

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2024-D-02

November 15, 2024

JUSTICE

Case File Number 007391

Office URL: www.oipc.ab.ca

Summary: An applicant (the Applicant) made an access to information request to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Canadian National Railway Company is an affected third party in the inquiry into the Public Body's response to the access request (the Affected Third Party). In the course of the inquiry, the Affected Third Party raised an argument that the records at issue in the inquiry were not properly responsive to the access request. The Adjudicator found that the Affected Third Party's argument about responsiveness raised a separate issue: whether an affected third party could raise a challenge to a public body's determination that the records were responsive, and hence whether the Affected Third Party's argument should be considered in the inquiry. The Adjudicator sought submissions from the parties on the issue.

The Adjudicator found that the matter of whether records are responsive to an access request is relevant to sections 10(1) and 7(2) of the FOIP Act. While the FOIP Act suggests that only an applicant can challenge responsiveness with respect to duties owed to an applicant under section 10(1), responsiveness is a jurisdictional matter with respect to section 7(2). As a matter of jurisdiction, challenges to responsiveness in relation to section 7(2) may be brought by any party, including the Affected Third Party.

The Adjudicator decided to consider the Affected Third Party's challenge to responsiveness.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 1(b), 1(r), 7(2), 10(1).

Authorities Cited: **AB:** Orders 2001-016, F2008-018, F2015-15, F2015-22, F2021-45

I. BACKGROUND

[para 1] This is an interim decision in the second part of the inquiry into an access request made to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act). The first part of the inquiry resulted in Order F2021-45. The Public Body sought judicial review of that Order. The judicial review is presently adjourned by consent order so that I may consider the Public Body's assertion that certain records responsive to the access request are subject to settlement privilege held by the Public Body and Canadian National Railway Company (the Affected Third Party).

[para 2] In its submission addressing the issue of settlement privilege, as well as other issues raised in the second part of the inquiry, the Affected Third Party raised an argument that the records in question were outside of the scope of the Applicant's access request. The Affected Party stated,

Although not identified as an issue by the IPC, the Affected Party also wishes to raise whether the Subject Records are properly responsive to the Applicant's initial request. The Applicant sought:

... records pertaining to guidelines, policies (formal or informal), directives, instructions, notices or *internal communications* (including emails), which address the use, format, structure and decision-making framework related to orders issued under section 234 of the Environmental Protection and Enhancement Act, RSA 2000 c E-12 (otherwise known as creative environmental sentences). These records would have informed the actions of the Crown Prosecutor in the matter of *R v Canadian National Railway Company* which saw the sentence order signed on June 2, 2017, for the time period January 1, 2017 to current (July 12, 2017).

(emphasis added)

The Applicant's request was expressly limited in scope to internal communications by the Public Body. The Subject Records are exclusively external communications between counsel for the Public Body and counsel for the Affected Party. None of the Subject Records are in fact responsive to the Applicant's request for "internal communications (including emails)" and therefore should have been withheld on that basis in the first instance, regardless of whether settlement privilege applies.

[para 3] In light of the above, I considered whether to add an issue addressing whether the records at issue in this inquiry were responsive to the Applicant's access request.

[para 4] Upon reviewing the FOIP Act, I found that it was not clear that an affected third party could challenge the Public Body's decision on what records are responsive to an access request. As discussed below the concept of "responsiveness" arose in earlier orders of this office in the context of considering whether public bodies met their duty to applicants under section 10(1) to respond openly accurately and completely, by properly interpreting the access request and identifying all requested records as responsive. As the

duty is clearly only owed to applicants, I considered that it was possible that perhaps only applicants may challenge a public body's decision in that regard.

[para 5] This interim decision contains the reasons for my decision that the Affected Third Party can challenge the Public Body's decision on responsiveness, not as a matter of whether or not the Public Body met its duty under section 10(1), but as a matter of jurisdiction; specifically whether the records at issue were ever requested as required under section 7(2) of the FOIP Act. If the records were never properly the subject of an access request, I would have no jurisdiction to order the Public Body to take any action with respect to them. My authority to order public bodies to alter their responses to access requests only extends to records that were in fact requested.

II. ISSUE

A. Can the Affected Third Party challenge the Public Body's decision on responsiveness?

III. DISCUSSION OF ISSUE

A. Can the Affected Third Party challenge the Public Body's decision on responsiveness?

[para 6] I requested submissions from the parties on this issue. The Applicant and the Affected Third Party provided submissions, the Public Body did not.

