

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-26

July 4, 2023

ALBERTA ENERGY REGULATOR

Case File Numbers 028368, 028370, 028371

Office URL: www.oipc.ab.ca

Summary: An Applicant made five access requests under the *Freedom of Information and Protection of Privacy Act* (the Act) to the Alberta Energy Regulator (the Public Body). The Public Body responded to the fifth request, which is not at issue in this inquiry.

The Public Body received permission to extend the time to respond to one request (request 0001), on two occasions. This request is not directly at issue in this inquiry. The Public Body also received permission to extend the time to respond to the remaining three requests (requests 0002-0004) on one occasion, but was denied the second time. This inquiry relates to these three requests.

The Applicant requested a review of the time taken by the Public Body to respond to the remaining three requests.

During the inquiry the Public Body stated that it had determined that request 0001 also encompassed requests 0002-0004 such that it decided to amalgamate the remaining four requests into one (request 0001). The Applicant requested that this decision be added to the inquiry.

The Adjudicator found that the Public Body did not meet its duty to assist the Applicant when it decided to amalgamate four of the Applicant's requests into one, without the Applicant's express consent.

The Adjudicator found that the Public Body failed to make every reasonable effort to respond to requests 0002-0004 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. 10, 11, 14, 55, 72.

Authorities Cited: AB: Orders F2004-008, F2011-003, F2012-09, F2013-20, F2021-36, F2023-22

I. BACKGROUND

[para 1] By letter dated December 14, 2021, the Applicant made five access requests under the *Freedom of Information and Protection of Privacy Act* (the Act) to the Alberta Energy Regulator (the Public Body). The letter states:

Please treat each numbered request below as a separate request, each subject to the three bullet point search parameters that follow. The \$25 processing fee for each request will follow.

[para 2] Following this is a list of five enumerated requests. After the list of five requests, the Applicant set out three bullet points that specify additional conditions (such as keyword terms for searches, Public Body employees who may have responsive records, etc); these three bullet points clearly state they are to be applied to each of the five enumerated requests.

[para 3] The Public Body treated each of the five requests separately, at least initially. The Public Body opened five files, 2022-G-0001, 2022-G-0002, 2022-G-0003, 2022-G-0004, and 2022-G-0005. The Public Body responded to the fifth request, which is not at issue in this inquiry.

[para 4] The Public Body extended its time to respond to the Applicant's four remaining requests, under section 14(1)(b), and informed the Applicant of this extension on February 24, 2022. On March 17, 2022, the Public Body sought permission from the Commissioner to extend its time to respond to the four requests. Permission was granted by the Assistant Commissioner on the grounds that the Public Body had received multiple concurrent requests from the Applicant (section 14(2)).

[para 5] The Public Body states that it was at this point that it concluded that request 0001 was sufficiently broad to encompass all four requests. It states (at para. 11):

Request 0001 was worded so broadly that it encompassed all the documents that could have been provided in response to the other remaining Access Requests, which are now the subject of the Inquiries. The AER's efforts in processing records in response to Request 0001 were effectively indistinguishable from the efforts to process records required to respond to the subject Access Requests. In processing the latter Access Requests, it became clear to the AER that distinguishing between records relating to Request 0001 and records relating to one or more of the subject Access Requests would require a significant amount of additional work that would not result in the disclosure of any additional records to the Applicant.

[para 6] On September 20, 2022, the Public Body again sought permission from the Commissioner for an extension of the time to respond to the Applicant's requests. It states that it informed the Commissioner at this time of its intention to respond only to request 0001, as it was sufficiently broad to encompass the remaining requests.

[para 7] The Public Body states that the Assistant Commissioner asked if this intention to amalgamate the four requests had been communicated to the Applicant and if the Applicant had consented to this approach. The Public Body acknowledged that it had not communicated with the Applicant about this approach to processing its requests.

[para 8] On October 20, 2022, the Public Body sent an email to the Applicant informing the Applicant that it had sought permission for another extension to respond to the requests. In this email, the Public Body informed the Applicant that it intended to process the four requests together; specifically, that it would process only request 0001 as it encompassed the same records as the other requests. In this email, the Public Body asked the Applicant to confirm whether it agreed with this approach.

[para 9] The Public Body states that it did not receive a response from the Applicant regarding its approach to amalgamate the four requests into request 0001, and process only that request.

