Court of Queen's Bench of Alberta

Citation: Oleynik v. University of Calgary, 2012 ABQB 189

Date: 20120323
Docket: 1101 09075
Registry: Calgary

Between:

Anton Oleynik

Applicant

- and -

The University of Calgary and
The Information and Privacy Commissioner
of Alberta

Respondents

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] Dr. Oleynik asks for judicial review of a decision of an adjudicator from the Office of the Information and Privacy Commissioner - Alberta - confirming that the University of Calgary had met the duty imposed upon it by s. 10(1) of the FOIP Act to assist Dr. Oleynik in obtaining personal information.

[2] Of the preliminary issues raised by Dr. Oleynik, the most important is his request to file additional evidence. That request is denied. The return filed by the adjudicator is adequate. Dr. Oleynik's request does not come within the relatively narrow set of exceptions to the rule according to which a review is undertaken only on the material assessed by the tribunal whose decision is being reviewed.

[3] The standard of review of the adjudicator's decision is reasonableness. Determining whether an adequate search was made of University records to assist Dr. Oleynik is deep within

the Information Commissioner's area of expertise and is, at worst, a mixed question of fact and law; therefore, reasonableness is the standard and deference to the tribunal is the result.

[4] Dr. Oleynik has not established that the adjudicator's decision was unreasonable.

Cases and authority cited

[5] **By Dr. Oleynik:** *Canada Evidence Act*, R.S.C., 1985, Chapter C-5, Section 14 & 15; The *Criminal Code*, R.S.C., 1985, Chapter C-5, Sections 131-133; The *Freedom of Information and Protection of Privacy Act*, Chapter F-25, Sections 6(1), 10(1); *Alberta Rules of Court*, Alberta Regulation 124/2010; Rules 1.2(2)(b), 1.5(1)&(2), 3.13(1), 3.18(2), 3.22(d), 4.31(a), 5.17(2), 5.28, 6.3(3), 9.2(2), 9.4(2)(c), 505(3), 508; ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61; ***Dunsmir v. New Brunswick***, [2008] 1 S.C.R. 190, 2008 SCC 9, para. 55; ***Marakowski v. KCO Metal Products Inc.***, 2003 ABQB 371; ***Newfoundland and Labrador Nurses' Union v. Newfoundland Labrador (Treasury Board)***, 2011 SCC 62; ***Oleynik v. Newfoundland and Labrador (Information and Privacy Commissioner)***, 2011 NLCA 73; ***Oleynik v. University of Calgary***, 2011 ABCA 281; Order F2009-023, Office of the Information and Privacy Commissioner of Alberta; ***York University (Re)***, 2010 CanLII 44189 (ON IPC).

[6] **By the University of Calgary:** ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*** 2006 ABQB 964.

Appendix A: Decision of the Information and Privacy Commissioner's Adjudicator - Order F2009 -022

1. Background

[7] Dr. Oleynik is an associate professor at Memorial University in Newfoundland. In 2007, Dr. Oleynik applied to the Social Sciences and Humanities Research Council of Canada Selection Committee #15 for a research grant. His application was denied.

[8] One of the individuals who sat on the SSHRC's Selection Committee #15 is an associate professor of humanities at the University of Calgary. In April 2008, Dr. Oleynik submitted an access to information request to the University of Calgary for copies of email correspondence sent or received by the professor who sat on the selection committee in which Dr. Oleynik's names, first and family, were mentioned; Dr. Oleynik expressed a concern that there may have been "eventual misuse" of his personal information. His application read, in part:

About the Information you want to access.	What records do you want to access? Please give as much detail as possible. *(If you want access to your personal information, be sure to give all your previous names. For another person's information, you must attach proof that you can legally act for that person. If you need more space, please attach a separate sheet of paper.)*

> E mail communications send and received by
> ( ), a member of SSHRC Selection
> Committee No 15 from U of Calgary, in which my name
> (OLEYNIK or OLEINIK or Anton) is mentioned. The Request is
> made in the framework of appealing a decision of Committee No 15
> on the ground of the eventual misuse of my PERSONAL INFORMATION
> What is the time period of the records? Please give specific dates.
> October 15, 2007 - April 23, 2008

[9] In June 2008, the University responded that it had reviewed the request with the professor who indicated that the committee members do not email each other and email is only used to communicate with the chair of the committee when there is a point to be clarified.

