(s)", "feral horse management", "Wild Horses of Alberta Society", "WHOAS", "Wild Horses of Alberta Society and Memorandum of Understanding/MOU", "WHOAS and Memorandum of Understanding/MOU". Would likely have located any type of record containing these terms.

[para 35] The Public Body also provided its best explanation as to why no responsive records were located. This included information about the dates of actions taken under the *Stray Animals Act* (such as the creation or amendment of Ministerial Orders and delegations), demonstrating that none occurred within the timeframe of the access request.

[para 36] The Public Body also noted that records that are no longer operationally relevant are subject to destruction in accordance with its records retention schedule.

[para 37] In its submission, the Public Body notes that the Applicant believes that a written authority regarding the MOU ought to exist. As set out in Order F2021-21, the Applicant believes that the Minister may have acted outside their authority in entering into the MOU with WHOAS; this is a primary reason the Applicant gives for expecting that responsive records exist. The Public Body states that "... a review of the *Stray Animals Act* by subject matter experts confirmed that the public body is not aware of any legislative, regulatory, or policy requirements that prohibit the Minister of the Crown to enter into an MOU with any entity such as WHOAS to do a specific set of work."

[para 38] The Applicant objects that this part of the Public Body's submission "stops short of confirming whether there is a belief no responsive record would have been created given the specific reasons advanced by the Applicant" (Applicant's submission, at para. 49).

[para 39] The Applicant also wants the Public Body's explanation to address whether there is a record of the authorization being sought; whether a record of the authorization was created but before the timeframe of the access request; whether a record of the authorization was created but destroyed; or, whether no record of the authorization was ever created.

[para 40] In my view, the level of detail the Applicant is seeking from the Public Body is more than is required under section 10 of the Act.

[para 41] The Applicant argues that the Public Body’s reasoning that no record exists because a record could not be found, is circular. The issue is not whether responsive records ought to exist, or ever existed, but whether the Public Body conducted an adequate search for the records (see Orders F2003-012, H2005-003). In this case, I accept that the Public Body’s search was sufficient to meet its duty under section 10. The Public Body has made extensive efforts to determine whether a record was created; however, it is not required to find a determinative answer to that question in order to satisfy its burden.

[para 42] Past Orders of this Office have clarified that the FOIP Act does not require a public body to answer questions, except regarding whether it has responsive records in its custody or control. In Order 2001-033, former Commissioner Work said (at para. 9):

The Applicant has a right of access to records (section 6(1) of the Act). The Applicant does not have a right to have the Public Body answer questions. Similarly, the Public Body does not have a duty to answer the Applicant’s questions (it may do so if it wishes), but the Public Body does have a duty to respond to the Applicant about whether it has records that will answer the Applicant’s questions.

[para 43] In Order F2014-39, the adjudicator agreed that a public body does not have a duty to answer questions, “unless that is the only way to answer the question of whether it has responsive records in its custody or control” (at para. 22).

[para 44] In this case, the Public Body responded to several questions and concerns raised by the Applicant, in order fulfill its duty to assist and provide its best answer as to why no responsive records were located. The Public Body’s efforts extended to consulting with a subject-matter expert to determine whether the Applicant’s contention – that the legislative scheme required a written authorization for the Minister to enter into the MOU – was correct. The Applicant is not satisfied with the answer, as it does not state whether the Public Body believes a record was created or not.

[para 45] The Public Body is not required to determine with certainty whether a record was created or not, or to state a belief one way or the other. The Public Body is not obliged to explain why the requested record was not created, if it was not. The Public Body is required to conduct an adequate search for the record, and, where appropriate, provide a reasonable explanation if no record is found. In this case, the Public Body conducted a thorough search, and consulted with subject-matter experts to determine if a record must have existed at some time. The explanations provided by the Public Body do not amount to certainty, but certainty – like perfection – is not the standard the Public Body must meet under section 10 (see Order 2000-021 at para. 68).

[para 46] I find that the Public Body met its duty to assist the Applicant.

V. ORDER

[para 47] I make this Order under section 72 of the Act.

[para 48] I find that the Public Body met fulfilled its obligations under section 10 of the Act.

Amanda Swanek
Adjudicator