



Duty to Assist #3

Third Party Notice

Guidelines for Public Bodies and Municipalities

Office of the Information and Privacy Commissioner for Nova Scotia
March 25, 2019

Notice to Users

This document is intended to provide general information only. It is not intended nor can it be relied upon as legal advice. As an independent agency mandated to oversee compliance with *FOIPOP*, *MGA* and *PHIA* the Office of the Information and Privacy Commissioner for Nova Scotia cannot approve in advance any proposal from a public body or municipality. We must maintain our ability to investigate any complaints and to provide recommendations in response to these complaints. The contents of this document do not fetter or bind this office with respect to any matter, including any complaint investigation or other matter respecting which the Information and Privacy Commissioner for Nova Scotia will keep an open mind. It remains the responsibility of each public body or municipality to ensure that it complies with its responsibilities under the relevant

INTRODUCTION

Under the *Freedom of Information and Protection of Privacy Act (FOIPOP)* and the *Municipal Government Act, Part XX (MGA)*, public bodies and municipalities are required to fully disclose requested records unless one or more of the specific and limited exemptions set out in the law apply. Two of those exemptions relate to the interests of third parties:

- Third party personal privacy: s. 20 *FOIPOP* / s. 480 *MGA*
- Third party confidential business information: s. 21 *FOIPOP* / s. 481 *MGA*

There are several unique rules associated with the third party exemptions. One of those unique rules is that the law requires that third parties be provided with notice of any proposed disclosure in advance of disclosure of information relating to them in certain circumstances.¹

The duty to assist requires a public body or municipality to make every reasonable effort to respond without delay to the applicant, openly, accurately and completely. If the responsive record includes third party information, part of meeting the duty to assist includes providing timely notice to third parties in accordance with the steps and timelines set out in the law. By completing third party notice in accordance with the law and in a timely fashion, public bodies and municipalities put themselves in a position to respond to applicants openly, accurately and completely. This guideline sets out the essential steps to completing third party notice in accordance with the law.

REQUIREMENT TO PROVIDE THIRD PARTY NOTICE

Both the *MGA* and *FOIPOP* require that third parties be provided with notice in certain circumstances. Section 22(1) of *FOIPOP* provides that notice to third parties is required “on receiving a request for access to a record that the head of the public body has reason to believe contains information the disclosure of which must be refused pursuant to section 20 or 21”. Section 482 of the *MGA* provides that notice to third parties is required “when a responsible officer receives a request for access to a record that contains or may contain information of or about a third party that cannot be disclosed”.

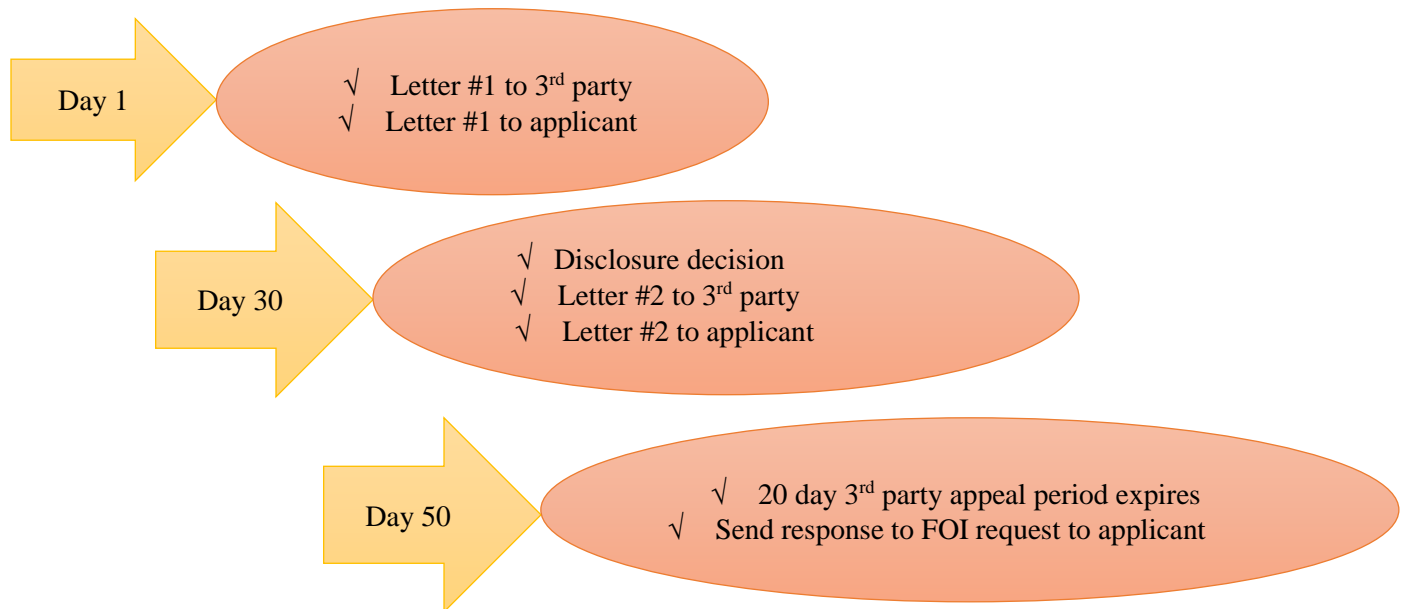
The Supreme Court of Canada has made clear that the requirement for third party notice in access to information laws has a low threshold. Observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information may be disclosed by a mistake.²