[10] In August 2008, Dr. Oleynik asked the Information and Privacy Commissioner to review the University's response to his request. The Commissioner authorized mediation to solve the dispute. As mediation was not successful, Dr. Oleynik's request to the Commissioner was scheduled for a written inquiry.

[11] In response to questions from the Commissioner's office as part of that inquiry, the Access and Privacy Coordinator at the University of Calgary made further inquiries from the professor whose emails had been requested and passed along this response to the Commissioner's office:

> On October 7, 2008, I received the following e-mail: "There was no correspondence regarding any specific grant application, although there was of course email correspondence regarding the time of the meeting, procedures, etc. Most of this came from the programme officer, with one or two emails from the Chair I think. I had NO correspondence with any other committee member regarding ANY application. We were mailed the applications in large boxes in late December, required to read them and assign them a score, which we then faxed to the programme officer in February before heading for Ottawa. Neither did I have any correspondence with any committee member regarding any application after the meeting."

Further, the professor in question mentioned that each member of the committee only scores a portion of the applications and that she did not think she had been assigned to score Dr. Oleynik's application. She wrote:

> In any case, I did not have any email correspondence regarding any application. We bring our notes explaining our score to the meeting in Ottawa but do not take them back with us. Committee members are not responsible for keeping records of any kind."
>
> (Emphasis in original)

[12] On February 24, 2010, the adjudicator concluded that the University conducted a reasonable search for responsive records and that the University had met its duty to assisted Dr. Oleynik as required by s. 10(1) of the FOIPP Act. That section, and the sections which immediately follow, read as follows:

> *Duty to assist applicants*
>
> 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.
>
> (2) The head of a public body must create a record for an applicant if
>
> > (a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and
> >
> > (b) creating the record would not unreasonably interfere with the operations of the public body.
>
> *Time limit for responding*
>
> 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.
>
> *Contents of response*
>
> 12(1) In a response under section 11, the applicant must be told
>
> > (a) whether access to the record or part of it is granted or refused,
> >
> > (b) if access to the record or part of it is granted, where, when and how access will be given, and
> >
> > (c) if access to the record or to part of it is refused,
> >
> > > (i) the reasons for the refusal and the provision of this Act on which the refusal is based,

> (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
>
> (iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.
>
> (2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of
>
> (a) a record containing information described in section 18 or 20, or
>
> (b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

[13] For ease of reference the adjudicator's decision is attached as Appendix A.

[14] In this special chambers application, Dr. Oleynik asks for judicial review of the adjudicator's decision.

2. Preliminary issues

[15] Before dealing with the application for judicial review itself, Dr. Oleynik asks the court to deal with certain preliminary matters. Among those matters, there are ones over which this court has no jurisdiction and ones which the court cannot deal with as stand-alone issues. Those matters will be dealt with first.

a) *Costs of Dr. Oleynik's unsuccessful appeal of a change of venue decision*

[16] As part of his current application, Dr. Oleynik asks this court to declare that without his unsuccessful appeal to the Court of Appeal from the decision of Belzil J., Dr. Oleynik would not have been able to move forward in perfecting his case in this matter. Therefore, he is of the view that, although his appeal was denied, he was actually successful in the appeal, and therefore he should not have to pay costs for his unsuccessful opposition to the chambers' application and for his unsuccessful appeal to the University of Calgary.

[17] This court simply has no jurisdiction to deal with the costs of the appeal. Within the time limits allowed, Dr. Oleynik would have had to ask the Court of Appeal itself to deal with costs.

[18] In any event, as I understand it, Dr. Oleynik is attempting to appeal the Court of Appeal's decision to the Supreme Court of Canada; if the SCC were to grant leave to hear his appeal, Dr. Oleynik could ask that court to deal with costs throughout.

b) *Declaration that Dr. Oleynik was prejudiced by the lack of response from the University of Calgary between November 2010 and May 2011*

[19] It is necessary to provide some background to this request for relief from Dr. Oleynik.

[20] On May 7, 2010, Dr. Oleynik filed his application for judicial review of the Adjudicator's decision. On June 17, 2010, a case management type hearing was held with a judge of this court who directed the parties to attempt to agree on a process schedule and ordered a further hearing to finalize process. In August 2010, Dr. Oleynik send a proposed schedule to the University of Calgary which required the timely filing by Dr. Oleynik of an affidavit of service. On November 1, 2010, the case management order was filed. That order: gave Dr. Oleynik an extension of time to apply for judicial review; gave notice to the Office of the Information and Privacy Commissioner to file a Return of documents; stated that Dr. Oleynik was not required to have an address for service in Alberta but was required to maintain an email address; stated that all materials could be served electronically between the parties; ordered the parties to reconvene by telephone conference call to set a date for the hearing and to coordinate filing of briefs; adjourned the application *sine die*; and, gave to the University relief from the Rules that would have required the University to have Dr. Oleynik approve the form of order prepared as the order given. None of that is in dispute. However, para. 2 of the Order issued on June 17, 2010 and filed on November 1, 2010, required Dr. Oleynik "to file an affidavit of service with the Court". After receiving a copy of the filed order, Dr. Oleynik attempted to re-address the schedule, but he alleges that the University would not cooperate. On April 1, 2011, the University served on Dr. Oleynik its affidavit of records. Dr. Oleynik contacted the University with a view to questioning on its affidavit, but asserts that he received no response. On May 31, 2011, Dr. Oleynik applied to the court to set a schedule for perfecting the judicial review hearing, which schedule provided for questioning on the University's affidavit of records and which relieved Dr. Oleynik from the costs implications of questioning the professor whose emails were the subject of the proceedings. In June, 2011, as a result of a letter sent by the University's lawyer to Dr. Oleynik, it became apparent that the affidavit of service filed by Dr. Oleynik in September 2010 had been misplaced by the court. On June 8, 2011, the University filed an application requesting the transfer of the proceedings to Calgary; this court granted that application over Dr. Oleynik's objections. On June 9, 2011, the Court of Appeal heard an appeal by Dr. Oleynik from the decision to transfer the proceedings to Calgary. During the course of that hearing, the University informed the court that it would not be raising any issue regarding the lost affidavit and Dr. Oleynik's compliance with the direction in the June 17, 2010 order that an affidavit of service be filed. Between early May 2010 and late August 2011, Dr. Oleynik was teaching and conducting research outside Canada, being on a one year sabbatical leave from his duties at Memorial University.

[21] The Court has no jurisdiction to make the declaration of prejudice which Dr. Oleynik requests. The University of Calgary was not involved in the problem which arose in relation to

the filing by Dr. Oleynik of an affidavit of service; the University is not a proper party to any such claim.

[22] In any event, Dr. Oleynik has not identified any prejudice suffered as a result of the loss of his affidavit of service. Indeed, as Dr. Oleynik fairly notes, he was outside Canada during the period. Nonetheless, he states that his appeal to the Court of Appeal of the order of this court transferring the proceedings to Calgary was necessary "to solve the problem of the last affidavit". With respect, that assertion is simply illogical; it was, in the end, an incidental result of the appeal that the issue of the affidavit of service became moot; that does not in any way logically make Dr. Oleynik's choice to appeal the change of venue decision a result of the loss of the affidavit of service.

[23] Dr. Oleynik also claims that the "still non resolved character of the judicial review application has undermined [his] efforts to demonstrate that his application for a SSHRC research grant in 2009 was evaluated in the conditions of a conflict of interest, which arguably invalidates outcomes of this competition for public funds". With respect, this argument has no temporal logic. The problem with the affidavit of service arose after June 17, 2010. Given what occurred in these proceedings up to June 17, 2010, it was clear that the judicial review application in relation to the 2007 application was not going to be decided - with or without the lost affidavit of service - before the 2009 grant was applied for. Because Dr. Oleynik began, in 2008, to attempt to obtain evidence to invalidate the 2007 selections any conflict of interest which arises on his view of conflict existed in 2009 and continued to exist. What is clear is that the alleged personal conflict which Dr. Oleynik identifies as arising between himself and the University of Calgary professor who was involved in the #15 selection committee arose in 2008 as soon as Dr. Oleynik challenged the University of Calgary professor's response to his request for emails. That conflict was in no way created by the loss of an affidavit of service.

c) The truthfulness of the University of Calgary professor

[24] The credibility of the University of Calgary professor whose emails were the subject of the request is not an independent matter. Assessing the reliability of that professor's evidence is a matter to be considered in the context of the assessment of whether the adjudicator's report satisfies the appropriate standard of review. It will not be considered as a separate topic.

