

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-022

August 21, 2007

ALBERTA SECURITIES COMMISSION

Case File Number 3309

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records from the Alberta Securities Commission (the Public Body) under section 7 of the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body estimated fees for producing copies at \$64.50. Subsequently, the applicant requested review by this office of whether the Public Body had met its duty to assist and had complied with the time limits for responding to an access request under the Act. The Applicant also requested waiver of the fees.

The adjudicator found that the Public Body did not extend the time frame for responding to the Applicant under section 14 of the Act and did not make every reasonable effort to respond to the applicant not later than 30 days after receiving an access request under section 11. The adjudicator found that the Public Body met its general duty to assist the Applicant under section 10(1). The adjudicator ordered the Public Body to refund the fees paid by the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 11, 12, 13, 14, 55, 72(3)(c), 93(4); *Interpretation Act* RSA 2000 c. I-8 s. 22(7)

Authorities Cited: **AB:** Orders 96-022, 98-002, F2005-012, F2005-020

I. BACKGROUND

[para 1] On March 15, 2005 the Public Body received an access request from the Applicant. The Applicant requested records containing her personal information from December 1, 2002 to March 15, 2005.

[para 2] On March 24, 2005, in response to a telephone conversation with a representative of the Public Body, the Applicant confirmed that all correspondence to, as well as from, the Public Body was to be included in the request, as well as any annotations to files, or records or notes relating to the Applicant.

[para 3] On April 5, 2005, the Public Body wrote the Applicant to advise that it would respond to her request or provide a fee estimate on or before April 15, 2005.

[para 4] On April 13 and 20, 2005 the Public Body telephoned the Applicant to advise her of the status of her request and the projected fees.

[para 5] On April 26, 2005, the Applicant received a fee assessment of \$64.50 from the Public Body.

[para 6] The Public Body received payment of the fee on April 27, 2005, and provided the records on April 28, 2005.

[para 7] The Applicant requested refund of the fee on the basis that the Public Body had taken longer than 30 days to respond to her access request. The Public Body denied the Applicant's request on May 19, 2005.

[para 8] On June 8, 2005, the Applicant requested review by this office of whether the Public Body had complied with the time limits for responding to an access request under the Act and whether the Public Body had met its duty to assist her. The Applicant also requested refund of the fees she had paid. Mediation did not resolve the issue, and the matter was set down for a written inquiry.

[para 9] The parties provided initial written submissions regarding the issues but neither party provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 10] As the matter turns around the manner in which the Public Body responded to the applicant's request, there are no records directly at issue.

III. ISSUES

Issue A: Did the Public Body properly extend the time limit for responding to a request under section 14 of the Act?

Issue B: Did the Public Body comply with the time limit in section 11 of the Act?

Issue C: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

Issue D: Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?

IV. DISCUSSION OF ISSUES

A. General

[para 11] Section 10(1) describes a public body's duty to assist an applicant making an access request. It states:

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.

[para 12] Section 11 establishes time limits for a public body to respond 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 13] Section 14 describes situations in which the time limit under section 11 may be extended:

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 14] Section 55 describes situations when a public body may apply to disregard a request:

55(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) 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.*

(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1) and

- (a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;*
- (b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.*

[para 15] Section 72 lists the Commissioner's powers on review. It states in part:

72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.

(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

- (c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*

[para 16] Section 93(4) establishes criteria for the head of a public body to consider in relation to waiving fees. It states:

- (4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,*
- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
 - (b) the record relates to a matter of public interest, including the environment or public health or safety.*

Issue A: Did the Public Body properly extend the time limit for responding to a request under section 14 of the Act?

Issue B: Did the Public Body comply with the time limit in section 11 of the Act?

[para 17] I have decided to address these issues together, as section 14 of the Act operates as an exception to the strict application of section 11. For example, if a public body properly extends time for responding to a request under section 14 and responds within that time frame, it meets the requirements of section 11.

[para 18] Both parties are in agreement that the Public Body received the access request on March 15, 2005. Accordingly, section 11 requires the Public Body to have made every reasonable effort to respond to the Applicant's request by the end of April 14, 2005, unless section 14 or 15 applies.