[para 10] On November 2, 2022, the Public Body received the Assistant Commissioner's decision regarding the second extension requests. The Assistant Commissioner agreed to permit the Public Body to extend request 0001 to February 21, 2023, but refused permission regarding requests 0002-0004. The Assistant Commissioner's decisions (provided to me by the Public Body) state that the Public Body provided sufficient information about request 0001, such as the number of responsive records to be processed, but did not provide similar information about requests 0002-0004. As such, the Assistant Commissioner refused permission to extend the time to respond to requests 0002-0004.

[para 11] The Public Body informed the Applicant on November 7, 2022 of the Assistant Commissioner's decisions regarding the extension requests. The Public Body also reminded the Applicant of its decision to process only request 0001, and that it had asked the Applicant if it was agreeable to this approach.

[para 12] The Public Body states that on December 15, 2022, it received emails from this office informing it that this office had received a request for review regarding each of requests 0001-0004, and asking if the Public Body had responded to the Applicant regarding these access requests. The Public Body responded, stating that it had received permission to extend its time to respond for request 0001, and that the Public Body had decided to process only that request, given the overlap of the four requests.

[para 13] By letter dated February 21, 2023, the Public Body responded to request 0001, refusing access to all responsive records.

[para 14] The Public Body provided me with copies of the correspondence with this office and the Applicant regarding the extensions.

[para 15] The Applicant requested a review of the time taken by the Public Body to respond to the requests 0002-0004.

II. RECORDS AT ISSUE

[para 16] As the issue in this inquiry relates to the timeliness of the Public Body's response and its duty to assist the Applicant, there are no records at issue.

III. ISSUE

[para 17] A Notice of Inquiry was sent for each file. All three Notices are dated April 21, 2023, and state the issue for each inquiry as follows:

Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 18] In its initial submission, the Public Body explained that it had essentially responded to the requests on February 21, 2023, refusing access to all requested records. This response will be discussed in greater detail later in this Order.

[para 19] By letter dated May 18, 2023, I asked the Applicant to confirm whether they remain interested in continuing with the inquiries, as the Public Body has provided a response since the date the Applicant requested a review. I also informed the Applicant that the Public Body's response to request 0001 – specifically, whether it had authority to refuse to provide the requested records – would not be added as an issue to the inquiry and that the Applicant would need to request a new review of that decision if it wished.

[para 20] In that letter, I noted that the Public Body's arguments provided in its submission relate to its duties under section 10 (duty to assist the applicant). From my review of the Public Body's submission, it seemed possible that in order to make a finding as to whether the Public Body met its timelines under section 11, I may need to also make a finding regarding section 10. Therefore, the parties were informed that if the Applicant is interested in pursuing the inquiries, the following issue would be added:

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

[para 21] The Applicant confirmed that they remain interested in pursuing the inquiries, and provided a submission. The Public Body then provided an additional submission.

IV. DISCUSSION OF ISSUE

Preliminary issue – identity of the Applicant

[para 22] The Applicant's access request, dated December 14, 2021 was sent to the Public Body by an external lawyer, on behalf of the Applicant. The request states that the author is

writing to request records “on behalf of our client [A], Executive Vice President of Benga Mining Limited, operating as Riversdale Resources.”

[para 23] The request for review, submitted to this office on September 27, 2022, lists A as the applicant, with their representative being the same lawyer who authored the access request.

[para 24] The Applicant submitted a Change of Contact and/or Address for Service form to this office, dated November 18, 2022, for several files relating to the Applicant, including the files to which this inquiry relates. This form lists the Applicant as “Benga Mining Limited operating as Riversdale Resources per [M]”.

[para 25] The Public Body states that it had understood that Benga Mining was the Applicant, but that the Change of Contact form indicates otherwise. It states (additional submission, at paras. 28-33, footnotes omitted):

27. Based on the correspondence received from the OIPC to date, the AER had assumed that Benga had properly acquired the authority of the Applicant, [A], in respect of the Access Requests and associated requests for review. However, based on the newly provided Change of Contact Form, the AER is now of the view that Benga has no standing to request a review of the AER’s response to the Access Requests.

