



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

REVIEW REPORT 23-08

August 18, 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 cause of the delay was the public body did not provide the responsive records to the administrator responsible for processing the request in a timely fashion and that Information Access and Privacy Services has delayed processing the records and sending them out for consultation. The applicant appealed to the Office of the Information and Privacy Commissioner (OIPC). 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 April 11, 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 himself and his children. Section 7(2) of *FOIPOP* required the public body to issue a decision in response to the request by May 11, 2023, unless an authorized time extension was taken.

[2] The public body took an initial time extension of its own accord under s. 9(1)(b) of *FOIPOP*, which extended the time to respond to June 12, 2023. On June 6, 2023, the public body was granted an additional time extension by the Office of the Information and Privacy Commissioner (OIPC) until July 12, 2023, to conduct consultations under s. 9(1)(c) of *FOIPOP*. The public body did not issue a decision in response to the access request by that time. The applicant filed a review request with the 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:

Burden of Proof

[5] 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.

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*?

[6] 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.

[7] 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 time period, it is deemed to have refused access to the requested records.

[8] In this case, the public body was of the view that time extensions would need to be taken to respond to this file. After taking its initial time extension of its own accord, it submitted a request for an additional time extension to the OIPC within the statutory time limits. The public body requested that the OIPC approve a time extension under s. 9(1)(b) (large volume and unreasonable interference) and under s. 9(1)(c) (consultation required). It asked for a time extension until September 23, 2023. Based on the information supplied to support its time extension request, the OIPC did not agree that a time extension was warranted under s. 9(1)(b). It agreed that the public body needed more time to consult so granted an extension under s. 9(1)(c). However, the OIPC did not agree that a time extension until September 23, 2023, was warranted and instead granted a time extension with a decision due date of July 12, 2023.

[9] The public body's representations in response to this review all centered on why a longer time extension should have been granted by the OIPC. At the end of the day, the legislation is clear. Section 7(3) states that when a public body fails to respond to an applicant within the statutory time period, it is deemed to have refused access to the requested records. The OIPC did not find that the evidence submitted upon the public body's request for a time extension warranted a time extension until September 23, 2023. Rather, the OIPC found that the evidence submitted by the public body only warranted an extension until July 12, 2023. Once the public

body missed that date, it was deemed to have refused to give the applicant access to the requested records.

[10] *FOIPOP* requires a 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. Searches for records should be completed within 10 days of receiving the access request.¹ This is important because it gives by Information Access and Privacy (IAP) Services² 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. In this case, the public body was asked to retrieve the records on April 11, 2023, but did not provide them to IAP Services until May 17, 2023, meaning it took approximately 46 days just to collect the records. A time extension was taken before the public body entered a deemed refusal situation, but this left IAP Services only about a month to process the records.

[11] Once IAP Services received the records, it realized that it wanted to enter into discretionary consultations with other public bodies. IAP Services has had the records now since May 17, 2023, and some three months later, has still not yet sent the records out for consultation.

[12] Timely access to information is key. That is because the value of information typically decreases with delay. I recognize that responding to access to information requests takes time, but public bodies need to be adequately resourced to respond to access requests. As stated by many of my colleagues and courts across this country:

The determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers.³

[13] The records in this case consist of 859 pages. This is a large volume, but large volume alone is not enough to warrant a time extension under s. 9(1)(b). The public body also needs to show that the volume would unreasonably interfere with its operations. The information supplied by the public body leads me to believe that the reason it cannot respond within the statutory time

¹ 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.

² 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.

³ See for example: *Crocker v. British Columbia (Information and Privacy Commissioner)*, [1997 CanLII 4406 \(BC SC\)](#), at para. 37; *BC Order 18-09, British Columbia (Social Development and Poverty Reduction) (Re)*, [2018 BCIPC 11 \(CanLII\)](#), at para. 21.

period is an ongoing resourcing issue. That is not a valid circumstance warranting a finding that responding would result in unreasonable interference. Public bodies need to ensure that there are sufficient resources to respond to access requests in a timely manner. As long ago as 2002, former British Columbia Information and Privacy Commissioner said the following, which applies in this case:

I do not question the diligence or good faith of those who processed the applicant's request, but their inability to respond as required by law cannot – whether or not it was due to an excess of demand over the resources available to respond – wipe away the fact that the responses were late. I therefore find that both public bodies have failed to discharge their duty under s. 6(1) to respond to the applicant without delay... In both instances, I can only say that these public bodies, and all others, should ensure that adequate resources are available so that their access to information staff can process requests in compliance with the law.⁴

[14] In reviews where deemed refusal is at issue, the only remedy is for the public body to issue a decision to the applicant. I have made that recommendation below.

FINDING & RECOMMENDATION:

[15] 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.

[16] I recommend that:

1. Within 14 days of the date of this report, the public body issue a decision in response to the applicant's access request, along with a copy of the records,⁵ and provide the OIPC with a copy of the decision letter sent to the applicant.

August 18, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 23-00312

⁴ *BC Order 02-38, Office of the Premier and Executive council operations and Ministry of Skills Development and Labour; Re, [2002 CanLII 42472 \(BC IPC\)](#)*, at para. 23.

⁵ Per s. 8(1)(a)(i) of *FOIPOP*.