

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-48

September 28, 2022

HEALTH

Case File Number 025483

Office URL: www.oipc.ab.ca

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

Evidence of existence of COVID-19 (Sars-Cov2) 2. Effectiveness of COVID-19 tests 3. Effectiveness of COVID-19 vaccines 4. Effectiveness of social distancing in prevention of COVID-19 5. Effectiveness of wearing a mask in prevention of COVID-19 6. Proof of COVID-19 Antibody tests. Date Range January 1, 2020 - January 16, 2021. Eliminate duplicates

The Public Body did not respond to the Applicant's access request and the Applicant requested that the Commissioner review the Public Body's failure to respond to the access request.

The Adjudicator ordered the Public Body to respond to the access request within 50 days of receiving the order.

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

Authorities Cited: AB: Orders F2018-10, F2018-41, F2019-16, F2021-40, F2021-46, F2021-47, F2021-51, F2022-01, F2022-14, F2022-17

I. BACKGROUND

[para 1] On January 16, 2021, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Health. The Applicant requested:

Evidence of existence of COVID-19 (Sars-Cov2) 2. Effectiveness of COVID-19 tests 3. Effectiveness of COVID-19 vaccines 4. Effectiveness of social distancing in prevention of COVID-19 5. Effectiveness of wearing a mask in prevention of COVID-19 6. Proof of COVID-19 Antibody test. Date Range January 1, 2020 - January 16, 2021. Eliminate duplicates

[para 2] The Public Body contacted the Applicant on February 3, 2021 to clarify the access request.

[para 3] The Public Body did not respond to the Applicant's access request. On February 18, 2022, the Applicant requested that the Commissioner review the Public Body's failure to respond to the access request.

[para 4] The Commissioner directed that the Applicant's request for review proceed directly to inquiry.

II. ISSUE

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

[para 5] Section 11 of the FOIP Act imposes a duty on public bodies to respond to access requests within 30 days of receiving them. 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 6] In this case the Public Body concedes that it has not responded within 30 days of receiving the access request. The Public Body also did not extend the time for responding under section 14, as permitted by section 11(1)(a).

[para 7] The Public Body states:

The Respondent is the Department tasked with leading the response to the COVID-19 pandemic. This affected the Respondent's FOIP Office's operations in two ways. First, there was a notable

increase in the number of FOIP access request 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-19 pandemic.

These factors resulted in this access request not being processed and a response not being provided to the Applicant per the timelines required by the Act.

[para 8] The Public Body requests that I not order it to respond as it is making its best efforts to respond to the access request.

[para 9] The Public Body's Director for FOIP/HIA provided an affidavit to support the Public Body's position.

For an individual who does not have experience as a FOIP Advisor, it takes 5 to 7 months of training to be able to fulfill all the duties of a FOIP Advisor.

Furthermore, given the pandemic moving staff internally from other program areas of Alberta Health to the FOIP Office would have caused significant delays to these other program areas, and possibly impeded Alberta's response to the pandemic if staff whose primary focus is responding to the COVID-19 pandemic were redeployed to assist the FOIP Office.

Moving staff from other ministries to work as FOIP Advisors within Alberta Health also presents unique challenges in that Alberta Health is both a public body per FOIP and a custodian per the HIA. Therefore, Alberta Health typically has records that may contain personal information and health information subject to the HIA within the same record(s). Whether a record contains health information often cannot be determined until the record is reviewed. As a result any individual processing records in response to an access request received by Alberta Health must also be an "affiliate" as per the HIA in order to access or view health information within the records of Alberta Health.

This complicates matters in terms of bringing FOIP staff from another public body that is not also a custodian per the HIA, to assist Alberta Health's FOIP Office. Informally using the services of individuals from other ministry FOIP offices could result in potential privacy and confidentiality breaches should these individuals access and view Alberta Health's records that contain health information.

A courtesy letter indicating that Alberta Health was still processing the Applicant's access request occurred on March 8, 2021, while the current Advisor assigned on file contacted the Applicant on August 25, 2022, to further clarify the request. The Advisor also advised the Applicant that every effort is being made to complete processing of the file, and that updates on this regard will regularly be provided.

[...], the FOIP Advisor currently processing the access request has advised me, and I do verily believe, that she will expedite the processing of the records that are the subject matter of this Inquiry.

[...] has further advised me, and I do verily believe, that she is making best effort to complete and provide the Applicant with the records as soon as possible, considering the current demands of the Alberta Health FOIP Office and the volume of records that will require processing for this file.

As of September 7, 2022, Alberta Health's FOIP Office has a total of 168 active FOIP files and six files that are with the Office of the Information and Privacy Commissioner, with each advisor

currently processing an average of 43 files. The cumulative total number of responsive records that are the subject of these access requests totals approximately 274,141 pages.

[para 10] While the Public Body asks that I not make an order, section 72(3)(a) of the FOIP Act does not give me discretion to provide the remedy the Public Body is seeking. Where the evidence establishes that a public body has failed to perform a duty, as in this case, all I may do is order the Public Body to perform the duty. In this case, I must order it to respond to the Applicant as the FOIP Act requires.

[para 11] The Public Body's argument that its FOIP Office lacks sufficient resources to process access requests and should not be ordered to respond has been rejected in past orders. See, for example, Orders F2018-10, F2018-41, F2019-16, F2021-40, F2021-46, F2021-47, F2021-51, F2022-01, F2022-14, and F2022-17. To reiterate the conclusions in those orders, if the Public Body has not met its duty to respond to an access request, there is no ability for me under section 72 to confirm that it does not need to meet its duty. I can only order it to comply with its duty to respond within the time frame set out in section 74 of the FOIP Act.

III. ORDER

[para 12] I make this Order under section 72 of the Act.

[para 13] I order the Public Body to respond to the Applicant.

[para 14] 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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