ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-003

May 13, 2011

ALBERTA FINANCE AND ENTERPRISE

Case File Number F5454

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Summary: The Public Body received an access request under the *Freedom of Information and Protection of Privacy Act* (the Act or the FOIP Act) that involved 899 pages of responsive records. It made a decision to withhold a large proportion of the records and to disclose another large proportion. Third parties made a request for review under section 65(2) of the Act with respect only to the Public Body's decision to disclose approximately 20 pages of the records. The Public Body effectively ceased processing the request at that time, taking the position that it was not to respond to any part of the request until the Commissioner's office had completed the request for review.

The Commissioner found that this was not the correct procedure to be followed. He ordered the Public Body to respond to the Applicant with respect to all the responsive records other than those that were the subject of the request for review under section 65(2) of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 12, 12(1)(b), 12(1)(c), 13, 14, 14(1), 14(1)(c), 14(1)(d), 14(3), 30, 31, 31(1), 31(2), 65(2), 72.

Orders cited: AB: Order 2000-014; F2004-026.

Authorities Cited: Service Alberta, *FOIP Guidelines and Practices Manual* (2009).

I. ISSUES

[para 1] The issues set out in the Notice of Inquiry are as follow:

1. Did the Public Body comply with section 12 of the Act (contents of response)?

2. Did the Public Body comply with section 13 of the Act (how access will be given)?

II. BACKGROUND

[para 2] The Public Body located 899 pages of records responsive to an access request. The records are labelled in a manner that seems to indicate that the Public Body decided to withhold a large portion of them. With respect to records it was considering disclosing, the Public Body indicated in its submission that it had provided notice under section 30 to third parties whose interests were potentially affected by disclosure. After receiving the responses of third parties, it made a decision to disclose some of them. At that point the Public Body notified the Applicant that that it had decided to partially disclose the records at issue, that the third parties had twenty days within which they could ask for a review of the decision to disclose under section 65(2), and that a response would be provided if no request for review were submitted.

[para 3] The third parties requested a review of the decision to disclose 20 pages of the records. The Public Body then notified the Applicant that it had received a request for review, and that it was unable to take any further action or release any information until the matter before the Commissioner had been resolved.

[para 4] Accordingly, the Public Body has not yet either disclosed the portions of the records that it has decided to disclose relative to which the third party has *not* objected to disclosure, neither has it given the Applicant an indication of the number of records that it is withholding, nor of which exceptions it is applying to which records, and why. It argues that this procedure for dealing with the access request is authorized under the Act.

[para 5] In effect, it appears the Public Body temporarily ceased processing the Applicant's access request when the third parties requested a review of the approximately 20 pages of records. The question is whether the Public Body is authorized to do this by the FOIP Act, and if so, under what circumstances.

III. DISCUSSION

[para 6] The Public Body argues in its submission that what it is obliged to communicate to an applicant under section 31(2) after making a decision about third parties' information under section 31(1) is merely a "notice", and is not a "response" within the terms of sections 11 and 12. On this basis, it says it is not obliged to comply

with section 12 and 13 in issuing this notice, and that it does not need to "respond" until after the Commissioner's review is completed.

[para 7] More significantly, it also interprets the legislation such that it is not to "respond" to the Applicant (in compliance with sections 11 and 12) with respect to *any of* the requested records until after a requested review by my office with respect to the small proportion of them (to which I will refer below as the "disputed records") has been completed. It also says that this is its historical and established practice. As well, it interprets portions of Service Alberta's *FOIP Guidelines and Practices Manual* (2009) as indicating this to be an appropriate practice.

[para 8] I disagree with the Public Body's practice, if it has such a practice in this or other cases, of deferring its response with respect to records that are not in dispute as a result of the section 30/31 process until after my office has completed a review with respect only to disputed records.

[para 9] I do not disagree with the Public Body that a notice under section 30 /31 does not need to comply with the requirements of sections 12 and 13. The two sets of provisions speak to different things.

[para 10] Sections 12 and 13 speak to the contents of a response to an applicant with respect to records that the public body has made decisions about without utilizing the section 30/31 process. They require that access be given to records to which access has been granted, and that the reasons for refusal and additional information be given respecting records for which access has been refused.

[para 11] Sections 30/31 create a separate procedure and requirements for responding for a specific category of records – those which it is considering disclosing but which affect or may affect third party interests. This is necessary because for this latter category of records, access is not to be given despite a public body's decision to disclose, because the affected third parties must be given an opportunity to request a review by my office of the public body's decision before the records are actually released in accordance with the decision.