[para 19] The Applicant argues that the Public Body did not comply with the time limit in section 11 of the Act and did not extend the time to comply under section 14. She notes that the Public Body received her request on March 15, 2005 and did not respond to the request within the meaning of the Act until April 26, 2005, on which date she received an assessment from the Public Body of fees for providing the records. On April 28, 2005, the Public Body provided the applicant with the records that were the subject of her access request.

[para 20] The Public Body argues that it must only make every reasonable effort to respond to the applicant's access request not later than 30 days after receiving it. The Public Body argues that it did make every reasonable effort but did not respond to the applicant's request within 30 days of the receipt of the request for the following reasons:

1. The Public Body has a heavy case load, and in fact, at the time of the Applicant's request, some of the requests were so large that the Public Body had to request an extension from this office to meet its responsibilities for responding to those requests.
2. It was necessary to consult with this office and Alberta Justice regarding the records, which contained confidential third party business and personal information.
3. The Public Body required clarification from the applicant as to the scope of her request.

In its arguments relating to section 14, the Public Body argues that it was proper to extend the time for responding by two weeks.

[para 21] 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. However, legislative provisions must be read in the context of other legislative provisions. To understand how section 11 of the Act operates, it is first necessary to examine section 14.

[para 22] Section 14 contains specific reasons and requirements for extending the time to respond under section 11. Section 14 recognizes that it may take longer than 30 days in some cases to respond to an applicant, in part due to the complexity of a request or the nature and quantity of records requested. Section 14 balances the right of an applicant to obtain information in a timely manner with the operational requirements of a public body. Section 14 creates obligations to communicate and gives an applicant a right to make a complaint about an extension in order to ensure transparency of process and to prevent abuse of the provision. There is no requirement under section 14 that a public body communicate with the applicant in writing; however, it is clearly desirable to keep written records of this type of communication as it may be necessary to prove that it was made at a later date.

[para 23] The second and third reasons provided by the Public Body as an explanation for failing to meet the 30-day deadline under section 11 would be grounds for extending the deadline under section 14. However, in order to extend the deadline, section 14 requires the head of a public body to tell the applicant three things: the reason for the extension, when a response can be expected, and that the applicant may make a complaint to the Commissioner about the extension.

[para 24] I find that the Public Body did not extend the time for responding to the access request under section 14. While there is evidence that the Public Body advised the applicant regarding “the status of her request and the pending fee estimate”, there is no evidence that it provided her with the information required by section 14 (a) – (c). In addition, the evidence of the Public Body is that it considered formally extending the response period under section 14, but chose not to. Given that the Public Body chose not to extend the time for response, it cannot then rely on the need to consult with the applicant or third parties as reasons for failing to respond within 30 days under section 11. Section 14 establishes a complete process to address situations in which timelines are affected by the need to consult with the applicant or third parties and includes a means of verifying whether the deadline for response has been properly extended. If a Public Body chooses not to follow the processes set out in section 14, it cannot then gain the benefit of section 14 for the purpose of meeting the requirements of section 11.

[para 25] In any event, I find that the applicant did provide sufficient detail to enable the Public Body to identify requested records. The applicant requested all records containing her personal information for the time periods December 1, 2002 – March 15, 2005. The Public Body contacted her to confirm that she wanted information that she herself had provided to the Public Body, which was clearly within the scope of the request. The primary purpose of clarification appears to have been to ensure that the applicant really wanted the records and was aware of the fees for those records.

[para 26] I also find that the evidence does not establish that consultation with third parties required an extension of the 30-day time limit. The affidavit evidence establishes that the Public Body thought it would be able to respond to the applicant by April 15, 2005, but “as it turned out, it took a few days longer than expected to be in a position to respond.” In the Public Body’s affidavit, this delay was not attributed to consultation with third parties, but to waiting for approvals.

