

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-16

May 11, 2021

CITY OF EDMONTON

Case File Number 006841

Office URL: www.oipc.ab.ca

Summary: An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated August 25, 2017, to the City of Edmonton (the Public Body) for a “list of properties from which land will be required for the Yellowhead Trail freeway conversion.”

The Public Body responded to the request, stating that it located responsive records but that all the information in the records was being withheld under sections 25 and 27 of the Act.

The Applicant requested review by the Commissioner. During the review, the Public Body withdrew its application of section 27 to the information in the records, but continued to withhold all information under section 25. The Applicant subsequently requested an inquiry.

The Public Body also withdrew its application of section 25 during the course of the inquiry and provided the responsive records to the Applicant. The Applicant argued that it was seeking an updated version of the responsive records and therefore the issue was not resolved as it had not received an updated list of properties.

The Adjudicator determined that the only reviewable decision was the decision made by the Public Body in 2017, to withhold the information in the records that were responsive

at that time. The Public Body has not made a decision regarding providing access to an updated list, and therefore, there is no decision for the Adjudicator to review.

As the Applicant did not raise any concerns about the records provided by the Public Body, the Adjudicator determined that there were no remaining issues to resolve in the inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7, 9, 25, 72.

Authorities Cited: AB: Order F2021-17

I. BACKGROUND

[para 1] An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated August 25, 2017, to the City of Edmonton (the Public Body) for a “list of properties from which land will be required for the Yellowhead Trail freeway conversion.”

[para 2] The Public Body responded to the request on September 19, 2017, stating that it located responsive records but that all the information in the records was being withheld under sections 25 and 27 of the Act.

[para 3] The Applicant requested review by the Commissioner. During the review, the Public Body withdrew its application of section 27 to the information in the records, but continued to withhold all information under section 25(1)(c). The Applicant subsequently requested an inquiry.

[para 4] With its initial submission, the Public Body provided seven pages of responsive records to the Applicant. The Public Body states (initial submission, at para. 11):

Upon a further review of the responsive records initially redacted by the Public Body, the Public Body has decided to use its discretion to unredact certain records that were previously redacted under section 25(1)(c) of the Act. The unredacted records are included in Schedule A, attached hereto, as pages 1-7.

[para 5] Of the seven pages provided by the Public Body with its initial submission, six are responsive to a related request (addressed in Order F2021-17). The last page is responsive to the request at issue in this case.

[para 6] With respect to the remaining records that were initially identified as responsive to the Applicant’s request at issue here, the Public Body states that the much of the information in the records was redundant. It states (initial submission, at para. 5):

The OIPC provided a letter dated March 8, 2018 with the Officer’s findings in respect of the review to both the Applicant and the Public Body. The Officer in this review

discussed the fact that although 13 pages of records were provided to the OIPC as responsive, only the last page was relevant and not redundant as it contained all of the responsive information for the YHT Request.

[para 7] I have reviewed all of the records initially identified by the Public Body as responsive to the Applicant's request (thirteen pages). I agree that the last page appears to encompass what the Applicant requested. Some of the remaining pages contain identical information with different formatting, and some contain the same information with additional detail that is not responsive to the Applicant's request.

[para 8] As the Public Body provided the Applicant with a copy of the last page, it seems that the Public Body's application of section 25 may no longer be a live issue. By letter dated April 1, 2021, I asked the Applicant to confirm that the issue has been resolved for this and the related file. If not, the Applicant was asked to specify what matters set out in the Notice of Inquiry remain unresolved.

[para 9] The Applicant responded on April 20, 2021, stating:

The records requested were for the "present date, or most up to date information at the time it is provided."

The Public Body has provided what is now out-of-date information by about 4 years. The Public Body itself admits that the information is now out-of-date at paragraphs 12 and 13. To allow its response to satisfy its obligations would be to have allowed the Public Body to weaponize the OIPC process against the Applicant. It let 4 years drip meaning from its obligations to disclose and now it purports to discharge them with an empty gesture. This would be a victory of form over substance and contrary to the remedial purpose of the underlying legislation. The matter unresolved is that the present date, up to date, list of the properties on the acquisition list for the West LRT Valley Line Project and for the Yellowhead Freeway Conversion Project have yet to be provided.

The Public Body has not responded to any of the substantive issues raised in the Applicant's submissions of March 4, 2021. This is because the Public Body's refusal to disclose the information is entirely without merit.

II. RECORDS AT ISSUE

[para 10] The Public Body has now provided the relevant responsive record to the Applicant. For the reasons set out in this Order, there are no records remaining at issue.

III. ISSUES

[para 11] The issue set out in the Notice of Inquiry dated February 4, 2021, is:

Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

IV. DISCUSSION OF ISSUES

[para 12] This inquiry arose from the Public Body's response to the Applicant's access request in 2017. The records identified as responsive by the Public Body at that time continue to be the records at issue here. Current records, created four years after the access request, cannot be responsive to that access request.

[para 13] The Applicant is interested in an updated version of the records at issue. It states that its request was for "present date, or most up to date information at the time it is provided." However, an access request made under section 7 of the Act must be for records a public body has in its custody and control: in other words, records that currently exist.

[para 14] That said, an applicant may make a "continuing request" for records, under section 9 of the Act. That section states:

9(1) The applicant may indicate in a request that the request, if granted, continues to have effect for a specified period of up to 2 years.

(2) The head of a public body granting a request that continues to have effect for a specified period must provide to the applicant

(a) a schedule showing dates in the specified period on which the request will be deemed to have been received and explaining why those dates were chosen, and

(b) a statement that the applicant may ask the Commissioner to review the schedule.

(3) This Act applies to a request that continues to have effect for a specified period as if a new request were made on each of the dates shown in the schedule.

[para 15] There is no indication that the Applicant made such a request here; even if it did, a continuing request can only be made for a period of two years and it has been four years since the Applicant's access request.

[para 16] As the Applicant has not made an access request for the current list of properties, the Public Body has not had an opportunity to locate the records or make any decision about providing access. Under the FOIP Act, it is the Public Body and not the Commissioner who must make the initial decision regarding access to information. The role of the Commissioner, and I as her delegate, is to review that decision. I cannot review a decision that has yet to be made.

[para 17] The Applicant may make a new request for current records if it wishes; the Public Body will have to make a new decision regarding providing access to those records.

[para 18] I acknowledge the delay associated with review of public body decisions, and that these delays may cause an impediment to access. However, I cannot remedy that

issue in this inquiry, nor can I alter the obligations and responsibilities as they are set out in the Act.

[para 19] In this case, the Public Body has said that it is exercising its discretion to provide the Applicant with the responsive records. I do not have submissions from the Public Body regarding whether it was appropriate to apply section 25(1)(c) to the information at the outset. Even if I were to decide that the Public Body's initial application of section 25 to the records at issue here was improper, I cannot order the Public Body to *not* apply that exception (or any other exception) to different records, even if they are similar to the records at issue here (i.e. an updated version). The circumstances relevant to an application of section 25 to new records may vary from the circumstances that were relevant to the Public Body's decision to the responsive records here. For example, it is possible that the Public Body's Yellowhead project is in a different phase than it was when it made its initial decision in 2017; in that case, the analysis of whether disclosure of new records could reasonably be expected to lead to one of the harms in section 25(1)(c) might be different than it was in 2017.

[para 20] In other words, a decision regarding the application of section 25 to the records here may be directly applicable to a new version of the records, but it may not. The application of section 25 must be considered on a record-by-record and case-by-case basis. Under the Act, it is the Public Body's obligation to make that decision first, before it can be reviewed by this Office.

[para 21] The Applicant has not raised an issue regarding the records provided to it by the Public Body. As section 25 is the only issue set out in the Notice, and as the Public Body has provided the Applicant with the requested information, there are no issues remaining for me to decide.

V. ORDER

[para 22] I make this Order under section 72 of the Act.

[para 23] As the Public Body has provided the responsive information to the Applicant, there are no remaining issues for me to decide or order to make.

Amanda Swanek
Adjudicator