

**ALBERTA**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**ORDER F2005-020**

June 19, 2006

**ALBERTA HEALTH AND WELLNESS**

Review Number 3197

**Office URL:** <http://www.oipc.ab.ca>

**Summary:** The Applicant made an access request for all records relating to the corporate tax-free status of Alberta Blue Cross. Alberta Health and Wellness (the “Public Body”) requested from the Commissioner a 60-day extension to respond to the request due to the volume of records involved and staff shortages. The extension was granted and one day after the extension expired, the Public Body requested a further extension. As the Public Body was in the process of releasing the records by installment, a final deadline was set by the Commissioner. The Public Body completed the release of documents after the final deadline. The Applicant initially argued that as the Public Body did not release the records as a matter of public interest under section 32, it did not meet its duty to assist under section 10. The Applicant further submitted that by responding after the expiry of the extensions, the Public Body failed to meet its duty to the Applicant as provided by sections 10, 11 (time limit for responding) and 14 (extending time limit). The Commissioner found that as the records were already released, the issue of whether release should have been pursuant to section 32 was moot. With regard to section 10, the Commissioner decided that the Public Body discharged its duty by informing the Applicant as to the requested extensions and the reasons for them. The Commissioner did find, however, that the Public Body did not comply with the time limit for responding to the Applicant as required by section 11 and as permitted by section 14 of the Act.

**Authorities Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(p), 10, 11, 11(1)(a), 14, 14(1)(b), 32, 32(1)(b), 71, 72. *Freedom of Information and Protection of Privacy Regulation 200/95*, ss. 10(2) and 13(1).

**Cases Cited:** *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4<sup>th</sup>) 231.

**Orders Cited: AB:** Orders 96-011, 96-014, Interim Order 97-015, 98-002, 99-005, 2000-014, 2001-024; **B.C.:** Order 04-25.

## **I. BACKGROUND**

[para 1] On June 9, 2004, the Applicant made an access request to Alberta Health and Wellness (the “Public Body”) for:

All records as defined by section 1(p) of the [*Freedom of Information and Protection of Privacy*] Act relating to the corporate tax-free status of Alberta Blue Cross, including all records relating to the decisions to revoke Alberta Blue Cross tax-free status.

[para 2] The Applicant’s initial fee was received by the Public Body on June 14, 2004. On June 22, 2004, the Public Body acknowledged receipt of the access request and initial fee. The Public Body sent the Applicant a fee estimate of \$1,937 and requested a deposit of \$968.50 on July 9, 2004. The Applicant sought a review of the fees from the Commissioner on July 28, 2004.

[para 3] On September 14, 2004, the Public Body wrote to the Applicant informing him that it had waived the fees and that it would be requesting from my office a 60-day extension to respond to the request due to staff shortages and the large volume of records involved. The Public Body estimated that the records covered approximately three cubic feet. On September 16, 2004, I granted an extension to November 15, 2004.

[para 4] On November 16, 2004, the Public Body requested a further extension from my office citing the volume of records involved, staff shortages and other ongoing access requests as grounds for the extension. On November 17, 2004, noting that the Public Body was processing the access request without delay and that the records already were being released in installments, I granted a final extension until December 2, 2004.

[para 5] The records were released as follows:

First installment:	November 17, 2004
Second installment:	December 2, 2004
Third Installment:	December 15, 2004
Final Installment:	December 23, 2004.

## **II. RECORDS AT ISSUE**

[para 6] As the records have now been released they are no longer directly at issue.

### III. PRELIMINARY ISSUE

[para 7] As a preliminary matter, the Applicant's submission has raised for the first time the applicability of section 32(1)(b) of the *Freedom of Information and Protection of Privacy Act* (the "Act"), arguing that since the Public Body did not release the records as a matter of public interest, it did not meet its duty to make every reasonable effort to assist the Applicant under section 10. The relief sought by the Applicant is that the Commissioner confirm that the Public Body is obligated to release the records in the public interest, as provided by section 32(1)(b), and that the Commissioner articulate a set of criteria for the application of that section.

[para 8] Section 32(1)(b) states:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

...

(b) information the disclosure of which is, for any other reason, clearly in the public interest...

