



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

REVIEW REPORT 23-09

September 22, 2023

Department of Municipal Affairs and Housing

Summary: The Department of Municipal Affairs and Housing (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 delay was caused by the public body failing to meet its legislated duty to assist the applicant without an authorized or legitimate or reason to do so. The applicant appealed to the Office of the Information and Privacy Commissioner. The Commissioner finds that because the public body did not respond to the applicant within its legislated deadlines, it is in contravention of s. 7 of *FOIPOP*. She recommends that the public body issue a decision to the applicant by October 13, 2023.

INTRODUCTION:

[1] On February 17, 2023, the applicant submitted an application for access to records (access request) held by the Department of Municipal Affairs and Housing (public body) under the *Freedom of Information and Protection of Privacy Act (FOIPOP)* for records related to a proposed consolidation of Antigonish Town and County. Section 7(2) of *FOIPOP* required the public body to issue a decision in response to the request within 30 days after the application was received unless an authorized time extension was taken.

[2] The public body did not and still has not issued a decision to the applicant within the deadlines set out in *FOIPOP*. The applicant has been waiting approximately seven months for a decision to be made by the public body, well outside the statutory deadline for response. The applicant has not received any records in response to her access request.

[3] 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 her access to information request.

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 deadlines set out therein.

[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. A failure by a public body to give an applicant a written decision within the statutory deadline 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".

[8] On February 17, 2023, the applicant made an access request to the public body. She included a request for a fee waiver with it. The public body corresponded with the applicant to clarify her request. An updated scope was agreed upon on February 21, 2023. The public body told the applicant that its due date for response became March 24, 2023, unless an authorized time extension was taken.

[9] The public body collected approximately 800 pages of records in response to the applicant's access request. It provided them to Information Access and Privacy Services (IAP Services)¹ on March 2 and 7, 2023. Under s. 44 of *FOIPOP*, a public body can delegate its duties under *FOIPOP* to an officer of the public body. While it is not clear to me if IAP Services was formally delegated the duties of the public body under *FOIPOP*, it acted in that capacity. IAP Services was the only contact the applicant had for her *FOIPOP* request.

[10] On March 16, 2023, IAP Services notified the applicant that it was extending the time to respond for an additional 30 days under s. 9(1)(b) of *FOIPOP*. This section allows public bodies to take a 30-day time extension when an applicant requests a large volume of records and

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.

meeting the time limit would unreasonably interfere with the operations of the public body. IAP Services issued a new deadline for response of April 24, 2023.

[11] The supporting documentation provided to this office indicates that on April 18, 2023, IAP Services recommended to the public body that it charge the applicant fees for processing her access request.

[12] On April 20, 2023, IAP Services sent the applicant a fee estimate. When a public body issues a fee estimate, the public body is allowed to “stop the clock” or pause its deadline for response until the applicant either (1) pays a fee deposit or (2) the public body grants a fee waiver. Thus, the clock was stopped on April 20, 2023, four days before the public body’s April 24, 2023, response deadline.

[13] On April 26, 2023, the applicant provided IAP Services with written rationale for why she believed she met the criteria set out in s. 11(7) of *FOIPOP* to warrant the public body granting a fee waiver. From the supporting documentation provided to this office, IAP Services appears to have waited almost two months before notifying the public body that the applicant had requested a fee waiver and supplied an argument for why she should be granted one. The public body’s representations to me state that it was “notified of the fee waiver request on June 21, 2023.” The supporting documentation supplied by the public body also supports that IAP Services waited two months to tell the public body. Once it was told, the public body made a decision to grant the fee waiver within 9 days, on June 30, 2023. During this two-month gap, the applicant followed up several times with IAP Services asking what the status of her request was. She repeatedly reminded IAP Services that she needed the responsive records for a July 7, 2023, court date. Ultimately, more than two months passed before the public body issued a decision to granting a fee waiver. The public body decided to grant the applicant’s request for a fee waiver and told IAP Services this on June 30, 2023. On July 5, 2023, IAP Services informed the applicant that the public body granted a fee waiver.

[14] *FOIPOP* is silent on the amount of time a public body is allowed to take when considering whether to waive fees. The OIPC is of the view that this lack of response time deadlines is problematic and has recommended that *FOIPOP* be amended to impose such deadlines, but no amendments have been made.² This review demonstrates why the lack of time deadlines with respect to fee waiver requests is problematic. In this case, more than two months were taken for this step. In my view, this is too long. It is inconsistent with the purpose of *FOIPOP* to allow public bodies to hold up access to information for unspecified periods of time while considering whether to waive fees.

