

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-09

April 30, 2012

ALBERTA TREASURY BRANCHES

Case File Number F5419

Office URL: www.oipc.ab.ca

Summary: The Applicant, the Alberta Union of Provincial Employees, made a request to Alberta Treasury Branches for access to records containing information about the number of employees of Alberta Treasury Branches excluded from the bargaining unit, the number of classifications excluded from the bargaining unit, policies regarding classification, and job descriptions of excluded positions.

Alberta Treasury Branches refused to respond to the access request on the basis that responsive records would be “in the control or custody of a treasury branch” within the terms of section 4(1)(r) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) and therefore the FOIP Act did not apply to them.

The Adjudicator found that the *Alberta Treasury Branches Act* (ATBA) distinguishes between Alberta Treasury Branches, which is established by section 2 of that Act as a corporate entity, and “a treasury branch,” which is an entity created by Alberta Treasury Branches under section 10 of the ATBA. She found that the FOIP Act distinguishes between the terms “Alberta Treasury Branches” and “a treasury branch” in the same way that the ATBA does. When it refers to “Alberta Treasury Branches”, the legislature is referring to the body corporate created by section 2 of the ATBA, and when it refers to a treasury branch, it is referring to a treasury branch created by Alberta Treasury Branches under section 10.

She found that there were two categories of records relating to Alberta Treasury Branches that are subject to the FOIP Act: records in the custody or control of Alberta Treasury Branches that are not in the custody or control of a treasury branch, and records in the control of a treasury branch that document a non-arm's length transaction as defined by the FOIP Act. As she determined that Alberta Treasury Branches had not yet addressed the question of whether records in the former category might exist, nor conducted a search for them, she ordered Alberta Treasury Branches to do so.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 72; *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008 Schedule 1; *Alberta Treasury Branches Act*, R.S.A. 2000, c. T-7, ss. 1, 2, 3, 10; *Interpretation Act* R.S.A. 2000 c. I-8, ss. 10, 28; *Personal Information Protection Act*, S.A. 2003, c. 6-5, s. 4; *Personal Information Protection Act Regulation*, Alberta Regulation 366/2003 - 51/2010, s. 2; *Public Service Employees Relations Act*, R.S.A. 2000 c. P-43, s. 12

Authorities Cited: AB: Orders 96-005, 98-019, 99-033, F2002-014, P2006-005, F2008-023, P2010-007, F2010-023, F2011-016, F2011-020

I. BACKGROUND

[para 1] On March 26, 2010, the Alberta Union of Provincial Employees (the Applicant) requested access to the following information from Alberta Treasury Branches:

The number of employees of the Public Body currently excluded from the bargaining unit represented by the Alberta Union of Provincial Employees, who are excluded pursuant to the provisions of Section 12(1)(f) of the *Public Service Employee Relations Act*.

The number of classifications currently excluded, the names of those classifications, and the number of employees of the Public Body working in each of those classifications.

Any policies of the Public Body currently in effect regarding classification to the above referenced positions.

All job or classification descriptions for the above referenced positions.

[para 2] On May 21, 2010, Alberta Treasury Branches wrote the Applicant to inform it that it considered the records to be subject to section 4(1)(r) of the FOIP Act, and therefore exempt from the application of the FOIP Act.

[para 3] The Applicant requested review by the Commissioner of Alberta Treasury Branches' decision that section 4(1)(r) applies to the records it requested.

[para 4] The Commissioner decided to conduct a written inquiry to resolve the issue between the parties. Both parties exchanged initial and rebuttal submissions.

II. ISSUE

Issue A: Are the records requested by the Applicant excluded from the application of the FOIP Act by section 4(1)(r)?

III. DISCUSSION OF ISSUE

Issue A: Are the records requested by the Applicant excluded from the application of the FOIP Act by section 4(1)(r)?

[para 5] Alberta Treasury Branches argues that the Applicant has requested records subject to section 4(1)(r). It reasons:

Generally the Act does not apply to records in the custody or control of ATB.

However, the Act applies where requested records, in the custody or control of ATB, relate to a “non-arm’s length transaction” between the Government of Alberta and another party.

