



Office of the Information and  
Privacy Commissioner of Alberta

# Investigation Report F2019-IR-02

*Investigation into Alberta Justice and Solicitor General's  
alleged destruction of records responsive to access requests*

**November 14, 2019**

*Alberta Justice and Solicitor General*

*Investigation 009330*



## Commissioner's Message

I opened this investigation after troubling details emerged in three applications for authorization to disregard access requests submitted by Alberta Justice and Solicitor General (JSG) under the *Freedom of Information and Protection of Privacy Act* (section 55 applications). Section 55(1) of the FOIP Act provides me with exclusive power to authorize a public body to disregard certain requests.

In April, May and June 2018, JSG brought three section 55 applications to disregard five access requests. All of the requests were for closed circuit television recordings at the Calgary Remand Centre. The videos were on a recording system which automatically overwrites video records after 30 days.

In its section 55 applications, JSG requested that I advise them to secure the responsive video records if they were to be preserved. Upon discovering those statements, I requested JSG to confirm whether it had preserved the responsive records. JSG informed me that all responsive records had been overwritten. I initiated this investigation in response.

During this investigation it was determined that the information provided by JSG in its section 55 applications was inaccurate. Three of the access requests were for records that had never existed. JSG did not know at the time it submitted the section 55 applications that those records did not exist. This investigation found that JSG did not preserve responsive records for the remaining two access requests.

When an applicant makes an access request, it triggers a duty on the public body to preserve all potentially responsive records, including transitory records. Ensuring responsive records are preserved is preliminary to and separate from processing the records. This duty to preserve is fundamental to a public body's duty to assist applicants under section 10(1) of the FOIP Act. Public bodies must comply with this duty no matter how they choose to respond to a request, including when they apply to me to disregard the request.

The failure by JSG to ensure that responsive records were preserved compromised the integrity of the access to information process, and did not comply with the GoA's rules relating to the destruction of records (i.e. records must be preserved when subject to an access request). JSG also failed to respect my exclusive power under the FOIP Act to authorize a public body to disregard certain requests. Had I ordered JSG to process these requests, it would not be in a position to do so. Furthermore, as JSG acknowledges, when it makes a section 55(1) application, asking the Commissioner to take active steps to ensure that responsive records are preserved is inappropriate and unacceptable.

It is hoped that the recommendations in this report will guide JSG and correctional staff when handling access requests for video surveillance and/or bringing forward section 55 applications.

Jill Clayton  
Information and Privacy Commissioner



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## Background

[1] On May 1, May 14 and June 21, 2018 respectively, the Information and Privacy Commissioner (Commissioner) received three applications from Alberta Justice and Solicitor General (the Public Body), made under section 55(1) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act), requesting authorization to disregard five access requests made by an inmate (the Applicant) to the Calgary Remand Centre (CRC). All five access requests were for CCTV video recordings. The Commissioner opened three case files: #008539, #008660, and #009008.

[2] On June 28, 2018, the Office of the Information and Privacy Commissioner's (OIPC) review of the three section 55 applications found they each contained wording similar to the following:

Please note that the video records that are requested are on a 30-day loop and have not been secured. The Public Body requests the OIPC to advise if they want the Public Body to secure the video records. A response is required by [...] in order to ensure that the video records are secured before the 30-day loop.

[3] On June 29, 2018, the Commissioner wrote to the Public Body and requested immediate confirmation as to whether the records responsive to the access requests had been destroyed. She stated:

I should not have to tell Alberta Justice and Solicitor General that it is required to preserve and not destroy any and all records that are responsive to these access requests while these matters are before me.

[4] The former Deputy Minister for the Public Body responded in letters dated July 12 and 19, 2018. The July 12<sup>th</sup> letter stated:

We have conducted inquiries and have confirmed that the videos were on an analog recording system and that they were overwritten after 30 days. I have been advised that they are not recoverable.

The approach taken by the public body was inappropriate. Requesting your office to take an active step to prevent the destruction of records subject to an access request is unacceptable and does not reflect JSG's guidance or corporate culture, or that of the GoA.

[5] On July 31, 2018, the Commissioner issued decisions for the three section 55 files.<sup>1</sup> The decision for file #009008 states:

I am extremely concerned about Alberta Justice and Solicitor General's destruction of records that are responsive to an access request under FOIP. I am aware that this same destruction of

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<sup>1</sup> Available at [https://www.oipc.ab.ca/media/949260/Section\\_55\\_Alberta\\_Justice\\_2018\\_1.pdf](https://www.oipc.ab.ca/media/949260/Section_55_Alberta_Justice_2018_1.pdf), [https://www.oipc.ab.ca/media/949257/Section\\_55\\_Alberta\\_Justice\\_2018\\_2.pdf](https://www.oipc.ab.ca/media/949257/Section_55_Alberta_Justice_2018_2.pdf), and [https://www.oipc.ab.ca/media/949263/Section\\_55\\_Alberta\\_Justice\\_2018\\_3.pdf](https://www.oipc.ab.ca/media/949263/Section_55_Alberta_Justice_2018_3.pdf).

responsive records has occurred in two other JSG applications under section 55(1) (OIPC File Nos. 008539 and 008660). My decisions in those matters are being issued concurrently.

