



Office of the Information and
Privacy Commissioner of Alberta

Investigation Report F2017-IR-01

*Investigation into Alberta Justice and Solicitor General's
delays in responding to access requests*

February 23, 2017

Alberta Justice and Solicitor General

Investigations 003650

Commissioner's Message

When I opened this investigation into Alberta Justice and Solicitor General (JSG) in September 2016, it was because my office had issued eight orders finding that JSG had failed to meet legislated timelines for responding to access requests. In addition, 14 more requests for review had been submitted by an applicant alleging no response by JSG to access requests.

Since that time, we have issued 16 more orders for JSG, and 44 in total for provincial government ministries. There are still numerous "deemed refusal" files before my office. This is unacceptable.

My hope in conducting this investigation was to shed some light on a situation that, in my view, has become a significant compliance issue with real consequences for the access rights of Albertans.

Perhaps not surprisingly, the investigation found the problem is more extensive than what is reflected in the number of cases before my office; that is, a significant number of access requests made to JSG are not responded to within legislated timelines. In many cases, my office may not be aware of the delay as applicants do not always ask for a review of the matter.

The situation appears to have been ongoing for some time, and a variety of factors contribute to delays. For example, the investigation found that since 2011, JSG has seen a steep increase in the number of access requests received (83%); however, it did not see a commensurate increase in staff and, in fact, lost staff in the very years when requests were at their peak. I understand it can be difficult to hire qualified staff, but I do commend JSG's efforts to hire additional staff to respond to the influx in access requests and for the steps already taken to address some of the recommendations made in this report.

The investigation also found that JSG's request processing practices, and an apparent lack of trust on the part of senior management and decision makers in the work of the public body's FOIP staff, unduly complicate and delay responses. The report makes a number of recommendations to address these issues, chief among them to trust the FOIP staff who work diligently to respond to requests and ensure compliance with the legislation.

Among the most concerning of the findings from this investigation, however, are the comments relayed to the investigator about the lack of respect for access to information across the Government of Alberta (GoA). It is easy to regard access to information as a nuisance, particularly when workloads are increasing and staff levels are not; however, access to information is also a cornerstone of democracy and, as has been said, "democracy dies behind closed doors."¹

With this in mind, I will repeat a comment I made in my 2013 submission to the Government of Alberta's review of the FOIP Act. In a section titled "Strong legislation is not enough...", I said that I "encourage the GoA and heads of all public bodies to lead by example and adopt a culture that respects and balances both access and privacy, and to ensure adequate resources are allocated to administering the FOIP Act and fulfilling legislative obligations."

Jill Clayton
Information and Privacy Commissioner

¹ "Democracy dies behind closed doors." Damon Keith, Aug. 26, 2002. US appeals court judge in *Detroit Free Press v. Ashcroft*, 303 F.3d 681.

Table of Contents

Introduction..... 5

Application of the FOIP Act 5

Methodology 6

Analysis and Findings..... 7

 Issue 1: Outstanding Requests 7

 Issue 2: Causes of Delays 9

Conclusion and Summary of Recommendations..... 22

Acknowledgement and Appreciation 26



Introduction

- [1] On September 1, 2016, the Office of the Information and Privacy Commissioner (OIPC) received a request from an individual (known as an applicant) who alleged he had not received a response to any of the 14 access requests he had made to Alberta Justice and Solicitor General (Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). Some of the requests had been made in 2014, over two years prior. Under the Act, a non-response is deemed to be a refusal of the right of access.²
- [2] Previous to receiving the 14 review requests alleging no response, the OIPC had received eight similar review requests that proceeded directly to inquiry and resulted in Orders issued between March and September 2016. In each of these cases an OIPC Adjudicator ordered the Public Body to respond to the requests as required by the Act.³
- [3] Prompted by the 22 cases, the Commissioner launched this investigation further to the general powers she has in the Act under section 53(1):

General powers of Commissioner

53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations to ensure compliance with any provision of this Act...

- [4] The purpose of the investigation was to review the Public Body's processing of access requests to identify reasons for the chronic delays that are currently being experienced, and to make recommendations as necessary to improve its compliance with the FOIP Act.

Application of the FOIP Act

- [5] One of the purposes of the Act is "to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act" (section 2(a)).
- [6] The provisions in the Act that relate to this investigation are sections 10 and 11.

² The Commissioner decided to have the 14 cases proceed directly to the OIPC's inquiry process, bypassing the typical mediated review or investigation process. The expedited inquiry process for deemed refusals allows for a quicker resolution when a public body has not responded to an access request within the legislated timeframe. Unlike the review process, an inquiry results in an Order which is a final decision binding on the parties.

³ As of the time of writing, the OIPC has issued 24 deemed refusal Orders involving the Public Body.

[7] Section 10 reads:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[8] Section 11 reads:

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...⁴

11(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.

Methodology

[9] In conducting this investigation I interviewed the following people:

- The Public Body's FOIP Director and the Public Body's Access Manager;
- The Public Body's access request processing staff of six Advisors, one temporary Advisor, and two administrative personnel;
- The Assistant Deputy Minister of Corporate Services, who is the Delegated Head of the Public Body; and,
- A person in a FOIP office within the Government of Alberta (GoA).

[10] In addition, I received and reviewed the following documents:

- Various reports from FOIPNet, the system used by the GoA to track access to information requests;
- A copy of the GoA's Cross-Department Request Process and its November 2016 *FOIP Best Practices for Deputy Ministers and Delegated Decision Makers* document;
- The GoA (Public Security) Complex Client Policy;
- A report on a previous review of the Public Body's FOIP Office done by Service Alberta;
- The Public Body's FOIP Delegation Table, and a Ministerial Order delegating FOIP responsibilities to the Assistant Deputy Minister of Corporate Services;
- Two Staffing Changes reports; and,

⁴ Section 14 allows a public body to extend the time for responding for up to 30 days, or longer with the Commissioner's permission, for four reasons (which are detailed later in the report).

