

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-36

September 13, 2021

MUNICIPALITY OF CROWSNEST PASS

Case File Number 022202

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request for information to the Municipality of Crowsnest Pass (the Public Body); the Public Body received this request on April 20, 2021.

The Applicant requested a review by this Office, stating that he had not yet received a response by the Public Body as required by the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

The Adjudicator found that the Public Body failed to make every reasonable effort to respond within the timelines provided in the Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3, 11, 72

Orders Cited: Orders F2004-008, F2013-20, F2013-54, F2020-25, F2021-31

I. BACKGROUND

[para 1] An Applicant made two requests for information to the Municipality of Crowsnest Pass (the Public Body); the Public Body received both requests on April 20, 2021. The Applicant submitted both requests on FOIP Request forms.

[para 2] One request was processed as a FOIP request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). This request was the subject of Order F2021-31.

[para 3] With respect to the request at issue in this inquiry, the Public Body states that the request at issue in this inquiry was characterized by the Public Body as a Development Research Request. The Public Body has an alternate, routine disclosure process for fulfilling such requests, which is separate from its FOIP request process.

[para 4] On July 9, 2021, this Office received a request for review from the Applicant, stating that he had not yet received a response by the Public Body as required by the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

II. RECORDS AT ISSUE

[para 5] As the issue in this inquiry relates to the timeliness of the Public Body's response, there are no records at issue.

III. ISSUE

[para 6] The Notice of Inquiry, dated July 30, 2021, states the issue for this inquiry as follows:

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

IV. DISCUSSION OF ISSUE

[para 7] 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 8] The Public Body states that upon receiving this request from the Applicant, a Public Body employee identified it as a Development Research Request, but noted that it was submitted using a FOIP request form. The employee called the Applicant to clarify. The employee explained that one request would be processed as a FOIP request, and the Applicant was required to pay a \$25 initial fee for that request (this is the request that is the subject of Order F2021-31). The employee further explained that it considered the other request to be a Development Research Request, which is processed outside the FOIP Act, using a separate process. The employee explained that this separate process had a \$50 fee. The Public Body further states (August 26, 2021 submission):

[The Public Body employee] further indicated to [the Applicant] that the Research Request was on a FOIP form, and as the Municipality does not have a specific form for the Development

Research Request and usually accepts these in the form of an email typically, she would route it to the Development Officer with a note that it was not a FOIP request but rather a Development Research Request so that [the Applicant] would not need to write it all out again. It is my understanding from our Receptionist that [the Applicant] then asked for clarification on why it was going to cost \$75.00, and the Receptionist explained again, that there was a FOIP Request and a Development Research Request and he said, ok, I understand. She explained that it would be routed to the Development Officer, and she wasn't sure on their timelines and how long it would take to process the Development Research Request. [The Applicant] then provided his payment card over the phone and did not protest or disagree with the proposed approach of the Municipality to respond to his requests. Unfortunately, this was not document in written form and as such, there are no notes or following correspondence regarding this call.

[para 9] The Applicant states (September 9, 2021 submission):

The Applicant agrees that he had a conversation with a receptionist at the Public Body regarding payment for the FOIP Request. He was told there was a different form involved and a higher (\$50) fee. He was not given any option to maintain the FOIP Request as he submitted it. The receptionist did not state that the FOIP Request would no longer be treated as a request under the FOIP Act, nor that the Public Body believed it would not need to comply with the FOIP Act by treating the request as a "Development Research Request". The Applicant did not agree to have the FOIP Request treated as anything other than a FOIP Act request, and he did not agree to release the Public Body in any way from its obligations under the FOIP Act.

[para 10] Public bodies may have alternate processes for providing access to information; section 3(a) of the Act contemplates this. It states:

3 This Act

(a) is in addition to and does not replace existing procedures for access to information or records

[para 11] There may be situations in which it is beneficial to an applicant to transfer a FOIP request to an alternate process outside the FOIP Act. For example, where a public body has streamlined its processes for providing certain information, it may be quicker and cheaper for an applicant to use that alternate process. As discussed in Order F2013-54, the Workers' Compensation Board routinely provides claimants with copies of their files outside the FOIP Act, free of charge, though a FOIP request may be made for additional information (see paras. 20-28 of that Order).

[para 12] In Order F2013-20 I addressed a situation in which the public body received a FOIP request but preferred to respond to that request via a routine process outside the FOIP process. It informed the applicant that the request would be processed using a separate process. However, in its subsequent response to the applicant, the public body informed them that they had the right to seek a review of the public body's response from this Office, pursuant to the FOIP Act. In that case I determined that while the public body had intended to respond outside the FOIP Act, it ultimately did not do so.

[para 13] In that Order, I discussed what a public body needs to tell an applicant when transferring a request from the FOIP process to an alternate process such that the obligations of a

public body under the FOIP Act, and the right of review afforded to an applicant, no longer apply. I said (at paras. 16-18):

While I agree with the former Commissioner in Order 98-002, that a public body has to inform the applicant of a dual process for access, I do not understand the former Commissioner to be saying that informing an applicant of a dual process is always the only thing a public body must do.

