

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-51

December 14, 2021

HEALTH

Case File Number 020465

Office URL: www.oipc.ab.ca

Summary: On May 17, 2018, an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to Health (the Public Body) for certain information. The Applicant asked for the request to remain in effect for two years with a quarterly schedule of record disclosures.

On March 24, 2021, the Applicant requested a review by this Office, indicating that the time limit for responding to his request under the Act for the sixth, seventh, eighth and ninth disclosure packages had expired and he had not received a response from the Public Body.

The Adjudicator found that the Public Body did not comply with section 11 of the Act. The Adjudicator ordered the Public Body to respond to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 9, 11 and 72.

Orders Cited: AB: Orders F2018-10, F2019-16, F2021-40, F2021-46 and F2021-47.

I. BACKGROUND

[para 1] On May 17, 2018, an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to Health (the Public Body) for certain information. The Applicant asked for the request to remain in effect for two years with a quarterly schedule of record disclosures.

[para 2] On March 24, 2021, the Applicant requested a review by this Office, indicating that the time limit for responding to his request under the Act for the sixth, seventh, eighth and ninth disclosure packages had expired and he had not received a response from the Public Body.

[para 3] The Commissioner decided to move the matter directly to inquiry and delegated her authority to conduct the inquiry to me.

II. RECORDS AT ISSUE

[para 4] 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 5] The Notice of Inquiry, dated November 10, 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 6] 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 7] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request not later than 30 days after receiving the request, unless the time for responding to the access request is extended under section 14, or the public body has transferred the access request under section 15.

[para 8] The Applicant made a continuing request to the Public Body for certain information, and asked for the request to remain in effect for two years with a quarterly schedule of record disclosures.

[para 9] Section 9 of the Act deals with continuing requests and states:

9(1) The applicant may indicate in a request that the request, if granted, continues to have effect for a specified period of up to 2 years.

(2) The head of a public body granting a request that continues to have effect for a specified period must provide to the applicant

(a) a schedule showing dates in the specified period on which the request will be deemed to have been received and explaining why those dates were chosen, and

(b) a statement that the applicant may ask the Commissioner to review the schedule.

(3) This Act applies to a request that continues to have effect for a specified period as if a new request were made on each of the dates shown in the schedule.

[para 10] The Applicant received five disclosure packages, but has not yet received the sixth, seventh, eighth, or ninth disclosure packages.

[para 11] According to the Public Body's submission, the date ranges for the sixth, seventh, eighth and ninth portions of the Applicant's continuing access request were as follows:¹

006: May 25, 2019 to August 25, 2019

007: August 26, 2019 to November 25, 2019

008: November 25, 2019 to February 25, 2020

009: February 26, 2020 to May 25, 2020

[para 12] In its submission, the Public Body stated:²

3. The Respondent has not provided a response within the legislated timeline required by s. 11(1) of the *Freedom of Information and Protection of Privacy Act* ("the Act") in regards to records that fall within the four requested date ranges in the access request.

[para 13] The Public Body explained that the Applicant's access request was assigned to one FOIP Advisor on May 24, 2018, but was subsequently transferred to another Advisor in January of 2019.³

[para 14] The Public Body stated:⁴

¹ Public Body's Submission (undated) received December 6, 2021 (the Public Body's submission) at pages 1 - 2.

² *Ibid.*, at page 2.

³ *Ibid.*, at page 3.

⁴ *Ibid.*, at pages 3 - 6.