[para 12] It does not follow, however, that because in a given case there is such a category of records, and the section 30/31 procedure comes into play, that the public body's duties under sections 12 and 13 with respect to the remaining records are automatically put on hold. Rather, in my view, each portion of the records is to be dealt with according to the category into which it falls.

[para 13] I acknowledge in saying this that there are provisions in the Act that can be read as intermingling the two sets of provisions, as I will explain below.

[para 14] Section 14 of the Act contains the following provisions:

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

(a) ...

(b) ...

(c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or

(d) a third party asks for a review under section 65(2) or 77(3).

(2) ...

(3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31.

[para 15] Sections 14(1)(d) and 14(3) both permit time extensions for completion of the section 30/31 process, yet they speak of extensions "for responding", whereas sections 30 and 31 speak only of notifying.[1] There is therefore a question of whether the term "response" in the section 14 provisions refers to the "notice" discussed in section 31, or to some other "response".

[para 16] Taken by itself, section 14(3) can be read as simply intended to permit a public body to itself extend the time (beyond the 60 days permitted by section 14(1)) for completing the section 30/31 process for the records to which that process applies. On this reading, section 14 uses "response" in a general sense which embraces the decision and notification referred to in section 31(2). Under this reading, there will never be any need for a response that conforms with section 12 for records for which the section 30/31 process is utilized.

[para 17] However, under section 14(1)(d), the provision also speaks of extending the time "for responding" in the event a third party asks for a review (under section 65(2)) of a decision under section 31. At the time such a review is requested, the section 31 notification has already been given with respect to the disputed records. The section 14(1)(d) extension "for responding" with respect to the records that are the subject of the review cannot be taken as referring to an extension "for notifying", since the notification has already been done. What, then, is the "response" that is contemplated, the time for which may be extended under section 14(1)(d)?

[para 18] One possible answer – the one it seems the Public Body would give – is that it is not until after the completion of the requested review by my office that the public body

[1] Section 14(1)(c) refers to consultations with third parties. However, in my view, the third parties being referenced there are not those who may have interests under section 30(1), but rather are other third parties such as, for example, government organizations that are not public bodies under the Act.

is to issue its first "response" within the terms of section 11, in conformity with section 12. Under this theory, the section 31 notice is not a response but is merely a notice, and the extension that is contemplated is to permit deferral of the "response", which would presumably be made in conformity with the outcome of the Commissioner's review. (I will deal later with the fact that the Public Body also deferred its response for records other than those that fall under sections 30/31.)

[para 19] However, there are problems with this idea. After the review with respect to the disputed records has been completed and an order is issued, it would be inapt to say the public body is 'responding' to the applicant's request for the records. The "responses" that a public body is required to make in conformity with sections 11 and 12 contemplate decisions by the public body as to whether to provide the records and the manner in which to provide them. After the Commissioner has issued an order, the public body is not "responding" to the applicant in this sense. When it provides the records, it is not making its own decision based on what the Commissioner has decided, it is simply carrying out the order of the Commissioner as to whether to withhold or disclose. While this, too, may be termed a (directed) "response", it is not, in my view, the kind of response sections 11 and 12 address.

[para 20] More significantly, the result of this analysis is that in the event a third party requests a review, (completion of which is likely to take longer than an additional 30 days), the public body would be obliged to ask the Commissioner for an extension, the necessary length of which would be largely unpredictable given that the review may require an inquiry to be conducted and a decision to be issued. On this account, I do not accept that a public body needs to ask the Commissioner for an extension "for responding" in the event of a request for review of a section 31 decision, so as to enable it to provide a first "response" to an applicant with respect to disputed records after the review has been completed. Rather, as affirmed by the language of section 14(3) (which enables a public body to extend the time for giving its "response" where this is necessary to comply with its duty to make a decision and give notice of it under section 31), the section 31 notice constitutes a "response" within the terms of section 11.

[para 21] An explanation for section 14(1)(d) that does not require treating a 'notice' under section 31 as not a 'response' is that the deferral contemplated under the provision is of a response with respect to requested records other than the records that are the subject of the review (or possibly, more narrowly, only with respect to records that were treated according to the section 30/31 process but which did not become the subject of a review as contemplated by section 31(3)).

