



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island**

Order No. OR-24-006

Re: Department of Finance
OIPC file C/24/00045 (formerly FI-21-420)

**Maria C. MacDonald
Deputy Commissioner**

July 9, 2024

Summary:

An applicant requested access to some records of a former Minister of Finance. The Department of Finance found and disclosed some responsive records. Later, the Applicant learned that the Public Body did not give them five pages of responsive records. The Applicant requested a review. The Public Body agreed that they had these records and that they were responsive but maintains that they conducted a reasonable search. The Deputy Commissioner found that the Public Body did not conduct an adequate search.

Statutes cited:

Freedom of Information and Protection of Privacy Act, RSPEI 1988, Cap. F-15.01, ss 8(1), 56(4), 61(2)(a), 75(1)(f)

Cases Considered:

Order F2021-23, *Re: Rocky View County*, 2021 CanLII 59471 (AB OIPC)

I. BACKGROUND

- [1] In 2019, an individual (the "Applicant") asked the Department of Finance (the "Public Body") for access to some records of a former Minister of Finance covering a four-month period in 2012, which I will refer to as "Access Request A". The Applicant asked for the following:

All records, in any formats, electronic or otherwise, of Wes Sheridan which were either sent to - or received from - [business person 1], or make mention of [business person 2] from June 1, 2012 to October 1, 2012.

- [2] The Public Body found and gave the Applicant 24 pages of responsive records. Not counting duplicates, these pages included 25 emails.
- [3] About five months later, someone else made an access request for some records of the former Minister of Finance. Their access request was broader and covered an 18-month period. I will refer to this as "Access Request B", which was a request for:

"All records in all formats (paper, email, text message, PINs, BBM, Fax) sent by Wes Sheridan to [business person 1], or received by Wes Sheridan from [business person 1], as well as records cc'd to [business person 1] or mention [business person 1], [the Applicant], or [business person 2]. From Sept 1, 2011- March 31, 2013.

- [4] The Public Body decided to disclose records on Access Request B, but a third party opposed disclosure and the Commissioner conducted a review. The Commissioner's inquiry delayed the Public Body providing access to some of the responsive records in Access Request B until June of 2021. The Applicant got a copy of the records from Access Request B and noticed there were five pages that the Public Body did not provide to the

Applicant, although they were responsive to Access Request A. The Applicant asked the Commissioner for a review, particularly because of this discrepancy.

- [5] For clarity, I am not reviewing how the Public Body responded to Access Request B. Some of the records the Public Body located in Access Request B are relevant to the review of the Public Body's response to Access Request A.
- [6] Clause 61(2)(a) of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, Cap. F-15.01 (the "*FOIPP Act*") has a limitation period for an applicant to ask the Commissioner for a review of 60 days but permits the Commissioner to extend this period. Although the Applicant was beyond the 60-day limitation period, Commissioner Denise N. Doiron extended the request for review period and accepted the request for review.
- [7] Commissioner Doiron requested and received submissions from the parties. She delegated this matter to me to complete in September of 2023. Considering the passage of time since they had made their submissions to the Commissioner, I invited the parties to advise me if there was any new relevant information. The Applicant provided supplementary submissions, and the Public Body responded. I also had some questions for the Public Body arising from their processing records.

II. RECORDS AT ISSUE

- [8] The records at issue are five pages which are five separate email strings that included 20 emails. I will refer to the five pages as the "records at issue".

III. ISSUE

- [9] The Commissioner advised the parties that the issue of this inquiry is whether the Public Body complied with subsection 8(1) of the *FOIPP Act*. Subsection 8(1) imposes a duty on

public bodies to make every reasonable effort to assist applicants and to respond to each applicant openly, accurately, and completely. Our office and many other Canadian jurisdictions have held that this includes a duty to make every reasonable effort to conduct an adequate search. In this matter, the issue is whether the Public Body fulfilled their duty to conduct an adequate search.

IV. BURDEN OF PROOF

[10] Subsection 8(1) of the *FOIPP Act* states:

8(1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

...

[11] A public body has the burden to show that they complied with the duties of subsection 8(1) of the *FOIPP Act*, in particular that they made every reasonable effort to locate responsive records. As set out in previous decisions of our office, the standard of review on the reasonableness of a public body's search is based on reasonableness in the circumstances, not perfection.