[para 9] Section 32(1)(b) places a duty upon the head of a public body to disclose information when the criteria set out in the section are met. The Applicant submits that the Public Body did not make every reasonable effort to assist and respond openly, because it broadly applied exemptions contrary to the public interest. The Applicant, however, has not submitted any evidence that the Public Body at any time attempted to rely on any exceptions to disclosure found in the Act or what sections, if any, were relied on for severing any information. Nor has the Applicant submitted evidence to demonstrate that the information released was clearly in the public interest.

[para 10] Since the Public Body has released the records at issue and claimed no exceptions to disclosure this issue appears moot. Order 99-005 determined that the issue of whether the Commissioner can hear a moot issue is a matter of general policy or practice, as set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R.(4<sup>th</sup>) 231.

[para 11] The Supreme Court of Canada in *Borowski* set out three guidelines to consider when deciding whether to exercise the discretion to hear a moot issue:

1. *The issue must exist within an adversarial context.* That requirement will be satisfied if the adversarial relationship will prevail even though the issue is moot. Consideration must be given whether a party will suffer any collateral consequences if the merits are left unresolved. In this instance, the records requested by the Applicant have now been released. Further, the Applicant's request that this office articulate a set of criteria for the application of section 32 has been previously met by this office, most notably by Commissioner Clark in

Order 96-011 and by Justice Cairns in Order 96-014. There are no issues therefore which exist within an adversarial context.

2. *Judicial Economy*: Consideration must be given whether the decision will have some practical effect on the rights of the parties, whether the case involves a recurring issue and a consideration of the public interest, namely, the social cost of continued uncertainty in the law. In this case, there will be no practical effect on the rights of the parties. Any recurrence of issues regarding the interpretation of section 32 continues to be dealt with by reference to the established orders dealing with that section, and the specific fact situation of each case.
3. *Role of the legislative branch*: Consideration should be given whether exercising discretion would be an intrusion into the role of the legislative branch. The Applicant has argued that there should be a link between the application of section 32 and the duty owed to applicants under section 10. Order 2000-014 stated that section 10 sets out the general duty of public bodies to assist applicants, it does not encompass other, more specific duties set out under the Act. The orders on this issue do not create a link between section 10 and other sections of the Act. Any proposed linkage as argued by the Applicant is a matter best left to the Legislature to consider.

[para 12] I, therefore, decline to exercise my discretion to decide this moot issue.

#### **IV. ISSUES**

[para 13] There are three issues in this inquiry:

- A. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?
- B. Did the Public Body comply with section 11 of the Act?
- C. Did the Public Body properly extend the time limit for responding to a request as authorized under section 14 of the Act?

#### **V. DISCUSSION OF THE ISSUES**

##### **A. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?**

[para 14] Section 71 of the Act is silent regarding who has the burden of proof regarding the applicability of section 10. However, as this section sets out a general duty for public bodies to assist applicants, the Public Body would appear best placed to meet

the burden of proof. Accordingly, the Public Body will bear the burden to establish that it fulfilled its duties under that section.

[para 15] Section 10(1) 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...

[para 16] Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is “reasonable”. In Order 98-002, Commissioner Clark adopted the definition of “reasonable” found in *Blacks’ Law Dictionary* (St. Paul, Minnesota, West Corp., 1999) as “fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view.”

[para 17] The Applicant states that the Public Body did not make every reasonable effort to assist and did not respond accurately and completely, because in severing some of the records, it too broadly applied the exceptions to disclosure found in the Act. The Applicant further contends that at least some of the material excluded was done so to spare the government political embarrassment.

[para 18] The Public Body states that it kept the Applicant regularly informed as to the progress of the access request. It released records in installments in an attempt to respond in a timely manner and assisted the Applicant by processing a fee waiver without receiving a formal request.

[para 19] With regard to the Public Body’s severance of the records, the Applicant has not provided any details as to what records were severed or made reference to any of the sections of the Act relied on by the Public Body. This issue was never raised previously by the Applicant and is now advanced in the vaguest of terms with no supporting evidence.

[para 20] Section 10 requires a public body to respond to an applicant openly, accurately and completely. The section places no additional duties on a public body other than that. I have reviewed the correspondence between the Public Body and the Applicant and it demonstrates that the Public Body discharged its duty by informing the Applicant as to the requested extensions and the reasons for them, at the same time the requests were made to this office. I, therefore, find that the Public Body has fulfilled the general duty to assist under section 10 of the Act.