- Emails regarding records retrieval, and an email about a comment made by a GoA FOIP employee.

[11] I received the items in the second bullet from the Manager of Corporate and Departmental FOIP Services in Service Alberta, the ministry that administers the Act. I discussed the processes described in these documents with the Manager.

[12] I also attempted to schedule an interview with the lawyer primarily assigned to the Public Body's FOIP Office; however, she politely declined to meet due to the "concerns for [her] around solicitor-client privilege" because as "a member of the Law Society, [she is] legally and ethically bound to observe privilege." As a consequence, she felt it "would be extremely difficult for [her] to respond ... openly and completely, while maintaining privilege, during an interview."

[13] The lawyer provided me with a letter describing the work she undertakes with respect to the Public Body's FOIP Office. It is unclear to me how describing one's work could reveal confidential legal advice; however, my investigation did not turn on interviewing the lawyer, and so I accepted the letter in lieu of an interview.

Analysis and Findings

[14] The concern that triggered this investigation was the Public Body's failure to consistently meet access request response timelines under the Act. Therefore, a primary goal of the investigation was to determine the scope of the problem, which involved identifying the number of access requests the Public Body had outstanding. Following that, I looked at factors that contributed to delays.

Issue 1: Outstanding Requests

[15] Further to section 11 of the Act, public bodies have 30 calendar days to respond to an access request. This time may be extended by a public body by an additional 30 calendar days under section 14 of the Act when the request must be clarified, there are a large number of records, or a public body *must* consult with a third party or *wants* to consult with another public body. Beyond this, more time can be granted by the Information and Privacy Commissioner if she is persuaded by a public body that one or more of the section 14 conditions are met.

[16] For purposes of this investigation, I looked at access requests received by the Public Body between April 1, 2013 and October 18, 2016. The Public Body told me it received 1,594 access requests during this time period. As of September 27, 2016:

- 187 requests⁵ (12%) were still outstanding and had been for more than 30 days. The newest outstanding request was 109 days overdue (approximately 3.6 months, based on a 30-day month); the oldest was over 1,000 days overdue (approximately 33.3 months, or 2.8 years).

⁵ FOIPNet outstanding requests Summary Report.

- Two of the outstanding requests were from 2013, 30 were from 2014, 102 were from 2015 and 53 were from 2016.

- [17] There is no single applicant type reflected in the 187 outstanding requests. These requests were made by representatives from media, elected officials, lawyers representing clients, individuals who have had some interaction with the justice system, inmates in correctional facilities and members of the general public.⁶
- [18] There are occasions when the Public Body has sought time extensions from the Commissioner; however, on a number of occasions the FOIP Director made the decision not to ask for extensions because the Public Body did not believe there was a statutory reason that would authorize the extension, and preparing an extension request is time consuming. For instance, according to the Director, sometimes requests are not responded to on time because they are complicated.⁷ The Commissioner has no ability to authorize an extension for a “complicated” request.
- [19] As part of assessing the overall state/scope of the problem that gave rise to this investigation, I also reviewed the GoA’s most recent Annual Report on the operation of the FOIP Act, which was tabled in November 2016 and includes statistics for 2013/14 and 2014/15.⁸
- [20] The Annual Report includes information on the number of days government ministries, agencies, boards and commissions take to respond to requests. However, this information is aggregated and does not provide information specific to each public body. As a result, **there is no information in the Annual Report to indicate whether the Public Body, or any specific public body, is generally responding to access requests within timelines, or not.**
- [21] Further, the aggregated Annual Report numbers only include the response times for requests that received a response within the reporting period. **There is no information in the Annual Report reflecting the number of access requests made to the Public Body, or any public body, that continue to be outstanding during the reporting period, or how long those requests may have been outstanding.**
- [22] Finally, the Annual Report identifies only three categories of response times: “30 days or less”, “31-60 days” and “60+ days”. As a consequence, a request that took, for example, 1,000 days to respond to may be reflected in the statistics as having a response time that was “60+ days”.
- [23] The 187 requests that the Public Body had outstanding as of September 2016 were outstanding during the periods covered in the Annual Report. Given that the Public Body is and has been working on its backlog for some time, according to the Director, there is a high

⁶ FOIPNet outstanding requests Detail Report, October 2016.

⁷ The FOIP Director provided this example of a request that is “complicated” but does not meet any of the criteria in section 14: an applicant made a request for records from the Alberta Serious Incident Response Team (ASIRT) that dealt with an informant on a murderer. These types of records are difficult to work on, cannot be handled by just any member of the staff, require consultation with ASIRT staff and extra scrutiny and care is taken given the serious nature of the records.

⁸ Section 86 of the FOIP Act requires the Minister of Service Alberta to prepare an annual report about the operation of the FOIP Act.

likelihood that more than 187 cases were outstanding (i.e., in deemed refusal) during the two-year period of the Annual Report; however, **this is not reflected in the Annual Report.** This also raises the question of how many other requests were or are currently outstanding for lengthy periods across the GoA.

Recommendations

- The Public Body should continue to work on its backlog of outstanding requests. Given the age of some of the access requests, it would be prudent to check with the affected applicants to ask if they are still interested in pursuing their requests.
- Good statistics are invaluable in helping to identify problems. The Public Body, and the GoA generally, should collect, and publicly report on, outstanding requests, not just on responses that have been provided. At a minimum, this should be done internally by the Public Body. In addition, response statistics should reflect the actual response times taken, not simply that it took a public body “60+ days”.

Issue 2: Causes of Delays

Processing Practices

[24] The processing practices employed by a public body impact the time it takes to respond to an applicant. Based on information provided by public bodies, I understand the general process for responding to an access request is as follows:

- The time a public body has to respond to a request is 30 calendar days. There are typically 21 to 22 working days in a month.⁹
- Retrieving records should take between 3-5 days.
- Responses must be approved by the Delegated Head, which should take 3-5 days depending on the volume of records in the response.
- Given the above, the best case allows a FOIP Analyst 16 working days to:
 - read all the records to confirm they were retrieved (which, if not, starts the 3-5 day retrieval process over again) and to review for mandatory exceptions;
 - consult with subject matter experts when necessary;
 - consult with other public bodies when desired;
 - consult with legal counsel on matters where legal advice is advisable;
 - redact the information from the records;

⁹ For instance, December 2016 had only 17 working days.

- fulfill the administrative duties (letter writing, entering processing information into FOIPNet, photocopying, etc.);
- manage all the other requests the Analyst has on her/his case load; and,
- manage access request reviews and inquiries that are with the OIPC.

[25] The greater the caseload per Advisor, the greater the likelihood a public body will be unable to consistently respond on time. Each additional step in the process adds to the time, and each task that takes longer than a reasonable period to complete, or is unnecessary, can lead to delays.

Records Retrieval

[26] Almost every FOIP Office staff member (the FOIP Advisors, the administration staff, the Manager, and the Director) interviewed for this investigation said that a major problem for the FOIP Office is retrieving records from program areas.

[27] There were many examples given, including many dealing with correctional facilities. I reviewed an email string documenting one such situation as follows:

- On January 27, 2016 a request was made for records in the Minister's office, the Deputy Minister's office and the Deputy Attorney General's office.
- The request for records went to the Assistant Deputy Minister of the Corporate Services Division (the Delegated Head of the Public Body); it was not sent directly to the Minister's office or to either Deputy's office. The FOIP Office had no contacts for these offices.
- On February 12, March 2, March 24 and April 8, the FOIP Office followed up with the Delegated Head asking for a response (to either provide records or to advise the FOIP Office no records exist).
- On April 25, the FOIP Office again followed up asking for a response and advising the Delegated Head the FOIP Office had only received records from the Minister's office and from two members from each Deputy's office. The FOIP Office still needed a response from three people, including from the Deputy Minister of Justice and Solicitor General.
- On May 26 and June 10, the FOIP Office again followed up with the Delegated Head asking for a response from one more person in the Deputy Minister's office.

[28] One initial request for records and seven reminders were required. It took the Public Body almost six months to provide a response to the applicant. In my view, this is not acceptable.

[29] The Public Body did not respond on time in this example and I was told of many other cases where similar prompts were necessary and similar delays occurred for a variety of offices in the Public Body.

Recommendations

- The Head of the Public Body (either the Minister or the Deputy Minister, further to section 21(1) and 21(1.1) of the *Interpretation Act*) should regularly remind all departmental personnel of their duty to retrieve records promptly.

One public body within the GoA copies its delegated head when requests for records are sent. Given the number of records requests the Public Body in this investigation makes, however, it may be onerous for the Delegated Head to be copied on all records requests; nonetheless, it may be possible to modify the process so that the Delegated Head is copied as necessary. If still more follow up is required, the Head (the Deputy Minister) could then be copied.

This approach would inform the departmental divisions, which house and retrieve the records, that they are responsible to the Head of the Public Body, not just to the FOIP Office.

- The FOIP Office should have direct access to the Minister's Office and the Deputy Minister's Office via a FOIP contact rather than having records requests and consultation questions go through the Delegated Head.

Consultation within the GoA

[30] According to the Public Body, the GoA has a practice that allows for the review of records by subject matter experts within the Public Body. Program areas want to put context to a record or comment on the response. In my view, providing additional material to applicants for context is generally a positive action as it can help explain the information. However, it is always possible that contextual material could obfuscate or confuse, and obtaining this information could delay a response. In the case of the Public Body, until a response is received from the program area, the Public Body feels it cannot complete the processing and release the record (or make a decision to withhold it).

[31] Another GoA practice is to consult with other public bodies, primarily GoA bodies, when responsive records have been created by, or came from, another public body. Though a public body may extend the time for 30 days to consult with another public body, there is **no statutory requirement under the FOIP Act to consult with another public body.**

[32] The consultation process adds to the work and can delay a response. It also adds to the work load of the public body being consulted. There is a balance between knowing the context and content around a record and meeting statutory requirements made more difficult given the short timelines.

[33] The process was recently addressed in Order F2017-12 issued by the OIPC. That Order states that an internal consultation process is not a requirement in the Act and a public body

“cannot permit [those] processes to interfere with its duty to make all reasonable efforts to respond [on time].”¹⁰

- [34] The Public Body, along with all other GoA public bodies, also consults with its legal counsel when it is deemed necessary. The Public Body’s FOIP Office advised that lengthy delays occur when obtaining legal advice.

Recommendations

- To help ensure fair and timely processing of an access request, the file, including the response package with records, should only be handled by the Advisor assigned to the file as the processor, the FOIP Director or the FOIP Manager (for quality control where needed), and the Head of the Public Body. All others are superfluous and may even be contrary to the privacy provisions in the Act if an applicant can be identified by the content of the records.
- Consider whether consultation with another public body is necessary in every circumstance or if disclosure decisions can be made without a consult. The records are, after all, the Public Body’s and it is the Head’s responsibility to make disclosure decisions. Given there is no statutory requirement to consult with other public bodies, to do so should be the exception and not the rule.

Application of Exceptions

- [35] The FOIP Act allows a public body to refuse to disclose information by applying what are referred to as “exceptions” (to the general rule of disclosure) or by citing an “exclusion” (when the Act does not apply to a certain category of records or information). When a public body applies an exception or exclusion it redacts the information from the record. This is time consuming and in many cases discretionary.
- [36] According to Service Alberta’s most recent Annual Report, the second most frequently cited reason for refusing to disclose records, by a large margin over the third place, was for the exception referred to as “Advice from Officials”.¹¹
- [37] Choosing whether or not to disclose “advice” is discretionary. A public body may disclose “advice” without contravening the Act. The type of information covered by this exception to access includes the advice, consultations, recommendations and policy options of government staff, the very details of decisions made in a bureaucracy. When not disclosed, the often admirable and good work of employees is shielded from view.
- [38] The “advice” exception is often cited as a means to support and allow for candid discussion, which, it is argued, ensures *all* advice is provided to decision makers, without fear of looking

¹⁰ Order F2017-12, <https://www.oipc.ab.ca/media/785663/F2017-12Order.pdf>

¹¹ In 2013/14, the “advice” provision was applied 610 times, and in 2014/15 it was applied 568 times. The next category, “privilege”, was applied 369 and 374 times, respectively. “Third party personal information” was denied 1,136 times in 2013/14, and 1,079 in the following year. Unlike the “advice” and “privilege” exceptions to access, which are discretionary, third party personal information is a mandatory non-disclosure provision if disclosure would be an unreasonable invasion of personal privacy.

foolish. However, this discretionary exception may also be used to shield bureaucratic-level decision making from scrutiny, as well as advice that was not taken.

[39] It is worth remembering that just because a discretionary exception to access applies to the information does not mean it *must* be used to withhold access.

Recommendations

- Trust Advisors to use their own judgment with all but the most sensitive of records. There are a very limited number of mandatory exceptions to disclosure and the chance of a seasoned Advisor inadvertently disclosing information subject to a mandatory exception is very low.
- Instruct Advisors to apply discretionary exceptions sparingly. The Public Body is not required to refuse to disclose information to which discretionary exceptions apply. Disclosing more information means requests take less time to process, there is a greatly reduced likelihood that the matter will proceed to the OIPC for review, and it helps the Public Body be more transparent.
- Trust the professionalism of civil servants to continue to provide sound advice even if they know that advice might be disclosed publicly.
- The Delegated Head and Assistant Deputy Ministers who are tasked with reviewing and approving responses must ensure they do so in a timely way. Guide the staff and then trust them to identify key or sensitive issues rather than reviewing all of the records. The FOIP Director, FOIP Manager and Advisors are familiar with the records and can supply information to the Delegated Head on what is being released.

The irony of the current process is that it is the Head's duty to ensure there is justification to withhold information; however, the reality is that the Head (and other approvers) often spend a great deal of time reviewing information that can be released under the Act.

Funneling Through the Delegated Head

[40] The Public Body has a practice of establishing key contacts in all program areas so the FOIP Office can communicate directly with each area, with two exceptions: the Deputy Minister's Office and the Minister's Office. The provision of advice to the Deputy Minister along with all requests for information, answers to questions, etc. are funneled through the Assistant Deputy Minister of the Corporate Services Division, who is the Delegated Head of the Public Body. Neither the FOIP Coordinator nor the FOIP Office has direct access to the Deputy Minister's Office or the Minister's Office. This is inefficient and slows down processing.¹²

[41] This situation may also inadvertently prevent key information from the Public Body's FOIP experts from reaching the Minister or the Deputy Minister.

¹² After its review of this report for accuracy, the Public Body said that requests for information and provision of advice are now funneled through the Executive Assistant for the Delegated Head and that "the current process does not appear to slow down processing."

Recommendation

- The FOIP Director should have access to the Head (Deputy Minister) when briefings on sensitive access request responses are required. Having the information relayed between the Delegated Head and a FOIP lawyer to the Head can lead to critical information being missed.

Requests that Cross Multiple GoA Public Bodies

- [42] For several years the GoA has had a practice of collaboration between ministries that receive identical access requests. Previous to 2012, there were only a few requests that crossed departmental lines; however, since that time, the numbers have increased so the process became more formalized including with the development, in June 2016, of a Cross-Department Request Process document.¹³
- [43] The practice is that all ministries who receive the same request meet and develop a plan to process the request. The meeting is chaired by the Assistant Deputy Minister of the Open Government Division in Service Alberta.
- [44] According to the Manager in Service Alberta who used to lead the meetings:
- Deputy Ministers as concurrent heads of the public bodies made the decision that Service Alberta would provide corporate policy direction with respect to x-dept requests and this policy position is conveyed through a Record of Decision (ROD...). The ROD is used by departments processing requests in applying the policy position in the departments' review and severing of department records, unless that is not reasonable given the circumstances of a particular request. Departments are not required to comply with the policy but the Deputy Minister as the head must decide that, not the FOIP Office.
- [45] According to the GoA's Cross-Department Request Process document, all public bodies must attend the meetings. Service Alberta, with the assistance of the Public Body's Legal Services (for any legal interpretations) and with the input of the departments, drafts the Record of Decision that results from the meeting.
- [46] According to the Service Alberta Manager, the types of issues addressed in a Record of Decision for which policy decisions are made include:
- ensuring there is a common understanding of the wording of the request and its scope;
 - capturing common areas for clarification or processing, including if there are differences identified by departments;
 - "interpretation of applicable sections of the FOIP Act as provided by legal counsel";
 - "ensuring applicable program areas are identified where relevant for a thorough records search"; and

¹³ Another document, *FOIP Best Practices for Deputy Minister and Delegated Decision Makers*, dated November 2016, aids decision makers when dealing with cross-government requests, as well as being used for single department requests.

- “coordinating or setting specifications for the creation of records as part of the duty to assist.”

