



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

REVIEW REPORT 21-06

June 14, 2021

Department of Fisheries and Aquaculture

Summary: The Department of Fisheries and Aquaculture (Department) refused an applicant access to records, relying on s. 7(4) of the *Freedom of Information and Protection of Privacy Act*, because it intended to release the records publicly at a later date. However, s. 7(4) only allowed the Department to take that action within 30 days after the applicant's request was received. This time period had long expired by the time the Department applied this provision. The Commissioner finds that the Department failed in its duty to assist the applicant as the decision was delayed, incomplete, inaccurate and not open. The Commissioner recommends the records be provided to the applicant immediately.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 7(1), 7(4).

Authorities Considered: Nova Scotia: Review Report 20-03, [2020 NSOIPC 3 \(CanLII\)](#)

INTRODUCTION:

[1] The applicant made a request for information from the Department of Fisheries and Aquaculture (Department). The Department provided a package of responsive records. The applicant noticed that the responsive records were missing specific records and requested them from the Department. The Department found the missing records and refused to disclose them pursuant to s. 7(4) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. The applicant filed a request for review.

ISSUE:

[2] Did the Department meet its duty to assist the applicant by responding openly, accurately and completely, without delay, as required by s. 7(1) of the *Freedom of Information and Protection of Privacy Act*?

DISCUSSION:

Background

[3] This matter was the subject of a previous review report (Review Report 20-03).¹ The issue under that review was the Department's failure to respond to the applicant's access to information request within the required legislated timelines.

[4] In that review report, I found the Department was violation of s. 7(2) of *FOIPOP* and made two recommendations: (1) issue a decision, with the copy of the records within two days and (2) refund the fees already paid and waive outstanding fees. The Department accepted both recommendations and issued a decision to the applicant on July 17, 2020.

[5] After receiving the Department's decision, the applicant identified missing records and contacted the Department. On September 18, 2020, the Department told the applicant the records were found and processed for disclosure but were waiting for deputy minister sign-off.

[6] After receiving nothing further, on September 30, 2020, the applicant asked the Office of the Information and Privacy Commissioner (OIPC) to conduct a review of the Department's failure to issue a decision regarding the outstanding records.

[7] Attempting to resolve the matter informally, on April 9, 2021, the OIPC provided the Department with a due date of April 26, 2021, to respond to the applicant with a decision and to provide the OIPC with additional information. The applicant did not receive a decision from the Department by April 26, 2021, and the Department did not provide the information requested in the OIPC's April 9, 2021 letter.

[8] On April 29, 2021, the OIPC notified the parties that the file would be moving forward to me if a decision was not issued within 15 days of that notice.

[9] On May 14, 2021, the Department sent a letter to the applicant confirming that it had identified additional records that should have been included with the decision issued on July 17, 2020. The Department did not disclose these records to the applicant, instead it said it was:

“...pleased to inform you that the additional records you are seeking will be made publicly available under section 7(4). The department is committed to make these records publicly accessible as soon as possible, but no later than 30 days from the date of this letter.”

Did the Department meet its duty to assist the applicant by responding openly, accurately and completely, without delay, as required by s. 7(1) of the *Freedom of Information and Protection of Privacy Act*?

[10] Initially, the issue under review was identified as whether the Department conducted an adequate search for records; however, as the records were already located by that point, the issue was updated to more accurately characterize it as one of duty to assist regarding the delay.

¹ [2020 NSOIPC 3 \(CanLII\)](#).

[11] This is an unusual review. Both parties were invited to provide representations setting out their arguments as to whether the Department met its duty to assist the applicant. The Department did not provide representations in response to the OIPC's Notice of Public Review Report. The Department also did not provide the standard documents public bodies are required to produce to the OIPC pursuant to s. 38(1)(a) of *FOIPOP*. 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 and from the previous public report.

[12] As set out above, the Department refused to disclose the records on the basis of s. 7(4), which reads:

- 7(4) The head of a public body may refuse to disclose to an applicant information
- (a) that is published and available for purchase by the public; or
 - (b) that, within thirty days after the applicant's request is received, is to be published or released to the public.

[13] The Department received the applicant's original request on February 5, 2020. Section 7(4) would have given the Department authority to refuse access to the records if, within 30 days after the applicant's request was received, they were to be published or released to the public. In other words, the Department was only authorized to rely on s. 7(4) if it was publishing the records by March 6, 2020. That window has long passed.

[14] Even if I were to accept that the start date for the application of s. 7(4) was the date the applicant identified the records as missing from the July 17, 2020 package (which was some date prior to September 18, 2020), the records would have had to be made public by mid-October, which was more than seven months ago. The ability for the Department to refuse access for this reason has long expired. It was not open to the Department to apply s. 7(4) months after the 30-day period set out in that section had expired.

[15] The duty to assist under *FOIPOP*² requires that public bodies "make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely".

[16] The duty to assist is made up of five requirements. These requirements, when fulfilled, meet the duty to assist. All elements are required to have a compliant response. The requirements are:

1. Make every reasonable effort to assist.
2. Respond without delay.
3. Respond openly.
4. Respond accurately.
5. Respond completely.

² See s. 7(1) of *FOIPOP*.

[17] In this case, the Department:

- confirmed that the records identified by the applicant should have been included in the decision issued on July 17, 2020 (not complete);
- was in contravention of the timelines set out in the law by the time the July 17, 2020 decision was issued (delayed);
- took 10 more months to make a decision on the missing records (delayed);
- refused access to the records 15 months after the request was made based on a provision (s. 7 (4)) that had expired well over a year ago (not accurate);
- told the applicant the records were waiting for sign-off (not open);
- provided no evidence to show it had made any efforts to assist the applicant.

[18] I find that the Department has not met any of the elements required and therefore has not met its duty to assist the applicant.

FINDINGS & RECOMMENDATIONS:

[19] I find that the Department was in contravention of s. 7(1) of *FOIPOP* because it failed in its duty to assist the applicant.

[20] I recommend that the Department provide the outstanding records to the applicant immediately (within 2 days) upon receipt of this report and provide the OIPC with a copy of the decision letter sent to the applicant.

June 14, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File 20-00442