

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-10

February 16, 2018

ALBERTA HEALTH

Case File Number 006712

Office URL: www.oipc.ab.ca

Summary: The Applicant, a representative of Alberta's Official Opposition, made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Health (the Public Body) on October 20, 2016. The Applicant stated:

I request all records related to the new laboratory model as referenced by Minister Hoffman. (See: <http://edmontonjournal.com/news/local-news/alberta-health-services-to-take-over-dynalife-labs-in-2022>)

The Public Body did not respond to the access request. As a result, on September 13, 2017, the Applicant requested that the Commissioner review the failure to respond to his access request.

At the inquiry, the Public Body indicated that its FOIP office had inadequate staff and experience. It anticipated that it would be able to respond to the access request by August 31, 2018. It asked that an order not be made, as it believed this would mean that it would take longer to respond to access requests from other requestors that it had received prior to the Applicant's access request.

The Adjudicator noted that the duty to make reasonable efforts to respond to an applicant lies with the head of the Public Body, in this case, the Minister of Health, rather than a FOIP office. The head may delegate her duties and authority to any person in order to comply with her duties under the FOIP Act. As a result, the fact that the FOIP office

lacked sufficient experienced employees to process access requests did not negate the head's duty to make reasonable efforts to respond within 50 days. Moreover, it would not be reasonable to delegate the duty to respond, or the duty to comply with the Commissioner's order, to the FOIP office if the FOIP office was unable to meet these duties. The Adjudicator required the head of the Public Body to comply with her duty to make all reasonable efforts to respond to the Applicant's access request. Reasonable efforts in this case would include delegating the duty imposed by section 11 of the FOIP Act to a person or persons with sufficient authority and ability to make access decisions in a timely manner, if the head determined that the Public Body's FOIP office would be unable to respond to the access request or comply with the order within the statutory timeframes.

Finally, the Adjudicator noted that the Public Body had engaged in a late "consultation" process. The Adjudicator noted that this process had also contributed to the failure to respond to the Applicant within the time imposed by section 11 and that the Public Body had not obtained the Commissioner's approval to extend the time for responding to engage in consultation.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 11, 14, 16, 17, 30, 72, 74, 85, 93

I. BACKGROUND

[para 1] The Applicant, a representative of Alberta's Official Opposition, made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Health (the Public Body) on October 20, 2016. The Applicant stated:

I request all records related to the new laboratory model as referenced by Minister Hoffman.
(See: <http://edmontonjournal.com/news/local-news/alberta-health-services-to-take-over-dynalife-labs-in-2022>)

[para 2] The Public Body acknowledged receipt of the Applicant's request on October 28, 2016. The Public Body estimated that the fees it would charge for the records would be \$540, although it indicated it did not know how many responsive records it was likely to locate.

[para 3] The Applicant requested a fee waiver on November 8, 2016 on the basis that the records related to a matter of public interest within the terms of section 93(4)(b) of the FOIP Act. On November 24, 2016, the Public Body informed the Applicant that it would waive the fees, as it agreed that the records related to a matter of public interest.

[para 4] On December 12, 2016, the Public Body's acting FOIP Coordinator emailed the Applicant to indicate that she was reviewing the records and wished to clarify the kinds of records that were responsive to the access request. The Applicant provided the requested clarification on the same day.

[para 5] On April 24, 2017, the FOIP Coordinator wrote the Applicant to inform him that the request had been reassigned to a FOIP Advisor.

[para 6] On September 13, 2017, the Applicant requested review by the Commissioner of the Public Body's failure to take reasonable steps to respond to his access request within the time frame imposed by section 11 of the FOIP Act.

[para 7] The Commissioner decided that the matter should proceed directly to inquiry.

II. ISSUE

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

[para 8] Section 11 of the FOIP 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 9] The Public Body states in its submissions:

The Respondent submits that it has been addressing the processing of this access request in accordance with its policies and procedures. The delay in a response has resulted due to the nature of the access request, FOIP staffing challenges, and the volume of access requests that the Respondent's FOIP Office has received since this the access request was received in October 2016. These factors have resulted in this access request not being fully processed and a response provided to the Applicant per the timelines required by the FOIP legislation.