[para 22] However, if the interpretation in the preceding paragraph were right, it would follow that the provision to applicants of records to which no exception had been applied (nor was the Public Body considering applying one), could be delayed by virtue of their association, as part of the same request, with records that had been subjected to a review of a section 31 decision. This would be contrary to the principle in the FOIP Act that persons have a right of access to records subject only to limited and specific exceptions. The same delay could result for provision to applicants of a description of records and

reasons for withholding records that the Public Body has from the outset decided to withhold. If the latter category of records exists, this would also delay the ability of applicants to make meaningful decisions to request a review of the withholding of records, as well as the ability to prepare for such a review.

[para 23] The reasons why deferrals such as just described should be permitted to happen are not clear to me in the abstract, and this explanation is, therefore, not a very satisfactory one. Possibly, however, there might be situations in which the relationship amongst all the requested records was such that it was desirable not to make a final decision about them, even though a provisional decision had been made about some of them, until the Commissioner had completed a review with respect to the "disputed records", and a review as to the totality of the records was for some reason undesirable. However, since this would not be in accord with the general scheme of the act that public bodies are to make decisions at first instance without the benefit of the Commissioner's viewpoint, a legislative amendment that clarifies the purpose of section 14(1)(d) would be desirable.[2]

[para 24] Regardless of the legislative purpose behind section 14(1)(d), what is clear is that the extension it contemplates can be done only *with the Commissioner's permission* if the requested review will take longer than an additional 30 days to complete - which will typically be the case and is the case in the present circumstance. Thus, if the situation is one that does warrant such a delay with respect to the remaining records in a given case, the public body is given an opportunity to tell the Commissioner why this is so, and the Commissioner is given an opportunity to decide if he agrees, taking into consideration as well if it would be fair to the applicant to delay the entire response in this way.

[para 25] In this case, the Public Body did not request permission under section 14(1)(d) to extend its response until after completion of the review – neither with respect to the disputed records (which would have been necessary if its interpretation of section 30/31 is right), nor with respect to the remaining records – which would have been necessary regardless. Nor did it give me any satisfactory reasons, in its submissions, as to why such a deferral of the response with respect to the remaining records might be justified.

[para 26] With respect to the latter point, the Public Body does say in its submission that it cannot disclose any records that "are or still could be the subject of the Commissioner's review".

[para 27] Possibly the Public Body is thinking that after the Commissioner issues a decision with respect to the disputed records, if the remaining records to be disclosed according to the notice have not yet been disclosed and only then is the public body to

[2] Another possible interpretation of section 14(1)(d) is that the extension contemplated by the provision is not actually to be done by the public body, but rather happens automatically when the Commissioner notifies the parties under section 67 after receiving a request for review under section 65(2). However, this interpretation would involve ignoring the plain language of the statute, which speaks of the *public body* extending *with the Commissioner's permission*. Furthermore, any permission that might be implied would at most be with respect to the disputed records.

issue a final "response" relative to then, this would give third parties an opportunity to request a review in relation to more of the records. However, quite apart from the fact that there seems to be no reason in principle to mandate such a multi-stage process, I see no mechanism in the Act that would address what is to happen with respect to the remaining section 30 records once the Commissioner's response with respect to the disputed records is given.

[para 28] The Public Body seems to think that at this point, it is to issue a response that complies with section 12. That is not the case with respect to the disputed records because at that point the public body has no decision to make – it must either withhold or disclose these records in accordance with the Commissioner's direction. As for the remaining records for which the public body has given notice of intended disclosure, sections 12 and 13 do not contemplate any further deferrals on account of a request for review; under these provisions, records which the public body has decided to disclose are to be disclosed.

[para 29] Possibly, though it did not suggest this, the Public Body may be thinking that at the completion of the Commissioner's review, it would be open to it, in light of the Commissioner's reasoning as to the disputed records, to decide to withhold some records that it had already indicated in the section 31(3) notice it was intending to disclose – in other words, that the final "response" can reverse the effect of the notice. In my view, if this were the legislature's intention, there would be some indication of it in the Act, which is not the case.

[para 30] In any event, even assuming the Act authorizes the Public Body to request extensions for responding with respect to records other than the disputed records when a third party requests a review of a decision regarding disputed records, it did not request such an extension in this case. It says in its submission (at page 5):

> Section 14(1)(d) provides that if a third party asks for a review under section 65(2) of the Act, the time period to respond to an applicant's request *is extended*. (my emphasis)

This assertion ignores the plain language of section 14(1)(d) that it is the public body (not the Commissioner) that is to extend, and that if the extension is to be for longer than 30 days, the Commissioner's permission is required. As already noted, even if the plain words are to be ignored and "permission" might be implied by the Commissioner's acceptance of the request for review, this would at most be with respect to the records in dispute in the review.

