

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2016-19

May 26, 2016

CITY OF ST. ALBERT

Case File Number 002762

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the City of St. Albert (the Public Body) for the “any documents, e-mails, text messages from [two councillors] that comment on the third floor news blog and any e-mails to /from [an individual].” He stated that his access request included “city and personal e-mails”.

The Public Body extended the time for responding to the access request by thirty days but did not respond within this time period. The Applicant requested review by the Commissioner of the Public Body’s failure to respond to his access request. In its submissions for the inquiry, the Public Body stated that it was unable to obtain the requested records from the two councillors.

The Adjudicator found that it was unclear that the Public Body had custody or control over the requested records and noted that the Public Body had not made a decision as to whether it did. She ordered it to determine whether it had custody or control over the requested records. If it decided that it did, she ordered it to take all measures available to it to obtain the records and to respond to the Applicant as required by Part 1 of the FOIP Act. If it decided that it did not, she ordered it to communicate this decision to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 7, 11, 14, 72

Authorities Cited: AB: Orders F2002-014, P2010-007, F2008- 023, F2010-023

I. BACKGROUND

[para 1] On November 2, 2015, the Applicant made an access request to the City of St. Albert (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested “any documents, e-mails, text messages from [two councillors] that comment on the third floor news blog and any e-mails to /from [an individual].” He stated that his access request included “city and personal e-mails”.

[para 2] On November 26, 2015, the Public Body extended the time for responding to the access request by thirty days under section 14 on the basis that a large volume of responsive records might exist.

[para 3] On February 28, 2016, the Applicant requested review by the Commissioner of the Public Body’s compliance with section 11 (time limit for responding) as the Public Body had not yet responded to his access request.

[para 4] The Commissioner decided that the matter should proceed directly to inquiry on an expedited basis.

[para 5] In its submissions for the inquiry, the Public Body acknowledged that it had not responded to the Applicant’s access request within the statutory time limits. It explained that it had not done so for the following reasons:

Multiple attempts were made to convince the two Councillors of their obligations to supply any existing records; the result being that the FOIP office had exceeded the time limit for issuing a response to the Applicant.

II. ISSUE

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

[para 6] Section 6(1) of the FOIP Act creates the right of access. It states:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[para 7] Section 11 of the FOIP Act requires a public body who has received an access request to take reasonable steps to respond to the access request within 30 days. 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 8] Section 14, to which section 11(1)(a) refers, and under which the Public Body extended the time for responding, states:

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 9] The Public Body concedes in its submissions that it has not complied with section 11. I note that its submissions for the inquiry reveal some misapprehensions regarding the extent of its obligations under the FOIP Act, which may have resulted in the impasse at which it has arrived. I also note that its correspondence with the Applicant reveals a misapprehension regarding the application of section 14. I will address these issues to assist the Public Body to meet its obligations under the FOIP Act.

The right of access

[para 10] From its submissions, I understand that the Public Body assumes that it has custody or control over the records and that the councillors have obligations under the FOIP Act to provide these records to the Public Body, so that it may respond to the Applicant. It also appears that the Public Body considers itself to be unable to obtain the records in question from the municipal councillors whose records are the subject of the access request.

[para 11] Section 6, cited above, gives an applicant the right to request records in *the custody or control* of a public body. Before a public body has an obligation to respond in relation to requested records, it must first have custody or control over them. Previous orders of this office have interpreted the terms “custody” or “control”.

[para 12] In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

Under the Act, custody and control are distinct concepts. “Custody” refers to the physical possession of a record, while “control” refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

[para 13] Former Commissioner Work interpreted “custody” as referring to physical possession of a record. He also suggested that it would be possible for a public body to have custody over a record but not control over it. Subsequent decisions of this office have moved away from this position and have determined that custody, like control, requires that a public body have rights and duties in relation to the record in question before a public body could be said to have custody over it.

[para 14] For example, in Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term “custody” was defined as the physical possession of a record, whereas the term “control” was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that “bare” possession of information does not amount to custody, as the word “custody” implies that there is some right or obligation to hold the information in one’s possession (Order F2009-023).