The right of review by this office is a significant aspect of the FOIP request process; it is not the public body's right but the right of an applicant. In my view, an applicant can give away this right and agree to a routine process outside of the FOIP Act only if the applicant is *aware* that the right is being given up.

In my view, in order to take the Applicant's request outside of the FOIP Act so that it may respond routinely, the Public Body has to inform the Applicant that processing the request routinely will mean that a request for a review of the Public Body's response cannot be made to this office and that there must be a new FOIP request before a review can be requested.

[para 14] This analysis does not apply where the request for information was not made under the FOIP Act in the first place (see Order F2020-25).

[para 15] In this case, the Applicant's request was made using a FOIP request form and was, on its face, a request made under the FOIP Act for records in the Public Body's custody and control that fall within the scope of the FOIP Act. Therefore, the analysis in Order F2013-20 is applicable: the Public Body cannot transfer the request to an alternate process outside the FOIP Act without informing the Applicant that the Public Body's obligations under the FOIP Act, and the right of review afforded to the Applicant, would no longer apply.

[para 16] The Applicant states that he did not understand that the Public Body would be processing his request outside of the FOIP Act. He understood that a different fee was charged, and that different forms were used; however, he states that he did not understand that the Public Body's duties under the FOIP Act would no longer apply.

[para 17] I have no reason to doubt the Public Body's explanation that the employee described the different processes and different fees to the Applicant. I also have no reason to doubt the Applicant's explanation that he did not understand that his request would be transferred outside the FOIP process.

[para 18] In Order F2004-008, former Commissioner Work discussed the burden of proof with respect to whether a public body met its duty under section 10, to assist an applicant. He said (at paras. 8-9):

FOIP is silent regarding which party has the burden of proof under section 10(1) of the Act. When FOIP is silent, a case-by-case determination must be made to decide which party has the burden of proof. Previous Orders issued under FOIP say that the party who is in the best position to show whether the duties to assist an applicant and to conduct an adequate search for records have been met, has the burden of proof. For that reason, a public body usually has

the burden of proof under section 10(1) of FOIP (Orders F2005-024, para 8; F2005-020, para 14; F2005-018, para 7; 98-012, para 11; 99-038, para 10; 97-006, para 7).

The Orders issued under FOIP say that applicants have an initial duty when making an access request under section 7 of FOIP. The Applicant's initial duty is to provide sufficient clarification of the request for access to enable the public body to respond appropriately to the request and to fulfill the duty to assist under section 10(1) of FOIP (Orders 99-038, para 10; 98-012, para 11; 97-006, para 7; 96-017, para 13).

[para 19] While section 10 is not an issue in this inquiry, the above analysis is helpful with respect to the question here: whether the Public Body properly transferred the Applicant's FOIP request to an alternate process that is not subject to the FOIP Act. I am satisfied that the Applicant's request was initially made under the FOIP Act; it is the Public Body's burden to satisfy me that it properly transferred the request to another process.

[para 20] In its August 26, 2021 submission, the Public Body states that it does not have a written record of what its employee told the Applicant when she transferred his request. Therefore, I cannot verify what the employee said to the Applicant, or whether the Applicant ought to have reasonably understood that the Public Body was proposing to process his request outside the FOIP Act and the consequences of that proposal.

[para 21] Given this, while I accept that the Public Body intended to transfer the Applicant's FOIP request to its alternate process outside the Act, I cannot conclude that it did so with the Applicant's informed agreement, which was required in these circumstances. Therefore, the Public Body's obligations under the FOIP Act continue to apply, including its obligation to respond within the timeframe set out in section 11.

[para 22] The Applicant's request was received by the Public Body on April 20, 2021. By the date of the Notice of Inquiry (July 30, 2021), the Public Body had not yet provided a response. There is no indication that the Public Body extended its time to respond under section 14 of the Act; presumably this is because the Public Body intended to transfer the request to its alternate process, outside the FOIP process.

[para 23] In its initial submission, the Public Body states (August 16, 2021 submission):

In light of having received this Notice of Inquiry, the Municipality will be taking steps to ensure that [the Applicant's] request is processed and we have assigned it file number FOIP 2021-017. The Municipality expects to fulfill FOIP 2021-017 in short order.

[para 24] On August 27, 2021, the Public Body provided its response under the FOIP Act, providing 326 records to the Applicant. The Public Body copied this Office on the response (excluding the attached records).

[para 25] While the Public Body has now responded to the Applicant as required by the Act, section 11 requires the Public Body to make every reasonable effort to respond to an access request in 30 days. The Public Body's August 27, 2021 response fell outside the 30 days. Again, I understand that this is because the Public Body believed it had properly transferred the

Applicant's request to an alternate process, such that the 30-day time limit in section 11 did not apply. Given my finding that the Public Body did not transfer the request appropriately and that the FOIP Act continues to apply, I find that the Public Body did not meet its duties under section 11 of the Act.

V. ORDER

[para 26] I make this Order under section 72 of the Act.

[para 27] I find that the Public Body did not respond to the Applicant within the time limit set out in section 11 of the Act. As the Public Body has now responded to the Applicant's access request, it is not necessary for me to order the Public Body to respond to the Applicant under the Act.

Amanda Swanek
Adjudicator