[para 27] I have already found that the Public Body did not extend the time limit for responding under section 14. I have also found that the Public Body cannot rely on the arguments that it required clarification from the applicant or needed to consult with third parties for failing to meet the 30-day time limit in section 11. I must now decide whether the Public Body made every reasonable effort to respond to a request not later than 30 days after receiving it.

[para 28] 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 29] In Order 98-002, the previous Commissioner adopted the following definition of “every reasonable effort”:

Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable. The use of “every” indicates that a public body’s efforts are to be thorough and comprehensive.

[para 30] The Public Body argues that its case load was heavy enough at the time of the Applicant’s request to be considered an extenuating circumstance. The Public Body’s argument that it had an unusually high case load at the time of the access request fails because the evidence does not establish that the Public Body made every reasonable effort to respond to the access request in view of its case load. Instead, the evidence indicates that the Public Body intended to respond to the request on or before April 15, 2005, reviewed responsive records, and contacted the applicant to provide status reports. While it provides an explanation of why it did not meet the time limit in section 11, the Public Body does not explain the steps it took to respond within 30 days. For example, in relation to the approvals it waited to obtain, the Public Body does not explain what steps were taken to obtain these approvals on or before April 14, 2005.

[para 31] The Public Body also argues that the legislation requires it to “juggle competing duties” under the statute, including the duty to respond within 30 days, the duty to clarify the applicant’s request, and a duty to provide a fee estimate to the applicant. The situation of the Public Body is no different than that of other public bodies under the Act. There is also no duty under the Act for a public body to charge fees. Under the Act, a public body may require a fee for producing copies of personal information, and if so, it must give an applicant an estimate of the total fee before providing the service.

[para 32] As an aside, I notice that the Public Body understood that if it responded to the Applicant on April 15, 2005, it would have responded within the time frame in the Act. While this would be true if section 11 referred to “a month”, this provision in fact specifies 30 days. Section 22 of the *Interpretation Act* explains how time is to be computed in enactments. It states in part:

(7) If an enactment provides that anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

In the present case, both parties agree that the request was received by the Public Body on March 15, 2005. Therefore, calculating from March 16, the 30th day falls on Thursday, April 14, 2005.

[para 33] In conclusion, I find that the Public Body did not make every reasonable effort to respond to the applicant’s request not later than 30 days after receiving it. The evidence of the Public Body describes the steps it took to process the applicant’s request and provides some reasons for lateness; the evidence does not explain the steps taken to meet the statutory deadline.

Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 34] The Applicant argues that the Public Body did not meet its duty to assist her because it withheld her termination record and did not respond to her access request within 30 days.

[para 35] The Public Body argues that section 10 should be interpreted as a general duty which does not encompass more specific duties set out under the Act. The Public Body also argues that the evidence demonstrates that it was diligent in returning calls, clarifying the scope of the request, and engaging in ongoing discussions with the Applicant regarding the fee estimate.

[para 36] When responding to an access request, a public body must determine whether an exception to access under the Act applies to the information requested. If the public body determines that information falls under a mandatory exception under Part I, Division 2, the public body must apply the exception and is obligated by the Act to refuse to disclose the information. An applicant is not entitled to information to which an

exception applies. When a public body makes a decision in good faith that it must refuse to disclose information, the public body is not in breach of its duty to assist, even if on review the public body's decision is later found to have been made in error.

[para 37] Under the Act, the duty to assist an applicant under section 10 is separate from the duty to respond to a request not later than 30 days after receiving it under section 11. If a public body does not meet its obligation under section 11, it is not necessarily in breach of section 10.

[para 38] In Order 96-022, the former Commissioner determined that a public body has the burden of proving that it has fulfilled its duty to an applicant under section 10(1). The former Commissioner noted that a public body must show: "(a) it made every reasonable effort to search for the records requested; and (b) that it informed the applicant in a timely fashion about what has been done."

[para 39] The reasonableness of the Public Body's efforts to search for records is not in issue. The Applicant does not argue that the Public Body did not make reasonable efforts to locate records; only that it has withheld records.

