

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2007-012**

October 12, 2007

**EDMONTON POLICE COMMISSION**

Case File Number 3617

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant requested records relating to the hiring of an executive director of the Edmonton Police Commission (the Public Body), including the employment contract under section 7 of the *Freedom of Information and Protection of Privacy Act* (the Act).

The Public Body advised the Applicant that it was extending the time to respond to his access request under section 14 of the Act. The Applicant requested review of the extension.

The Public Body responded to the access request and severed information under section 17 of the Act. The Applicant requested review of the Public Body's decision on the basis that it had not met its duty to assist him.

The Adjudicator found that the Public Body had not met its duty to assist the Applicant under section 10 or its duty to respond to the Applicant within the statutory timeframe in section 11. The Adjudicator ordered the Public Body to reconsider its decision to withhold information under section 17 and ordered the Public Body to refund fees to the Applicant.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 11, 14; *Personal Information Protection Act* S.A. 2003, c. P-6.5

**Authorities Cited:** AB: Orders 2001-011, F2004-026, Order F2005-016

**Cases Cited:** *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403

## **I. BACKGROUND**

[para 1] On January 12, 2006, the Public Body received an access request from the Applicant. The Applicant requested records relating to the hiring of an executive director of the Public Body from January 1, 2005 to July 30, 2005, including the employment contract.

[para 2] On February 7, 2006, the Public Complaint Director of the Public Body acknowledged receipt of the Applicant's access request and advised that the request would be processed as expeditiously as possible.

[para 3] In a letter dated March 1, 2006, the chair of the Public Body advised the Applicant that it had extended the time to respond to his request by thirty days to allow a third party the opportunity to make representations concerning disclosure.

[para 4] On March 20, 2006, the Applicant requested review of the decision to extend the time to respond.

[para 5] The Public Body provided the Applicant with the requested records on April 5, 2006 but severed information on the basis of section 17 of the Act.

[para 6] On April 25, 2006, this office received the Applicant's request for review of the Public Body's response to his access request, arguing that the head of the Public Body had breached the duty to assist him.

[para 7] Mediation did not resolve the issue and so the matter was scheduled for a written inquiry.

[para 8] On September 11, 2007, I noted that this office had not provided the Public Body with the Applicant's April 2006 request for review, as required by section 67 of the Act. In order to ensure jurisdiction to address the Applicant's issues, I forwarded the Applicant's request to the Public Body. I invited both parties to provide any further submissions in relation to the request to me by September 29, 2007. The Public Body advised that it had no submissions in relation to the record, but asked that I take into consideration that it was not provided with this document when I review its submissions.

## **II. RECORDS AT ISSUE**

[para 9] As the matter turns around the timeframe and 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 meet its duty to assist the Applicant under section 10(1) of the Act?**

**Issue B: Did the Public Body conduct an adequate search for responsive records?**

**Issue C: Did the Public Body comply with section 11 (time limit for responding to a request)?**

**Issue D: Did the Public Body properly extend the time limit for responding to the Applicant's request under section 14 of the Act?**

### IV. DISCUSSION OF ISSUES

**Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?**

**Issue B: Did the Public Body conduct an adequate search for responsive records?**

[para 10] I will address issues A and B together as a decision regarding the adequacy of the search for responsive records will assist me to determine whether the Public Body has met its duty to assist the Applicant under section 10(1).

[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] A public body bears the onus of proving that it has fulfilled its duty to assist an applicant. This duty is discharged by taking all reasonable steps to search for responsive records and to respond to an applicant openly, accurately, and completely.

[para 13] The Public Body submits that it requested any and all responsive records from staff and members and searched its office paper files and electronic records. To its knowledge, all responsive records in its control were provided to the Applicant.

[para 14] The Public Body did not provide evidence to support that it followed this process. However, the reasonableness of the Public Body's efforts to search for records is not at issue, as the Applicant has not challenged the adequacy of the search and did not provide argument in relation to the issue of whether the Public Body conducted an adequate search for records.

[para 15] As there is no issue as to whether the Public Body conducted an adequate search for records, I will consider whether the Public Body made every reasonable effort to respond to the Applicant openly, accurately and completely.

[para 16] The Applicant's primary argument is that the head of the Public Body was in a conflict of interest situation when he processed the Applicant's access request. As a result, the Applicant argues that the head of the Public Body failed in his duty to assist the Applicant in accordance with section 10. On page 9 of his rebuttal submissions, the Applicant also argues that the Public Body's failure to consider section 17(2)(e) of the Act when it processed his application led to delays in responding to him.