8. The delay in a response resulted due to the Respondent's staffing challenges (which are already known to the OIPC), and the current volume of access requests being processed by the Respondent's FOIP Office.
9. The Respondent is the Department tasked with leading Alberta's response to the COVID-19 pandemic. This affects the Respondent's FOIP Office's operations in two ways. First, there has been a notable increase in the number of FOIP access request [sic] submitted to the Respondent regarding the Respondent's handling of the pandemic. Second, the program areas holding responsive records in respect of FOIP access requests regarding the Respondent's handling of the pandemic are the same program areas responsible for leading the response to the COVID-10 pandemic.
10. These factors resulted in this access request not being processed and a response not being provided to the Applicant within the timelines required by the Act.
- ...
14. Although the Respondent's FOIP Office is currently prioritizing working through their high volume of requests, the Respondent is making the necessary efforts to respond to this Applicant's request by processing this file according to established FOIP processes in a timely manner as possible.
15. The Respondent has determined that the access requests consist of 350 pages of records total over the requests numbered 006 to 009.
16. The Respondent is currently processing the records with the intent to respond to the Applicant before or on January 31, 2022.
17. The Respondent respectfully requests that no order be made that it has refused to respond to the Applicant's access request, as the Respondent is making its best efforts to complete the request and provide responsive records to the Applicant.

[para 15] The Public Body also provided me with an Affidavit sworn by the Public Body's FOIP/HIA Coordinator.

[para 16] The FOIP/HIA Coordinator advised that the continuing request files in question were opened as follows:⁵

8. The continuing request files in question were opened as follows; 2018-G-0292-006 was opened August 26, 2019, 2018-G-0292-007 was opened November 25, 2019, 2018-G-0292-008 was opened February 26, 2020, and 2018-G-0292-009 was opened June 8, 2020.

[para 17] The FOIP/HIA Coordinator provided details about when the FOIP Office sent out requests for responsive records to various areas in the Public Body, and when it received responsive records from those areas.⁶

⁵ FOIP/HIA Coordinator's Affidavit sworn December 3, 2021.

⁶ *Ibid.*

[para 18] The FOIP/HIA Coordinator advised that the FOIP office continues to have significant file loads and a reduced staff at this time, and that the current staff complement includes three active FOIP advisors, two active FOIP Administrators (one of which is newly hired and still being trained), and one full time HIA analyst.⁷

[para 19] The FOIP/HIA Coordinator also explained why the Public Body could not move staff from other areas of the Public Body, or from other ministries, to work as FOIP advisors within Alberta Health as a way of addressing the short staffing issue it continues to have.⁸

[para 20] The FOIP/HIA Coordinator advised that the Public Body was taking steps to hire temporary additional staff at this time.⁹

[para 21] The FOIP/HIA Coordinator stated:¹⁰

21. Courtesy letters indicating that Alberta Health was still processing the Applicant's access request occurred on September 25, 2019 and January 24, 2020.
22. [Name], the FOIP Advisor currently processing the access request has advised me, and I do verily believe, that he has now put aside all other active files he is managing in order to expedite the processing of the records that are the subject of this Inquiry.
23. [Name of FOIP Advisor] has further advised me, and I do verily believe that he is making best efforts to complete and provide the Applicant with the records requested by January 31, 2022.
24. As of December 3, 2021, Alberta Health's FOIP Office has a total of 232 active FOIP files, with each advisor currently processing 71 to 109 files. The cumulative total number of responsive records that are the subject of these access requests totals approximately 228,337 pages.

[para 22] The Public Body argues that it has made every reasonable effort to respond to the Applicant but has been unable to do so within the time limit set out in section 11 of the Act "due to the Respondent's staffing challenges (which are already known to the OIPC), and the current volume of access requests being processed by the Respondent's FOIP Office" and because:¹¹

The Respondent is the Department tasked with leading Alberta's response to the COVID-19 pandemic. This affects the Respondent's FOIP Office's operations in two ways. First, there has been a notable increase in the number of FOIP access request [sic] submitted to the Respondent regarding the Respondent's handling of the pandemic. Second, the program areas holding responsive records in respect of FOIP access requests regarding the Respondent's handling of the pandemic are the same program areas responsible for leading the response to the COVID-10 pandemic.

⁷ *Ibid.*, at para. 17.

⁸ *Ibid.*, at paras. 19 and 20.

⁹ *Ibid.*, at para. 17.

¹⁰ *Ibid.*, at paras. 21 - 24.

¹¹ Public Body's submission at page 3.

