



**Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph**

REVIEW REPORT 24-16

October 23, 2024

Department of Community Services

Summary: The Department of Community Services (public body) did not issue a decision to the applicant in response to an access to information request within the legislated time period required by the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. The cause of the delay was related to the public body's search actions. The applicant appealed to the Office of the Information and Privacy Commissioner. The Commissioner finds that the public body is in contravention of s. 7 of *FOIPOP* and recommends that a decision be issued to the applicant within 14 days of the date of this review report.

This is the fifth report that the Commissioner has made since August 2023 because the public body has failed to respond to the applicant within the statutory deadline. For this reason, the Commissioner builds upon her recommendation in *NS Review Report 24-03* that senior leadership at the public body address this problem by ensuring it has sufficient resources to fulfill its legal obligations under *FOIPOP*. In this report, the Commissioner elaborates on this by recommending that within one month of the date of this report, the public body hire additional staff and explore any other avenues that could be capitalized on to complete this work.

INTRODUCTION:

[1] On May 31, 2024, the applicant made a request for records (access request) held by the Department of Community Services (public body) under the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. Section 7(2) of *FOIPOP* required the public body to issue a decision in response to the access request within 30 days, which in this case was by July 2, 2024, unless an authorized time extension was taken.

[2] A public body may, on its own accord, extend the time to respond to an access request for up to 30 days if it meets one or more of the circumstances set out in s. 9(1) of *FOIPOP*. On June 28, 2024, the public body advised the applicant that it was taking a time extension under s. 9(1)(b) of *FOIPOP*. This section allows the public body to take a time extension if a large number of records is requested or must be searched, and meeting the time limit would unreasonably interfere with the operations of the public body. This extended the public body's time to respond to August 1, 2024.

[3] The public body did not issue a decision in response to the access request by that time. On September 4, 2024, the applicant filed a review request with the Office of the Information and Privacy Commissioner (OIPC) about the public body’s failure to respond to their access request.

[4] The OIPC’s efforts to informally resolve this matter and facilitate a decision being issued were not successful. As such, this matter proceeded to this public review report.

ISSUE:

[5] Did the public body meet its duty to assist the applicant by responding without delay as required by s. 7 of the *Freedom of Information and Protection of Privacy Act*?

DISCUSSION:

Burden of proof

[6] With respect to the duty to assist set out in s. 7, *FOIPOP* is silent as to who bears the burden of proof. Therefore, the parties must each submit arguments and evidence in support of their positions. However, it is the public body who failed to make a decision in this case and who is in the best position to discharge the burden of proof.

Did the public body meet its duty to assist the applicant by responding without delay as required by s. 7 of the *Freedom of Information and Protection of Privacy Act*?

[7] For the reasons provided below, I find that the public body is in contravention of s. 7 of *FOIPOP* in that it has failed to respond to the applicant’s access request within the required legislated time period.

[8] Section 7(1) requires public bodies to respond to access requests openly, accurately, completely and without delay. Section 7(2) requires public bodies to respond to access requests within 30 days unless an authorized time extension has been taken by the public body or granted by the OIPC under s. 9 of *FOIPOP*. Section 7(3) states that when a public body fails to respond to an applicant within the statutory time period, it is deemed to have refused access to the requested records. This circumstance is referred to as a “deemed refusal.”

[9] The reason for the delay in this case is related to the public body’s search efforts. *FOIPOP* requires a public body to (a) retrieve or collect the records, (b) “process” the records (i.e., apply any applicable exemptions), and (c) notify third parties under s. 22. These steps must be taken within 30 days because a decision must be issued to the applicant within 30 days. Searches for records should be completed within 10 days of receiving the access request.¹ This is important because it gives Information Access and Privacy (IAP) Services² enough time to consider

¹ *Access & Privacy Essentials Toolkit FOIPOP & MGA* (December 2019), online: Office of the Information and Privacy Commissioner for Nova Scotia

<<https://oipc.novascotia.ca/sites/default/files/publications/Access%20%26%20Privacy%20Essentials%20Toolkit%20%28FOIPOP%20%26%20MGA%29%202019%2012%2005.pdf>>, at p. 21 (Request Processing Checklist).

² Information Access and Privacy (IAP) Services was formed April 1, 2015, by centralizing information access and privacy staff from across several government departments into one centralized service at the Department of Service Nova Scotia and Internal Services (now called the Department of Service Nova Scotia). The mandate for this group is to provide information access and privacy policies, practices, services and resources for government. This

whether a time extension is warranted and if so, to take it and/or request permission from the OIPC to extend the time for response before the public body is deemed to have refused to give access to the requested records. Or, if a time extension is not warranted, it gives IAP Services enough time to get the records processed, complete any internal sign-off, and issue a decision to the applicant within the 30-day statutory timeframe.

[10] In this case, the public body was asked to retrieve the records on June 5, 2024. A partial amount of the records (188 pages) was provided to IAP Services on June 5, 2024 (well before the initial July 2, 2024 deadline for response). The public body provided IAP Services with an additional 69 pages of records on June 6, 2024 (again, well before the initial July 2, 2024 deadline). Upon review of these records, it became apparent that there were likely still records missing that were responsive to the applicant's request. IAP Services followed up with the public body to explain this and ask it to do additional searches.

[11] As set out in paragraph 2 of this review report, on June 28, 2024, the public body advised the applicant that it was taking a time extension under s. 9(1)(b) of *FOIPOP*, which extended its deadline for response to August 1, 2024. Unfortunately, the public body exceeded this deadline. By its August 1, 2024 deadline, the public body still had not pulled the remainder of the responsive records.

[12] Instead, on August 14, 2024, the public body provided IAP Services with 1,389 pages of responsive records. At this point, the public body was in a deemed refusal position because it failed to meet its extended August 1, 2024 deadline and it failed to request an additional time extension from the OIPC before the August 1, 2024 response date. By delaying the collection of records, there was no way to go back and ask for a time extension, as s. 7(3) of *FOIPOP* makes it clear that once the deadline has passed, the public body is deemed to have refused to give the applicant the record.³

[13] An additional 1,248 pages were then provided to IAP Services on September 10, 2024. As of September 20, 2024, the records collected amounted to 2,894 pages.

[14] IAP Services has taken some steps to get this file out the door. These efforts were hampered by the public body's delay in conducting the search for records. So far 26 duplicate pages and 1,220 pages of not responsive records have been removed from the responsive records. However, the public body said that 1,648 pages still need to be reviewed. It also said that consultations *may* be required but no details about the type or volume of the potential consultations were provided, nor whether they are mandatory under *FOIPOP*. I cannot consider hypothetical consultations.

information was obtained from an Information Access and Privacy Services pamphlet prepared for the 2018 Reverse Trade Show.

³ *Time Extension Request Guidelines for Public Bodies* (November 2022), online: Office of the Information and Privacy Commissioner for Nova Scotia

https://oipc.novascotia.ca/sites/default/files/forms/FOIPOP%20Forms/2022%2011%2001%20FOIPOP%20Time%20Extension%20Guidelines_0.pdf, at p. 2.

[15] The public body also noted that given the size of this file, a time extension under s. 9(1)(b) would likely have been granted by the OIPC. I agree. A file of this size is large for this public body. But once the file is in a deemed refusal position, there is nothing else that the law allows me to do. That is why it is so important to collect records quickly so that a time extension can be requested within statutory deadlines. If that is not done, as is the case here, there is no going back – the public body has been deemed to refuse the applicant access to the requested records.

[16] Nevertheless, the reason for the delay in this case is the same as that in *NS Review Report 23-06*,⁴ *NS Review Report 23-07*,⁵ *NS Review Report 23-08*⁶ and *NS Review Report 24-03*⁷ – the public body failed to collect the responsive records and provide them to the IAP Services administrator responsible for processing them in a timely manner.

[17] In *NS Review Report 23-07* I said:

[18] The actions of the public body are raising alarms for me in this case. Employees appear to be either failing to appreciate that they cannot simply ignore statutory deadlines, or they do not have enough resources to deal with access requests in a timely manner. Regardless of what is causing these actions, they need to stop. Employees either need education on their role or more resources to ensure that they have enough time to respond as required by law. If the public body is unable to meet its statutory timelines, it must retain additional resources to ensure that it stays in compliance with the law.

