

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2021-46**

November 30, 2021

**HEALTH**

Case File Number 021196

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

**Summary:** On February 4, 2021, an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to Health (the Public Body).

On April 30, 2021, the Applicant requested a review by this Office, indicating that the time limit for responding to his request under the Act had expired and he had not received a response from the Public Body.

The Adjudicator found that the Public Body did not comply with section 11 of the Act. The Adjudicator ordered 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, 14, and 72.

**Orders Cited: AB:** Orders F2018-10, F2019-16, and F2021-40.

## I. BACKGROUND

[para 1] On February 4, 2021, an individual (the Applicant) submitted an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to Health (the Public Body) for the following information:<sup>1</sup>

. . . copies of records, including but not limited to public policy memos, regarding the selection of benchmarks and hospitalization targets for Alberta’s phased reopening plan announced Jan 29, 2021.

Eliminate: “dup-recs”, “dup-emails”, “litigation-privilege”, “third-party-business”, “third-party-personal”

Start Date: January 1, 2021

End Date: January 29, 2021

[para 2] The Public Body sent a letter dated February 9, 2021 to the Applicant, acknowledging receipt of his access request and advising that the Public Body had 30 days under the Act to respond to the request, and would reply to the Applicant by March 10, 2021, if possible.<sup>2</sup>

[para 3] On March 10, 2021, the Public Body wrote to the Applicant to advise him that the Public Body was continuing to process his request. The Public Body informed the Applicant that he could ask this Office to review any matter pertaining to his request.

[para 4] On March 17, 2021, the Applicant emailed the Public Body to enquire about the status of his access request. The Applicant referred to the Public Body’s March 10th letter and noted that the letter did not indicate a timeline for a response. The Applicant asked when he could expect the response to be completed.

[para 5] On March 17, 2021, the Public Body responded to the Applicant via email and stated:

Apologies for the delay in response. Your file is still being processed, unfortunately we cannot estimate a completion date at this time, as several factors can contribute to how

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<sup>1</sup> Applicant’s access request dated February 4, 2021.

<sup>2</sup> In its submission dated November 18, 2021 (the Public Body’s Submission), the Public Body stated that it received the Applicant’s access request on February 4, 2021. This is also the date on the Applicant’s access request. I note however, that in the FOIP/HIA Advisor’s response to the Applicant dated February 9, 2021, the FOIP/HIA Advisor stated that the Public Body received the Applicant’s access request on February 8, 2021. The discrepancy is not material to my findings in this case as whether the Public Body received the Applicant’s access request on February 4 or 8, 2021, more than 30 days have passed since it received the Applicant’s access request. I also note that the Public Body’s letter dated February 9, 2021 did not accurately repeat the Applicant’s access request of February 4, 2021. For example, the Public Body’s letter indicated that the date range for the Applicant’s access request was “December 1, 2020 to January 29, 2021”; however, the access request itself indicates the date range is January 1, 2021 to January 29, 2021”. It also did not accurately repeat the records the Applicant specified to be eliminated in his access request. If there were discussions or correspondence between the parties wherein the Applicant modified his access request, neither party informed me of this. While the discrepancies are not material to my findings given the issue in this inquiry, the Public Body should ensure that it processes the Applicant’s request based on the terms of his access request (or any subsequent modifications the Applicant specified to his access request).

quickly a file can be completed. We are experiencing a high volume of requests and are doing all we can to process them in a timely manner. We cannot currently give a definitive due date, however, the advisor will be in touch with you to update when there are changes, or alternatively, feel free to contact our office by email or phone 780-422-5111 to inquire as to the status of the file.

[para 6] On April 7, 2021, the Applicant emailed the Public Body again to enquire about the status of his access request. If the Public Body responded to this email, neither the Applicant nor the Public Body provided me with the response.

[para 7] On April 30, 2021, the Applicant requested a review by this Office, indicating that the time limit for responding to his request under the Act had expired and he had not received a response from the Public Body.