The Respondent submits that it will be able to process the access request and provide a response to the Applicant by August 31, 2018.

[...]

The Respondent respectfully requests that no order be made that it has refused to respond to the Applicant's access request or failed to comply with s.11(1) since the Respondent has been making best efforts to provide a response within legislated time timelines and a response to the Applicant is anticipated by August 31, 2018.

[para 10] The Public Body explained in its submissions what its procedures entail, how they were followed with regard to this particular access request, and why it believes

it requires until August 31, 2018 to respond. The Public Body explains that the Public Body experienced staffing shortages in its FOIP unit between the time it received the access request and the present day. It states:

The Respondent has been undertaking the necessary steps to gather responsive records, consult with third parties as required, advise the Applicant, and process the responsive records so as to provide a response to the Applicant.

The Respondent has had staffing challenges and volume issues which have resulted in delays in processing this access request per the timelines established in s. 11 of the Act.

At the end of the 2016 calendar year the Respondent had 33 active access requests with 20,423 pages of responsive records to be processed.

At the end of the 2017 calendar year the Respondent had 38 active access requests with approximately 130,000 pages of responsive records to be processed.

The Respondent has also had staffing challenges in both 2016 and 2017. At the end of 2016 the Respondent had only the FOIP Coordinator and one FOIP adviser as its only staff available to process access requests.

In the 2017 calendar year the Respondent hired further FOIP advisers but these staff had no experience in FOIP so delays were incurred in assigning access requests to these advisers until they had the necessary training in the Respondent's FOIP processing procedures.

[para 11] The FOIP Coordinator described the process the Public Body followed regarding the Applicant's access request and the steps it intends to take in her affidavit. She states:

A review of the responsive records to this access request indicated that consultation was required with third parties which commenced in September 2017. These third parties included Technologists (ACCLXT), Alberta Construction Safety Association (ACSA), Alberta Section of Laboratory Physicians, Alberta Union of Provincial Employees (AUPE), BC Clinical and Support Services, Canadian Centre for Healthcare Facilities, College of Medical Laboratory Technologists of Alberta, College of Physicians and Surgeons, Canadian Union of Public Employees (CUPE), Diagnostic Services Manitoba, Dynalife, Eastern Ontario Regional Laboratory Association (EORLA), Edmonton Journal, Friends of Medicare, Health Sciences Association of Alberta (HSAA), Hofstra University (Hempstead, NY), Mayo Medical Laboratories (Rochester, MN), Hospital for Sick Children (Toronto), University of Utah, Northern Laboratory Professionals (NLP), and two members of the general public.

Consultation also occurred in September 2017 with the following public bodies: Advanced Education, Alberta Health Services, Alberta Innovates, Canadian Agency for Drugs and Technologies in Health (CADTH), Covenant Health, Executive Council, Health Quality Council of Alberta, Alberta Infrastructure, NAIT, SAIT, Treasury Board and Finance, University of Alberta and the University of Calgary.

The consultation process with third parties and public bodies was completed by October 2017.

[...] the FOIP adviser on the file has advised me and I do verily believe that the responsive records are very complex and she continues to work with the appropriate program areas within Alberta Health to process this access request.

[The FOIP Advisor] has had further advised that as a result of her efforts the number of responsive records has been reduced from 4,133 pages to 2,708 pages.

In further discussions [the FOIP Advisor] she indicates that she will be able to provide a response to the Applicant by August 31, 2018.

Alberta Health's FOIP office though continues to have significant file loads and although two new FOIP advisers were added in 2017 those persons were new to FOIP and required significant training and orientation to undertake their duties as FOIP advisers.

As of the end of December 2017 Alberta Health's FOIP office has 38 active access requests which were allocated to 3 FOIP advisers. The number of responsive records that are the subject of these access requests totals approximately 130,000 pages.