28. The Change of Contact Form was apparently submitted to the OIPC on December 2, 2022. It lists the name of the party changing its contact and address for service as “[Benga] per [M]” notwithstanding that the original Applicant in respect of the Access Requests, as well as the requests for review and all other associated paperwork, is consistently referred to as [A], and not Benga.

29. Based on this detail, presumably decided on with the assistance of able counsel, it is clear that the Applicant made the intentional decision to officially make the Access Requests in his individual capacity, and not on behalf of Benga. Contrast this decision and the associated paperwork with the Change of Contact Form, which clearly identifies that the individual signing the form is doing so on behalf of Benga.

30. The AER acknowledges that the Applicant is identified as the Executive Vice President of Benga in some of the paperwork associated with the Access Requests. However, this ought to be considered as further evidence that the Applicant intended to sign such documents in his personal capacity and not on behalf of Benga, due to the involvement of counsel in the process who would have been aware of the significance of the distinction.

31. Importantly, the Authorization of Representative form signed by the Applicant indicates that the Applicant authorized two lawyers at Osler as his “personal representative to act on his] behalf, and to exercise all [his] rights under the *Freedom of Information and Protection of Privacy Act*.” Furthermore, the Authorization of Representative indicated that the authorization will be in effect until revoked in writing.

32. The Applicant went to the length of including an affidavit witnessing his signature of the Authorization of Representative, which document repeatedly refers to the Applicant as an individual. Notably, there is no reference in any of the paperwork to the Applicant signing on behalf of Benga, or of the Applicant having the Authority to sign on behalf of Benga, as may

have been expected if the Applicant intended to engage Benga's legal rights or responsibilities as opposed to his own.

33. The AER should therefore be able to rely on the multiple instances in which the Applicant is identified as an individual, not Benga. The distinction between the Applicant in his individual capacity and Benga, his employer at the time, is not an inconsequential detail that can be easily remedied. The rights and responsibilities arising from the Access Requests belong to the Applicant and not to Benga.

[para 26] I do not find this argument persuasive. The Public Body notes that A "is identified as the Executive Vice President of Benga in some of the paperwork associated with the Access Requests". In fact, A's position with Benga Mining appears in every instance where A is mentioned in correspondence relating to the access requests, with two exceptions. The first exception is the Request for Review form of this office, where A is listed as the Applicant, with counsel listed as the representative. On the Request for Review form, there is space only for a first and last name of an applicant; there is no space to include an organization name in the event that an employee is requesting the review on behalf of an organization.

[para 27] The second exception is the affidavit of an individual who witnessed the signing of an Authorization of Representative form by A. This affidavit is comprised of a form entitled Affidavit of Witness. In that affidavit, the witness identifies A by his name only and does not include A's job title with Benga. However, contrary to what the Public Body seems to indicate in its submission above, the actual Authorization of Representative form signed by A does include A's job position and Benga's name.

[para 28] It is not clear how the Change of Contact form signed in November 2022 is relevant. The Change of Contact form was necessary because Benga is now represented by a different law firm and therefore communications relating to Benga's files were to be sent to the new lawyer. That form clearly lists Benga as the Applicant, with M as Benga's primary contact, where previously A had been the primary contact. I am not able to follow the Public Body's logic whereby Benga's changing law firms somehow amounts to evidence that A (who no longer appeared to be involved with the files as Benga's contact person) had intended to make the access requests in a personal capacity.

[para 29] The Public Body's evidence that A intended to make the requests in his personal capacity is the affidavit of witness form, which was attached to the Authorization of Representative form and provided by Benga to the Public Body with the access requests in December 2021. This evidence is not convincing. In its submission cited above, the Public Body refers to "multiple instances in which the Applicant is identified as an individual, not Benga"; however, the documents the Public Body points to are all copies of this same affidavit of witness form.

[para 30] The Public Body argues that in the Authorization of Representative form, A "authorized two lawyers at Osler as his "personal representative to act on his] behalf, and to exercise all [his] rights under the *Freedom of Information and Protection of Privacy Act*."

[para 31] This may be a possible interpretation of the circumstances; however, I do not believe it to be the most likely or reasonable.

[para 32] Firstly, in the Authorization of Representative form, A clearly included his job position and Benga's name on the form, the same way it is included in the access requests. This indicates that A was acting as an employee of Benga at the time.

[para 33] Secondly, the Authorization of Representative form used by Benga is a Government of Alberta form created specifically for applicants to use when authorizing a representative to act on their behalf when making an access request under the FOIP Act; this is apparent from the logo in the header of the form. This form is included in Appendix 5 in the Government of Alberta's *Guidelines and Practices Manual*¹. In that Manual, the form is accompanied by the same Affidavit of Witness form that was provided with Benga's access requests.

[para 34] The Government of Alberta form is set out as follows (in part):

I, _____,
living at _____, in the province of _____,
authorize _____
living at _____, in the province of _____,
as my personal representative to act on my behalf, and to exercise:

(select one)

- all my rights under the Freedom of Information and Protection of Privacy Act
- my right to access all my records containing personal information in all categories of personal information
- my right to access all of the following records containing personal information or all of the following categories of personal information (number and titles of records or categories):
- the rights that I have under the Freedom of Information and Protection of Privacy Act regarding the following other matters (e.g. consent to disclose personal information):

I confirm that my representative has the authority to exercise the above right(s) under the Act for me.

[para 35] It seems that this form is primarily meant for individuals acting in a personal capacity.

[para 36] That Authorization to Represent form includes a space for the signature of the authorizing person, as well as a space for the signature of a witness; the signatory is referred to the Affidavit of Witness form, which is included in the next page of Appendix 5.

[para 37] That Affidavit of Witness form also seems primarily meant for individuals acting in a personal capacity. It sets out, in part:

¹ <https://open.alberta.ca/publications/9780778585633>

1. I was personally present and I saw _____ Name of Individual _____
sign the Authorization of Representative form to which this is attached.
2. The Authorization of Representative form was signed by _____ Name of Individual _____
at _____, in the province of _____
and that I am the one who witnessed the form.

[para 38] It appears that Benga (or its lawyer) used standard Government of Alberta forms made specifically for applicants to use when making an access request. Those forms do not have a check box or option specifically for organizations rather than individuals acting in a personal capacity.

[para 39] In my view, it is reasonable to interpret the Authorization of Representative form signed by A, wherein A included his job position and Benga's name with his own, as intending to confirm Benga as the applicant. The same can be said for the Request for Review form submitted by the Applicant to this office, where only A's name appears, without Benga's name. As noted above, the Request for Review form does not have a space to include an organization's name where an employee is acting on behalf of that organization.

[para 40] If A were the applicant, acting in a personal capacity, it would be curious that wherever his name appears it is accompanied by his job position and Benga's name (with the exception of the Affidavit of Witness form and Request for Review form). While it is not uncommon for individuals acting in their personal capacity to include their business phone number or email as their contact information, it is not common for applicants to include their job position and company name in an access request and related documentation, unless that job position and company name is relevant.

[para 41] Further, if A were the applicant acting in his personal capacity, it would be even more curious for counsel to also include A's job position and Benga's name, wherever A's name is mentioned.

[para 42] It must also be noted that like public bodies, an organization can act only through its employees. It is not unusual for an organization (as opposed to an individual acting in a personal capacity) to make an access request under the FOIP Act. It is reasonable for that request to be undertaken or overseen by a particular employee, even if the organization elects to have external counsel represent it on the matter.

[para 43] In my view, the Public Body's argument that A is the applicant acting in his personal capacity is not the most reasonable explanation. Rather, the most reasonable explanation in this case is that A was acting as the main contact person within Benga for matters relating to the access requests. In late 2022, the main contact was changed to M, but Benga remained the applicant.

[para 44] As such, I reject the Public Body's argument that Benga does not have a right to request a review of the Public Body's actions under the Act.

Preliminary issue – scope of inquiry

[para 45] As stated above, I informed the Applicant in my May 18, 2023 letter that it would have to submit a new request for review in order to have the Public Body's decision not to provide responsive records reviewed. Even so, the Applicant requested that the issue be added to the ongoing inquiries, stating:

In the spirit of enhancing efficiency, together with the fact that Benga experienced significant delays awaiting the decisions of the AER in connection with its requests, we ask that the issues before the Inquiries be amended to include the AER's decision not to provide Benga access to any of the responsive records.

[para 46] The Applicant also confirmed that it has also submitted a new request for review to this office.

[para 47] I understand the Applicant's arguments regarding efficiency, and the delays the Applicant has already experienced. However, there are several reasons that I have declined to add the Public Body's decision to withhold requested records as an issue.