[para 8] 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 9] 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 10] The Notice of Inquiry, dated October 26, 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 11] Section 11 of the 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 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 12] Section 14 of the Act states:

*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) the applicant does not give enough detail to enable the public body to identify a requested record,*
- (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,*
- (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) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other.*

*(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.*

*(4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant*

- (a) the reason for the extension,*
- (b) when a response can be expected, and*
- (c) that the applicant may make a complaint to the Commissioner or to an adjudicator as the case may be, about the extension.*

[para 13] In its submission, the Public Body stated:<sup>3</sup>

3. The Respondent has not provided a response within the legislated timeline required by s. 11(1) of the *Freedom of Information and Protection of Privacy Act* ("the Act") in regards to records that fall within the requested date range in the access request.

[para 14] The Public Body explained that the Applicant's access request was assigned to one FOIP Advisor on February 8, 2021, but was subsequently transferred to another Advisor in March of 2021.

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<sup>3</sup> Public Body's Submission at page 1.

[para 15] The Public Body stated:<sup>4</sup>

8. The delay in a response resulted due to the Respondent's FOIP Office staffing challenges (which are already known to the OIPC), Alberta Health's role in providing support due to the current pandemic, and the current volume of access requests.
9. The Respondent is the Department tasked with leading the response to the COVID-19 pandemic. This affects the Respondent's FOIP Office's operations in two ways. First, there has been a notable increase in the number of FOIP access request [sic] submitted to the Respondent regarding the Respondent's handling of the pandemic. Second, the program areas holding responsive records in respect of FOIP access requests regarding the Respondent's handling of the pandemic are the same program areas responsible for leading the response to the COVID-10 pandemic.
10. These factors resulted in this access request not being processed and a response not being provided to the Applicant per the timelines required by the Act.
- ...
14. Although the Respondent's FOIP Office is currently understaffed for the volume of requests it receives, the Respondent has undertaken the necessary steps to gather the responsive records.
15. The Respondent is currently processing the records with the intent to respond to the Applicant as soon as possible.
16. The Respondent respectfully requests that no order be made that it has refused to respond to the Applicant's access request, as the Respondent is making its best efforts to complete the request and provide responsive records to the Applicant.

[para 16] The Public Body also provided me with an Affidavit sworn by the Public Body's FOIP/HIA Coordinator. The FOIP/HIA Coordinator provided the following pertinent details about the steps the Public Body had taken to respond to the Applicant's access request:<sup>5</sup>

- ...
11. The day that the Alberta Health FOIP Office receives and logs the request into FOIPNet, the FOIP Office's administrative staff send a broadcast e-mail to the senior executive members (Deputy Ministers and Associate Deputy Ministers) of each division that may hold records responsive [sic] to the request text. The broadcast e-mail tells the ministry to not delete, destroy or otherwise remove records that are responsive to the access request. The next day, the FOIP Office will send an electronic location of records ("LOR") request to the EAs of each Alberta Health division.
12. The LOR is provided to all divisions of Alberta Health who have been identified as having records responsive to the request, as the request may not be applicable to all division [sic] within Alberta Health. The FOIP Advisor in charge of the request may

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<sup>4</sup> *Ibid.*, at pages 2 – 4.

<sup>5</sup> FOIP/HIA Coordinator's Affidavit sworn November 18, 2021 (the FOIP/HIA Coordinator's Affidavit).

choose to include a note indicating that the request will only be presented to specific areas based on the content and scope of the request.