[25] I now turn to the preliminary issues over which this court does have jurisdiction and which require commentary before turning to the judicial review itself.

d) Should Dr. Oleynik be allowed to file fresh evidence?

[26] Dr. Oleynik applies to file evidence on the judicial review application that was not heard or considered by the adjudicator. Specifically, the evidence which Dr. Oleynik now proposes to file is evidence which he had attempted to file on an *in camera* basis with the adjudicator, but which the adjudicator refused to accept on that basis.

[27] The application to file fresh evidence is denied.

[28] Dr. Oleynik acknowledges that affidavits are permitted in judicial review only in limited circumstances: ***Alberta Liquor Store Association***. Nevertheless, he advances several arguments in support of his position that such evidence should be allowed here:

- by referring to an affidavit of records, the case management judge who made an order in June 2010 implicitly allowed Dr. Oleynik to file new evidence;

- by failing to object in a timely way to Dr. Oleynik's proposed new evidence, and by filing its own evidence, the University of Calgary has implicitly allowed Dr. Oleynik to file new evidence;

- the new evidence is material to the issue before the court because it will likely affect the court's decision concerning the validity of the adjudicator's decision.

[29] With respect, none of these arguments is persuasive and the arguments considered in their totality are no more persuasive.

[30] The decision in ***Oleynik v Newfoundland and Labrador (Information and Privacy Commissioner)*** is of no assistance to Dr. Oleynik since, in the circumstances here, the Commissioner was ordered to provide a return, and did so. Of course, the adjudicator's return did not include the material that was attempted to be introduced on an *in camera* basis; that material was returned to Dr. Oleynik and was not considered by the adjudicator in her final decision.

[31] I observe that the June 17th order of this court does not refer explicitly to an affidavit of records; the only affidavit that is referred to explicitly is an affidavit of service. Dr. Oleynik has not provided a transcript of the June 17th appearance, so the reference to an affidavit of records cannot be confirmed. Given the fact that the order on that date gave Dr. Oleynik additional time to apply for judicial review, it may well be that the affidavit of service referred only to service on the University of Calgary and the Commissioner of Dr. Oleynik's actual review request. Even if the judge who granted the June 17, 2010 order did intend the affidavit of service to apply to an affidavit of records, any such order could not be interpreted as giving leave to file affidavit evidence; because there is a well-established principle that judicial reviews are on the record, approval of leave to file supplementary affidavit evidence would have to be given explicitly to override the usual practice. Moreover, all the first judge was attempting to do was to provide a framework within which procedural matters could be dealt with in a timely way. If Dr. Oleynik wanted to file additional evidence, it was obviously salutary to impose a deadline by which such proposed new evidence would be put forward to give to the University the opportunity of making submissions about the admissibility of the proffered evidence. It must also be noted that, as Dr. Oleynik himself acknowledges, in June 2010, the Commissioner's return had not yet been provided; before deciding whether fresh evidence should be allowed, a court must look at the apparent completeness of the return. Again, if he did refer to an affidavit of records, the judge

who issued the order in June 2010 was merely ensuring that the issue of fresh evidence could be addressed as early as possible, once the return was available to both parties.

[32] In law, it is only in exceptional situations that silence can be construed as approval; this is not one of those situations. The fact that the University itself did, at one point, file new evidence is irrelevant: as the saying goes, two wrongs don't make a right. Folk wisdom has a point here - there is no particular merit in consistency where the position on which one is consistent is in error. Here, fortunately once current counsel was appointed, the University reconsidered its position on the filing of new evidence before the court had to make a decision about whether the University's proffered new evidence would be accepted.

[33] Some of the "fresh" evidence tendered by Dr. Oleynik is not fresh; the evidence was available to him at the time of the adjudication but he did not want to present it openly. The adjudicator properly declined to receive that evidence *in camera*; it is a hallmark of the Canadian justice system that it is transparent. Dr. Oleynik chose a tactical position for the hearing; he cannot now use that failed tactic as an advantage in the judicial review process. The correctness of the adjudicator's decision not to accept the evidence *in camera* has been confirmed by the fact that Dr. Oleynik is now willing to divulge that information publicly even though the investigation at the federal Information Commissioner's office is apparently not concluded.

[34] Moreover, the fresh evidence - i.e. evidence that was released to him on November 1, 2011, that Dr. Oleynik advances is not determinative: it only provides proof that general administrative matters relating to the conduct of the assessments were discussed with the University of Calgary professor in emails. That was never the issue, nor ever denied by the Calgary professor. There is nothing in this evidence that proves or even suggests that the Calgary professor mis-stated the evidence she provided to the adjudicator.

