

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2019-22

June 21, 2019

EDMONTON CATHOLIC SCHOOL DISTRICT NO. 7

Case File Numbers 002492, 002493

Office URL: www.oipc.ab.ca

Summary: The Applicant, a journalist, made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Edmonton Catholic School District No. 7 (the Public Body). He requested records created between January 1, 2010 and the date of the access request related to:

[...] all retreats and / or meetings attended by principals that took place outside of Edmonton.

He made a similar request for records regarding retreats and or meetings attended by teachers. The Applicant explained that the requests included all costs associated with any meetings and / or retreats in such places as Jasper Park Lodge or Kananaskis.

The Public Body responded to the Applicant by providing a summary it had created for the purpose of responding to the access request.

The Adjudicator found that manually creating a summary of information to respond to the access request was not a response contemplated by the FOIP Act. She directed the Public Body to comply with its duty under section 11 of the FOIP Act by responding to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7, 10, 11, 12, 14, 72, 93;

Authorities Cited: AB: Orders F2007-029, F2016-39

I. BACKGROUND

[para 1] On September 21, 2015, the Applicant, a journalist, made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Edmonton Catholic School District No. 7 (the Public Body). He requested records created between January 1, 2010 and the date of the access request related to:

[...] all retreats and / or meetings attended by principals [and teachers] that took place outside of Edmonton.

[para 2] The Applicant explained that the request included all costs associated with any meetings and / or retreats in such places as Jasper Park Lodge or Kananaskis. The Applicant requested a fee waiver on the basis that “the matter is in the public interest”.

[para 3] On October 19, 2015 the Public Body wrote the Applicant to inform him that it was extending the time to respond to the access request until November 23, 2015, as it would interfere with its operations to process the large volume of responsive records within the 30-day limit. It informed him that it would not grant the fee waiver in the absence of evidence that the records related to a matter of public interest. However, the Public Body did not provide a fee estimate under section 93(3) of the FOIP Act.

[para 4] On November 23, 2015, the Public Body wrote the Applicant and stated:

You are requesting access to:

“...all records as defined by Section 1(q) of the Act related to all retreats and / or meetings attended by principals that took place outside of Edmonton.

To clarify, this request includes – but is not limited to – all costs associated with any meetings and / or retreats in such places as Jasper Park Lodge or Kananaskis.

However, the nature of your request is very broad. Please help us narrow your request by providing more details regarding the specific records you are requesting. For example, if you are only seeking access to records relating to expenses (i.e. financial records), please clearly indicate that this is the case. If you are seeking access to information in addition to financial records, please clarify the types of records you are looking for and the departments and / or individuals within our district who may be in possession of these records. Please be as specific as possible. Edmonton Catholic Schools cannot continue to process your request until we receive more information.

[para 5] On December 2, 2015, the Applicant emailed the Public Body and stated:

[Name of employee] - I think everything needs to be documented in writing now.

Thirty days after seeking clarification, your FOIP people waited another nearly 30 days to tell us they require further clarification.

Never during the process, including after seeking clarification, did they provide any information to assist us in determining how we might clarify or narrow our request. Put another way, we were never told what the issues were in relation to the volume of documents.

Also, as far as we know, they never sought permission from the Office of the Information and Privacy Commissioner for a second extension, as required under Section 14 of the Act, nor have they provided, as far as we know, any explanation to the OIPC of the problems faced by the school board.

We have also never been told the board only has a half-time FOIP person and that a consultant would have to be hired, apparently at our expense, to process the request.

Your superintendent seems unaware that the media, acting on behalf of the public, has a right to this information by law and we have a right to it at no cost to us other than the initial application fee. This fact is well established under the Act and in precedent.

We would like the school board to tell us in writing exactly what issues it is facing in processing our request and provide suggestions for how we might narrow or clarify our request in order to speed the processing of the request.

