

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-29

June 15, 2022

ROCKY VIEW COUNTY

Case File Number 007587

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Rocky View County (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act). The Applicant sought records relating to residential developments.

The Adjudicator considered whether the Public Body fulfilled the duty to assist under section 10(1) of the Act when it responded to the access request. The Adjudicator found that the Public Body failed to meet the duty to assist since it had not adequately explained why it believed no further records exist. In particular, the Public Body failed to address the Applicant's concerns that under the Public Body's existing bylaws and published practices respecting residential developments there ought to be further responsive records than what was provided in response to the access request.

The Adjudicator ordered the Public Body to provide an explanation of the basis for its conclusion that no further records exist.

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

Authorities Cited: **AB:** Orders 97-006, 2000-030, 2001-033, F2004-008, F2007-029, F2015-29, F2019-33

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

I. BACKGROUND

[para 1] The Applicant is a developer operating within Rocky View County (the Public Body). The Applicant is the owner of a bundle of lots developed as “Calterra Country Estates.” The Applicant’s development sits adjacent to another development referred to as “Mountain Lynn Estates.” In 2002, the Applicant applied, and received approval from the Public Body, to name a road within the Calterra Country Estates development “Calterra Estates Drive.”

[para 2] Subsequently the Applicant observed a pair of signs erected within the Mountain Lynn Development advertising land in the Mountain Lynn Development as “Phase 5 of Calterra Estates.” The Applicant also became aware that around 2008 or 2009, a street within the Mountain Lynn Estates development was named “Calterra Court.” The Applicant states that it has been trying to obtain clarification about the signs and the use of the street name “Calterra Court” since 2013, but has not been successful.

[para 3] On August 29, 2017, the Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to the Public Body. The Applicant sought the following information:

1. Copies of development permits or other documentation approving the erection of two signs located within Rocky View County's road allowance advertising the sale of 2-acre home sites in "Phase 5 of Calterra Estates".
2. Copies of appropriate documentation approving the neighbourhood/development name of Mountain Lynn Estates.

[para 4] The Public Body replied to the access request by letter dated September 15, 2017. In the letter, it informed the Applicant that it did not locate any responsive records; the Public Body wrote,

I regret to inform you that a search by Rocky View County has failed to retrieve any records relating to the subject of your request.

Rocky View County's Information Services searched all neighbourhood naming applications from 2005 to present for "Mountain Lynn Estates". Rocky View County's Engineering Services searched ACRES and the K: drive files; no records were found indicating the approval of the name "Mountain Lynn Estates". Rocky View County's Planning Services searched ACRES, MATS and internet resources; references to "Mountain Lynn Estates" were found, however, no records indicating approval of the name.

[para 5] Subsequently, on October 16, 2017, the Applicant made another access request. The Applicant’s access request was worded as follows:

This request for information is made in furtherance to our initial Access to Information Request 08-30-2017-01 and a corresponding response letter dated September 15, 2017 (the "Response Letter"), both of which are enclosed hereto for your ease of reference. We would appreciate further information and clarification on the following questions:

1. Are there any development names or road names approved for the following lands: East 1/2-16-26-1-W5M? If so, could you please provide us with copies?
2. Are there any development names or road names approved for the following lands: Lots 1 to 10, Block 3, Plan 0715820? If so, could you please provide us with copies?
3. Are there any development names or road names approved for the following lands: Lots 11 to 27, Block 3, Plan 1312270? If so, could you please provide us with copies?
4. Did Rocky View County provide any formal direction or approval for use of "Calterra Estates" development name for the lands referenced above? If so, could you please provide us with copies?
5. Did Rocky View County provide any formal direction or approval for use of the road name "Calterra Court" for the lands referenced above? If so, could you please provide us with copies?
6. Could you please provide us with a list of documents that have references to Mountain Lynn Estates development name, as noted in the Response Letter?

[para 6] The Public Body replied to the access request by letter dated November 1, 2017. The November 1, 2017 letter sets out the Public Body's understanding of the information requested. In the letter the Public Body presents reframed versions of the above six questions that composed the access request. The Public Body reframed the request for information as follows:

1. Records regarding any development names or road names approved for East 1/2 - 16-26-1-W5M
2. Records regarding any development names or roads names approved for Lots 1 to 10, Block 3, Plan 0715820
3. Records regarding any development names or road names approved for Lots 11 to 27, Block 3, Plan 1312270
4. Records regarding any formal direction or approval for use of the road name "Calterra Estate" for the Lands referenced above
5. Records regarding any formal direction or approval for use of the road name "Calterra Court" for the Lands referenced above
6. Records with references to Mountain Lynn Estate development name

[para 7] The Public Body provided 11 responsive documents.