[47] The Service Alberta Manager said the cross-government practice is intended “to support consistency within the GoA” and Service Alberta does not “want to short change anyone” and does not want to affect timelines. Further, “Service Alberta works very hard not to add any time beyond the normal time a department spends clarifying or initiating records searches.” To this end, the Assistant Deputy Minister who chairs the cross-government meetings has two placeholders in her weekly calendar to hold the space in the event a cross-ministry request is received.

[48] Despite these efforts, I was told that delays do occur. Ensuring the scope of a request is standardized across each public body delays the retrieval of records because a common understanding must be agreed to, or at least determined, before a search can begin.

[49] Further, interpreting applicable sections of the FOIP Act is a duty the Act ascribes to each individual public body. It is unclear to me why it is necessary to have a group decide on what sections apply to any given record or to determine the scope of the request. The Public Body’s FOIP staff is trained to do just that.

[50] Further, it is the responsibility of the Head of each public body to make disclosure decisions, with the assistance of her/his FOIP staff. Each exception to access set out in the Act explicitly states “the head of the public body” must make the decision. Obtaining an interpretation from outside the public body not only can delay a response but may also be seen to interfere with the discretion of the Head.¹⁴

Recommendation

- The GoA should review the Cross-Department Request Process and consider the extent to which this process delays responses to access requests and interferes with the delegated responsibilities of the Head of each public body.

¹⁴ After its review of this report for accuracy, the Public Body said, “The decision to manage these types of requests in this fashion was made jointly at the deputy table. As a result they have had their discretion to implement this approach.”

Volume of Requests and Staffing

[51] The table below identifies the number of access requests received by the Public Body over a span of five years, as well as the number of staff within the Public Body processing the requests.

Year	Number of Requests ¹⁵	Number of Staff ¹⁶
2011	224 (both Justice and Solicitor General)	Two ministries/two FOIP offices
2012	309	11 dropped to 10
2013	401	10 dropped to 8.5
2014	394	Between 7.5 to 11.5
2015	342	Between 8 to 11
2016	410	Between 11 to 12, anticipated 16

[52] These figures show the Public Body experienced an 83% increase in the number of cases opened since 2011 and a 33% increase in requests following the merger of Justice with Solicitor General in May 2012. However, there has not been a commensurate increase in the number of staff processing the requests; instead, the number of staff has in fact decreased in some years.

[53] The Public Body reported the increase in access requests began in 2012. This is the year Alberta began to have substantial numbers of members in opposition in the Legislative Assembly. The use of access to information legislation by elected members of the Assembly, journalists, researchers, inmates in correctional facilities, and special interest groups continues to increase as shown in the table above.

[54] The Public Body reported that three applicants represent 30% of all access requests it receives: an inmate, a member of the general public and an elected official. As of December 16, 2016, those same three applicants represent 41% of the cases the Public Body has under review by the OIPC.

[55] For example, at the time of writing, the FOIP Office has 102 active requests from a single individual; 61 of these access requests were received in 2016 alone. A staff member has been assigned to manage this work.

[56] The Public Body provided me with two FOIP Office Staffing Changes reports that show intent to hire four additional staff members as of May 2016: one at the administration level, and three others as FOIP Advisors. Between May and September, two people were hired as temporary staff. Following the start of this investigation in September, the two temporary

¹⁵ The figures above reflect only access requests made under the Act. The FOIP Office also deals with responding to requests for the following record types:

- Threat Risk Assessments – these are records that are gathered by the FOIP Office and supplied to a unit that works with the Crown Prosecutors’ Office.
- Dangerous Offender applications – these are records that are gathered by the FOIP Office and supplied to a unit that determines whether someone is a dangerous offender.
- Consultation with other public bodies and with federal agencies
- Requests from individuals who were in an Indian Residential School (this started in 2008; the requests began slowing down last year).

¹⁶ The figures on number of staff are from the FOIP Office Staffing Changes reports.

staff became permanent and another person was hired. A fourth candidate was chosen in early December; however, this individual has not yet started, pending the completion of human resource activities.

Recommendation

- The Public Body should ensure an appropriate level of staffing so that access requests are responded to in a timely fashion. The appropriate staffing level should be determined by the Public Body in consultation with its FOIP Director who will be able to provide the best information on the needs of the FOIP Office. During the course of this investigation, the Public Body advised me additional staff have been hired and there are plans to bring on more staff as identified in the staffing chart.

Managing OIPC Reviews and Inquiries

[57] The Public Body has established a Priority Request Processing standard to manage workload as follows:

1. Requests where there is an express need for the record are handled without delay. Examples include individuals who need documents for a court process or because the death of someone is imminent.
2. Compliance with OIPC Orders.
3. New access requests, so that they too do not start to fall behind.
4. Backlog. This has now been changed with the hiring of a person who is dedicated to processing the backlog. The backlog had always been worked on throughout the period this investigation covered; however, a dedicated staff member did not come on board until after May 2016.¹⁷

[58] In amongst these priorities, the FOIP Office also deals with the many reviews and inquiries that are before the OIPC. Reviews usually result when an applicant does not receive all the records or information she/he wants and makes a request to the Commissioner for a review of the matter. There are other reasons reviews are requested. For example, when an applicant is challenging a fee or the length of time it took to process a request, or because there appears to be records missing. However, the single biggest factor leading to a review by the Commissioner is when information has been redacted.

[59] The more information a public body refuses to provide to an applicant, the greater the chance an applicant will ask for a review. The more information is released, the less likely a review will be requested. More reviews by the OIPC means the Public Body has less time to spend on new access requests, leading to delays.

¹⁷ After its review of this report for accuracy, the Public Body said, "Since that time an additional three staff have been assigned to the backlog."

