



Order F23-59

UNIVERSITY OF BRITISH COLUMBIA

David S. Adams
Adjudicator

August 8, 2023

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested records from the University of British Columbia (UBC). Approximately six months later, UBC still had not provided the applicant with a response. The applicant asked the Office of the Information and Privacy Commissioner to review UBC's failure to respond to his access request as required under FIPPA. The adjudicator found that UBC had failed to fulfil its duties under ss. 6(1) and 7 of FIPPA and ordered it to respond to the applicant by a set date.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 5(1), 6(1), 7(1), 7(2), 10(1), 10(2), 53(3), Schedule 1 (definition of "day"). *Interpretation Act*, RSBC 1996, c 238, s. 29 (definition of "holiday").

INTRODUCTION

[1] This inquiry is about whether the University of British Columbia (UBC) complied with its duty to respond to the applicant's access request in accordance with ss. 6(1) and 7 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Those sections require a public body to make every reasonable effort to respond without delay to an applicant's request for records, in accordance with the required statutory timelines.

[2] On January 31, 2023, the applicant made the following request to UBC:

Please provide copies of all communications, including: e-mails, texts or Instant messages, slack messages, WhatsApp messages, briefing notes, memos, media lines, contracts, invoices, etc., sent/rec'd by the Department of Geography Climate Action Committee, Centre for Law and Environment and UBC Sustainability Hub which reference any and all advocacy actions organized or funded by any of the above named UBC organizations, directed towards Vancouver city council's July 2022 motion to take legal

action against energy producers in Canada. Kindly provide all relevant documents generated [between] 01 Jan 2022 and the date this request is received.¹

[3] UBC replied the next day, acknowledging receipt of the access request and setting out a response deadline of March 15, 2023. However, UBC did not provide a response by that date. Section 53(3) of FIPPA provides that the failure of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record.

[4] On June 2, 2023, the applicant complained to the Office of the Information and Privacy Commissioner (OIPC) that UBC had failed to respond to his request according to the timelines set out in FIPPA. Mediation did not resolve the matter and it proceeded to inquiry.

[5] The applicant and UBC each provided inquiry submissions. UBC also provided affidavits from two of its staff, an FOI specialist (the FOI Specialist) and an FOI manager (the FOI Manager), both of whom worked on the applicant's request.

ISSUES

[6] The issues I must decide in this inquiry are:

1. Did UBC make every reasonable effort to respond without delay to the applicant's request, as required by ss. 6(1) and 7 of FIPPA?
2. If not, what is the appropriate remedy?

[7] FIPPA does not set out who has the burden of proving that a public body did not respond to an applicant's access request. However, previous OIPC orders place the burden on the public body to prove that it fulfilled its obligations under FIPPA, since it is in the best position to provide evidence and information on this point.² I agree with and adopt this approach.

¹ Affidavit of FOI Manager, Exhibit A.

² F20-34, 2020 BCIPC 40 (CanLII) at paras 5-6; Order 01-47, 2001 CanLII 21601 (BC IPC) at para 9; Order 02-38, 2002 CanLII 42472 (BC IPC) at paras 13-14.

DISCUSSION

Background³

[8] UBC is a public university with about 70,000 students. It “facilitates initiatives across a broad range of interests” through committees, groups, and other means.⁴

[9] The chronology of the events leading to this inquiry is not in dispute. On January 31, 2023, the applicant submitted his access request to UBC via email. On February 1, 2023, UBC acknowledged receipt of the applicant’s request and undertook to respond by March 15, 2023.

[10] On March 7, 2023, UBC wrote to the applicant to request that he clarify his access request, since in UBC’s opinion, “the request was too vague and it would take several hours to collect any responsive records.” On the same day, the applicant replied with a clarification. UBC then wrote to the applicant to say that it could try using a keyword search to find responsive records. The applicant accepted this suggestion.

[11] On May 15, 2023, UBC began preparing the records responsive to the applicant’s request for release to him.

[12] On May 31, 2023, UBC wrote to the applicant to advise him that “quite a substantial number of records” were responsive to his request. It sought his permission to exclude some of them from the request. On the same day, the applicant agreed to this proposal and asked about the length of time it was taking UBC to respond. UBC replied that the employee handling the request had been away from the office unexpectedly for several weeks.

[13] On June 2, 2023, the applicant and UBC had a telephone call in which they discussed the timeline of the request, with UBC proposing a response by the last week of June or the first week of July. The applicant did not consent to an extension of the response deadline. The applicant followed up with an emailed summary of the call, requesting confirmation that the summary was accurate, but UBC did not respond. On the same day, the applicant asked the OIPC to review UBC’s overdue response to his access request.

[14] On July 4, 2023, the OIPC issued a Notice of Written Inquiry. To date, UBC has not provided the applicant with a response to his access request.

³ The information in this section is drawn from the parties’ submissions and evidence.

⁴ UBC’s initial submission at para 4.

Duty to respond without delay

[15] FIPPA requires a public body to respond to access requests within certain timelines. The following sections of FIPPA are relevant here:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Time limit for responding

7(1) Subject to this section and sections 23 and 24(1), the head of a public body must respond not later than 30 days after receiving a request described in section 5(1).

(2) The head of a public body is not required to comply with subsection (1) if

(a) the time limit is extended under section 10...

Extending the time limit for responding

10(1) The head of a public body may extend the time for responding to a request for up to 30 days if one or more of the following apply:

(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 meeting the time limit would unreasonably interfere with the operations of the public body;

...

(d) the applicant has consented, in the prescribed manner, to the extension.

(2) In addition to the authority under subsection (1), with the permission of the commissioner, the head of a public body may extend the time for responding to the request as follows:

(a) if one or more of the circumstances described in subsection (1) (a) to (d) apply, for a period of longer than the 30 days permitted under that subsection;

(b) if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate.

Parties' positions

[16] UBC submits that it has made every reasonable effort to respond without delay to the applicant's request. It acknowledges that it has failed to respond within the time limit set out in s. 7, but says that this failure was unavoidable given the nature of the request and the volume of responsive records, as well as other demands on its resources.⁵

[17] The FOI Manager deposes that UBC's FOI office is facing increasing demands on its resources and is currently in a backlog, with 146 active access requests. She says that between January 1 and February 28, 2023, the office received 61 access requests and disclosed 12,270 pages; between March 1 and April 30, the office received 60 access requests and disclosed 15,826 pages; and that between May 1 and June 30, the office received 101 access requests and disclosed 22,313 pages.⁶

[18] UBC says it has identified about 8,962 pages of records that are "potentially disclosable" to the applicant.⁷ UBC says it is actively working on the applicant's access request and preparing the responsive records.⁸ UBC proposes a response deadline of August 18, 2023, since, as the FOI Manager deposes, there are "no additional resources available to the FOI Office at UBC to process the Applicant's request quicker than" that date.⁹

[19] UBC asks that I confirm it has made every reasonable effort to respond without delay to the applicant's request.¹⁰

[20] The applicant says that UBC's failure to respond in time was a foreseeable result of staff failing to plan adequately for time off. He says that UBC's resource issues do not negate its duty to respond to applicants within the timelines set out in FIPPA.¹¹

[21] In reply, UBC says that its FOI office experienced an unexpected and unavoidable staff shortage between February and March 2023, and says that it has continuously made reasonable efforts to staff its FOI office. It says that the office has grown from one full-time employee in 2014 to five currently.¹²

⁵ UBC's initial submission at paras 3 and 24-37.

⁶ Affidavit of FOI Manager at paras 13-15.

⁷ UBC's initial submission at para 17.

⁸ *Ibid* at para 3.

⁹ Affidavit of FOI Manager at para 14.

¹⁰ UBC's initial submission at paras 36-37.

¹¹ Applicant's response submission at paras 20-25.

¹² UBC's reply submission at paras 3-5.

What was UBC’s statutory deadline to respond and did it meet that deadline?

[22] UBC does not dispute that it received the applicant’s access request on January 31, 2023. Section 5(1) of FIPPA provides that to obtain access to a record, an applicant must make a written request that “provides enough detail to enable an experienced employee of the public body, with a reasonable effort, to identify the record sought.” UBC does not argue (though it does submit in passing that the applicant’s initial request was “too vague”)¹³, and I do not find, that the applicant’s request was deficient under s. 5(1).

[23] Schedule 1 of FIPPA provides that “day” does not include a holiday or a Saturday. Section 29 of BC’s *Interpretation Act* defines “holiday” to include Sundays and several specified holidays.¹⁴ I find that the deadline to respond to the access request was March 15, 2023. UBC concedes that it has not met the deadline imposed by s. 7 of FIPPA.

[24] UBC could have taken more than the 30 days allowed under s. 7(1) by taking a self-initiated extension (or gaining the applicant’s consent) under s. 10(1) or by requesting an extension from the Commissioner under s. 10(2).

