

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-35

October 3, 2013

**EVERGREEN REGIONAL WASTE MANAGEMENT SERVICES
COMMISSION**

Case File Number F6103

Office URL: www.oipc.ab.ca

Summary: The Applicant requested video footage and reports relating to an inspection of cells 1, 2, 3 and 4 of a landfill pursuant to the *Freedom of Information and Protection of Privacy Act* (FOIP or the Act). Prior to the Applicant's access request, the Public Body advised the Applicant that it had records relating to cells 1, 3 and 4 only and that it could obtain those from its contractor for a cost of \$550, which the Applicant was asked to pay. The Applicant then made a request pursuant to the Act for the same information. The Public Body did not respond to the Applicant's access request, so he complained to the Office of the Information and Privacy Commissioner (this Office). During the course of the inquiry, the Applicant also gave evidence that he had asked for a fee waiver, though it was not clear when that request was made.

The Adjudicator found that the Public Body performed an adequate search for responsive records but either failed to respond to the Applicant's access request as required by the Act or failed to meet its duty under section 10 of the Act to assist the Applicant. The Adjudicator also found that the Public Body properly exercised its discretion to refuse the Applicant's request for a fee waiver.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7, 10, 11, 12, 72, and 93; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, s. 11.

Authorities Cited: **AB Orders:** 2001-016 and F2007-029.

I. BACKGROUND

[para 1] According to the Applicant, in 2010, he made a FOIP request to Evergreen Regional Waste Management Services Commission (the Public Body) for all pictures of the cell construction completed on a landfill, and a power point presentation given by an employee of the Public Body. The Public Body responded but the Applicant was not satisfied with the response and asked this Office to review the matter. That matter proceeded through mediation but was never referred to adjudication.

[para 2] On November 12, 2011, the Applicant made a request for information about a landfill to the Public Body. The request was not made pursuant to the *Freedom of Information and Protection of Privacy Act* but through a different system of access made available by the Public Body. The Public Body corresponded with the Applicant with the result that the Public Body believed that the Applicant's request was narrowed to a request for video footage of inspections and other information about the video inspections, which were contained in a Quality Control/Quality Assurance Report (QC/QA report). The Public Body advised the Applicant that there was video footage of inspections of cells 1, 3 and 4 and that they would make those available to him for a fee of \$550 (which would be the cost to the Public Body of obtaining the footage from its contractor). The Public Body further advised the Applicant that no video coverage had been retained beyond this.

[para 3] The Applicant was not satisfied by the Public Body's response and asked this Office to review the matter. However, because the Applicant's access request had not been made pursuant to the Act, he was advised by this Office that it could not review the matter. Subsequently, on December 29, 2011, the Applicant wrote to the Public Body and stated:

My FOIP request can be found in the Contact Documents titled MSW Cell 2 and Dry Waste Cells 2 & 3 Construction – February 2007 – Section 02723 Page 4 – Leachate Collection Piping.

The information I'm requesting is item 3.03 System Testing

A. Camera Test

[para 4] The Public Body did not respond to this request. As a result, the Applicant asked this Office to review the matter. The Commissioner authorized a portfolio officer to investigate and attempt to settle the issues between the parties. This was not successful and the Applicant requested an inquiry. The Applicant and Public Body provided both initial and rebuttal submissions.

[para 5] The Applicant's first request in 2010 did not proceed beyond mediation and is now closed. The Applicant's second request in November of 2011 was not made pursuant to the Act and, therefore, I have no jurisdiction to review the Public Body's response to it. Therefore, for the purpose of this inquiry, I will only make findings relating to the Applicant's December 2011 FOIP request and the Public Body's response to that request.

II. INFORMATION AT ISSUE

[para 6] Given the Applicant's access request and his subsequent submissions, I was confused as to what information the Applicant was seeking. In order to clarify this, I wrote to the Applicant and asked what information he was seeking. The Applicant responded to my questions at length but summarized his request as being for, "...any available videos or reports written about the video inspections for cells 1-4" regarding the leachate collection piping.

