

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-30

August 18, 2021

TOWN OF PONOKA

Case File Number 019352

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made an access request to the Town of Ponoka (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the *FOIP Act*) on October 28, 2020.

On December 17, 2020, this Office received a Request for Review/Complaint form from the Applicant in which she indicated that the time limit for responding to her request had expired and she had received no reply. She requested a review of the Public Body's compliance with the time limit for providing a response under the *FOIP Act*.

The Public Body submitted that it responded to the Applicant via email on November 25, 2020, and that its email records indicated that the response was delivered to the Applicant, and no rejection notice was received.

The Adjudicator found that the Public Body made every reasonable effort to respond to the Applicant's request not later than 30 days after it received the request, as required by section 11 of the *FOIP Act*. As the Public Body provided a copy of its response to the Applicant's access request as part of its submissions to the Adjudicator and the Applicant in the inquiry, the Adjudicator found that it was not necessary to order the Public Body to provide its response again to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 12, 72, and 83; *Electronic Transactions Act*, S.A. 2001, c. E-5.5, s. 8; *Interpretation Act*, R.S.A. 2000, c. I-8.

Orders Cited: AB: Orders 98-002, F2006-022, F2007-012, F2007-017, F2013-11, F2015-13, F2018-22.

Cases Cited: AB: *Workers' Compensation Board v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 99.

Other Sources: Merriam-Webster dictionary online (www.merriam-webster.com).

I. BACKGROUND

[para 1] On October 28, 2020, an individual (the Applicant) made an access request to the Town of Ponoka (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the *FOIP Act*).

[para 2] On December 17, 2020, this Office received a Request for Review/Complaint form from the Applicant in which she indicated that the time limit for responding to her request had expired and she had received no reply.

[para 3] The Commissioner decided to move the matter directly to inquiry and delegated her authority to conduct the inquiry to me.

II. RECORDS AT ISSUE

[para 4] As the issue in this inquiry relates to the timeliness of the Public Body's response, there are no records at issue.

III. ISSUE

[para 5] The Notice of Inquiry, dated March 17, 2021, states the issue for this inquiry as follows:

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

IV. DISCUSSION OF ISSUE

[para 6] Section 11 of the *FOIP Act* requires a public body to make every reasonable effort to respond to an access request not later than 30 days after receiving the request. Section 11 of the *FOIP 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 7] The Applicant provided a copy of the email she sent to the Public Body's FOIP Coordinator (the Employee) on October 28, 2020, attaching her completed Request to Access Information form under the *FOIP Act* (the FOIP Request). In the email she stated:

Please find attached a FOIP request.

I understand that there is a \$25 fee associated with this. How can I pay this?

[para 8] The Request to Access Information form used by the Applicant provided the following direction:

Send your completed request form, and initial fee if applicable, to the FOIP Coordinator of the public body that has the records you wish to access. For contact information, consult the Directory of Public Bodies on the FOIP website at foip.alberta.ca.

[para 9] The Request to Access Information form also included the following instructions for completing the "About You" portion of the form:

About You

In this part of the form enter:

- your last name, first name and preferred title, if any;
- the name of the company or organization you are representing, if applicable;
- your complete mailing address and daytime and evening telephone numbers so that the public body can contact you about the request;
- a fax number or e-mail address, if any, where correspondence may be sent.

[para 10] The Applicant completed this portion of the form and provided her email address.

[para 11] The Applicant's FOIP Request was for general information. It was not for her own personal information.

[para 12] On the same day, the Employee responded via email and stated:

Payment for the FOIP request can either be made in person at the Town Office or by credit card. I have attached [the] credit card form if you wish to pay that way, please complete and return by email. Similarly, we will email your receipt to you.

I have reviewed your request to access information, and would like to discuss it briefly with you to clarify a couple points. Please let me [know] if there is a time that works for you on October 29th and we can do this over the phone.

[para 13] The Applicant replied via email to the Employee on the next day and indicated she would be available to speak that afternoon and provided her phone number. The Employee responded via email and indicated that they would call her that afternoon.

[para 14] On October 30, 2020, the Applicant emailed the Employee and stated “Please find attached my completed CC authorization form”.

[para 15] On December 17, 2020, this Office received a Request for Review/Complaint form from the Applicant in which she indicated that the time limit for responding to her request had expired and she had received no reply.