Essentially, the records requested by AUPE must fulfill certain requirements before AUPE will be entitled to disclosure of the requested records. Based on section 4(1)(r) of the Act, those requirements are as follows:

- 1) There must be a “record” in the custody or control of a treasury branch; and
- 2) The “record must relate to a “non-arms length transaction” “between the Government of Alberta and another party.”

...

There must be “a record of information in any form” by which to enable ATB to respond to the access request.

The nub of AUPE’s request is for positions excluded by ATB from the AUPE bargaining unit pursuant to section 12(1)(f) of the Public Service Employee Relations Act R.S.A. 2000 c. P-43 (PSERA)...

...

The AUPE access request assumes that persons excluded from their bargaining unit have been excluded from the bargaining unit because they fall within one of the PSERA exclusions. It also presumes ATB’s classifications reflect the Province’s classifications as outlined in PSERA. Neither of those assumptions are accurate.

ATB’s approach for exclusion of employees from the AUPE bargaining unit has been based on whether the employees are “employed in administrative or support services”. ATB’s employees have been excluded from AUPE’s bargaining unit if they are not employed in “administrative or support services”, which is consistent with both AUPE’s certificate with ATB and ATB’s past collective agreements with AUPE.

Therefore, simply put, ATB does not have such records within its custody or control because ATB has not excluded any employees from AUPE’s bargaining unit based on section 12(1)(f) of PSERA. This includes those documents which ATB provided to the Commissioner circa December 7, 2010, for its limited purpose of determining any potentially-affected third parties to this inquiry.

[para 6] Alberta Treasury Branches argues that only those records within its custody or control that disclose the details of non-arm's length transactions, within the terms of section 4(4) of the FOIP Act, are subject to the FOIP Act. It also argues that even if this were not the case, the Applicant has made a request for records that do not exist since its classifications are not based on the provincial classification system created by the *Public Service Employee Relations Act* (PSERA).

[para 7] In turn, the Applicant argues:

ATB Financial refused to provide the requested records on the grounds that such records were exempt under section 4(1)(r) of the Act as being "a record in the custody or control of a treasury branch" and not "a record that relates to a non-arm's length transaction between the Government of Alberta and another party."

AUPE submits that the requested records do not fall within the exemption set forth in section 4(1)(r). Section 4(1)(r) was intended to protect the records accumulated by the ATB acting as a financial institution, and was not meant to exempt the records which AUPE has requested, based on the following:

1. The Information and Privacy Commissioner ("Commissioner") has stated that the scheme of the Act is that records pertaining to the ATB's business as a banking institution are not subject to the Act normally;
2. The Act states that records "that relate to a non-arm's length transaction between the Government of Alberta and another party" are subject to the Act, thereby implying that only records relating to other banking "transactions" are exempt from the Act;
3. The Commissioner has interpreted section 4(1)(r) as exempting banking transaction records including loans, guarantees and personal account information;
4. The ATB is listed as a "public body" subject to the Act, and
5. To interpret section 4(1)(r) as exempting the requested records would obstruct the labour relations process and it must not have been the intent of the Legislature when it enacted privacy legislation in this province.

[para 8] Section 4(1)(r) exempts a class of records from the scope of the FOIP Act. It states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (r) a record in the custody or control of a treasury branch other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party;*

If a record is in the custody or control of a treasury branch, then the FOIP Act does not apply to it and an applicant has no right of access to the record under the Act unless it relates to a non-arm's length transaction as defined in the FOIP Act.

What does it mean to have custody or control of a record?

[para 9] Previous orders of this office have considered what it means to have custody or control of records.

[para 10] In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

Under the Act, custody and control are distinct concepts. "Custody" refers to the physical possession of a record, while "control" refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

[para 11] In Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term "custody" was defined as the physical possession of a record, whereas the term "control" was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that "bare" possession of information does not amount to custody, as the word "custody" implies that there is some right or obligation to hold the information in one's possession (Order F2009-023).

[para 12] In Order F2010-023, I said:

In section 6 of the FOIP Act, the word "custody" implies that a public body has some right or obligation to hold the information in its possession. "Control," in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

I find that the question "Does the Public Body have a right to obtain the records?" must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

[para 13] The phrase "custody or control" refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. "Custody or control" also imparts the notion that a public body has duties and rights in relation to a record, such as the duty to preserve or maintain records, or the right to destroy them.