[60] In addition, the review process takes more time for the FOIP staff than it previously did because the Public Body (as with all GoA public bodies) no longer provides copies of records to which solicitor-client privilege (SCP) has been applied. As a consequence, the OIPC review officer is unable to review the records to determine if SCP was properly applied without additional information being supplied by the Public Body. A description of each record and details about who authored and who received the information in the record must be completed and provided to the OIPC. This takes much more time than simply providing a copy of the records.

Recommendation

- Disclose more information. Much of the information that is withheld is done so under discretionary provisions so the Public Body could disclose the information and not be in contravention of the Act. When more information is released, the request takes less time to process, there is a greatly reduced chance of the matter proceeding to the OIPC for review, and the Public Body is more transparent.

Complex Clients

[61] The Public Body reported that on any given day, the FOIP Office is managing requests and complaints from numerous complex clients. Complex clients are individuals with the following characteristics:

- Individuals known to submit nuisance and habitual complaints;
- Individuals known to adhere to an anti-authority or anti-government ideology; or,
- Individuals who are at a high risk to commit violence, verbal or written threats, harassment or inappropriate communications.¹⁸

[62] Some complex client applicants can be belligerent or threatening toward staff. These individuals are required to communicate only through the Director and additional protocols are in place to manage the safety of the staff while still providing service to the clients.

[63] The Public Body is also the contact for other government FOIP offices seeking advice and assistance to manage complex clients. The Public Body is the ministry that developed and administers the complex client policy.¹⁹

Recommendation

- Section 55 of the Act allows the Commissioner to authorize a public body to disregard a request or

¹⁸ From the Government of Alberta's (Public Security) Complex Client Policy.

¹⁹ The policy directive was put in place to "manage clients who exhibit Inappropriate Contact and Conduct (ICC), which could potentially place Government of Alberta employees at risk." One of its purposes is to ensure, "in the absence of very good reasons to the contrary, all clients [will] have a right to access public services."

requests for access if “(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or (b) one or more of the requests are frivolous or vexatious.”

The Commissioner is aware that time spent on frivolous or vexatious requests, or on requests that would unreasonably burden a public body because of their repetitive or systematic nature, reduces the amount of time that can be spent on requests that do not share those characteristics.

The Commissioner does not take lightly the removal of someone’s right of access; however, this may be appropriate in some circumstances. I recommend the Public Body consider availing itself of this provision in appropriate circumstances. When used judiciously, this provision can assist the Public Body to meet its duties to other applicants.

Complex or Large Requests

- [64] Most public bodies can receive complex or large requests and a few receive them with some regularity, including the Public Body in this investigation. The main characteristics of complex or large requests are with their breadth, the significant review required and on occasion the ambiguity of the request itself.
- [65] A request can be for records spanning many years, many program areas, many databases, many geographic locations and/or many individual staff member records. Each element increases the search arena and record volume. Or, the volume of records may turn out to be low but a large number of records must still be searched to locate only a small number of responsive records.
- [66] The FOIP Act recognizes that a full disclosure of all information on every record, every time, is not always prudent or in the public interest. For example, as with this Public Body, records may be withheld when there is a valid concern about interfering with law enforcement or Crown prosecutor activities, or when consideration must be given to ensure releasing records does not aid criminal activity. However, the Act also requires that unless a valid exception to access applies, the record must be released. As a consequence, records responsive to complex requests often require significant review because they are very specialized or sensitive (e.g., records dealing with criminal activity).
- [67] A request can appear plain and straightforward but once it is examined by the program area that houses the records, it can become complicated. Its language appears to be clear on the surface; however, when attempting to locate records much more detail is needed.
- [68] Some examples of large or complex requests received by the Public Body were for records “related to oil and gas issues”, “records about fentanyl deaths”, “all guidelines and all forms” used by the Public Body and records about an informant on a murderer. These take lengthy periods of time to gather and process and the FOIP Advisor must adhere to the duties in the Act while also factoring in the complexities of the request.

Recommendation

- Establish criteria to determine the complexity of a request. This can help to balance work load so that complex cases are shared amongst the more senior members on the team or, alternatively, a single experienced and skilled member of the team handles the complex files. It can also help create data about the percentage of complex cases the Public Body receives.

Respect for the FOIP Act – A Culture of Access or Nuisance?

- [69] During the course of my investigation into the factors that contribute to delays in responding to access requests, I spoke with a number of individuals who reported comments or anecdotes that suggest one of the contributing factors is a lack of respect for the FOIP Act itself across pockets of the GoA.
- [70] For example, I was told that in May 2016, during a cross-ministry access request meeting, an employee of a public body (not the Public Body that is the subject of this investigation) made a comment related to gathering statistics about cross-ministry access requests received by GoA public bodies. The statistics were gathered for the then-Assistant Deputy Minister of Open Government.
- [71] The comment, made by a senior member of a GoA FOIP office, was that the information gathered “may be used to publicly shame the Wildrose Party.”
- [72] The essence of this comment was told to me by a number of individuals within the GoA who found the comment to be inappropriate and inconsistent with the principles of the FOIP Act.
- [73] I spoke with the person who made the comment. I was told:
- the comment was made in a mocking format;
 - it was not intended to represent the position of the GoA;
 - the comment was not made to the full room but rather to one person and perhaps overheard by just a few others;
 - it does not reflect the position of the person who said it; and,
 - the person’s personal feelings are that “If you operate with integrity, there’s nothing to worry about”, the “Act is intended to” allow for transparency and the person fully supports the Act’s intentions.
- [74] The person, who was cooperative during my investigation, said that while the comment does not represent the position of the GoA, there is a tone within some areas in the GoA that the FOIP Act is not being used as intended. While not everywhere, there are pockets of resistance within the GoA and sometimes reluctance from the senior administrative and executive levels to fully support the goals of an access to information regime.

[75] A similar sentiment was expressed in a public body's May 2014 submission²⁰ to the Commissioner asking her for authorization to disregard an access request made by a researcher for the Wildrose Official Opposition. The submission said:

...the extent to which the Applicant is utilizing the system, **without any accountability on their part**, is creating a burden that overtaxes the administration of government. [emphasis added]

[76] The public body went on to say that if the Commissioner allowed it to disregard the access request, then it could use its resources to:

...serve those taxpayers and applicants **who use the legislation and resources appropriately**. [emphasis added]

[77] This theme was repeated by others whom I interviewed. One individual said the biggest issue for her was that "FOIP wasn't taken seriously" by senior levels of the organization when the Department of Justice was merged with the Solicitor General's department in 2012, and again when the increase in access requests began. In her mind, this is when the problems began.

[78] In addition, the individual felt that sometimes senior members in program areas do not support the records retrieval process, that it is "awful, truly awful" and that there is no urgency attached to the process. As discussed earlier in this report, prompt records retrieval is one of the cornerstones in processing any access request.

[79] Access to information is central to the ability of the citizenry to find out how its government operates, how it cares for provincial resources, how it manages its finances, how it protects the vulnerable or who has input into the development of policies. It should not be considered a nuisance or an attempt to interfere with government.

[80] Further, the actions of applicants are not under scrutiny in an access request; they have no duty to be accountable to the provincial government. The law is in place to allow for the scrutiny of those who govern, not the other way around. When making access requests, applicants who frequently use the Act are exercising a statutory right. While some requests can be complicated and may even be intended as "fishing expeditions", they are lawful and ought to be treated with respect.²¹

²⁰ See https://www.oipc.ab.ca/media/533001/Section55_2015_Service_Alberta.pdf for the full submission.

²¹ As previously noted, there are some requests that are frivolous or vexatious or, due to their repetitious or systematic nature, would unreasonably interfere with public body operations or are an abuse of the right of access. The Act allows for public bodies to ask the Commissioner to disregard those requests. Those are not the type of requests being referred to in this section of the report.

Recommendations

- Set the tone from the top. Senior administrators and executives must voice and demonstrate respect for the legislation including positively stating support for the legislation and setting expectations for compliance, disavowing statements that are contrary to the legislation or that undermine it, and acting to provide timely records retrieval and reviews/approvals.
- The Head of the Public Body (either the Minister or the Deputy Minister, further to section 21(1) and 21(1.1) of the *Interpretation Act*) should regularly remind all departmental personnel of their duty to retrieve records promptly.
- Advise all program areas that they can assist applicants too. Not all matters require an access request. Simply answering questions is very much within the spirit of the Act and is part of a robust access regime. For the Public Body, this includes responding to the queries of inmates, particularly when the request is for information found on the internet.
- Revisit the review done by Service Alberta.²² The review took time and resources, was well done, and some of the recommendations (referred to as “next steps” in the document) are mirrored here. Had the steps been taken, it would have prevented the need for some of the recommendations I have made in this report.

Conclusion and Summary of Recommendations

- [81] Despite the comments about a pressing work load, the perceived lack of support from senior members of the Public Body, and the complications of the job, I found the FOIP Office staff to be a dedicated bunch, committed to the principles of access to information, and very responsive and helpful with this investigation. The team operates very effectively and seems to enjoy working in the unit.
- [82] In addition, the following comment from the Director of the FOIP Office reflected what I found, “I am continually surprised at how hard my staff works.” There was rarely a conversation when that same sentiment was not raised.
- [83] When asked what he would like the investigation to accomplish, the Director said, “I want the backlog to go away.” He also wants the difficulty of processing access requests to be recognized. That opinion was expressed by almost every FOIP Office staff member.
- [84] Overall, I found that the Public Body’s FOIP staff makes genuine efforts to comply with the requirements of section 11 of the Act; however, due to a number of factors outlined in this report, the Public Body routinely falls significantly short of 100% compliance.

²² The document is titled *Justice and Solicitor General FOIP Office Review: Service Alberta’s Executive Summary and Detailed Findings*.

- [85] While these delays are very troubling, the diverse group of applicant types suggests the processing, or rather the lack of processing, is not focused on a single applicant category. I found no evidence that certain requester types were targeted for significant delays.
- [86] Nonetheless, it is almost impossible to fulfill the access duties of a public body given the current environment, and particularly without an adequate number of properly trained staff. It is clear that staffing levels have not kept up to the significant increase in the number of access requests over the last five years.
- [87] As well, the efficient processing of access requests requires an organizational structure that allows for proper delegation, and with fewer hands or levels dealing with the details and paper of an access request.
- [88] Finally, and most crucially, support from the top is essential to a successful and efficient access regime.
- [89] The body of the report listed 20 recommendations but one recommendation is repeated in two sections of the report; therefore, the following is a summary of the 19 recommendations I made throughout this report:

1. The Public Body should continue to work on its backlog of outstanding requests. Given the age of some of the access requests, it would be prudent to check with the affected applicants to ask if they are still interested in pursuing their requests.
2. Good statistics are invaluable in helping to identify problems. The Public Body, and the GoA generally, should collect, and publicly report on, outstanding requests, not just on responses that have been provided. At a minimum, this should be done internally by the Public Body. In addition, response statistics should reflect the actual response times taken, not simply that it took a public body “60+ days”.
3. The Head of the Public Body (either the Minister or the Deputy Minister, further to section 21(1) and 21(1.1) of the *Interpretation Act*) should regularly remind all departmental personnel of their duty to retrieve records promptly.

One public body within the GoA copies its delegated head when requests for records are sent. Given the number of records requests the Public Body in this investigation makes, however, it may be onerous for the Delegated Head to be copied on all records requests; nonetheless, it may be possible to modify the process so that the Delegated Head is copied as necessary. If still more follow up is required, the Head (the Deputy Minister) could then be copied.

