

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2024-22

July 17, 2024

CITY OF EDMONTON

Case File Number 033325

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request dated September 12, 2023 to the City of Edmonton under the *Freedom of Information and Protection of Privacy Act*.

On November 28, 2023, the Applicant requested a review of the Public Body’s failure to respond to the request.

The Adjudicator ordered the Public Body to respond to the request as required by the FOIP 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, F2021-46, F2021-51, F2022-10, F2022-11, F2023-12, F2024-10

I. BACKGROUND

[para 1] The Applicant made an access request dated September 12, 2023 to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

[para 2] The request was for “All records for the Meet Me Downtown campaign”, from October 1, 2022 to the date of the request (September 12, 2023).

[para 3] The initial fee was paid by the Applicant on September 18, 2023 and the Public Body emailed an acknowledgement of the fee payment and informed the Applicant of the October 18, 2023 due date for the request.

[para 4] The parties discussed the scope of the request on September 20, 2023; the Applicant provided confirmation of the amended scope, in writing, the following day on September 21, 2023.

[para 5] On October 17, 2023 the Public Body sent the Applicant a confirmation of the amended request:

“Re: Meet Me Downtown campaign

Emails and decisions from the City Manager’s Office, City Council and Mayor’s Office.

Exclude any communication or documents about marketing material such as the website and logo design”;

for the time period of October 1, 2022 to September 12, 2023.

The due date for the request was extended to November 17, 2023, under section 14(1)(c) of the FOIP Act.

[para 6] On November 8, 2023, the Applicant was informed of the Public Body’s intention to request a time extension to respond from the Office of the Information and Privacy Commissioner.

[para 7] The Public Body located 932 records that could be responsive to the Applicant’s request.

[para 8] On November 17, 2023, the Public Body sought a 60 day extension under sections 14(1)(c) and 14(2) of the FOIP Act. The Applicant was updated by the Public Body on November 22, 2023, that it had not received a response from the OIPC to the November 17, 2023 request.

[para 9] On December 21, 2023, the Public Body received permission from the Commissioner to further extend the due date by 50 days to January 8, 2024. The Applicant was informed of the extension on January 4, 2024.

[para 10] The Applicant was advised on January 8, 2024 that the Public Body would not be able to provide a response to the request by the due date. Further extensions from the OIPC were not sought after this date.

[para 11] On February 13, 2024, the Public Body informed the Applicant that it expected to respond by March 28, 2024. It did not do so.

[para 12] The Public Body updated the Applicant on April 26, 2024, that internal consultations were in progress and that affected third party consultations would also occur. The Applicant was to be notified of the commencement of the third party consultations once they started.

[para 13] On November 28, 2023 this Office received a request from the Applicant to review the Public Body's failure to respond to the request. The Commissioner issued a Notice of Inquiry on June 7, 2024.

II. RECORDS AT ISSUE

[para 14] There are no records at issue as the issue in this Inquiry relates to the timeliness of the Public Body's response.

III. ISSUE

[para 15] The June 7, 2024 Notice of Inquiry states the issue as:

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

IV. DISCUSSION OF ISSUE

[para 16] Section 11 of the FOIP Act addresses the time limit for responding to a request:

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 17] Section 14 (in part) of the FOIP Act addresses time extensions:

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

[...]

(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

[...]

(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.

[para 18] The Public Body acknowledges that the section 11 timelines have been exceeded. It further submits that the high volume of requests being processed at its office and the processing of the Applicant's numerous requests in a short time span, should be a consideration in the time needed to respond to the request.

[para 19] In its submissions, the Public Body states at paragraph 25:

...In 2023 such requests totalled approximately 946. In addition, the office is involved in privacy breach investigations, as well as providing internal advice to business areas of the Public Body in respect of programs, initiatives, proposals, documents, and activities, which range in complexity and duration.

[para 20] The Public Body further submits that earlier this year, it had to prepare and respond to Order F2024-10 of this Office, which also pertained to a request by the Applicant.

[para 21] The Public Body submits that, "in respect of the offices from which records are sought, the City Manager's Office, City Council, and the Mayor's Office, each have their own priorities and responsibilities that affect their respective response times. Furthermore, the office of each City Councillor is individually consulted on their respective records."

[para 22] Several Orders (F2018-44, F2018-57, F2021-46, F2021-51, F2022-10, F2022-11, F2023-12) of this Office have applied the analysis found in Order F2018-10. In Order F2018-10, at paragraphs 18-22, the Adjudicator discussed the Public Body's obligations under section 11 of the FOIP Act, with respect to a Public Body's workload and staffing issues:

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, 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 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 23]

As noted in Order F2024-10 at 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 24] I note that 290 days have passed since the original request (September 12, 2023) was received by the Public Body and the submissions (June 28, 2024) made by the Public Body to this office. The last update given to the Applicant was April 26, 2024, without any indication of when the Public Body would be able to respond to the request. To date, the Public Body has not responded to the request.

[para 25] Based on the submissions before me, I find that the Public Body has not made a reasonable effort to comply with section 11 of the FOIP Act.

V. ORDER

[para 26] I make this Order under section 72 of the FOIP Act.

[para 27] I order the Public Body to respond to the Applicant in accordance with the Public Body's remaining obligations under the FOIP Act.

[para 28] 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.

Pam Gill
Adjudicator