



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

REVIEW REPORT 21-02

January 29, 2021

NSCAD University

Summary: NSCAD University (NSCAD) did not issue decisions in response to two access to information requests to the applicant within the legislated time period required by the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. The applicant appealed to the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC). The cause of the delay appears to initially have been because NSCAD did not have processes in place to receive mail due to the impacts of COVID-19 on its operations. Once it received the access to information requests, NSCAD provided no rationale for why it did not respond to the applicant within statutory time frame. The Commissioner finds that NSCAD is in violation of s. 7 of *FOIPOP* and recommends that the decisions be issued within 30 days and appropriate processes be put in place to respond to its access to information obligations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 7(1), 7(2), 7(3); *Interpretation Act*, [RSNS 1989, c 235, s. 19\(k\)](#).

Authorities Considered: Nova Scotia: Review Report 18-06, [2018 NSOIPC 6 \(CanLII\)](#), Review Report 20-01, [2020 NSOIPC 1 \(CanLII\)](#).

INTRODUCTION:

[1] The applicant advised that on November 5, 2020, he mailed two access to information requests, along with the two application fees, from outside of Nova Scotia to NSCAD University (NSCAD). The applicant said that he made the same two requests via email to NSCAD's designated FOIPOP administrator on November 11, 2020.

[2] The requests were made under the *Freedom of Information and Protection of Privacy Act (FOIPOP)* for various records in relation to human resources matters. Thirteen subject areas were listed in the two requests. It appears that a significantly large volume of records were requested by the applicant.

[3] NSCAD did not issue the decisions in response to the access to information requests by the 30-day due date estimated by the applicant, so the applicant told this office that he followed up with NSCAD on December 9, 2020. The applicant also said that he had made many previous attempts to contact NSCAD by email and by phone with no response received.

[4] The applicant filed a review request with the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC) relating to NSCAD's failure to respond to his access to information requests by December 9, 2020.¹

[5] A failure by a public body to give an applicant a written decision within the statutory time limit is, under s. 7(3) of *FOIPOP*, deemed to be a refusal to give access to the record. This circumstance is regularly referred to as "deemed refusal".

ISSUE:

[6] Did NSCAD 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:

Relevant statutory provisions

[7] Section 7(2) of *FOIPOP* is straightforward. It requires public bodies to respond to access to information 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*. In this case, no time extensions were taken under s. 9 of *FOIPOP*.

Did NSCAD 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*?

[8] Both parties were invited to provide representations setting out their arguments as to whether NSCAD met its duty to assist the applicant by responding without delay. NSCAD did not provide representations in response to the OIPC's Notice of Review. The applicant provided some information with his request for review. In addition, I have relied on the information gleaned from the parties during the intake stage of the review process.

[9] The NSCAD FOIPOP administrator told this office that on October 16, 2020, the applicant emailed her about his anticipated access to information requests. The NSCAD FOIPOP administrator said that in response, she asked the applicant to email his requests for information and explained that the application fees could be paid by cheque.

[10] The applicant says he placed his access to information requests in the mail on November 5, 2020. NSCAD claims to have not received the mail. The applicant also supplied this office with an email dated November 11, 2020, that appears to show that he sent the access to information

¹ Based on the date of when the applicant claims to have placed the requests in the mail and the estimated delivery time on Canada Post's website, the estimated arrival date would have been November 13, 2020. Thus, the actual due date was not until December 14, 2020.

requests to the NSCAD FOIPOP administrator by email on that date. NSCAD claims to have not received this email.

[11] The applicant provided an email dated December 9, 2020 from NSCAD to him that stated:

All NSCAD University campuses are closed due to COVID-19 and NS Public Health instructions to universities. Staff are working from home, so I have no way to receive NSCAD hardcopy mail. I am glad that you have emailed your application. I will date your digital request as received today, December 9, 2020 and will waive the application fee (the cheque will not be cashed).

I can only respond by email as I do not have a NSCAD phone number due to a technical problem that does not forward messages or record voice mail.

[12] *FOIPOP* requires public bodies to both retrieve the records and “process” them (i.e. apply any applicable exemptions and provide a copy to the applicant) within 30 days unless time extensions are taken in accordance with s. 9 of *FOIPOP*. It is up to public bodies to set their own internal processes to ensure that access to information requests are responded to within the 30-day time frame required by *FOIPOP*.

[13] Based on the applicant’s claim that he placed the requests in the mail on November 5, 2020 and using the estimated delivery times on Canada Post’s website, the estimated arrival date would have been November 13, 2020. This means that NSCAD’s response was due December 14, 2020. Even if I give NSCAD the benefit of the doubt that the mail had not arrived, it is clear that NSCAD acknowledged receipt of the requests on December 9, 2020. Using this as the start date, the due date was January 11, 2021. Either way, NSCAD’s 30-day response time has passed and so it is deemed to have refused access to the requested records pursuant to s. 7(3) of *FOIPOP*.

[14] This deemed refusal review is unlike any other this office has ever received. In this case, NSCAD’s reasoning for not having issued the decisions in December 2020 was that it had not received the access to information requests sent in the mail because its staff were working from home during the COVID-19 pandemic and as a result, were not picking up any mail.

[15] In April 2020, the OIPC supported the International Conference of Information Commissioners’ statement *Access to Information in the context of global pandemic COVID-19*² about public bodies’ obligations regarding access to information requests during a global pandemic. This statement includes support for a flexible approach that takes into account the compelling public interest in the current health emergency, while safeguarding the values of the right to access information.

[16] What this means in practice is that the OIPC recognizes the pandemic as an exceptional and unforeseeable situation and expected that at the outset of the pandemic public bodies may have been delayed in responding to access to information requests; however, the obligations of *FOIPOP* remain and a public body cannot merely cease processing access to information

² [ICIC – Access to information in the context of global pandemic COVID-19 \(informationcommissioners.org\)](https://www.informationcommissioners.org/).

requests. Responding to access to information requests is a legislated mandate. Public bodies were required to make arrangements, while respecting public health directives, to continue to meet their obligations under *FOIPOP*.

[17] While some flexibility was understandable at the outset of the pandemic in approximately March 2020, the applicant made his requests in either November or December 2020. By now, the OIPC expects that all public bodies have implemented practices and procedures that would enable them to respond to access to information requests within statutory timelines while respecting COVID-19 public health directives.

[18] In this case, NSCAD did not make a plan for how to mitigate the impacts of COVID-19 on its legislated responsibilities to receive and respond to applicants who are exercising their rights under *FOIPOP*, even eight months after the shutdowns began and people transitioned to working from home.

[19] There is no question that this is a concerning situation. NSCAD failed to have appropriate processes and tools in place to respond to its obligations under *FOIPOP*.

[20] Furthermore, even once it acknowledged the access to information requests, NSCAD still did not respond within the statutory 30-day time frame. NSCAD provided no rationale to this office for why it did not respond within the statutory time frame. Even more concerning is that NSCAD has not even provided an estimate for when the decisions will be issued.

[21] The timeliness of granting access to information is often very important to applicants and their ability to hold government accountable. Ensuring that public bodies are fully accountable to the public goes to the heart of the purpose of *FOIPOP*.³ That is why *FOIPOP* places a deadline on public bodies. It is not open to NSCAD to ignore statutory obligations.

FINDINGS:

[22] I find that NSCAD University is in violation of s. 7(2) of *FOIPOP* in that it has failed to respond to the applicant's access to information requests within the required legislated timeline.

[23] I find that NSCAD University has failed to implement appropriate processes for responding to its obligations under *FOIPOP*.

RECOMMENDATIONS:

[24] I recommend that NSCAD University issue the decisions in response to the applicant's two access to information requests, along with the copy of the records,⁴ within 30 days of receipt of this review report and provide the OIPC with a copy of the decision letters sent to the applicant.

[25] I recommend that within 30 days of receipt of this review report, NSCAD University make appropriate arrangements to accept access to information requests (by mail, email and fax),

³ Per s. 2(a) of *FOIPOP*.

⁴ Per s. 8(1)(a)(i) of *FOIPOP*.

communicate with applicants (by mail, email and phone), identify and collect records responsive to access to information requests (paper and electronic), process records responsive to access to information requests for disclosure, and issue decisions and disclose records to applicants within statutory timelines. These arrangements should be set in writing and information about how applicants can make access to information requests should be posted to NSCAD's website.

January 29, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC Files: 20-00552 and 20-00553