ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-46

December 13, 2023

UNIVERSITY OF ALBERTA

Case File Number 016252

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Summary: In 2014, the Applicant made an access to information request (the initial request) under the *Freedom of Information and Protection of Privacy Act* (the Act) to the University of Alberta (the Public Body). The Public Body responded to that access request, providing records with some redactions. In 2019, the Applicant made another request (the current request) to the Public Body seeking unredacted versions of the records provided in response to the initial request. The Public Body elected not to process the current request and instead offered the Applicant a copy of its response to the initial request. The Applicant argued that the Public Body failed to meet its duty under section 10(1) (duty to assist applicants) of the Act.

The Adjudicator found that providing a copy of the response to the initial request did not fulfil the duty to respond to the current request as required by section 10(1). Since the time of the initial request the circumstances relevant to withholding information may have changed, rendering those redactions inapplicable in response to the current request. Neither does the Act bar repetitious requests.

The Adjudicator ordered the Public Body to respond to the current request considering the circumstances that apply to it, not those that applied to the initial request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss: 2(a), 10(1), 17(1), 17(2)(i), 17(5), 17(5)(e), 17(5)(g), 19(2), 19(3), 55, 55(1)(a), 65(1), 66(2)(a), 66(2)(a)(i), 66(2)(a)(ii), 70, 72; *Municipal Freedom of Information and Protection of Privacy* Act, R.S.O. 1990, c. M.56

Authorities Cited: AB: Orders F2020-13 **BC:** Order 01-16 **ON:** Orders MO-2788, PO-2930

Cases: *Ellis v. Denman Island Local Trust Committee,* 2020 BCSC 935

I. BACKGROUND

[para 1] On or around November 20, 2014, the Applicant made an access request (the initial access request) to the University of Alberta (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act). At the time, the Applicant was an employee of the Public Body. The Applicant made the initial request in the hopes of acquiring information about how the Public Body handled her application for reappointment as a Department Chair.

[para 2] The Public Body assigned the initial access request file #2014-035. In response to the initial request it provided some records to the Applicant, with significant amounts of information withheld under the Act.

[para 3] The Public Body did not state under which sections of the Act redactions in response to the initial request were made. The Applicant seems to recall that some were made under section 19 of the Act.

[para 4] The Applicant did not seek a review of the Public Body's response to the initial access request from the Information and Privacy Commissioner (the Commissioner).

[para 5] In 2018, the Applicant ceased being an employee of the Public Body.

[para 6] On December 11, 2019, the Applicant made an access request to the University of Alberta (the Public Body) under the Act, seeking the following information:

> Documentation from my file #2014-035. I would like copies of unredacted originals from the following request.
>
> The initial request: "I would like to obtain all information submitted in relation to my reappointment as Chair of the Department of [Department Name]. In particular the communications with the Dean and the administrator for the process, [Employee 1].

> Example: Letters from faculty members that were taken into account both anonymous and those signed.

[para 7] The December 11, 2019 access request (the current access request) is the subject of this inquiry.

[para 8] The Public Body responded to the access request on December 18, 2019, by letter. The letter is signed by an Information and Privacy Officer with the Public Body. The Public Body declined to process the request for the following reasons, as stated in the letter:

> Having discussed this matter with my colleagues and supervisor, we have decided not to process this request as you are effectively asking us to reprocess the same records. This request is the same request we responded to in file 2014-035. You were provided with an opportunity to have the decisions made by the University in response to that request reviewed by the OIPC at the time (approximately 5 years ago) and we do not have any documentation relating to a request for review from the OIPC in relation to 2014-035. The University's IPO responded to the request for these records already. You did not request a review of that response and the time period for requesting a review has expired. We considered this matter concluded.
>
> However, we are willing to provide you with a copy of the records as they were released to you in the university's response to file 2014-035. Please contact me if you wish to obtain a copy of these redacted records

[para 9] On January 29, 2020, this Office received a Request for Review of the Public Body's response to the access request. In the Request for Review, the Applicant explains her rationale for requesting unredacted copies of records previously provided in response to her earlier access request. Among other reasons, the Applicant notes,

> For me circumstances have changed in that I am now retired and the nature of my relationship with peers and subordinates as determined by the work situation no longer applies: I draw to your attention: 19 Confidential evaluations - for purposes of subsection 2 "participant" includes peer, subordinate or client Supervisor or superior is not included.

