

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2023-24**

June 23, 2023

**ENVIRONMENT AND PROTECTED AREAS**

Case File Number 030445

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

**Summary:** On August 31, 2022, an applicant (the Applicant) made an access request to Environment and Protected Areas (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act), for certain information.

On April 25, 2023, the Applicant requested a review by this Office, indicating that the time limit for responding to the access request under the Act had expired and the Public Body had not provided a response.

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, 12, 14, 15, 72 and 74; *Freedom of Information and Protection of Privacy Regulation*, AR 186/2008, ss. 14

**Authorities Cited: AB:** Orders F2022-10 and F2022-21.

**I. BACKGROUND**

[para 1] On August 31, 2022, an applicant (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to Environment and Protected Areas (formerly Environment and Parks) (the Public Body or EPA), for certain information.

[para 2] The Public Body corresponded with the Applicant in order to clarify the Applicant's access request. An updated scope was agreed upon and the file was assigned to an advisor.

[para 3] The Public Body acknowledged the Applicant's request by letter dated September 19, 2022. The Public Body informed the Applicant that it would provide a response on or before October 17, 2022.

[para 4] On September 28, 2022, the Public Body sent the Applicant a fee estimate and required her to pay a 50% deposit, which she paid on the same day.

[para 5] On October 17, 2022, the Public Body informed the Applicant that it was extending the deadline to respond by 30 days, to November 14, 2022 under section 14(1)(b) of the Act due to the large volume of records involved.

[para 6] On November 10, 2022, the Public Body submitted a Request for Time Extension to the Commissioner under section 14 of the Act, requesting permission to extend the time to respond to the Applicant. The Commissioner determined she did not have jurisdiction to consider the Public Body's request because it was made after the deadline to respond to the Applicant had expired.

[para 7] On April 25, 2023, the Applicant requested a review by this Office, indicating that the time limit for responding to the access request under the Act had expired and the Public Body had not provided a response.

[para 8] The Commissioner decided to move the matter directly to inquiry and delegated her authority to conduct the inquiry to me.

## **II. RECORDS AT ISSUE**

[para 9] 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 10] The Notice of Inquiry, dated May 29, 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 11] Section 11 of the Act requires a public body to make every reasonable effort to respond to an access request not later than 30 days after receiving the request. 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 12] Section 12(1) of the Act sets out what a public body must include in its response. It states:

*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 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 13] Section 14 of the Act states:

*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).*

*(2) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other.*

*(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.*

*(4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant*

*(a) the reason for the extension,*

*(b) when a response can be expected, and*

*(c) that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.*

[para 14] Section 11 of the Act requires a public body to respond to an applicant not later than 30 days after it receives the applicant's access request, unless that time limit is extended under section 14, or the request has been transferred under section 15 to another public body.

[para 15] The Public Body received the Applicant's access request on August 31, 2022.

[para 16] In its submission, the Public Body stated:

While EPA acknowledges that it has not responded to the request within the timelines provided in the FOIP Act, EPA submits that it has made all reasonable efforts to respond given the circumstances surrounding the receipt and processing of this request. There are several factors outside of the control of the FOIP office that contributed to EPA being unable to respond within the timelines provided in the FOIP request.

[para 17] The Public Body provided the following description of the steps taken in the processing of this request:

1. The request was submitted on August 31, 2022. The request had to be clarified with the applicant in order for it to comply with section 7(2) of the FOIP Act. The FOIP Coordinator and the applicant exchanged emails, an updated scope was agreed upon. The file was assigned to an advisor.
2. The request was acknowledged by letter dated September 19, 2022. The Applicant was informed that EPA would provide a response on or before October 17, 2022.
3. A search for records was initiated on September 19, 2022. The search was sent to the Manager of Rangeland Stewardship division within Environment. The program area provided a time frame and estimated page count to respond to the record search. On September 22, 2022, the program area estimated that the scope of the request would encompass over 24,000 pages of records and take approximately 221.5 hours to collect.