[para 6] On January 12, 2016, the Public Body informed the Applicant of the following:

In response to your recent inquiries of the District in relation to the records requested pursuant to the *Freedom of Information and Protection of Privacy Act*, we would like to advise you of several matters that we hope will lead to a satisfactory resolution of your request and the issues arising therefrom.

In this regard, it is our understanding that in speaking with District representatives, you were advised that in their present form, your formal requests would require a significant record search process that would involve all District sites, and subsequent to the collection of records, would also involve an extensive review of all such records by our staff involved in responding to FOIP requests. This situation arises solely as a result of the District's accounting practices, insofar as the information you have requested is not presently coded or tracked so as to provide for an easier search mechanism. Instead, responding to your requests would require a manual, record by record review of each site's annual expenditures and because of the movement of staff during the time period of your request, would likely involve not only the efforts of thousands of staff presently located at each site, but also staff that have since transferred to other sites and many staff, including principals who may have retired. In light of not only the immense effort involved but also the time that it will take to provide such a response, we have instead been gathering the following information that we hope will be of assistance.

As the reports do not exist in the format that you requested, we hope that the summary tables that our District has created for you from our financial systems meet your needs. In the event that this information does not meet your needs, we would appreciate the opportunity to further discuss this matter with you with the view to further clarifying the Information you require.

Your formal request details information in relation to "all retreats and/or meetings" attended by "principals" and "teachers" that took place "outside of Edmonton". The following schedule shows for the past five years (ending August 31) the significant charges to schools for our out of city costs for conferences, meetings and seminars. Certificated staff includes principals and teachers. There was a partial freeze on out of Province travel in 2014 so this amount is lower than average. It should also be noted that a number of our schools are accredited as International Baccalaureate sites, and in order to retain this designation all staff must attend on-going professional development that is only available outside of Edmonton.

[Table containing figures of expenses]

[...]

Further details that may be of interest are that the Jasper Leadership Academy includes several sessions, some with guest speakers, and some with in-district specialists. Each session begins with a spiritual reflection. The Academy always ends with a Mass led by the Archbishop or one of the priests attending the Academy. The costs associated with holding the Academy at other venues have been analyzed over the years and the costs were similar or greater to those incurred at Jasper Park Lodge. Provided for your review In Appendix “B” is a summary of the Jasper Leadership Themes and Objectives.

Kananaskis

The other significant conference attended this year is the Catholic Education “Blue Prints” conference in Kananaskis, Alberta, which is a provincial conference hosted by the Alberta Catholic School Trustees of Alberta for Catholic school trustees and administrators across the province. This conference costs \$865 per person which includes costs of registration, hotel and meals. Travel costs are considered minimal as attendees will car pool. In 2015 there were 19 attendees composed of new Principals and their mentors. This number for 2015 is unusually high as there were a considerable number of new Principals attending who the District felt would benefit from the conference. This totals \$16,435. In previous years the number of attendees is unknown as schools would make their own arrangements. In any one year, however we estimate it would be between 4 to 8 teachers/Principals attending.

We can provide the following information in regards to our financial structure and the volumes of financial Information we process annually. Table 1 provides examples of the financial operations of District and the second table lists some of the codes that we use in the District to track school operating expenses:

[table]

In this regard, we hope to provide some context into the nature of our operations as well as the fact that we do not specifically track the information that you have requested. As noted at the outset of this letter, it is our desire to provide the Information you may be requesting, and certainly, if we have not done so in this response, we would invite further clarification in that regard in hopes of finding a mutually agreeable solution that provides what you are looking for in a timely fashion in light of our financial reporting structures.

[para 7] The Public Body attached five invoice summaries from the Fairmont Jasper Park Lodge and seven pages of information that appear to describe the topics of seminars held there.

[para 8] On February 4, 2016 the Applicant requested review by the Commissioner. The Applicant complained that the Public Body had not responded to his access request. He stated:

[...] I contend the response, or lack thereof, from the [Public Body] represents a deemed refusal to process my requests.

