

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-11

February 16, 2018

ALBERTA COMMUNITY AND SOCIAL SERVICES

Case File Number 006713

Office URL: www.oipc.ab.ca

Summary: On October 11, 2016, the Applicant, a representative of Alberta's Official Opposition, made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Human Services (now Alberta Community and Social Services) (the Public Body).

On September 13, 2017, the Applicant requested review by the Commissioner of the Public Body's failure to respond to the access request.

The Adjudicator ordered the head of the Public Body to comply with his duty to respond to the Applicant under section 11 (time limit for responding) of the FOIP Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 1, 11, 14, 30, 31, 72, 85

I. BACKGROUND

[para 1] On October 11, 2016, the Applicant, a representative of Alberta's Official Opposition, made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Human Services (now Alberta Community and Social Services) (the Public Body). The Applicant requested:

[...] all guidelines / policies on determining the funding amount for people with AISH / PDD.

Please include but do not limit records to: any briefing notes, action request tracking and cover sheets, memorandum, presentation slides, ministerial orders, “advice to minister” and “advice to deputy minister” notes, timelines or summaries of the process (Process for Minister’s office or Deputy Minister’s Office), requests for decision, description of steps in the process, meeting agendas, as well as emails and letters.

Please note that duplicates may be excluded.

On November 4, 2016 the Public Body acknowledged that it had received the access request. It estimated that the fees for processing the access request would likely total \$250.

[para 2] On November 22, 2016, the Applicant requested that the fees be waived on the basis that the records related to a matter of public interest. On December 20, 2016, the Public Body determined that the records related to a matter of public interest and granted the request for a fee waiver.

[para 3] On December 20, 2016, the Public Body informed the Applicant that it was extending the time to respond to the Applicant’s access request under section 14(1)(b) of the FOIP Act until January 25, 2017.

[para 4] On February 13, 2017, the Public Body informed the Applicant that the Commissioner had granted an extension to the time for responding to the access request until March 27, 2017.

[para 5] On April 18, 2017, the Applicant emailed the Public Body to determine whether it had finished processing the access request. The Public explained that it had not completed processing the access request, but that it anticipated completing the access request by May 31, 2017.

[para 6] On July 12, 2017 the Public Body emailed the Applicant and stated:

In response to your emails I wanted to provide you with an update on the General Request and the Information and Privacy Office (IPO). Since June 28th the IPO has been involved in a major move from Center West building to Standard Life building. Unfortunately, the renovations are just now being completed and there have been major delays in computer, phones and record access.

The General Request is still in progress. We have identified records that will require consultation with other public bodies. However, we are currently assessing records those records that do not require consultation to provide you with a first release. I will be in a better position next week to provide you a tentative date for first release.

[para 7] The Public Body did not release records or communicate further with the Applicant. On September 13, 2017 the Applicant requested review by the Commissioner of the Public Body’s failure to respond to his access request.

II. ISSUE

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

[para 8] Section 11 of the FOIP Act imposes a duty on the head of a public body to take all reasonable measures to respond to an applicant within 30 days of receiving 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 9] Section 11 imposes the duty to make reasonable efforts to respond on the head of a public body, rather than on a public body or the FOIP office of a public body. Under section 1(f)(i) of the FOIP Act, the head of a public body is the member of the Executive Council who presides over the relevant department of the Government of Alberta. In this case, the public body is the Ministry of Community and Social Services. The head of the public body is the Minister of Community and Social Services. Clearly, it would be impractical for the Minister to process access requests personally. For this reason, section 85 of the FOIP Act permits the Minister to delegate his duties, powers or functions under the FOIP Act to any person. However, if the Minister does not delegate his duty, the duty remains with him. Moreover, if the duty is not met by the delegate, the Minister will not have complied with the duty to make reasonable efforts to respond to an access request within 30 days imposed by section 11 of the FOIP Act.