4. A fee estimate was sent to the applicant on September 28, 2022. The applicant paid the fee estimate on the same date. The response date stayed the same.
5. By letter dated October 17, 2022, EPA informed the Applicant that it was extending the time to respond by 30 days pursuant to section 14(1)(b) of the Act and that the response date was November 14, 2022.
6. An OIPC RFTE was submitted on November 10, 2022, as the search for records was still outstanding. On December 5, 2022, the OIPC denied the extension request.
7. Search responses were received on November 30 and December 2, 5 and 15, 2022.
8. On December 21, 2022, EPA provided an estimated timeline for completion to the applicant based on the high volume of records, which was 210 days to process the request after receiving records.
9. Upon returning from Christmas closure, the advisor began to convert the 24,000 pages of records into a readable format. This task was completed May 11, 2023. The records were then reviewed and divided into 4 different packages based on the scope of the request. This task was completed by May 30, 2023.
10. Public body consultations are required for each of the 4 packages as the Rangeland Stewardship division was moved out of the Ministry of Environment and Protected Areas to the Ministry of Forestry and Parks. This consultation is currently underway. This consultation will add to the time required to process this request.

[para 18] The Public Body provided the following information about the Request for Time Extension (RFTE) it submitted under section 14 to the Commissioner on November 10, 2022, and the Commissioner's decision:

While a time extension under section 14(1)(b) was taken for this request, the FOIP office did seek further extension of time from the Commissioner under section 14 before the 30-day extension expired. The request received could not be accepted until section 7(2) requirements were met. Although it was anticipated that the due date was November 14, 2022, the OIPC deemed that was incorrect, and therefore, the extension had expired earlier than the FOIP office had originally calculated. The OIPC decision had denied the Public Body the extension based on deemed refusal, and determined they had no jurisdiction to consider its request for a time extension. As the OIPC deemed the public body to be in deemed refusal, the request for a time extension based on a large volume of records was not considered.

[para 19] As I understand it, the Public Body's failure to properly calculate the deadlines in this case led to it submitting its RFTE to the Commissioner *after* the deadline to respond to the request had expired, and resulted in the Commissioner determining that she had no jurisdiction to consider the Public Body's RFTE.

[para 20] The Public Body made the following additional submissions:

The program area has limited staff available as field training has started. Once field training is complete, staff members will be deployed to complete projects outside of the office, leaving limited staff to review and provide input on the records packages. A review and approval process will be required for a response to be provided to EPA from FP.

A consultation with third parties that submitted records will also be required, further extending the timeline to complete this request.

After the consultations are completed, it is expected the Advisor assigned to the request will be able to apply redactions to the responsive records, prepare 4 approval packages, undertake the approval process with delegated decision makers for each package, and prepare a response to the applicant. These steps will take considerable time to complete considering that there are approximately 22,000 pages of responsive records in 4 packages which are considered very sensitive given the topic of the request. It will be imperative to carefully review records and apply redactions in order to avoid the inadvertent disclosure of records that should be withheld and to ensure the proper application of sections of the FOIP Act.

...

There are several factors outside the control of EPA that contributed to it being unable to respond to the applicant within the timelines provided under the FOIP Act. Based on the scope of the request that encompassed three equine zones across the province over a 7-year period, the program area required considerable time to search and provide the records to the FOIP office. The program area completed the search for records in 87 days. They provided over 24,000 pages of records to be reviewed and considered by the FOIP office.

This applicant has previously submitted similar requests in 2015 and 2018 that contained narrower scopes, covered a smaller area of the province, and had a shorter time frame. Each of these requests have been taken to review by the applicant. The decisions on similar previous records processed by EPA and decisions made by the OIPC on each of these previous requests need to be considered during the processing of the current request for a consistent severing approach.

[para 21] The Public Body proffered similar reasons as to why it could not meet the timelines in the Act to the adjudicator in Order F2022-10.

[para 22] At paragraphs 8 - 14, and 16 - 17 of Order F2022-10, the adjudicator stated:

[para 8] As noted in previous orders, the duty to respond to an access request under the FOIP Act is that of the *head* of the Public Body – the Minister. The Minister delegates the Minister’s powers under the FOIP Act to a FOIP office in order to meet the Minister’s duties as head. This point was made in Order F2018-10:

I am unable to accept the Public Body’s arguments regarding the delay in responding to the access request or to accept its suggestion that it respond by August 2018 to ensure that it responds to prior access requests in a timely manner. Section 11 imposes a duty on the *head* of a public body to make reasonable efforts to respond to an access request. As the head is the Minister of Health, it would be impractical for her to process access requests personally. For this reason, section 85 of the FOIP Act permits the head to delegate her duties, powers or functions under the FOIP Act to any person. However, if the head does not delegate her duty, the duty remains with her. Moreover, if the duty is not met by the delegate, the Minister will not have complied with the duty imposed by the FOIP Act.

The Public Body’s arguments and proposed response time appear to rely on the notion that it is the FOIP branch of the Public Body that has the duty to respond to the Applicant, rather than the head. If that were the case, then the arguments regarding staffing levels and complexity of records very complex [sic] that

requires the FOIP Advisor to “work with the appropriate program areas” in making access decisions would be more persuasive. However, as noted above, it is the *head* of the Public Body who has the duty to make reasonable efforts to respond to the Applicant. She may meet this duty by delegating her duties to “any person” and is not limited to delegating the duty to an employee of a FOIP office. If the FOIP office is unable to meet the head’s duties under section 11, then the head will fail in her duty under section 11 if she delegates to an employee of the FOIP Office without ensuring the duty can be met. In contrast, if the FOIP office is sufficiently staffed with persons having adequate authority and knowledge to make timely access decisions, then the head will be more likely to meet her duty under section 11 by delegating the duty to an employee of the office.

The foregoing analysis holds true for the other access requests, for which the Public Body indicates the head may not meet, or has not met, her duty under section 11 to respond to applicants if she were to “reprioritize” the access request before me.

The Public Body indicates that its FOIP coordinator and three recently hired FOIP advisors must review 130,000 records in order to process the access requests currently before them. I agree with the Public Body that it would not be reasonable to expect the Public Body’s FOIP office, with its current staffing and experience levels to process that number of records within the timeframe imposed by sections 11 or 74(1) to the FOIP office. If delegating the duty to the FOIP office is not likely to bring about compliance with section 11 of the FOIP Act, than it would be unreasonable for the head of the Public Body to delegate this duty to the FOIP office.

The FOIP Act, which is a paramount statute, does not create exceptions to the duty under section 11 to accommodate low staff levels or insufficient experience. Instead, section 85 of the FOIP Act enables the head of the Public Body to achieve compliance through delegations of the head’s duties, powers, and functions. However, if the head delegates her duty and authority to employees who lack sufficient authority, time, and experience to fulfil those duties, the result may be a failure to comply with mandatory duties under the FOIP Act.

[para 9] The FOIP Act requires the *head* of a public body to respond to an Applicant within 30 days or to extend the time for responding in accordance with section 14. Section 14 permits the head to extend the time for responding in specific circumstances, such as when there are a large number of records to process, or more time is needed to consult with another public body or a third party as to whether to grant access. Extending the time for responding allows a public body more time to process records while providing an applicant an anticipated time for responding.

[para 10] I am told that the time for responding was not extended in this case because a program area within the Public Body did not respond to the FOIP office’s requests for information. While the FOIP office may have taken reasonable steps in requesting a response from the program area, I cannot find that the public body as a whole took reasonable steps, given that the program area failed to respond to the FOIP Office in

time for the FOIP Office to seek the Commissioner's approval to extend and no reason has been given for that failure.

[para 11] In my view, there is nothing unreasonable about an applicant making access requests for records in the custody or under the control of a public body. Doing so is a right created by the FOIP Act. It is also reasonable for the Applicant to expect that the Public Body will respond to the access requests, not only because the FOIP Act requires it, but also because the Public Body required a deposit in advance.

[para 12] The Public Body has suggested that the number of access requests made by the Applicant has affected the ability of government to function as a whole. The Public Body cited the number of access requests (fifty) and the number of records (34,000) as having this affect. The Public Body did not provide any evidence to support its claim. Fifty access requests is not, in and of itself, an excessive amount of access requests. 34,000 is not, in and of itself, an exceedingly large number of records. If each record is unique, it may take some time to process the access request, but if many of the records are duplicates, it may not take as much time as the Public Body anticipates. Moreover, the Public Body indicated that the requests are for records on similar subjects, which may allow the Public Body to streamline its searches and involve fewer employees in the search.

[para 13] The time limits imposed by the Legislature and the process for extending the time are not unreasonable. Sections 11 and 14 recognize that processing records may be time consuming, but also recognize that the value of information decreases with delay. Information may be relevant when it is requested, but lack value a year or years later once it is no longer current. At the same time, the Act permits a public body to extend the time to ensure that the public body's ability to perform its public functions are not duly affected. As discussed above, the Public Body did not extend the time for responding in this case.