[para 17] The Public Body argues that section 17 makes it mandatory to sever salary information of a third party when responding to an access request. The Public Body also contends that it met its duty to assist the Applicant within the meaning of the Act by:

- Acknowledging the receipt of the request and the initial fee, and confirming the scope of the Request;
- Advising that the Chair was handling the Request;
- Advising the Applicant of the time extension for Third Party consultation and the right to seek a review by the IPC;
- Providing a written response to the Applicant's verbal voice mail to stop the process
- Acknowledging the Applicant's request to re-commence the FOIP process;
- Providing a final response to the Applicant with responsive records, portions of the records withheld from disclosure were clearly identified with the relevant FOIPP Act provisions noted; the right to seek a review by the IPC including the 60-day deadline was included and the salary range of the Third Party was also provided beyond the requirements of the FOIP Act. (*sic*)

[para 18] I do not agree with the Applicant's argument that a conflict of interest results in a failure to meet the Public Body's duty to assist. Under the Act, the head of the public body is accountable for any failures or omissions of the public body in responding to an access request. The head of a public body, by the very nature of the position, will often have duties to the public body that may compete with the head's duties under the Act. Delegating the head's responsibility to respond to an access request to an employee such as a FOIP coordinator does not mitigate the potential for conflict of interest. For this reason, the Act provides individuals who have made access requests the right to an independent review of the head's decisions by a neutral third party, the Information and Privacy Commissioner. The independent review rectifies any issues of conflict of interest or potential bias. As the Applicant in this case has exercised his right to request an independent review, any miscarriage of natural justice he perceives will be remedied by the review. See *Harelkin (supra)*.

[para 19] Section 10 imposes a duty to respond openly, accurately and completely. Consideration of whether a Public Body has met this duty requires review of the decision the Public Body to withhold information. In Order F2004-026, the Commissioner noted:

I agree that a Public Body's failure in its original response to carefully consider, and correctly choose, which exceptions to apply, meant that it did not make every reasonable effort to assist the Applicant.

To determine whether the Public Body has met its duty to assist the Applicant, it is therefore important to review its decision to withhold information to ensure that it was carefully considered, even though in this case, the Applicant has not requested review of the Public Body's decisions to sever information under section 17. As both parties made submissions regarding the application of section 17 in relation to sections 10 and 11, I am satisfied that I have jurisdiction to review this issue.

[para 20] In Order F2004-026, the Commissioner noted:

In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case.

Following Order F2004-026, I will therefore determine whether the Public Body considered the purpose of the provisions on which it relied when it severed information on the basis of section 17 to determine whether it responded openly, accurately, and completely for the purposes of section 10.

[para 21] Section 17 requires a public body to withhold personal information once it has determined that releasing the information would be an unreasonable invasion of a third party's personal privacy. It states in part:

*17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

*(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

*(a) the third party has, in the prescribed manner, consented to or requested the disclosure...*

*(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council...*

*(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if...*

*(d) the personal information relates to employment or educational history...*

*(g) the personal information consists of the third party's name when*  
*(i) it appears with other personal information about the third party, or*

- (ii) *the disclosure of the name itself would reveal personal information about the third party...*

*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny...*
- (e) the third party will be exposed unfairly to financial or other harm,*
- (f) the personal information has been supplied in confidence,*
- (g) the personal information is likely to be inaccurate or unreliable,*
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) the personal information was originally provided by the applicant.*

[para 22] Section 17 requires a Public Body to determine first that disclosing personal information would be an unreasonable invasion of personal privacy before the mandatory duty to withhold the information arises. In performing this exercise, a Public Body must take into account all relevant factors.

[para 23] In Order 2001-011, the Commissioner said:

In an inquiry, a public body must provide evidence on how a particular exception applies; and secondly, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold access to information. Consequently, Alberta Justice must show that it considered the purposes of the Act, one of which includes allowing access to information.

Alberta Justice did not provide any direct evidence by way of affidavit or otherwise, to show how the head exercised its discretion. Often, this evidence can be given by the public body's FOIP coordinator or the person responsible for reviewing the records.

[para 24] While the Public Body provided submissions, it did not provide direct evidence to show that it took into consideration all the relevant factors. The Public Body does not indicate who provided submissions on its behalf, and so I am unable to consider the explanations contained in the submissions as direct evidence.

