

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-16

April 11, 2019

ALBERTA HEALTH

Case File Number 011227

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to Alberta Health (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act) on October 3, 2017. The Public Body sent an acknowledgement of the request on October 5, 2017.

The Applicant requested a review of the time taken by the Public Body to respond.

The Adjudicator found that the Public Body failed to make every reasonable effort to respond within the timelines provided in the Act.

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

Authorities Cited: Orders F2006-022, F2013-53, F2018-10

I. BACKGROUND

[para 1] An Applicant made an access request to Alberta Health (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act) on October 3, 2017. The Public Body sent an acknowledgement of the request on October 5, 2017. There was also further correspondence between the Public Body and Applicant regarding fees.

[para 2] By letter dated November 14, 2017, the Public Body notified the Applicant that it was extending its time to respond under section 14(1)(b), which permits a time extension where a large number of records relate to the request. In this case, the Public Body states that it received 3873 pages of responsive records in response to its call for records from program areas. The new response date was stated to be December 12, 2017.

[para 3] By letter dated January 2, 2018, the Public Body informed the Applicant that it had received permission from this Office to extend its time to respond to the Applicant's request by 120 days. The new response date was stated to be April 12, 2018.

[para 4] By letter dated April 12, 2018, the Public Body informed the Applicant that it has sought a further extension from this Office and was awaiting the decision. The Public Body provided a copy of the Assistant Commissioner's decision, dated April 23, 2018, which denied the extension request.

[para 5] On January 2, 2019, this Office received a request from the Applicant to review the time taken by the Public Body to respond.

II. RECORDS AT ISSUE

[para 6] As the issue in this inquiry relates to the timeliness of the Public Body's response, there are no records at issue.

III. ISSUE

[para 7] The Notice of Inquiry, dated March 7, 2019, states the issue for this inquiry as follows:

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

IV. DISCUSSION OF ISSUE

[para 8] Section 11 of the Act states:

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

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

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

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

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

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

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

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

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

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

Section 11 of the Act requires the head of a public body to make every reasonable effort to respond to the applicant not later than 30 days from the date of receipt of an access request. If a public body can demonstrate that it made every reasonable effort to respond to a request within the time limit, but failed due to circumstances beyond its control, the public body would not be in breach of section 11.

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

processing steps that were listed in both the first and second extension request, only one of seven is noted as having progressed at all.

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

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

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

V. ORDER

[para 23] I make this Order under section 72 of the Act.

[para 24] I find that the Public Body did not respond to the Applicant within the time limit set out in section 11 of the Act. While it is too late for the Public Body to now comply with that section of the Act, I order the Public Body to respond to the Applicant in accordance with the Public Body's remaining duties under the Act.

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

Amanda Swanek
Adjudicator