[35] The fact that new evidence was allowed in other situations is irrelevant. It is equally irrelevant, for example, that Dr. Oleynik has lost some of his applications in vaguely similar proceedings, such as the Newfoundland decision referred to above: each case must be decided on its own merits.

[36] Here, the record provided by the adjudicator is adequate; no additional evidence is necessary and none should be permitted

[37] In summary on this issue, no fresh evidence is admitted on the judicial review; that review will be conducted in the ordinary way, that is on the basis of the evidence which the adjudicator considered.

e) Should questioning on the evidence produced by the University of Calgary be permitted?

[38] For the purposes of this application, I accept that the withdrawal of an affidavit filed in a proceeding will not automatically prevent questioning on that affidavit. Nevertheless, the court retains the jurisdiction to determine whether questioning will be decided on any affidavit: rule

3.21. Here, the court exercises its jurisdiction to prevent such questioning. The basis for the court's decision on this matter is that the proposed questioning could only relate to an issue which is not properly the subject of judicial review.

[39] As to questioning on the affidavits that were filed by the University in the proceedings before the adjudicator, obviously questioning on those affidavits cannot now be allowed since the proceedings before the adjudicator are concluded. The court must decide if there was any flaw in those proceedings requiring that the matter be sent back to the adjudicator for re-assessment; it would be wrong in principle on a review to reopen the evidence before the adjudicator for the benefit of one party.

[40] In summary on this issue, Dr. Oleynik cannot question any of the affiants who have filed affidavits provided by the University of Calgary in these proceedings.

3. Judicial Review

[41] Having disposed of the preliminary matters, the court now turns to the judicial review itself.

a) Standard of review

[42] As I understand it, the parties agree that the standard of review of the adjudicator's decision is reasonableness. Were there no agreement, the court would decide that reasonableness is, in fact, the proper standard of review. A determination with respect to the keeping of records by a public body and what constitutes a reasonable search of those records is a matter that is deep within the expertise of the tribunal whose decision is the subject of this review. As Dr. Oleynik observes, the Supreme Court of Canada has stated that the guiding principle of the reviewing court in situations of this type is deference. Here the court understands why the adjudicator made her decision; her reasons are therefore sufficient.

b) Was the Adjudicator's decision reasonable?

[43] Dr. Oleynik has not proved that the adjudicator's decision was unreasonable.

[44] The adjudicator did not uncritically accept the evidence of the professor from the University of Calgary: she gave reasons for her decision.

[45] Dr. Oleynik's statement, in his original request, that he was concerned about the potential misuse of his personal information did not require the adjudicator to respond in those terms. As Dr. Oleynik himself noted, a statement of concerns is not really material to the inquiry. In any event, however, even if Dr. Oleynik had not made that concern explicit, the nature of his concern was obvious to the adjudicator.

[46] Dr. Oleynik states that the adjudicator has not taken into account the bias that exists between universities and the SSHRC. Even if he were correct that such a bias or perceived bias

does exist, the scale of such institutional bias would be at the low end and could not be avoided. Necessity relieves against prohibitions grounded in bias: in order to have a university grant program, it is necessary to have university input. Therefore, concern about putative bias must give way to the benefits of having a research council which gives grants to universities.

[47] Dr. Oleynik also states that the adjudicator has not taken into account that, on a subsequent SSRHC application, there was a conflict of interest arising because of his challenge to the response made on this request. Even if Dr. Oleynik is correct in asserting a conflict on his next application, any such personal bias experienced by the professor at the University of Calgary is irrelevant to the assessment of bias in relation to Dr. Oleynik's 2007 application and to the responses to his inquiries relative to that application.

[48] The adjudicator was entitled to rely on the evidence concerning the search made for the documents requested by Dr. Oleynik; it gave reasons for choosing to do so. The court finds those reasons reasonable.

[49] As indicated earlier, each situation must be assessed on its own merits. For that reason, the decision of the Ontario Information Commissioner in the mater of ***York University*** cannot determine what is a reasonable search in the situation here. In any event, it should be noted that, in the York University case, the adjudicator found that the university had conducted a reasonable search. More pertinently, in that decision, the following is noted:

> Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records existed.

Here, Dr. Oleynik has never provided such a basis.

[50] Moreover, it should be noted that Dr. Oleynik is now attempting to expand his original request for information. He would now like to make a request for all correspondence between the administrators and the members of Committee #15 in addition to the request he originally made. More importantly, perhaps, he would like to assess the adjudicator's assessment as if he had originally made an expanded request. With respect, the issue before the adjudicator, and before this court, is whether the response to Dr. Oleynik's actual request, not the request that he now thinks he should have made, was sufficient.

[51] Incidentally, on the issue of prejudice suffered by the delay caused by the problem of the lost affidavit of service, Dr. Oleynik answers his own allegation. At para. 17 of his brief Dr. Oleynik states that he had "absolutely no means to compel the University to prepare . . . (an) Affidavit of Records". Yet, in para. 18, he himself notes: "Because of the lack of response from [the University], [I] filed an interlocutory application . . . request[ing] that this Honourable Court set a schedule for perfecting the present case." Obviously there was a means of dealing with the pace of litigation, and Dr. Oleynik eventually used it.

[52] Overall on the question of delay, the court notes that the adjudicator had the jurisdiction to grant adjournments. There is no delay in the circumstances here which infirms the adjudicator's right to make a final decision on the disputed issue.

4. Costs

[53] Dr. Oleynik has been unsuccessful on these applications. Therefore, according to the general practice in civil matters, he will pay costs to the University. Because of the procedural difficulties experienced on this file to date, at the request of both parties, the court will set the costs. Dr. Oleynik has made frequent reference to what he described as perjured evidence by the professor from the University of Calgary. Because of the protection from libel which shields participants in court proceedings, the justice system provides a check and balance to guard against reckless accusations in the form of costs: if a person alleges fraud or some other criminal conduct, such as perjury, and does not prove it, that person may become subject to an accelerated, punitive, costs award. Perhaps in recognition of the fact that Dr. Oleynik is self-represented, the University has not asked for accelerated costs on this application. In the result, on the basis of item 8 of the tariff set in Schedule C to the Rules of court, I set the costs of the special chambers hearing before me at $1,000.00. Those costs are to be paid forthwith by Dr. Oleynik.

Heard on the 22nd day of February, 2012.
Dated at the City of Calgary, Alberta this 19th day of March, 2012.

J.B. Veit
J.C.Q.B.A.

Appearances:

Anton Oleynik,
on his own behalf

Ivan Bernardo and Jill W. Wilkie, Miller Tomson LLP
for the Respondent, University of Calgary

The Information and Privacy Commissioner of Alberta
did not appear

Appendix A

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-022

February 24, 2010

UNIVERSITY OF CALGARY

Case File Number F4618

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the University of Calgary (the Public Body) for email communications containing his personal information sent and received by a professor in relation to the Applicant's Social Sciences and Humanities Research Council (SSHRC) grant application. When it responded to the Applicant, the Public Body explained that the professor had not created or received any responsive email communications.

The Applicant requested that the Commissioner review the Public Body's response on the basis that it had not conducted an adequate search for records. The Adjudicator found that the evidence of the Public Body confirmed that records responsive to the access request had never existed. She confirmed that the Public Body had met its duty to the Applicant under section 10(1) of the Act.

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

Authorities Cited: AB: Orders 2001-016, F2007-029

I. BACKGROUND

[para 1] On April 30, 2008, the Applicant made an access request to the University of Calgary (the Public Body) for email communications containing his personal

information sent and received by a Professor in relation to his Social Sciences and Humanities Research Council (SSHRC) grant application.

[para 2] The Public Body responded to the Applicant's access request on June 5, 2008. The Public Body stated:

> I am responding to your request of April 30, 2008 for copies of e-mail correspondence sent or received by [a professor] in which your name is mentioned. I understand that this is in reference to a grant application submitted by you to a SSHRC selection committee of which she was a member.
>
> I have reviewed your request with [the professor] and she has indicated that she does not have any records responsive to the request. According to her, the grant applications are sent by regular post, whereupon she reads them and faxes her scores to the SSHRC office. The committee members do not e-mail each other and e-mail is only used to communicate with the chair of the committee when there is a point to be clarified. As far as she can recall, no issues arose in the latest cycle.

[para 3] On August 29, 2008, the Applicant requested review by the Commissioner of the Public Body's response to his access request. In particular, he requested review of the adequacy of the search conducted by the Public Body for responsive records. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The parties exchanged initial and rebuttal submissions.