[para 14] Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 15] Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said that an entity, such as a treasury branch, has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records.

What is "a treasury branch"?

[para 16] The next question to consider is to what the phrase, "a treasury branch," refers within the context of section 4(1)(r). As both the Applicant and Alberta Treasury Branches point out in their submissions, the *Interpretation Act* defines the term "treasury branch" when it is used in an enactment of Alberta. Section 28(1)(ddd) of that Act states:

28(1) In an enactment,

(ddd) "treasury branch" means a treasury branch within the meaning of the Alberta Treasury Branches Act;

[para 17] A "treasury branch" is defined in the *Interpretation Act* by reference to the ATBA. Section 1 of the ATBA states, in part:

1 In this Act,

(k) "treasury branch" means a treasury branch established under section 10, whether the branch carries on business with the public directly or serves as an administrative or head office;

[para 18] Section 10 of the ATBA states:

10 Alberta Treasury Branches may establish and operate treasury branches at any location within Alberta.

[para 19] A treasury branch, then, within the terms of section 28(1)(ddd) of the *Interpretation Act*, and therefore, section 4(1)(r) of the FOIP Act, is a treasury branch established by Alberta Treasury Branches pursuant to section 10 of the ATBA where public or administrative business is conducted.

Is Alberta Treasury Branches a Public Body under the FOIP Act?

[para 20] Schedule 1 of the Freedom of Information and Protection of Privacy Regulation establishes that “Alberta Treasury Branches” is a public body within the terms of section 1(p)(ii) of the FOIP Act.

Is Alberta Treasury Branches “a treasury branch” within the terms of section 4(1)(r) of the FOIP Act?

[para 21] Section 2 of the ATBA states:

2(1) There is hereby established a corporation with the name “Alberta Treasury Branches”, consisting of the board of directors appointed under section 3.

(2) For the purpose of carrying on its business, Alberta Treasury Branches has the capacity and, subject to this Act and the regulations, the rights, powers and privileges of a natural person.

(3) Alberta Treasury Branches is for all purposes an agent of the Crown in right of Alberta, and may exercise its powers under this Act only as an agent of the Crown in right of Alberta.

(4) An action or other legal proceeding in respect of a right or obligation acquired or incurred by Alberta Treasury Branches on behalf of the Crown in right of Alberta, whether in the name of Alberta Treasury Branches or in the name of the Crown in right of Alberta, may be brought or taken by or against Alberta Treasury Branches in the name of Alberta Treasury Branches in any court that would have jurisdiction if Alberta Treasury Branches were not an agent of the Crown in right of Alberta.

[para 22] “Alberta Treasury Branches” is a corporation created by section 2 of the ATBA. It is given the powers of a natural person and an agent of the Crown under the ATBA. Section 2(1) establishes that the entity known as “Alberta Treasury Branches” consists of a board. The powers and duties of the Board are set out in section 3 of the ATBA, which states:

3(1) The Lieutenant Governor in Council may appoint a board of directors and a chair of the board.

(2) The board shall manage the business and affairs of Alberta Treasury Branches.

(3) The board may delegate to any director, to a committee of directors or to any officer or employee of Alberta Treasury Branches any of the board's powers and duties under this Act except

- (a) the power to make a recommendation under section 6,*
- (b) the power to make bylaws under section 8, and*
- (c) the board's duties under section 16.*

(4) The board may designate the offices of Alberta Treasury Branches, other than the office of Chief Executive Officer, and appoint persons to those offices and specify their duties.

[para 23] Alberta Treasury Branches is not established under section 10 of the ATBA, and is therefore not a treasury branch within the terms of section 1 of the ATBA. For this reason, it is not a treasury branch within the terms of section 28(1)(ddd) of the *Interpretation Act*, and, by reference, is not a treasury branch under section 4(1)(r) of the FOIP Act. Alberta Treasury Branches is assigned powers under section 2 and 3 of the ATBA; a treasury branch may exercise only the powers delegated to it by Alberta Treasury Branches.

[para 24] Had the legislature intended to the FOIP Act to apply to the Public Body solely in relation to records containing information about non-arm's length transactions, as Alberta Treasury Branches argues, this objective could have been achieved in a manner consistent with the ATBA and the *Interpretation Act*, by substituting "Alberta Treasury Branches" for "a treasury branch" in section 4(1)(r). However, the legislature did not do so.

[para 25] From my review of the relevant legislation, I conclude that while Alberta Treasury Branches may establish a treasury branch, it is not in itself a treasury branch, and the two terms are not synonymous.

Records in the custody or control of "treasury branches"

[para 26] Given that section 4(1)(r) applies to information over which a treasury branch would have custody or control, and given that treasury branches are offices where the business of Alberta Treasury Branches is transacted, within the terms of section 1(k) of the ATBA, it follows that the records contemplated by section 4(1)(r) would be those that document transactions, financial or otherwise, that the treasury branch is authorized to enter on behalf of Alberta Treasury Branches. A treasury branch entering a transaction

with a client would have rights and responsibilities over information regarding the transaction. Consequently, it could be said that such a treasury branch would have custody or control over records documenting the transaction, which would have the effect of excluding such records from the scope of the FOIP Act.

[para 27] As established in the ATBA, a “head office” is also “a treasury branch”. Records in a head office might also include records documenting the administration of the business of treasury branches.

[para 28] I recognize that records in the custody and control of a “treasury branch” may also be in the custody or control of Alberta Treasury Branches in the sense that the latter may have the power to obtain them; indeed, it seems likely this would be the case for many such records. However, the converse is not true. There may be records in the custody or control of Alberta Treasury Branches, acting through its Board, that are not in the custody or control of a “treasury branch”, in the sense that a treasury branch would not have custody over them or a right to demand them from the board of directors. I find that the reference in section 4(1)(r) to records in the custody or control of “a treasury branch” does not refer to records in the custody or control of Alberta Treasury Branches, consisting of its board of directors, unless these records are also in the custody or control of a “treasury branch,” by which I mean that a treasury branch would have the legal right to demand them from the board of directors.

[para 29] In my view, records that are in the custody or control solely of Alberta Treasury Branches but not in the custody or control of a “treasury branch” remain subject to the FOIP Act, as do records in the custody or control of a “treasury branch” that document “non-arm’s length transactions”.

Earlier decisions of this office

[para 30] In Order 96-009, in which he considered section 4(1)(m), (now section 4(1)(r)), the former Commissioner Clark stated:

In other words, records related to ATB transactions are not accessible under the Act unless there has been some government involvement (as defined) in the transaction.

In that case, an applicant had requested records relating to the identities of employees who had approved loans. The former Commissioner decided that this information related to an arm’s length ATB transaction and was therefore not subject to the FOIP Act.

[para 31] Order 96-009 does not refer to the provisions of the *Interpretation Act* or the *Alberta Treasury Branches Act* that were in force at the time that order was made or that the former Commissioner may have considered in arriving at his decision. However, the request for access under review was made on February 2, 1996, which indicates that the relevant statute in force at the time was the *Treasury Branches Act R.S.A., 1980 c. T-7*. Under that legislation, “a treasury branch” was defined as an “Alberta Treasury Branch,” which was a branch of the Alberta Treasury under section 2(2) of that Act and which included the board of directors. Under that scheme, records in the control or

custody of the board of directors would also have been in the custody or control of “a treasury branch.” In contrast, I am bound by the legislation that was in force at the time of the Applicant’s access request, and which does create a distinction between Alberta Treasury Branches, established under section 2 of the ATBA, and “a treasury branch” created under section 10 of that Act. Given that the legislative scheme under review in Order 96-009 was different than the one before me, I find that Order 96-009 can be distinguished on that basis.

[para 32] In Order 99-033 the former Commissioner said:

In my view, the definition of “treasury branch” focuses on the business structure of the Alberta Treasury Branches system, rather than on a particular business location of a treasury branch (i.e., a “treasury branch facility”, as defined by section 1(l) of the *Alberta Treasury Branches Act*). Because the Public Body operates the entire system, I do not believe that a treasury branch can be considered to be an entity separate and distinct from the Public Body. It follows that the records produced anywhere within the Alberta Treasury Branches system cannot be considered to be within the custody or control of any particular treasury branch facility.

