



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

REVIEW REPORT 23-06

August 2, 2023

Department of Community Services

Summary: The Department of Community Services (public body) did not 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 (OIPC). The cause of the delay was that the public body did not provide the responsive records to the administrator responsible for processing the request in a timely fashion. The OIPC finds that the public body is in contravention of s. 7 of *FOIPOP* and recommends that a decision be issued within 14 days.

INTRODUCTION:

[1] On February 3, 2023, the applicant submitted an application for access to records (access request) held by the Department of Community Services (public body) under the *Freedom of Information and Protection of Privacy Act (FOIPOP)* for records related to workplace safety. Section 7(2) of *FOIPOP* required the public body to issue a decision in response to the request by March 6, 2023.

[2] The public body did not issue a decision in response to the access request by March 6, 2023. The applicant filed a review request with the Office of the Information and Privacy Commissioner (OIPC) about the public body's failure to respond to their access to information request.

[3] 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 records. This circumstance is regularly referred to as "deemed refusal".

ISSUE:

[4] Did the public body 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:

[5] For the reasons set out below, I find that the public body is in contravention of s. 7 of *FOIPOP* in that it has failed to respond to the applicant's access request within the required legislated time period.

[6] 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*. Section 7(3) states that when a public body fails to respond to an applicant within the statutory timelines, it is deemed to have refused access to the requested records. In this case, no time extensions were taken or granted under s. 9 of *FOIPOP*.

[7] 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. The applicant did not provide arguments (referred to as "representations"). 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.

[8] In this case, the public body explained that the applicant's access request for records held by the public body was received by Information Access and Privacy (IAP) Services¹ on February 3, 2023. IAP Services said that it sent the records collection request the same day to the public body. On February 9, 2023, the applicant amended the access request. IAP Services said that it sent an amended records collection request to the public body the next day (February 10, 2023).

[9] On February 24, 2023, IAP Services said that it followed up with the public body to see if its search for the requested records was complete.

[10] The decision was due to the applicant on March 6, 2023.

[11] On March 20, 2023, IAP Services said that it again followed up with the public body to see if its search for the requested records was complete.

[12] The public body provided the requested records to IAP Services on March 22, 2023. It explained that its search efforts involved contacting multiple employees named in the access request to request a search of their information. The public body explained that on the same day, it determined that a time extension for volume and unreasonable interference should have been taken under s. 9(1) of *FOIPOP*, however the file was already in deemed refusal.

¹ Information Access and Privacy (IAP) Services 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 (now called the Department of Service Nova Scotia). 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.

[13] The public body explained that the search required additional time due to the number of employees involved and the type of information requested. It said that the employees who were asked to search for information have high workloads as they are service delivery staff who are providing direct services to clients. It also explained that 1045 pages of records were found in response to the applicant's access request. Given the size of the records, the public body felt that the request could have supported a time extension under s. 9(1) of *FOIPOP*. The public body said that it was still reviewing the records to confirm if they are responsive to the access request. It asked for additional time to process the request and get a decision out to the applicant. Essentially, the public body's arguments focused on making a case for a time extension after the fact.

[14] Under s. 7(3), if a public body does not respond within the legislated timeframe, it is deemed to have refused to give the applicant access to the requested records. Legislated timelines can be extended if the circumstances in s. 9(1) are met but those extensions have to be taken before the statutory deadline for responding has passed. Otherwise, it is too late – the public body is already in a deemed refusal situation. *FOIPOP* does not give the OIPC the authority to grant a time extension after the public body is already in a deemed refusal situation.

[15] *FOIPOP* requires the public body to both (a) retrieve or collect the records, and (b) "process" the records (i.e., apply any applicable exemptions) and provide a copy to the applicant within 30 days. In this case, despite IAP Services following up with the public body on the status of its records collection, the public body took approximately 46 days to complete only the first step of retrieving the records. While it is up to the public body to set its own internal timeframes to ensure that an access request is responded to within the 30 days required by *FOIPOP*, taking 46 days to retrieve the records is too long because that puts the public body in a deemed refusal situation. Searches for records should be completed within 10 days of receiving the access request.² This is important because it gives IAP Services enough time to consider whether a time extension is warranted and if so, to take it before the public body is deemed to have refused to give access to the requested records. Or, if a time extension is not warranted, it gives IAP Services enough time to get the records processed, complete any internal sign-off, and issue a decision to the applicant within the 30-day statutory timeframe.

[16] The actions of the public body in this case suggest that employees have failed to appreciate their obligation to respond to access requests within the legislated timeframe set out in *FOIPOP*. This situation highlights the importance for those who are tasked with collecting records for IAP Services to recognize their role in the process and to complete their record retrieval tasks in a timely manner.

[17] The timeliness of granting access to information is often very important to applicants and their ability to hold government accountable. That is why *FOIPOP* places a legislated deadline on public bodies to respond to the applicant within 30 days. In order to meet its statutory obligations, the public body must ensure that its access to information program is properly

² Office of the Information and Privacy Commissioner for Nova Scotia, *Access & Privacy Essentials Toolkit (FOIPOP & MGA)* (December 2019), online: <<https://oipc.novascotia.ca/sites/default/files/publications/Access%20%26%20Privacy%20Essentials%20Toolkit%20%28FOIPOP%20%26%20MGA%29%202019%2012%2005.pdf>>, Request Processing Checklist, at p. 21.

resourced. If in the short term it is unable to meet its statutory timeline, it must retain additional resources to ensure that it stays in compliance with the law.

[18] It is clear that the public body missed its legislated deadline in this case. I find that the public body is in contravention of s. 7 of *FOIPOP* in that it has failed to respond to the applicant's access request within the legislated time period.

FINDING & RECOMMENDATION:

[19] I find that the public body is in contravention of s. 7 of *FOIPOP* in that it has failed to respond to the applicant's access request within the legislated time period.

[20] I recommend that the public body issue a decision to the applicant in response to their access to information request, with a copy of the record,³ within 14 days of the date of this review report and provide the OIPC with a copy of the decision letter sent to the applicant.

August 2, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 23-00100

³ Per s. 8(1)(a)(i) of *FOIPOP*.