I have opened a new file to investigate Alberta Justice and Solicitor General's destruction of responsive records.

- [6] On the same date, the Commissioner wrote to the former Minister for the Public Body advising that she was opening an investigation under section 53(1)(a) of the FOIP Act to investigate the destruction of the responsive records. Section 53(1)(a) reads:

**General powers of Commissioner**

53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records...

- [7] The Commissioner authorized me to conduct this investigation. This report sets out my findings and recommendations.



## Jurisdiction

- [8] The FOIP Act applies to all records in the custody or under the control of a public body with some exclusions as set out in section 4(1).
- [9] “Public body” is defined in section 1(p)(i) of the FOIP Act to include “a department, branch or office of the Government of Alberta”. The Public Body is a department of the Government of Alberta (GoA). Alberta’s correctional and remand centres are program areas of the Public Body.<sup>2</sup> Therefore, the Public Body is responsible for responding to access requests under the FOIP Act for records which are in the custody or under the control of a provincial correctional institution, including the CRC.
- [10] Section 1(q) of the FOIP Act defines “record” as follows:
- (q) “record” means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records
- [11] The video records requested by the Applicant under the FOIP Act are “records” as defined in section 1(q).

## Issues

- [12] The Commissioner opened this investigation in order to investigate the destruction of records responsive to the Applicant’s access requests. The following main issues were identified for my investigation:
- Did the Public Body destroy records responsive to an access request?
  - If the Public Body destroyed records, was the destruction in compliance with rules relating to the destruction of records?
  - Did the Public Body contravene section 92(1)(g) of the FOIP Act?
  - Did the Public Body comply with its duty to assist the Applicant under section 10(1) of the FOIP Act?
- [13] I also conducted a broad review of how access requests are handled by the Public Body in the CRC context, including how requests for video recordings are addressed. This was done in order to identify any gaps and to assist the Public Body in meeting its duties under the FOIP Act.

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<sup>2</sup> Correctional centres normally house inmates serving sentences of up to 2 years and remand centres house those awaiting trial.

## Methodology

[14] I took the following steps as part of this investigation:

- Interviewed CRC staff involved in administering access requests and securing video recordings and the Alberta Infrastructure technologist responsible for managing the CCTV system.
- Reviewed the system used at the CRC to view, retrieve and store video records.
- Interviewed the Public Body's FOIP staff involved with the processing of the access requests and submitting the section 55 applications.
- Received and reviewed written responses from the Public Body's former Deputy Minister to questions from the Commissioner.
- Reviewed records relating to the intake, processing, decision-making and disposition of the access requests and section 55 applications under review.
- Reviewed records related to the creation, retention and destruction of video recordings created by the CRC.
- Reviewed records related to records management training for CRC staff and responding to access requests under the FOIP Act and informal requests, and the Public Body's delegation matrix.

## Analysis and Findings

### Issue 1: Did the Public Body destroy records responsive to an access request?

- [15] Section 6(1) of the FOIP Act states that, “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”.
- [16] In order to obtain access to a record, a person must make a request, in writing, to the public body that the person believes has custody or control of the record (sections 7(1) and (2)).
- [17] A public body must respond to a request within 30 days of receiving it, unless the timeline has been extended as authorized by the FOIP Act. Sections 12 and 13 of the Act prescribe the contents of the Public Body’s response to an applicant.
- [18] In this case, between April 24 and June 20, 2018, the Public Body received five access requests from the Applicant for CCTV recordings. The Applicant had submitted six earlier access requests of a similar nature in April 2018. By May 1, he had submitted 12 requests in 2018, in addition to seven requests in 2017.
- [19] According to Alberta Correctional Services Division’s Adult Centre Operations Branch (ACOB) policies, individuals in custody at provincial correctional institutions, including a remand facility, may make formal access requests under the FOIP Act or informal requests which are processed outside of the Act.<sup>3</sup>
- [20] Applicants can make an access request by using an official access request form or by writing a letter which requests records and references the FOIP Act. Informal requests can be verbal or in writing, and may be on an “RFI”. An RFI is a form used by inmates to request information, materials, assistance and/or meetings from various people/program areas. Once the RFI is responded to or addressed, the inmate receives a copy of the RFI with the response. An RFI can also contain an access request, however, if it refers to the FOIP Act. Corrections staff are usually the first to receive these requests, although applicants can forward requests directly to the Public Body’s FOIP Office.
- [21] As per ACOB policies, corrections staff are permitted to process informal access requests. These requests are to be actioned within 30 days of receipt and satisfied to the fullest extent possible outside the FOIP Act. According to the Public Body’s FOIP staff, the unofficial guidance is that correctional centres may process simple requests and requests for

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<sup>3</sup> ACOB Policy 3-2.3, section 1 defines a “formal request” as a request for information that makes reference to the FOIP Act and is in writing. It may be in any form, such as a letter or RFI form. Section 3 states that a request for information shall be considered an “informal request” where no reference is made to the FOIP Act. For similar definitions see Policies 3-2.2, section 1 and 3-2.4, section 1.

information from inmates under 40 pages. However, formal access requests must be forwarded to the Public Body's FOIP Advisor to be processed in accordance with the Act.<sup>4</sup>