¹ A copy of the relevant sections is provided in Appendix 1 to this guideline.

² See *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII), at para 80 [*Merck Frosst*].

THIRD PARTY NOTICE TIMELINE

The third party notice provisions include a number of important time limits summarized below:



STEPS TO COMPLETING THIRD PARTY NOTICE

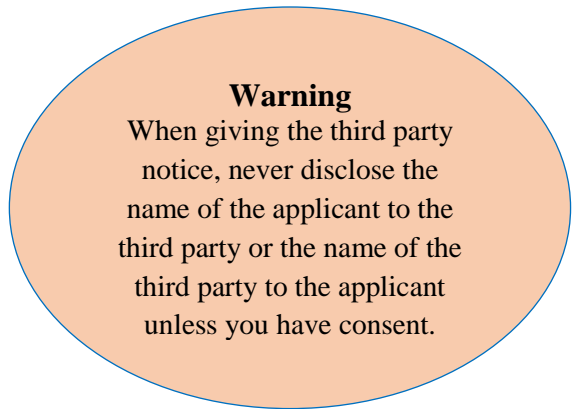
When a public body or municipality receives a request for records it believes might affect the interests of a third party, there is a nine-step notice process involved. By following these nine steps, public bodies and municipalities will ensure that they properly identify third party information and give third parties the opportunity to provide input relating to the potential disclosure of the third party information.

- 1. Review the records:** First, carefully read the records at issue and decide if there is reason to believe the records contain or may contain information the disclosure of which must be refused under a third party exemption. Only if there is some reason to believe a third party exemption might apply does notice need to be given. This is not a high test, but it is a necessary first step. Public bodies and municipalities should stop here if there is no reason to believe that a third party exemption applies.
- 2. Decide if third party notice is required:** Also, keep in mind that notice is not required in two circumstances: (i) if the public body or municipality has sufficient evidence to support the application of a third party exemption and decides to refuse access to the record or (ii) if giving notice is not practical.³ The Regulations provide that notice is deemed practical where the third party can reasonably be located.⁴

³ FOIPOP s. 22(1A), MGA s. 482(1A).

⁴ Regulation 105/94 as amended, ss. 13, 14. If the third party is a corporation the Regulations provide that notice given to the third party by registered mail to the last known address of the recognized agent of the corporation or last known address of the corporation without an agent is sufficient. See Appendix 1 for the full text of the Regulation.

3. Time extension: If the public body or municipality decides that a third party exemption might apply, then third party notice is required. In total, the process can take up to 50 days to complete. The law specifically provides that the 30-day time period for responding to requests is not extended by reason only that a notice has been given to a third party.⁵ Public bodies and municipalities will need to consider whether or not they must take a time extension⁶ or request a further time extension from the Information and Privacy Commissioner to ensure they have enough time to complete the third party notice process and provide a final response to the applicant. Make this decision before the time to respond to the access to information request expires. Typically, a time extension request would be for 51 days. Thirty days to complete the notice and decision, 20 days for the third party appeal time period and 1 additional day because the 20-day appeal time period ends at midnight on the 20th day. You will need at least one additional day to get the response package out to the applicant. For more information on time extensions, see our time extension guidelines.⁷



4. Letter #1 to third party: If a third party exemption might apply, it is best practice for the public body or municipality to highlight those portions of the records it thinks the exemption applies to and send a copy of the records, a copy of the relevant section of the *Act* and a letter to the third party explaining that it is seeking the third party's evidence on whether or not the exemption might apply to the records. Where the exemption relates to third party confidential business information, the letter should include an explanation of the three-part test and remind the third party that it must prove that all three parts of the test apply to any withheld information.⁸ The public body or municipality must tell the third party that it has 14 days to either consent to the disclosure or to make representations as to why the exemption should be applied.⁹

5. Letter #1 to the applicant: On the same day the public body or municipality writes to the third party, it should also write to the applicant advising him/her that it has notified a third party and is awaiting the third party's response.¹⁰ It must advise the applicant that it has up to 30 days to decide whether to give access to the records or part of the records.