[25] Section 10(1) allows a public body to extend its response deadline for up to 30 days if the applicant does not give enough detail to enable the public body to identify a requested record, if a large number of records are requested or must be searched and meeting the time limit would unreasonably interfere with the public body’s operations, or if the applicant consents to the extension. Meanwhile, s. 10(2) allows a public body to ask the Commissioner to extend its response timeline beyond the additional 30 days allowed by s. 10(1), or if the Commissioner otherwise considers an extension fair and reasonable.

[26] UBC did not rely on either method to extend its response timeline, so the deadline remained March 15, 2023. UBC does not explain, and I am unable to infer from the circumstances, why it did not rely on s. 10.

[27] To summarize, I find that UBC failed to respond to the applicant’s access request within the statutory deadline imposed by s. 7.

Did UBC make every reasonable effort to respond without delay?

[28] From my review of the evidence, including the parties’ correspondence, it appears that the applicant and UBC were engaged, from January to March 2023, in a productive search for solutions, including a narrowing of the access request

¹³ UBC’s initial submission at para 31.

¹⁴ *Interpretation Act*, RSBC 1996 c 238.

that would still capture the material the applicant was seeking. This correspondence was then apparently cut short.

[29] Public bodies must ensure that they have adequate resources to fulfil their obligations under FIPPA. In Order 02-38, former Commissioner Loukidelis made the following observation, which is applicable in this case:

I do not question the diligence or good faith of those who processed the applicant's request, but their inability to respond as required by law cannot – whether or not it was due to an excess of demand over the resources available to respond – wipe away the fact that the responses were late. I therefore find that both public bodies have failed to discharge their duty under s. 6(1) to respond to the applicant without delay...In both instances, I can only say that these public bodies, and all others, should ensure that adequate resources are available so that their access to information staff can process requests in compliance with the law.¹⁵

[30] Here, I make a similar finding. UBC has not responded to the applicant in a timely way. While some delay caused by UBC's resource constraints is understandable, and I accept that UBC made some efforts to narrow and clarify the applicant's request, on the evidence before me, UBC cannot be said to have discharged its burden of proving that it made every reasonable effort to respond to the applicant without delay. I therefore find that UBC has breached its duty under s. 6(1).

What is the appropriate remedy?

[31] The usual remedy in these cases is to make an order under s. 58 directing the public body to respond to the applicant by a particular date.¹⁶ I will do so here.

[32] UBC says it is actively working on the applicant's request and that it expects to respond to the applicant by August 18, 2023.¹⁷ I accept the FOI Manager's evidence that UBC has no additional resources that would allow it to respond to the applicant's request earlier than this.

[33] The applicant does not make a submission on what the appropriate remedy would be, except to say that UBC's resource issues do not negate its duty to assist applicants and to respond in time.¹⁸ He does not propose an alternative timeline.

¹⁵ Order 02-38, 2002 CanLII 42472 (BC IPC) at para 23.

¹⁶ See, e.g., Order F20-34, *supra* note 2 at para 51; Order F21-24, 2021 BCIPC 29 (CanLII) at para 24.

¹⁷ Affidavit of FOI Specialist at para 7; UBC's initial submission at paras 30 and 35-36.

¹⁸ Applicant's response submission at para 25.

[34] I agree with the applicant that a public body's resource issues do not negate its duty to respond without delay. The timelines and other duties imposed by FIPPA are legal duties. As the Director of Adjudication put it in Order F21-33, "[it] is not up to [a public body] to ignore its legal duties under FIPPA and sit back to see whether this Office will hold it to account for its failure to respect the law."¹⁹ Similarly, here it was not open to UBC to wait for the applicant to request a review from the OIPC before fulfilling its obligation to respond to the applicant's access request. However, in effect this is what UBC did.

[35] Nevertheless, I accept UBC's evidence that it does not have the resources to respond to the applicant sooner than August 18, 2023. I therefore require UBC to provide the applicant with a response to his access request by that date.

CONCLUSION

[36] For the reasons given above, under s. 58(3)(a) of FIPPA, I require UBC to perform its duty under s. 6(1) to respond to the applicant's access request by no later than **August 18, 2023**.

August 8, 2023

ORIGINALSIGNED BY

David S. Adams
Adjudicator

OIPC File No.: F23-93332

¹⁹ Order F21-33, 2021 BCIPC 41 (CanLII) at para 32.