Generally, I contend the [Public Body] failed to process our records by purposely misinterpreting the request. I note the [Public Body], a publicly funded institution, does not have full-time personnel assigned to FOIP.

You will note that [the Public Body] did not acknowledge my request until six days before the first deadline. Then, 30 days after seeking clarification of my requests, the [Public Body’s] staff

responsible for FOIP waited until the next due date, 30 days later, to tell me they required further clarification.

[para 9] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. Following this process, the Applicant requested an inquiry.

II. ISSUES

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

Issue B: Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist)?

Issue C: Did the Public Body properly extend the time limit for responding to a request as authorized by section 14 of the Act?

III. DISCUSSION OF ISSUES

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

The Public Body's Position

[para 10] The Public Body's Director of District Monitoring swore an affidavit explaining the actions the Public Body took in relation to the Applicant's access request. This affidavit states:

The Applicant's initial requests were for "all records" related to retreats and meetings attended by teachers or principals outside of Edmonton. This would include emails, agendas, outlook appointments, planning materials, notes and other records generated by those in attendance, course and conference handouts or packages video and audio recordings of the sessions, other presentation materials and any additional correspondence before, during or after the event.

I am advised by the District's Human Resource Services department that there is no mechanism within the District's human resources database to identify individuals who met the criteria of attending retreats or meetings outside the City of Edmonton during the relevant time period.

I am advised that other than sending an email to all 2977 certificated teachers and principals and inquiring whether they attended professional development retreats or meetings outside of Edmonton during the relevant time period (which would not identify any teacher or principal who had left the employment of the District between 2010 and 2015 or anyone who did not attend but who had records which were nonetheless responsive), the only way to assemble the list of relevant teachers and principals was to review all 6600 coding series transactions and cross reference each transaction with the physical receipts located in schools.

After completing its investigations into whether it could gather the records requested by the Applicant, the District concluded that it was unable to perform an adequate search based on the initial criteria provided by the Applicant.

[para 11] The Public Body argues:

There is no mechanism within the District's human resources database to identify individuals who met the criteria of attending retreats or meetings outside the City of Edmonton during the relevant time period. [...]

There were approximately 2,977 certificated teachers and principals employed by the District at the relevant time. [...]

The only way to assemble the list of teachers and principals who attended professional development retreats and/or meetings outside of the City of Edmonton during the relevant time period was to review all of the 6600 coding series transactions and cross reference each transaction with the physical receipts located at each site. [...]

After completing its investigations into whether it could gather the records requested by the Applicant, the District concluded it was unable to perform an adequate search based on the initial criteria provided by the Applicant. [...]

On November 23, 2015, the District sent two clarification letters to the Applicant. Each letter explained the broad nature of the requests and asked the Applicant to provide additional details, including the types of records sought and the areas of the organization the Applicant wanted to include in the search for records. [...]

Based on the information relayed by the Applicant to [an employee], District staff located and created summary records relating to the costs associated with professional development for teachers and principals from January, 2010 to December, 2015. [...]

The Applicant's Position

[para 12] The Applicant states:

As mentioned previously, rather than process my request, [the Public Body] chose to instead provide a summary of information that [the Public Body] determined was sufficient in a January 12, 2016 letter.

In doing so, [the Public Body] arbitrarily modified my request without seeking my permission, which is a breach of the FOIP Act. [...]

Even if the adjudicator finds this is not a breach of the Act, I contend it is not for the public body to determine what the applicant should consider to be in the public interest. This is highly improper and reveals a disregard for the Act and my rights to information under the Act

Analysis

[para 13] For the reasons that follow, I find that the Public Body has not responded to the Applicant as required by the FOIP Act. I make this finding on the basis that the Public Body did not provide a response to the Applicant regarding records in its custody or control, but instead created records to address the access request, which is not an action contemplated by the FOIP Act.