- [22] ACOB policies also require each correctional facility to have an "identified FOIP Coordinator" whose role is to "make decisions regarding information requests using the principles of the FOIP Act, develop procedures, provide consultation to staff regarding FOIP issues and provide any reporting information as requested by the department's FOIP advisors."<sup>5</sup>
- [23] The CRC Deputy Director fulfills this role for CRC. He coordinates all access requests within CRC and processes informal access requests. At times during this investigation he referred to himself as the "FOIP Coordinator" for CRC, although in a subsequent interview, he indicated he is not a "FOIP Coordinator" but acknowledged that he fills the role of the "FOIP Contact" at the CRC. Although ACOB policies also refer to this role as a "FOIP Coordinator", the Public Body's former Deputy Minister clarified that the correct title is the line area "FOIP Contact" for the Public Body.
- [24] As the FOIP Contact, the CRC Deputy Director receives and reviews an access request and determines whether it is an access request under the FOIP Act or an informal request. He also assists inmates if the request needs to go to a different GoA department's FOIP Office or to a federal body. He generally forwards access requests to the Public Body's FOIP Office within 24 hours by fax, followed by a hard copy by mail. However, if he is away or the requests are forwarded by other staff, there could be a lag time of up to three to six days. He stated that the FOIP Office usually responds to him within one to two days. If a request is straightforward, however, such as a request for case notes or information that does not exist, he will process it himself, so as not to inundate the Public Body's FOIP Office. However, all requests for video recordings and more complex requests are forwarded to the Public Body's FOIP Office.
- [25] Another CRC staff member, whom I shall refer to as the Assistant, identifies and secures video recordings that are responsive to an access request and provides them to the CRC Deputy Director for his review. However, the Deputy Director told me that the Assistant requires his verbal authorization before securing any videos.
- [26] I was advised by the CRC Deputy Director that CRC's general practice was not to preserve video records responsive to an access request until the Public Body's FOIP Office directed it to do so, unless it related to a serious incident or, in some cases, if the 30-day retention period was approaching. The Deputy Director was concerned that there would be an "avalanche" of access requests if inmates knew that the CRC would automatically "pull" videos and in his view there should be limits to what inmates may ask for to address

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<sup>4</sup> Section 10(1) of the FOIP Act makes the head of a public body responsible for the public body's response to access requests under the Act. The head can delegate some responsibilities to others, such a FOIP coordinator, usually by way of a delegation instrument (FOIP section 85). The Assistant Deputy Minister, Corporate Services Division has the delegated authority for the Public Body to make decisions in relation to responding to access requests. The Public Body's FOIP Coordinator is delegated to make decisions relating to the administrative handling of access requests and to respond to requests for an applicant's personal information. See also ACOB Policy 3-2.2, standards 11(d), 12(e), procedures 3-5, 9-14; Policy 3-2.3, standards 2-4; Policy 3-2.4, standards 1-2.

<sup>5</sup> ACOB Policy 3-2.2, Standard #4.

frivolous requests. However, I was told that since being advised of the current investigation, CRC has been preserving all responsive video recordings.

- [27] In the case at hand, the Applicant's five access requests were made using official access request forms. Upon receipt, the CRC Deputy Director forwarded the requests to the Public Body's FOIP Office. However, he did not direct his staff to preserve the responsive video recordings. He made this decision based on the following:
- the limited staffing available for video retrieval demands;
  - the perceived frivolousness of the requests; and
  - the general practice of awaiting direction from the Public Body's FOIP Office before securing video records.
- [28] The Public Body's FOIP Office received the access requests, and prepared submissions under section 55 of the FOIP Act requesting authorization from the Commissioner to disregard the requests.
- [29] The Public Body's FOIP Office did not direct CRC staff to preserve the video records that were responsive to the access requests. In an email dated April 25, 2018, a FOIP Advisor for the Public Body informed the CRC Deputy Director that if the CCTV footage had not yet been secured for one of the requests "you do not need to secure the records until further notice." Instead, the Public Body's section 55 submissions asked the Commissioner to advise it if the records were to be secured.
- [30] As part of my investigation, I reviewed the Applicant's access requests with CRC staff. During this review, CRC staff discovered that there were, in fact, no responsive records for three of the Applicant's access requests, as the CCTV camera in question was not functional. This information was not known to the Public Body's FOIP Office at the time it prepared its section 55 applications.
- [31] Nonetheless, it appears there were records responsive to two of the Applicant's access requests, and those records were overwritten (as confirmed by the former Deputy Minister's July 12, 2018 letter to the Commissioner). I find that the Public Body destroyed records responsive to an access request.

#### Recommendations

- CRC staff should preserve all responsive records, particularly video records, as soon as an access request is received, without waiting for direction from the Public Body's FOIP Office.
- The Public Body should clarify the roles of the line area FOIP Contact and the Public Body's FOIP Coordinator and ensure that the correct titles assigned to these roles are reflected in ACOB policies.

- The Public Body should provide training to CRC staff involved in handling access requests which should include:
  - distinguishing between informal and access requests;
  - conducting adequate preliminary reviews of access requests;
  - the duty to preserve responsive records, including video records, the process for preserving records and the difference between preserving and processing video records;
  - locating and retrieving records in response to access requests; and
  - the importance of complying with the FOIP Act, regardless of one's views about an individual access request or the merits of an application to disregard.
- The Public Body should periodically review decisions made by CRC staff as to what constitutes access requests versus informal requests to ensure that access requests are being processed in accordance with the FOIP Act and the Public Body's delegation matrix.

## Issue 2: If the Public Body destroyed records, was the destruction in compliance with rules relating to the destruction of records?

- [32] Under section 53(1)(a)(i) of the FOIP Act, the Commissioner has the power to conduct investigations to ensure compliance with rules relating to the destruction of records set out in any enactment of Alberta. Section 1(3) of the *Freedom of Information and Protection of Privacy Regulation* defines an “enactment of Alberta” as “an Act or regulation or any portion of an Act or regulation.”
- [33] Section 14(2) of Schedule 11 of the *Government Organization Act* enables the *Records Management Regulation* (RM Regulation), which establishes the rules GoA departments must follow when it comes to management of records in their custody.
- [34] Section 4 of the RM Regulation makes the Minister of Service Alberta responsible for establishing a records management program, which all other GoA departments, including the Public Body, must follow. Sections 10 and 11 make the department deputy head responsible for ensuring that the department prepares records retention and disposition schedules for all records under its control and that records are only destroyed in accordance with policies established under section 4(2). Section 4(2) reads:
- 4(2) For the purpose of providing the details for the operation of the records management program, the Minister may establish, maintain and promote policies, standards and procedures for the creation, handling, control, organization, retention, maintenance, security, preservation, disposition, alienation and destruction of records in the custody or under the control of departments and for their transfer to the Provincial Archives of Alberta.
- [35] In this case, the former Deputy Minister informed me that the CRC’s CCTV system runs on roughly a 30-day loop, after which video is overwritten if it is not secured beforehand. The Public Body said that these records are retained and disposed of in accordance with the GoA’s Transitory Records Schedule (1995/007-A001), item #6 “information of short term value.”
- [36] The Transitory Records Schedule (the Schedule) defines transitory records as:
- ...records in any media that
- will have no further value to government beyond an immediate and minor transaction; or
  - will only be required for a short time, until they are made obsolete by an updated version of a record or by a subsequent transaction or decision.
- Transitory records are not required to meet statutory obligations or to sustain administrative or operational functions and are not filed in official records systems.
- [37] The Schedule delegates authority to destroy transitory records to every GoA employee and enables the immediate destruction of transitory records.

[38] Despite this, Service Alberta’s guidance document , “Official and Transitory Records: A Guide for Government of Alberta Employees” (the Guide),<sup>6</sup> makes clear that “transitory records *cannot* be routinely destroyed when there is a FOIP request or litigation.” Under the heading “When There Is a FOIP Request or Litigation” it states:

**If a FOIP request is received, the ability to routinely destroy transitory records is suspended until the access request has been processed and any appeal or appeal period has been completed.** It is an offence to wilfully destroy records during this time. The same is true during litigation and discovery. GoA legal counsel, your FOIP Coordinator, SRO and/or IM manager are responsible for notifying staff when a FOIP request has been received or a legal action is underway. [emphasis added]

[39] Service Alberta’s “FOIP Guidelines and Practices Manual” also says:

**Public Bodies must not dispose of any records relating to a FOIP request after it is received, even if the records are scheduled for destruction under an approved records retention and disposition schedule.**

This includes any e-mail and transitory records relevant to the request that may exist at the time the request is received. **In effect the receipt of a FOIP request freezes all disposition action relating to records responsive to the request until the public body has responded to the request, the Commissioner has disposed of any complaint or request for review, and all time limits relating to the exercise of rights by parties have passed.**<sup>7</sup> [emphasis added]

[40] As soon as an access request is received, a public body has a duty to preserve and not destroy responsive records, even if they are transitory. This duty is well documented in previous OIPC investigation reports and orders<sup>8</sup>, as well as the above-referenced Service Alberta publications.

[41] The “duty to preserve” extends to all access requests, regardless of how a public body intends to address a request, including if it brings an application for authorization to disregard.

[42] In this case, the Public Body received the Applicant’s access requests well before the expiration of the 30-day overwriting period. It received two requests four days after the date of the requested video surveillance, and the others eight, 11 and 23 days afterwards respectively. Therefore, at the time of the requests, the responsive video records (where they existed) had not yet been overwritten. Although the videos were transitory records (since they were not required by ACOB policy or other operational requirements to be retained), once the access requests were received the Public Body was required to ensure the videos were preserved.

[43] As such, I find that the destruction of the video recordings was not in compliance with the GoA’s rules relating to the destruction of records. As noted above, it is the responsibility of

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<sup>6</sup> Government of Alberta, *Official and Transitory Records: A Guide for Government of Alberta Employees*, at pp. 6-7, October 2015, available online at <https://www.alberta.ca/assets/documents/IM-Transitory-Records-Guide.pdf>.

<sup>7</sup> Service Alberta’s FOIP Guidelines and Practices Manual (2009) at page 70. This document is available from <https://open.alberta.ca/publications/9780778585633>.

