

An Example of How Government Delays Access to Information Requests: Pretending to not Understand Them

By: Drew Yewchuk

Decision Commented On: *Re Health*, [2022 CanLII 51351 \(AB OIPC\)](#) (Order F2022-25)

Re Health, Order F2022-25 is a decision from an adjudicator at the Office of the Information and Privacy Commissioner (OIPC) ordering Alberta Health to respond to an access request that Alberta Health had wrongly refused to process. The conduct of Alberta Health described in the decision is a good illustration of the strategies used by public bodies in Alberta to defeat access requests under the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25 \(FOIP\)](#)

The Non-Processing of the Request

On November 8, 2020, the applicant sent a *FOIP* request for:

All emails received by [names of eight individuals] from Tyler Shandro

Eliminate dup-recs, drafts, dup-emails, litigation privilege, third party business and third party personal

From June 1, 2019 to November 8, 2020 (at para 1) (The names of the eight individuals are redacted from the OIPC order)

That should have been a very easy request to process. It specifies ‘e-mails’ rather than ‘all records’, and so handwritten notes and letters did not need to be searched. As a completely electronic form of records, e-mails are relatively easy to search and disclose. The language in the second line of the request eliminates certain types of records that generally take longer to process, which should have sped processing further.

But Alberta Health did not process the request. Instead, they told the applicant this:

Your request does not provide enough detail to enable Alberta Health to identify possible records. Based on the information provided to date, the request does not have sufficient detail to be considered a request under the FOIP Act. We require additional information to enable us to identify the records. (at paras 2-3)

The public body told the applicant that to be processed, the request would have to be rephrased to specify a topic of the information, something like:

All emails received by [named individuals], from Tyler Shandro that includes content regarding any and all matters related to the provision of healthcare in Alberta. (at para 5)

On November 23, 2020, the applicant agreed to the change (at para 6). Alberta Health's conduct here was already improper, a public body is not permitted to select the language of the request. *FOIP* officers have previously tried to pressure me to rephrase access request language by refusing to process a request as initially phrased. This is an inappropriate way for public bodies to avoid processing requests they do not want to process. This approach of requiring an applicant to rephrase the request in a manner selected by the public body allows public bodies to hide records by rephrasing the request to remove records from the scope of the request. For instance, if Minister Shandro had sent an inappropriate e-mail completely unrelated to the provision of healthcare in Alberta to one of the eight named individuals, it would be outside the scope of the request as rewritten by Alberta Health.

But Alberta Health's conduct would become much worse. Even though the applicant had agreed to Alberta Health's improper request, they still refused to process the request, asking for a more precise topic to be selected (at para 7). The applicant, fed up with the bizarre treatment he was getting from the Alberta Health *FOIP* office requested a review from the information commissioner on November 30, 2020, writing:

Alberta Health is refusing this request on the grounds that the request needs a specific topic or subject. I have filed and received many requests that are essentially "all the emails sent from person A to person B within this date range." This is a routine use of the Act. I have never been told that a subject or topic is a requirement for a request.

To be clear, no one at Alberta Health has advised me that this request would incur a significant fee or return too many records, or any of the usual processes that occur with a request. This is a simple refusal of access.

I ask that you direct Alberta Health to locate all of the emails in the named individuals' Outlook inboxes sent to them from the Minister, and release them subject only to the specific exemptions provided for in the Act.

I also ask that you confirm with Alberta Health that these requested records have not been destroyed, as they have not been able to confirm that with me as of today. (at para 8)

At inquiry, Alberta Health argued that their record keeping was so weird and complex that the proposed request was unworkable (at para 12-13). Alberta Health then took "the position that it does not have to search for records in Outlook because email accounts are deleted when employees leave their positions" (at para 25).

The adjudicator found the access request was "clear and it is easy to envision records that would be responsive – records sent by the former Minister to the employees named in the access request within the timeframe in the access request" (at para 17). The Adjudicator also determined Alberta's Health's claims about Outlook were nonsense, and that Alberta Health had "arbitrarily decided

that applicants may not request records stored in Outlook and that it need not look for such records. There is no authority in the FOIP Act for the Public Body’s position” (at para 26).

Alberta Health also described a new, much broader interpretation of the request that had made it unworkable, saying:

It was the Respondent’s interpretation of the access request that it was not limited to only those emails sent directly from Minister Tyler Shandro to the named individuals, but emails sent by or on behalf of Minister Tyler Shandro to those individuals. (at para 22)

There was no sign that this was the interpretation Alberta Health had taken when initially deciding not to process the request. Their earlier e-mails with the applicant did not describe this interpretation, and it is clear to me that this argument was invented when the issue was at inquiry. The adjudicator also dismissed this bizarre argument:

The Public Body appears to say that the FOIP Act requires it to interpret an applicant’s access request more broadly than an applicant intends, with the result that the request becomes insufficiently clear within the terms of section 7(2). The FOIP Act does not require a public body to interpret an access request more broadly than an applicant intends, particularly when the applicant contacts a public body to explain the narrow nature of the request. (at para 23)

The Adjudicator ordered Alberta Health to process the request (at para 40).

Alberta Health’s Victory by Delay

Alberta Health’s arguments were laughable. In my view, Alberta Health never could have believed their position would be successful before the information commissioner. Alberta Health lost on every point, but their strategy was a success. As I described in an earlier post [here](#), the long delays occasioned by forcing a complaint, mediation, and inquiry by the OIPC is a victory for the government. It also punishes the applicant by wasting their time.

The request was first filed November 8, 2020, and so the records should have been released by December 8, 2020. Order F2022-25 was released on May 11, 2022 and the public body will now start to process the request. By pretending to be too incompetent to understand how to process the request, Alberta Health bought themselves more than 500 days of delay.

FOIP requests are defeated by delays that ruin the newsworthiness of the records, which is what has happened here: Tyler Shandro, the Minister who was the target of the request, was shifted out of his position as the Minister of Health back in September 2021. The facts this OIPC decision describes are a successful cover-up operation by Alberta Health of something or other, but exactly what it was is not yet clear. Especially damning, in my perspective, is that Alberta Health issued two ‘stop pulling’ emails on November 16, 2020 and November 24, 2020 telling their staff to stop locating responsive e-mails (at para 13). By sending those ‘stop pulling’ emails, Alberta Health’s *FOIP* office effectively admitted they knew the search for records would turn up records. They ordered those records not to be found. There are no penalties for public bodies that adopt these

inappropriate delay tactics against applicants, and the government staffers who carried out the cover-up will likely be rewarded for their loyalty to the Minister and the party.

In other *FOIP* news, the Select Special Information and Privacy Commissioner Search Committee recommended the appointment of [Diane McLeod](#) as the new information and privacy commissioner. She appears to be [well-suited for the job](#), and I wish her luck in getting Alberta *FOIP* and the OIPC working. It will not be easy.

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