13. The identified divisions have three business days within which to respond to the request and all searches must be documented and returned to the FOIP Office to be logged into FOIPNet, and provided to the FOIP Advisor for review and evaluation.
- ...
16. The Applicant's access request was assigned to [name of employee], a FOIP Advisor with Alberta Health on February 8, 2021.
17. The LOR was sent to the Minister's Office (MO) February 9, 2021, and 120 pages of responsive records were received on March 17, 2021.
18. The LOR was sent to the Deputy Minister's Office (DMO) on February 9, 2021, and 103 pages of responsive records were received on October 28, 2021.
19. The LOR was sent to the Office of the Chief Medical Officer of Health (OCMOH) on February 9, 2021 and 1117 pages of responsive records were received November 17, 2021.
20. The LOR was sent to Health Standards, Quality, and Performance (HSQP) division on February 9, 2021, and 28 pages of records were received on June 22, 2021.
21. The LOR was sent to the Public Health and Compliance (PHC) division on February 9, 2021, the request was not applicable to this area and no responsive records were identified.
22. The LOR was sent to the Financial and Corporate Services (FCS) division on February 9, 2021, no responsive records were found.
23. The LOR was sent to the Emergency Operations Centre (EOC) on February 9, 2021, no responsive records were found.
24. A first pass of the records has not yet been completed but is in progress.

[para 17] The FOIP/HIA Coordinator advised that the FOIP office continues to have significant file loads and reduced staff at this time, and that the current staff complement includes three active FOIP advisors, two active FOIP Administrators (one of which is newly hired and still being trained), and one full time HIA analyst.<sup>6</sup>

[para 18] The FOIP/HIA Coordinator also stated:

26. For an individual who does not have experience as a FOIP Advisor, it takes 5 to 7 months of training to be able to fulfill all the duties of a FOIP Advisor. Furthermore, given the ongoing pandemic moving staff internally from other program areas of Alberta Health to the FOIP Office would cause significant delays to these program

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<sup>6</sup> *Ibid.*, at para. 25.

areas, and possibly impede Alberta's response to the pandemic if staff whose primary focus is responding to [the] COVID-19 pandemic are redeployed to assist the FOIP Office.

27. Moving staff from other ministries to work as FOIP advisors within Alberta Health also presents unique challenges in that Alberta Health is both a public body per FOIP and a custodian per the Health Information Act (HIA). Therefore, Alberta Health typically has records that may contain personal information and health information subject to the HIA within the same record(s). Whether a record contains health information cannot be determined until the record is reviewed. As a result any individual processing records in response to an access request received by Alberta Health must also be an "affiliate" as per the HIA in order to access or view health information within the records of Alberta Health.
28. This complicates matters in terms of bringing FOIP staff from another public body, that is not also a custodian per the HIA, to assist Alberta Health's FOIP office. Since these individuals from other ministry FOIP offices would not be considered "affiliates" per the HIA it could result in potential privacy and confidentiality breaches should these individuals access and view Alberta Health's records that contain health information.

[para 19] The FOIP/HIA Coordinator advised that the Applicant's access request was transferred to another FOIP Advisor in March 2021 and that FOIP Advisor had advised the FOIP/HIA Coordinator that they were making their best efforts to complete and provide the Applicant with the records requested.<sup>7</sup>

[para 20] The FOIP/HIA Coordinator concluded by providing the following information about the FOIP Office's current case load:<sup>8</sup>

31. As of November 17, 2021, Alberta Health's FOIP Office has a total of 229 active FOIP files, with advisors currently processing 66 to 103 files each. The cumulative total number of responsive records that are the subject of these access requests totals approximately 225,287 pages.

[para 21] The Public Body did not suggest that any subsection of section 14 applied to the Applicant's access request in this case to permit it to extend the deadline for responding to the Applicant by an additional 30 days. Even if a subsection of section 14 had applied, and the Public Body had properly followed the requirements of section 14, the extra 30 day period would have long since expired. The Public Body also did not apply to the Commissioner under section 14 for permission for a longer period to respond to the Applicant's access request.

[para 22] The Public Body argues that it has made every reasonable effort to respond to the Applicant but has been unable to do so within the time limit set out in section 11 of the Act due to: (1) understaffing of its FOIP Office for the volume of requests it receives and the large number of pages it must process; and (2) it has received an increased number of access requests for information related to its handling of the COVID-19 pandemic, and the program areas that

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<sup>7</sup> *Ibid.*, at paras. 29 and 30.

<sup>8</sup> *Ibid.*, at para. 31.

may hold responsive records in respect of these requests are the same program areas responsible for leading the response to the COVID-19 pandemic.

[para 23] The Public Body asks me to find that it has not contravened section 11 of the Act because it has made every reasonable effort to respond to the Applicant.

[para 24] Similar arguments have been advanced by the Public Body in other inquiries before this Office.

[para 25] In Order F2018-10, the adjudicator made the following findings with respect to the Public Body's arguments that it should not be found to have failed to comply with section 11 of the Act, despite not meeting the 30 day time limit for responding to the access request (footnotes omitted):

[para 9] The Public Body stated in its submissions:

The Respondent submits that it has been addressing the processing of this access request in accordance with its policies and procedures. The delay in a response has resulted due to the nature of the access request, FOIP staffing challenges, and the volume of access requests that the Respondent's FOIP Office has received since this the access request was received in October 2016. These factors have resulted in this access request not being fully processed and a response provided to the Applicant per the timelines required by the FOIP legislation.

The Respondent submits that it will be able to process the access request and provide a response to the Applicant by August 31, 2018.

[. . .]

The Respondent respectfully requests that no order be made that it has refused to respond to the Applicant's access request or failed to comply with s.11(1) since the Respondent has been making best efforts to provide a response within legislated time timelines and a response to the Applicant is anticipated by August 31, 2018.

...

[para 17] 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.

[para 18] 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 18 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.

[para 19] 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 [sic] 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.

[para 20] The foregoing analysis holds true for 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.

[para 21] 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.

[para 22] 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 23] Section 72(3)(a) authorizes the Commissioner to order that the duty under section 11 be performed, while section 74(1) of the FOIP Act imposes a duty on the head of the Public Body to comply with the Order. If the head delegates the duty to comply with the order I must make solely to its FOIP office in its current state, as it has been described to me in the Public Body's submissions, then it is likely that the head will be unable to comply with the Commissioner's order, despite the duty to do so imposed by section 74(1). Further, she will not be able to meet her duty to other applicants under section 11. It appears then,

that the head must consider delegating her duty and authority to another person or persons under section 85, if she is to comply with her statutory duties under the FOIP Act.

[para 24] I find, on the evidence before me, that the head has not made all reasonable efforts to respond to the Applicant within 30 days, as required by section 11. I must therefore order the head of the Public Body to meet her duty under section 11 by making all reasonable efforts to respond to the Applicant. As noted above, the head also has the duty, under section 74(1), of complying with the order within fifty days of receiving this order.

[para 26] In Order F2019-16, the Public Body made the following submission to the adjudicator regarding whether it had made every reasonable effort to respond to the applicant within the time frames set out in section 11 of the Act:

[para 9] In its submission, the Public Body states that it “has not provided a response within the time frames set out in s. 11(1)” of the Act. However, the Public Body argues that it made every reasonable effort to do so; therefore, it complied with section 11 of the Act. It states (at paras. 16-18):

The Respondent was unable to respond to the Access Request within the timelines set out in s. 11(1) of the Act, due to:

- a. the complex nature of the records;
- b. staff turnover, and the difficulty of recruiting employees who already have the requisite knowledge, skills, and experience at the time of hiring to process complex FOIP requests for Alberta Health such as this Access Request;
- c. the lengthy training period for new employees in the Respondent’s FOIP Office; and
- d. the extraordinarily high volume of access requests that the Respondent is processing.

The Respondent expects that it will be able to provide a response to the Applicant by May 9, 2019.

The Respondent submits that, in the circumstances, it has made every reasonable effort to respond to the Request within the time period set out in s. 11(1) of the Act.

[para 27] The adjudicator in Order F2019-16 made the following findings with respect to the Public Body’s arguments:

[para 10] The adjudicator in Order F2006-022 addressed similar arguments. She said (at paras. 21 and 28, emphasis added):

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

...

The Public Body has the onus of establishing that it made every reasonable effort to respond to the access request within the Act's time limits, as it is in the best position to know what steps it took to comply and bears the obligation of complying with section 11.

[para 11] Past Orders of this Office have addressed the effect of staffing shortages on a public body's duty to comply within the time frame of the Act. In Order F2013-53 the public body stated that it did not meet its timeline under section 11 of the Act due to being temporarily short staffed. That Order found that being short staffed did not affect the public body's duty under section 11.

[para 12] The adjudicator in Order F2018-10 explained why being short staffed or having a high workload does not mitigate a public body's duty under section 11. She noted that the duty to make every reasonable effort to respond in 30 days is a duty of the *head* of the public body. Clearly, the head cannot respond to each access request, and so must delegate that responsibility. But the head must delegate the responsibility in a manner that would allow the head's duties to be met. Delegating a large workload to a systemically understaffed unit such that the statutory timelines are consistently not met does not satisfy the duty to make every reasonable effort under section 11 (see paras. 17-18).

[para 13] I agree with the reasoning of these Orders. Where adequate staffing is a consistent problem and the workload is consistently high, not meeting statutory timelines for these reasons is not making every reasonable effort to respond within the timelines.

[para 14] The Public Body provided me with a copy of the Assistant Commissioner's decision to refuse the Public Body's second time extension request. The Assistant Commissioner's reasons are consistent with the reasoning of the past Orders cited above. He states:

It is apparent that the Public Body continues to face resourcing challenges. It is incumbent upon a Public Body to take reasonable steps to ensure resources are in place to meet its obligations under the FOIP Act.

There is no provision made in the FOIP Act that allows for an extension of time to be granted on the basis that a Public Body does not have necessary resources to address the volume of access requests that it receives.

[para 15] To be clear, it is possible for a public body to *both* fail to meet its timelines *and* have made every reasonable effort to meet them. However, the public body must show what steps it took to meet its timelines. In this case, the Public Body has told me the reasons why it didn't meet its timelines, but did not tell me the steps it took to try and do so.

[para 16] The Public Body states that as of March 2019 it had 43 access requests in progress, and that it experienced staff turnover. In a sworn affidavit provided with the Public Body's submission, a FOIP/HIA coordinator with the Public Body states (at para. 33):

The onboarding of FOIP Office staff and the volume and complexity of access requests received by Alberta Health since October, 2017 has made it challenging to adhere to the timelines established per s. 11 of FOIP, and this has resulted in an unintended delay in responding to this Applicant's access request.

[para 17] This suggests that the Public Body has experienced some increase in access requests and staff training. However, further detail in this regard is necessary to find that the Public Body made every reasonable effort to respond to the Applicant's request, but failed due to circumstances beyond its control. For example, the Public Body has not argued that 43 requests is an unusually or unforeseeably high number in comparison to its usual workload. The Public Body has not told me that the turnover currently (or recently) experienced is unusually or unforeseeably high. The affidavit provided by the Public Body states that due to staff turnover, it has recruited three new FOIP advisors in the time period during which the Applicant's access request has been process [sic]. It is not clear whether the Public Body has added these three positions or whether it replaced staff that left. Staff turnover is not an uncommon occurrence and therefore is generally not unforeseeable (barring exceptional circumstances that do not seem to be present here). Further, as the Public Body has been processing the Applicant's request for a year and a half, it is also not clear whether this is an unusually high turnover for that period of time.

[para 18] The Public Body did tell me that the Applicant's request was reassigned due to staff turnover, but this occurred after the Public Body's initial 30 day time to respond, its 30 day extension under section 14(1)(b), and its 120 day extension granted by this Office. Therefore, it is not clear how this particular reassignment affected the Public Body's ability to respond within the extended 180-day timeline.