[18] In *NS Review Report 23-08* I said:

[13] The information supplied by the public body leads me to believe that the reason it cannot respond within the statutory time period is an ongoing resourcing issue. That is not a valid circumstance warranting a finding that responding would result in unreasonable interference. Public bodies need to ensure that there are sufficient resources to respond to access requests in a timely manner. As long ago as 2002, former British Columbia Information and Privacy Commissioner said the following, which applies 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.⁸

⁴ *NS Review Report 23-06, Nova Scotia (Department of Community Services) (Re)*, [2023 NSOIPC 7 \(CanLII\)](#).

⁵ *NS Review Report 23-07, Nova Scotia (Department of Community Services) (Re)*, [2023 NSOIPC 8 \(CanLII\)](#).

⁶ *NS Review Report 23-08, Nova Scotia (Department of Community Services) (Re)*, [2023 NSOIPC 9 \(CanLII\)](#).

⁷ *NS Review Report 24-03, Nova Scotia (Department of Community Services) (Re)*, [2024 NSOIPC 3 \(CanLII\)](#).

⁸ *BC Order 02-38, Office of the Premier and Executive council operations and Ministry of Skills Development and Labour (Re)*, [2002 CanLII 42472 \(BC IPC\)](#), at para. 23.

[19] In its representations to me, the public body expressed that it is doing its best to respond to access requests in a timely manner but that this is challenging because the staff being asked to search for information have high workload demands, as they are service delivery staff who are providing direct services to clients. My question for the public body is what else has it tried to do to resolve this ongoing problem? Can searches not be done electronically by information technology staff to take this work off the hands of service delivery staff? Has overtime been approved for this task? Have additional staff been obtained to address this concerning issue? It is the public body's role to explore every possibility it can utilize to comply with its legal obligations.

[20] I understand that there are competing pressures and that is challenging, but *FOIPOP* is a law that must be followed. Furthermore, the time limits imposed by *FOIPOP* are reasonable. They require a response within 30 days but also permit the extension of time in limited circumstances. This balance is a recognition that the value of information often decreases with delay.⁹ It is important that public bodies understand their legal obligation to conduct adequate and timely searches when collecting records in response to access requests.

[21] This is now the fifth deemed refusal complaint about this public body resulting from not collecting records in a timely manner that has proceeded to a public review report since August 2023. This is very troubling. There seems to be a pattern of contravening the law. There seems to be acceptance that it is permissible to exceed legal timelines because the public body has other work to do. It is not. The public body is legally obligated to find the resources it needs to comply with its *FOIPOP* obligations.

[22] Overall, I once again strongly urge the public body not to take a similar approach in future. Its actions in this matter not only contravene s. 7 of *FOIPOP* but are also inconsistent with the purpose and spirit of the law.

[23] In reviews where deemed refusal is at issue, the only remedy is for the public body to issue a decision to the applicant. I have made that recommendation below. Given that I am now issuing the fifth review report to address the same problem in such a short period of time, in the recommendations below I have also strengthened Recommendation #2 from *NS Review Report 24-03*.

FINDING & RECOMMENDATIONS:

[24] I find that the public body is in contravention of s. 7 of *FOIPOP* in that it has failed to respond to the applicant's access request within the legislated time period.

[25] I recommend that:

1. Within 14 days of the date of this review report, the public body issue a decision in response to the applicant's access request, along with a copy of the records.¹⁰

⁹ *AB Order F2022-10, Environment and Parks (Re)*, [2022 CanLII 14907 \(AB OIPC\)](#), at para. 13.

¹⁰ Per s. 8(1)(a)(i) of *FOIPOP*.

2. Within one month of the date of this review report, senior leadership at the public body address this problem by ensuring it has sufficient resources to fulfill its legal obligations under *FOIPOP*. This includes hiring additional staff and exploring any other avenues that could be capitalized on to complete this work.

October 23, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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