V. ANALYSIS

[12] Commissioner Doiron asked the Public Body to explain why the records at issue were located and retrieved in Access Request B, but not in Access Request A. The Commissioner also asked the Public Body, if they could not give an exact explanation, to give their best theories of why the records at issue were not located in Access Request A. This mirrors a sentiment expressed in a few decisions of the Alberta Office of the Information and Privacy Commissioner that, when a public body is unable to locate a record that was expected to be in their custody or control, some explanation is better

than no explanation at all [see Order F2021-23, *Re: Rocky View County*, 2021 CanLII 59471 (AB OIPC), at para 26.]

[13] The Public Body acknowledged that the records at issue are responsive to Access Request A and apologized for the inconvenience but were not able to explain precisely why they did not find the records at issue. Their position is that they conducted an adequate search. The Public Body provided submissions and described their search efforts.

[14] The Public Body advised that, because the former Minister was no longer a part of government, the Public Body asked the administrative assistant in the Minister's office (the "Searcher") to search for records. The Searcher had searched for responsive records on multiple access requests and advised the Public Body that in all cases, they searched for emails on a request-by-request basis and printed the search results to forward for processing. An employee at the Access and Privacy Services Office (APSO) reviewed and considered whether any exceptions to disclosure applied. The Searcher completed a search form. They were vague on some particulars of the email address they searched, and did not list the keywords they searched, but the Searcher recorded when they conducted the search, and how long their search took.

[15] The Public Body was not able to explain why the records at issue were not located and was reluctant to speculate. Their best theory is that it was an unintentional error, possibly in printing or compiling the results. The Public Body responded as follows:

Given the same information and evidence, we are also unable to speculate about specific reasons the emails in question were not processed in [Access Request A]. It appears an unintentional error occurred along the way, possibly with respect to printing or compiling search results. In submitting this, we note that the searcher had limited or no personal knowledge of the activity in the former Minister's office for the time periods of the two requests. They would not have recognized that something was missing during the search, or when printing/compiling records for processing.

[16] The Public Body did not explain further any potential issue the Searcher or others may have been having with printing or compiling results.

[17] In response, the Applicant cited from Order FI-20-007, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 43897 (PE IPC). Order FI-20-007 held a different public body did not fulfill their duty to be open, accurate and complete because they did not explain why only a few responsive records were found. This decision is distinguishable based on different facts. In Order FI-20-007, the public body knew some emails were not available to be searched. In this matter, the Public Body had the records at issue, but the Public Body does not know why they did not find them.

[18] When we ask a public body to explain why responsive records were not located and retrieved in an access request, we expect that public body to make appropriate internal inquiries. But we acknowledge that sometimes such an investigation may not result in complete answers. Through no fault of the Public Body or the Applicant the review did not start until about two years after the search was conducted, which may have impacted the Public Body's ability to fully investigate and respond. Although it does not resolve the issue of whether the Public Body conducted an adequate search, I do not fault the Public Body for not providing a precise reason for why they did not find the records at issue in Access Request A.

[19] In response to the Public Body's position, the Applicant expressed their concerns with various public bodies' responses to their and other people's access requests, and evidence in other reviews of our office and civil proceedings. I reviewed the Applicant's submissions and enclosures, and in summary, the Applicant does not accept that this was a simple mistake or oversight.

[20] I carefully reviewed the original set of responsive records and the records at issue, and have not noticed anything that might explain how the records at issue were found in

Access Request B, but not found in Access Request A. There is no significant difference in the texts of the access requests, no pattern in the dates of the emails, the senders, recipients, or other content of the records that explains how the Searcher missed the records at issue.

[21] I asked the Public Body if it was possible that there was more than one archive of the former Minister of Finance, but the Public Body advised that there was not.

[22] I carefully reviewed the Public Body's processing records and observed a few remarks that I asked the Public Body about or considered. I have organized these considerations under the following headings:

- i. Groupwise;
- ii. Access Request C; and
- iii. Records identified after the initial search.

i. Groupwise

[23] There are two remarks in the processing records of Access Request A about GroupWise, which was an email platform the provincial government formerly used.

[24] The former Commissioner had authorized an extension for the Public Body to respond to this and a few other access requests of the Applicant. One remark was in an email to the former Commissioner about this extension that related to another concurrent access request that there are "limitations that are generally experienced when searching GroupWise". I asked the Public Body if there were any difficulties searching records in Groupwise. The Public Body checked with the province's Information Technology Shared Services and stated that: "There are no known limitations concerning this email program from an information technology perspective."