[para 19] The Assistant Commissioner's decision to refuse the Public Body's second request for a time extension noted that very little progress seemed to have been made during the previous 120 days. He said:

I also reviewed the work completed and the work that remains, as stated by the Public Body in each request for an extension of time. It appears to me that minimal progress has been made on this request during the four month extension that I granted. The work completed and the work that remains sections of each submission contains mostly the same content. The first extension request submission says a first pass of the records is underway so responsive records can be uploaded into the redacting software, and the second confirms that this was done. However, beyond this initial processing step, it appears that little additional work has been completed during the four month extension that I granted. Of the seven processing steps that were listed in both the first and second extension request, only one of seven is noted as having progressed at all.

[para 20] I do not have the submissions made to the Assistant Commissioner; however, the Public Body provided me with his decisions and did not provide any explanation for, or refutation of, his finding that little progress was made during the first time extension. Further, almost a full year has passed since the expiry of the Public Body's last extended deadline (and since the Assistant Commissioner's decision not to extend the Public Body's timelines again). The Public Body has not told me what steps it has taken to respond to the Applicant's request in that year.

[para 21] I cannot accept the Public Body's arguments that it made every reasonable effort to meet its timelines for responding to an access request that is currently a year late for the reason that the Public Body is, by all accounts, systemically understaffed. Such a finding would mean that a public body could effectively thwart the timelines in the Act by understaffing the program areas that respond to access requests, which is an absurd result. The staffing levels of program areas are clearly within the control of public bodies.

[para 22] Given the above, I find that the Public Body failed to make every reasonable effort to respond to the Applicant within the timelines of the Act. The Public Body states that the staff member currently processing the Applicant's request believes the response will be complete by May 9, 2019. This is well within the compliance period.

[para 28] The adjudicator made the following order in F2019-16:

[para 24] 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 25] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

[para 29] Recently, in Order F2021-40, the adjudicator considered the Public Body's submission that its role in responding to the COVID-19 pandemic affected its ability to meet the time lines specified for responding to access requests under the Act. The adjudicator stated:

[para 9] A Public Body must make every reasonable effort to respond to an access request within 30 days of receiving it unless the Public Body has extended the time for responding to the access request under section 14, or has transferred the access request under section 15.

[para 10] The Public Body states:

This Inquiry was ordered as a result of Alberta Health's delay in providing a response to the applicant's access request received on October 29, 2020. Subsequent to that date, Alberta Health provided the records to the applicant as identified in the access request on September 16, 221 [sic]. As the records have now been provided to the applicant, Alberta Health has no further information to provide in relation to the Inquiry.

Alberta Health's delay in responding was not a deliberate refusal to respond to the access request. The records being sought were in relation to Alberta Health's response to the COVID-19 pandemic. Since March of 2020, Alberta Health has led the Government of Alberta's COVID-19 pandemic response and is dealing with unprecedented demands in this regard. The fact that this urgent work caused Alberta Health's delay in responding to the access request was an unfortunate occurrence arising from this unique situation.

[para 11] The Public Body attributes its delay in responding to the Applicant's access request to the role of Health in responding to the COVID-19 epidemic. It is not clear in its submissions why the Public Body's FOIP Office was unable to respond to the access request. Perhaps the Public Body received many requests for similar information or perhaps the program areas that held the responsive records did not respond in a timely manner due to their duties regarding pandemic response. I accept that the Public Body considers the situation to be unique. I recommend that the Public Body consider how the delay occurred and take any measures available to it to avoid similar delays.

[para 30] At paragraphs 15 and 16 of Order F2021-40, the adjudicator made the following Order:

[para 15] 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 16] 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.

[para 31] It appears to me from the prior Orders referred to herein, and from the Public Body's submissions in this inquiry, that the Public Body's primary challenge in responding to access requests within the time frame required by the Act continues to be inadequate staffing for the volume of access requests it receives and the large number of records it must process in relation to those access requests. A further challenge to providing responses within the time limits required by the Act is where the divisions or program areas holding potentially responsive records to particular access requests, are also the divisions or program areas responsible for leading the Public Body's response to the COVID-19 pandemic.

[para 32] The prior Orders of this Office mentioned herein have concluded that where the reason a public body has not responded to an applicant within the time limit under section 11 is because it is chronically short staffed in relation to the volume of access requests it receives, it cannot be said that the public body has taken every reasonable step to respond to an applicant and complied with section 11. Staffing is an issue which is within the control of the Public Body.

[para 33] I note that while the Public Body discussed the issues it saw with moving staff internally from other program areas, or moving staff from other ministries, or bringing FOIP staff from another public body to work as FOIP Advisors for Alberta Health, it did not advise whether it had taken, or was taking, any steps to hire and train more staff, as employees of Alberta Health, to respond to access requests.

[para 34] The Public Body also submitted that it had received a notable increase in access requests related to the Public Body's handling of the pandemic, and that the program areas holding responsive records in respect of FOIP access requests regarding the Public Body's handling of the pandemic were the same program areas responsible for leading the response to the COVID-10 pandemic.

[para 35] The Public Body advised that these factors resulted in this access request not being processed and a response not being provided to the Applicant per the timelines required by the Act. The Public Body submitted that I should take this into consideration in determining whether it had made every reasonable effort to respond to the Applicant within the 30 day time limit under section 11.

[para 36] With respect to the steps it took in relation to responding to the Applicant's access request, the Public Body has provided me with information about when it sent out the LORs, and details about when it received responsive records back from the divisions it sent the LORs to.

[para 37] The FOIP/HIA Coordinator's Affidavit indicates that there were delays by a number of the divisions (or program areas) in providing responsive records to the Public Body's FOIP Office. The Public Body did not tell me what efforts it made to follow up with those divisions that did not respond to the FOIP Office within the three business days.

[para 38] Nor did the Public Body provide me with any specific details as to why a division was unable to provide a response to the Public Body's FOIP Office in a timely manner. I do not have information on how the division's responsibilities in dealing with the COVID-19 pandemic might have impacted its ability to respond to the LOR. If there were unforeseen circumstances, or circumstances beyond the division's control that it was dealing with, that impacted its ability to respond to the access request, the Public Body did not tell me about this.

[para 39] In Order F2021-40, with respect to the Public Body's submission that its responsibilities with regard to COVID-19 had an effect on its ability to meet the time lines for responding under the Act, the adjudicator recommended that the Public Body consider how the delay occurred and take any measures available to it to avoid similar delays.

[para 40] The Public Body has told me that the COVID-19 pandemic was a reason why it did not respond to the Applicant's access request within the time frames under the Act, but it did not tell me what steps or measures it took in this case to address this. I would reiterate the adjudicator's recommendation in Order F2021-40, that the Public Body consider how the delay occurred and take any measures available to it to avoid similar delays.

[para 41] I also have no specific information from the Public Body on the steps that the FOIP Advisor who was reassigned the Applicant's access request has taken to review the responsive records the FOIP Office has received for the Applicant's access request. The Public Body has told me that a first pass of the records has not yet been completed but is in progress. I do not know what portion of the records have been given a first pass, or how many passes the records will go through.

[para 42] It has been more than nine months since the Applicant submitted his access request to the Public Body and the Public Body has not responded to the Applicant and has not given any indication as to when it expects to provide a response to the Applicant.

[para 43] In light of the foregoing, I find that the Public Body failed to make every reasonable effort to respond to the Applicant within the timelines of the Act.

[para 44] As the Public Body has not responded to the access request as required under section 11 of the Act, I must make an order directing the Public Body to respond to the Applicant.

## **V. ORDER**

[para 45] I make this Order under section 72 of the Act.

[para 46] 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 47] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with it.

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Carmen Mann  
Adjudicator  
/kh