[para 40] The Public Body has provided affidavit evidence documenting its contact with the Applicant. The Public Body discussed the request with the applicant on March 23 and 24, 2005. The Applicant was sent a letter on April 5, confirming the scope of her request. The Public Body telephoned her on April 13 and 20 to advise the status of her request and to provide fee estimates.

[para 41] I find that the Public Body conducted a reasonable search and that the Applicant was informed in a timely fashion regarding what had been done, therefore complying with its duty under section 10(1) of the Act.

Issue D: Should the Applicant be excused from paying all or part of a fee?

[para 42] Although the issue was originally stated as "Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act", I have rephrased the issue, as 93(4) is limited to situations in which the head of a public body may waive fees. Section 72(3)(c) empowers the Commissioner to confirm or reduce a fee or order a refund, in the appropriate circumstances, including when a time limit is not met.

[para 43] The Applicant argues that she is entitled to a refund of fees because the Public Body did not respond to her request within the time required by the Act.

[para 44] The Public Body argues that the Applicant has not produced any evidence that the Applicant is unable to pay the fee, pursuant to section 93(4)(a). It also notes that there is no evidence that the records relate to an issue of public interest under 93(4)(b). The Public Body further argues that it would not be fair to waive fees in this case because none of the following criteria, apparently from its policy, apply:

- an applicant narrows a request to reduce the amount of fees chargeable
- an applicant offers to pay part of the fees but asks to waive the remainder
- there are a number of computer screen prints involved so a limited amount of information is spread out over a number of pages, or
- an applicant would otherwise have access if they lived in Edmonton or had Internet skills and access

The Public Body also notes that it provided the Applicant with some of the same records in 2004 and waived the fees at that time and advised that the Applicant:

...refused to exclude the 41 pages of records previously provided to her in response to her September 2003 request and refused to exclude the considerable correspondence that she sent to the Public Body.

[para 45] With respect to the Public Body, a strict application of its first two criteria has the effect of undermining an applicant's access rights under the Act. The Act gives applicants a right to access records. If an applicant demonstrates that he or she is unable to pay for the records, or that it is not fair to be required to pay for the records, the head of the Public Body may waive the fees. An applicant is not required by the Act to reduce the number of records in a request, or pay for the records in part, in order to "qualify" for a fee waiver on the basis of lack of financial resources or fairness.

[para 46] In its affidavit evidence, the Public Body provided the following reason for not responding to the access request within 30 days:

In addition to our request volume, submissions pertaining to two IPC appeals relating to the Applicant's previous requests... needed to be prepared in advance of the May 18, 2005 deadline.

[para 47] From the Public Body's submissions and evidence, the inference can be drawn that the Public Body believes that the Applicant should not have made the access request of March 15, 2005 and any delay in responding to her request was in part due to her exercise of her rights under the Act relating to other requests and her refusal to narrow her request.

[para 48] The Act gives applicants the right to timely access to personal information about themselves held by a public body. Applicants also have the right to a review of decisions made by public bodies about their personal information. If access requests are repetitious or systematic in nature and could interfere with operations of the public body, or are frivolous and vexatious, a public body may apply to disregard the request under section 55 of the Act. It is not open to a public body to give an access request less priority than required by the Act because it disagrees with an applicant's request or because the applicant has requested review.

[para 49] Failing to meet a time limit in the Act will not always be an appropriate circumstance for the purpose of reducing fees or ordering a refund. However, in this case, the Public Body has provided no evidence that it took steps to comply with section 11 and suggests that the Applicant herself is partly responsible for the fact that it did not

meet the time limit. I find that, in this case, the Public Body's delay in responding to the Applicant's access request is an appropriate circumstance in which to order a refund of fees.

V. ORDER

[para 50] I make this Order under section 72 of the Act.

[para 51] I find that the Public Body did not make every reasonable effort to respond to the Applicant's request not later than 30 days after receiving it as required by section 11.

[para 52] I find that the Public Body met its general duty to assist the Applicant under section 10(1) of the Act.

[para 53] I order the Public Body under section 72(3)(c) of the Act to refund the fees paid by the Applicant.

Teresa Cunningham
Adjudicator