

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-25

May 11, 2022

HEALTH

Case File Number 019132

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Health for the following:

All emails received by [names of individuals] from Tyler Shandro

Eliminate dup-recs, drafts, dup-emails, litigation privilege, third party business and third party personal

From June 1, 2019 to November 8, 2020

The Public Body informed the Applicant that his access request was unclear. The Applicant explained that he was looking for emails located in Outlook.

The Public Body informed the Applicant that the added clarification that responsive records would be located in Outlook was insufficient. The Public Body required the Applicant to provide the topic of records that would be responsive.

The Applicant agreed to the topic suggested by the Public Body; however, the Public Body determined that the access request was still too vague to meet the requirements of section 7(2) of the FOIP Act (How to make a request.) The Public Body subsequently closed the file without responding to the Applicant.

The Applicant sought review by the Commissioner.

The Adjudicator determined that the access request was clear and directed the Public Body to search for responsive email records, and to include Outlook in its search. In the event that the Public Body determined that it had destroyed responsive records, the Adjudicator ordered it to determine whether any such records could reasonably be restored or recovered.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, ss. 1, 6, 7, 10, 11, 72, 92

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

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

1. BACKGROUND

[para 1] On November 8, 2020, Alberta Health received a request for access to the following information:

All emails received by [names of individuals] from Tyler Shandro

Eliminate dup-recs, drafts, dup-emails, litigation privilege, third party business and third party personal

From June 1, 2019 to November 8, 2020

[para 2] Alberta Health acknowledged receipt of the request and began to search for responsive records; however, it then consulted with Service Alberta and was informed that the access request lacked sufficient clarity. The Public Body then informed the Applicant that the access request was unclear. It stated:

Your request does not provide enough detail to enable Alberta Health to identify possible records. Based on the information provided to date, the request does not have sufficient detail to be considered a request under the FOIP Act. We require additional information to enable us to identify the records.

This requirement for additional details is supported by section 7 of the FOIP Act that states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable to public body to identify the record.

Please contact [the FOIP Advisor] to provide the further details or additional information to make the request more specific.

[para 3] The Applicant contacted the FOIP Advisor to discuss the access request. Following this conversation, the Public Body wrote the Applicant to confirm the conversation:

Your request does not provide enough detail to enable Alberta Health to identify possible records. Based on the information provided to date, the request does not have sufficient detail to be considered a request under the FOIP Act. We require additional information to enable us to identify the records.

[para 4] On November 16, 2020, the Public Body directed employees who were likely to have responsive records to stop looking for them.

[para 5] The Public Body asked the Applicant to provide the topics of information that would be responsive and suggested that he alter his access request to the following:

All emails received by [named individuals], from Tyler Shandro that includes content regarding any and all matters related to the provision of healthcare in Alberta.

[para 6] On November 23, 2020, the Applicant agreed to the proposed description of the records as including records relating to the provision of health care in Alberta.

[para 7] Although the Applicant had agreed to narrow the request to records relating to the provision of health care, as the Public Body had suggested, on November 27, 2020, the Public Body informed the Applicant:

As we discussed the other day, I followed up on your question on whether or not adding further clarification for this request in the vein of limiting the areas to be searched for records to Outlook. Unfortunately this would not provide sufficient information to allow us to conduct a search for records. A subject or topic is required before we can begin to process this request further.

Would you like to specify a topic or subject in order to proceed?

[para 8] On November 30, 2020, the Applicant requested review by the Commissioner of the Public Body's refusal to respond to the access request. He stated:

Alberta Health is refusing this request on the grounds that the request needs a specific topic or subject. I have filed and received many requests that are essentially "all the emails sent from person A to person B within this date range." This is a routine use of the Act. I have never been told that a subject or topic is a requirement for a request.

To be clear, no one at Alberta Health has advised me that this request would incur a significant fee or return too many records, or any of the usual processes that occur with a request. This is a simple refusal of access.

I ask that you direct Alberta Health to locate all of the emails in the named individuals' Outlook inboxes sent to them from the Minister, and release them subject only to the specific exemptions provided for in the Act.

I also ask that you confirm with Alberta Health that these requested records have not been destroyed, as they have not been able to confirm that with me as of today.

[para 9] On December 15, 2020 the Public Body requested permission to extend the time for responding to an access request so that it could continue to clarify the access request with the Applicant.

[para 10] On January 14, 2021, the Public Body informed the Applicant that it considered the access request file closed.

[para 11] The Commissioner assigned a senior information and privacy commissioner to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

II. ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 11 of the Act (time limit for responding)?

[para 12] The Public Body argues:

Records consisting of emails are stored in multiple locations, not just in Outlook inboxes, but also in the Action Request Tracking System (ARTS), shared network drives, SharePoint sites, print, and other record repositories. Records outside of Outlook are generally organized according to subject or topic, and not according to format or the author of the record.