[para 10] As the head may delegate the duty to respond to a requestor to any person, and is not restricted to delegating duties to FOIP offices, arguments that a FOIP office is understaffed do not serve to negate the duty under section 11. A head must make reasonable efforts to respond; if the FOIP office is unable to respond to an applicant, it may not be reasonable for the head to delegate the duty to the FOIP office. Making reasonable efforts to respond may include delegating the duty to someone capable of meeting the duty.

[para 11] The Public Body states:

The Public Body undertook the following processes:

- November 4, 2016 - Acknowledgement letter was sent to the Applicant with a fee estimate. Request on hold.

- November 8, 2016 - Additional records were located and a second fee estimate letter was sent to the Applicant. Request remained on hold.
- November 22, 2016 - Applicant requested a fee waiver under Section 93(3.1) Public body has 30 days to make a decision.
- December 20, 2016 - Letter was sent to the Applicant advising fee waiver was approved and notifying the Applicant that a 30 day time extension under Section 14(1)(b) was required based on the volume of records responsive to the request. The new due date for a response January 25, 2017.
- January 22, 2017 - A request for time extension of 60 days under Section 14(2) was submitted to the Office of the Information and Commissioner (OIPC).
- February 1, 2017 - The OIPC granted the time extension with a new due date for a response by March 27, 2017.
- April 19, 2017 - Correspondence to the applicant advising the OIPC extension had expired and request was not yet completed.
- July 12, 2017 - Correspondence to applicant acknowledging the delay in the response.
- September 11, 2017 - As per Section 30(1), five third party notices were sent for representation on release. Third parties to respond by September 26, 2017. In addition, two public body consultations were initiated.
- October 13, 2017 - Request was reassigned due to Access Specialist leaving position.
- October - December, 2017 - Work continued on the request.
- December 20, 2017 - As per Section 31 (2), a decision to release was reached by the Public Body and was sent to the identified third parties. The third parties had until January 8, 2018 to request the OIPC review the decision. January 12, 2018 the OIPC confirmed that none of the third parties requested a review on the decision to release third party information.
- December 22, 2017 - Received letter dated December 19, 2017 from the OIPC notifying the Public Body:
 - on September 13, 2017 the Applicant submitted a request for review to the OIPC on the Public Body's failure to respond to the request;
 - OIPC made the decision that this matter will proceed directly to inquiry to ensure a timely response to the access request; and
 - written submission by the Public Body for the inquiry is due January 22, 2018.
- January 22, 2018 - records to be released to the Applicant on January 23, 2018.

[para 12] The Public Body provided the following analysis regarding the head of the Public Body's compliance with section 11. It states:

Section II of the Act states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless
(a) that time limit is extended under section 14, or
(b) the request has been transferred under section 15 to another public body.
(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

The Public Body acknowledges that it has missed the deadline imposed by section 11 and therefore was not in compliance with the FOIP Act. The Public Body continued to work on the request and records to be released to the Applicant on January 23, 2018.

[...]

Did the Public Body comply with section 11 of the Act?

The Public Body acknowledges that it did not comply with section II of the FOIP Act.

The following circumstances were incurred during the processing of the request resulting in the delay in the response:

- The Public Body acknowledges it missed the deadline to request a second time extension from the OIPC before March 27, 2017. The Access Specialist continued to work on the request to eliminate duplicates, review and sort responsive records from the 2542 pages received from multiple program areas.
- The access request was considered complex as it involved a large number of records in multiple formats: included records from five third parties and two other public bodies; and the scope and subject of the request required considerable analysis to determine responsiveness of records.
- As well the Access Specialist maintained a caseload of multiple requests and did their best to fulfill their responsibilities and provide service to Albertans.
- The third party notification process was initiated on September 11, 2017 and the third party notification process was completed on January 8, 2018.
- Resource capacity of the IPO was a factor in the completion of this request: the IPO operated with less resources as one Specialist was seconded to Executive Council; the assigned Access Specialist left the position in October 2017 and multiple requests had to be reassigned.
- The IPO provides FOIP services for four ministries and Schedule One Public Bodies. The IPO has been managing a high volume of requests for several years. From October 11, 2016 the IPO has handled 1556 requests. Throughout the processing of this request the IPO has received and has been responding to 50 other requests from this Applicant, 12 specific to Community and Social Services.