[para 14] Section 11 of the FOIP Act requires a public body to make every reasonable effort to respond to an access request within 30 days of receiving it. 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 15] Section 12 dictates the contents of a response within the terms of section 11. It 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.*

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

- (a) a record containing information described in section 18 or 20, or*
- (b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 16] In Order F2007-029, former Commissioner Work commented on the relationship between sections 10, 11, and 12 of the FOIP Act, stating:

Section 10 establishes the quality of a response required by the Act, while section 11 establishes the timing of the response, and section 12 establishes the formal content requirements of a response. A failure to comply with section 10 does not necessarily mean that a Public Body has contravened sections 11 or 12. However, if a Public Body fails to meet the requirements of section 12, the response will, in most cases, fail to meet the requirements of completeness, openness and accuracy under section 10.

Consequently, to meet the duty to assist an Applicant, a Public Body must inform the Applicant of all records in its custody or under its control that are responsive to the request, whether access will be granted to those records and when access will be given. If the Public Body intends to sever information from records, it must notify the Applicant not only of the provision of the Act on which it relies, but also the reasons for refusal, the name of a contact person, and notice of the right to request review. Further, this response must be full, complete, and accurate.

I would add only that if a public body fails to meet the requirements of section 12, and additionally does not provide a response contemplated by the FOIP Act, it will fail to meet the requirements of section 11.

[para 17] The Public Body's submissions and evidence establish that it did not conduct a search for responsive records. I make this finding based the Director of District Monitoring's affidavit, in particular, paragraphs 17 – 20, which are reproduced above. The Director of District Monitoring was able to describe the kinds of records that would be responsive and a method of searching for them; the reason provided for not performing a search, was that the search would require sending emails to 2977 teachers and principals, and then reviewing the "code series transactions" with the physical receipts located in schools.

[para 18] Instead of searching for responsive records and preparing a fee estimate regarding the costs of searching for and producing the records, (which section 93(3) requires a public body to do as a prerequisite for charging fees) the Public Body asked the Applicant to narrow his request. The Public Body informed the Applicant that his request was "very broad" and that it needed the Applicant to "help us narrow your request by providing more details regarding the specific records you are requesting." As set out above, the Public Body informed the Applicant that it "cannot continue to process your request until we receive more information." In essence, the Public Body informed the Applicant that it would not process his access request unless he asked for fewer records.

[para 19] At some point, the Public Body decided that the Applicant had narrowed or altered his access request so that it applied solely to information regarding the costs associated with professional development. The Public Body indicates that the Applicant had spoken with an employee and "advised that he would like to see all the costs associated with professional development for teachers and principals from January, 2010 to December, 2015." The Applicant's position is that he did not alter his request in this way.

[para 20] Regardless, the Public Body created an *ad hoc* committee “to locate and *create* [my emphasis] responsive records *summarizing* the costs associated with professional development for teachers and principals from January 1, 2010 to September 21, 2015” as a means to satisfy the Applicant’s access request. In other words, the Public Body decided to create records responsive to its interpretation of the Applicant’s access request.

[para 21] In Order F2016-39, I reviewed orders of this office addressing the circumstances when section 10 of the FOIP Act does, or does not, require a public body to create records.

From its submissions, and from the correspondence it sent to the Applicant, I understand that the Public Body agreed to create records of the requested information for the years 2008 – 2011 for the Applicant, by having its employees manually input data from invoices. While its position on May 7, 2014 was that section 10(2) of the FOIP Act did not require it to create records in this way, it subsequently indicated to the Applicant that it could do so in its email of May 12, 2014. Its position at the inquiry is that it may charge its actual costs for creating responsive records.

I turn to the question of whether the Public Body can charge the Applicant for the time its employees spent manually entering data into its database in order to create responsive records.

Past orders of this office have discussed the duty to assist and to create records.