It would be unworkable to locate every email from the Minister of Health that was received by the named individuals, in all of these locations, without knowing the subject of the records being sought.

For example, in ARTS, a search for records within the relevant time frame using the search terms “Tyler Shandro” and [names of employees]” would likely not narrow the scope of records to be searched within ARTS in a meaningful way, because many action requests within ARTS would serve as the basis for briefings to those two individuals, as Minister and Deputy Minister. In addition, there are many records within ARTS that are not emails, and there is no way to limit a search in ARTS to just emails.

Outlook mailboxes are not considered to be a proper record repository by the Respondent. The reason for this is that the Outlook mailbox(es) of a departing employee of the Respondent is subject to being deactivated and its contents deleted after a set period has expired after the departure of the employee from the Respondent. It is expected that, prior to departing the Respondent, the employee migrates their emails to a dedicated storage location.

The Applicant subsequently has not provided any subject or topic as requested by the Respondent to allow the Respondent to search for responsive records.

[para 13] The Public Body provided the affidavit of its Acting Director of FOIP / HIA. This affidavit states:

For the request in question, 2020-G-0559, the LOR was sent to the relevant program areas within Alberta Health on November 12, 2020.

After receiving feedback from program areas that the request was too broad, Service Alberta’s advice was sought on November 13, 2020 concerning whether the access request provided enough detail to allow for proper processing. In response, Service Alberta’s FOIP Strategic Service Branch advised that the request lacks the detail necessary to be considered an access request under section 7(2) of the FOIP Act, which states (emphasis added with underlining) that “A request must be in writing and *must provide enough detail* to enable the public body to identify the record. [emphasis in original]”

Records consisting of emails are stored in multiple locations, not just in Outlook inboxes, but also in the Action Request Tracking System (ARTS), shared network drives, SharePoint sites, print, and other record repositories. Records outside of Outlook are generally organized according to subject or topic, and not according to format or the author of the record.

The reason why it is not helpful to search for records by author and format in such record repositories is shown in the following example. In ARTS, a search for records within the relevant time frame using the search terms “Tyler Shandro” and “[employee name]” would likely not narrow the scope of records to be searched in a meaningful way, because many action requests within ARTS would serve as the basis for briefings to those two individuals, as Minister and Deputy Minister. In addition, there are many records within ARTS that are not emails, and there is no way to limit a search in ARTS to just emails.

On November 16, 2020 the FOIP Office sent out a “stop pulling” email to the concerned program areas to halt the search for records. Consequently, a Section 7 letter was sent to the Applicant by the FOIP Adviser [...]

As a result on November 23, 2020 the Applicant modified his access request to read as follows:

All emails received by [names of employees] from Tyler Shandro that includes any and all matters related to the provision of health care in Alberta. (emphasis added). Eliminate: “dup-recs”, “drafts”, “dup-emails”, “litigation-privilege”, “third party-business”, “third-party-personal”

Date Range: June 1, 2019 - November 8, 2020

On November 24, 2020, a new LOR request was sent to the relevant program areas. In response, the program areas advised the FOIP Office that they still could not identify records despite the provided clarification. As a result a second “stop pulling” email was sent to the program areas who had received the second LOR.

Some time after November 24, [2020], and prior to November 27, 2020, the FOIP Adviser spoke with Applicant and agreed he would check with the program areas to determine if focusing the search on emails in Outlook would facilitate the processing of the request.

[para 14] Section 11 of the FOIP Act requires a public body to respond to an access request within 30 days of it, unless it has extended the time for responding under section 14. Section 11 states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 15] The Public Body concedes that it has not responded to the Applicant’s request for records. However, it takes the position that the access request is unclear to the point that it does not meet the requirements of section 7 of the FOIP Act. Section 7 states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

(3) In a request, the applicant may ask

(a) for a copy of the record, or

(b) to examine the record.

[para 16] If an access request does not contain sufficient information to enable a public body to identify responsive records, and the applicant does not respond to requests for clarification, section 8 of the FOIP Act authorizes the public body to treat the access request as abandoned. Section 8 states:

8(1) Where the head of a public body contacts an applicant in writing respecting the applicant's request, including

(a) seeking further information from the applicant that is necessary to process the request, or

(b) requesting the applicant to pay a fee or to agree to pay a fee,

and the applicant fails to respond to the head of the public body, as requested by the head, within 30 days after being contacted, the head of the public body may, by notice in writing to the applicant, declare the request abandoned.

(2) A notice under subsection (1) must state that the applicant may ask for a review under Part 5.