[para 10] Investigation and mediation were authorized to try to resolve the matter, but did not do so. On December 15, 2020, the Applicant filed a Request for Inquiry to address the issues.

[para 11] On January 13, 2021, under section 70 of the Act, the Public Body made a request to the Information and Privacy Commissioner (the Commissioner) to refuse to hold an inquiry in this matter. Section 70 states,

> *70 The Commissioner may refuse to conduct an inquiry pursuant to section 69 if in the opinion of the Commissioner*

> *(a) the subject-matter of a request for a review under section 65 has been dealt with in an order or investigation report of the Commissioner, or*
>
> *(b) the circumstances warrant refusing to conduct an inquiry.*

[para 12] The Public Body argued to the Commissioner that the matter had been dealt with already in Order F2020-13. Though that Order concerned an access request made by a different applicant to a different public body, the Public Body argued the decision in Order F2020-13 disposed of this matter since the Director of Adjudication determined, in that Order, at para. 69,

> Accordingly, I find that a public body has neither a duty to provide records it has already provided to an applicant a second time, nor to again deny records it has already denied.

[para 13] On February 17, 2022, the Commissioner denied the Public Body's request to refuse to hold an inquiry, finding that it was not clear whether Order F2020-13 disposed of the issue in this inquiry.

[para 14] The Commissioner delegated the authority to conduct this inquiry to me.

II. ISSUE

[para 15] The issue set out in the Notice of Inquiry is as follows:

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)?

III. DISCUSSION OF ISSUES

Preliminary Matter – Commissioner's decisions not in issue

[para 16] Portions of the Public Body's submissions address and argue against the Commissioner's rationale for not refusing to conduct an inquiry. I do not consider those arguments vis-à-vis the Commissioner's decision since I have no authority to hear an appeal of it. I do consider the same arguments to the extent that they are relevant to the issue of whether the Public Body complied with section 10(1) in this case.

[para 17] Similarly, it appears that the Applicant argues that the Commissioner should extend the time to conduct a review pursuant to section 66(2)(a)(ii). That section, discussed further below, permits the Commissioner to extend the deadline by which an applicant must submit a request for review of a public body's response to an access request. The Applicant's argument can only sensibly refer to the initial access request since the request for review of the current access request was made in time. However, an extension of time under section 66(2)(a)(ii) is a decision for the Commissioner to make,

and is not the subject of this inquiry. If an applicant wishes to make such a request, the proper approach is to apply to the Commissioner. I continue to consider these arguments to the extent that they are relevant to the issue in this inquiry.

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 18] Section 10(1) states as follows:

> *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 19] Typically, issues arising under section 10(1) concern whether a public body which has responded to an access request has conducted an adequate search for records. The Public Body does not appear to have had any difficulty locating responsive records. The question is whether by only offering to provide a copy of its response to the initial access request, the Public Body can be said to have made every reasonable effort to respond openly, accurately, and completely as required by section 10(1).

The Public Body's arguments

[para 20] The Public Body takes the position that the access request is not an access request, and the duty to assist under section 10(1) does not arise. The Public Body argues that the current access request is in the nature of a request for it to reprocess the initial process, which it is not obligated to do, or an attempt to seek review of its response of the initial access request. In the latter case, the Public Body argues that any sort of review is contrary to the access to information scheme in the Act, and section 66(2)(a) in particular.

[para 21] Section 66(2)(a) sets a deadline by which time an applicant must inform the Commissioner that they seek a review of a public body's response to an access request pursuant to section 65(1); it states

> *(2) A request for a review of a decision of the head of a public body must be delivered to the Commissioner*
>
> *(a) if the request is pursuant to section 65(1), (3) or (4), within*
>
> *(i) 60 days after the person asking for the review is notified of the decision, or*
>
> *(ii) any longer period allowed by the Commissioner,*

[para 22] The Public Body argues that since the Applicant never sought a review of the initial access request, the sixty day limit referred to in section 66(2)(a)(i) to seek a review

of it has lapsed, and the Applicant cannot seek a review by submitting an access request for the same information sought in the initial request.