<sup>8</sup> OIPC Investigation Reports F2016-IR-01 at para. 35; F2019-IR-01, at page 7, footnote 1. See also Order F2014-10 at para. 26.



the Deputy Head of the Public Body to ensure that records are managed and destroyed in compliance with the GoA's records management policies, standards and procedures.

#### Recommendation

- The Public Body should ensure that CRC staff involved in handling access requests are made aware of applicable records management policies.

### Issue 3: Did the Public Body contravene section 92(1)(g) of the FOIP Act?

- [44] I have already found that the Public Body in this case destroyed records that were responsive to an access request, and that the destruction was not in compliance with rules respecting the destruction of records.
- [45] I next considered whether anyone involved with the access requests or section 55(1) applications contravened section 92(1)(g) of the FOIP Act, which makes it an offence to wilfully destroy records with the intent to evade an access request. Section 92(1)(g) reads:
- 92(1) A person must not **wilfully**
- (g) destroy any records subject to this Act, or direct another person to do so, **with the intent** to evade a request for access to the records. [emphasis added]
- [46] A person who contravenes one of the offence provisions in section 92(1) can be fined up to \$10,000.
- [47] To determine whether section 92(1)(g) applies, the investigation must find that:
- records subject to the FOIP Act were destroyed; and
  - the destruction was wilful and with the intent to evade requests for access to those records (OIPC Investigation Reports 99-IR-003, 99-IR-004, 2001-IR-004 [37]).
- [48] If the Commissioner believes that there are reasonable and probable grounds that an offence has been committed, then the matter is referred to the Crown Prosecutor for a determination as to whether further proceedings are warranted (OIPC Investigation Report 2001-IR-010, paras. 46-47).
- [49] In this case, neither the Public Body's FOIP staff nor CRC staff preserved the videos responsive to the two access requests for which records existed. Consequently, the records were overwritten and cannot be recovered.
- [50] In my view, the failure to preserve the responsive videos in this case amounted to "destroying records" under section 92(1)(g). No steps were taken to interfere with the scheduled overwriting of responsive video records, despite staff knowing about the 30-day overwriting period and having roughly 19 and 26 days from the receipt of the two access requests to intervene.
- [51] In my view, however, the destruction of the records in this case was not wilful. It was not done with the intent to evade a request for access. My conclusion is based on the following:
- In its section 55 submissions, the Public Body informed the Commissioner that the records had not yet been preserved and requested her to advise by certain dates if she wanted the records preserved. While this approach was misguided, it suggests that the Public Body was not trying to evade the requests.

- The Director stated that in choosing not to secure the videos, it was not the Public Body's intention to allow records to be destroyed and evade an access request. Rather, it was to explain to the Commissioner why, in the Public Body's view, no actions should be taken on those requests from the beginning. The Director believed the access requests on their face met the criteria to disregard and the application would be granted. He anticipated that the Public Body would either receive a decision from the Commissioner on the section 55 applications or be directed to preserve the records prior to the 30-day loop. He did not realize that the deadlines had passed without receiving a response from the OIPC, and as such did not follow up.

[52] In this case, I find that the Public Body's failure to preserve responsive records does not amount to an offence under section 92(1)(g) because the destruction was not done wilfully with the intent to evade an access request.

## Issue 4: Did the Public Body comply with its duty to assist the Applicant under section 10(1) of the FOIP Act?

[53] Section 10(1) of the FOIP Act reads:

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.

[54] Section 10(1) imposes a broad general duty upon public bodies to assist applicants. A public body's obligations under section 10(1) are triggered by an access request and continue throughout the request process.

[55] Despite these provisions, section 55 of the FOIP Act authorizes a public body to apply to the Commissioner for authorization to disregard an access request(s) in certain circumstances. Further, the processing of a request ceases when a public body has made such a request. Section 55 reads as follows:

55(1) If the head of the public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if

(a) because of their repetitious or systemic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1) and

(a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;

(b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.

[56] In this case, the Public Body received five access requests from the Applicant, and made three section 55 submissions to the Commissioner requesting authorization to disregard the requests. The Public Body requested the OIPC "...advise if they want the Public Body to secure the video records. A response is required by [...] in order to ensure that the video records are secured before the 30-day loop."

[57] The Commissioner asked the Public Body to confirm whether the records responsive to the five access requests had been preserved. In order to respond, the Public Body's FOIP staff consulted with CRC staff who manage the recording system. CRC staff confirmed that the records had not been preserved and were not recoverable, without apparently turning their minds to the camera functionality and realizing that for three of the requests, no records ever existed that could be overwritten.

[58] The former Director and FOIP Coordinator (the Director) for the Public Body explained the decisions and actions taken on the section 55(1) applications as follows:

- they were not aware that there were no responsive records for three of the requests;
- they made the section 55(1) applications based on a belief that the requests were frivolous and vexatious, not whether there were records or not;
- they felt that it would be vexatious to do any work on the requests, including securing responsive videos, which would take work away from legitimate requests; and
- they felt that it would be too onerous to bring forward the section 55(1) applications and secure the videos, given the burden it placed on the CRC.

[59] The Director made the decision to ask the Commissioner to advise the Public Body if she wanted the records preserved in the section 55(1) submissions. He said that the Public Body tried to make the request clear in its submissions. The Public Body's FOIP staff believed that the access requests were, on their face, frivolous and vexatious and so were asking for a quick response. They had hoped the Commissioner would either issue a decision before the 30-day loop or direct them to preserve the records.