[para 48] The first reason is that the Public Body's decision to withhold records relates to the Applicant's first request (Public Body file #2022-G-001). The files at issue in this inquiry relate to the Applicant's second, third and fourth requests (Public Body files #2022-G-002, #2022-G-003, and #2022-G-004).

[para 49] The second reason is that this file proceeded directly to inquiry pursuant to an internal process of this office to expedite files where an applicant has not received any response from a public body within the statutory timelines. This is in contrast to the usual process of the office, whereby an applicant's request to review a public body's response to an access request is first reviewed by a Senior Information and Privacy Manager. If that review does not settle the matter, the Commissioner will decide whether the file should proceed to an inquiry. In other words, although I understand that the Applicant has experienced delays in receiving responses to its requests, the Applicant has essentially 'jumped the queue' in this office, which is permitted in only limited circumstances. This expedited process that led to these inquiries is meant to ensure that applicants receive a response from a public body that has already exceeded its time limits, in as timely a manner as possible. In an Order resulting from such an expedited inquiry, a public body may be ordered to respond to an applicant in accordance with the Act; applicants are then advised that if they object to the public body's response, they may submit a new request for review to the office (see Order F2023-22, at para. 18). All this is to say that refusing to add the issue of the Public Body's decision not to provide the Applicant with access to the requested records is in keeping with the expedited process of this office.

[para 50] Further, the usual process whereby a public body's response to an access request is reviewed by a Senior Information and Privacy Manager, is an invaluable part of the overall processes of this office. It is worth noting that the majority of files that come to the office are resolved at this stage. Even where matters are not entirely resolved, the issues are often refined such that where an inquiry is conducted, it can proceed more efficiently than if the review had

not taken place. This is another reason that files bypass the review stage of this office in only limited circumstances.

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

[para 51] Section 10(1) of the Act reads as follows:

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 52] In Order F2004-008, former Commissioner Work discussed the burden of proof with respect to whether a public body met its duty under section 10, to assist an applicant. He said (at paras. 8-9):

FOIP is silent regarding which party has the burden of proof under section 10(1) of the Act. When FOIP is silent, a case-by-case determination must be made to decide which party has the burden of proof. Previous Orders issued under FOIP say that the party who is in the best position to show whether the duties to assist an applicant and to conduct an adequate search for records have been met, has the burden of proof. For that reason, a public body usually has the burden of proof under section 10(1) of FOIP (Orders F2005-024, para 8; F2005-020, para 14; F2005-018, para 7; 98-012, para 11; 99-038, para 10; 97-006, para 7).

The Orders issued under FOIP say that applicants have an initial duty when making an access request under section 7 of FOIP. The Applicant's initial duty is to provide sufficient clarification of the request for access to enable the public body to respond appropriately to the request and to fulfill the duty to assist under section 10(1) of FOIP (Orders 99-038, para 10; 98-012, para 11; 97-006, para 7; 96-017, para 13).

[para 53] The Public Body states that it decided to amalgamate requests 0001-0004 and to respond only to request 0001. It states that this is because request 0001 encompassed requests 0002-0004, and that responding to the four requests separately would require significant additional effort. The Public Body states that requiring this additional effort was not reasonable, as responding to the request separately would not result in any additional responsive records being located (given the overlap between the requests).

[para 54] The Public Body states that in the Assistant Commissioner's second time extension decision letter for request 0001, the Assistant Commissioner encouraged the Public Body to communicate the Public Body's intended approach to process all four requests under request 0001 only. The Public Body states that it "interpreted this decision as consistent with its own decision on how to process each of the subject Access Requests, i.e. by providing a single response to the Applicant under Request 0001". The Public Body also states that this office did not object to the Public Body's intended approach to process only request 0001, during any communications regarding the extension requests.

[para 55] The Public Body may be arguing that the Assistant Commissioner approved the Public Body's approach. I have reviewed the Assistant Commissioner's decision letter regarding the second extension request. The only issue before the Assistant Commissioner was the

extension sought by the Public Body under section 14 of the Act. The Assistant Commissioner was not making a determination as to whether the Public Body could amalgamate the Applicant's requests as it did.