[para 23] The Public Body argues that the Applicant's change in circumstances may be relevant to a consideration by the Commissioner of whether to extend time to seek review under section 66(2)(a)(ii), but the Applicant has not requested such consideration. Therefore, any review of the initial access request, which is what the Public Body argues the access request is, is barred by the Act.

[para 24] The Public Body also argues that the decision in Order F2020-13 disposes of the issues in any case. The Public Body's position is that since the current request is for the same records already provided in response to the initial request, it has no obligation to provide them under section 10(1). In Order F2020-13, the Director of Adjudication considered whether the Calgary Police Service (CPS) was obligated to provide records it had provided in earlier requests, which were absent in a subsequent request that included the earlier records in its scope. As quoted above at para. 12, the Director of Adjudication concluded that a public body has no duty to provide records already provided in response to an earlier access request.

[para 25] In the alternative, the Public Body argues that its offer to provide a copy of its response to the initial access request satisfies the duty under section 10(1).

The Applicant's arguments

[para 26] The Applicant frames the issue in this case as whether the Public Body is required to make a new decision on whether to release previously withheld information in light of material changes in the Applicant's circumstances.

[para 27] The Applicant argues that in addressing this issue, the purposes of the Act, stated in section 2, must be considered; the purpose in section 2(a) in particular. Section 2(a) states,

> *2 The purposes of this Act are*
>
> > *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*
> >
> > ...

[para 28] The Applicant further argues that the principles of issue estoppel should serve to guide the decision about whether the Public Body should respond to the current access request. The Applicant would apply the following test for issue estoppel as set out

in *Ellis v. Denman Island Local Trust Committee* 2020 BCSC 935 at para. 15 (emphasis mine):

> 15. the preconditions for a successful plea of cause of action estoppel are that: (i) there was a final decision of a court of competent jurisdiction in the prior proceeding, (ii) the parties to the prior proceeding were the same parties or in privity with the parties to the subsequent proceeding, (iii) the cause of action in the prior proceeding was not "separate and distinct" from the subsequent proceeding, and (iv) **the basis for the cause of action in the subsequent proceeding was argued or could with reasonable diligence have been argued in the prior proceeding.**
>
> [emphasis added]

[para 29] The Applicant submits that the effect of her retirement on the response to her access request could not have been contemplated at the time of the initial request. As such, the issue was not, and could not have been, considered in the previous access request.

Decision

[para 30] I agree with the Public Body that it has no duty to reprocess the initial access request having long ago responded to it. For the reasons below, it still must properly respond to the current access request.

[para 31] As for the Public Body's argument that the access request is not an access request but rather is an attempt to have the initial access reprocessed or reviewed, I disagree. The Ontario Information and Privacy Commissioner considered arguments very similar to the Public Body's in Order MO-2788. Order MO-2788 concerned an access request that repeated a request to which the City of Vaughn (the City) had responded just two months' prior. The Adjudicator concluded at paras. 19 – 20:

> The first argument made by the city is that the appellant should not be able to submit a new request for the same records in these circumstances. It argues that section 39(2) establishes a 30-day time period to file an appeal of an access decision, and that allowing a requester to simply file a new request if the 30-day time period is missed obviates the purpose of section 39(2). It also states that access requests are filed and processed with a view to providing access to "records", not with a view to reiterating previous decisions in the absence of records. Furthermore, the city states that it is "not aware of any provision in the *Act* that speaks to the filing of requests for the sole purpose of re-starting the appeal window provided for in section 39(2)".
>
> I do not accept the city's position on this point. Although section 39(2) of the *Act* clearly establishes a 30-day window of time in which to file an appeal, there is nothing in the *Act* that precludes an individual from making a subsequent request for the same

> records. There can be many reasons why an individual may decide to make a new request for records previously requested (for example, a sudden public interest in the records which may affect access, or changed circumstances where possible harms from disclosure no longer exist). In my view, and in the absence of circumstances where a request may be considered frivolous or vexatious (which would trigger the application of section 20.1 of the *Act*), there is nothing in the *Act* prohibiting a requester from making a new request for records previously requested under the *Act*…

[para 32] While Order MO-2788 was concerned with access requests made under the *Municipal Freedom of Information and Protection of Privacy* Act, R.S.O. 1990, c. M.56, the Act functions in a substantially similar way, and does not bar applicants from making requests for the same records more than once.

[para 33] It is further clear that an access request does not cease to be an access request simply because it is repetitive. Section 55(1)(a) of the Act specifically contemplates that an access request may be repetitious, while also providing public bodies the means to address concerns about that repetition. Section 55 states,

> *55(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if*
>
> > *(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or*
> >
> > *(b) one or more of the requests are frivolous or vexatious.*
>
> *(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1) and*
>
> > *(a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;*
> >
> > *(b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.*
>
> [underlining mine]

[para 34] Where an access request is repetitious, it stands to reason that the processing and review of it would be repetitious as well. The Act therefore contemplates that public bodies may have to perform these repetitive actions; doing so is not contrary to the scheme of the Act. As the Public Body did not avail itself of the process to disregard the access request under section 55, it must respond to it as required by section 10(1).

[para 35] Regarding the Public Body's argument that Order F2020-13 disposes of the issue, the Public Body's argument exceeds the scope of the decision in that Order.

[para 36] As described in Order F2020-13 at para. 1, the access request was for the following:

> "[a]ll information obtained or created by the CPS for the investigation of", or in some cases for "[a]ll information obtained, provided to, or created by the CPS that related to the investigation of" a number of specified CPS files, and two RCMP files, as well as for such materials contained in any other files held by any district of the CPS.

[para 37] The above access request is referred to as Request 1280 (Order F2020-13 at para. 9).

[para 38] When it responded to Request 1280, the CPS photocopied its responses to earlier requests and provided them to the Applicant again. (See Order F2020-13 at para. 3)

[para 39] The wording of the access request and the CPS' decision to provide photocopies of responses of earlier request inform the Director of Adjudication's conclusion at para. 69 Order F2020-13 that "…a public body has neither a duty to provide records it has already provided to an applicant a second time, nor to again deny records it has already denied." That conclusion only applies to copies of responses to earlier requests. Indeed, the Director of Adjudication states that a public body is not obligated to photocopy and resupply an Applicant with the *same response* already provided to an earlier access request. She stated at para. 229 of Order F2020-13,

> As for the Applicant's belief that the CPS is obliged to tell her whether the records provided in Response 1280 that had also been provided in responses to her earlier requests still exist in CPS's possession, I have already explained above that the CPS was not obliged to re-provide records it had already provided. Thus in response to the request in this inquiry, it was obliged to provide neither the <u>copies of the earlier response files</u>, nor <u>newly-created copies of the records it had already provided</u> in the earlier responses.
>
> [underlining added]

[para 40] The Applicant in this case neither seeks photocopies of the response to the initial request nor newly created copies of that same response. The Applicant's access request is worded explicitly for something different; she requests, "I would like copies of <u>unredacted</u> originals from the following request. The initial request:…" [underlining mine]. Since she requested unredacted records, which the Public Body has never provided, the Public Body cannot be said to have discharged its duty under section 10(1) simply by having responded to the initial access request, and noting as much. The current request is not for the same thing.

[para 41] As to the Applicant's argument that the matter should be guided by the principles of issue estoppel, I find otherwise. Principles of issue estoppel are designed to bring finality to litigation. An access request under the Act is not a cause of action or any form of litigation subject to final decision and then never to be brought again. As already noted, the Act contemplates repetitious access requests, and while it provides a mechanism by which public bodies may disregard them, it does not bar them.

[para 42] Having decided that the duty under section 10(1) arises in this case, and that the principles of issue estoppel do not apply to that analysis, I turn now to the question of whether the Public Body's response to the current access request satisfies its duty to make every reasonable effort to respond openly, accurately, and completely.

[para 43] Here I consider the Applicant's arguments in respect of changes in her circumstances in the time between the initial and current access requests.

[para 44] A significant change in circumstances may lead to a different result than an identical access request brought earlier. This prospect has been noted in decisions from the British Columbia and Ontario Information and Privacy Commissioners.

