

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2023-12**

March 17, 2023

**AGRICULTURE AND IRRIGATION**

Case File Number 029129

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

**Summary:** An Applicant made an access request dated May 20, 2022 to Agriculture and Irrigation (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body sent an acknowledgement of the request on May 27, 2022.

On February 21, 2023 this Office received a request from the Applicant to review the Public Body's failure to respond to the request.

The Adjudicator found that the Public Body failed to make every reasonable effort to respond within the timelines provided in the Act.

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

**Authorities Cited:** Orders F2006-022, F2013-53, F2018-10, F2018-44, F2019-16

**I. BACKGROUND**

[para 1] An Applicant made an access request dated May 20, 2022 to Agriculture and Irrigation (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body sent an acknowledgement of the request on May 27, 2022.

[para 2] By letter dated June 20, 2022, the Public Body notified the Applicant that it was extending its time to respond under sections 14(1)(b) and (c), which permit a time extension where a large number of records relate to the request and when additional time is required to consult with third parties or other public bodies. In this case, the Public Body states that it received 3593 pages of responsive records in response to its call for records from program areas. The new response date was stated to be July 20, 2022.

[para 3] By letter dated July 28, 2022, the Public Body notified the Applicant that it had sought and received permission from the Commissioner to extend its time to respond by an additional 120 days, citing sections 14(1)(b) and (c). The new response date was stated to be November 17, 2022.

[para 4] By letter dated November 16, 2022, the Public Body informed the Applicant that it had given third parties an opportunity to make representations regarding disclosure of information about the third parties. The Public Body informed the Applicant that it was extending its time to respond to the request under section 14(3), which permits a public body to extend the time to respond in order to comply with section 31. The new response date was stated to be December 16, 2022.

[para 5] By email dated December 20, 2022, the Public Body informed the Applicant that it had requested permission from the Commissioner to further extend its time to respond to the Applicant but had not received a decision.

[para 6] By letter dated January 10, 2023, the Public Body notified the Applicant that it had sought and received permission from the Commissioner to extend its time to respond by an additional 85 days, citing sections 14(1)(b) and (c). The new response date was stated to be February 10, 2023.

[para 7] On February 21, 2023, the Applicant requested a review of the Public Body's failure to respond to the request.

## **II. RECORDS AT ISSUE**

[para 8] 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 9] The Notice of Inquiry, dated February 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 10] 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 11] Section 14 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 12] 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 13] 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 Public Body states it acknowledged the Applicant's request on May 27, 2022.

[para 14] In its submission, the Public Body acknowledges that it has not provided a response within the time frames set out in section 11(1) of the Act. However, the Public Body argues that it made every reasonable effort to do so.

[para 15] The Public Body states that it initiated the search for records the same day it acknowledged receipt of the request. It received 3593 pages of responsive records from the relevant program areas by June 10, 2022. The Public Body sent a fee estimate to the Applicant on June 13, 2022, which the Applicant paid the following day.

[para 16] The Public Body states that records were sent "for program area review" on November 14, 2022, which was completed on November 25, 2022. It states that consultation packages were sent to 10 public bodies on November 15, 2022, with responses received December 2, 2022. Notices were sent to third parties on November 16, 2022, with responses received by December 2, 2022.

[para 17] The Public Body states that the responsive records were provided to the delegated decision makers for approval on February 13, 2023. It states:

It is anticipated that the approval process with delegated decision makers will take significant time to complete given there are 3500 pages of responsive records which are considered sensitive in that they contain business/commercial information belonging to third parties.

[para 18] The Public Body states that it did not seek permission for an additional time extension from the Commissioner under section 14, as there were "no new significant factors that would justify a further time extension."

[para 19] The Public Body argues that there were two factors outside its control that contributed to the Public Body's inability to respond to the Applicant within the extended timelines. The first factor is that there is a large number of responsive records, and the records include sensitive information. The Public Body states:

It was essential to conduct a thorough line-by-line review of the records in order to avoid the inadvertent disclosure of information that could be harmful to the business interests of third parties. Based on the large volume and complexity of records, and the high caseload of the Advisor, the review took a significant amount of time to complete. Some of the records also required review by Legal, which added further to the processing of the request.

[para 20] The second factor is that the structuring of the FOIP area as well as "a high level of staffing changes, turnover and leaves. During the entire time period since this request was received, the FOIP office has not been staffed at capacity."

[para 21] The Public Body also notes that it was closed for 6 business days over the December holidays.

[para 22] Similar arguments have been addressed in past Orders. In Order F2006-022 the adjudicator 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 23] 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 24] 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 (see paras. 17-18).

[para 25] I agree with the analyses in 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. As stated in Order F2018-44, "[i]f the Public Body is experiencing systemic issues in meeting its obligations under the Act, it is up to the Public Body to address those issues" (at para. 16).

[para 26] To be clear, it is possible for a public body to *both* fail to meet its timelines *and* have made every reasonable effort to do so. However, the public body must show what steps it took to meet its timelines. In this case, the Public Body has told me the reasons why it didn't meet its timelines, but did not tell me the steps it took to try to do so.

[para 27] Regarding staffing turnover, in Order F2019-16, I addressed a similar argument. I found (at para. 17):

This suggests that the Public Body has experienced some increase in access requests and staff training. However, further detail in this regard is necessary to find that the Public Body made every reasonable effort to respond to the Applicant's request, but failed due to circumstances beyond its control. For example, the Public Body has not argued that 43 requests is an unusually and unforeseeably high number in comparison to its usual workload. The Public Body has not told me that the turnover currently (or recently) experienced is unusually or unforeseeably high.

The affidavit provided by the Public Body states that due to staff turnover, it has recruited three new FOIP advisors in the time period during which the Applicant's access request has been process. It is not clear whether the Public Body has added these three positions or whether it has simply replaced staff that left. Staff turnover is not an uncommon occurrence; further, as the Public Body has been processing the Applicant's request for a year and a half, it is also not clear whether this is an unusually high turnover for that period of time.

[para 28] The same analysis applies here: the time period between the Public Body's acknowledgement of the request and the date of its submission to this inquiry is 293 days. It is not clear whether the staffing turnover experienced by the Public Body during that time unusually or unforeseeably high.

[para 29] Regarding the complexity of the request and volume of records, those factors have already been taken into account in the time extensions under section 14. The Public Body states that the records contained sensitive information that required a line-by-line review. It is not unusual for responsive records to contain sensitive information. Further, a line-by-line review of records should be undertaken in every case. This is not an unforeseeable situation.

[para 30] Lastly, given the 293 days the Public Body has had the request, the 6-day office closure is not a significant amount of time. More importantly, it is a scheduled closure and therefore entirely foreseeable.

[para 31] I cannot accept the Public Body's arguments that it made every reasonable effort to meet its timelines for responding to an access request for the reasons argued by the Public Body.

[para 32] Given this, I find that the Public Body failed to make every reasonable effort respond to the Applicant within the timelines of the Act.

## **V. ORDER**

[para 33] I make this Order under section 72 of the Act.

[para 34] 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 duties under the Act.

[para 35] 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.

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Amanda Swanek  
Adjudicator