



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

**REVIEW REPORT 21-11**

**September 17, 2021**

**Department of Environment and Climate Change**

**Summary:** The Department of Environment and Climate Change (public body) failed to 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 applicant appealed to the Office of the Information and Privacy Commissioner for Nova Scotia. The Commissioner finds that the public body is in violation of s. 7 of *FOIPOP* and recommends that the public body issue the decision within two weeks of the date of this report. The Commissioner also recommends that the public body refund the fees paid by the applicant within 30 days of the date of this report.

**INTRODUCTION:**

[1] On March 5, 2021, the Department of Environment and Climate Change (public body) received an access to information request under the *Freedom of Information and Protection of Privacy Act (FOIPOP)* for records related to a particular property for a 35-year period. The public body acknowledged the request on March 8, 2021.

[2] The public body issued a fee estimate which the applicant paid. The public body then took two time extensions. Its first time extension of 30 days was of its own accord and the second extension for 90 days was with the Office of the Information and Privacy Commissioner for Nova Scotia's (OIPC) permission. The public body's response due date was August 3, 2021. The public body requested a third time extension from the OIPC but it was not approved. The due date remained August 3, 2021.

[3] The public body did not issue a decision in response to the access to information request by August 3, 2021. The applicant filed a review request with the OIPC relating to the public body's failure to respond to her access to information request.

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

[5] In reviews where deemed refusal is at issue, the only remedy is for the public body to issue a decision to the applicant. Once a decision is issued to the applicant, the review file is closed. These files are addressed by the OIPC at the intake stage of the review process and are generally resolved in a timely and efficient manner by facilitating a decision to the applicant, usually with one telephone call to the public body, and in almost all instances, within 15 days or less. This method has proven highly successful in resolving deemed refusal reviews. This approach was not successful in this case as despite the OIPC's efforts, the public body has not issued a decision to the applicant.

**ISSUE:**

[6] Did the public body meet its duty to assist the applicant by responding openly, accurately and completely, without delay, as required by s. 7(1) of *FOIPOP*?

**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, there were two time extensions taken under s. 9 of *FOIPOP*.

**Did the public body meet its duty to assist the applicant by responding openly, accurately and completely, without delay, as required by s. 7(1) of *FOIPOP*?**

[8] The applicant did not provide a submission in response to the Notice of Review. The public body did provide a submission setting out the chronology as well as the standard documents that must be provided to the OIPC, pursuant to s. 38(1)(a) of *FOIPOP*. The focus of the public body's submission was to restate its argument for the time extension that was not approved by the OIPC.

Date (MM/DD/YY)	Day #	Actions
03/05/21	0	Information Access and Privacy Services <sup>1</sup> (IAP Services) received the access to information request.
03/08/21	3	IAP Services sent acknowledgement to the applicant confirming the response due date of 04/06/21.
03/12/21	7	Public body (program area #1) provided 174 pages of records to IAP Services.
03/18/21	13	Public body (program area #2) informed IAP Services there was a large volume of responsive records – 938 pages.

<sup>1</sup> The Information Access and Privacy (IAP) Services group 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. The mandate for this group is to provide information access and privacy policies, practices, services and resources for government. This information was obtained from an Information Access and Privacy Services pamphlet prepared for the 2018 Reverse Trade Show.