[para 17] The difficulty for the Public Body's position is that the Applicant's access request is clear and it is easy to envision records that would be responsive – records sent by the former Minister to the employees named in the access request within the timeframe in the access request. It is also possible to identify records that would not be responsive – records of emails not sent by the former Minister, or records of emails not received by the employees named in the access request.

[para 18] The Applicant responded to the Public Body's requests for clarification and took the step of modifying the access request as the Public Body suggested. However, the modified access request was subsequently rejected by the Public Body.

[para 19] Section 7 requires an access request to be clear enough to enable a public body to identify responsive records. To be responsive to the Applicant's access request, a record must be an email sent by Tyler Shandro to any one of the employees listed in the Applicant's access request between June 1, 2019 to November 8, 2020. If the sender is not Tyler Shandro, or the recipient is not one listed by the Applicant, or the email was not sent during the relevant time, the record will not be responsive.

[para 20] The Applicant also provided the additional clarification to the Public Body that he was looking for emails that would be found in Outlook, an email client used by the Government

of Alberta for sending and receiving email. In other words, the Applicant was clear that he wanted emails located in Outlook that had been sent by the Minister to the named employees using this email client. To conduct a search for responsive records would be a matter of searching the inboxes of the employees the Applicant named. Another likely location of responsive records would be the former Minister's "sent" items folder. Outlook has features that enable searching by sender and recipient, in addition to key word.

[para 21] The affidavit of the Public Body's Acting Director states:

On November 24, 2020, a new LOR request was sent to the relevant program areas. In response, the program areas advised the FOIP Office that they still could not identify records despite the provided clarification. As a result a second "stop pulling" email was sent to the program areas who had received the second LOR.

From the foregoing statement, it appears that the Public Body attempted to search for responsive records that had been sent to the employees listed in the email and could not find any. However, the Public Body does not indicate *where* it searched for responsive records or the search methods that were used. The Public Body does not say that it asked the employees named in the access request whether they had received emails directly from the former Minister at the relevant time. The Public Body does not say that it ever asked these employees to search their Outlook folders for responsive records.

[para 22] The Public Body argues:

The Respondent's basis for determining it needed further clarification from the Applicant was based on its interpretation of the access request. It was the Respondent's interpretation of the access request that it was not limited to only those emails sent directly from Minister Tyler Shandro to the named individuals, but emails sent by or on behalf of Minister Tyler Shandro to those individuals.

This would include emails sent by the Minister's office or other staff within the Respondent who were either delegated or required to provide ministerial correspondence or direction to the individuals identified in the access request.

This interpretation was consistent with how a minister communicates with their department. The vast majority of ministerial correspondence to ministry employees is not sent by a minister directly but through office staff and other intermediaries — ie "by or on behalf" of a minister.

The Respondent's interpretation would therefore capture a potentially much larger scope and volume of email records than simply emails sent directly from Minister Tyler Shandro to the individuals identified in the access request.

The Respondent's interpretation of the access request is consistent with the requirement in orders of the OIPC that public bodies take a broad and generous approach in interpreting the scope of an access request in order for the public body to meet its duty to assist as per Section 10 of the Act.

The Respondent, in part based on its broad interpretation of the access request, determined it required further and sufficient clarity and detail to enable it to identify the records, as required by Section 7(2) of the Act.

The Applicant on November 30, 2020 did provide a topic or subject line consisting of "Provision of health care in Alberta" which is the broadest definition of the Ministry of Health's mandate. Identifying "health care" as a search parameter in the Respondent's systems does not provide the necessary clarification to

allow the Respondent to search its systems for responsive records because any record within the Ministry of Health's repositories and subject to FOIP would by necessary definition pertain or relate to said mandate.

The Applicant in his submission in this inquiry though has articulated the scope of his access request as being limited to direct emails sent by Minister Tyler Shandro to the named individual in the access requests. The Applicant's statement in his submissions clarifying the scope of his access request reads as follows: "Requests for emails sent by Person X to Person Y within a certain date range are routine uses of the Act. "It is worth noting that it is unusual for ministers to exchange emails directly with deputy or assistant deputy ministers. Information is usually routed through the deputy minister's office staff and the minister's staff. So I was expecting a comparatively small number of records."

The Applicant in his submissions then went on to effectively state that only emails found in Outlook would be responsive to his access request. The Applicant in his submissions highlighted his request for records consisting of emails found in Outlook by stating the following: "Alberta Health's argument is absurd. It's a matter of a few minutes work for eight people to open their Outlook email system and search for emails from a single recipient, and then isolate the emails within the date range. It's possible but unlikely that this produces a large number of records, but Alberta Health never made that claim."