[para 56] Given the Public Body's duty to communicate with the Applicant regarding any amendments to the scope of the Applicant's access request (to be discussed in detail, below), a reasonable interpretation of the Assistant Commissioner's encouragement for the Public Body to communicate with the Applicant in this regard was to help ensure the Public Body met its duty to assist the Applicant as set out in the Act. Either way, the Assistant Commissioner's decisions regarding section 14 are not material to my decision, as this inquiry deals with different issues.

[para 57] Past Orders of this office have discussed the scope of a public body's duty to assist. For example, a public body will fail to meet this duty to assist if it unilaterally narrows the scope of an Applicant's request. In Order F2012-09, the adjudicator stated (at para. 53):

If a public body interprets a request for records too restrictively, or wrongly, the public body runs the risk of unilaterally narrowing the scope of the access request and failing in its duty to assist the Applicant, by failing to search for records falling within the scope of the access request.

[para 58] A public body also cannot unilaterally decide to transfer an access request made under the FOIP Act to an informal process outside the FOIP Act without the applicant's consent to do so. Order F2021-36 discusses a situation in which the public body informed the applicant that it intended to process his FOIP request via an alternate process, instead of under the FOIP Act. In that case, the applicant had made a request for information that the public body usually provided using an alternate process. The public body informed the applicant that it had an alternate process, and would be processing his request using that alternate process.

[para 59] The applicant subsequently requested a review by this office of the time taken by the public body to respond to the request. The public body had argued that this office did not have jurisdiction to review the matter, because the applicant's request was no longer being processed under the FOIP Act. The applicant argued that he had not understood that the public body was removing his request from the FOIP process such that the rights set out in the FOIP Act would not apply.

[para 60] In that case, the communications between the public body and applicant had been done by phone and a written record did not exist. In Order F2021-36, I accepted the explanation of both parties; in other words, I accepted that the public body explained the alternate process to the applicant *and also* that the applicant did not understand that his request would be transferred outside the FOIP process. Applying Order F2004-008, cited above, I found (at paras. 19, 21):

While section 10 is not an issue in this inquiry, the above analysis is helpful with respect to the question here: whether the Public Body properly transferred the Applicant's FOIP request to an alternate process that is not subject to the FOIP Act. I am satisfied that the Applicant's request was initially made under the FOIP Act; it is the Public Body's burden to satisfy me that it properly transferred the request to another process.

...

Given this, while I accept that the Public Body intended to transfer the Applicant's FOIP request to its alternate process outside the Act, I cannot conclude that it did so with the Applicant's informed agreement, which was required in these circumstances. Therefore, the Public Body's obligations under the FOIP Act continue to apply, including its obligation to respond within the timeframe set out in section 11.

See also Order F2013-20.

[para 61] Under section 7 of the Act the Applicant must provide sufficient detail to enable the Public Body to identify responsive records. In this case, the Public Body has not argued that the Applicant's requests were not sufficiently detailed; rather, the Public Body argues that the requests overlapped and that it would be difficult for the Public Body to respond to each request separately. I conclude from the Public Body's submissions that the Applicant has met its duty under section 7.

[para 62] It is also clear from the Public Body's submissions that it understood the scope of the Applicant's requests, such that they didn't require clarification. The Public Body was also very clear that it was not omitting anything from the scope of the Applicant's requests in processing those requests, even when it decided to respond only to request 0001. This is because request 0001 encompassed the other requests. The Public Body also did not propose to process the requests outside the FOIP Act.

[para 63] However, the analyses in the past Orders cited above regarding clarifying requests, unilaterally narrowing the scope of a request, and transferring a request outside the FOIP processes, are nevertheless relevant here. It is clear from those Orders that the Public Body bears the onus of obtaining informed consent from the Applicant before it can amend the Applicant's access requests.

[para 64] The Applicant agrees that its previous counsel did not respond to the Public Body's attempts to confirm its intended approach to amalgamate the Applicant's four requests into one. The Applicant argues that it did not have an obligation to respond, and points out that it specifically requested in its initial access request that all five requests be processed separately. The Applicant set out reasons for wanting the five requests to be processed separately. It states (submission, at para. 41):

Among other things, the information received in response to each separate request would be easier for the Applicant to categorize and review, and most notably, having separate requests were intended to expedite the Applicant's receipt of the responsive records. Having all responsive records treated as one response effectively nullified these advantages.