[para 14] To conclude, the Public Body has acknowledged in its submissions that it did not respond to the Applicant's access request and did not extend the time for responding. As the Public Body has not responded to the Applicant as required by the FOIP Act, I must make an order directing the Public Body to do so.

...

[para 16] I order the Public Body to respond to the Applicant.

[para 17] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

[para 23] I agree with the analysis and conclusions of the adjudicator in Order F2022-10.

[para 24] In the case before me, the Public Body has similarly acknowledged in its submissions that it has not responded to the request within the timelines provided in the Act. In this case though, the Public Body *did* ask the Commissioner for permission to extend the time to respond to the Applicant under section 14 of the Act; however, the Public Body informed me that the Commissioner determined the Public Body had not properly calculated the deadline and did not request permission before the deadline to respond to the Applicant had expired. The



Public Body advised that as a result, the Commissioner determined she did not have jurisdiction to consider the Public Body's request.

[para 25] It has now been over nine months since the Public Body received the Applicant's access request. Although the Public Body has corresponded with the Applicant, it has not yet provided the Applicant with a response to her access request as required under sections 11 and 12 of the Act.

[para 26] In light of the foregoing, I find that the Public Body has not made every reasonable effort to respond to the Applicant as required by the Act, and has not complied with the timelines in the Act. As the Public Body has not responded to the Applicant as required by the Act, I must make an order directing the Public Body to do so.

[para 27] Even if I had determined the Public Body had made every reasonable effort to respond to the Applicant not later than 30 days after receiving the request, this would not excuse the Public Body from complying with its duty to provide a response to the Applicant, and as it has not yet provided a response to the Applicant, I would still have to make an order directing the Public Body to do so.

[para 28] It is not clear whether, in telling me everything that is left for the Public Body to do in order to respond to this request, the Public Body is asking me to select a due date for its response.

[para 29] Section 74(1) of the Act provides that subject to subsection (2), not later than 50 days after being given a copy of an order of the Commissioner, the head of a public body concerned must comply with the order.

[para 30] At paragraphs 12 and 13 of Order F2022-21, the adjudicator stated:

[para 12] Past Orders of this Office have addressed the time to comply with Orders; In Order F2018-65 I said:

Regarding the Public Body's request for a date of compliance with this Order, I have addressed similar requests in Orders F2017-68, F2017-69, F2018-28, and F2018-44. The time for complying with an Order is set out in the Act as 50 days (section 74(1)). Even where a public body has valid reasons for requesting further time to comply, I cannot alter the time limit set out in the Act.

[para 13] In other words, I have no authority under the Act to select a due date for the Public Body's compliance.

[para 31] I agree with the conclusion of the adjudicator in Order F2022-21. I have no authority under the Act to select a due date for the Public Body's compliance with this Order.

[para 32] The Public Body advised that it provided a fee estimate to the Applicant and required the Applicant to pay a 50% deposit of the fee estimate, and that the Applicant paid the required deposit.

[para 33] Section 14(2) of the *Freedom of Information and Protection of Privacy Regulation*, AR 186/2008 (the Regulation) states:

*14(2) The balance of any fee owing is payable at the time the information is delivered to the applicant.*

[para 34] I make no findings with regard to the Public Body's fee estimate and this Order does not affect or displace the requirements of section 14(2) of the Regulation.

[para 35] If the Applicant is not satisfied with the response she receives from the Public Body, such as the application of any exceptions under the Act the Public Body might apply to withhold responsive information, the Applicant may submit a new request for review to this Office in accordance with the Act, identifying the issues she would like this Office to review with respect to the Public Body's response.

[para 36] This case underscores how important it is for public bodies to properly calculate the deadlines under the Act, and ensure that any initial time extension they take on their own under section 14, and any subsequent request for permission to the Commissioner under section 14 to extend the time to respond, are made prior to the expiry of the correctly calculated deadline to respond to the applicant.

## **V. ORDER**

[para 37] I make this Order under section 72 of the Act.

[para 38] I find that the Public Body failed to 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 39] I further order the Public Body to notify me and the Applicant in writing not later than 50 days after being given a copy of this Order, that it has complied with it.

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Carmen Mann  
Adjudicator