The Applicant in his submission has identified that the records he seeks are relatively narrow consisting of direct emails from Minister Shandro to the named individuals in the access request as located in the Respondent's Outlook system.

If that is the case then this Inquiry should accept the Applicant's submission and not proceed on the basis of the broader interpretation of the access request that the Respondent had applied in deciding how to proceed in this matter.

[para 23] The Public Body appears to say that the FOIP Act requires it to interpret an applicant's access request more broadly than an applicant intends, with the result that the request becomes insufficiently clear within the terms of section 7(2). The FOIP Act does not require a public body to interpret an access request more broadly than an applicant intends, particularly when the applicant contacts a public body to explain the narrow nature of the request.

[para 24] The Public Body is correct that many Ministers do not email employees directly. The Applicant acknowledges this and does not anticipate that there would be many records, if any. However, the fact that there may not be many, or even any, responsive records, does not mean that the Applicant cannot make an access request for emails sent by the Minister to specific employees. The Public Body's duty is then to search and see if it has custody or control over responsive records.

[para 25] The Public Body acknowledges that the access request, as one for records in Outlook, is clear. However, it takes the position that it does not have to search for records in Outlook because email accounts are deleted when employees leave their positions.

[para 26] The Public Body has arbitrarily decided that applicants may not request records stored in Outlook and that it need not look for such records. There is no authority in the FOIP Act for the Public Body's position. Rather, the FOIP Act permits an applicant to request any record in the custody or control of a public body, subject to limited and specific exceptions.

[para 27] Section 6 of the FOIP Act creates an applicant's right of access. It states, in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[...]

[para 28] Section 1(q) of the FOIP Act defines the term “record” for the purposes of the Act. It states:

I In this Act,

(q) “record” means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records

[para 29] Emails are records of information that are stored by public bodies. As a result, an applicant has a right to request emails that are stored by a public body, including in Outlook.

[para 30] The Public Body’s argument that it need not search Outlook for emails sent to employees, because the email accounts of departing employees are deactivated and then deleted is problematic. As noted above, requestors have a right of access under the FOIP Act to such information. Moreover, public bodies are required to follow record retention schedules under the Records Management Regulation. If a record should not be destroyed under a record retention schedule or by virtue of a provision of the FOIP Act, then the record should not be destroyed, even if the record is located on the computer, or in an Outlook account, of a former employee. It is especially problematic for a public body to destroy records that are the subject of an access request, as section 92(1)(g) makes it an offence to destroy records with the intention of evading an access request.

[para 31] As the Public Body has failed to respond to a clear and intelligible access for records, I must direct it to meet its duty under section 11 and respond to the Applicant. Responding in this case will include conducting a search for responsive records in Outlook and giving access to them, subject to the exceptions to disclosure in the FOIP Act.

[para 32] The Public Body has referred to a process by which it deletes email accounts on the departure of employees. If the Public Body deleted any accounts in which potentially responsive information would be likely to be located, it must consider whether it can reasonably restore the account in order to include these records in its search.

[para 33] Section 10 of the FOIP Act sets out the duty to assist an applicant. It 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 34] 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.

[para 35] 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 36] 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 37] 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. While there is no certainty that responsive records exist, it is also clear that the Public Body has not yet searched for the requested records. Given the Public Body's confusion as to what constitutes a clear access request and how to conduct a search for requested records, in the event that it is unable to locate responsive records, I believe that it is necessary to require it to demonstrate that it has conducted a reasonable search for responsive records when it does respond.

[para 38] Alberta's FOIP Act requires the Public Body to assist applicants by assisting access requestors rather than impeding access, and by responding fully, accurately, and completely, which includes conducting a reasonable search for the records an applicant has requested. As the Public Body has yet to meet the standards imposed by the FOIP Act, I must require it to do so.

III. ORDER

[para 39] I make this Order under section 72 of the Act.

[para 40] I order the Public Body to comply with its duty under section 11 and respond to the Applicant. I order the Public Body to include Outlook in its search for responsive records.

[para 41] In the event that the Public Body deleted repositories of records where responsive records would likely have been located, I order the Public Body to determine whether it can reasonably restore these records.

[para 42] In the event that the Public Body is unable to locate responsive records, I require it to provide an explanation of its search to me and to the Applicant. The explanation of the search should cover the following elements, set out in Order F2007-029:

1. The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
2. The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
3. 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.
4. Who did the search
5. Why the Public Body believes no more responsive records exist than what has been found or produced.

[para 43] In the event that the Public Body determines that responsive records were destroyed, I direct it to determine whether any such records can reasonably be restored.

[para 44] If the Applicant is unsatisfied with the Public Body search for responsive records, he may request review and I will continue the inquiry.

Teresa Cunningham
Adjudicator
/bah