As of the date of this my affidavit the FOIP office of Alberta Health consists of myself and 3 now trained FOIP Advisors who are currently processing 32 active files. Currently one FOIP adviser position is unfilled although there is a staffing process underway to staff this position.

The turnover in FOIP Office staff and the volume and complexity of access requests received by Alberta Health since October 2016 has made it challenging to adhere to the timelines established per s. 11 of the FOIPPA and this has resulted in an unintended delay in responding to this Applicant's access request. Re-prioritizing this access request may have caused Alberta Health to delay processing of other access requests and create further noncompliance with the timelines for responses set out in the legislation.

[para 12] It is unclear from the Public Body's reference, above, to the necessity of consulting with the entities it consulted what the source of this "necessity" was. There is no duty in the FOIP Act to *consult* with third parties. Section 30 of the FOIP Act imposes a duty on the head of the Public Body to provide *written notice* to a third party when the head is considering giving access to a record that may affect the interests of a third party under section 16, or may be an unreasonable invasion of a third party's personal privacy under section 17. Providing written notice is not synonymous with engaging in a consultation.

[para 13] I note too that some of the entities listed by the Public Body as having been consulted are newspapers and public bodies. It is unclear that such entities could possibly meet the requirements of sections 16 or 17 of the FOIP Act. If a newspaper article appears among the responsive records, it does not mean that the newspaper supplied the article in confidence within the terms of section 16(1)(b), or that the information in the article meets the terms of section 16(1)(a). Further, section 1(r) of the FOIP Act excludes public bodies from the definition of "third party" for the purposes of the FOIP Act. As a result, section 30 imposes no duty to give notice to other public bodies.

[para 14] I acknowledge that section 14(1) 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 [my emphasis]

(d) a third party asks for a review under section 65(2) or 77(3).

[para 15] The FOIP Act acknowledges that a public body may choose to consult with a third party or public body in making a decision whether to grant access and it creates the ability to extend the time for responding in order to do so. However, it does not require the Public Body to consult (although in some cases consultation may be the only way to make a reasonable decision is to obtain information about the records from another public body). In other words, section 14 does not impose a duty to consult. In this case, the Public Body did not extend the time for responding, and the consultations it engaged in apparently took place over two months, concluding at the end of October 2017. However, it is not clear that this process assisted the Public Body to make final, reasonable, determinations regarding the records, as it is asks to be permitted to respond by August 31, 2018.

[para 16] There is simply no requirement under the FOIP Act to engage in this process or to do so for an extended period of time without extending the time for responding. In contrast, the Act does impose a duty on the head of the Public Body to make all reasonable efforts to respond to a requestor within 30 days of receiving the access request. If engaging in a discretionary process results in failing to meet a mandatory statutory duty, and it is unnecessary to engage in this process to make a reasonable decision, then the discretionary process should not be followed.

[para 17] Despite the Public Body's consultation process, it appears from the FOIP Coordinator's affidavit that the Public Body's consultation processes are not the primary cause of the failure to respond to the Applicant's access request. The Public Body attributes the failure to the lack of staffing and the high volume of records involved in access requests that have been made to it. It notes that "re-prioritizing" the access request that is the subject of this inquiry has led it, or will lead it, to take longer to process access requests it received before this one.

[para 18] I am unable to accept the Public Body's arguments regarding the delay in responding to the access request or to accept its suggestion that it respond by August 2018 to ensure that it responds to prior access requests in a timely manner. Section 11 imposes a duty on the *head* of a public body to make reasonable efforts to respond to an access request. As the head is the Minister of Health, it would be impractical for her to

process access requests personally. For this reason, section 85 of the FOIP Act permits the head to delegate her duties, powers or functions under the FOIP Act to any person. However, if the head does not delegate her duty, the duty remains with her. Moreover, if the duty is not met by the delegate, the Minister will not have complied with the duty imposed by the FOIP Act.