This approach would inform the departmental divisions, which house and retrieve the records, that they are responsible to the Head of the Public Body, not just to the FOIP Office.

4. The FOIP Office should have direct access to the Minister’s Office and the Deputy Minister’s Office via a FOIP contact rather than having records requests and consultation questions go through the Delegated Head.

5. To help ensure fair and timely processing of an access request, the file, including the response package with records, should only be handled by the Advisor assigned to the file as the processor, the FOIP Director or the FOIP Manager (for quality control where needed), and the Head of the Public Body. All others are superfluous and may even be contrary to the privacy provisions in the Act if an applicant can be identified by the content of the records.
6. Consider whether consultation with another public body is necessary in every circumstance or if disclosure decisions can be made without a consult. The records are, after all, the Public Body's and it is the Head's responsibility to make disclosure decisions. Given there is no statutory requirement to consult with other public bodies, to do so should be the exception and not the rule.
7. Trust Advisors to use their own judgment with all but the most sensitive of records. There are a very limited number of mandatory exceptions to disclosure and the chance of a seasoned Advisor inadvertently disclosing information subject to a mandatory exception is very low.
8. Instruct Advisors to apply discretionary exceptions sparingly. The Public Body is not required to refuse to disclose information to which discretionary exceptions apply. Disclosing more information means requests take less time to process, there is a greatly reduced likelihood that the matter will proceed to the OIPC for review, and it helps the Public Body be more transparent.
9. Trust the professionalism of civil servants to continue to provide sound advice even if they know that advice might be disclosed publicly.
10. The Delegated Head and Assistant Deputy Ministers who are tasked with reviewing and approving responses must ensure they do so in a timely way. Guide the staff and then trust them to identify key or sensitive issues rather than reviewing all of the records. The FOIP Director, FOIP Manager and Advisors are familiar with the records and can supply information to the Delegated Head on what is being released.

The irony of the current process is that it is the Head's duty to ensure there is justification to withhold information; however, the reality is that the Head (and other approvers) often spend a great deal of time reviewing information that can be released under the Act.

11. The FOIP Director should have access to the Head (Deputy Minister) when briefings on sensitive access request responses are required. Having the information relayed between the Delegated Head and a FOIP lawyer to the Head can lead to critical information being missed.
12. The GoA should review the Cross-Department Request Process and consider the extent to which this process delays responses to access requests and interferes with the delegated responsibilities of the Head of each public body.
13. The Public Body should ensure an appropriate level of staffing so that access requests are responded to in a timely fashion. The appropriate staffing level should be

determined by the Public Body in consultation with its FOIP Director who will be able to provide the best information on the needs of the FOIP Office. During the course of this investigation, the Public Body advised me additional staff have been hired and there are plans to bring on more staff as identified in the staffing chart.

14. Disclose more information. Much of the information that is withheld is done so under discretionary provisions so the Public Body could disclose the information and not be in contravention of the Act. When more information is released, the request takes less time to process, there is a greatly reduced chance of the matter proceeding to the OIPC for review, and the Public Body is more transparent.
15. Section 55 of the Act allows the Commissioner to authorize a public body to disregard a request or requests for access if “(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or (b) one or more of the requests are frivolous or vexatious.”

The Commissioner is aware that time spent on frivolous or vexatious requests, or on requests that would unreasonably burden a public body because of their repetitive or systematic nature, reduces the amount of time that can be spent on requests that do not share those characteristics.

The Commissioner does not take lightly the removal of someone’s right of access; however, this may be appropriate in some circumstances. I recommend the Public Body consider availing itself of this provision in appropriate circumstances. When used judiciously, this provision can assist the Public Body to meet its duties to other applicants.

16. Establish criteria to determine the complexity of a request. This can help to balance work load so that complex cases are shared amongst the more senior members on the team or, alternatively, a single experienced and skilled member of the team handles the complex files. It can also help create data about the percentage of complex cases the Public Body receives.
17. Set the tone from the top. Senior administrators and executives must voice and demonstrate respect for the legislation, including positively stating support for the legislation and setting expectations for compliance, disavowing statements that are contrary to the legislation or that undermine it, and acting to provide timely records retrieval and reviews/approvals.
18. Advise all program areas that they can assist applicants too. Not all matters require a FOIP request. Simply answering questions is very much within the spirit of the Act and is part of a robust access regime. This includes responding to the queries of inmates, particularly when the request is for information found on the internet.

19. Revisit the review done by Service Alberta²³. The review took time and resources, was well done, and some of the recommendations (referred to as “next steps” in the document) are mirrored here. Had the steps been taken, it would have prevented the need for some of the recommendations I have made in this report.

[90] After reviewing this report, the Public Body accepted most of the recommendations, and in fact implemented some during the course of this investigation. Other recommendations are being reviewed, some of which will require cross-government consultation.

[91] I will follow up on implementation of the recommendations with the Public Body in September 2017.

Acknowledgement and Appreciation

[92] The investigation would not be possible without the cooperation and assistance of the Public Body and its staff and I am grateful to them for that. In particular, I want to thank all the FOIP Office members for their thoughtful comments, their clear commitment to access to information, and their time. I also want to thank the Delegated Head of the Public Body for his time and insight and expressed desire for change.

[93] The Service Alberta Manager I spoke to was also very helpful, cooperative and insightful into how the FOIP Act operates throughout the GoA, and I thank her for that. I am thankful to the Public Body’s FOIP lawyer for offering a written response and for providing a descriptive explanation of the work she does for the FOIP Office.

Catherine Taylor
Senior Information and Privacy Manager

²³ The document is titled *Justice and Solicitor General FOIP Office Review: Service Alberta’s Executive Summary and Detailed Findings*.