[para 7] In the Affected Third Party's submission, it states that it was not its intention to request an issue be added, but rather it wished to point out the absurdity of considering the issue of whether or not settlement privilege applies to the records, "...whose disclosure the Applicant never sought, and which could and ought to have been withheld, in the first instance." Despite stating that it did not wish to add an issue regarding responsiveness, the Affected Third Party maintains that it may challenge the disclosure of the records at issue on the basis that they are beyond the scope of the access request.

[para 8] Whether or not the Affected Third Party wanted to add an issue, or simply raise an argument regarding responsiveness makes no difference. At the heart of either course of action is the question of whether the Affected Third Party can challenge the Public Body's decision on responsiveness.

[para 9] I note that other orders of this office have at least addressed third party arguments that records containing their information are non-responsive. In Order F2015-15 at paras. 9 – 10, the adjudicator noted the argument but swiftly concluded the records were responsive. The same occurred in Order F2008-018 at paras. 61 – 63. In neither case did the adjudicator consider the issue of whether the third party could challenge responsiveness. The ready conclusion regarding responsiveness would have obviated the need to do so. I am in no position to readily decide the question as I do not have copies of the records at issue in this inquiry, and so cannot determine by simple review whether

they are, in fact, responsive. Despite my requests for them, neither the Public Body nor the Affected Third Party have provided them.

[para 10] To begin, I address the Affected Third Party's statement that the records at issue should have been withheld on the basis that they are not responsive to the access request.

[para 11] Non-responsiveness is not an exception to access under which records are "withheld" under the Act. The bases on which a public body may withhold records or information are set out in Division 2 of Part 1 of the Act; a public body only engages the provisions therein where it determines a record is responsive to an access request. If a record is not responsive, there is no need to apply an exception to disclosure.

[para 12] The concepts of responsive records and non-responsive records are not mentioned in the Act. They are useful concepts enunciated in earlier orders of this office addressing whether a public body met its duty to an applicant under section 10(1) of the FOIP Act, which states,

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 13] In order to properly respond to an access request, openly, accurately, and completely, a public body has a duty to make every reasonable effort to determine which records are responsive to an access request; it must answer the question, "what records is the applicant seeking?" and regard those records as responsive. (See Order 2001-016 at para. 12 – 16). Doing so necessarily creates another set of records: those that are, by exclusion from the category of responsive records, categorized as non-responsive records. Within the context of a public body's duties to an applicant under section 10(1), responsiveness and non-responsiveness demarcate a public body's understanding of the access request, nothing more. As it comes to responding to an access request, it is the exclusive domain of a public body to make that decision and to identify as responsive all records reasonably related to an access request, aided by clarification from an applicant where required (see Order F2015-22 at paras. 21 – 26).

[para 14] As a matter of meeting a duty to applicants under section 10(1), the structure of the FOIP Act suggests that an affected third party could not challenge the public body's fulfillment of its duty to the applicant under section 10.

[para 15] The duty in section 10(1) is clearly one that arises between a public body and an applicant, and no one else. The section is specific to a duty to assist applicants and contains no contemplation that a similar duty extends to any other person, including third parties. The terms "applicant" and "third party" are defined in the Act such that they are exclusive of another. Sections 1(b) and (r) of the Act state,

(b) "applicant" means a person who makes a request for access to a record under section 7(1);

(r) “third party” means a person, a group of persons or an organization other than an applicant or a public body;

[para 16] In view of the above, a public body’s determination of whether records are responsive is not engaged vis-à-vis third parties in consideration of the duty in section 10(1). I find, however, that the issue of responsiveness is also engaged as a matter of jurisdiction with respect to section 7(2), which states,

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

[para 17] Section 7(2) sets general requirements for a request to access information. Those requirements inform the scope of what records can be regarded as responsive to the access request: the writing in the request must contain sufficient detail for a public body to conclude that a record is included within its scope, based upon proper interpretation and understanding of the request. Clarification of the intended scope and breadth of the access request may be required from an applicant, as noted above. Once properly interpreted, records that are reasonably understood to be included in the scope of access request will be responsive. A public body’s handling of those records will be subject to review by the Information and Privacy Commissioner, should an applicant seek a review.

[para 18] Conversely, a public body’s handling of records that are outside of the scope of an access request would not be subject to review. It is axiomatic that under the FOIP Act, the Information and Privacy Commissioner’s power to review responses to access request only extends to records that were actually requested. Accordingly, whether the records at issue are actually responsive is a matter of jurisdiction in this case, and as such, can be raised by any party, including the Affected Third Party in this inquiry.

IV. DECISION

[para 19] My decision is that I will consider the Affected Third Party’s argument regarding responsiveness in this inquiry. The parties will have the opportunity to make arguments on that point in their remaining submissions.

John Gabriele
Adjudicator
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