[para 16] In the letter accompanying the Applicant’s Request for Review/Complaint form, she stated:

[Employee], responded via email on October 28th indicating she had received my application. I spoke with [Employee] on October 29th via phone to discuss the scope of the request. I advised that my request was in anticipation of a development appeal board hearing, related to the development permit. [Employee] indicated that it was a 30 day turnaround time period, although she generally tried to complete these requests in a shorter timeframe.

[para 17] The Applicant advised in her letter that she spoke with the Employee and another employee of the Public Body “in mid-November” about her FOIP Request. She stated:

There were two conversations; one was to advise that [the Employee] would be away and that another employee would be following up with my request. The second conversation with [the Employee] was to discuss if I would like access to records that involved communications with 3rd parties (namely neighbours in my area, also in regards to the appealed development permit). [The Employee] explained that process of obtaining 3rd party information, and the timeline surrounding it. I declined the 3rd party information request, as I had received a development appeal board hearing scheduled for November 30th. I felt that I would not be able to obtain the 3rd party information in time for the hearing. I reiterated with [the Employee] that I would still be needing the rest of the outstanding information within the 30 day FOIP time period.

On November 23rd, I filed my submissions for my development appeal board hearing. My submissions detailed that I had an outstanding FOIP request, and that the information I provided in support of my position at the hearing reflected the information I had available. This submission was sent to the Town of Ponoka’s Development Authority [name] as well as the Town of Ponoka’s Legal Council [sic], [name].

By my accounting, November 23rd would have been the 30th calendar day from October 29th and would have been the deadline for a FOIP response. I received no response from the Town of Ponoka, and did not receive an extension request or reasons why they were unable to comply.

[para 18] The Applicant advised that the first portion of the development board hearing proceeded on November 30, 2020. She advised that the Public Body’s development authority

(the Development Authority) and the Public Body's legal counsel (the Legal Counsel) participated in the hearing. She stated:

I verbally advised the board, as well as [the Development Authority] and [the Legal Counsel], that the Town of Ponoka had not complied with my FOIP request. The hearing proceeded, and the second part of the hearing was adjourned until December 15, 2020.

[para 19] The Applicant further submitted:

On December 15, 2020, the development hearing board, as well as [Development Authority] and [Legal Counsel], reconvened for the second stage of the hearing. I again advised that the Town of Ponoka still had not complied with the FOIP request. I believe that due to the Town of Ponoka's failure to comply with the FOIP request, I was at a disadvantage in the hearing. Unfortunately, the hearing has now closed for the Board to make their decision, and no new evidence can be introduced.

[para 20] Whether the Applicant was disadvantaged in the hearing is outside of the scope of the jurisdiction of this Office and is not an issue in this inquiry.

[para 21] In its submission, the Public Body confirmed that it received the Applicant's FOIP Request on October 28, 2020, and her payment for her FOIP Request on October 30, 2020. It stated:

When calculating the time period to respond, we started our calculation on October 31, 2020, the day after payment was received as per section 3.3 of the *FOIP Guidelines and Practices*. According to our calculations, the response date would be November 30, 2020.

[para 22] The Public Body stated that it spoke to the Applicant to clarify the scope of her request, and an extensive search of records was conducted to fulfill the request.

[para 23] The Public Body submitted that it emailed its response to the Applicant's FOIP Request to her on November 25, 2020. With its submission, which it provided to me and to the Applicant, the Public Body provided a copy of the email it sent to the Applicant on November 25, 2020. The email stated:

Good morning,

Attached is the Town's response to your Request to Access Information.

Thank you,

The Public Body also provided the attachments to the email, which included its response letter.

[para 24] The Public Body stated:

As the FOIP request from [the Applicant] was initiated by email, and contact was maintained throughout the access request process by email, the response was sent by email. Our email

records indicate that the response was delivered to [the Applicant], and no rejection notice was received.

It is unfortunate that [the Applicant] did not receive the requested records, however, had we been advised that email delivery was not successful, we certainly would have made alternate arrangements for these records to be delivered.

In closing, the Town diligently followed the process to respond to a ‘request to access information’, sought to clarify the scope of the request, conducted a thorough review of records, and responded to the request in the appropriate time frame.

[para 25] The Public Body provided information to indicate that the email address it sent its response to was the email address the Applicant provided on her FOIP Request. It is the same email address that the Applicant used to correspond with the Public Body about her FOIP Request.

[para 26] While there is no explanation before me as to why the Public Body’s email attaching its response was not received by the Applicant, nor why, if it was not delivered, no “delivery failure” notification was received by the Public Body, I accept the Public Body’s submission that it sent the email with its response to the Applicant on November 25, 2020 and did not receive a “delivery failure” notification. I also accept the Applicant’s submission that she did not receive the email.

[para 27] The only question to be determined in this inquiry is whether the Public Body made every reasonable effort to respond to the Applicant’s FOIP Request not later than 30 days after it received it as required by section 11 of the *FOIP Act*.

[para 28] At paragraph 59 of Order 98-002, the Commissioner adopted the following definition of “every reasonable effort”:¹

[para 59] I accept the following interpretation of “every reasonable effort”, as set out by the British Columbia Information and Privacy Commissioner in British Columbia Order 30-1995:

Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable. The use of ‘every’ indicates that a public body’s efforts are to be thorough and comprehensive . . .

[para 29] In Order F2007-012, the adjudicator made the following comments regarding section 11 of the *FOIP Act*:²

[para 32] Section 11 of the Act requires the head of a public body to make every reasonable effort to respond to the applicant not later than 30 days from the date of receipt of an access request. If a public body can demonstrate that it made every reasonable effort to respond to a

¹ See as well, Orders F2006-022 at para. 29 and F2015-13 at para. 31.

² See as well, Order F2007-017 at paragraph 37, where the adjudicator stated “Notwithstanding the Public Body’s failure to meet the 30 day time limit, section 11 states that if a Public Body made a reasonable effort to meet the deadline, it will not breach that section.”

request within the time limit, but failed due to circumstances beyond its control, the public body would not be in breach of section 11.

...

[para 36] Although the Public Body did not respond to the Applicant's access request within the time limit contemplated by section 11, if the Public Body can demonstrate it took all reasonable steps to respond to the access request within the time limit, it would not be in breach of section 11, despite missing the time limit.

[para 30] In Order F2018-22, the adjudicator made the following order where a public body had failed to respond to the applicant within the time limit set out in section 11 of the *FOIP Act*:

[para 10] I find that the Public Body did not respond to the Applicant within the time limit set out in section 11 of the Act. While it is too late for the Public Body to now comply with that section of the Act, I order the Public Body to respond to the Applicant in accordance with the Public Body's remaining duties under the Act.

[para 31] The purpose of section 11 is to ensure that applicants receive timely responses to their access requests from public bodies.

[para 32] In light of the previous Orders of this Office referred to herein, in my view, if a public body made every reasonable effort to provide its response to an applicant within the 30 day time limit set out in section 11, but for reasons outside of the public body's control the applicant did not receive the public body's response within the time limit, the public body would not be in breach of section 11; however, upon being made aware that the applicant did not receive its response, a public body would, in most cases, have a duty under the *FOIP Act* to provide its response again to the applicant.³

[para 33] I will now consider whether the Public Body made every reasonable effort in this case to respond to the Applicant's access request not later than 30 days after it received the access request.

[para 34] The Public Body's evidence in this case is that it responded to the Applicant's access request via email on November 25, 2020. This is within the 30 day period specified by section 11 of the *FOIP Act*; however, the Applicant says she did not receive the Public Body's response.

[para 35] In determining whether the Public Body made "every reasonable effort" to respond to the Applicant, I will consider whether it was reasonable in this case, for the Public Body to use email as the method to provide its response to the Applicant.

³ I leave room for the possibility that there may be situations in which it may be reasonable for a public body not to have to attempt to provide its response to an applicant more than once. For example, where the public body has mailed its response to the applicant and the mail has been returned to the public body indicating the applicant has moved, and the applicant has not provided the public body with any other contact information, this might result in a situation where the public body could not provide its response to the applicant.

[para 36] Section 83 of the *FOIP Act* addresses permissible delivery methods under the *FOIP Act*. It states:

83(1) Where this Act requires any notice or other document to be given to a person, it is to be given

- (a) by sending it to that person by prepaid mail to the last known address of that person,*
- (b) by personal service,*
- (c) by substitutional service if so authorized by the Commissioner,*
- (d) by facsimile telecommunication, or*
- (e) in electronic form other than facsimile telecommunication if the person to whom the notice or document is to be given has consented to accept the notice or document in that form.*

(2) For the purposes of subsection (1)(e), whether a person has consented may be determined in accordance with section 8(2) of the Electronic Transactions Act.

[para 37] Section 8 of the *Electronic Transactions Act*, S.A. 2001, c. E-5.5 (the *Electronic Transactions Act*) states:

8(1) Nothing in this Act requires a person to use, provide or accept information or a record in electronic form without the person's consent.

(2) Subject to section 19, consent for the purposes of subsection (1) may be inferred from a person's conduct if there are reasonable grounds to believe that the consent is genuine and relevant to the information or record.

(3) Subsection (1) applies to information and records of all kinds, including payments.

[para 38] Section 11 of the *FOIP Act* requires public bodies to make every reasonable effort to respond to an access request. Section 12 of the *FOIP Act* sets out what a public body must tell the applicant in a response under section 11. It is clear from these sections that a public body's response must be provided in writing to an applicant.

[para 39] Section 83(1) of the *FOIP Act* sets out how delivery of documents is to be effected under the *FOIP Act*. The word "document" is not defined in the *FOIP Act*; nor is it defined in the *Interpretation Act*, R.S.A. 2000, c. I-8. One of the definitions given in the Merriam-Webster dictionary online (www.merriam-webster.com) is "a writing conveying information". I would accordingly interpret the word "document" in section 83(1) of the *FOIP Act* to include a response that is to be given by a public body under sections 11 and 12 of the *FOIP Act*.

[para 40] Section 83(1)(e) of the *FOIP Act* provides that documents may be sent electronically where consent has been given. Section 83(2) provides that "For the purposes of subsection (1)(e), whether a person has consented may be determined in accordance with section 8(2) of the

Electronic Transactions Act". Section 8(2) of the *Electronic Transactions Act* states that "Subject to section 19, consent for the purposes of subsection (1) may be inferred from a person's conduct if there are reasonable grounds to believe that the consent is genuine and relevant to the information or record". Section 8(1) of the *Electronic Transactions Act* states that "Nothing in this Act requires a person to use, provide or accept information or a record in electronic form without the person's consent".

[para 41] Given that the instructions attached to the Request to Access Information form requested applicants to enter "a fax number or email address, if any, where correspondence may be sent", and the Applicant included her email address on her FOIP Request, there is some basis upon which to conclude that the Applicant explicitly consented to receiving the Public Body's response via email. However, in the event I am incorrect, I will also consider whether the Applicant's consent to receive the Public Body's response via email can be inferred from her conduct.

[para 42] To answer this question, I take into account the fact that the Applicant provided her email address on her FOIP Request, that she used email to submit her FOIP Request as well as her initial fee, and that she used email to correspond with the Public Body regarding her request. I note that the consent requirement in section 8(2) of the *Electronic Transactions Act* states that consent may be inferred from a person's conduct "if there are reasonable grounds to believe that the consent is genuine and relevant to the information or record". I see nothing in the present circumstances to suggest that this aspect of the requirement was not met. In my view, given the facts before me, the Applicant's consent to receiving the Public Body's response by email may be inferred from her conduct.

[para 43] Therefore, I find that the Applicant consented to receive the Public Body's response via email and that when the Public Body emailed its response to the Applicant, it did so in accordance with section 83(1)(e) of the *FOIP Act*.

[para 44] In my view, in these circumstances, the Public Body made every reasonable effort to respond to the Applicant as required by section 11 of the *FOIP Act*.

[para 45] However, as stated above, if a public body is made aware that an applicant has not received its response, in most cases, the public body continues to have a duty under the *FOIP Act*, to provide its response to the applicant.

[para 46] In this regard, the Applicant's submission indicates she raised the fact she had not received a response from the Public Body in her submissions of November 23, 2020 for her development appeal board hearing, which she sent to the Public Body's Development Authority and Legal Counsel, and at the hearings on November 30, 2020 and December 15, 2020, at which the Public Body's Development Authority and Legal Counsel were present.

[para 47] I do not consider this to be notification to the Public Body that the Applicant had not received the Public Body's response. Neither of these individuals were the employees with whom the Applicant had been corresponding and speaking with about her FOIP Request, and there is nothing before me upon which to conclude that either the Development Authority or

Legal Counsel were responsible for responding to the Applicant's FOIP Request, or had any responsibility to report the Applicant's comments to the individual or individuals who were responsible for responding to the Applicant's FOIP Request.

[para 48] There is no evidence before me that following the conversations the Applicant had "in mid-November" with the Employee she was communicating with about her FOIP Request, and with the other employee she was informed would be following up on her FOIP Request, that the Applicant subsequently contacted or attempted to contact either of these individuals to enquire about the status of her FOIP Request. Had she contacted either of these individuals, or anyone else with the Public Body who had responsibility to respond to her FOIP Request, or report that the Applicant had not received a response, after the Public Body emailed its response to her on November 25, 2020 (which as I have noted, was within the 30 day time period prescribed by section 11 of the *FOIP Act*), the Public Body would have then had notice that its emailed response had not been received by the Applicant, and would have had an opportunity to provide it to her again.

[para 49] I would compare the situation in this case to a case where a public body mails its response to an applicant, properly addressed and within the time limit required by section 11, but for some reason the mail does not reach the applicant. In such a case, unless the mail is returned, or the applicant contacts the public body to ask why they have not received a response, the public body has no reason to believe that the applicant did not receive the response. It would not seem reasonable in such a case to conclude that the public body had not made every reasonable effort under section 11 of the *FOIP Act* to respond to the applicant's access request. Nonetheless, if the public body subsequently became aware that the applicant did not receive the response, in most cases the public body would need to send it to the applicant again.

[para 50] Put another way, the fact that an applicant does not receive a public body's response within 30 days of the public body's receipt of their access request, does not necessarily lead to the conclusion that the public body did not make every reasonable effort to respond to the access request within 30 days as required under section 11 of the *FOIP Act*.

[para 51] I have also considered whether, having sent a response in accordance with the requirements under section 83(1) of the *FOIP Act*, the requirement to "make every reasonable effort to respond" in section 11 of the *FOIP Act* imposes an additional duty on a public body to take active steps to confirm that an applicant has received its response to an access request.

[para 52] I am assisted in answering this question by the decision of the Alberta Court of Queen's Bench in *Workers' Compensation Board v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 99 (*WCB*), which reviewed the decision of the adjudicator in Order F2013-11.

[para 53] At paragraph 99 of Order F2013-11, the adjudicator ordered the Workers' Compensation Board to send sensitive information only by "secure, traceable means". In reviewing this requirement, the Court in *WCB* held that where sending a document by a

particular method (in that case by regular prepaid mail) is authorized by an enactment, it is unreasonable to impose a more onerous requirement not required by the statute.⁴

[para 54] I believe this reasoning would apply to the question of whether “every reasonable effort” to respond under section 11 of the *FOIP Act* requires the additional step of checking whether delivery has been effected. Accordingly, in my view, when a public body has sent its response by one of the methods prescribed in section 83(1), it is not reasonable to read into the requirement that a public body must “make every reasonable effort” to respond, an obligation to take additional steps to confirm that an applicant has in fact received the public body’s response. In the absence of information that delivery of its response has failed, it is reasonable for a public body to presume that an applicant has received its response.

[para 55] In light of the facts and evidence before me, I conclude that the Public Body made every reasonable effort to respond to the Applicant’s access request not later than 30 days after it received it, as required by section 11 of the *FOIP Act*.

[para 56] Despite the Public Body making every reasonable effort to respond to the Applicant’s access request within the 30 day time limit under section 11 of the *FOIP Act*, the Applicant has stated that she did not receive the Public Body’s response.

[para 57] As the Public Body provided its response to the Applicant’s FOIP Request which it originally sent to the Applicant via email on November 25, 2020, to the Applicant and to me as part of its submissions in this inquiry, it is not necessary for me to order the Public Body to provide its response again to the Applicant.

V. ORDER

[para 58] I make this Order under section 72 of the *FOIP Act*.

[para 59] Although the Applicant did not receive the Public Body’s response within 30 days of the Public Body’s receipt of the Applicant’s FOIP Request, I find that the Public Body made every reasonable effort to respond to the Applicant’s FOIP Request within the time limit set out in section 11 of the *FOIP Act*.

[para 60] As the Public Body has provided the Applicant with its response to her FOIP Request with its submissions in this inquiry, it is not necessary for me to order the Public Body to respond to the Applicant again under the *FOIP Act*.

Carmen Mann
Adjudicator
/kh

⁴ *Workers’ Compensation Board v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 99 at paras. 55 – 59.