[para 25] In addition, even if the Public Body's submissions did constitute direct evidence, they do not establish that the Public Body considered section 17(5) when it made its decision that releasing the information would be an unreasonable invasion of the Third Party's personal privacy. From the Public Body's submissions, it appears to have reasoned, incorrectly, that as the severed information was personal information and did not fall under section 17(2)(e), it must be withheld under section 17(1) unless the Third Party authorized the disclosure. As a consequence, I find that the Public Body has not

demonstrated that it took into consideration all the relevant factors when it withheld the Third Party's personal information.

[para 26] For these reasons, I find that the Public Body did not carefully consider the provision on which it relied to sever information, and consequently, did not respond openly, completely and accurately to the Applicant within the meaning of section 10 of the Act.

**Issue C: Did the Public Body comply with section 11 (time limit for responding to a request)?**

**Issue D: Did the Public Body properly extend the time limit for responding to the Applicant's request under section 14 of the Act?**

[para 27] I have decided to address issues C and D 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 28] The Applicant argues that the Public Body did not meet its obligations under section 11 of the Act, as it did not extend the time limit until after the statutory deadline had passed.

[para 29] The Public Body argues that it did not breach the time limit for responding to the Applicant from the date that it extended the time limit. Further, it argues that it required time to consult the Third Party, and that the fact that the Applicant had made other access requests should be taken into consideration.

[para 30] 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 31] 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 32] 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.

[para 33] 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 34] I agree with the Applicant that it was not open to the Public Body to extend the time limit more than 30 days after it had received his access request. Section



14 is prospective in application, rather than retroactive. This means that section 14 operates to extend the time limit in the future, but cannot be invoked to allow a public body to meet a statutory deadline it has already missed.

[para 35] In the present case, section 11 imposed a duty to respond to the Applicant not later than Monday, February 13, 2006. The Public Body sent a letter to the Applicant confirming that it had received the access request on February 7, 2006. However, a confirmation letter is not a response within the meaning of sections 11 and 12 of the Act. The Public Body did not advise the Applicant that it intended to extend the time limit for response until it sent its letter dated March 1, 2006, after the statutory deadline had passed, and did not respond within the meaning of the Act until April 2006.

[para 36] Although the Public Body did not respond to the Applicant's access request within the time limit contemplated by section 11, if the Public Body can demonstrate that it took all reasonable steps to respond to the access request within the time limit, it would not be in breach of section 11, despite missing the time limit.

[para 37] The Public Body did not provide direct evidence that it took reasonable steps to meet the deadline. In its submissions, the Public Body argues:

there was a technical breach of the time limit, but the delay was inevitable under circumstances authored by the Applicant.

[para 38] "The circumstances authored by the Applicant" apparently relates to the fact that the Applicant exercised his statutory right under sections 6 and 7 to make other access requests. The Public Body has not established that it took any reasonable steps to meet its duty under section 11 or that the delay was inevitable. Instead, it suggests that failing to comply with section 11 is a technical matter and that its failure is the responsibility of the Applicant.

[para 39] I do not accept the argument of the Public Body that its obligations under the Act are merely technical in nature. Laforest J., with whom the majority of the Supreme Court of Canada agreed on this point, explained the important public policy purpose of access to information legislation in *Dagg (supra)*:

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.

The duties imposed by the Act on the Public Body are intended to promote the important goals of democracy and government accountability. The Act imposes no duty on an applicant to limit or simplify an access request for the benefit of a public body. A public body may extend the time limit under section 14, but otherwise, it must respond to the applicant in accordance with section 11. Failing to meet statutory duties is not simply a technical matter, but has the effect of undermining the vital public interests that access to information legislation promotes.

[para 40] I find that the Public Body did not properly extend the time limit under section 14, as it did not extend the time limit until after February 13, 2006. I further find that the Public Body did not meet its duty to respond to the Applicant not later than 30 days after receiving the access request.

[para 41] I note that the Public Body charged the Applicant an initial fee of \$25 to process the access request. Section 72(3)(c) authorizes me to order a Public Body to refund fees in appropriate circumstances, including if a time limit is not met.

[para 42] I find that this is an appropriate case to order a refund of the initial fee, and any additional fees, charged by the Public Body in relation to this access request.

## **V. ORDER**

[para 43] I make this Order under section 72 of the Act.

[para 44] I order the Public Body to reconsider its decision to withhold information under section 17 and in doing so take into consideration all the relevant provisions of section 17 and their purposes.

[para 45] I order the Public Body to refund the fees charged in relation to this access request.

[para 46] I order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

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Teresa Cunningham  
Adjudicator