[25] In Order FI-20-007, *supra*, the former Commissioner made a finding about another public body retaining email records. This could have been what these remarks were about. We are not aware of any technical problems with searching Groupwise for responsive records from either our own former work experience with Groupwise, or from reviewing other access requests.

[26] There was another remark that it was frustrating for searchers when they receive different results even when using the same parameters. The Public Body states that this notation is not a technical or expert opinion, nor is it an official statement about the email program. This note was from a month before the Public Body searched for records on Access Request A. I do not know exactly what this person's role was in Access Request A, but they appear to be speaking for the Searcher, and other searchers. The notes continue, stating that this individual continues to work with the Searcher.

[27] In the summer of 2019, the Access and Privacy Services Office adopted a guideline to search Groupwise for responsive records. But we do not know if this was intended to address any difficulties searching Groupwise to respond to access to information requests.

[28] I am persuaded that, although it may not have been a technical issue, some searchers were having some problem searching the Groupwise platform.

ii. Access Request C

[29] There are a couple of remarks in the Public Body's processing records of Access Request A that say there was another similar access request and the search produced the same records as Access Request A. I will refer to this other request as "Access Request C". The wording of Access Request C was identical to Access Request A, but the time span was

three months longer. Access Request C was for the period from April 1 to November 1, 2012, and Access Request A was for the period from June 1 to October 1, 2012.

[30] I asked the Public Body if it was accurate that Access Request C produced the same results as Access Request A and asked for a copy of the search form for Access Request C. The Public Body confirmed that it resulted in the same 24 pages of responsive records, but they did not find a search form for Access Request C. The records at issue were not located or retrieved in Access Requests A or C.

[31] For clarity, I am not reviewing how the Public Body processed Access Request C. I did not ask the Public Body to explain how the Public Body missed the records at issue in Access Request C, nor did they offer an explanation. I am only looking at it for insight into how the Public Body handled Access Request A.

[32] Access Request C covered a period three months longer than Access Request A. We know some records from April, May and October of 2012 exist because they were found in Access Request B. Records from these three months were not found in Access Request C. It is more likely than not that the Searcher relied on their search results on Access Request A to respond to Access Request C, despite the Searcher's statement that they conducted a separate search for each access request.

[33] As noted, I am not reviewing how the Public Body processed Access Request C. I would not be concerned about a public body relying on an earlier search and response to an access request if it was reasonable in the circumstances. For example, if the access request is the same, and there were no reasonable concerns about the thoroughness of the first search. We have observed other public bodies have relied on an earlier search, with notice to the applicant. In this matter, although the text of the access request was the same, the time span for the access requests were not the same.

[34] I do not think that the Searcher conducted a new search on Access Request C, and the Public Body's results on Access Request C do not help me assess whether the Public Body conducted an adequate search on Access Request A.

iii. Records identified after the initial search

[35] In addition to the records at issue, other records were not found in the initial search. In their submissions, the Public Body advised that "the processing file shows that some of the records processed in [Access Request A] were identified after the initial search." The Public Body referred to the "initial search", and we will too, but in case this expression suggests that there was another supplementary search, it does not appear that anyone conducted another search on Access Request A.

[36] The processing records state that the Public Body found other records when searching for another access request. We do not know the text of the other access request. I considered whether the records could have been discovered when the Public Body processed Access Request C, which was almost identical to Access Request A except it was for three months longer. I dismissed this possibility because, as explained above, I am not persuaded that the Public Body conducted a separate search on Access Request C.

[37] Most of the original 24 pages of responsive records have a date stamp when they were printed on the header or footer. We observe that most of the records were printed on the date on the search form, (August 21, 2019), but about a third were dated about six weeks earlier (July 10, 2019). It is more likely than not that the records with the header and footer date stamps from the previous month are the records identified from the other access to information request, but not found in the initial search.

Conclusion regarding reasonable search

[38] Subsection 8(1) of the *FOIPP Act* requires a public body to make every reasonable effort.

The standard of review on the adequacy of a public body's search is reasonableness in the circumstances. Without other information, a public body missing responsive records known to be in their custody or control may not be enough to find that the Public Body did not conduct an adequate search. People sometimes make honest mistakes.

[39] Completing a search form, or some record of the search efforts, is not a statutory requirement, but it is an efficient and effective way for a public body to defend a later claim that they did not conduct an adequate search. Ordinarily the evidence from search forms is helpful when reviewing the adequacy of a public body's search. However, in this instance, the Searcher was vague in some details. For example, the Searcher did not record the keywords they used in their electronic search. We cannot review whether the keywords the Public Body used in their search were reasonable.