[para 19] The Public Body's arguments and proposed response time appear to rely on the notion that it is the FOIP branch of the Public Body that has the duty to respond to the Applicant, rather than the head. If that were the case, then the arguments regarding staffing levels and the complexity of records very complex that requires the FOIP Advisor to "work with the appropriate program areas" in making access decisions would be more persuasive. However, as noted above, it is the *head* of the Public Body who has the duty to make reasonable efforts to respond to the Applicant. She may meet this duty by delegating her duties to "any person" and is not limited to delegating the duty to an employee of a FOIP office. If the FOIP office is unable to meet the head's duties under section 11, then the head will fail in her duty under section 11 if she delegates the duty to an employee of the FOIP Office without ensuring the duty can be met. In contrast, if the FOIP office is sufficiently staffed with persons having adequate authority and knowledge to make timely access decisions, then the head will be more likely to meet her duty under section 11 by delegating the duty to an employee of the office.

[para 20] The foregoing analysis holds true for the other access requests, for which the Public Body indicates the head may not meet, or has not met, her duty under section 11 to respond to applicants if she were to "reprioritize" the access request before me.

[para 21] The Public Body indicates that its FOIP Coordinator and three recently hired FOIP advisors must review 130,000 records in order to process the access requests currently before them. I agree with the Public Body that it would not be reasonable to expect the Public Body's FOIP office, with its current staffing and experience levels, to process that number of records within the timeframe imposed by sections 11 or 74(1) of the FOIP Act. However, that it would be unreasonable to expect the FOIP office to be able to respond to the Applicant's access request means only that it may be unreasonable for the head of the Public Body to delegate the duties imposed by section 11 and 74(1) to the FOIP office. If delegating the duty to the FOIP office is not likely to bring about compliance with section 11 of the FOIP Act, then it would be unreasonable for the head of the Public Body to delegate this duty to the FOIP office.

[para 22] The FOIP Act, which is a paramount statute, does not create exceptions to the duty under section 11 to accommodate low staff levels or insufficient experience¹. Instead, section 85 of the FOIP Act enables the head of the Public Body to achieve

¹ Section 14 enables a public body to seek the permission of the Commissioner to extend the time for responding if processing a high volume of records would interfere with the operations of the Public Body. There is no evidence before me that the operations of Alberta Health would be interfered with if it processed the records in the access request; in any event, an extension under section 14 does not appear to have been sought.

compliance through delegation of the head's duties, powers, and functions. However, if the head delegates her duty and authority to employees who lack sufficient authority, time, and experience to fulfil those duties, the result may be a failure to comply with mandatory duties under the FOIP Act.

[para 23] Section 72(3)(a) authorizes the Commissioner to order that the duty under section 11 be performed, while section 74(1) of the FOIP Act imposes a duty on the head of the Public Body to comply with the Order. If the head delegates the duty to comply with the order I must make solely to its FOIP office in its current state, as it has been described to me in the Public Body's submissions, then it is likely that the head will be unable to comply with the Commissioner's order, despite the duty to do so imposed by section 74(1). Further, she will not be able to meet her duty to other applicants under section 11. It appears then, that the head must consider delegating her duty and authority to another person or persons under section 85, if she is to comply with her statutory duties under the FOIP Act.

[para 24] I find, on the evidence before me, that the head has not made all reasonable efforts to respond to the Applicant within 30 days, as required by section 11. I must therefore order the head of the Public Body to meet her duty under section 11 by making all reasonable efforts to respond to the Applicant. As noted above, the head also has the duty, under section 74(1), of complying with the order within fifty days of receiving this order.

III. ORDER

[para 25] I make this order under section 72 of the FOIP Act.

[para 26] I require the head of the Public Body to comply with her duty to make all reasonable efforts to respond to the Applicant's access request. Reasonable efforts may include delegating the duty imposed by section 11 of the FOIP Act to a person or persons with sufficient authority and ability to make access decisions within the timeframe required by the FOIP Act, if the head determines that the Public Body's FOIP office is unable to respond to the access request appropriately within 50 days of receiving this order.

[para 27] I further order the Public Body to notify me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator