

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2017-12

January 27, 2017

#### EXECUTIVE COUNCIL

Case File Number 004532

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** On May 2, 2016, the Wildrose Party (the Applicant) made a request for access to the Executive Council (the Public Body) for copies of “all polling paid for by the Government of Alberta.” It also requested copies of “analysis and deliverables completed as a result of polling.” The date range of the requested records was January 1, 2014 – May 2, 2016.

On May 13, 2016, the Public Body wrote the Applicant to inform it that it was extending the time for responding to the request until June 4, 2016, because “a large volume of records must be searched”.

On July 12, 2016, the Public Body wrote the Applicant and stated:

The third party consultation has been conducted. The records within the file have been partially severed under the following exemptions: Section 16 (Third Party Business Interests).

Under Section 31(3), on July 12, 2016, we provided the third party with notice that once 20 days elapsed the contents of the file will be partially released. At the conclusion of the 20 day appeal period, on Monday August 1, 2016, the records will be released to you.

[...]

Please note that under Section 65 of the FOIP Act, you may ask the Information and Privacy Commissioner of Alberta to review the decision to consult. To request a review, you must complete and deliver a Request for Review form within 60 days from the date of this notice [...]

On November 2, 2016, the Applicant complained to the Commissioner that it had not yet received a response from the Public Body. The Commissioner decided to refer the matter directly to inquiry.

On December 12, 2016, the Public Body provided notice to the Applicant and third parties that it had made a decision to grant partial access to the records the Applicant had requested.

On January 5, 2017, the Public Body responded to the Applicant's access request. It informed the Applicant that information had been severed under sections 16 and 24 of the FOIP Act.

At the inquiry, the Public Body attributed its failure to respond to the Applicant within statutory time limits due to the ministry's influx of FOIP [requests], the large volume of records, the internal and third party consultation requirements, and the extensive review and approval period, to which it subjected the request. It also explained that it had provided notice to third parties of a decision to disclose information in the records on December 12, 2016 and was waiting for the appeal period under section 31 to end before releasing the records.

The Adjudicator found that the Public Body had failed to comply with its duty to make reasonable efforts to respond to the Applicant within 30 days, as required by section 11 of the FOIP Act. She found that this failure was due in part to the Public Body's internal review and consultation process, and its decision to make a decision under section 31 for a second time. She noted that duties under the FOIP Act are statutory, while internal consultation and review procedures are not.

**Statutes Cited:** AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 16, 24, 30, 31, 72

## **I. BACKGROUND**

[para 1] On May 2, 2016, the Wildrose Party (the Applicant) made a request for access to the Executive Council (the Public Body) for copies of "all polling paid for by the Government of Alberta." It also requested copies of analysis and deliverables completed as a result of polling." The date range of the requested records was January 1, 2014 – May 2, 2016.

[para 2] On May 13, 2016, the Public Body wrote the Applicant to inform it that it was extending the time for responding to the request until June 4, 2016, because "a large volume of records must be searched".

[para 3] On July 12, 2016, the Public Body wrote the Applicant and stated:

The third party consultation has been conducted. The records within the file have been partially severed under the following exemptions: Section 16 (Third Party Business Interests).

Under Section 31(3), on July 12, 2016, we provided the third party with notice that once 20 days elapsed the contents of the file will be partially released. At the conclusion of the 20 day appeal period, on Monday August 1, 2016, the records will be released to you.

[...]

Please note that under Section 65 of the FOIP Act, you may ask the Information and Privacy Commissioner of Alberta to review the decision to consult. To request a review, you must complete and deliver a Request for Review form within 60 days from the date of this notice [...]

[para 4] On November 2, 2016, the Applicant complained to the Commissioner that it had not yet received a response from the Public Body. The Commissioner decided to refer the matter directly to inquiry.

[para 5] On December 12, 2016, according to the submissions of the Public Body, it sent third party decision letters to the Applicant and third parties “with the legislated appeal period of 20 days.”

[para 6] On January 5, 2017, the Public Body responded to the Applicant’s access request. It informed the Applicant that information had been severed from the records under sections 16 and 24 of the FOIP Act.

## **II. ISSUE**

### **Issue A: Did the Public Body comply with section 11 of the Act (time limit for responding?)**

[para 7] Section 11 of the FOIP Act requires the head of a public body to make every reasonable effort to respond to an applicant within 30 days of receiving an access request. It states:

*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*

*(b) the request has been transferred under section 15 to another public body.*

*(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

The Applicant requested access to records in the custody or control of the Public Body on May 2, 2016. The Public Body did not respond to the access request until January 5, 2017, well outside the 30-day period contemplated by section 11.

[para 8] The Public Body provided the following explanation of the efforts it made to respond to the Applicant within the terms of section 11:

[...] The FOIP legislated due date to the Applicant was June 1, 2016.

On May 12, 2016, the Public Body's FOIP Coordinator (the delegated authority for time extensions) granted a time extension under section 14(1)(b) [...]

The Applicant was notified by the FOIP Office of the 30 day time extension on May 13, 2016.

A Request for Records response was received by the FOIP Office on May 27, 2016. The FOIP Office received 505 responsive records from the Director of Research.

Within the responsive records, six affected third parties were identified. The third party consultation process commenced on June 9, 2016.

No disclosure decision was provided to the Applicant relating to the third party process; as such the FOIP Office was considered to be in deemed refusal under the FOIP Act.

The delay in processing the response can be attributed to the ministry's influx of FOIP [requests], large volume of records, the internal and third party consultation requirements, and the extensive review and approval period.

Notwithstanding the fact that no response was provided, the Applicant did receive regular status updates from the FOIP Office.

Prior to disclosure, the FOIP Office was required by law to provide the affected third [parties] the right of appeal concerning our decision to partially release their information. The third party decision letters were sent to the Applicant and the third [parties] on December 12, 2016 with the legislated appeal period of 20 days. No appeals were received by your office.

A formal response to the request for information has been provided to the Applicant on January 5, 2017.

[para 9] The Public Body acknowledges that it failed to respond to the Applicant within 30 days of receiving its access request, but states that it did respond to the Applicant on January 5, 2017. It provided a copy of its January 5, 2017 response to the Applicant for my review.

[para 10] From its submissions, reproduced above, I understand that it attributes this failure to the volume of FOIP requests it has received, the number of records requested by the Applicant, the time added by the third party consultation process set out in sections 30 and 31 of the FOIP Act and its own internal approval and consultation processes.

[para 11] As the Public Body has now responded to the Applicant's access request, there would be no benefit to my ordering it to respond to the Applicant under section 72(3)(a). I could also conclude this order by requesting that it be mindful of its duties under section 11 in the future. However, I have some concerns with the reasons the Public Body has offered as an explanation of its failure to meet its duty under section 11 of the FOIP Act. I have therefore decided to address the Public Body's explanation to assist the Public Body to comply with the requirements of section 11 in the future.

*The high volume of access requests and the number of records requested by the Applicant*

[para 12] The letter of July 12, 2016 reports that the Public Body had completed its section 31 consultation process and made access decisions at the date of writing. From this it appears that the Public Body was prepared to respond to the Applicant by August 1, 2016. Without further particulars and submissions regarding its letter of July 12, 2016, the Public Body's references to the high number of records and high volume of access requests as explanations for the delay in responding are hard to grasp.

*Section 31 consultation requirements*

[para 13] Section 31 states:

*31(1) Within 30 days after notice is given pursuant to section 30(1) or (2), the head of the public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of*

*(a) 21 days after the day notice is given, and*

*(b) the day a response is received from the third party.*

*(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision, including reasons for the decision, to the applicant and the third party.*

*(3) If the head of the public body decides to give access to the record or part of the record, the notice under subsection (2) must state that the applicant will be given access unless the third party asks for a review under Part 5 within 20 days after that notice is given.*

*(4) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) must state that the applicant may ask for a review under Part 5.*

[para 14] Section 31 requires that the head of a public body make a decision between 21 and 30 days after giving notice either to disclose or withhold information. If the head decides to withhold information from the applicant, sections 31(2) and (4) require the head to inform the applicant of this decision, with reasons, and to state that the Applicant may ask for review.

[para 15] The Public Body's notice of July 12, 2016 to the Applicant appears to be a decision under section 31.

[para 16] It is unclear from the Public Body's submissions why it refers to making access decisions regarding third party information after August 1, 2016 or why it

apparently commenced a second notice period. There is no ability under the FOIP Act to consult with a third party after the conclusion of the 20 day appeal period in section 31 of the FOIP Act, as the Act requires the head of the public body to give the records to the Applicant at the conclusion of the appeal period if there is no appeal (and the head has not applied other exceptions to disclosure to the records). In this case, there was no appeal of the July 12, 2016 decision.

[para 17] I also note that the Public Body’s notice refers to the Applicant having the right to request review of its decision to consult third parties; section 31(4) actually requires a public body to notify an applicant that the decision to withhold information from the applicant may be the subject of a request for review to the Commissioner.

*Internal consultation requirements and the extensive review and approval period*

[para 18] The Public Body also refers to its own “internal consultation requirements” and the “extensive review and approval period” as reasons for its delay in responding to the Applicant. From this description, it appears that the Public Body has created steps in its procedure for processing access requests that are not required by the FOIP Act and which are contributing to its failures to comply with its duties to respond to an applicant under the FOIP Act. As insufficient information has been provided regarding these procedures I will not comment on them, other than to note that the FOIP Act’s requirements are statutory, while the processes that apparently contributed to the Public Body’s failure to comply with the FOIP Act’s response and notice requirements are not. While a public body may choose to consult internally and to create a review and approval process, it cannot permit these processes to interfere with its duty to make all reasonable efforts to respond to an applicant within the terms of section 11. From the Public Body’s submissions, I conclude that the Public Body’s internal review and consultation processes may have contributed to an additional six-month delay in responding to the Applicant. I ask the Public Body to ensure that these processes, if it chooses to continue following them, do not prevent it from meeting its duties to applicants in the future.

**III. ORDER**

[para 19] I make this Order under section 72 of the Act.

[para 20] I confirm that the Public Body did not meet its duty to take all reasonable steps to respond to the Applicant within the terms of section 11 of the Act.

[para 21] As the Public Body has now responded to the Applicant’s access request, I will not make an order requiring it to perform its duty to respond to the Applicant. However, I ask that it review its processes regarding responding to an applicant, so that it may align them with the requirements of section 11 of the Act.

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Teresa Cunningham  
Adjudicator