

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-11

February 23, 2022

ENVIRONMENT AND PARKS

Case File Number 023741

Office URL: www.oipc.ab.ca

Summary: On December 1, 2020, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* to Environment and Parks (the Public Body) for the following:

Any and all meeting minutes, notes from telephone conversations or meetings, and calendar invitations regarding telephone conversations or meetings between Alberta Environment and Parks and TransAlta Corp. and/or TransAlta Renewables Inc. regarding Alberta Energy Regulator Subsurface Order No. 6. Time Period: January 1, 2018 to November 13, 2020

The Public Body did not respond to the access request or extend the time for responding beyond 30 days, and the Applicant sought review by the Commissioner.

The Adjudicator directed the Public Body to respond to the access request.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 14, 72

Authorities Cited: **AB:** F2018-10

1. BACKGROUND

[para 1] On December 1, 2020, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* to Environment and Parks (the

Public Body) for the following:

Any and all meeting minutes, notes from telephone conversations or meetings, and calendar invitations regarding telephone conversations or meetings between Alberta Environment and Parks and TransAlta Corp. and/or TransAlta Renewables Inc. regarding Alberta Energy Regulator Subsurface Order No. 6. Time Period: January 1, 2018 to November 13, 2020

[para 2] The Public Body did not respond to the access request. On November 15, 2021, the Applicant asked the Commissioner to review the Public Body's failure to respond to the access request. The Commissioner directed that the matter proceed to inquiry.

II. ISSUE: Did the Public Body meet its duty to the Applicant as provided by section 11 of the Act (time limit for responding)?

[para 3] Section 11(1) of the Act establishes the time frame for responding to an access request. It states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

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

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

[para 4] Section 14 of the FOIP Act authorizes a public body to respond to an access request within a time frame greater than 30 days in specific circumstances. It 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 5] The Public Body provided the following explanation of the steps it followed to process the access request:

9. This Request is one out of the 20 Access Requests submitted by the Applicant on December 1, 2020. The efforts made by Alberta Environment and Parks to respond to the Applicant's Request within the time limit include the following:

a) The Public Body acknowledged the Applicant's Request and initiated a search for records immediately (On December 3, 2020) after the request was received.

b) A Section 14(1)(b) Extension Notice was issued to the Applicant on January 4, 2021 thereby extending the response due date to February 3, 2021.

c) The search for records responsive to this Request was completed by the Program Area on April 29, 2021. By this time, 147 days had passed since the search was initiated.

d) Upon receipt of the records on April 29, 2021, the AEP FOIP office started reviewing the records and subsequently sent the records for Program Area review on May 11, 2021.

e) The Dam Safety Program Area provided a response to the review of the records on July 9, 2021

f) A section 30 Notice was issued to two Third Parties on July 15, 2021 regarding the disclosure of their records.

g) On July 29, 2021, the Third Parties responded to the Section 30 Notice.

- h) On August 4, 2021, the AEP FOIP Office initiated the approval process for the disclosure of the records.
- i) The AEP Delegated Decision Maker made a decision on the disclosure of the records on September 24, 2021 and a Section 31 Notice was sent to the Third Parties.
- j) The general records excluding the Third Party records were disclosed to the Applicant on September 28, 2021.
- k) On October 15, 2021, the Office of the Information and Privacy Commissioner confirmed that the Third party has requested for a review of the Public Body's decision to disclose the records and directed the Public Body not to disclose the records.
- l) The Public Body is still awaiting further directions from the Office of the Privacy Commissioner regarding the review of the Third Party records. The Public Body will disclose the Third Party records as soon as the Review is completed.
- m) The most important factor that contributed to the inability of the Public Body to respond to the Applicant's request within the timelines provided under the FOIP Act is that twenty (20) multiple concurrent requests on similar topics were received from the Applicant on December 1, 2020. The Applicant subsequently submitted fourteen (14) additional requests on similar topics related to the Brazeau Dam on March 16, 2021. Further, the Applicant submitted an additional sixteen (16) Access requests pertaining to the Brazeau Dam on June 8, 2021.
- n) Overall, the Applicant submitted a total of fifty (50) Access requests to the Public Body on similar topics pertaining to the Brazeau Dam within an approximately six-month period.
- o) The Public Body was still processing the twenty (20) requests received on December 1, 2020 when the second batch was received on March 16, 2021. This created a backlog of files to be processed. Similarly, when an additional sixteen requests were received on June 8, 2021, many of the files in both the first and second batches were still being processed.
- p) The Public Body has continuously worked on the Requests since they were received, and in all, forty-two (42) of the above-mentioned fifty Requests have been closed. However, these fifty Requests, all received in relatively close proximity to one another, significantly impacted the FOIP Office and the relevant program area within AEP. All of the Requests needed to be clarified with the Applicant. Many of them came back with large volumes of records, extensive consultations with the program area and, where necessary, third parties.
- q) When all fifty Access Requests are combined, there were over 34,000 pages of potentially responsive records that the program area not only had to search for and locate, but also conduct the subject matter review for each request, all simultaneously and at various stages. Even the Requests that had no records impacted the program area given that they had to conduct a thorough search that involved a large volume of records and respond within a reasonable time frame knowing that there were numerous other requests where records had to be searched for and located.
- r) The fifty (50) Access Requests have unreasonably interfered with the operations of Alberta Environment and Parks, but also the government as a whole. AEP does not operate in isolation, but interacts with other public bodies to fulfill the mandate of the Government of Alberta and to serve Albertans. Given this situation, it was unreasonable to assume this much work could be done by the program area or the FOIP Office within the legislated timelines allowed by the Act.
- s) Furthermore, the fact that many of the fifty Requests overlap in their scope has contributed to the Public Body being unable to respond to the Applicant within the timelines. Although each Request was distinct, there was still considerable overlap that affected the review

of the records. As many of the Requests were similar in topic, there was a greater chance of there being potential overlapping records that were responsive to other requests. In particular, this request, E20-G-1462, overlaps considerably with request E20-G-1461. There is a need for consistency in severing approaches to avoid the inadvertent disclosure of information that should be withheld, and this had slowed the processing of the request.

