

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2016-28**

July 18, 2016

**PUBLIC AFFAIRS BUREAU / EXECUTIVE COUNCIL**

Case File Number 003001

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

**Summary:** On August 20, 2015, the Applicant made a request for access to the Public Affairs Bureau (the Public Body) for access to records from May 5, 2015 to the present “related to branding of government materials, including usage of colour.”

On April 19, 2016, the Applicant requested review by the Commissioner on the basis that the Public Body had not yet responded to his access request.

The Adjudicator found that the Public Body had not complied with the timeline established by section 11 of the FOIP Act. She ordered the Public Body to respond to the Applicant in accordance with its remaining duties under the FOIP Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 14, 16, 17, 30, 31, 72

**I. BACKGROUND**

[para 1] On August 20, 2015, the Applicant made a request for access to the Public Affairs Bureau (the Public Body) for access to records from May 5, 2015 to the present “related to branding of governmental materials, including the usage of colour.”

[para 2] The Public Body wrote the Applicant on September 30, 2015. It stated:

Normally, Executive Council responds to a request for information within 30 days after receiving the request. However, in limited circumstances, the FOIP Act provides that a public body may extend this time limit.

A preliminary review of the records you have requested indicates that extensive consultations with other parties including most Alberta Government ministries may be required before we can fully process your request. This consultation is necessary for us to deal completely with the records that are the subject of your request.

Pursuant to section 14(1)(c) of the FOIP Act, we will require a time extension of 30 days to respond to the request. A response to your request will be ready by Friday October 23, 2015. However, we will try to respond sooner, if possible.

[para 3] The materials the Public Body submitted for the inquiry indicate that it consulted with the Ministry of Labour (formerly Jobs, Skills, Training and Labour or “JSTL”) in January 2016. The materials also indicate that a third party organization contacted it on January 7, 2016 regarding notice it had received under section 30 of the FOIP Act.

[para 4] On April 19, 2016, the Applicant requested review by the Commissioner on the basis that the Public Body had not yet responded to his access request. The issue in this inquiry as set out in the Notice of Inquiry dated June 22, 2016 is the following: Did the Public Body comply with section 11 of the Act (time limit for responding)?

## II. DISCUSSION OF ISSUE

[para 5] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request no later than 30 days after receiving the request. 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 6] Section 14 of the FOIP Act authorizes a public body to extend the time for responding to an access request in limited circumstances. It 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).*

[...]

[para 7] In its submission to the inquiry, the Public Body states:

As required under section 69(1)(Inquiry by the Commissioner), Executive Council's FOIP Office has enclosed the chronology of FOIP file 2015-G-0078 ("Branding") for your files. In reviewing the order of events, we have determined that we did not meet our duty to respond as required under section 11 of the FOIP Act.

Our records indicate that we did not contact or communicate with the Applicant on or before the original due date which progressed this file into non-compliance early into the FOIP process. A time extension letter was sent to the Applicant on September 30, 2015 but was not on or before the due date of September 23, 2015. Unfortunately, the FOIP file became non-compliant and was automatically a deemed refusal to the Applicant as of September 23, 2015.

In agreement with the Applicant, the FOIP Office continued to process the file and in February 2016, we commenced the third party process as required under section 30 of the FOIP Act. Approximately 31 affected parties were consulted and coordinated pertaining to the release of responsive records.

Final review and approval commenced on April 13, 2016 and the file was partially released to the Applicant on June 15, 2016 (613 responsive records and 535 pages released).

As you know, the FOIP office is dealing with significant backlog of request for information under the FOIP Act. However, we can reassure your office that we are working toward faster FOIP request turnaround given the additional resources have recently been added to address the volume of requests and the establishment of an internal network group to enhance or streamline the records retrieval process.

As we [are] continuing to move towards total FOIP compliance in our Ministry, we are making every effort to ensure we have constant communication with the FOIP Applicant for both old and new FOIP files.

[para 8] The Public Body acknowledges that it has not met its duty to the Applicant under section 11 of the FOIP Act, as it has not yet produced all records responsive to the access request.

[para 9] Although the Public Body originally extended the time for responding to the Applicant under section 14(1)(c) by 30 days, to enable it to consult with public bodies

as to whether to give access to the records, it does not appear that it consulted with any public bodies during the period of the extension.

[para 10] The Public Body subsequently determined that it must provide notice under section 30 to a third party organization. According to the logs the Public Body submitted into evidence, it was contacted on January 7, 2016 by a third party organization regarding a “third party consult” letter sent to that third party organization. However, there is no record of the Public Body making an access decision under section 31 following this contact.

[para 11] The Public Body did not apply section 14(3) to extend the time for responding to the access request, although this is the provision a Public Body must use if it intends to provide section 30 notice. Section 14(3) enables a public body to extend the time to the amount of time necessary to consult with third parties and make a decision regarding access.

[para 12] From the evidence before me, I conclude that the Public Body originally decided that it did not need to provide notice under section 30, but decided to do so following another review of the records. Section 30 states:

*30(1) When the head of a public body is considering giving access to a record that may contain information*

- (a) that affects the interests of a third party under section 16, or*
- (b) the disclosure of which may be an unreasonable invasion of a third party’s personal privacy under section 17,*

*the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4). [my emphasis]*

*(1.1) Subsection (1) does not apply to information that the head of a public body may refuse to disclose in accordance with section 29.*

*(2) Subsection (1) does not apply to a record containing information described in section 17(2)(j).*

*(3) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 16 or 17, the head may give written notice to the third party in accordance with subsection (4).*

*(4) A notice under this section must*

- (a) state that a request has been made for access to a record that may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party,*

*(b) include a copy of the record or part of it containing the information in question or describe the contents of the record, and*

*(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed. [my emphasis]*

*(5) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that*

*(a) the record requested by the applicant may contain information the disclosure of which would affect the interests or invade the personal privacy of a third party,*

*(b) the third party is being given an opportunity to make representations concerning disclosure, and*

*(c) a decision will be made within 30 days after the day notice is given under subsection (1). [my emphasis]*

[para 13] Section 30 requires the head of a public body to provide notice to a third party when the third party is considering disclosing information that may affect the third party's interests under section 16 or 17. The head is not required to provide notice if the head is not considering giving access to the information, or if the head decides that the record does not contain information affecting a third party's interests under section 16 or 17. Section 30(4) contains the form that notice is to take and a time limit for receiving representations from a third party.

[para 14] Section 30(5) makes it mandatory to provide notice to an applicant that the head of a public body has provided notice under section 30(1). Section 30(5)(c) establishes that the applicant is to be told that a decision will be made 30 days after notice has been given to the third party.

[para 15] As the Public Body points out, it is mandatory to provide notice to a third party under section 30 if the head is considering providing access to records that may affect the third party's interests under section 16. Section 30(5) of the FOIP Act also makes it mandatory to contact an applicant when the head has provided notice to a third party under section 30(1). It is unclear whether the Public Body complied with this aspect of section 30 with regard to the consultation that took place in January 2016.

[para 16] Section 31(1) of the FOIP Act contains time limits for completing a consultation under section 30. It states, in part:

*31(1) Within 30 days after notice is given pursuant to section 30(1) or (2), the head of the public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of*

*(a) 21 days after the day notice is given, and*

*(b) the day a response is received from the third party.*

Section 31(1) requires the head of a public body to make a decision 21 days after notice is given or the third party provides a response to the notice it has received under section 30. Section 31(1) appears intended to ensure that a public body may make a timely decision regarding access even though a third party has not responded to the section 30 notice.

[para 17] While the time for responding to an applicant may be extended to accommodate third party consultation under section 30, section 31 requires this process to be completed within 30 days of providing notice. In this case, the Public Body did not comply with the terms of section 31(1), as it took more than 30 days to make a decision under section 30.

[para 18] Although I make no finding or order in relation to this issue, I note that the Public Body appears to have failed to meet its mandatory duty under section 31 to make a decision within 30 days after giving section 30 notice. It is unclear from the Public Body's submissions why it has only partially released records to the Applicant at this time, and to what extent delay has been caused by its consultation processes. It is also unclear that all the delays in this case are attributable to staffing problems, given that it appears that the Public Body's staff members were available to receive information from a third party organization and a public body regarding their positions about disclosure. In addition, it is unclear from the evidence what happened to the information it received from the parties it consulted between January, when it was received, and June, when the Public Body states it began to release records. The Public Body refers to beginning the third party consultation process in February 2016; however the "request detail report" it submitted for the inquiry indicates that the consultation process was underway by January 7, 2016. Given its failure to meet its timelines and the discrepancies in its evidence regarding third party consultations, it may be the case that the Public Body could improve its timelines by developing a section 30 consultation procedure that will enable it to meet its duties under sections 11, 30, and 31.

[para 19] In any event, as I find that the Public Body has failed to meet its duty under section 11, I will order it to respond to the Applicant in accordance with its remaining duties under the FOIP Act.

### **III. ORDER**

[para 20] I make this Order under section 72 of the Act.

[para 21] I find that the Public Body did not respond to the Applicant within the time limit set out in section 11 of the Act. While it is too late for the Public Body to now comply with that section of the Act, I order the Public Body to respond to the Applicant in accordance with the Public Body's remaining duties under the Act.

[para 22] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Teresa Cunningham  
Adjudicator