

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2024-10

March 14, 2024

CITY OF EDMONTON

Case File Number 032870

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request to the City of Edmonton (Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), on August 11, 2023.

By February 2, 2024, 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, 72

Authorities Cited: AB: Orders F2018-10, F2018-44, F2018-57, F2019-15, F2021-46, F2021-51, F2022-10, F2022-11, F2023-12

I. BACKGROUND

[para 1] The Applicant made an access request to the City of Edmonton (Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated August 11, 2023.

[para 2] The Public Body extended its time to respond under section 14(1)(b) of the Act, to October 10, 2023. The Public Body sought and received permission from the Commissioner to further extend its time to respond to December 11, 2023, under sections 14(1)(b) and 14(2) of the Act.

[para 3] On February 2, 2024 this Office received a request from the Applicant to review the Public Body's failure to respond to the request. The Commissioner has decided to hold an inquiry on this matter.

II. RECORDS AT ISSUE

[para 4] 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 5] The Notice of Inquiry, dated February 21, 2024, 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 6] 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 7] 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 8] 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 dated August 11, 2023. The Public Body extended its time to respond on its own, and obtained permission from the Commissioner for an additional extension. The Public Body's final extension was to December 11, 2023.

[para 9] In its submission, the Public Body acknowledges that it exceeded the timelines in section 11 of the Act to respond to the Applicant.

[para 10] In its submission, the Public Body argues that it is in the best position to determine how much time it needs to complete its response to the Applicant. It notes that it extended its time to respond by 30 days, under section 14(1), and requested a further 90 day extension from the Commissioner under section 14(1) and (2). However, the Commissioner granted only 60 days. The Public Body states that it did not seek an additional extension from the Commissioner because its initial extension request was not granted in full.

[para 11] I note that had the Public Body received the full 90-day extension from the Commissioner, that deadline would have been January 10, 2024, a date which has also come and gone.

[para 12] The Public Body provides an explanation for the time taken to respond to the Applicant:

15. The Public Body advises that the initial amount of records located that were potentially responsive were approximately 1,321 pages. The Public Body had to review all of these records before it was able to determine what records were responsive to the Applicant's request. The extensive number of these records require a significant amount of time and resources to review the same in order to ensure that the Public Body meets its obligations under the Act. However, the Public Body including the City Operations, the Office of the Mayor, and the Office of the Councillors have limited resources. And each

of these parts of City Government have their own competing responsibilities and priorities.

[para 13] In Order F2018-10, the adjudicator considered the impact of a public body's high workload and staffing issues on its obligations under section 11 of the Act. She said (at paras. 18-22):

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 the complexity of records very complex 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 the duty 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) of the FOIP Act. However, that it would be unreasonable to expect the FOIP office to be able to respond to the Applicant's access request means only that it may be unreasonable for the head of the Public Body to delegate the duties imposed by section 11 and 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, then 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 delegation 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 14] This point has been made and the analysis applied in several subsequent Orders (see Orders F2018-44, F2018-57, F2019-15, F2021-46, F2021-51, F2022-10, F2022-11, F2023-12).

[para 15] Nothing before me indicates that the same analysis and finding ought not to apply here.

[para 16] I acknowledge the Public Body's arguments regarding its high workload and the corresponding difficulty in meeting the legislated timelines. However, it is the head of the Public Body that has a duty to respond as required by the Act, as discussed in Order F2018-10. If 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.

[para 17] The Public Body argues that the timelines in the Act are outdated. It states:

21. The Act was passed by the Alberta legislature in June 1994 and is no longer reflective of the current circumstances faced by public bodies which have to deal with more frequent access requests involving increasingly large numbers of records which need to be compiled, reviewed and processed. In the Joint Resolution: Modernization (2019), the Federal, Provincial and Territorial Information and Privacy Commissioners including the OIPC called on their respective governments to modernize legislation dealing with privacy and access to information.

[para 18] This Office is not responsible for amendments to the FOIP Act. I am required to interpret a public body's duties on the basis of what the FOIP Act currently states, not what a modernized Act ought to say. The Public Body may consider making a request for amendment to the Minister responsible for the administration of the Act.

[para 19] 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.

V. ORDER

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

[para 21] 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.

[para 22] 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