6. Make a decision: A public body or municipality has up to 30 days from the date notice was given to the applicant (step 4) to decide but it cannot decide before it hears from the third party or

⁵ Section 22(3) *FOIPOP*, s. 482(3A) *MGA*.

⁶ Section 9 *FOIPOP*, s. 469 *MGA*.

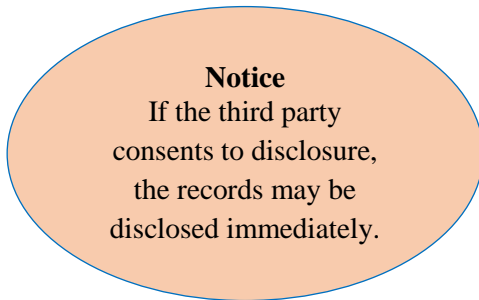
⁷ Available on our website at: <https://oipc.novascotia.ca/toolsguidance>.

⁸ Remember, if the third party disagrees with the public body or municipality, the third party business can file a request for review and in that review, the third party bears the burden of proving that the third party business exemption applies. *FOIPOP* s. 45(3)(b), *MGA* s. 498(3)(b)).

⁹ Section 22(1)(c) *FOIPOP*, s. 482(1)(c) *MGA*.

¹⁰ Section 22(2) *FOIPOP* and s. 482(2) *MGA* set out the obligation to give the applicant notice that the third party is being given an opportunity to make representations.

after 14 days from when the notice is given to the third party, whichever comes first.¹¹ If the third party consents to the disclosure, it cannot sever any information under the third party exemption. If the third party does not consent to the disclosure, then the public body or municipality must consider any information provided by the third party or any other evidence it has that supports the application of the third party exemption. It then can make a final decision on what, if anything, will be withheld.



7. Letter #2 to the third party: The public body or municipality must write to the third party and advise the third party of its decision.¹² Best practice is to provide a copy of the records with any proposed severing. If the public body or municipality intends to disclose part or all of the records, its letter must advise the third party that it has the right to request a review of that decision within 20 days.¹³

8. Letter #2 to the applicant: On the same day the public body or municipality sends letter #2 to the third party, it must write to the applicant and advise him/her of its final decision regarding the third party business information.¹⁴ It also must advise that it will

give access to the records consistent with its decision unless the third party files a request for review within 20 days.

9. Send access to information response to the applicant: Once the 20-day appeal period has expired, the public body or municipality must confirm that the third party has not filed an appeal either to the Nova Scotia Supreme Court or to the Office of the Information and Privacy Commissioner. If there is no outstanding appeal, it can then send the final decision and package of responsive records to the applicant. If an appeal has been filed, the public body or municipality must not disclose the records in dispute until the appeal has been heard.

QUESTIONS

This guidance was prepared by the Office of the Information and Privacy Commissioner for Nova Scotia. Whether you are an applicant, a public body or a municipality, we encourage you to contact us if you have any questions about the access to information process in Nova Scotia.

Phone: 902-424-4684
Toll Free (NS): 1-866-243-1564
TDD/TTY: 1-800-855-0511
Fax: 902-424-8303
Email: oipecns@novascotia.ca

¹¹ Section 23(1) of *FOIPOP*, s. 482(3) *MGA* set out the obligation to make a decision not before the earlier of 15 days after the first notice is given to the third party or the day a response is received by the third party and overall, within 30 days after notice is given to the applicant.

¹² Section 23(2)(b) of *FOIPOP*, s. 482(4) of *MGA* set out the obligation to notify the third party of the decision.

¹³ Section 23(3) of *FOIPOP*, s. 482(5) of *MGA* provide that where the decision is to give access to the records or part of the records, the public body or municipality must notify the third party of its right to request a review within 20 days after the notice is given.

¹⁴ Section 23(2)(a) of *FOIPOP*, s. 482(4) of *MGA* set out the obligation to notify the applicant of the decision.

Appendix 1: Relevant Statutory Provisions

Freedom of Information and Protection of Privacy Act

Notices

22 (1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the third party a notice

- (a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party;
- (b) describing the contents of the record; and
- (c) stating that, within fourteen days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

(1A) Notwithstanding subsection (1), that subsection does not apply if

- (a) the head of the public body decides, after examining the request, any relevant records and the views or interests of the third party respecting the disclosure requested, to refuse to disclose the record; or
- (b) where the regulations so provide, it is not practical to give notice pursuant to that subsection.

(2) When notice is given pursuant to subsection (1), the head of the public body shall also give the applicant a notice stating

- (a) that the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party; and
- (b) that the third party is being given an opportunity to make representations concerning disclosure. (c) repealed 1999 (2nd Sess.), c. 11, s. 11.

(3) For greater certainty, the time limited by subsection (2) of Section 7 for responding to a request for access to a record is not extended by reason only that a notice is given to an applicant pursuant to subsection (2) of this Section, but that time may be extended pursuant to Section 9.

(4) In complying with subsections (1) and (2), the public body shall not

- (a) disclose the name of the applicant to the third party without the consent of the applicant; or
- (b) disclose the name of the third party to the applicant without the consent of the third party.

Decisions

23 (1) Within thirty days after notice is given to an applicant pursuant to Section 22, the head of the public body shall decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of

- (a) fifteen days after the day notice is given; or
- (b) the day a response is received from the third party.

(2) On reaching a decision pursuant to subsection (1), the head of the public body shall give written notice of the decision to

- (a) the applicant; and
- (b) the third party.

(3) Where the head of the public body decides to give access to the record or to part of the record, the notice shall state that the applicant will be given access unless the third party asks for a review pursuant to this Act within twenty days after the day notice is given pursuant to subsection (2).

(4) Notwithstanding anything contained in this Section, the head of a public body who has, pursuant to Section 22, given notice to a third party of a request for access to a record may, with the consent of the third party, give access to the record to the person who has made the request before the expiration of the time limited by subsection (3) for the third party to ask for a review.

FOIPOP Regulation 105/94

Notice to Third Parties

13 For the purposes of subsections 22(1) and 31(2) of the Act, it is deemed to be practicable to give the third party a notice where the third party can reasonably be located.

14 Where a third party is a corporation registered to carry on business in the Province, a notice to the third party pursuant to subsection 22(1) of the Act or a notice of disclosure to the third party pursuant to subsection 31(3) of the Act shall be given by registered mail addressed to the last known address of the recognized agent of the corporation or if the corporation does not have a recognized agent, by registered mail addressed to the last known address of the corporation.

Notice to third party

482 (1) When a responsible officer receives a request for access to a record that contains or may contain information of or about a third party that cannot be disclosed, the responsible officer shall, where practicable, promptly give the third party a notice

- (a) stating that a request has been made by an applicant for access to a record containing information that disclosure of which may affect the interests, or invade the personal privacy, of the third party;
- (b) describing the contents of the record; and
- (c) stating that, within fourteen days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the responsible officer explaining why the information should not be disclosed.

(1A) Notwithstanding subsection (1), that subsection does not apply if

- (a) the responsible officer decides, after examining the request, any relevant records and the views or interests of the third party respecting the disclosure requested, to refuse to disclose the record; or
- (b) where the regulations so provide, it is not practical to give notice pursuant to that subsection.

(2) When notice is given pursuant to subsection (1), the responsible officer shall also give the applicant a notice stating that

- (a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party; and
- (b) the third party is being given an opportunity to make representations concerning disclosure.
- (c) repealed 2003, c. 9, s. 90.

(3) Within thirty days after notice is given to an applicant, the responsible officer shall decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of

- (a) fifteen days after the day notice is given; or
- (b) the day a response is received from the third party.

(3A) For greater certainty, the time limited by subsection 467(2) for responding to a request for access to a record is not extended by reason only that a notice is given to an applicant pursuant to subsection (2), but that time may be extended pursuant to Section 469.

(3B) In complying with subsections (1) and (2), the municipality shall not

- (a) disclose the name of the applicant to the third party without the consent of the applicant; or
- (b) disclose the name of the third party to the applicant without the consent of the third party.

(4) On reaching a decision, the responsible officer shall give written notice of the decision to the applicant and the third party.

(5) Where the responsible officer decides to give access to the record or part of the record,

- (a) the notice shall state that the applicant will be given access after twenty days, unless, in that time, the third party asks for a review pursuant to this Part;
- (b) the notice shall state that the third party may ask for a review pursuant to this Part within twenty days of the notice; and
- (c) access shall not be provided until the expiry of the twenty day period.

(6) Notwithstanding anything contained in this Section, the responsible officer who has, pursuant to this Section, given notice to a third party of a request for access to a record may, with the consent of the third party, give access to the record to the person who has made the request before the expiration of the time limited by subsection (3) for the third party to ask for a review.

MGA Regulation

MGA

s. 501(2) The regulations made pursuant to the *Freedom of Information and Protection of Privacy Act* apply with respect to this Part with all necessary changes, unless the Governor in Council decides otherwise, by regulations made pursuant to subsection (1).