

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2022-47

September 28, 2022

HEALTH

Case File Number 026934

Office URL: www.oipc.ab.ca

Summary: Health (the Public Body) received the Applicant's access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant requested:

All emails (and associated attachments) "sent to" and "received from" the email domain @pfizer.com Searches may be run by the Alberta Health Exchange infrastructure team using Microsoft Office 365 content search or ediscovery tools with the following query: participants:pfizer.com. Date Range: August 1, 2019 to March 2, 2022.

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The Public Body refused to respond to the access request on the basis that the Applicant had not specified a subject for the search.

The Adjudicator directed the Public Body to respond to the Applicant, fully, accurately, and completely, as required by sections 10 and 11 of the FOIP Act as it had not yet met its duties to the Applicant under the FOIP Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, ss. 7, 10, 11, 72

Authorities Cited: **AB:** Orders F2007-029, F2015-29, F2022-25

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*
2010 ABQB 89 (CanLII)

I. BACKGROUND

[para 1] On March 4, 2022, Health (the Public Body) received the Applicant's access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant requested:

All emails (and associated attachments) "sent to" and "received from" the email domain @pfizer.com Searches may be run by the Alberta Health Exchange infrastructure team using Microsoft Office 365 content search or ediscovery tools with the following query: participants:pfizer.com. Date Range: August 1, 2019 to March 2, 2022.

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[para 2] The Public Body refused to respond to the access request on the basis that the Applicant had not specified a subject for the search.

[para 3] The Public Body requested that the Applicant provide a topic for it to search. The Applicant responded in an email dated March 17, 2022:

The most efficient and comprehensive search approach would be through keyword search via the ediscovery technology tools available to your organization. I have provided you with enough information to conduct the search via your IT teams quickly and effectively. In fact, another public body I sent the request to has already compiled the records via the suggested approach.

[para 4] In a letter dated March 29, 2022, the Public Body stated:

Your request does not contain a subject matter and does not provide enough detail to enable Alberta Health to identify possible records. Based on the information provided to date, the request does not have sufficient detail to be considered a request under the FOIP Act. We require additional information to enable us to identify the records.

This requirement for additional details is supported by section 7 of the FOIP Act that states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable to public body to identify the record.

Please contact health.infoaccess@gov.ab.ca or write to the address noted above, to provide a subject matter or additional information to make the request more specific.

If we do not receive a response with additional details by **April 29, 2022**, the file will be closed.

[para 5] On April 4, 2022, the Applicant informed the Public Body that he considered the access request to be clear and was unable to clarify it further.

[para 6] On May 17, 2022, the Applicant requested review by the Commissioner of the Public Body's failure to respond to the access request.

II. ISSUE: Did the Public Body meet its duty to the Applicant as provided by section 11(1) of the Act (time for responding)?

[para 7] Section 11 of the FOIP Act requires a public body to respond to an applicant within 30 days of receiving the access request. 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.

Section 11 of the FOIP Act requires a public body to respond to an access request within 30 days of receiving the request, unless the time for responding is extended under section 14 of the FOIP Act. In this case, the time for responding was not extended under section 14.

[para 8] The Public Body has not responded to the access request. Its position is that it is unable to search for the requested information as it lacks the necessary information to identify responsive records.

[para 9] The Public Body relies on section 7 of the FOIP Act which sets out the requirements of an access request. This provision states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

(3) In a request, the applicant may ask

(a) for a copy of the record, or

(b) to examine the record.

[para 10] The Public Body states:

After thorough consideration of the Applicant's request, as well as consultation with the Respondent's Senior Records Management Officer, the FOIP Advisor determined, and advised the Applicant via email on March 17, 2022, that the Respondent has its own process for actioning FOIP requests and finding responsive records. In addition, the Applicant was requested to clarify his request by providing a topic of interest. The Applicant responded to the email on the same day, advising he does not have a specific topic in mind and suggested:

... the most efficient and comprehensive search approach would be through keyword search via the ediscovery technology tools available to your organization. I have provided you with enough information to conduct the search via your IT teams quickly and effectively. In fact, another public body I sent the request to has already compiled the records via the suggested approach.

With the aim of successfully assisting the Applicant as "the other public body" has, the FOIP Advisor connected with the FOIP Operational Services Branch of Service Alberta on March 25, 2022.

In response, Service Alberta advised they have received the same request for which they did not conduct a search. Instead, a letter under section 8 of the FOIP Act, seeking further information from the Applicant that is necessary to process the request, was issued by Service Alberta.

The section 8 letter was based on Service Alberta applying section 7(2) of the FOIP Act which states as follows:

How to make a request

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

As per Service Alberta, an instruction to do a keyword search to retrieve records via IT with no topic does not "identify the record".