II. RECORDS AT ISSUE

[para 5] As the issue for this inquiry is whether the Public Body met its duty to assist the Applicant, there are no records at issue.

III. 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)?

IV. DISCUSSION OF 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)?

[para 6] The Applicant argues that the Public Body did riot conduct a reasonable search for responsive records and therefore did not meet its duty to assist him under section 10(1) of the FOIP Act. He argues that the search was not reasonable as “reasonable search would involve not only the consultation with the university representative who sat on Committee No 15 but also the search on back-up e-mail servers.”

[para 7] The Public Body argues that it is reasonable to rely solely on the statements made by the professor whose emails formed the basis for the access request for the following reasons:

> The University submits that it is justified in limiting its search to the employee's response in circumstances particular to this case, that is, where the employee has:
>
> a) described a process which negates the possibility of the creation of such records,
> b) indicated that no responsive records exist, and
> c) asserted that she did not ever create or received such records, and
> d) where the employee is the sole source for responsive records, and
> e) where there is no reason for the University to doubt the truthfulness of the employee's response.

The Public Body provided the affidavit of the professor who served on the SSHRC committee in support of its position.

[para 8] Section 6 of the FOIP Act establishes an applicant's right to access information. 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.*
>
> *(3) The right of access to a record is subject to the payment of any fee required by the regulations.*

[para 9] An applicant has a right to access to information in the custody of or under the control of a public body unless an exception under Division 2 applies to the information.

[para 10] Section 10 of the FOIP Act explains a public body's obligations to respond to an applicant when an applicant makes an access request for records. 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 11] The Public Body has the onus of establishing 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).

[para 12] Previous orders of this Office have established that the duty to assist includes conducting an adequate search for records. In Order 2001-016, the Commissioner 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(l))]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) [now 10(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 about what has been done.

[para 13] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records. He said:

> 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 14] The affidavit of the professor who served on the SSHRC committee states the following:

> THAT I am a faculty member at the University of Calgary and have a personal knowledge of the facts sworn to here.
>
> THAT I was a member of SSHRC Standard Research Grants Selection Committee #15 in 2007 - 2008.
>
> THAT, as a member of SSHRC Standard Research Grants Selection Committee #15, I received large boxes of grant applications to review in mid to late December 2007.
>
> THAT I read those applications and assigned them a score which I faxed to the SSHRC programme officer in February before heading to Ottawa for a full committee meeting.
>
> THAT between December 2007 when I received the applications and February 2008 when the full committee met to determine final recommendations, I did not have any email correspondence with any committee member regarding any application.
>
> THAT further, I have not had any email correspondence with any committee member regarding any application at any time since the full committee met in February 2008.

[para 15] The evidence of the affiant establishes that she did not create ernails in relation to her work on the SSHRC committee and that there are no records responsive to the Applicant's access request. Further, the Applicant does not challenge the affiant's evidence. I accept the evidence of the affiant that she did not create or receive any ernails relating to evaluations of SSHRC candidates.

[para 16] Through the affidavit evidence of the professor, the Public Body has established the steps it took to locate records responsive to the access request. In effect, the Public Body asked the professor, the person whose records were requested, whether she had created or received responsive records. She explained that she did not send or receive emails in relation to the Applicant's SSHRC application, or the SSHRC application of any other candidate. In effect, the affiant explained that responsive records had never existed. From the way in which the Applicant framed his access request, only emails containing his name created by the professor for the purposes of the SSHRC committee would be responsive. The evidence of the Public Body supports a finding that these records never existed. As a result, all evidentiary requirements referred to by the Commissioner in Order F2007·029 are met.

[para 17] As the Public Body has established that responsive records were never created, it is unnecessary for the Public Body to search for backup files for responsive emails. As responsive emails never existed, they cannot have been deleted.

[para 18] The Public Body conducted a reasonable search for responsive records. In addition, it explained the steps it took to locate responsive records and the results of its search to the Applicant when it responded to him. I find that in the circumstances of this case, section 10(1) does not require anything further from the Public Body.

V. ORDER

[para 19] I make this Order under section 72 of the Act.

[para 20] I confirm that the Public Body met its duty to assist the Applicant as required by section 10(1) of the FOIP Act.

“TC”

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Teresa Cunningham
Adjudicator