[para 45] In British Columbia Order 01-16, the applicant made an access request to Simon Fraser University. That request was identical to one that had earlier been the subject of review by the British Columbia Information and Privacy Commissioner and was settled during mediation. The British Columbia Information and Privacy Commissioner found that the second request was an abuse of process and therefore the university did not have to respond to it. While Simon Fraser University was relieved of its obligation to respond, the British Columbia Information and Privacy Commissioner stated at para. 46,

> In the circumstances, the applicant's present pursuit of the review and inquiry process under Part 5 of the Act warrants my intervention. This decision does not mean a public body can avoid processing an access request simply because it repeats an earlier access request where no review was sought under Part 5 respecting that earlier request. That is the province of s. 43, which addresses "repetitious" or systematic access requests. The principle discussed above deals only with cases where a request duplicates an earlier access request that was resolved by mediation by this Office under Part 5. In the case of repeat requests, with or without previous mediation, it should be noted that a second request may have very different implications on its merits, including owing to the passage of time, changes in public body circumstances relevant to harm or changes in third-party circumstances relevant to harm. (The short time between the first and second requests in this case works against such a conclusion here.)

[para 46] In Ontario Order PO-2930, the issue was whether to revisit determinations made on earlier access requests. The Adjudicator stated at para. 24,

> However, I note that there may be certain, limited situations where a determination made in a previous order is revisited. Two examples would be:
>
> > -where a significant change in circumstances occurs, which would result in a different decision. For example, if an order confirms that access to a document is denied on the basis that disclosure would prejudice an ongoing trial, and a later request is made for the same information when the trial is over, different considerations may apply. However, in these circumstances the original decision is not reconsidered; rather, a new request might result in a different decision.
> >
> > …

[para 47] The same reasoning in the above orders is equally applicable to review of response to access requests made under the Act.

[para 48] Exceptions to disclosure of information in response to an access request are listed in Division 2 of Part 1 of the Act. They are of two kinds: mandatory and discretionary. For either type, there are numerous considerations and criteria that must be satisfied before a public body may withhold information under them, many of which will shift over time.

[para 49] The Applicant provides an example of changes in circumstances in respect of section 19(2) of the Act, which is discretionary. Sections 19(2) and 19(3) state,

> *(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.*
>
> *(3) For the purpose of subsection (2), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.*

[para 50] The Applicant observes that section 19(3) states that "participant" as used in section 19(2) includes, peers, subordinates, or clients of an applicant. At the time of the initial access request, as an employee of the Public Body, the Applicant had peers and subordinates. Having retired during the time between the initial and current requests, she no longer does. That may affect the operation of section 19(2).

[para 51] Even mandatory exceptions to disclosure will involve considerations that change over time. For example, the application of section 17(1) (mandatory refusal to disclose third party personal information) is limited by time itself under section 17(2)(i). Section 17(2)(i) removes the requirement to withhold information under section 17(1) in cases where the personal information is about an individual who has been dead for at least 25 years. As well, section 17(5) presents a non-exhaustive list of factors which

could weigh in favour of withholding information at the time of one request, but not at a later date. For example, it could be that the third party will be unfairly exposed to harm as contemplated by section 17(5)(e) at one time, but the threat of harm may diminish during subsequent years. Likewise, it may be likely that information is inaccurate or unreliable under section 17(5)(g) at first, but is subsequently verified at a later date.

[para 52] The Public Body does not argue or indicate that it considered whether the sections of the Act under which it withheld information in response to the initial access request would still be applicable in response to the current request. By only offering a copy of the redacted records already provided in response to the initial access request, the Public Body has failed to respond openly, accurately, and completely to the current one. The earlier redactions may no longer be proper by reason that the pertinent circumstances on which they rely are no longer present, pertinent, or carry the same weight. Much may have changed in the intervening five years. The Public Body is required to consider which, if any, redactions are proper in the circumstances that surround the current access request.

[para 53] I find that the Public Body failed to meet its duty under section 10(1).

IV. ORDER

[para 54] I make this Order under section 72 of the Act.

[para 55] I order the Public Body to perform its duty under section 10(1) of the Act and provide a new response to the current access request. The Public Body shall consider the circumstances surrounding the current access request when determining if any information may or must be withheld in response to it, without reliance on the redactions made in response to the initial access request.

[para 56] I order the Public Body to confirm to the Applicant and me, in writing, that it has complied with this Order within 50 days of receiving it.

_____
John Gabriele
Adjudicator