

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-09

February 23, 2022

ENVIRONMENT AND PARKS

Case File Number 023739

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 hydraulic fracturing, fracking, oil and gas operations, oil and gas development, induced seismicity, seismic risk or seismic hazard in the vicinity of Brazeau Dam and/or Power Canal Dyke infrastructure. Time Period: January 1, 2014 to November 13, 2020 This request excludes: duplicate records, email records which are duplicated in the final/longest string.

The Public Body did not respond to the access request or extend the time for responding 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 hydraulic fracturing, fracking, oil and gas operations, oil and gas development, induced seismicity, seismic risk or seismic hazard in the vicinity of Brazeau Dam and/or Power Canal Dyke infrastructure. Time Period: January 1, 2014 to November 13, 2020 This request excludes: duplicate records, email records which are duplicated in the final/longest string.

[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:

Below is a description of the steps taken in the processing of this request:

1. The request was received on November 13, 2020. It was one of a group of 20 requests on similar, often overlapping, topics submitted by the applicant on that day. The request had to be clarified with the applicant in order for it to comply with section 7(2) of the FOIP Act. In fact, each of the twenty requests required clarification.
2. The request was acknowledged by letter dated December 2, 2020. The Applicant was informed that AEP would provide a response on or before December 31, 2020. A revised acknowledgement letter was sent on December 4, 2020, which informed the applicant that in accordance with section 22(1) of the Interpretation Act, the due date had been modified to January 4, 2021.
3. By letter dated January 4, 2021, AEP informed the Applicant that it was extending the time to respond by 30 days pursuant to section 14(1)(b) of the Act and that the response date was February 3, 2021. [my emphasis]

4. The search for records was initiated on December 3, 2020. In order to conduct a thorough and complete search for records, the search was sent to several program areas and search contacts. Specifically, a records search was sent to [...], Executive Director, Water Infrastructure Operations Branch, Resource Stewardship Division; [...], Director, Infrastructure Technical Services, Water Infrastructure and Operations Branch, Resource Stewardship Division; and [...], Executive Advisor, Assistant Deputy Minister's Office in the Resource Stewardship Division.
5. A fee estimate was sent to the applicant on February 3, 2021. The applicant paid the fee estimate on February 4, 2021.
6. Search responses were received on December 8, 11, and 15, 2020; January 8, 2021; and April 28, 2021. As some records appeared to be missing, one of the program areas was contacted again to locate the missing records, which were received on May 19, 2021. By this time, 167 days had passed since the search for records had been initiated.
7. It was determined that there were more missing records. On May 27, 2021, those records were requested from the relevant program area; they were received on June 7, 2021. By this time, 187 days had passed since the search for records was initiated.
8. The records were sent for program area review on May 27, 2021. The review was completed on June 7, 2021.
9. Section 30 notices were sent to two third parties on June 30, 2021. Third party responses were received on July 19 and July 29, 2021.
10. Around August 23, 2021, the Advisor assigned to this request at the time received feedback from another Advisor pertaining to a related request from the same applicant, E20-G-1448. Based on this feedback, the Advisor for this request determined that consultation with the Environmental Law Team, and further consultation with a program area, would be required concerning some of the records. E20-G-1448 has records that overlap considerably with E20-G-1459 and with other related requests (E20-G-1447 and E20-G-1460). The consultation with the Environmental Law Team was initiated on September 2, 2021 and concluded around November 8, 2021.

[para 6] The Public Body argues that it took all reasonable steps to process the Applicant's access request. It also argues that it would be unreasonable to expect it to respond to the Applicant within the time frame required by the FOIP Act.