The Public Body understands that the resource capacity of the IPO is not a factor that the OIPC can consider in the Public Body's duty under section 11. The Public Body is taking steps to improve the efficiency and productivity of the IPO to meet the statutory requirements under the FOIP Act.

[...]

The Public Body acknowledges that it has missed the deadline imposed by section 11 and therefore was not in compliance with the FOIP Act. The Public Body continued to work on the request and records to be released to the Applicant on January 23, 2018.

[para 13] I note that the Applicant was told by the Public Body on December 20, 2016 that he would receive the response to his access request on January 25, 2017. The Public Body subsequently obtained a two-month extension from this office to respond to the access request by March 27, 2017. When the Applicant inquired two weeks after the expiry of the March 27, 2017, the Applicant was told that he would receive the response by May 31, 2017. The Public Body did not respond by that date. On July 12, 2017, in response to the Applicant's inquiry, the Public Body's FOIP Office noted that it had moved offices and was unable to provide an estimated date for responding to the access request.

[para 14] On September 11, 2017, the Public Body decided that it would give notice to third parties and consult with other public bodies before releasing the records. It states that it issued its decision regarding third party records on January 8, 2018. I am unable to identify any correspondence in the records before me that meet the requirements of 30(5) of the FOIP Act. Section 30(5) requires the Public Body to inform the *applicant* that the Public Body had decided to give notice to third parties. Further, section 31(2) requires the Public Body to give notice to the *applicant* of its decision regarding the records for which

it provided the notice. There is nothing before me to suggest that the Public Body provided the notice required by the FOIP Act to the Applicant when it provided notice to third parties. Rather, it appears to have ended all communication with the Applicant after July 12, 2017.

[para 15] The process by which the FOIP Office that serves the Public Body processes access requests is, as it admits, inefficient. It appears from the Public Body's correspondence to the Applicant and its submissions that a number of inconsistent decisions regarding the access request were made in processing the access request. I make this finding based on the Public Body's initial position that it would be in a position to release records by the end of May (without providing notice to third parties) and its subsequent decision to consult third parties in September, rather than release records. The Public Body states that it is currently taking measures to improve its efficiency and productivity, and I assume that it intends to address the inconsistencies in its decision making and correspondence with the Applicant that I have noted above.

[para 16] I note too, that the Public Body reports that the delay in responding was attributable to a high volume of access requests, given that its FOIP unit serves several public bodies. As noted above, it is the head of the Public Body, the Minister, who has the duty to respond to access requests. If the head delegates the duty to a FOIP unit that lacks the resources and authority to meet the duty, then the head will not have taken all reasonable measures to respond to the access request within 30 days, as required by section 11 of the FOIP Act. The staffing of a FOIP unit does not diminish or negate the Minister's duty under section 11.

[para 17] At the time it made its submissions for this inquiry, (January 22, 2018), the Public Body estimated that it would respond to the Applicant on January 23, 2018. Neither the Applicant nor the Public Body has confirmed whether it did or did not respond on that date. As I do not know whether the Public Body responded as it intended to do, I must make an order requiring the head of the Public Body to respond to the Applicant. If the Public Body has already responded, the head may inform this office in writing that it has done so, so that the head of the Public Body is in compliance with the order.

III. ORDER

[para 18] I make this Order under section 72 of the Act.

[para 19] I order the head of the Public Body to respond to the Applicant in accordance with his duty under section 11 of the Act.

[para 20] I order the head of the Public Body to inform this office within 50 days of receiving this order, that he has complied with it.

Teresa Cunningham
Adjudicator