

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-57

October 1, 2018

ALBERTA COMMUNITY AND SOCIAL SERVICES

Case File Number 009139

Office URL: www.oipc.ab.ca

Summary: On June 26, 2017, the Applicant, a political party, made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Community and Social Services for all briefing materials “created as a result of or in preparation for meetings between the Minister and Deputy Minister”. The Applicant indicated that it would prefer to make the request a recurring one, and proposed several quarterly periods when it would receive responsive records.

The Public Body waived half the fees for processing the request, but then did not respond to the Applicant, despite obtaining an extension from the Commissioner to enable it to do so.

During the inquiry, the Public Body indicated that its lack of staff members in its FOIP unit was the primary reason it could not respond to the Applicant in a timely manner.

The Adjudicator noted that it is the head of a public body that has the duty to respond to an Applicant within 30 days of receiving an access request, and not a public body’s duty. The head may meet this duty by delegating it to someone in a position to respond on his behalf. The Adjudicator ordered the head of the Public Body to respond to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 72; *Freedom of Information and Protection of Privacy Regulation* A.R. 186 / 2008 s. 11

Authorities Cited: AB: Order F2018-10

I. BACKGROUND

[para 1] On June 26, 2017, the Applicant made an access request to Alberta Community and Social Services for all briefing materials “created as a result of or in preparation for meetings between the Minister and Deputy Minister”. The Applicant indicated that it would prefer to make the request a recurring one, and proposed several quarterly periods when it would receive responsive records. The Applicant paid an initial fee of \$50, which section 11(2) of the Freedom of Information and Protection of Privacy Regulation indicates may be charged when a continuing request is made.

[para 2] The Public Body sent a letter to the Applicant on July 13, 2017 acknowledging receipt of the request. The Public Body stated:

It is my understanding that you have clarified your Cross Ministry requests with Energy on behalf of all Public Bodies receiving requests, to receive

“A copy of briefing materials provided to the Minister for a meeting between the Minister and Deputy Minister Briefing materials include attachments, which are limited to the following: the actual briefing note, presentations, memorandums, and reports related to the briefing note. Duplicates and drafts can be excluded”

It is also noted that you have confirmed “a meeting between the Minister and Deputy Minister” means regularly scheduled meetings, or closest equivalent, where the meeting is intended to be between the Minister and Deputy, even though department ADM’s or other departmental subject matter experts may also attend

You have stated the time frame for the request is January 19, 2017 to June 26, 2017 and you are requesting this be a continuing request As clarified, for this Cross Ministry request, this will be a continuing request for two years The following schedule is based on an email June 26, 2017 from [...] stating preference to receiving records quarterly and suggested timeframes

[para 3] The Public Body indicated that it would respond on or before July 26, 2017.

[para 4] On Jul 26, 2017 the Public Body wrote the Applicant to inform it that the estimated cost of processing the access request would be \$540. It estimated that the search for records would take two hours, and that preparing and handling the records would take eighteen hours. It required a deposit of \$270 to process the access request.

[para 5] On August 4, 2017, the Applicant requested a fee waiver on the basis that the records related to matters of public interest.

[para 6] On September 5, 2017, the Public Body granted a partial fee waiver and determined that it would not require a deposit. It noted that there were a large number of

records that were responsive to the access request and stated that it was extending the time for responding to the access request for that reason until October 5, 2017.

[para 7] On October 5, 2017, the Public Body informed the Applicant that it was seeking a further time extension from the Commissioner under section 14(2) of the FOIP Act. Section 14(2) authorizes a public body, with the Commissioner's permission, to extend the time for responding, when an applicant makes multiple *concurrent* requests.

[para 8] On November 9, 2017, the Public Body informed the Applicant that the Commissioner had granted its extension request until December 4, 2017.

[para 9] On December 4, 2017, the Public Body informed the Applicant that it had submitted another extension request to the Commissioner "due to multiple concurrent requests".

[para 10] On March 16, 2018, the Public Body wrote the Applicant and stated:

The requested records contain information that may affect the interests of third parties. To assist us in determining whether we may disclose this information to you, we are giving the third parties an opportunity to make representations concerning disclosure. We will notify you of our decision by April 16, 2018.

[para 11] On July 3, 2018, the Applicant requested review by the Commissioner of the Public Body's failure to respond to its access request. The Commissioner decided that the matter should proceed directly to inquiry and delegated her authority to conduct the inquiry to me.

II. ISSUE: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 12] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request no later than 30 days after receiving the request. Section 11 of the Act 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.

[para 13] The Public Body confirms that it did not meet its duty under section 11 of the FOIP Act. It states:

The following circumstances which arose during the processing of the request resulted in the delay in the response:

Due to the staff leaving the IPO this request has been reassigned two times

The access request was considered complex as it involved a large number of records and required considerable analysis to determine records requiring consultation with another Public Body, multiple program areas and third parties.

The Access Specialists maintained caseloads of multiple requests and did their best to fulfill their responsibilities and provide service to Albertans.

Resource capacity of the IPO has been a factor in the processing of this request. The IPO is operating with limited resources:

The first assigned Access Specialist left the IPO, CSS in October 2017
The second assigned Access Specialist left the IPO, SA in July 2018,
Two more Senior Access Specialists left the IPO, one in May 2018 (under CSS) and one in August 2018 (under SA); and
All their requests have been reassigned and three positions are still vacant.

The IPO provides FOIP services for four ministries and Schedule One Public Bodies. The IPO has been managing a high volume of requests for several years. From June 2017 to August 2018 the IPO handled 1547 requests. Throughout the processing of this request the IPO has received and has been responding to 36 other requests from this Applicant, 11 specific to Alberta Community and Social Services.

The Public Body understands that the resource capacity of the IPO is not a factor that the OIPC can consider in the Public Body's duty under section 11 (Order F2016-36). The IPO, is taking steps to meet the statutory requirements under the Act.

[para 14] As indicated in the foregoing excerpt, the Public Body does not respond on its own behalf, but uses the IPO to respond and to make its submissions. The IPO represents several public bodies in making responses under the FOIP Act, and also makes submissions on their behalf in an inquiry.

[para 15] The Public Body states that the following actions took place in the processing of the access request:

2017

July 13 Acknowledgement letter to Applicant with schedule for quarterly releases of records for period of 2 years

July 26 Fee estimate letter to Applicant

August 4 Applicant requested fee waiver under s. 93(3.1)

September 5 Letter to Applicant advising partial fee waiver approved for 50% (deposit for first quarter release) with balance due when processing completed. Applicant notified 30-day time extension under s. 14(1)(b) required based on volume of records responsive to request. New due date for response October 5, 2017.

September 27 Request reassigned due to Access Specialist leaving position

October 5 Request for 60-day time extension under s. 14(2) submitted to Office of the Information and Commissioner (OIPC)

October 26 OIPC granted time extension with new December 4, 2017 due date for response

December 4 Second 60-day time extension request submitted to OIPC

December 14 OIPC rejected second request

2018

March 16 Consultation required with third parties. Letter sent notifying Applicant.

March 16 Consultations required with other Public Bodies

April 26 Consultation required with another Public Body

May 2 Email sent to Applicant providing update on request

July 6 Email to Applicant providing links to publicly available information in relation to request

July 6 Request reassigned due to Access Specialist leaving position

[para 16] The Applicant made a continuing access request for records. A continuing request is one for records that will be created in the future. In a continuing access request, the Applicant essentially asks for access to records as they become available. In this case, the Applicant requested any records regarding meetings that would take place between the deputy minister and the Minister between June 26, 2017 and July 19, 2019. The Applicant asked for the Public Body to treat the access request as if it were being made quarterly, according to the schedule it provided.

[para 17] The submissions made on the Public Body's behalf do not refer to the fact that the Applicant made a continuing access request. From my review of the evidence before me, it appears that the Public Body has not responded to the Applicant in relation to any portion of the Applicant's access request, except for emailing the Applicant to inform it as to the information that it considered responsive and to be publicly available. It is not clear from its submissions whether it is referring to responsive records created between January 19, 2017 and June 26, 2017, or to responsive records created between January 19, 2017 and the present. However, given that the access request is continuing, the scope of this order will encompass records created between January 19, 2017 and the date of this order.

[para 18] The Public Body's representative acknowledged that details of its staffing shortages are not relevant to the question of whether it has made reasonable efforts to comply with the duty under section 11. Nevertheless, the Public Body's representative, the IPO, offers its staffing shortages as the reason the Public Body has not complied with section 11 of the FOIP Act.

[para 19] In Order F2018-10, I rejected the argument that the Public Body should not be required to respond to a requestor within 50 days of receiving my order due to its inadequate staffing. I said:

Despite the Public Body's consultation process, it appears from the FOIP Coordinator's affidavit that the Public Body's consultation processes are not the primary cause of the failure to respond to the Applicant's access request. The Public Body attributes the failure to the lack of staffing and the high volume of records involved in access requests that have been made to it. It notes that "re-prioritizing" the access request that is the subject of this inquiry has led it, or will lead it, to take longer to process access requests it received before this one.

I am unable to accept the Public Body's arguments regarding the delay in responding to the access request or to accept its suggestion that it respond by August 2018 to ensure that it responds to prior access requests in a timely manner. Section 11 imposes a duty on the *head* of a public body to make reasonable efforts to respond to an access request. As the head is the Minister of Health, it would be impractical for her to process access requests personally. For this

reason, section 85 of the FOIP Act permits the head to delegate her duties, powers or functions under the FOIP Act to any person. However, if the head does not delegate her duty, the duty remains with her. Moreover, if the duty is not met by the delegate, the Minister will not have complied with the duty imposed by the FOIP Act.

The Public Body's arguments and proposed response time appear to rely on the notion that it is the FOIP branch of the Public Body that has the duty to respond to the Applicant, rather than the head. If that were the case, then the arguments regarding staffing levels and the complexity of records very complex that requires the FOIP Advisor to "work with the appropriate program areas" in making access decisions would be more persuasive. However, as noted above, it is the *head* of the Public Body who has the duty to make reasonable efforts to respond to the Applicant. She may meet this duty by delegating her duties to "any person" and is not limited to delegating the duty to an employee of a FOIP office. If the FOIP office is unable to meet the head's duties under section 11, then the head will fail in her duty under section 11 if she delegates the duty to an employee of the FOIP Office without ensuring the duty can be met. In contrast, if the FOIP office is sufficiently staffed with persons having adequate authority and knowledge to make timely access decisions, then the head will be more likely to meet her duty under section 11 by delegating the duty to an employee of the office.

The foregoing analysis holds true for the other access requests, for which the Public Body indicates the head may not meet, or has not met, her duty under section 11 to respond to applicants if she were to "reprioritize" the access request before me.

The Public Body indicates that its FOIP Coordinator and three recently hired FOIP advisors must review 130,000 records in order to process the access requests currently before them. I agree with the Public Body that it would not be reasonable to expect the Public Body's FOIP office, with its current staffing and experience levels, to process that number of records within the timeframe imposed by sections 11 or 74(1) of the FOIP Act. However, that it would be unreasonable to expect the FOIP office to be able to respond to the Applicant's access request means only that it may be unreasonable for the head of the Public Body to delegate the duties imposed by section 11 and 74(1) to the FOIP office. If delegating the duty to the FOIP office is not likely to bring about compliance with section 11 of the FOIP Act, then it would be unreasonable for the head of the Public Body to delegate this duty to the FOIP office.

The FOIP Act, which is a paramount statute, does not create exceptions to the duty under section 11 to accommodate low staff levels or insufficient experience. Instead, section 85 of the FOIP Act enables the head of the Public Body to achieve compliance through delegation of the head's duties, powers, and functions. However, if the head delegates her duty and authority to employees who lack sufficient authority, time, and experience to fulfil those duties, the result may be a failure to comply with mandatory duties under the FOIP Act.

[para 20] The Minister of Community and Social Services, not the IPO, has the duty to respond to the Applicant. If the IPO does not discharge the Minister's duty by taking all reasonable steps to respond to the Applicant within 30 days of receiving the access request, or within a longer time allowed by the FOIP Act, the Minister will have failed to perform his duty under the FOIP Act. In this case, I find that the Minister has failed to meet his duty to make reasonable efforts to respond to the Applicant within 30 days after receiving the access request. I must therefore direct him to comply with his duty.

III. ORDER

[para 21] I make this order under section 72 of the Act.

[para 22] I require the head of the Public Body to comply with his duty under section 11 of the FOIP Act to make reasonable efforts to respond to the Applicant. The scope of this order includes responsive records created between January 19, 2017 and the present day.

[para 23] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator