

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2023-09

February 15, 2023

ENERGY

Case File Number 028139

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to Energy (Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act), which was clarified on January 19, 2022.

By August 11, 2022, the Public Body had not responded to the Applicant's request and the Applicant requested a review of the Public Body's failure to respond.

The Adjudicator ordered the Public Body to respond to the Applicant's access request as required by the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 14, 30, 31, 72, *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 1896/2008, s. 14

Authorities Cited: AB: Orders F2011-003, F2013-37

I. BACKGROUND

[para 1] The Applicant made an access request to Energy (Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act), which was clarified on January 19, 2022.

[para 2] By letter dated January 28, 2022, the Public Body informed the Applicant it was extending its time to respond by 30 days, per section 14(1)(b) of the Act. The new deadline for the Public Body's response was stated to be March 21, 2022. The Public Body provided the Applicant with a fee estimate on February 11, 2022.

[para 3] On March 22, 2022, the Public Body informed the Applicant of the following:

The requested records contain information the disclosure of which may affect the business interests or invade the privacy of a third party. The third party is being given an opportunity to make representations concerning disclosure. A decision will be made within 30 days after the date of this notice.

We will give you written notice of the decision as required by section 31 of the FOIP Act within 30 days of the date of this letter.

The response due date for your request has been extended under section 14(3) of the FOIP Act for the time necessary to comply with the requirements of section 31 of the FOIP Act.

[para 4] On August 11, 2022, the Applicant requested a review review of the Public Body's failure to respond to the request.

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 January 23, 2023, 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 requires a public body to make every reasonable effort to respond to an access request no later than 30 days after receiving the request. Section 11 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] Section 12 of the FOIP Act establishes the requirements of a response under the FOIP act. 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 9] Section 14 of the FOIP Act, referred to in section 11(1)(a), authorizes the Public Body to extend the time for responding to an access request. It states, in part:

14(1) The head of a public body may extend the time for responding to a request for up to 30 days or with the Commissioner's permission, for a longer period if

- (a) the applicant does not give enough detail to enable the public body to identify a requested record,*
- (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,*
- (c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or*
- (d) a third party asks for a review under section 65(2) or 77(3).*

[...]

(3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31 [...]

[para 10] Section 31, to which section 14(3) refers, states:

31(1) Within 30 days after notice is given pursuant to section 30(1) or (2), the head of the public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, and

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision, including reasons for the decision, to the applicant and the third party.

(3) If the head of the public body decides to give access to the record or part of the record, the notice under subsection (2) must state that the applicant will be given access unless the third party asks for a review under Part 5 within 20 days after that notice is given.

(4) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) must state that the applicant may ask for a review under Part 5.

[para 11] The Public Body must make every reasonable effort to respond to an access request in 30 days, subject to time extensions under section 14. In this case, the Applicant's request was clarified and finalized on January 19, 2022.

[para 12] On January 28, 2022, the Public Body extended its time to respond under section 14(1)(b) of the Act, bringing the Public Body's stated deadline to March 21, 2022. The Public Body provided a fee estimate on February 11, 2022; under section 14 of the FOIP Regulation, the time to process an access request stops once a fee estimate is provided, and resumes when the applicant agrees to the fee estimate and pays the deposit. Neither the Public Body nor the Applicant have provided a date that the Applicant paid the required fees, although it appears he did, as the Public Body resumed processing the request.

[para 13] On March 22, 2022, the Public Body informed the Applicant that the records responsive to his request contained information of a third party. The Public Body informed the Applicant that it would be providing the third party with an opportunity to make representations regarding disclosure of that information. The Public Body also informed the Applicant that the time to process his request was being extended under section 14(3), to allow time to comply with the Public Body's obligations under section 31. Section 14(3) permits an extension for a period of time *necessary* to comply with section 31.

[para 14] Under section 30 of the Act, the third party had 20 days after receiving the notice from the Public Body regarding the Applicant's access request, to provide a response to the Public Body regarding disclosure. Section 31 requires the Public Body to make a decision regarding access within 30 days of providing notice to the third party.

Section 31 also requires the Public Body to inform the Applicant and third party of its decision regarding access. If the Public Body decides to grant access to information about the third party, the third party must be given 20 days to request a review of that decision by this Office. The Public Body cannot provide access to that information until that 20 days has passed.

[para 15] There is no indication that the Public Body made a decision regarding access after its March 22, 2022 letter to the Applicant within the time period set out in the Act. With its submission to this inquiry, the Public Body provided a copy of a letter sent to the Applicant dated February 7, 2023; this letter informs the Applicant that the Public Body had decided to grant partial access to the requested information. The Public Body noted that it has withheld information in the records under sections 17(1), 20, 24, and 25 of the Act. The Public Body informed the Applicant that the third party has also been given notice of the Public Body's decision, and that the Applicant will be granted partial access to the records on February 28, 2023 unless the third party requests a review by the Commissioner.

[para 16] It is not entirely clear where the delay occurred: either the Public Body delayed in sending a notification to the third party, such that the Public Body's decision regarding access – communicated in its February 7, 2023 letter – was made 30 days after notifying the third party. Or, the Public Body did notify the third party sometime around its March 22, 2022 letter to the Applicant, but failed to make a decision regarding access within the time period set out in section 31.

[para 17] In its submission, the Public Body acknowledges that it failed to respond to the Applicant within the time frame set out in section 11 of the Act.

[para 18] Given the expiration of the Public Body's extended deadlines, and the Public Body's acknowledgement that it did not comply with section 11 of the Act, I find that the Public Body failed to make every reasonable effort to respond within the timelines provided in the Act.

[para 19] In its submission, the Public Body states:

Given the fact the Public Body has completed processing the above-noted request, the Public Body respectfully requests this Inquiry be closed.

[para 20] It is not clear from what is before me that the Public Body *has* completed processing the Applicant's request. The Public Body states that if the third party does not request a review, the records will be provided to the Applicant on February 28, 2023. Until this happens, the Public Body has not completed processing the request.

[para 21] If the third party requests a review by this Office of any decision made by the Public Body to disclose information relating to the third party, the Public Body cannot disclose that information at issue until such time as that review is complete.

[para 22] However, it is also not clear from the information before me that all of the responsive records contain information relating to the third party. I note that the Public Body is withholding information under several exceptions under the Act, only one of which relates to a third party (section 17(1)).

[para 23] In Order F2011-003, former Commissioner Work found that the FOIP Act does not permit a public body to cease processing an access request pending the outcome of a review of the application of section 16(1) (see also Order F2013-37). The same would be true of a review of the application of section 17(1).

[para 24] Records that do not contain information relating to the third party are not awaiting a decision from the third party regarding whether to request a review of the Public Body's decision. As such, there is no reason for the Public Body not to provide those records to the Applicant, subject to the application of exceptions (or to have done so already). This is true whether or not the third party requests a review of the Public Body's decision regarding access to information of the third party. If there are responsive records that do not contain information relating to the third party and the Public Body has not provided the Applicant with a response with respect to those records, it is obliged to do so.

V. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I find that the Public Body did not respond to the Applicant within the time limit set out in section 11 of the Act. While it is too late for the Public Body to now comply with that section of the Act, I order the Public Body to respond to the Applicant in accordance with the Public Body's remaining obligations under the Act, as discussed in the Order.

[para 27] 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.

Amanda Swanek
Adjudicator