Based on Service Alberta's advice and not receiving any other further clarification from the Applicant as to the access request, a letter under section 8 of the FOIP Act was issued to the Applicant on March 29, 2022. The letter indicated that the request did not have sufficient detail to be considered a request under the FOIP Act, and that additional information was required for the Respondent to identify the records. It also indicated that if the Respondent does not receive a response with additional details by April 29, 2022, the file will be closed.

On April 4, 2022, the Applicant replied to the letter advising that his request is clear, and that he cannot clarify it any further. The [FOIP] Office did not consider this a clarification of the request and proceeded to consider the matter closed on April 30, 2022.

[para 11] The Public Body argues that section 7 of the FOIP Act requires an applicant to provide a topic. It reasons that a public body is relieved of the duties to respond to an applicant, or conduct a reasonable search for responsive records, unless the applicant does so.

[para 12] Section 7 only requires an access request to be clear enough to enable a public body to identify records that would be responsive. It does not require an applicant

to provide a topic. In many cases, it would not be possible to do so, as the applicant may not know what the record contains or how a public body has categorized the content of the record. Records that would be responsive in this case are any records “sent to or received from Pfizer.com”. If a record was sent to Pfizer.com, or received from Pfizer.com, it will be responsive, regardless of subject matter. I find that the access request is clear and meets the requirements of section 7 of the FOIP Act.

[para 13] The Applicant suggested means by which the Public Body could conduct the search for the requested records, presumably because the Public Body informed him that it was unable to search without a topic. I believe that the Applicant’s suggestions as to how the Public Body might conduct a search were provided as examples as to how public bodies normally conduct searches for information such as emails and were not requirements that would render information nonresponsive if the search were not conducted as he described.

[para 14] I find that the Public Body has failed to meet its duty under section 11 to respond to the Applicant in the time frame permitted by the FOIP Act. It cannot rely on section 7 as a reason for not complying with section 11, given that the access request is clear. The Public Body appears to have decided, arbitrarily, and without authority, that it need not conduct searches for records without a topic.

[para 15] As the Public Body has failed to respond to a clear and intelligible access request for records, I must direct it to meet its duty under section 11 and respond to the Applicant. Responding in this case will include conducting a search for responsive records in Outlook, and any other repositories of records likely to include correspondence sent to or originating from Pfizer.com and giving access to them, subject to the exceptions to disclosure in the FOIP Act.

[para 16] Section 10 of the FOIP Act sets out the duty to assist an applicant. It states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 17] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records.

[para 18] In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

Earlier orders of this office provide that a public body’s description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included “why the Public Body

believes no more responsive records exist than what has been found or produced” in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 19] In *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII), the Alberta Court of Queen’s Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

The University’s submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced.* [Emphasis added in original]

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University’s rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, *its reasons for concluding that no more responsive records existed.* [My emphasis]

[para 20] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional responsive records are likely to exist. While there is no certainty that responsive records exist, it is also clear that the Public Body has not yet searched for the requested records. Given the Public Body’s confusion as to what constitutes a clear access request and how to conduct a search for the requested records, in the event that is unable to locate responsive records, I believe that it is necessary to require it to demonstrate that it has conducted a reasonable search for responsive records when it does respond. I made a similar determination in Order F2022-25 where I directed the Public Body to respond to an applicant’s access request as required by sections 10 and 11.

[para 21] As I noted in Order F2022-25, Alberta’s FOIP Act requires the Public Body to assist applicants by assisting access requestors rather than impeding access, and by responding fully, accurately, and completely, which includes conducting a reasonable search for the records an applicant has requested. As the Public Body has yet to meet any of the standards imposed by the FOIP Act with regard to access requests, I must require it to do so.

III. ORDER

[para 22] I make this Order under section 72 of the Act.

[para 23] I order the Public Body to comply with its duty under section 11 and respond to the Applicant. I order the Public Body to include Outlook in its search for responsive records.

[para 24] In the event that the Public Body deleted repositories of records where responsive records would likely have been located, I order the Public Body to determine whether it can reasonably restore these records.

[para 25] In the event that the Public Body is unable to locate responsive records, I require it to provide an explanation of its search to me and to the Applicant. The explanation of the search should cover the following elements, set out in Order F2007-029:

1. The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
2. The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
3. The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
4. Who did the search
5. Why the Public Body believes no more responsive records exist than what has been found or produced.

[para 26] If the Applicant is unsatisfied with the Public Body's search for responsive records, he may request review and I will continue the inquiry.

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

Teresa Cunningham
Adjudicator

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