[40] Although, the Searcher is experienced and spent an appropriate amount of time on the search, the Public Body's evidence does not assist much in assessing whether the Public Body made every reasonable effort to identify and locate responsive records.

[41] We are aware of the risk of hindsight bias. Now we know that the Public Body missed the records at issue, but when assessing whether they undertook every reasonable effort, we should consider what they knew at the time. Before they responded to the Applicant, the Public Body knew that:

- the Searcher was frustrated by receiving different results when using the same parameters; and
- the Searcher's initial search missed some responsive records that the Public Body found before they finished processing the request.

[42] I do not fault the APSO analyst or the head of the Public Body for not following up with the Searcher when they learned that the initial search missed some responsive records.

The Searcher advised them that they conducted a search on another nearly identical access request (Access Request C) a few weeks later and advised that they had the same responsive records.

[43] Although the Public Body did not identify the problem, it appears based on the evidence available to us, that there was some problem with this search. Although they were found prior to responding to the Applicant, the Searcher did not find eight pages of responsive records in the initial search, nor did they find the five pages of the records at issue. While I appreciate that an electronic search entails more than pressing a few buttons, I find that a reasonable electronic search would not have missed 13 of 29 pages of responsive records. I find that the Public Body did not conduct an adequate search.

[44] I will briefly address two of the Applicant's repeated concerns. The Applicant believes that someone at the Public Body willfully concealed the records at issue which, if true, would be an offence under the *FOIPP Act*. The Applicant also believes that the Public Body withheld records as privileged but did not advise the Applicant.

a) Privilege

[45] The Applicant mentioned a few times that they believe the Public Body withheld information as subject to privilege but did not advise the Applicant. When asked by the Applicant, the Public Body gave the Applicant a copy of the Public Body's search form for Access Request A. The Searcher checked a box on the form next to the question "Are records subject to legal privilege?" Because of this checkmark, the Applicant believes the Public Body withheld information, claiming it as privileged, but did not tell the Applicant.

[46] In response to this submission, the Public Body advised that they did not consider any of the responsive records to be privileged, including the records at issue, and they did not withhold the records at issue for privilege or any other exception to disclosure.

[47] I reviewed the rest of the search form. The Searcher did not answer the other questions on the form related to privilege (the number of pages subject to legal privilege, and the name of the employee or office that held the privileged records). The Searcher also checked the option "I have no concerns with these records being disclosed". For these reasons, I find that this check on the search form next to the sentence about legal privilege was a minor error in completing the search form. I have no reason to believe the Public Body withheld the records at issue, or other records, as privileged and will not address this further.

b) Offence

[48] The Applicant mentioned a few times that they believe that someone at the Public Body intentionally interfered and willfully concealed documents that were relevant to their lawsuit against the Government of PEI and others. The Courts have a separate process for obtaining records that is not affected by the *FOIPP Act*. It is not obvious to me whether these records were relevant to the lawsuit. But in any event, if this was true, it would be an offence under clause 75(1)(f) of the *FOIPP Act* for someone to willfully conceal records with the intent to evade a request for access to records.

[49] The Applicant asked the Commissioner to hold the Public Body to account and to fine the Public Body. The Courts determine if someone has committed an offence, and whether to fine someone. Our office does not issue fines, but if there is evidence of an offence, subsection 56(4) of the *FOIPP Act* authorizes the Commissioner to disclose this information to the Minister of Justice and Public Safety and Attorney General.

[50] Neither the Commissioner nor I identified any evidence that anyone intended to conceal these records as the Applicant alleges, therefore there was no evidence to give to the

Minister of Justice and Public Safety and Attorney General under subsection 56(4) of the *FOIPP Act*.

VI. FINDINGS

[51] Although no one was able to explain why the records at issue were not found, or identify any systemic problem with the Public Body's searches, I find that the Public Body did not conduct an adequate search, and did not comply with subsection 8(1) of the *FOIPP Act*.

VII. ORDER

[52] Although the Applicant has the records at issue, I am not persuaded that the Public Body conducted an adequate search. I therefore order the Public Body to conduct another search.

[53] In accordance with subsection 68(1.1) of the *FOIPP Act*, the head of the Public Body shall not take any steps to comply with this order until the end of the period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*, RSPEI, 1988, c. J-3.

SGD MARIA MACDONALD

Maria C. MacDonald
Deputy Commissioner