[para 6] The Public Body argues that it took all reasonable steps to process the Applicant's access request. It also argues:

The Public Body submits that the delays in processing the Applicant's Request were caused by the extended time period it took the Program Area to complete the search for records given that a total of 50 requests were submitted by the Applicant within a six-month period.

The Public Body did not request a time extension from the Office of the Information and Privacy Commissioner as it did not have sufficient information at the appropriate time to apply for an extension given that the search for records was ongoing and the Program Area was being overwhelmed by the Applicant's fifty (50) Requests and not responding to requests to provide information which could have been used to request an extension.

As can be gleaned from the chronology of process events, a fair and rational person would be of the view that the Public Body made every reasonable effort to process this request within the required timelines. However, due to the delays caused by the extended time period it took to complete the search for records given that a total of fifty (50) requests were submitted by the Applicant, the Public Body was not able to meet the timeline for processing this request.

The Public Body respectfully requests that the Commissioner find that the Public Body made every reasonable effort to respond to this request within the time limit, but failed due to circumstances beyond its control.

The Public Body argues that it would be "unreasonable" to expect the Public Body's FOIP Office to respond to the Applicant within the timelines required by section 11 of the FOIP Act. This argument requires some comment.

[para 7] As noted in previous orders, the duty to respond to an access request under the FOIP Act is that of the *head* of the Public Body – the Minister. The Minister delegates the Minister's powers under the FOIP Act to a FOIP office in order to meet the Minister's duties as head. This point was made in Order F2018-10:

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 8] I am told that the time for responding was not extended in this case because a program area within the Public Body did not respond to the FOIP office’s requests for information. While the FOIP office may have taken reasonable steps in requesting a response from the program area, I cannot find that the public body as a whole took reasonable steps, given that the program area failed to respond to the FOIP Office in time for the FOIP Office to seek the Commissioner’s approval to extend and no reason has been given for that failure.

[para 9] The FOIP Act requires the *head* of a public body to respond to an Applicant within 30 days or to extend the time for responding in accordance with section 14. Section 14 permits the head to extend the time for responding in specific circumstances, such as when there are a large number of records to process, or more time is needed to consult with another public body or a third party as to whether to grant access. Extending the time for responding allows a public body more time to process records while providing an applicant an anticipated time for responding.

[para 10] The Public Body has suggested that the number of access requests made by the Applicant has affected the ability of government to function as a whole. The Public Body cited the number of access requests (fifty) and the number of records (34,000) as having this effect. The Public Body did not provide any evidence to support

its claim. Fifty access requests is not, in and of itself, an excessive amount of access requests. 34,000 is not, in and of itself, an exceedingly large number of records. If each record is unique, it may take some time to process the access request, but if many of the records are duplicates, it may not take as much time as the Public Body anticipates. Moreover, the Public Body has indicated that the requests are for records on similar subjects, which may allow the Public Body to streamline its searches and involve fewer employees in the search.

[para 11] The time limits imposed by the Legislature and the process for extending the time are not unreasonable. Sections 11 and 14 recognize that processing records may be time consuming, but also recognize that the value of information decreases with delay. Information may be relevant when it is requested, but lack value a year or years later once it is no longer current. At the same time, the Act permits a public body to extend the time to ensure that the public body's ability to perform its public functions are not unduly affected. As discussed above, the Public Body did not extend the time for responding in this case.

[para 12] In my view, there is nothing unreasonable about an applicant making access requests for records in the custody or control of a public body. Doing so is a right created by the FOIP Act. It is also reasonable for the Applicant to expect that the Public Body will respond to the access requests, not only because the FOIP Act requires it, but also because the Public Body required a deposit in advance and informed the Applicant that it would respond by February 3, 2021.

[para 13] The Public Body argues that a "fair and rational" person would find that it took all reasonable steps to respond within time. However, it has not provided adequate evidence to support this position. For example, it has not detailed the steps it took to search for records to explain the length of time that searching took in this case.

[para 14] The Public Body explains in its submissions that it made the decision to disclose records containing information about third parties, but that the third parties sought review of that decision. Clearly, the Public Body cannot release that particular information until the Commissioner makes a final decision regarding it. However, it is unclear from its submissions whether the Public Body has made decisions regarding records that do not contain third party information, or records containing third party information that the Public Body has decided should be withheld from the Applicant. If there are records falling within these two categories, the Public Body must still meet its obligations under section 11 by either giving the applicant access to such records or providing the applicant with its decision to refuse access to them.

[para 15] To conclude, the Public Body has acknowledged in its submissions that it did not respond to the Applicant's access request and did not extend the time for responding. As the Public Body does not appear to have responded to the Applicant as required by the FOIP Act, I must make an order directing the Public Body to do so.

III. ORDER

[para 16] I make this order under section 72 of the FOIP Act.

[para 17] If it has not already done so, I order the Public Body to respond to the Applicant with regard to any records that do not contain third party information or that are the subject of a decision to apply exceptions under the FOIP Act.

[para 18] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator
/ah