



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

REVIEW REPORT 22-04

February 1, 2022

Office of the Premier

Summary: The Office of the Premier (public body) did not 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 public body is in violation of s. 7 of *FOIPOP*. She recommends that the public body issue the decision within 30 days of the date of this report. Because this report highlights a need for a legislated duty to document and a requirement to properly manage records, this report will be provided to the Minister of Justice with a request that he put forward a comprehensive bill to amend *FOIPOP* and its related Acts to include such provisions.

INTRODUCTION:

[1] On August 23, 2021, the Office of the Premier (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 relate to the Province of Nova Scotia's proof of vaccination initiative.

[2] The public body acknowledged the request on August 23, 2021 and provided a response due date of September 22, 2021. On September 22, 2021, the public body took a 30-day time extension under s. 9(1)(b) of *FOIPOP*. The reason given by the public body for the need of a time extension was that a large volume of records needed to be searched and meeting the time limit would unreasonably interfere with the operations of the public body. The new due date given was October 22, 2021. The public body did not issue a decision in response to the access request by the extended deadline of October 22, 2021. On November 15, 2021, the applicant contacted the public body about the status of the decision. She was informed there was a substantial delay with the records involving the previous government and that the public body expected the delay to last for a while longer. The applicant was not provided with an expected timeframe, other than "in due course." On December 22, 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 public bodies to respond to access requests 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 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.

[9] With respect to the duty to assist set out in s. 7, *FOIPOP* is silent as to who bears the burden of proof. Therefore, the parties must each submit arguments and evidence in support of their positions. However, it is the public body who failed to make a decision in this case and who is in the best position to discharge the burden of proof. The applicant did not file any representations.

[10] The public body's representations were essentially an argument requesting a time extension from the OIPC. The reasons provided for the extension can be summarized as:

1. There was an election on August 17, 2021, with the new government being sworn in on August 31, 2021.
 - a. This represented a major transition for the public body's staff.
 - b. The majority of the record holders ceased to be employed with the public body.
 - c. The remaining staff were prioritizing the swearing in of the new government.
2. The volume of incoming *FOIPOP* requests to the public body has increased in the last year.
3. The records were primarily created by the former government.
 - a. The records needed to be properly managed and archived in the post-election period. This task has now been completed.
 - b. The search for the responsive records is ongoing.
 - c. Staff are not experts in the records created by the former government.
 - d. The scope of the records requested spans a long period of time in the midst of the ongoing global pandemic. A large volume of records must be assessed.
4. More time is needed to complete the search for the responsive records, at which point the volume and content of the records will dictate what happens next, including whether consultations are required.
 - a. The public body requested a deadline of February 28, 2022 to complete the search function only of responding to the access request.

[11] 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 grant a time extension request that was not made in accordance with s. 9 of *FOIPOP*.

[12] The OIPC has a long-standing process in place for public bodies to request a time extension for access request files when more than 60 days is required to respond to the

applicant.¹ It is too late for a time extension in this case because a time extension request can only be granted when the request is made before the legislated time period has expired. In this case, the time period for making a time extension request had passed by the time these arguments were made by the public body. 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.

[13] That being said, elements of the public body's arguments are persuasive, and I will take them into consideration for how much time I grant for the implementation of my recommendation.

[14] Searches for records should be completed within 10 days of receiving the access request² so the responsive records can be processed for disclosure within the legislated time period. The public body wants a total of approximately 189 days to complete the search for the records before it even starts to review for disclosure. That is much too long. While the political party leading the government did change around the time this access request was made, government as a whole is continuous.

[15] Government has policies³ in place to govern the management of records. If those policies were not properly followed and enforced, it highlights the need for legislative changes to be made to *FOIPOP* that require a duty to document, including a requirement to properly manage records in accordance with any records retention requirements throughout their life cycle. Both my predecessor Catherine Tully⁴ and I,⁵ as well as all Canadian Commissioners⁶ have called upon government to create a legislated duty to document, accompanied by strong records management practices and standards, because existing records management policies that are not subject to independent oversight and do not contain sanctions for non-compliance are not sufficient. It is for this reason that this review report will be provided to the Minister of Justice with a request that he put forward a comprehensive bill to amend *FOIPOP* and its related Acts to include a provision requiring a duty to document and a requirement to properly manage records.

[16] In its representations, the public body also set the stage for extending the time beyond the approximate 189 days to complete the search for the records, to then conduct consultations and its review of the records for any possible severing prior to release. It did not say who may need to be consulted or why. Based on the nature of the records requested, I fail to see how s. 22 of *FOIPOP* (which is the consultation provision) would be engaged. Furthermore, any

¹ See [Time Extension Guidelines for Public Bodies](#) and [Time Extension Request Form for Public Bodies](#), both available on the OIPC website.

² See [Access & Privacy Essentials Toolkit \(FOIPOP & MGA\).pdf \(novascotia.ca\)](#), page 21 Request Processing Checklist.

³ See for example [4.1 Records Management Policy](#).

⁴ See the OIPC's 2017 Special Report: [Accountability for the Digital Age, Modernizing Nova Scotia's Access & Privacy Laws](#), at pages 14-15.

⁵ For example, [Nova Scotia Information and Privacy Commissioner's 2019-2020 Annual Report](#), at page 10 and a guest opinion published by Saltwire during Right to Know Week 2021: <https://www.saltwire.com/atlantic-canada/opinion/tricia-ralph-forgoing-record-keeping-a-growing-government-secrecy-ploy-100636325/>.

⁶ For example, Joint Resolutions of Canadian Information and Privacy Commissioners: [Effective privacy and access to information legislation in a data driven society](#) (2019) and [Statement of Information and Privacy Commissioners of Canada on the Duty to Document](#) (2016).

consultations with other public bodies are discretionary and therefore should not be used to delay the decision further. The public body did not provide any arguments as to how long it would need to review the records once the search for them has been completed.

FINDING:

[17] I find that:

1. 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:

[18] 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,⁷ within 30 days of the date of this review report and provide the OIPC with a copy of the decision letter sent to the applicant.

February 1, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File 21-00571

⁷ Per s. 8(1)(a)(i) of *FOIPOP*.