[60] Section 55(2) states that the "processing" of an access request ceases during the intervening period between an application under section 55(1) and the Commissioner's decision.<sup>9</sup> This section relieves a public body from taking any further actions in respect of a request until the Commissioner issues a decision. If the request is granted, processing does not resume. If the request is denied, a public body must proceed with processing the request.

[61] In my view, although section 55(2) relieves a public body from processing a request pending the Commissioner's decision, it does not relieve a public body from its duty to *preserve* responsive records. Any other interpretation would frustrate the intent and purpose of section 55, which is to confer exclusive jurisdiction on the Commissioner to authorize a public body to disregard a request. As the Commissioner stated in her decisions on the section 55 applications:

Regardless of a public body's belief in the merits of a section 55(1) application, bringing an application under section 55(1) of FOIP does not guarantee a public body will be granted authorization to disregard a request. Further, a public body does not have authorization under FOIP to destroy records that are the subject of an access request during the intervening period between its application under section 55(1) and my decision.<sup>10</sup>

[62] In OIPC Order F2016-58, the Adjudicator found that a public body had failed to meet its duties under section 10 when it did not include certain records in its response to the

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<sup>9</sup> "Processing" is not expressly defined in the FOIP Act. However, section 11(3) of the FOIP Regulation AR 186/2008 (the Regulation) states that "processing of a request will not commence until the initial fee has been paid." Similarly, section 14(1) states "processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately upon the receipt of an agreement to pay the fee." Section 13(1) and Schedule 2 of the Regulation set out services for which the Public Body can charge an applicant, which include "searching for, locating and retrieving a record".

<sup>10</sup> Section 55 Decision: Alberta Justice and Solicitor General, July 31, 2018 (OIPC file 008539) at para. 10.

Applicant, despite the fact that the records were within the scope of the access request and the public body was aware of the records at the time of the request and knew they were responsive.<sup>11</sup> The public body then destroyed the records, relying on its retention schedule. The Adjudicator stated at para. 39:

Section 92(1)(g) of the FOIP Act makes it an offense to wilfully destroy any records subject to the FOIP Act with the intent of evading a request for access. In this case, I do not believe the Public Body destroyed the records in order to evade a request for access. Rather, it destroyed records on the mistaken assumption that they were not subject to the FOIP Act. **While its destruction of the records may not amount to an offence under the FOIP Act, it does result in a failure to respond to the Applicant openly, accurately, and completely within the terms of section 10 of the FOIP Act.** [emphasis added]

- [63] In Order F2010-022, at para. 88, the Adjudicator stated, “A public body’s destruction of records [in contravention of section 92(1)(g)] would also necessarily mean that the public body failed to respond to the applicant openly, accurately and completely under section 10.”<sup>12</sup>
- [64] I appreciate the volume of requests for correctional records and how it may be frustrating to take steps in furtherance of access requests which are the subject of an application to disregard. In this case, however, the Public Body was required to preserve the video records responsive to the access requests at issue, even when they were the subject of applications for authorization to disregard.
- [65] I find that the Public Body’s failure to preserve records constitutes a breach of its duty to assist the Applicant under section 10(1) of the FOIP Act. Despite deciding to submit a request to disregard, the Public Body should have informed the relevant program area(s) staff of the request and instructed them to preserve any responsive records while the matter was before the Commissioner. If a request is for video records which are automatically deleted after a short retention period, steps should be taken to prevent the destruction of those records. The same holds true for any records subject to a retention schedule which may provide for their destruction.

#### Recommendation

- CRC staff should preserve all responsive records, particularly video records, as soon as an access request is received, without waiting for direction from the Public Body’s FOIP Office.

<sup>11</sup> Order F2016-58 is available at <https://www.oipc.ab.ca/media/768669/F2016-58Order.pdf>.

<sup>12</sup> Order F2010-022 is available at <https://www.oipc.ab.ca/media/125683/F2010-022Order.pdf>.

## Additional Issues

- [66] As noted previously in this report, my investigation included a broad review of how access requests are handled by the Public Body in the CRC context, including how requests for video recordings are addressed. This was done in order to identify any gaps and to assist the Public Body in meeting its duties under the FOIP Act. The following paragraphs summarize what I was told about the Public Body's CCTV system, including video retrieval, preservation, editing, redaction and retention by the CRC.
- [67] The CRC has a combination of analog and digital surveillance cameras in operation. Video recordings have roughly a 30-day retention period, although this was not in a written policy. After 30 days, the recordings are overwritten (if not secured beforehand) and cannot be recovered.<sup>13</sup> When questioned as part of my investigation, however, CRC staff said they did not know whether there is a retention and disposition schedule for its video recordings.
- [68] CRC staff were also not aware of the exact number of cameras in operation, and did not have a policy governing the use of its CCTV system. I was told Alberta Infrastructure is responsible for the management of the CCTV system and maintains an inventory of cameras; however, CRC staff did not have a copy.<sup>14</sup> The CRC Deputy Director and staff person responsible for video retrieval nonetheless stated they are aware of the various cameras' functionality throughout the institution.
- [69] The CRC Deputy Director stated that securing video footage for criminal matters and serious incidents is first priority and that video footage responsive to access requests are "second or third" but he does what he can to address those requests in a timely manner.
- [70] At the time of the access requests in question, the CRC only had one staff member (the Assistant) responsible for all the video retrieval demands for the institution. This includes locating video recordings responsive to access requests, obtaining video records required for serious incidents and institutional disciplinary hearings, responding to criminal disclosure requests and other internal needs. The Assistant carried out these duties in addition to other operational responsibilities. He stated that access requests generally constitute a modest portion of the CRC's overall video retrieval demands.
- [71] The Assistant reviews an access request, goes to the camera(s) with potentially responsive video, accesses the requested date and time and locates the incident. He then exports and saves the video and gives a copy to the CRC Deputy Director to forward to the Public Body's FOIP Office. The saved copy is retained by CRC indefinitely.
- [72] I was given a demonstration of the CRC's video editing software and process. I was told the length of time to process video depends on:

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<sup>13</sup> CRC staff indicated that the storage time for CCTV videos has varied in the past. Once, there was an issue of the system overriding in less than a 30-day loop when the server went down and needed to be updated.

<sup>14</sup> The Public Body's FOIP staff indicated that it is the responsibility of program areas to manage their records, including their video systems.

- the terms of the request (whether the request is for one space or requires following an inmate through the institution);
- the clarity of the request (whether the dates and timeframes provided are accurate); and
- the number of cameras to be checked for potential responsiveness.

[73] The Assistant indicated that for a simple matter it could take five to 10 minutes, whereas an escort through the building could take one to two hours to identify, capture and merge the video footage. He stated that about 80% of his work is video footage requests arising from institutional reports; 20% of his work is access requests.<sup>15</sup>

[74] When a request is made for an incident or transaction involving multiple videos from different camera angles, the Assistant will construct a single video of the incident with the video editing software to produce a continuous stream. However, any required editing or blurring (e.g. to avoid disclosure of others' personal information) is done by the Public Body's FOIP Office. The Public Body's FOIP Office reviews the responsive video footage for any considerations under the FOIP Act and may consult with corrections staff about any concerns with its release, such as security concerns.

[75] The CRC Deputy Director acknowledged that during the time of the access requests at issue, CRC did not have adequate staffing in place to meet all of the video retrieval demands for the institution. For example, I was informed that in February 2018, approximately 30 videos of institutional incidents were not preserved by CRC because other priorities prevented the Assistant from extracting the videos before they were overwritten. The CRC has taken interim steps to address these staffing issues and says that securing all records is high on their priority list. However, as of the time of my visits, a full-time staffing allocation for video retrieval had yet to be formalized.

[76] CRC has no formal surveillance system policy. Amongst other things, there seems to be a lack of clarity concerning for how long copies of video recordings should be stored for.<sup>16</sup>

### Recommendations

- The Public Body should take steps to ensure that CRC has adequate staffing in place on a go-forward basis to meet its video retrieval requirements.
- The Public Body should clearly define the roles and responsibilities of program area staff and the FOIP Office with regard to preserving, retrieving and processing video records. For example, *preserving* responsive video is not the same as processing it. Preserving consists of taking steps to ensure that responsive video footage is set aside so that it is not overwritten or otherwise destroyed.

<sup>15</sup> I note these time estimates are much shorter than the ones provided by the Public Body to the Commissioner in its section 55(1) submissions.

<sup>16</sup> ACOB policies do address the retention and disposition of video recordings for planned use of force events.



It appears that, in some cases, the Assistant responsible for video retrieval does more than just search, locate and retrieve responsive video footage. Constructing a single video from multiple cameras is part of “processing” a video record and consumes time. Processing video records is the responsibility of the Public Body’s FOIP Office. This practice could also raise concerns about the integrity of the records and whether all responsive video footage is provided to the Public Body’s FOIP Office.

- CRC should develop a policy for the operation of its CCTV system. The policy should include such things as:
  - the location and functionality of the various cameras;
  - the use of the system’s equipment, including which personnel are authorized to operate the system and other access controls;
  - where the system creates a record how to deal with the access, use, disclosure, retention and destruction of those records;
  - ensuring reasonable security safeguards are in place to protect against unauthorized collection, use, disclosure or destruction of records; and
  - provisions to ensure compliance with the policy, including training and orientation requirements and consequences for breaches of the policy.
- CRC should review certain security features of its video monitoring system, the details of which will be provided in separate correspondence for security reasons.
- CRC should prepare and submit a privacy impact assessment (PIA) to the OIPC if it changes its surveillance system. A PIA is a due diligence process that identifies and addresses potential privacy risks that may occur in the course of operations, and a project’s overall compliance with the FOIP Act, including its ability to provide individuals access to personal information that is being collected about them and ensuring reasonable security arrangements are in place.

## Summary of Findings

[77] My findings from this investigation are as follows:

- The Public Body destroyed records responsive to an access request.
- The destruction of the video recordings was not in compliance with rules relating to the destruction of records.
- The Public Body's failure to preserve responsive records does not amount to an offence under section 92(1)(g) because the destruction was not done wilfully with the intent to evade an access request.
- The Public Body's failure to preserve records constitutes a breach of its duty to assist the Applicant under section 10(1) of the FOIP Act.

