

**OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER  
OF ALBERTA**

**OIPC Inquiry #007391 (Part 2)**

**Submission of the Applicant**

**August 29, 2024**

Copies sent to:

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**Alberta Justice**

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## Introduction

1. The Adjudicator requested submissions on whether or not the Affected Third Party can challenge the Public Body's determination as to what records are responsive to the Applicant's access request.
2. This is the submission of the Applicant addressing the Adjudicator's request.
3. No grounds are available under the *Freedom of Information and Protection of Privacy Act* to an affected third party to bring a challenge to the Public Body's determination of responsiveness.<sup>1</sup>

## Section 10(1)

4. The duty to determine which records are responsive is solely that of the public body under s. 10(1) of *FOIP*, which states "[t]he head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely."<sup>2</sup>
5. This imposes a positive duty on the public body in this regard.<sup>3</sup> As detailed in Order F2008-006: "Section 10(1) of the Act imposes a general duty on a public body when responding to an applicant's request for records. As a part of this general duty, a specific duty to perform an adequate search for records in response to an access request has evolved."<sup>4</sup>
6. Determining which records are responsive to the applicant's request is expressly part of the public body's duty. This was recently described by Adjudicator Gabrielle:

The two parts of the duty to assist in section 10(1) were set out in Order F2004-008 at para 32:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?
  - Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?<sup>5</sup>
7. A legal duty carries a jural correlative in the form of a right.<sup>6</sup> In the context of the duty created by s.10, the applicant is the rightsholder. No such right is created in a third party by s. 10, or by any other section of *FOIP*, and there is no rightsholder other than the applicant with respect to the public body's s. 10 duty.

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<sup>1</sup> RSA 2000, c F-25 [*FOIP*].

<sup>2</sup> *Ibid*, s. 10(1).

<sup>3</sup> Order 96-014, at p. 38-41.

<sup>4</sup> *Re Edmonton (City)*, AB OIPC Order F2008-006, at para 21.

<sup>5</sup> *Re Rocky View County*, AB OIPC Order F2022-29, at para 14, citing AB OIPC Order F2004-008.

<sup>6</sup> Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16, at 30.

8. As the duty concerns only the right of the applicant, a third party has no basis under s.10 or any other section of *FOIP*, to challenge the public body's carrying out of this duty.

### **Section 71(3)(b)**

9. Section 71(3)(b) of *FOIP* places a burden on third parties to prove that an applicant has no right of access to a record in cases other than those involving personal information.
10. However, this does not permit a third party to challenge the public body's determination as to what records are responsive to an applicant's access request.
11. The role of a third party under *FOIP* is only to protect their information by showing there is no right of access to a record or part thereof because of an exception to disclosure in Part 1, Division 2 of *FOIP*.
12. The right of access is established by s. 6(1) and exists irrespective of an applicant's request to access records under s. 7(1). The right of access is limited by s. 6(2), which specifies that the right does not extend to information excepted from disclosure under Part 1, Division 2 of *FOIP*.
13. As a result, the only grounds upon which a third party may dispute an applicant's right of access to a record, or part thereof, are found in ss. 16 and 17 in Part 1, Division 2 of *FOIP*. Notably, disputing the public body's determination as to the responsiveness of records is not a limitation available under those sections.

### **Proving No Right of Access Is Distinct from Challenging Responsiveness**

14. Further, applying exceptions or limitations to the right of access to records, such as those available to a third party under ss. 16 and 17, is a separate process that occurs after the public body's determination of responsiveness under s. 10(1).
15. This distinction was articulated by Commissioner Clark in AB OIPC Order 97-020:

The first step in responding to an applicant's request for access is to find the records that are responsive to the applicant's request. ...

The second step in responding to an applicant's request is to decide what, if any, exceptions under the Act apply to the responsive information and records, so that the public body can tell the applicant why it won't be disclosing that information or those records. This is "severing".

I emphasize that severing is the process that occurs after a public body has determined what records or information are responsive. The removal of non-responsive information or records is not severing.

Severing information from records constitutes a refusal to provide the information. The public body must then comply with the duty under section

11(1)(c)(i) of the Act to provide an applicant with the reasons for the refusal, and the provision of the Act on which the refusal is based.<sup>7</sup>

16. This distinction between determining responsiveness and applying exceptions to the right of access means that the burden placed on third parties by s.71(3)(b) to prove that an applicant has no right of access to information in cases other than those involving personal information does not permit a third party to raise an issue related to responsiveness.
17. The scheme of *FOIP* protects the interests of third parties with limited and specific exceptions to disclosure. Allowing third parties to argue about the scope of requests and the responsiveness of records would delay and complicate the already lengthy processing of requests under *FOIP*.
18. Section 30(4) of *FOIP* makes it clear that scoping and responsiveness are not issues third parties are intended to be involved in because the notice a public body must provide a third party does not anticipate disclosing the scope or wording of the request to the third party.<sup>8</sup>

### **Timeliness and the Right of Access**

19. Finally, the Affected Third Party's attempt to challenge the Public Body's determination of responsiveness should not be allowed because it would have the effect of prolonging a process that is already susceptible to delays.
20. The Court of King's Bench of Alberta recently considered the impacts of delays and the importance of timeliness in the processing of *FOIP* requests in a decision to dismiss an application by Alberta Energy for judicial review of the decision of an OIPC Adjudicator.<sup>9</sup>
21. In that decision, Justice Teskey suggested "[t]he number of records in play for a *FOIPP* request should be precise and uncontroverted, especially 15 months into the process."<sup>10</sup>
22. It is worth noting that, in the instant case, the Applicant's request was initiated in July 2017 and the number of records in play is now being controverted *84 months* into the process.
23. Further, Teskey J. highlighted the legislative intent for timeliness and identified its importance to the right of access:

The *FOIPP* regime in Alberta is premised on relatively tight deadlines and an obligation for the public body to respond quickly. That speaks to the fact that for the right of access to information to be meaningful, it must be timely. Receiving

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<sup>7</sup> *Re Alberta Human Rights and Citizenship Commission*, AB OIPC Order 97-020, at paras 86—89 [Emphasis added].

<sup>8</sup> The *FOIP Guidelines and Practices 2009* provide a model third party notice under Appendix 3: Model Letter L. As can be seen in the model notice, the third party is not informed about the scope of the request. Instead, the third party is alerted to consideration of ss. 16 and 17 and their input is requested concerning disclosure of information, not scoping or responsiveness decisions. Link: [FOIP guidelines and practices 2009 - Appendix 3. Model letters - Open Government \(alberta.ca\)](#).

<sup>9</sup> *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198.

<sup>10</sup> *Ibid*, at para 67.

records years after a request may often be a pyrrhic victory and one that does little to contribute to the need for public accountability for government actions.<sup>11</sup>

24. The public's right of access to records is diminished if the process of resolving an applicant's request is of an unreasonably long duration. A challenge to the Public Body's determination of responsiveness by the Affected Third Party would have the effect of prolonging this process, contrary to the purpose of *FOIP* under s. 2(a) and contrary to legislative intent.
25. Finally, Justice Teskey's remarks regarding the duration of that particular *FOIP* request, and the importance of a meaningful right of access to records in a functional democracy, are illustrative of the instant case:

The effect of this is that the pace of a specific request for information can become totally disconnected from the Legislature's intention for timeliness. I find that is the case here. While I can accept that some of the delays in this matter are attributable to COVID-19, the bottom line is that the release of information in this matter has been so slow as to be practically non-existent. I further find that the Public Body's application for judicial review has further delayed the process such that it engages questions of public confidence about the practical reality of the right to information in Alberta.

Every Albertan is entitled to a broad right of access to the records of their government. This is an essential pillar of a functional democracy. *FOIPP* contemplates a regime that is prompt, accessible and fair. This regime, however, can only function where the public body adopts the attitude of access imposed on it by the Legislature. Little about this matter is consistent with these principles.

The Requesting Parties have been required to expend considerable resources and time. Most parties would have neither the resources nor stamina to continue this matter in the face of this Public Body's intransigent [sic].<sup>12</sup>

## Conclusion

26. The scheme of *FOIP* does not allow the Affected Third Party to raise issues about responsiveness of records, as it limits affected third parties to arguing information falls within *FOIP*'s exceptions to the right of access.

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<sup>11</sup> *Ibid*, at para 76 [Emphasis added].

<sup>12</sup> *Ibid*, at paras 78—80.

Sincerely,

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A handwritten signature in cursive script, appearing to read "Drew Yewchuk".

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