While a time extension under section 14(1)(b) was taken for this request, AEP FOIP did not seek further extension of time from the Commissioner under section 14 before the 30 day extension expired. The original request could not be accepted until section 7(2) requirements were met, however, the clarification process was not adequately documented. Therefore, it was anticipated that the due date of February 3, 2021, was actually incorrect and that, therefore, the extension had expired earlier than the AEP FOIP office had originally calculated. This was compounded by the fact that the office did not have sufficient information to request an extension from the OIPC at the appropriate time because the search for records was ongoing and the program area was not responding to requests to provide information which could have been used to request an extension. [My emphasis]

There are several factors outside of the control of AEP that contributed to it being unable to respond to the applicant within the timelines provided under the FOIP Act. The most significant circumstance is that multiple concurrent requests were received from the Applicant. On December 1, 2020, the Applicant submitted twenty access requests on similar topics. The applicant submitted

a further fourteen access requests on similar topics on March 16, 2021. Finally, the applicant submitted an additional sixteen access requests on similar topics on June 8, 2021. Considering the requests submitted on December 1, 2020, March 16, 2021, and June 8, 2021 as a whole, the applicant submitted fifty requests on similar topics concerning the Brazeau Dam within an approximately six-month period. Many of the first batch of twenty requests were still being processed when the second batch was received on March 16. This created a backlog of files to be processed which would reasonably take some time to rectify. Similarly, when an additional sixteen requests were received on June 8, many of the files in both the first and second batches were still being processed.

AEP has continuously worked on the requests since they were received, and in all, 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 with 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. When all fifty 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. The fifty access requests have unreasonably interfered with the operations of AEP, 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. [My emphasis]

Furthermore, the fact that many of the fifty requests overlap in their scope has contributed to AEP 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. Because many of the requests were similar in topic, there was a greater chance of a potential overlapping of responsive records in multiple requests. In particular, this request, E20-G-1459, overlaps considerably with request E20-G-1448. There is a need for consistency in severing approaches to avoid the inadvertent disclosure of information that should be withheld, and this slowed the processing of the request.

Another factor that has affected AEP's ability to respond to this request is staffing changes within the FOIP office. This request has been reassigned to different Advisors more than once since it was received, because Advisors left the FOIP Office. This request was reassigned on August 18, 2021, and again on November 26, 2021. Each time the request is reassigned, the new Advisor requires time to become knowledgeable about the request and to review the records. This has significantly delayed the processing of the request.

The difficulties arising from request reassignment are further compounded by understaffing at the FOIP Office. During the entire time period since this request was received, the FOIP office has not been staffed at capacity. Currently, there are 4 Senior Advisor positions and 1 Team Lead position vacant. As a result, Advisors are all carrying a heavier than normal workload. This impacts the ability of the FOIP office to process requests in a timely manner or to assign other Advisors to assist with processing requests. Besides this request, the Advisor currently assigned to this request has several other requests that are also complex and involve a large volume of potentially responsive records.

[para 7] 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 8] 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 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] 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 11] In addition, the processes the Public Body described appear inefficient. While consulting may be beneficial, particularly if the Public Body has allowed a reasonable amount of time to consult and has extended the time for responding within the terms of section 14 for that purpose, there is no duty in the FOIP Act to consult with public bodies or third parties. The Public Body made a decision to consult with its legal team for a two-month period, beginning in September 2021, over 8 months after section 11 required it to have responded to the Applicant. It is unclear why the Public Body waited so many months to contact its legal department or why the process took two months. While seeking legal advice may assist public bodies to make good decisions, efficiency may require FOIP units to have the authority and the ability to make good decisions quickly without extensive consultation, or alternatively, to have timely access to legal advice. Imposing a requirement that a FOIP unit engage in extensive and lengthy consultations, even after the deadline for responding has passed, may be reasonably expected to result in a failure to comply with the public body's statutory obligations under the FOIP Act.

[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 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 14] 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.

[para 15] To conclude, the Public Body has acknowledged in its submissions that it did not respond to the Applicant's access request within 30 days of receiving it and did not extend the time for responding. As the Public Body has not 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 Act.

[para 17] I order the Public Body to respond to the Applicant.

[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
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