[para 23] The Public Body has given the same, or very similar reasons, for not responding to other access requests in accordance with the time limits in the Act, in other inquiries before this Office (see Orders F2018-10, F2019-16, F2021-40, F2021-46 and F2021-47).

[para 24] In Order F2019-16, at paragraphs 10 – 13, the adjudicator stated:

[para 10] The adjudicator in Order F2006-022 addressed similar arguments. She said (at paras. 21 and 28, emphasis added):

Section 11 of the Act requires the head of a public body to make every reasonable effort to respond to the applicant not later than 30 days from the date of receipt of an access request. If a public body can demonstrate that it made every reasonable effort to respond to a request within the time limit, but failed due to circumstances beyond its control, the public body would not be in breach of section 11.

...

The Public Body has the onus of establishing that it made every reasonable effort to respond to the access request within the Act's time limits, as it is in the best position to know what steps it took to comply and bears the obligation of complying with section 11.

[para 11] Past Orders of this Office have addressed the effect of staffing shortages on a public body's duty to comply within the time frame of the Act. In Order F2013-53 the public body stated that it did not meet its timeline under section 11 of the Act due to being temporarily short staffed. That Order found that being short staffed did not affect the public body's duty under section 11.

[para 12] The adjudicator in Order F2018-10 explained why being short staffed or having a high workload does not mitigate a public body's duty under section 11. She noted that the duty to make every reasonable effort to respond in 30 days is a duty of the *head* of the public body. Clearly, the head cannot respond to each access request, and so must delegate that responsibility. But the head must delegate the responsibility in a manner that would allow the head's duties to be met. Delegating a large workload to a systemically understaffed unit such that the statutory timelines are consistently not met does not satisfy the duty to make every reasonable effort under section 11 (see paras. 17-18).

[para 13] I agree with the reasoning of these Orders. Where adequate staffing is a consistent problem and the workload is consistently high, not meeting statutory timelines for these reasons is not making every reasonable effort to respond within the timelines.

[para 25] I agree with the conclusion reached by the adjudicator in paragraph 13 of Order F2019-16 and find that it applies in the case before me.

[para 26] In Order F2021-47, the adjudicator also considered the same, or very similar reasons given by the Public Body for failing to respond within the time limits under the Act to the access request in that case, and reached the following conclusion:

[para 9] The Public Body has provided two distinct reasons for failing to respond. First, it states that its FOIP Office lacks the employees necessary to process the volume of access requests it receives in a timely way. Second, it states that the areas of the Public Body that are handling the pandemic are the areas where responsive records are located. The second factor suggests that the Public Body is unable to respond to access requests when the area that holds responsive records has different priorities. It is unclear from the Public Body's submissions to what extent these factors have contributed to the Public Body's failure to respond to the Applicant. In any event, in this inquiry, I am tasked with determining whether the Public Body has responded to the Applicant and to issue an order requiring it to do so if I find it has not.

[para 10] I find that the Public Body failed to meet its duty to respond to the Applicant within 30 days of receiving the access request. As a result, I must order the Public Body to respond to the Applicant.

[para 27] It is also unclear from the Public Body's submissions in this case how the Public Body's role in responding to the COVID-19 pandemic affected its ability to respond to the Applicant's continuing access request within the time limits under the Act. In this case, the Applicant's access request was not for information about the Public Body's handling of the COVID-19 pandemic, and at least some of the information in response to the continuing request was due in 2019, prior to the COVID-19 pandemic.

[para 28] The Public Body has not responded to the Applicant for the four access requests that span the dates May 25, 2019 to May 25, 2020. It is now well beyond the time limit set out in section 11 of the Act for the Public Body to respond to each of these accesses requests.

[para 29] I find the Public Body has failed to make every reasonable effort to respond to the Applicant within the time limit under section 11 of the Act. As a result, I must order the Public Body to respond to the Applicant.

V. ORDER

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

[para 31] I order the Public Body to respond to the Applicant's sixth, seventh, eighth and ninth access requests that form part of his continuing access request.

[para 32] 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.

Carmen Mann
Adjudicator
/kh