In Order F2009-032, the Director of Adjudication commented at paragraph 21 that the FOIP Act creates a right of access, but not a right to information in “newly created records”.

In Order 2001-033, former Commissioner Work commented that an applicant has no right to require that a public body create a record to answer the applicant’s questions or that is in a form satisfactory to the applicant, unless the record can be created from an electronic record within the terms of section 10(2) of the FOIP Act. However, if a public body has records in its custody or control that will serve to answer an applicant’s questions, the FOIP Act requires it to provide such records to the Applicant, subject to the payment of fees.

Section 6 creates a right of access. It states, in part:

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.

The right of access is limited to records in the custody or control of a public body. The FOIP Act does not create a right to obtain information that is not recorded in some form.

[...]

Section 10(1) requires a public body to make every reasonable effort to assist an applicant. Section 10(2) establishes that the duty to assist an applicant includes creating a record if a record can be created from one that is in electronic form using normal computer hardware and software and technical expertise, and if it would not interfere with the public body’s operations to do so.

Previous orders of this office have interpreted section 10(2) as applying when a record can be created by manipulating electronic data, as is the case when search parameters are entered into a database. In Order F2011-R-001, I interpreted section 10(2) in the following way:

[...] I believe the better interpretation of the phrase “create a record” in the context of section 10(2) is that it does not relate to or limit the duty of a public body under section

13 to produce copies of records that it has decided to disclose. Rather, it creates a separate duty to assist applicants, when the terms of the provision are met, by manipulating data existing in electronic form so as to produce it in a form more usable or more economical for the applicant – for example, where a small data element is being sought from a larger database, or where unresponsive parts of documents could be removed electronically to reduce the size of the document that contains responsive data. However, even where this cannot be done because the limitations in section 10(2) do apply, this does not obviate the duty of the public body to provide copies of as much of the database or document as it is necessary to provide, in order to satisfy the request, subject to the “reasonableness” limitation and the payment of fees. [emphasis added in original]

In Order F2013-16, the Adjudicator determined that section 10(2) does not require a public body to have its staff members manually type data elements into a record in order to satisfy the terms of an access request. He said:

Turning to the microbiological data, the Public Body does not have spreadsheets containing this information similar to those for the chemical analyses and volatile hydrocarbons. Rather, it has copies of the entire Microbiological Reports. Still, I find that section 10(2) does not require the Public Body to place the data elements in those Reports in a spreadsheet, so as to create a different record for the Applicant. First, it says that it only has 163 Microbiological Reports in its possession, out of the numerous that emanate from the Provincial Laboratory. Given this limited amount of information, a spreadsheet would not be particularly useful to the Applicant. In reference to a study conducted in the Beaver River Basin, the Applicant writes; “[I]f it is only a small amount of data... it would be acceptable in any form, as long as it was supplied in its entirety”. In Order F2012-14, I already ordered the Public Body to give the Applicant access to the whole of the Microbiological Reports in its possession (but for any names, addresses and telephone numbers).

Second, if there are electronic versions of the Microbiological Reports, they exist, at best, as scanned copies of hard copies, given the appearance of the sample copy submitted to me. This means that a staff member of the Public Body would have to manually type the data elements into a spreadsheet, as opposed to create a record from a record that is in electronic form, using the Public Body’s normal computer hardware and software and technical expertise, within the terms of section 10(2). I accordingly conclude that the section does not apply in respect of the microbiological data held by the Public Body. [emphasis added in original]

The Adjudicator in Order F2013-16 distinguished between creating a record from a record in electronic form, and manually typing in data elements into a record where they did not previously exist, in order to create a record meeting an applicant’s requirements. In my view, the Adjudicator’s interpretation reflects the terms of section 10(2), in which a record is to be created using “normal computer hardware, software, and technical expertise”. While directing staff members to enter data elements manually to create a record could involve using hardware and software and technical expertise, it also necessarily requires employing physical labour to introduce the external data element into a new document, which is an activity not encompassed by the terms “hardware, software, and technical expertise”. Section 10(2) contemplates that a record with responsive data elements will be created *only* through the use of hardware, software, and technical expertise. If an external data element can be introduced using software, hardware, and technical expertise, then section 10(2) may require that a record including the external data element be created. However, if a record cannot be created using just hardware, software and technical expertise, then section 10(2) does not require the Public Body to create the record.