## Summary of Recommendations

[78] I made the following recommendations as a result of my findings from this investigation:

- CRC staff should preserve all responsive records, particularly video records, as soon as an access request is received, without waiting for direction from the Public Body's FOIP Office.
- The Public Body should clarify the roles of the line area FOIP Contact and the Public Body's FOIP Coordinator and ensure that the correct titles assigned to these roles are reflected in ACOB policies.
- The Public Body should provide training to CRC staff involved in handling access requests which should include:
  - distinguishing between informal and access requests;
  - conducting adequate preliminary reviews of access requests;
  - the duty to preserve responsive records, including video records, the process for preserving records and the difference between preserving and processing video records;
  - locating and retrieving records in response to access requests; and
  - the importance of complying with the FOIP Act, regardless of one's views about an individual access request or the merits of an application to disregard.
- The Public Body should periodically review decisions made by CRC staff as to what constitutes access requests versus informal requests to ensure that access requests are being processed in accordance with the FOIP Act and the Public Body's delegation matrix.
- The Public Body should ensure that CRC staff involved in handling access requests are made aware of applicable records management policies.

[79] In addition to the above, I made the following recommendations with respect to the administration of the Public Body's CCTV system:

- The Public Body should take steps to ensure that CRC has adequate staffing in place on a go-forward basis to meet its video retrieval requirements.
- The Public Body should clearly define the roles and responsibilities of program area staff and the FOIP Office with regard to preserving, retrieving and processing video records. That is, *preserving* responsive video is not the same as processing it. Preserving consists of taking steps to ensure that responsive video footage is set aside so that it is not overwritten or otherwise destroyed.

It appears that, in some cases, the Assistant responsible for video retrieval does more than just search, locate and retrieve responsive video footage. Constructing a single video from multiple cameras is part of “processing” a video record and consumes time. Processing video records is the responsibility of the Public Body’s FOIP Office. This practice could also raise concerns about the integrity of the records and whether all responsive video footage is provided to the Public Body’s FOIP Office.

- CRC should develop a policy for the operation of its CCTV system. The policy should include such things as:
  - the location and functionality of the various cameras;
  - the use of the system’s equipment, including which personnel are authorized to operate the system and other access controls;
  - where the system creates a record how to deal with the access, use, disclosure, retention and destruction of those records;
  - ensuring reasonable security safeguards are in place to protect against unauthorized collection, use, disclosure or destruction of records; and
  - provisions to ensure compliance with the policy, including training and orientation requirements and consequences for breaches of the policy.
- CRC should review certain security features of its video monitoring system, the details of which will be provided in separate correspondence for security reasons.
- CRC should prepare and submit a privacy impact assessment (PIA) to the OIPC if it changes its surveillance system. A PIA is a due diligence process that identifies and addresses potential privacy risks that may occur in the course of operations, and a project’s overall compliance with the FOIP Act, including its ability to provide individuals access to personal information that is being collected about them and ensuring reasonable security arrangements are in place.

[80] The Public Body’s former Deputy Minister has already committed to the following actions on behalf of the Public Body, in coordination with Service Alberta:

With the recent consolidation of FOIP resources under Service Alberta’s leadership, I will take their advice to ensure our public body follows a consistent GoA approach to dealing with Applications for Authorization to Disregard Access Requests in the future. In the immediate term for the Public Body, the following has been done or coordinated with Service Alberta (SA):

- The JSG Assistant Deputy Minister, Corporate Services has engaged the SA FOIP Division ED [Executive Director] and discussed how to proceed should any further access requests of this nature (i.e. systemic, repetitive, vexatious) be received or any OIPC submissions be required;
- Any JSG correspondence with the OIPC on such matters will be first reviewed by the SA FOIP Division Executive Director (ED) and then approved by the department decision maker.
- Work will commence as soon as possible (with the program area and SA FOIP division leadership) to develop policy and procedure(s) on how to best deal with access requests of this nature on a go-forward basis.

- JSG will engage SA on FOIP and Information Management (IM) training for the Public Body staff to reinforce IM procedures, knowledge and practices.

With the support of Service Alberta, I will be stressing with JSG staff the need to comply with all requirements of the FOIP Act for all access requests regardless of resource implications and including those for which we plan to submit an Application for Authorization to Disregard Access Requests.<sup>17</sup>

...

While I have put into place some measures to ensure these types of matters are dealt with appropriately, Service Alberta is currently crafting appropriate policy, procedures and training to support all GoA FOIP staff. I expect that you will hear from them with respect to this matter.

[81] With the recent consolidation of FOIP Services into Service Alberta, I encourage the Public Body and Service Alberta to work together to ensure the effective implementation of these recommendations. To this end, I have forwarded a copy of this report to the Deputy Minister of Service Alberta. I request the Public Body report back to me on implementation of the recommendations and commitments outlined in this report, within six months of the date of the report.

[82] Finally, I wish to thank officials and staff at the Public Body and the technologist at Alberta Infrastructure for their assistance in this investigation.

Leanne Salel  
Senior Information and Privacy Manager

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<sup>17</sup> Letter from former Deputy Minister for the Public Body to Commissioner, July 12, 2018.