



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

REVIEW REPORT 22-02

January 11, 2022

Department of Community Services

Summary: The Department of Community Services (public body) failed to issue a decision to the applicant in response to an application for access to a record 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 applicant filed a valid application for access to a record and that the public body is in violation of s. 7 of *FOIPOP* because it failed to issue a response within the statutory time period. She recommends that the public body issue the decision within 14 days of the date of this report.

INTRODUCTION:

[1] On October 18, 2021, the Department of Community Services (public body) received an application for access to a record (access request) under the *Freedom of Information and Protection of Privacy Act (FOIPOP)* for records that were missing from the disclosure package the applicant had received in response to a previous access request. The applicant provided a detailed list of the records that she was seeking access to. The list was made up of documents she believed to be missing.

[2] The public body did not issue a decision in response to the access request by the statutory deadline of November 17, 2021. On November 26, 2021, the applicant filed a review request with the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC) relating to the public body's failure to respond to her access request.

[3] 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".

[4] 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:

[5] 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

[6] Sections 7(1) and 7(2) of *FOIPOP* are straightforward. Section 7(1) requires a public body to respond to an access request 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*.

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*?

[7] Section 7(2) of *FOIPOP* sets out that a public body is required to respond to an applicant's access request within the legislated time period. For the following reasons, I find that the public body is in violation 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] The procedure for obtaining access to records is set out in s. 6 of *FOIPOP*:

- 6 (1) A person may obtain access to a record by
 - (a) making a request in writing to the public body that has the custody or control of the record;
 - (b) specifying the subject-matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record; and
 - (c) paying any fees required pursuant to Section 11.

[9] Additional information regarding access requests can be found in s. 3 of the *FOIPOP Regulations*:¹

- 3 (1) An application
 - (a) must state that the application is made pursuant to the Act;
 - (b) may be in Form 1.
- (2) If an individual familiar with the subject matter is unable to identify a

¹ *Freedom of Information and Protection of Privacy Regulations*, [NS Reg 105/94](#), s. 3.

record for which an application is made, the head of the public body shall so advise the applicant and permit the applicant to amend the application to provide additional particulars.

[10] Once a valid access request is made, the duty of the public body to provide a response is set out in s. 7 of *FOIPOP*:

7 (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and

(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2),
or

(ii) transfer the request to another public body in accordance with Section 10.

(2) The head of the public body shall respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirements of clauses (b) and (c) of subsection (1) of Section 6, stating

...

(3) The head of a public body who fails to give a written response pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[11] In this case, the applicant did not use the regulated Form 1² option. However, what she did submit can be described as a handwritten reproduction of the form which includes the words "Re: Application pursuant to the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*")." The request includes what amounts to three pages of information that describe the type of records generally, the dates and/or other descriptions of each individual item, and references to her evidence that the documents are missing from the responsive records to her previous request (i.e., where one document that she received from a previous access request references the document she is now specifically seeking in this access request). She also provided a copy (sample) of one of the documents that she had in her possession by another means. Because she was requesting access to her own personal information, an application fee was not required.

[12] In her representations, the applicant stated her position that she provided sufficient particulars to the public body to permit it to find the requested records.

² A copy of the form can be found on the OIPC website:
<https://oipc.novascotia.ca/sites/default/files/forms/FOIPOP%20Forms/Form%201.pdf>

[13] The public body's representations were focused on its position that no access request was received from the applicant on October 18, 2021, and therefore the public body had no obligation to make a decision in relation to the handwritten reproduction of the form. It said that the applicant simply asked a number of questions about existing access requests and that did not constitute a valid access request. The public body's second argument was that because the applicant identified missing records from the decision it issued in response to her previous access request, her only option was to file a request for review with this office on the issue of search.

[14] The public body has a legal duty to make every reasonable effort to assist the applicant and to make a decision in response to the access request or to transfer the access request to another public body. The public body did not provide any evidence to suggest that it told the applicant it was unable to identify a record for which the October 18, 2021, access request was made or that it permitted the applicant to amend the access request to provide additional particulars.

[15] In terms of its position that the applicant's only option was to file a request for review with this office on the issue of search, I have no hesitation in rejecting this assertion. *FOIPOP* does not set out an option to allow public bodies to disregard an access request because the applicant could have instead filed a review on the issue of search. There is no limit on an applicant to make only make one request for the same records. While an applicant may file a review regarding records the applicant alleges to be missing from the public body's response, they are also free to request those records from the public body, which the applicant did in this case. A public body cannot simply disregard such requests or process them informally absent any timelines. *FOIPOP*, including the statutory timelines to respond, applies to such requests. In this case, the applicant exercised a legitimate legal mechanism available to her, which is entirely permissible.

[16] I reject the public body's position that a valid access request had not been received or that the applicant's only option was to file a request for review on the issue of search. I find the applicant submitted a valid application for access to a record that is in compliance with s. 6 of *FOIPOP*.

[17] I find that the public body is in violation of s. 7 of *FOIPOP* in that it has failed to respond to the applicant's application for access to a record within the required legislated time period.

FINDINGS:

[18] I find that:

1. The applicant submitted a valid access to information request that is in compliance with s. 6 of *FOIPOP*.
2. The public body is in violation of s. 7 of *FOIPOP* in that it has failed to respond to the applicant's application for access to a record within the required legislated time period.

RECOMMENDATION:

[19] I recommend that:

1. The public body issue a decision to the applicant in response to her access to information request, with the copy of the record,³ within 14 days of the date of receipt of this review report and provide the OIPC with a copy of the decision letter sent to the applicant.

January 11, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File 21-00537

³ Per s. 8(1)(a)(i) of *FOIPOP*.