**B. Did the Public Body comply with section 11 of the Act?**

[para 21] Section 11(1)(a) reads:

- 11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless
  - (a) that time limit is extended under section 14, or
  - ...

[para 22] On June 9, 2004, the Applicant's access request was received, with the Public Body being paid the initial fee on June 14, 2004. Pursuant to section 10(2) of the *Freedom of Information and Protection of Privacy Regulation* (the "Regulation") processing of the Applicant's request commenced on that date. On July 9, 2004, a fee estimate of \$1,937 and a request for a deposit of \$ 968.50 was sent to the Applicant. In accordance with section 13(1) of the Regulation, processing of the request ceased once the fee estimate was forwarded and would recommence immediately upon agreement to pay the fee and upon receipt of 50% of the fees.

[para 23] In this instance, the Applicant, on July 28, 2004, sought a review of the fees by this office. On September 14, 2004, the Public Body informed the Applicant that it had decided to waive the fees related to this request. It further informed the Applicant that it was seeking from this office a 60-day extension to the initial 30-day time limit pursuant to section 14(1)(b).

[para 24] The relevant provisions of section 14 of the Act read:

- 14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
  - ...
  - (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body...

[para 25] The Public Body's request for an extension cited the volume of records requested and shortfalls of manpower and expertise as the reasons for an extension. At this point the Public Body was within the timeframe contemplated by section 14. On September 16, 2004, I granted an extension until November 15, 2004.

[para 26] On November 16, 2004, one day after its initial 60-day extension had expired; the Public Body requested a further extension citing the large volume of records involved in the request, staff shortages and other complex access requests which led to its inability to meet the time limit. On November 17, 2004, noting that the Public Body was currently releasing the records by installments, I granted a final extension until December 2, 2004.

[para 27] The Public Body released the records in four installments, the dates of release being:

First installment: November 17, 2004  
Second installment: December 2, 2004  
Third installment: December 15, 2004  
Fourth installment: December 23, 2004.

[para 28] In my November 17, 2004 extension letter to the Public Body, there was an acknowledgement that the records were to be released by the Public Body in installments. However, I gave no permission for the installments to extend beyond the December 2, 2004 deadline. The Public Body's response to the Applicant made by way of its third and fourth installments of records occurred after the December 2, 2004 extension expired. I, therefore, find that the Public Body did not comply with the time limit for responding to the Applicant, as required by section 11 and as permitted by section 14 of the Act.

**C. Did the Public Body properly extend the time limit for responding to a request as authorized under section 14 of the Act?**

[para 29] In this instance, the Public Body requested an extension one day after the initial 60-day extension expired. The Public Body accordingly failed to properly extend the time limit for responding to the first request, as authorized by section 14 of the Act.

[para 30] In conclusion, I accept the evidence of the Public Body that in attempting to meet this request, the Public Body's staff worked 44 overtime hours in 13 days. However, as was recognized by British Columbia's Commissioner in B.C. Order 04-25 privacy legislation imposes legal obligations on public bodies to respond to access requests within certain timeframes for good reasons. Access delayed can in some cases become access denied where the passage of time causes records to become less relevant than they were when the access request was originally made. When public bodies fail to comply with legislative timeframes, the Act's goals of accountability and openness become increasingly frustrated.

[para 31] Usually, I would order the return of fees paid and order the Public Body to respond to the Applicant. However, in this instance the Public Body has waived fees and has released the records in question. Regrettably, there are no other useful remedies at hand. I can only caution the Public Body and remind it that as far back as Order 98-002, this office has stated that a large number of requests and inadequate resources are insufficient circumstances to justify a failure to respond within the time limits set out under the Act.

## **VI. ORDER**

[para 32] I make the following Order under section 72 of the Act.

[para 33] I find that the Public Body met its general duty to assist the Applicant, as provided by section 10(1) of the Act.

[para 34] I find that the Public Body did not comply with the time limit for responding to the Applicant, as required by section 11 and as permitted by section 14 of the Act.

[para 35] I find that the Public Body did not properly extend the time limit, in its first request for an extension, for responding to a request as authorized under section 14 of the Act.

Frank Work, Q.C.  
Information and Privacy Commissioner