<b>Date</b> (MM/DD/YY)	<b>Day #</b>	<b>Actions</b>
03/18/21	13	Fee estimate provided to the applicant (\$1,035). IAP Services placed the file on hold.
03/19/21	- <sup>2</sup>	Applicant paid the fee in full (\$1,035).
03/19/21	-	IAP Services requested the public body (program area #2) resume collecting the records by 03/26/21.
03/24/21	18	Public body (program area #2) provided part of the records to IAP Services for processing.
03/30/21	24	Public body (program area #2) provided the remaining records to IAP Services for processing.
04/01/21	26	IAP Services notified the applicant it was taking a 30-day time extension with a new response due date of 05/06/21. The reason given for the extension was that a large number of records were requested, and meeting time limits would unreasonably interfere with the operations of the public body (s. 9(1)(b)).
04/01/21	26	Applicant requested certain information (court file numbers and locations) to be pulled from the file to assist her search for records elsewhere while she awaited response from the public body. The requested information was provided to the applicant two weeks later.
04/06/21	31	Applicant requested the processing of the access request to be expedited because the court proceedings that the requested records were about was scheduled to take place.
04/07/21	32	IAP Services responded to the applicant with a caseload description but did not provide the records in the requested expedited time frame.
05/06/21	61	IAP Services notified the applicant that it was approved for a 90-day extension by the OIPC with a new response due date of 08/03/21. The reasons given for the extension were that a large volume of records were requested, and meeting the time limit would unreasonably interfere with the operation of the public body (s. 9(1)(b)). Additionally, the public body confirmed more time was needed to consult with a third party or other public body (s. 9(1)(c)).
05/06/21	61	Applicant notified IAP Services that the court date, for which the requested records would be required, was set for 06/08/21, with the documents needing to be filed by 05/26/21.
07/28/21	144	IAP Services sought approval of a third time extension from the OIPC, for 60 more days to 10/04/21. The grounds for the extension request were the same: large volume of records and unreasonable interference (s. 9(1)(b)) as well as consultation (s. 9(1)(c)). The specific reasons given for the additional extension: recalculated page count average, unprecedented spike in new files (caseload increase), training/onboarding new staff, and realization that a different public body needed to be consulted.

<sup>2</sup> The dash here is used to indicate that the file was on hold.

Date (MM/DD/YY)	Day #	Actions
07/29/21	145	OIPC denied IAP Services' time extension request based on the facts that there was no change in volume of records and that IAP Services provided no information or evidence in support of completing the consultations with either public body.
07/30/21	146	IAP Services requested that the OIPC reconsider the decision to deny the time extension request. The OIPC's decision remained unchanged.
07/31/21	147	Applicant requested a file status update from IAP Services.
08/03/21	150	IAP Services informed the applicant more time was needed to complete the file, despite the time extension being denied by the OIPC. The target date for completion given to the applicant was 10/04/21, which is 212 days from the date the access to information request was received.
08/11/21	158	The OIPC received a request for review (Form 7) from the applicant.
08/29/21	176	IAP Services provided a public body with notice of the access to information request and requested a consultation. That public body's view on the disclosure of 136 of 1031 pages was requested by 09/10/21.

[9] This is a case where the public body failed to respond to the applicant, despite taking two time extensions. Normally, for deemed refusal review reports, the details of any associated time extension and their merits do not form a significant part of the discussion since they are not under review. However, in this case, the public body's representations were essentially a request for the Commissioner to reconsider her delegated employee's decision to deny the previous time extension request. As a result, I will analyze the relevant factors of that time extension request with regard to the deemed refusal.

[10] The relevant factors, considerations and calculations, based on the public body's representations, are listed below:

- The responsive record is 1031 pages.
- The deadline to provide a decision, which included two time extensions, was 151 days.
- The time estimated to review each page was 1 minute.
- This works out to just over 17 hours of work.
- Of the 151 days, 104 days were working days.<sup>3</sup>
- This works out to 10 pages per day or 10 minutes per day to review responsive records and apply any necessary severing.
- The public body estimated an additional 3 hours to organize and prepare the records.
- The extension approved by the OIPC for 90 days included time to consult with another public body.
- Consultations with another public body did not happen until after the due date and after the applicant filed a request for review with the OIPC.

<sup>3</sup> Using the [timeanddate.com Working Date Calculator](http://timeanddate.com/WorkingDateCalculator).

[11] The public body's representations also included rationale for why the OIPC should have approved its request for a third time extension:

- This file is 15 times larger than the average file processed by the public body – 1031 pages versus 69 pages.<sup>4</sup>
- The public body was in the midst of an unprecedented spike in volume of new access to information requests being received.

[12] The public body provided calculations of its various file counts and date ranges. Based on that information, the public body actually experienced a reduction of new access to information requests between the time this request was made and the OIPC's denial of its request to take a third time extension.

[13] The public body provided the OIPC with the following information regarding its file counts and date ranges:

- Numbers given on May 5, 2021:
  - 233 files in 2 months (March and April 2021) = 117 files per month
  - 246 files in 3 months (December 2020 to February 2021) = 82 files per month
- Numbers given on July 29, 2021:
  - 301 files in 3 months (January to March 2021) = 100 files per month
  - 245 files in 3 months (October to December 2020) = 82 files per month
  - 425 files in 5 months (March to July 2021) = 85 files per month

[14] Using the information provided, the average number of new access to information requests the public body received per month was 91.

[15] As such, between March and July 2021, the average of new files received was 7% below the average of 91 files per month.<sup>5</sup>

[16] If the average number of pages per request is 69 pages, 1031 is most certainly a large volume of records. I accept that it would be unlikely that the work could be completed in the first 30 or even 60 days. However, I have no hesitation to say that a reasonable person would conclude that 104 days would be enough time to complete 20 hours of work. The public body has provided no evidence to the contrary.

[17] What has been provided by the public body appears to show that despite taking two time extensions, IAP Services completed no work on processing the responsive records. IAP Services' work focused on general caseload management. This general caseload management included processing new files coming in, asking for time extensions (which require justification) and responding to questions from the applicant. It did not include processing the records in response to this request for disclosure. The delays came from a slow start of the process. First, it took 13

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<sup>4</sup> IAP Services provided this number as the average during the second time extension request to the OIPC. It provided a 200 page average for its first time extension request.

<sup>5</sup> 85 files vs. 91 files.

days for the public body to issue a fee estimate. This should have happened in the first 5 days. The second delay was the time the public body took to gather the records before processing could even begin. It took 24 days for the public body's program areas to collect the full responsive records for processing. This should have happened within the first 11 days.<sup>6</sup>

[18] The timeliness of granting access to information is often very important to applicants, including those who are trying to pursue legal avenues which require the records being sought. That is why *FOIPOP* places a deadline on public bodies.

[19] While examining the public body's calculation of the fees to determine the level of review needed, I noted a clear, and major, miscalculation. The public body estimated it would take 1 minute per page to review and sever the responsive records. Using 938 pages<sup>7</sup> for the number of responsive pages, the estimate was calculated to be 31 hours. This is double what 1 minute per page would be. This resulted in an overcharge of \$465.

### **FINDING:**

[20] I find that the public body is in violation of s. 7(2) of *FOIPOP* in that it has failed to respond to the applicant's access to information request within the required legislated time period.

### **RECOMMENDATIONS:**

[21] I recommend that the public body issue a decision in response to the access to information request, with the copy of the record,<sup>8</sup> within two weeks of the date of receipt of this review report and provide the OIPC with a copy of the decision letter sent to the applicant.

[22] I recommend that the public body refund all of the processing fees paid by the applicant<sup>9</sup> within 30 days of receipt of this report and provide the OIPC with proof that this has been done.

September 17, 2021

Tricia Ralph  
Information and Privacy Commissioner for Nova Scotia

OIPC File 21-00358

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<sup>6</sup> See the [Access & Privacy Essentials \(FOIPOP & MGA\) Toolkit](#), Request Processing Checklist (pages 21-22), prepared by the OIPC.

<sup>7</sup> The applicant was only charged for processing the records from the public body's program area #2.

<sup>8</sup> Per s. 8(1)(a)(i) of *FOIPOP*.

<sup>9</sup> The [Accountability for the Digital Age](#) Special Report issued by the OIPC in 2017 recommended that the legislation be amended to require a refund of fees when decisions are issued late (see Recommendation #5(f)).