

Issues

- [4] The only issue in this review is whether the Department of Health and the Department of Human Resources conducted a diligent search for the records sought by the Applicant.

Facts

- [5] The Applicant was a GN employee from 1999 to 2011, and again in 2019. After their employment at the Department of Health was terminated near the end of 2019, they filed nine access requests for information related to their employment during the periods 1999-2011 and 2019.
- [6] At the suggestion of the department's ATIPP Coordinator, seven of the requests were consolidated into one request to the Department of Health, and two requests were consolidated into one request at the Department of Human Resources. (The Department of Human Resources provides certain human-resources functions for all public bodies, as well as providing advice and leadership on human resources matters throughout the GN. It is often implicated in access requests related to employment issues within the GN.)
- [7] The processing of the Applicant's ATIPP requests did not proceed smoothly. The government-wide ransomware attack in November 2019 created data-retrieval issues that affected this file and many others. The COVID-19 pandemic, and subsequent shutdown of GN offices, dramatically slowed response times for this file and many others. When disclosure was made, it was not always complete. There were other problems too. This file generated two Review Reports on ancillary matters: *Review Report 21-182 (Re)*, 2021 NUIPC 1 (CanLII) and *Department of Health (Re)*, 2021 NUIPC 7 (CanLII).
- [8] The Applicant's personnel file for 2019 was disclosed to the Applicant in January 2020, and the Applicant's personnel file for 1999 to 2011 was disclosed to the Applicant in October 2020.

- [9] Currently, there is only one outstanding issue: the Applicant's annual performance appraisals. The Applicant expected the performance appraisals to be in the personnel files, but they were not there. Neither the Department of Health nor the Department of Human Resources has been able to locate them. I will have more to say about the two departments' search for the performance appraisals in the Analysis section below.
- [10] The Applicant's initial position was there should be a performance appraisal for each year of their employment. It appears, however, that the Applicant's employment in 2019 was not long enough for an annual performance appraisal to have been completed. Moreover, the Applicant was seconded to the federal government from 2009 to 2011, and it appears to be the practice that no performance evaluation is done during a secondment. The search for performance appraisals has therefore been narrowed to the period 1999-2009. The Applicant remembers participating in annual performance appraisals during that time.
- [11] The Applicant asks for a review of the department's failure to produce the performance appraisals.

Law

- [12] An applicant has "a right of access to any record in the custody or under the control of a public body": ATIPPA, s 5(1).
- [13] The head of a public body "shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay": ATIPPA, s 7(1). This is often referred to as "the duty to assist".
- [14] There is nothing else in the ATIPPA itself about what "every reasonable effort" means. I have found reference in case reports to "diligent search", "reasonable search", "thorough search", "full search", "comprehensive search" and "exhaustive search", and various combinations of these

adjectives. I prefer the term “diligent search” and that is the term I will use in this report.

[15] In *Department of Education (Re)*, 2021 NUIPC 10 (CanLII), I explained what it means to do a diligent search:

[24] In Ontario, the search required of a public body is described this way: “A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request”: *Municipality of Chatham-Kent (Re)*, 2019 CanLII 108986 (ON IPC) at paragraph 15; *Health Professions Appeal and Review Board (Re)*, 2018 CanLII 74224 (ON IPC) at paragraph 11.

[25] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner: *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). This case is especially pertinent because the language of Alberta’s “duty to assist” is the same as Nunavut’s, and because the case involves the search for a specific document that had definitely existed, but could not now be found.

[26] The adjudicator in *University of Lethbridge* gives this explanation of the source of the public body’s duty, and the kind of evidence required to show “reasonable efforts”:

[para 7] A public body’s obligation to respond to an applicant’s access request is set out in section 10, which 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 8] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7).

[para 9] 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:

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

[27] I adopt this explanation of the ATIPPA search requirement, along with the stipulation from the Ontario cases that the search should be conducted by “an experienced employee knowledgeable in the subject matter of the request”.

[16] In the *Department of Education* case from which this statement of the law is taken, I concluded that the department had not met the standard of a diligent search, and recommended the department keep looking.

Analysis

[17] In this case, I have concluded that the departments did conduct a diligent search for the Applicant's performance appraisal. They have done what the ATIPPA requires of them, though the search has come up dry. In this section, I will explain how I reached that conclusion.

Has the Applicant met the “some basis” threshold?

- [18] There is a threshold question that has to be answered in every “diligent search” case, and that is whether there is some basis for believing that the requested record exists at all: *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner.
- [19] The “some basis” test is a low threshold. It requires some evidence, but not much, from which it is reasonable to conclude that the record probably exists. The purpose of the “some basis” test is to prevent the public body expending time and effort on searches based only on an applicant’s subjective belief that a document must exist or should exist or might exist.
- [20] In this case, the Applicant states that they have a clear recollection of doing performance appraisals during the 1999-2009 stretch of employment with the GN. The GN has not suggested that the performance appraisals did not happen. Indeed, according to the GN’s Human Resources Manual, Section 316, compliance with the performance management system is mandatory for all employees and supervisors, and the system includes annual performance appraisals. Although a written policy does not mean that every GN employee has a performance appraisal every year, the lends support to the Applicant’s recollections.
- [21] The Applicant has met the “some basis” threshold.

Where should the performance appraisals be?

- [22] The structure of the GN’s human resources management is that each department has its own HR division, while overall guidance and support is provided by the Department of Human Resources. This structure can be confusing at times, since “HR” can refer either to the HR division of the home department, or to the Department of Human Resources.

- [23] Performance appraisals are typically handled by the home department's HR division. According to the GN Human Resources Manual, Section 316, "A copy of the review will be kept on the employee's personnel file. A signed copy will also be provided to the employee."
- [24] These days, performance appraisals and other HR documents are kept on a digital drive, commonly referred to as "the Y drive". But that procedure has been in place for perhaps four or five years. During the period in question (1999-2009), the performance appraisals were kept in hard-copy personnel files in the employee's home department. Under normal circumstances, the performance appraisals would not have been sent to the Department of Human Resources.
- [25] Occasionally a performance appraisal would have been sent to the Department of Human Resources, but only if it became part of an employee relations matter on which HR was assisting the home department. In that case, HR would keep the performance appraisal in the personnel file they keep for GN employees.
- [26] After an employee's employment with the GN ends, their personnel file is sent to the records management division of the Department of Community and Government Services (CGS) for storage. Personnel files are archived and held for fifty years from the termination date of the employee.
- [27] Despite the fact that performance appraisals were more likely to be found in Health than in Human Resources, it was Human Resources that initially took the lead in trying to find them.

Did Human Resources conduct a diligent search?

- [28] On February 8, 2021, the Department of Human Resources wrote to the Applicant to say that the department was unable to find the performance appraisals.

- [29] On February 15, 2021, I wrote to HR, asking for detailed information about their search. On March 3, 2021, HR replied to my detailed questions with detailed answers in a seven-page letter. I was satisfied the answers were complete and direct.
- [30] In brief, HR had retrieved the Applicant's personnel file from CGS. This was the file that was disclosed to the Applicant in October 2020. When the Applicant advised that the performance appraisals were missing, HR contacted the manager of the staffing division of HR, the manager of HR at Health, and the director of HR at health. None of them could locate any additional files with the Applicant's performance appraisals.
- [31] The only suggestion HR could make was that the performance appraisals, if they still exist at all, might be somewhere in the Department of Health. That is where, according to normal procedures, the performance appraisals should have been.
- [32] I am satisfied that the Department of Human Resources met its legal obligation for a "diligent search" for the Applicant's performance appraisals.

Did Health conduct a diligent search?

- [33] At this point, the focus turned back to Health. HR had provided me with a one-line e-mail from the Director of Human Resources at Health, saying "I wanted to confirm that we have not been able to locate any of [the Applicant's] performance evaluations from 1998 to 2011."
- [34] On March 4, 2021, I wrote to Health asking the same sort of detailed questions that I had already asked HR. On March 25, 2021, Health replied to my detailed questions.
- [35] In brief, Health looked through the Y drive, but found no performance appraisal there. They retrieved a personnel file from a storage area where the file was being prepared for archiving. (This was not the file for the 1999-2011 period.) Health confirmed that no performance appraisal was

done during the Applicant's period of employment in 2019. None of the Applicant's managers from 1999-2011 were still working with the GN, so the existence of a performance appraisal could not be confirmed with them. The people in Health who led the search were sufficiently senior and experienced in what to look for.

- [36] I was not entirely satisfied with the answers from Health. As a follow-up, I asked for a meeting with the Director of Human Resources. I also asked Health to retrieve from CGS all archived files concerning the Applicant. When the files arrived from CGS on April 1, 2021, I went to the offices of the Department of Health and personally went through them, together with the Director of Human Resources and the department's ATIPP Coordinator.
- [37] There was a great deal of detail in the Applicant's personnel files for the 1999-2011 period – e.g. hiring, relocation expenses, various kinds of leave, secondment – but there were no performance appraisals.
- [38] The department's ATIPP coordinator had one last idea. If the Applicant or their supervisors had e-mailed the performance appraisals, a search of the e-mail archives might locate them. It was a long shot, because the paper-based process in 1999-2009 made it unlikely that the appraisals had been scanned and e-mailed. I concluded it was worth a try, and so postponed the writing of this Review Report until we had the results.
- [39] With the Applicant's help, a list of supervisor names was compiled, and requests were made to the CGS Helpdesk for the archives. It took a considerable period of time, up to a few days before the date of this decision, for the e-mail archives to be produced. Unfortunately, no performance appraisals were found.

The Applicant's position

- [40] The Applicant is naturally disappointed with the result. They believe the performance appraisals "...will assist me in my grievance of my dismissal and any further legal remedies I may ... request of the GN." I am

somewhat doubtful that performance appraisals from 12-22 years ago would carry much weight in court, but that is not for me to say. If the records exist and can be found, the Applicant has a right under the ATIPPA to receive them.

- [41]** The Applicant goes further, and suggests that the GN is deliberately denying disclosure of the performance appraisals in order to weaken the Applicant's case against the 2019 termination. The belief that documents are being deliberately withheld is not unusual among applicants. I have seen it in other cases, especially where the applicant feels aggrieved by their treatment at the hands of the GN; or where processing has been inordinately delayed; or where a document that ought to be in the file cannot be found. All of those elements are present in this case. The Applicant's frustration is perhaps understandable.
- [42]** In my role as Commissioner, I can go only on the evidence before me. In this case, the evidence is that both Health and Human Resources undertook detailed, good-faith efforts to find the performance appraisals. I am sure the performance appraisals happened as the Applicant recalls, but that does not mean the resulting paperwork was correctly handled and filed. Everything was done on paper, even as recently as 2009. Maybe the appraisals were not filed at all. Maybe they were misfiled. We do not know, and will probably never know, why they are not where they are supposed to be.
- [43]** The ATIPPA does not require perfection or promise guaranteed retrieval. It requires "every reasonable effort". I find that the two departments have made every reasonable effort to find the Applicant's performance appraisals.

Conclusion

[44] The Department of Health and the Department of Human Resources met their legal obligation to conduct a diligent search for the performance appraisal records sought by the Applicant.

Recommendations

[45] I make no recommendation for further search. It goes without saying that if the performance appraisals are found at some point in the future, they should be immediately disclosed to the Applicant.

Graham Steele

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