[para 31] Therefore, the Public Body was obliged to meet the terms of section 12 and 13 with respect to the records it had decided to withhold, and with respect to the records it had decided to disclose relative to which the third parties have raised no objection. (As to the disputed records, its response to this is not in contention as a practical matter, since a review has been requested for these records).

[para 32] According to earlier decisions of this office, to comply with section 12(1)(c) with respect to records it is withholding, a public body is obliged to indicate how many

records (including numbers of pages) are being withheld, to describe or classify these records insofar as this is possible without revealing information that is to be or may be excepted, and to provide the reasons for withholding for each category. (See Order F2004-026 at paras 98 and 99. See also Order 2000-014, which held that public bodies should be as specific as possible about records to which they have decided to give access and not give access.) In failing to do this, the Public Body has failed to comply with the terms of section 12(1)(c). I will therefore direct it to comply with its duty to the extent that it earlier failed to do so by now providing to the Applicant the numbers and a general description of the records that it is withholding, and the reasons for withholding each record or part thereof.

[para 33] As well, I will direct the Public Body to comply with its duty under sections 12(1)(b) and 13, to provide to the Applicant the records it has decided to disclose relative to which there has been no request for review.

[para 34] Before concluding I note that I have reviewed the Public Body's references to parts of Service Alberta's *FOIP Guidelines and Practices Manual* (2009).[3] The first of them is ambiguous in the sense that on its face the reference to the "records requested by the applicant", which the excerpt quoted states "must be withheld until the review is completed" could be either to all the requested records, or to only the part that was brought into dispute by the request for review. However, in my view the next quoted excerpt confirms that the prohibition is only with respect to "any record or part of a record that is the subject of a Commissioner's review".[4]

[para 35] I also note the statement in the Public Body's rebuttal that it has not provided submissions on the question of whether it complied with the response timelines because

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[3] I also note the following entry in these Guidelines:

> Some requests will involve records that take little time to review or are easily disclosable. In these instances, the public body may disclose available records as soon as possible, rather than waiting until all records are ready for disclosure. This situation may occur when some records are ready for disclosure and other records have been sent to third parties for consultation.

This entry possibly suggests that a disclosure in stages is optional at the discretion of the public body. For the reasons already given above, in my view there is no ability to defer a response of any records that are not in dispute, except, possibly, with the permission of the Commissioner pursuant to section 14(1)(d).

As well, the Guidelines provide:

> The public body should delay its response only with respect to the records for which the notification process is not complete. Although the Act does not specifically provide for responding to a request in part, this approach to timely release of records is consistent with the spirit of the Act.

[4] The last of the quoted entries states: "Any extension allowed under section 14(1)(d) immediately ends when the records are no longer in issue in a review. A failure to respond under section 11 at that time is a deemed refusal to provide access". In my view, nothing conclusive can be drawn from this because, as has been discussed, it is not clear what purpose section 14(1)(d) is meant to serve, and a possible purpose is that it permits extensions (which require the Commissioner's permission if over 30 days) with respect to responsive records that are not the subject of the review, rather than those that are.

this was not raised as an issue in the Notice of Inquiry, and that it asks for an opportunity to provide such submissions if the timing of its responses is an issue. The submissions and rebuttal submissions of the Applicant clearly deal with its concerns about the failure of the Public Body to provide its response with respect to the records other than what I have termed the disputed records, and if I understand correctly, it has not yet provided this response. As I have noted, no permission was requested or granted to defer the response. If deferring the response in relation to records other than the disputed records is what the Public Body is referring to when it speaks of the "timing" issue, that is the whole substance of the present inquiry, which the Public Body has had ample opportunity to address.

[para 36] To conclude, the Public Body was not authorized to cease processing the Applicant's access request with respect to the remaining records when the third parties requested that my office review its decision with respect to the approximately 20 pages of records. The only circumstance in which it would be authorized to do so is one in which it had requested, and I had granted, an extension of time to do this under section 14(1)(d). That did not happen in this case.

IV. ORDER

[para 37] I make this order under section 72 of the Act.

[para 38] I find that the Public Body has not complied with its duties under sections 12 and 13 of the Act.

[para 39] I order the Public Body to comply with its duties under sections 12 and 13 of the Act, as described in paras 31 to 33 above, with respect to all the requested records other than those relative to which a request for review has been made by a third party under section 65(2).

[para 40] I further order the Organization to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Frank Work, Q.C.
Information and Privacy Commissioner