[para 15] In Order F2010-023, I said:

In section 6 of the FOIP Act, the word “custody” implies that a public body has some right or obligation to hold the information in its possession. “Control,” in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

I find that the question “Does the Public Body have a right to obtain the records?” must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

[para 16] The phrase “custody or control” refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. “Custody or control” also imparts the notion that a public body has duties and rights in relation to a record, such as the duty to preserve or maintain records, or the right to destroy them.

[para 17] Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body’s mandate and functions?
- Does the public body have the authority to regulate the record’s use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 18] Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said, after consideration of the factors, that a public body has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records.

[para 19] In this case, the Applicant has requested emails and text messages in the possession of two counsellors containing comments regarding a news blog. His access request includes “city and personal” emails and text messages. It is unclear whether the requested records would be in the custody or control of the Public Body on the evidence before me. It appears possible that some of the requested records are not within the custody or control of the Public Body at all, in the sense that it may have no legal right to demand them from the councillors. I say this because personal emails and text messages that are not created in the councillor’s representative capacity, but in their personal capacities may not be records to which the FOIP Act applies.

[para 20] Based on the evidence and submissions before me, I conclude that the Public Body has yet to make a determination as to whether it has custody or control over the records in the possession of the councillors. In making such a decision it need not obtain these records to make the determination; rather, it must consider the factors set out above, and decide whether it has the legal right to demand the requested records from the councillors.

[para 21] If the Public Body determines that it has the legal right to obtain some or all of the records for the purpose of responding to the access request, then it has the power, and therefore the duty under the FOIP Act, to take steps to obtain the records from the councillors. If it decides that it does not have custody or control over the records the Applicant has requested, then it must communicate this decision to the Applicant. The Applicant could then request that the Commissioner review this decision.

Section 14

[para 22] As discussed above, the Public Body initially extended the time frame for responding to the access request under section 14, stating:

A search for records has been initiated and this search has not been concluded yet, however, it is noted that a large volume of records may exist which will require the FOIP office to extend the time limit for responding to this request by 30 days.

[para 23] Cited above, section 14(1)(b) permits a public body to extend the time for responding to an access request for thirty days if “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.” Section 14(1)(b) requires that the Public Body determine two things: first, that a large number of records has been requested or must be searched, and second, that responding within the 30 day period set out in section 11 would unreasonably interfere with its operations.

[para 24] The Public Body’s reasons for extending the time for responding do not meet the requirements of section 14(1)(b), as they refer only to the possibility that a large quantity of records might exist.

[para 25] In its submissions for the inquiry, the Public Body states “[m]ultiple attempts were made to convince the Councillors of their obligations to supply *any* existing records.”

[para 26] There is tension between the Public Body’s stated reason for extending the time to respond to the access request, which suggests that it has reason to believe that there will be a large volume of responsive records to process, and the reason provided for the extension in the inquiry, which indicates that it does not know whether there are any responsive records.

[para 27] In this case, as the Public Body has not yet responded to the Applicant’s access request, nothing turns on whether its extension decision complies with the terms of section 14. However, I draw to the Public Body’s attention that section 14 requires the Public Body to provide its actual reasons for extending the time to respond to an access request, and that these reasons must be authorized by section 14 as grounds to extend the time.

III. ORDER

[para 28] I make this Order under section 72 of the Act.

[para 29] I order the Public Body to decide whether it has custody or control of the records that are the subject of the access request.

[para 30] If it determines that it has custody or control of some or all of the records, then I order the Public Body to exert this control and to obtain these records by whatever means are available to it. Once it obtains the records, the Public Body must then issue an access decision to the Applicant, in accordance with Part I of the Act.

[para 31] If the Public Body determines that it has neither custody nor control over some or all of the requested records, then I order the Public Body to make a decision and to communicate this decision to the Applicant in response to the Applicant’s access request.

[para 32] I further 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.

Teresa Cunningham
Adjudicator