[para 22] As discussed in the foregoing excerpt, the FOIP act does not contemplate that a public body will manually enter data or text to create a record in order to respond to an access request. Rather, a public body has a duty to grant access to public records in its custody or control unless an exception to disclosure applies to the records. Section 10 supports the right of access by requiring a public body to make every reasonable effort to assist an applicant, which, as discussed in past orders, includes conducting a reasonable search for responsive records in its custody or control (or to create a record in the circumstances contemplated by section 10(2)).

[para 23] In this case, the Public Body did not conduct a search for responsive records in the locations it considered likely repositories of responsive records, such as schools. Further, it did not inform the Applicant of the kinds of responsive records it had in its custody or control. Instead, according to its evidence, it informed the Applicant that it would not search for responsive records unless he asked for fewer records. It then decided to create records summarizing some of the information the Applicant had requested. While I accept that the Public Body believes that the Applicant limited his access request by indicating that he was seeking all costs associated with professional development, agreeing that he wanted records of this kind would not mean that he did not want the other records he had requested, or that he was requesting the Public Body to create summaries of its records outside the requirements of the FOIP Act.

[para 24] I acknowledge that section 7(2) of the FOIP Act requires an access request to be in writing and requires it to “provide enough detail to enable the public body to identify the record.” However, section 7(2) does not operate so as to prevent an applicant from making a broad access request for which thousands of records may be responsive. Instead, it enables a public body to require clarification of unclear or incomprehensible requests. In this case, the Applicant’s access request was neither unclear nor incomprehensible, and the Public Body was able to give it reasonable meaning. The difficulty the Public Body identified was the steps that would be required to enable it to compile a list of teachers and principals who attended professional development retreats; however, it is unclear from the Public Body’s arguments and evidence why it considered it necessary to create such a list, or why being unable to do so led it to the conclusion that it could not conduct a reasonable search for responsive records if the Applicant did not narrow the scope of the request. The FOIP Act does not impose a duty to create or compile a list in order to respond to an applicant.

[para 25] It is also unclear from the Public Body’s submissions why it did not consider contacting the schools, where it acknowledges responsive records are likely to be located, and delegating at least some aspects of the search to be conducted to school employees responsible for organizing and maintaining the records.

[para 26] For the foregoing reasons, I find that the Public Body has not responded to the Applicant at this time. As the Public Body has not responded to the Applicant within the terms of the FOIP Act, I must direct the Public Body to respond to the Applicant’s access request.

[para 27] In the interest of ensuring that the Applicant's rights under the FOIP Act are adjudicated in a timelier manner, I have decided to retain jurisdiction over this matter. If the Applicant is dissatisfied with the Public Body's response, once the Public Body responds, he may request review of the new response and I will schedule an inquiry regarding the new response.

Issue B: Did the Public Body comply with section 10 of the Act (duty to assist)?

[para 28] As I find that the Public Body has not responded to the Applicant, I find that the question of whether it complied with its duty under section 10 is premature.

Issue C: Did the Public Body properly extend the time limit for responding to a request as authorized by section 14 of the Act?

[para 29] As I have found that the Public Body has not responded to the Applicant, I need not address this question.

IV. ORDER

[para 30] I make this Order under section 72 of the FOIP Act.

[para 31] I order the Public Body to respond to the Applicant as required by section 11 of the FOIP Act.

[para 32] I order the Public Body to inform me, within 50 days of receiving this order, that it has complied with it.

Teresa Cunningham
Adjudicator