

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2023-27**

July 5, 2023

**CITY OF CALGARY**

Case File Numbers 016717 & 016718

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made two requests for access to information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records relating to the City of Calgary's (the Public Body) decision to approve a secondary suite in the Applicant's cul-de-sac.

The Public Body searched for records and provided what it located to the Applicant. The Applicant requested a review by the Commissioner.

The Public Body conducted an additional search for responsive records.

The Adjudicator found that the Public Body had conducted a reasonable search for responsive records. She confirmed that the Public Body had met its duty to assist the Applicant under the FOIP Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 17, 72

**Authorities Cited:** **AB:** Order F2007-029

## I. BACKGROUND

[para 1] The Applicant made the following access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the City of Calgary (the Public Body):

I wish to access the document(s) "PLANNING, DEVELOPMENT& ASSESSMENT: DEVELOPMENT PERMIT APPLICATION INFORMATION" for CITY OF CALGARY PLANNING AND DEVELOPMENT APPLICATION (2019 -3908) at [...] Court N. W. Specifically:

1. The Complete Land Use Bylaw Check
2. The Stream 3 Application Review
3. The POSSE circulation review and RESPONSES

Permit Application Information (DP2019-3908); Application DP2019-3908 POSSE Referees  
From Application July 30, 2019 to October 7, 2019

[para 2] The Public Body conducted a search for records. The Public Body responded on November 26, 2019 providing 119 pages of records in pdf format and one video. Redactions were made to the records under section 17(1) of FOIP.

[para 3] The Applicant submitted a second access request to the Public Body on December 30, 2019. This access request was for the following:

ALL materials related to Application DP2019-3908 and subsequent Appeal DP2019-0068 between the dates of September 5, 2019 and October 30, 2019 inclusive

[para 4] The Public Body responded to the foregoing access request on January 29, 2020. It indicated that it was providing responsive records on a USB. It stated:

The USB also contains one video that is responsive to your request.

Please note that the responsive video, as well as pages 0041-0159 of the release were previously provided to you in response to access request 2019-G-0353.

[para 5] The Applicant requested a review by the Commissioner of the Public Body's response to his access requests. In particular, he questioned the adequacy of the Public Body's search for responsive records.

[para 6] The Applicant included in his request for review documents his neighbour had received in response to an access request made in relation to permit application DP2019-3782. The neighbor received a record referring to permit application DP2019-3908, which the Applicant did not receive in response to his access requests. This record is an email and states both DP2019-3782 and DP2019-3908 were discussed at a meeting and a decision had been made to refuse both developments. The Applicant was concerned that he should have received a "Reasons for Refusal" document, or other records relating to a decision to deny the permit, in response to his access request, but none was provided.

[para 7] The Commissioner appointed a senior information and privacy manager to investigate and attempt to settle the matter. In the course of this process, the Public Body

conducted a new search and located additional records. The Public Body did not locate a Reasons for Refusal record.

[para 8] The Commissioner referred the matter to inquiry and delegated the authority to conduct it to me.

[para 9] In its initial submissions, the Public Body reversed its decision to withhold information under section 17 and provided copies of the records to the Applicant without severing information from them. As a result, the Public Body's application of section 17 is no longer at issue.

## II. ISSUE

### **ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**

[para 10] Section 10(1) of the Act states:

*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] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).

...

Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).

Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.

...

In general, evidence as to the adequacy of 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 12] The Public Body provided an account of its search for the inquiry, which I will not reproduce in its entirety due to its length. It acknowledges that its search was flawed initially:

In regard to request 2019-G-0390, the Public Body admits that Search 2 failed to account for the expanded scope of records sought and that Search 3 failed to seek records from the Development Authority who approved the Development Permit. This has been resolved with the provision of additional documents from the Development Authority during the course of this Combined Inquiry.

[...]

[para 13] I have reviewed the Public Body’s evidence and submissions. It provided detailed submissions addressing each point set out in Order F2007-029. The Public Body also took the step of contacting the senior planning technician who was involved in the permit granting process to determine whether an official refusal document had been prepared. The employee answered that a formal refusal was never prepared, as the permit was approved. The senior planning technician also participated in the search and located records.

[para 14] The Applicant argues that the Public Body’s reasons for approving secondary suites were unclear, particularly in view of the fact it had originally decided to deny them. Although the Applicant acknowledges that the FOIP Act does not impose a duty for public bodies to document, he believes the Public Body should have created more documentation regarding its change in position. He points to the fact that there is reference in the records to the permit application being refused, but no “Reasons for Refusal” document appears in the records. In addition, he feels there should be more records that would document the Public Body’s change in position regarding the permit application.

[para 15] The Public Body acknowledges that it did not initially locate all responsive records in relation to the Applicant’s access request; however, it conducted a further search for responsive records. It states:

During the course of this Combined Inquiry, the Development Authority who approved the permit was made aware, for the first time, of the request for records pertaining to DP2019-0068. She conducted a search of her emails using the keywords “DP2019-0068” and “[...] NW” and provided an additional 115 pages of records. Of these 38 were duplicates of records already provided and 77 were new records. These records are provided in Exhibit C of the [...] Affidavit.

The Public Body admits that Search 2 may have been insufficient not taking into account the expanded scope of records sought, which included “all materials” and not just the document types previously requested. This deficiency was ameliorated in part by Search 3 which included searching the File Manager’s records taking into account the expanded scope of the records request. The additional search of the Development Authority’s emails furthers the steps taken towards a reasonable search effort.

[para 16] The Public Body recognizes that the original search with regard to inquiry case file 016718 was based on an overly narrow interpretation of the access request; once it was clear that the scope of this second request was broader than the first request, it conducted a new search for responsive records and located an additional 77 responsive records.

[para 17] The duty to assist may be viewed as taking place on a continuum. A public body may fail to locate responsive records initially because of its interpretation of the request or because of the manner in which it stores or labels records, as examples. If the public body then searches for records once it is made aware that the scope of the initial search was too narrow, or that a record it did not produce likely exists, it is fulfilling its duty to assist an applicant. In this case the Public Body did not initially conduct an adequate search, and failed to produce the record the Applicant included in his request for inquiry. Once it conducted a new search based on the new understanding of the scope of the access request – one that included the types of records the Applicant included in his request for review – the search was reasonable. From the Public Body’s lengthy and detailed account of its search, I am satisfied that it was unlikely to have missed any responsive records. The additional step of contacting the senior planning technician involved in the permit process was a reasonable step in determining whether there had been a refusal of the permit.

[para 18] The Applicant reasons that there should be more records, given that the Public Body initially decided to refuse the permit applications before approving them. He is seeking a “Reasons for Refusal” document, which the Public Body located for his neighbour’s access request for records relating to DP2019-3782, but not the Applicant’s access request for records relating to DP2019-3908. Given that there is a record indicating that both applications were to be refused, the Applicant believes there should also be a “Reasons for Refusal” document for DP2019-3908.

[para 19] The records at issue establish that the Public Body’s permit review process takes place in stages and decisions change based on available information. In this case, the permit applicant submitted the application for a secondary suite on July 30, 2019. On August 17, 2019, prior to the initial review, the Public Body wrote the permit applicant to inform the applicant that the permit application was incomplete. In September, the position of the Public Body was that the permit would be denied; however, it also arranged for a site inspection of the proposed suite, parking spot, and lot. The Public Body communicated its intention to refuse the permit application to the permit applicant by email in September. The notes of the senior planning technician indicate that the permit applicant then agreed to the inspection and also provided the Public Body with precedents of secondary suites the Public Body had approved on cul-de-sacs.

[para 20] The site inspection was conducted on October 3, 2019. Once the site inspection report was received, the Public Body learned that the proposed suite had a suitable tenant parking spot available in the garage. On October 11, 2019, the Public Body made the decision to grant the permit application, on the basis of the results of the inspection. The inspection established that the application did not require a variance and was within the Public Body's guidelines. The Public Body informed the permit applicant on October 7, 2019 that the application had been approved.

[para 21] I am satisfied that a Reasons for Refusal document was not prepared for the permit application DP2019-3908. The Public Body's records establish a clear time line and document the reasons for its decision. The Public Body initially thought it would refuse the application, but changed the decision once it gathered additional evidence. Given that the permit applicant for DP2019-3908 agreed to the site inspection, there would be no reason for the Public Body to prepare a Reasons for Refusal document prior to obtaining the evidence from that inspection.

[para 22] To conclude, I find that the Public Body has conducted a reasonable search for responsive records. I have no basis on which to find that it has not produced all the responsive records in its custody or control. While it would have been preferable had it responded to the second access request fully within the timelines of the FOIP Act, I find that it was reasonable to conduct a second broader search, once it realized that the second access request was broader in scope than the first. In any event, the only remedy available when a public body's search is inadequate is to order it to do another one. As the Public Body has already demonstrated that it conducted a reasonable search and has produced all the responsive records it has in its custody or control, there would be no benefit to making such an order.

### **III. ORDER**

[para 23] I make this Order under section 72 of the Act.

[para 24] I confirm that the Public Body met its duty to assist by conducting an adequate search for responsive records.

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Teresa Cunningham  
Adjudicator  
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