[para 65] I understand from the Public Body's time extension requests made to this office that the Public Body located approximately 60,000 pages of records as responsive (or potentially responsive) to the Applicant's requests. The Public Body states that it decided to amalgamate the requests for the following reasons (initial submission, at para. 12):

12. The reason for this assessment was that any document that might be included in any of the subject Access Requests would also necessarily have been collected and reviewed in responding to Request 0001. It would require significant additional time and effort to identify any documents among those collected in response to Request 0001 and to subsequently review them to determine which, if any, of the Access Requests might also relate to each document. Such additional work would effectively be a redundant review of records that had already been reviewed in response to Request 0001 and would therefore be unreasonable.

[para 66] I understand the Public Body's reasons for wanting to amalgamate the Applicant's four requests into one; the approach seems reasonable.

[para 67] However, as indicated by the Applicant, there may be many reasons for an applicant to make separate requests. For example, it may be useful to know how many records are responsive to each request, which wouldn't be known if separate requests were amalgamated. In this case, the Applicant expressly asked that each of its five requests be processed separately. The Applicant's reasons for wanting the requests processed separately are also reasonable.

[para 68] Whether or not the Public Body's reasons for wanting to amalgamate the Applicant's four requests into one were reasonable, the Public Body cannot unilaterally decide to do this without the Applicant's consent. This is consistent with past Orders finding that a public body cannot decide to transfer a request to a process outside the FOIP Act, or alter the scope of an applicant's access request, without the applicant's express consent.

[para 69] This is not to say that public bodies are always required to process requests as the applicant wishes, if those requests are repetitious and would unreasonably interfere with the operations of the public body. Section 55(1) of the Act permits public bodies to ask the Commissioner for authority to disregard access requests in certain circumstances. It states:

55(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if

(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

[para 70] The Public Body has not said whether it considered requests 0002-0004 to be repetitious within the terms of section 55(1) or if so, whether it considered requesting authorization from the Commissioner to disregard requests 0002-0004.

[para 71] The fact that the Act sets out a process whereby public bodies can request permission from the Commissioner to disregard repetitious requests supports the conclusion that a public body cannot unilaterally decide to amalgamate requests that it believes are repetitious or overlapping.

Was the Public Body permitted to rely on the Applicant's silence as consent?

[para 72] The Public Body has argued that the Applicant implicitly consented to the Public Body's approach of amalgamating the four requests, by not responding when the Public Body asked it to confirm whether it agreed with the approach. Again, past Orders make it clear that a public body needs express consent to alter an applicant's request. I find that the same requirement applies here. Therefore, I disagree that the Applicant implicitly consented to the Public Body's decision to amalgamate four requests into one, when the Applicant failed to respond to the Public Body's proposal. Further, in this case, the Applicant made it clear in its access requests that it wanted the requests to be processed separately.

[para 73] The Public Body has also argued that it was authorized to rely on the Applicant's silence as consent, because the Applicant was represented by counsel, and the Law Society of Alberta's Code of Conduct applies to that counsel.

[para 74] The Public Body argues that section 7.2-7 of the Code of Conduct requires lawyers to answer all professional letters with reasonable promptness. The Public Body also argues (additional submission, at para. 10, footnotes omitted):

10. Importantly, members of the Law Society are also barred from misleading other lawyers, including through silence, and they are required to correct misunderstandings if they become aware that they have inadvertently misled an opposing party.

[para 75] The Public Body states that as the Applicant's previous counsel seems to have received the Public Body's correspondence, it is unreasonable to argue that the Public Body ought to have assumed that the Applicant objected to its proposed approach.

[para 76] I do not find this argument to be persuasive. Whether a lawyer has contravened the Law Society's Code of Conduct is not a matter I have jurisdiction to decide. Even if the Applicant's lawyer at the time failed to fulfill their obligations under the Code of Conduct, this does not detract from their client's (the Applicant) rights under the FOIP Act. The Public Body is required to obtain express and informed consent from an applicant before amending an applicant's access request – whether that is by transferring it to a process outside the FOIP Act, altering the scope of the request, or amalgamating several requests into one. This requirement applies equally to applicants who are represented by counsel and those who are not.

Additional comments

[para 77] The Public Body states that it did not receive a copy of the Applicant's requests for review made to this office until it received the Notice of Inquiry. It states this was the first indication it received that the Applicant disagreed with the Public Body's approach to respond only to request 0001. The Applicant's requests for review were submitted to this office in September 2022. This office contacted the Public Body in December 2022, to inform it that requests for review were made and to which of the Public Body's files the requests related. The requests for review were not provided to the Public Body at that time. The requests for review were provided to the Public Body in April 2023, with the Notice of Inquiry.

[para 78] The Public Body states that if it had received the requests for review when they were submitted to this office, it could have approached its response to the Applicant differently, as it

would have understood that the Applicant did not agree to the Public Body responding only to request 0001. It states that it could have addressed the Applicant's concerns at an earlier stage, such that this inquiry would not have been necessary.

[para 79] Regarding when the Applicant's requests for review were provided to the Public Body by this office, this office is experiencing significant delays in processing files due to backlogs. The Public Body was informed in December 2022 that requests for review were received and which files they related to. The Public Body received copies of the requests for review when the review was initiated; in this case, the review is in the form of this inquiry.

[para 80] That said, I agree that had the Applicant responded to the Public Body's attempts to confirm its intended approach to processing the requests, the matter may have been settled between the parties long before now. The fact that the Applicant did not have a legal obligation to respond does not mean that the Applicant should not engage with the Public Body to ensure as efficient process as possible.

Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 81] 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 82] I have found that the Public Body did not have authority to amalgamate the Applicant's four requests into one. The Public Body's extended time to respond to requests 0002-0004 ended on September 23, 2022; the Public Body's extension to respond to request 0001 does not apply to these requests.

[para 83] The Public Body responded to request 0001 by letter dated February 21, 2023, refusing access to the records responsive to request 0001. This subject line of this letter references requests 0001, 0002, 0003 and 0004. This letter further notes that it did not receive any indication from the Applicant that it objected to the Public Body's decision to process only request 0001. It states:

The AER has not been made aware of any objection to its decision to process the Requests as though 2022-G-0001 were the only request. However, if there is an objection, then for the purpose of clarity the AER has decided to refuse each of the Requests based on the reasons contained in this letter.

[para 84] The Public Body's February 21, 2023 letter to the Applicant responding to request 0001 notes that its response to requests 0002-0004 would be the same. However, this does not

appear to be a proper response under the Act. In Order F2011-003, former Commissioner Work stated (at para. 32):

According to earlier decisions of this office, to comply with section 12(1)(c) with respect to records it is withholding, a public body is obliged to indicate how many records (including numbers of pages) are being withheld, to describe or classify these records insofar as this is possible without revealing information that is to be or may be excepted, and to provide the reasons for withholding for each category. (See Order F2004-026 at paras 98 and 99. See also Order 2000-014, which held that public bodies should be as specific as possible about records to which they have decided to give access and not give access.) In failing to do this, the Public Body has failed to comply with the terms of section 12(1)(c). I will therefore direct it to comply with its duty to the extent that it earlier failed to do so by now providing to the Applicant the numbers and a general description of the records that it is withholding, and the reasons for withholding each record or part thereof.

[para 85] The Public Body's brief reference to requests 0002-0004 having the same result as request 0001 in its February 21, 2023 letter to the Applicant does not appear to be sufficient to meet the Public Body's obligations under the Act.

[para 86] Further, the Public Body's submissions acknowledged that it processed the Applicant's requests "effectively as though Request 0001 were the only access request" (initial submission, at para. 13). This indicates that the Public Body ceased processing requests 0002-0004 as separate requests.

[para 87] As the Public Body ceased processing requests 0002-0004, it cannot be said to have made every reasonable effort to respond to the Applicant as required by section 11. Therefore, I find that the Public Body failed to make every reasonable effort to respond within the timelines set out in section 11 of the Act.

[para 88] As such, I will order the Public Body to respond to the Applicant's requests 0002, 0003 and 0004. The Public Body should provide a separate response to each request, as set out in the Applicant's December 14, 2021 access request. The Public Body should ensure that these responses fulfill its obligations under section 12(1) of the Act.

V. ORDER

[para 89] I make this Order under section 72 of the Act.

[para 90] I find that the Public Body did not meet its duty to assist the Applicant.

[para 91] 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. The Public Body is to respond to each of the Applicant's requests separately.

[para 92] 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