I conclude that a record in the custody or control of a treasury branch refers to a record located anywhere within the Alberta Treasury Branches system, including a record located at the head office of the Public Body.

Section 1(l) of the ATBA, to which the former Commissioner referred, defines a “treasury branch facility” as “real property that is used or intended to be used in connection with or incidental to the operations of Alberta Treasury Branches.”

[para 33] I disagree with the former Commissioner Clark’s analysis, as it does not attribute to the phrase “a treasury branch” the definition imposed by section 28(1)(ddd) of the *Interpretation Act*, which would apply to the phrase “a treasury branch” in section 4(1)(r) of the FOIP Act. Moreover, his analysis does not acknowledge that there is a distinction between Alberta Treasury Branches consisting of, and operating through, its board of directors, and a treasury branch operating on behalf of Alberta Treasury Branches through its employees.

The effect of PIPA and the PIPA Regulation

[para 34] As the Applicant notes, order P2006-005 states the following;

As FOIPPA does not apply to the Organization [Alberta Treasury Branches/ ATB Financial], the Organization denied the request on October 8, 2003. However, on December 18, 2003 the Applicant submitted the request again, this time under the *Personal Information Protection Act* (the Act), to which the Organization would be subject once the Act was in force on January 1, 2004. The Applicant also requested additional records containing her personal information created by two other employees of the Organization.

The statement that “FOIPPA does not apply to the Organization” suggests that the FOIP Act has no application to Alberta Treasury Branches or to ATB Financial. In my view, this statement is not entirely accurate. Rather, the FOIP Act applies to records in the custody of control of Alberta Treasury Branches, but would not apply to records in the

custody or control of ATB Financial, which is an entity created by Alberta Treasury Branches under section 10 of the ATBA, unless the records contained information regarding a non-arm's length transaction.

[para 35] In my view, the Personal Information Protection Act Regulation, (the PIPA Regulation) on which the Commissioner appeared to rely in Order P2006-005, is not intended to oust the jurisdiction of the FOIP Act over records in the custody or control of Alberta Treasury Branches.

[para 36] Section 4(2) of the *Personal Information Protection Act* (PIPA) establishes that that Act does not apply to information in the custody or control of a public body. It states:

4(2) Subject to the regulations, this Act does not apply to a public body or any personal information that is in the custody of or under the control of a public body.

As noted earlier, Alberta Treasury Branches, and its subsidiaries (which term may include "a treasury branch or branches"), are public bodies under the FOIP Act.

[para 37] However, this provision is expressed to be subject to the regulations. Section 2 of the PIPA regulation states:

2(1) The Act applies to Alberta Treasury Branches and its subsidiaries and to any personal information that is in the custody of or under the control of Alberta Treasury Branches or any of its subsidiaries.

(2) Notwithstanding subsection (1), any records of Alberta Treasury Branches and of any of its subsidiaries that are subject to the Freedom of Information and Protection of Privacy Act remain subject to that Act.

The question is thus which records that are in the custody and control of Alberta Treasury Branches or its subsidiaries are subject to the FOIP Act.

[para 38] Section 4 of the FOIP Act establishes the kinds of records that are not subject to the FOIP Act. As discussed above, section 4(1)(r) provides that records in the custody and control of "a treasury branch" are not subject to the FOIP Act, with the exception of "non-arm's length" transactions. Therefore, records in the custody and control of a treasury branch or branches that do not record non-arm's length transactions are subject to PIPA in relation to any personal information they may contain.

[para 39] As discussed above, records that are in the custody and control of Alberta Treasury Branches, the corporate entity established under section 2 of the ATBA, but not in the custody and control of "a treasury branch" established under section 10 of the ATBA are subject to the FOIP Act and therefore, according to the PIPA Regulation, are not subject to PIPA.

The records at issue in the inquiry

[para 40] In view of the foregoing analysis, the question that arises is whether the records that are the subject of the Applicant's access request would be in the custody or control of Alberta Treasury Branches or in the custody or control of "a treasury branch". In my view, it is possible that any responsive records that may exist would be in the custody or control of Alberta Treasury Branches, and not a treasury branch, given that section 7 of the ATBA grants Alberta Treasury Branches the authority to engage employees.

7 Alberta Treasury Branches may engage employees for the purpose of carrying on the business of Alberta Treasury Branches and may determine their conditions of service.

[para 41] In addition, section 8 of the ATBA authorizes Alberta Treasury Branches to make bylaws governing the management of its business and affairs and to conduct its business.

8(1) Subject to this Act and the regulations, the board may make bylaws governing

- (a) the management of the business and affairs of Alberta Treasury Branches, and*
- (b) the calling and conduct of board meetings and the conduct of the business of the board generally.*

[para 42] In view of the authority given to Alberta Treasury Branches by these provisions, it is possible that information regarding classifications and job descriptions is in its custody or control, but not in the custody or control of a "treasury branch". As I have not been presented with evidence as to how classifications or job descriptions are developed or brought into force within the scheme of the Alberta Treasury Branches organization I cannot state conclusively that Alberta Treasury Branches does, or does not, have responsive records in its custody or control. Rather, responsive records may potentially exist solely within the custody or control of Alberta Treasury Branches, and Alberta Treasury Branches has not submitted any evidence that would enable me to discount this possibility.

[para 43] As discussed above, in my view there are two categories of records relating to Alberta Treasury Branches to which the FOIP Act applies: those in the custody or control of Alberta Treasury Branches but not a treasury branch, and those in the custody or control of a treasury branch that document a non-arm's length transaction as defined under the FOIP Act. In its submissions, as set out above, Alberta Treasury Branches states at paragraph 7 that only records documenting non-arm's length transactions are subject to the FOIP Act. From this I infer that it has not turned its mind to the possibility that records responsive to the access request may be subject to the FOIP

Act if they are in the custody or control of Alberta Treasury Branches, but not “a treasury branch”.

[para 44] Moreover, as discussed above, I am unable to discount the possibility that records relating to employment classifications and job descriptions are in the sole custody or control of Alberta Treasury Branches, given its statutory powers and duties.

[para 45] If there are responsive records in the custody or control of Alberta Treasury Branches, but not of “a treasury branch”, Alberta Treasury Branches has a duty to assist the Applicant in relation to them. I will therefore order Alberta Treasury Branches to assist the Applicant by determining whether there would be responsive records in the custody or control of Alberta Treasury Branches. If there are such records, then Alberta Treasury Branches must conduct a reasonable search for these records.

The PSERA Issue

[para 46] The Applicant argues:

The argument asserted by the ATB that it did not exclude certain employees from AUPE’s bargaining unit based on the 12(1)(f) exemption and therefore does not have any records responsive to AUPE’s request, is, with respect, nonsensical. The listed classifications, or the classifications of employees performing substantially similar duties to a person employed in that position classification are not included in a bargaining unit, by operation of law.

[para 47] From its arguments, I understand that Alberta Treasury Branches argues that the access request is ambiguous, or, alternatively, is a request for records that do not exist because of the reference to section 12 of PSERA. Alberta Treasury Branches presents an interpretation of the scope of PSERA that differs from that of the Applicant.

[para 48] In its exchangeable submissions, Alberta Treasury Branches argues that, in any event, it does not have records in its custody or control that would be responsive to the access request. As set out above, Alberta Treasury Branches states:

The AUPE access request assumes that persons excluded from their bargaining unit have been excluded from the bargaining unit because they fall within one of the PSERA exclusions. It also presumes ATB’s classifications reflect the Province’s classifications as outlined in PSERA. Neither of those assumptions are accurate.

ATB’s approach for exclusion of employees from the AUPE bargaining unit has been based on whether the employees are “employed in administrative or support services”. ATB’s employees have been excluded from AUPE’s bargaining unit if they are not employed in “administrative or support services”, which is consistent with both AUPE’s certificate with ATB and ATB’s past collective agreements with AUPE.

Therefore, simply put, ATB does not have such records within its custody or control because ATB has not excluded any employees from AUPE’s bargaining unit based on section 12(1)(f) of PSERA. This includes those documents which ATB provided to the Commissioner circa December 7, 2010, for its limited purpose of determining any potentially-affected third parties to this inquiry.

However, in its *in camera* submission, which preceded its exchangeable one, Alberta Treasury Branches did not take this approach. Rather, it raised concerns as to the amount of time that it would take to identify responsive records. Its subsequent open submission appears to involve a change in its position in this regard, or, possibly, it presents a different interpretation of the Applicant's access request and the kinds of records that would be responsive to it. It is possible that the interpretation of the access request presented in the exchangeable submissions is one that overlooks the Applicant's obvious intention in making the request, in favour of a narrower interpretation of its language.

[para 49] Additionally, I note that in its initial reply to the Applicant, Alberta Treasury Branches stated that it would "decline access to all of the requested records", which also indicates that at one point, certainly, it thought there were records that were responsive to the access request.

[para 50] As Alberta Treasury Branches has presented different interpretations of the Applicant's access request at different times, it is clear that it views the request to be open to different interpretations, with one being more restrictive, such that there would be no responsive records, while the other is broader, with the result that there may be many responsive records.

[para 51] When a public body views an access request as open to more than one possible interpretation, it is necessary to consult with the applicant in order to determine the intent of the request and to avoid unilaterally adopting an unreasonable interpretation. In Order F2011-016, the Adjudicator considered previous orders of this office commenting on the duties of public bodies to interpret access requests reasonably. He said:

The Applicant submits that the Public Body was too restrictive in its interpretation of the information that he requested and therefore overlooked responsive records. Previous Orders of this Office have said that a record is responsive if it is reasonably related to an applicant's access request and that, in determining responsiveness, a public body is determining what records are relevant to the request (Order 97-020 at para. 33; Order F2010-001 at para. 26). The Applicant argues that applicants should be given some latitude under the Act when framing their access requests, as they often have no way of knowing what information is actually available. I note Orders of this Office saying that a broad rather than narrow view should be taken by a public body when determining what is responsive to an access request (Order F2004-024 at para. 12, citing Order F2002-011 at para. 18).

[para 52] In that order, the Adjudicator found that the public body in that case had taken too restrictive an approach in its interpretation of the kinds of information requested by the Applicant, with the result that it failed to locate records responsive to the access request. Similarly, in Order F2011-020, I found that a public body had failed to meet its duty to assist an applicant because it had adopted an overly narrow interpretation of the access request.

[para 53] In Order F2011-016, the Adjudicator also said:

Because the Public Body took an overly restrictive view of the information that the Applicant was seeking, in view of both the wording of his initial access request and the clarification

subsequently provided by him, I find that the Public Body did not adequately search for responsive records and therefore did not meet its duty to assist the Applicant under section 10(1) of the Act. I intend to order it to conduct another search for responsive records, bearing in mind the scope of the information that the Applicant actually requested, as discussed above.

I agree with this reasoning. If a public body interprets a request for records too restrictively, or wrongly, the public body runs the risk of unilaterally narrowing the scope of the access request and failing in its duty to assist the Applicant, by failing to search for records falling within the scope of the access request.

[para 54] Consequently, to determine which of the interpretations of the access request Alberta Treasury Branches has offered for this inquiry better reflects the intention of the Applicant in requesting the records, Alberta Treasury Branches may benefit from consulting the Applicant to obtain clarification in this regard.

Conclusion

[para 55] I find that Alberta Treasury Branches has not established that it has conducted an adequate search records responsive to the access request that may be within the custody or control of Alberta Treasury Branches but not in the control or custody of “a treasury branch”.

[para 56] I will therefore order it to determine whether the kinds of records that would be responsive are in the custody or control of Alberta Treasury Branches, but not of “a treasury branch”, and to conduct an adequate search for responsive records if it determines that they are.

IV. ORDER

[para 57] I make this Order under section 72 of the Act.

[para 58] I order Alberta Treasury Branches to assist the Applicant within the terms of section 10(1) of the Act, by determining whether there would be records responsive to the access request in the custody or control of Alberta Treasury Branches, but not “a treasury branch” and conducting an adequate search for such records if it determines that there are.

[para 59] I further order Alberta Treasury Branches to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator