

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2023-04**

January 25, 2023

**PUBLIC SERVICE COMMISSION**

Case File Number 017218

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Public Service Commissioner (the Public Body) for records in the Applicant’s personnel file. The Public Body did not respond to the Applicant under the FOIP Act although it contacted the Applicant regarding obtaining the requested records through processes other than those governed by the FOIP Act.

The Applicant sought review by the Commissioner.

The Adjudicator directed 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. 6, 10, 11, 12, 15, 72

**Authorities Cited: AB:** Order 2001-016

**I. BACKGROUND**

[para 1] The Applicant made an access request for the Applicant’s personal information, under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), to the Public Service Commission (the Public Body) for “Any and all HR records and correspondence Nov 2015 – Present”. The request was dated November 4th, 2019.

[para 2] The Public Body did not provide the requested records to the Applicant.

[para 3] The Applicant requested review by the Commissioner of the Public Body's lack of response to the access request.

## II. ISSUES

**Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**

**Issue B: Did the Public Body meet its duty under section 11 of the Act (time limit for responding)?**

## III. DISCUSSION OF ISSUES

**Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**

[para 4] Section 10 of the FOIP Act imposes a duty on public bodies to assist applicants who make access requests. 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 5] 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. In Order 2001-016, the Commissioner said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 6] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable search for responsive records.

[para 7] The Public Body provided the following history of the actions it took in relation to the access request:

On April 23, 2021, the OIPC reviewer concluded that the Public Body fell short of fulfilling its duties as it did not accept the FOIP request and deal with it as an official request under the FOIP Act. Specifically, the Public Body should have:

- Transferred the request to the correct Public Body, or
- Formally responded to the Applicant and advised them that PSC did not have the records they were seeking however they could proceed on their own with Agriculture and Forestry with a section 88 routine disclosure; or,
- Formally responded to the Applicant and advised them that PSC did not have the records they were seeking however they could proceed with making an access request under the Act to that Public Body.

Following the issuance of the OIPC findings, the Public Body agreed to open a personal access request file for the original request of the Applicant and transfer the same to AF in order to close the loop on this request. Before this process was started, the Applicant made a request for inquiry to the OIPC; and on May 12, 2021, the OIPC instructed the Public Body by email not to transfer the request from PSC to AF. It was agreed that the Public Body would wait and respond in the context of the inquiry

[para 8] The Public Body concedes that it did not meet the duty to assist in this case. It states:

The Public Body attempted to deal with this request expediently and efficiently outside of the Act (see Appendix 1). The Public Body was willing to open an official access request based the [OIPC's] recommendations in their April 23, 2021 letter, but was later advised not to. However, the Public Body agrees that the original request should have been opened as an official access request. In doing so, it would have allowed the Applicant a method of recourse.

From the foregoing, I understand that the Public Body did not respond to the Applicant's access request under the FOIP Act. It did not take steps to process the access request under the FOIP Act as it thought the access request could be addressed outside the FOIP Act.

[para 9] As the Public Body acknowledges that it did not take steps to process the Applicant's access request, I find it did not respond to the Applicant openly, accurately and completely, as required by the FOIP Act.

**Issue B: Did the Public Body meet its duty under section 11 of the Act (time limit for responding)?**

[para 10] Section 6(1) of the FOIP Act creates the "right of access". It states:

*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.*

[para 11] Section 11 of the FOIP 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 12] Section 11 of the FOIP Act imposes a duty to make reasonable efforts to respond to an access request within 30 days of receiving it.

[para 13] Section 12 of the FOIP Act sets out the contents of a response. It states, in part:

*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.*

[para 14] Section 15 of the FOIP Act authorizes public bodies to transfer access requests in certain circumstances. It states:

*15(1) Within 15 days after a request for access to a record is received by a public body, the head of the public body may transfer the request and, if necessary, the record to another public body if*

*(a) the record was produced by or for the other public body,*

*(b) the other public body was the first to obtain the record, or*

*(c) the record is in the custody or under the control of the other public body.*

*(2) If a request is transferred under subsection (1),*

*(a) the head of the public body who transferred the request must notify the applicant of the transfer as soon as possible, and*

*(b) the head of the public body to which the request is transferred must make every reasonable effort to respond to the request not later than 30 days after receiving the request unless that time limit is extended under section 14.*

[para 15] The Public Body concedes that it did not comply with section 11 of the Act. It states:

The Public Body did respond to the Applicant within the 30 days allowed by the Act to complete a request and attempted to conclude the request in an amicable fashion. However, since the access request was never officially opened under the Act, the Public Body did not meet its duties under section 11 of the Act.

[...]

The Public Body did attempt to resolve this matter in an open and timely manner.

- In consultation with the program area, the Public Body, through the FOIP Office, is willing to release the personnel file to the Applicant in a manner suitable to them, even after several previous attempts and by means that is outside of GoA common practice.

- The FOIP Office and the Public Body consider this a significant learning opportunity. Specifically, protocols have been clarified for the processes of intake, transfer, and closure of any access requests filed under the Act and emphasis has been placed on how to fulfill the requirements of sections 10 and 11 of the FOIP Act in responding to applicants openly, accurately and completely.

From the foregoing, I understand that the Public Body communicated to the Applicant regarding the access request, but ultimately decided not to respond under the FOIP Act.

[para 16] The Public Body concedes that it was under a duty to respond to the Applicant and has now introduced protocols to ensure that it does not fail to respond to applicants in the future.

[para 17] The reason the Public Body did not respond was because another public body had custody or control of the requested records and the Public Body considered it would be more efficient if the Applicant requested the records from that public body.

[para 18] If a public body has the power to obtain requested records from another public body that has physical custody of the records, both public bodies may be said to have control over the records. In other words, even though a public body does not have physical *custody* of records, it may still have *control* over the records under the FOIP Act. Under the FOIP Act, more than one public body may have custody or control over a record. When they receive access requests, public bodies with custody or control over records have a duty to respond to the applicant under section 12, or to transfer the access request to another public body under section 15. This is because applicants are given the

right of access to records in the custody *or* control of public bodies. While a public body that has control over a record may ask an applicant to make an access request to another public body, if the applicant is unwilling to do so, the public body must still discharge its duties under sections 10, 11, and 12 of the FOIP Act either by responding to the applicant or transferring the request.

[para 19] As the Public Body has stated that it is able to provide the Applicant with the requested records, I conclude that it has custody or control of them. Therefore, I direct it to respond to the Applicant under the FOIP Act.

#### **IV. ORDER**

[para 20] I make this Order under section 72 of the FOIP Act.

[para 21] I order the Public Body to respond to the Applicant by providing the Applicant with copies of the requested records, subject to the application of any exceptions to the right of access.

[para 22] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

---

Teresa Cunningham  
Adjudicator