III. ISSUES

[para 7] The Notice of Inquiry dated November 8, 2012 lists the issues for this inquiry as follows:

- A. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records within its custody or control.**
- B. Did the Public Body comply with section 11 of the Act (time limit for responding)?**
- C. Did the Public Body comply with section 12 of the Act (contents of a response)?**
- D. Should the Applicant be excused from paying the initial processing fee, as provided by section 93(4) of the Act (fees)?**

[para 8] In his response to questions I asked after submissions were complete, the Applicant stated that a paramount issue is where the Public Body's FOIP Coordinator's fiduciary duty lies. He took issue with the job title used by the FOIP Coordinator and with other duties she apparently has which he felt may conflict with the fulfillment of her duties as the FOIP Coordinator. The job responsibilities of the FOIP Coordinator are not relevant to this inquiry nor do I have jurisdiction to determine the fiduciary duties of the FOIP Coordinator; therefore, I will not make any findings on these issues.

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records within its custody or control.

[para 9] Section 10(1) of the Act 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 10] The Public Body has the onus to establish that it made every reasonable effort to assist the Applicant, which includes performing an adequate search for responsive records. In Order 2001-016 the Commissioner stated:

An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 11] In Order F2007-029 the Commissioner described evidence that a public body ought to provide to meet its burden. He stated:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 12] The Public Body submits that its current FOIP Coordinator did the following:

- Phone[d] [the FOIP Coordinator at the time of the request] and ask[ed] her for all of FOIP information. She supplied me with all the records she had.

- I then [p]honed [the Public Body's secretary at the time] and ask[ed] her if she had any information regarding FOIP requests, she gave me all her information.
- I went through all the information.
- I phone[d] [the contractor involved making the report] to see if there was any more information regarding the FOIP request.

[para 13] In summary, the Public Body states in its initial submission:

[The Applicant] has been told a number of times that the video camera inspection portion was not retained. He was told all the information is in the QC/QA report and he has been offered this report.

[para 14] In its rebuttal submission the Public Body states that there were video recordings in the possession of the contractor engaged by the Public Body to assist with the inspections (the contractor) and that these recordings were offered to the Applicant for a fee of \$550.00, which is the cost that the contractor would charge the Public Body to provide the information.

[para 15] Although the Public Body was able to locate video, it was not clear to me if the video was in its control, so I asked the Public Body if, under the terms of the contract or otherwise, its contractor was required to provide the Public Body with this footage. The Public Body's response was:

...[the contract between the Public Body and its contractor] did not require [the contractor] to provide [the Public Body] with any video recordings when or if requested by [the Public Body].

[para 16] The Public Body also confirmed that the cost of producing the video was not included in the contract price originally negotiated between the Public Body and its contractor. The Applicant argued that a document, titled "Contract Documents" prepared by the Public Body's contractor clearly provides the answer to my question about custody and control. The document does state that the contractor will perform a video inspection, however, it does not state that the video inspection footage will be provided to the Public Body.

[para 17] Based on this evidence, I find that the footage offered to the Applicant was not in the custody or control of the Public Body. If the Applicant wishes to obtain a copy of the video footage, he may take steps to do so but it will be outside of his access rights under the Act.

[para 18] The Applicant's submissions indicate that he does not feel that the Public Body has found all of the information responsive to his FOIP request. He submits that his request for this information began years ago. In 2010 he requested video information. The fee estimate was large and so the Applicant narrowed his access request, for video information on cell 2 only (there were four cells in total). He was then advised that no video inspection

was retained for cell 2. The Public Body's response to the Applicant's 2010 access request was reviewed by this Office but the Applicant was, apparently, not satisfied with the conclusions of the portfolio officer, so he proceeded to make another access request, which is described in the background section of this order.

[para 19] As part of his submissions, the Applicant provided letters from the contractor which states that there is video of cells 1, 3, and 4 which could be made available to the Public Body for an estimated cost of \$550.00. It should be noted that prior to the December 2011 access request that is the subject of this inquiry, the Public Body advised the Applicant that this video was available for an estimated fee of \$550.00.

[para 20] The Applicant also provided a copy of a letter to the Public Body from the contractor. The letter states:

Installed leachate collection lines were video inspected by [a subcontractor] for the Contractor. Based on review of the video and report by [the subcontractor], it is noted that the installation of the leachate collection lines satisfied the contract requirements.

[para 21] On the basis of these letters, the Applicant believes that there is video footage and reports of the video footage in the custody and control of the Public Body, which have not been offered to him.

[para 22] Based on the evidence of the Public Body, I am satisfied that it has offered the Applicant all records responsive to his request that are in its custody. However, I was not certain if the Public Body searched for all records in its control and so I asked the Public Body if there were any other contractors that may have information responsive to the Applicant's access request. The Public Body's response was that the subcontractor referred to in the letter quoted above had been hired by the contractor and that the information referred to in the letter quoted above was the same information that the Public Body had offered to the Applicant for the fee of \$550.00. The Public Body stated that it contracted with only the one contractor.

[para 23] The Applicant has no evidence that the video footage for cell 2 actually exists. He believes that the video inspection footage and report for cell 2 ought to exist because he feels that there is a requirement for the footage and report to be kept. He also notes that he has not been given a reason why the footage for cell 2 does not exist. The evidence before me is that the Public Body employed a contractor to do the video inspections of the cells. The Public Body contacted that contractor and in letter dated July 12, 2010, the contractor advised that there was footage for cells 1, 3, and 4. There were no other contractors contracted by the Public Body to do the inspections. Therefore, there are no other contractors to contact to see if there is a video inspection report or footage for cell 2. In any event, the contractor has told the Public Body that there is no obligation imposed by the Government or contractually to have or retain the information the Applicant seeks. So, it could be that the video footage for cell 2 never existed or that it has not been retained.

[para 24] The Applicant thinks that the Public Body should have asked all the subcontractors for responsive records because the Public Body would have a right to those records. The evidence indicates that the Public Body hired one contractor and that contractor then hired a subcontractor to do the video inspections. In any event, the Public Body's rights seem to be a moot point, as the contractor had the responsive records in its custody and has confirmed to the Public Body that no other video footage exists.

[para 25] Either way, I find that the video footage for cell 2 does not exist. On this basis, I find that the Public Body performed an adequate search prior to responding to the Applicant's request.

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

[para 26] 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 27] The Applicant sent his FOIP request to the Public Body on December 29, 2011. He did not provide the \$25 initial fee to the Public Body at the time of the request. The Public Body did not respond to the Applicant and the Applicant asked this Office to review the matter. Subsequently, the Commissioner advised the parties that she was referring this matter to a portfolio officer to investigate and attempt to resolve the issues.

[para 28] According to the submissions of the Public Body, on March 5, 2012, the portfolio officer was sent a letter from the Public Body which explained that it had responded to the Applicant's access request and provided copies of e-mails dating back to November of 2011 – before the Applicant's FOIP access request. The Public Body then stated:

[The Applicant] was not satisfied with the reply and resubmitted his request as a FOIP request without the initial fee. In any event the information available to him would be the same. The camera test that he is requesting was not retained.

[para 29] I take from this quote that the Public Body did not respond to the Applicant's access request either because it felt it had already responded, or because the Applicant did not provide the initial fee.

[para 30] If the Public Body did not respond to the Applicant's access request because it had already responded to a similar access request that was not made pursuant to the Act, this would be problematic.

[para 31] Section 7 of the Act dictates how an access request is to be made. It states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

(3) In a request, the applicant may ask

(a) for a copy of the record, or

(b) to examine the record.

[para 32] The Applicant's FOIP access request made in December of 2011 met the criteria set out in section 7 and, therefore, the Public Body's obligations under the Act were triggered. Regardless of any previous access requests, whether they were made under the Act or otherwise, the Applicant's FOIP access request made in December of 2011 was separate and distinct, and the Public Body was required to respond to it.

[para 33] The Public Body also seems to indicate that because the Applicant did not provide an initial \$25 fee as it requires, it did not respond to the access request. The portions of Section 11 of the *Freedom of Information and Protection of Privacy Regulation* that are relevant to this inquiry state:

11(1) This section applies to a request for access to a record that is not a record of the personal information of the applicant.

(2) An applicant is required to pay

(a) an initial fee of \$25 when a non-continuing request is made, or

...

(3) Processing of a request will not commence until the initial fee has been paid.

...

[para 34] The contents of a response pursuant to section 11 of the Act are dictated by section 12 of the Act which states:

12(1) In a response under section 11, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

...

[para 35] In view of these provisions, to properly respond to a request under section 11 of the Act, the Public Body must begin processing the request in order to determine if access will be granted or refused. The Public Body is not required to start processing the Applicant's request until the initial fee is paid pursuant to section 11 of the Regulation. As a result, I cannot find that the Public Body failed to meet the timelines set out in section 11 of the Act.

[para 36] However, while it is true that the Public Body was not required to process the Applicant's access request until the initial fee was paid (or waived), this does not mean that the Public Body has no obligations to the Applicant. Once the Applicant made a request within the terms of section 7 of the Act, the Public Body had an obligation to the Applicant under section 10 of the Act to assist him (short of actually processing his request), regardless of whether the initial application fee was paid or not. Certainly, this would involve advising the Applicant that his access request would not be processed until his initial fee was received.

[para 37] I have no information to indicate that the Public Body advised the Applicant that his initial fee had to be paid before the Public Body could process his request and cannot find that it did so. Failure to do so would constitute failure to assist the Applicant as required by section 10 of the Act.

Issue C: Did the Public Body comply with section 12 of the Act (contents of a response)?

[para 38] The Public Body did not respond to the Applicant's FOIP request; therefore I cannot make any finding about the contents of its response.

Issue D: Should the Applicant be excused from paying the initial processing fee, as provided by section 93(4) of the Act (fees)?

[para 39] Section 93(4) of the Act states:

93(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.

[para 40] In his submissions, the Applicant made no argument directly about section 93(4) of the Act and whether he should have been excused from paying the initial fee. I also had no evidence that the Applicant even asked the Public Body for a fee waiver. As a result, I asked the Applicant for arguments specifically on the fee waiver. He stated:

My agreement (*sic*) regarding fees stems from two scenarios.

- (a) The public body must retain all QA/QC documents at the landfill office/on site as per their approval (Environmental Protection and Enhancement Act Approval No. 24806-00-00) with Alberta Environment for as long as the landfill remains in existence.
- (b) The public body retained a contractor to construct the landfill cells and paid for that service, therefor (*sic*) the cost of reproducing this information on a CD is minable (*sic*) and I am willing to pay for that reproduction.

[para 41] As I understand his submissions, the Applicant is arguing that the estimated fees (which I take to be the \$550 the Public Body asked for to obtain the video footage, and the \$25 initial fee) should be waived because the Public Body should have this information in its possession rather than having to pay the contractor to obtain it. Alternatively, the Applicant argues that the estimated fee is too high given that the Public Body retained and paid the contractor for this information and is entitled to it.

[para 42] With regard to fees, the fact that a public body should have certain records readily available to access requestors that it does not have might, in some circumstances, be a reason to excuse payment of the costs to the Public Body of obtaining the information, as a matter of fairness by reference to section 93(4)(a) of the Act. However, in this inquiry, the Public Body has explained that there is no statutory or Government requirement for it to keep the video records requested by the Applicant; the Governmental requirement is that it needs to keep only the report itself. The Public Body's contractor further stated that all QA/QC reports were reviewed by Alberta Environment and found to satisfy the regulatory requirements by Alberta Environment. The difference between the Applicant's and Public Body's positions in this regard may be due to their differing interpretations of what constitutes QA/QC documents. That is, the Applicant feels that the QA/QC documents should include all materials used to develop the report and the Public Body believes that the report itself is all that it is required to have. From the information I have before me from the Public Body and its contractor, it appears that Alberta Environment regulates the QA/QC requirements and has no issue with the amount of information that was retained by the Public Body. In any event, given the explanation of the Public Body, I find that its reason for not having the records requested by the Applicant *in its custody* is reasonable.

[para 43] The Applicant has not argued that he cannot afford the estimated fees or that the Public Body should waive the estimated fees because the record relates to a matter of public interest. Therefore, the conditions set out under section 93(4) of the Act are not met.

[para 44] Finally, I also note that the Public Body is asking the Applicant to pay the fee that it must pay to the contractor to obtain the video records. As I found above, the Public Body does not actually have control of the video footage; therefore, the \$550 amount is not subject to the terms of the Act, and I cannot review or grant a "fee waiver" relative to this charge.

[para 45] On the basis of the evidence before me, I find that the Public Body properly exercised its discretion in not granting a fee waiver to the Applicant pursuant to section 93(4) of the Act.

V. ORDER

[para 46] I make this Order under section 72 of the Act.

[para 47] I find that the Public Body performed an adequate search for responsive records.

[para 48] I order the Public Body to respond to the Applicant's access request pursuant to the Act. If its reason for not responding was non-payment of the initial fee, and it has not already told the Applicant this, it must inform him that he must pay the fee before it will respond.

[para 49] I find that the Public Body properly used its discretion when it denied the Applicant's request for a fee waiver.

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

Keri H. Ridley
Adjudicator