[para 8] On December 27, 2017, the Applicant filed with this Office a request for review of the response to his October 2017 request for information. As discussed in more detail below, the Applicant is concerned that responsive records it has reason to believe exist were not provided, and that requests for information in some of its six questions were ignored. Investigation and mediation were authorized to try to resolve the issues between the parties. On May 16, 2018, the Public Body conducted an additional search for responsive records and provided an additional 62 responsive documents. Despite that further information was provided, mediation and investigation did not resolve the issues between the parties, and as a result, the matter proceeded to Inquiry.

[para 9] With the exception of some information withheld under section 17(1) in the records provided in the May 16, 2018 search, the Public Body did not withhold information under any exceptions to disclosure under the Act.

II. ISSUES

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

III. DISCUSSION OF ISSUES

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

[para 10] Concerns that a public body has failed to provide all responsive records, or failed to conduct a proper search for records are addressed under section 10(1) of the Act, which sets out a public body's duty to assist an applicant when responding to an access request:

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 11] The Applicant believes that further records exist than what the Public Body provided in response to the October 2017 access request in light of the Public Body's Land Use Bylaw C-4841-97 (in force at the time) and practices concerning the naming of roads. In its submission the Applicant lays out which sections of the Land Use Bylaw and published practices of the Public Body indicate that there should be further records with respect to the naming of Mountain Lynn Estates, the signage therein that advertises phase 5 of Calterra Estates, and naming a road "Calterra Court." In brief, the bylaws and practices indicate that certain documents must be filed in respect of developments, signage and naming roads, and that the Public Body must make certain decisions on naming roads and development that would surely be documented. The Applicant sets out the specific records or types of records that it states should exist and notes that the Public

Body did not provide such records. The Applicant summarizes its belief that further records exists as follows:

Overall, the Applicant respectfully submits that, if there is a named neighbourhood or road within Rocky View, that Rocky View must have documentation related to the approval of the neighbourhood name and road name. Further, assuming the Signs were erected in accordance with the Bylaw, the Applicant submits that Rocky View should have the corresponding application for a Development Permit and notice to those affected.

[para 12] The Applicant also appears to be aware of other documents that would be responsive to its access request. In a letter from the Applicant's legal counsel in response to the further search for records conducted in May, 2018, the Applicant states,

Our client's experience with filing applications with Rocky View County for development has provided them with a great deal of insight into what records they might expect to have received. Notably, our client is aware of several full application files in Rocky View County's possession from at least 1 concept plan amendment (2012) (including public hearings), at least 1 redesignation (2012) (R2 to R1 for the Mountain Lynn lots) and at least 2 subdivisions creating the Mountain Lynn lots in 2013.

We also understand that there were multiple emails from a single councilor to the various internal departments specifically relating to the Mountain Lynn development, but none of this information has been provided in the records. When the records produced did not include items such as these, that we would have expected to see in a complete and thorough response, it raises concerns that the records relating to the Mountain Lynn Estates development area have been intentionally withheld. If that is the case we are entitled to be notified and provided with reasons for the information to be excluded from the records provided.

[para 13] The Applicant is also specifically concerned that the Public Body's Planning Services found references to "Mountain Lynn Estates" (as stated in its letter of September 15, 2017) but did not provide any records containing such references. In regards to the first two requests in the access request, the Applicant notes that the only responsive records it has received are documents that relate to its own development of Calterra Country Estates while records relating to Mountain Lynn Estates are absent.

[para 14] The two parts of the duty to assist in section 10(1) were set out in Order F2004-008 at para 32:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?
- Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?

[para 15] The burden of proof falls on the Public Body to demonstrate that it met its duty under section 10(1). (See Order 97-006). A public body must provide the

Commissioner with sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request. (See Order 2000-030). Former Commissioner Work, Q.C. described the general points that a public body's evidence should cover in Order F2007-029 at para. 66:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 16] The Public Body explains that it modified the wording of the access request (as reflected in its letter of November 1, 2017) in order to turn it into an "actionable request." The manner in which the Public Body modified the request was proper. The access request posed specific questions and requested documents that would help answer them. However, a public body is not required to answer questions in response to an access request; its responsibility is to provide requested information. Where an applicant asks questions, the proper approach is to provide records that answer the questions, but not to answer questions directly (Order 2001-033 at paras. 7 – 11). The modified wording of the Public Body's access request indicates that it took that approach.

[para 17] The Public Body described the steps it took to search for responsive records. It states:

Three departments were contacted to complete a search and provide responsive records: Planning Services, GIS Services, and Engineering Services. Experienced staff in each of those departments conducted the searches using the names, legal descriptions, and specifications provided by the applicant. These departments were chosen as the most likely source for responsive records as Planning Services maintains all records related to land and development applications, GIS Services generally maintains records related to street naming and parcel boundaries, and Engineering Services' staff were some of the best researchers in the organization and the department also maintained records related to roadways.

The departments were ordered to search all electronic and physical records. The departments specifically identified searching the road naming application files, the

corporate intranet storage system known as 'ACRES', local drives, as well as subdivision files 2005-RV-070, 2005-RV-249, 2008-RV-276, 2012-RV-123, and roll files for 06516009, 06516004, 06516031, and 06516037. These files made up of records associated with the implementation of the Calterra Estates Conceptual scheme, phases 1-5A of the conceptual scheme, as well a subsequent re-division of some already subdivided lots into smaller parcels. This search involved 6.5 hours of staff time and 51 pages of records deemed responsive were provided to the applicant without additional fees.

In May of 2018, Rocky View County undertook a supplementary search in an effort to assist the applicant who was not satisfied with the results of the initial search. This time, five departments were contacted including Building Services, Planning Services, Engineering Services, GIS Services, and IT Services. Email records, records on local drives, GIS information, road naming, application records, and subdivision files 1998-RV-064, 2005-RV-070, 2005-RV-249, 2008-RV- 276, and 2012-RV-123 were searched. These files are composed of the same phases of the Calterra Estates Conceptual Scheme that were previously searched but also included the original adoption of the conceptual scheme itself, though these files were from applications outside of the original date range provided by the applicant. A further 450 records were provided, though as the Applicant points out in a October 24, 2018 letter that some of the records were loosely affiliated as staff attempted to interpret the search parameters more broadly. This search took 17 hours and 40 minutes of staff time and the applicant was again not charged any additional fees.

[para 18] The Public Body's explanation of its search covers the first five points mentioned in Order F2007-029 above. However, the Public Body has omitted an explanation of how it determined that no further responsive records exist. For the reasons that follow, I find that it has failed to fulfill the duty to assist because of it.

[para 19] The requirement for public bodies to provide an explanation for why it believes no further records exist is part of the "informational component" of the duty to assist. The Court of Queen's Bench of Alberta has confirmed that there is such a component in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89. What is required to fulfill the informational component may vary from case to case. A more or less detailed explanation may be required depending on the circumstances.

[para 20] In the absence of credible reasons why an applicant believes further records exist, a public body may satisfy the informational component of the duty to assist simply by demonstrating that it searched areas where responsive records were likely to be located. This was the case in Order F2019-33.

[para 21] However, in circumstances where an applicant has provided credible reasons for its belief that further records exists warrant a more detailed explanation. In Order F2015-29 the Director of Adjudication stated at para. 18,

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 22] I have no hesitation in concluding that the Applicant's reasons for believing that further records exist are credible. It has laid out in detail the bylaws and practices of the Public Body that indicate that further records should exist and is a veteran of the Public Body's development processes, with first-hand knowledge of the sorts of records involved in naming development projects, roads therein, and posting signage relating to the same. The Public Body does not contradict the Applicant's assertions about the applicability of the bylaws and practices it cites.

[para 23] Accordingly, I find that the Public Body has failed to meet the duty to assist in section 10(1). In particular, a satisfactory explanation about why it believes no further records exist must be provided.

IV. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] I order the Public Body to provide a new description of its search to me, and to the Applicant, that is adequate to explain why the records the Applicant believes exist, as described above and in its communications and submissions, do not exist. I will reserve jurisdiction to consider the adequacy of the explanation if the Applicant is not satisfied by it, and to order a further search for responsive records if necessary.

[para 26] If the Applicant is not satisfied with the Public Body's explanation and wishes a review of it, it must inform me and the Public Body within 30 days of receiving the Public Body's explanation.

[para 27] I order the Public Body to comply with this Order within 50 days of receiving it and to confirm the same to me and the Applicant in writing.

John Gabriele
Adjudicator
/bah