[15] In any event, the clock resumed in early July. The deadline for response came and passed, but the public body did not issue a decision to the applicant, nor did it request an additional time extension from the OIPC. In terms of why it did not request an additional time extension from the OIPC in an effort to avoid a deemed refusal, the public body explained that once the clock

² Office of the Information and Privacy Commissioner for Nova Scotia, *Accountability for the Digital Age, Modernizing Nova Scotia’s Access and Privacy Laws* (June 2017), online: <<https://oipc.novascotia.ca/sites/default/files/publications/annual-reports/Accountability%20for%20the%20Digital%20Age%20%28June%202017%29%20.pdf>>, recommendation 5.

resumed by the granting of the fee waiver in early July, it only had four days left to respond by its response deadline. The public body said this did not leave it enough time to make a time extension request to the OIPC on the basis that it needed an extension to conduct consultations or because the volume was high and would unreasonably interfere with the operations of the public body. I cannot accept this argument. Firstly, the applicant's access request identified that she was seeking third party information so it should have been clear that consultations might be needed in this case when she filed her access request on February 17, 2023.³ Secondly, in its representations, the public body noted that it had collected the approximately 800 pages of responsive records and provided them to IAP Services on March 2 and 7, 2023. The public body should have realized shortly thereafter that consultations were required. The public body had more than enough time to request a time extension from the OIPC before getting itself into a deemed refusal situation.

[16] When IAP Services told the applicant on July 5, 2023 that the fee waiver had been granted, it did not tell the applicant when the records would be issued, stating only that the records would be processed and provided to the applicant "as soon as possible". On July 18, 2023, the applicant followed up by email asking for a more specific date and was told by IAP Services that a rough estimate for the applicant getting her records would be about three weeks. Those three weeks came and went. The applicant asked IAP Services multiple times what the status was. She was repeatedly told that it would take longer for various reasons (none of which would have authorized it to not meet its response deadline). By August 26, 2023, the applicant had still not been given a concrete date by which the public body would respond to her access request, and so she filed a request for review of the public body's actions.

[17] In addition to the above, despite being aware that consultations were needed at least by June 30, 2023, IAP Services did not send out its consultation letters to third parties until September 2023, more than two months later. Some consultation notices were sent on September 7, 2023. The public body said in its representations that it expected that all consultation notices would be sent by September 12, 2023. I do not know for certain if that was done. Regardless, this is way too long to take to send out consultation notification letters. As set out above, the public body should have been aware that the records might require consult at the time she made her access request given the nature of her request. It had a second opportunity to catch this once it had collected the records in early March. Furthermore, the public body's representations to me stated that by June 30, 2023, it thought it did not have enough time to request a time extension for consultations from the OIPC. This implies that certainly by June 30, 2023, it was fully aware that it thought consultations would be needed. Despite this, the public body still waited more than two months before it even sent out the consultation letters. I have not been given any legitimate explanation that would rationalize this unacceptable delay. Finally, as an aside, I will also note that it is not clear why consultations were required in this case and whether any would qualify as mandatory consultations within the meaning of s. 22 of *FOIPOP*. With deemed refusals, I do not have the benefit of reviewing the responsive records. It is not apparent from the consultation notices that the public body supplied to this office why the consultations were needed. Finally, the public body's representations do not rationalize why consultations were required. Since the issue in this review is deemed refusal, I will not get into it except to remind

³ Not all third party information will trigger a third party consult requirement.

IAP Services and the public body that they should be following the *OIPC's Guidelines*⁴ on third party notice when conducting consultations with third parties.

[18] Overall, the public body's representations and its supporting documentation lead me to believe that the primary reason for the delay in this case was a lack of communication between the public body and IAP Services. An example of this is the two months IAP Services appears to have waited to inform the public body of the applicant's fee waiver request from April 26, 2023 to June 21, 2023. Thus, two months of delay likely would have been prevented if IAP Services had informed the public body in a timely manner.

[19] *FOIPOP* requires that the *head* of a public body comply with the duties set out in the legislation. In this case, that is the Minister of Municipal Affairs and Housing. The Minister is authorized to delegate his powers and duties. However, as an OIPC adjudicator in Alberta has stated, "...if the head delegates her duty and authority to employees who lack sufficient authority, time, and experience to fulfil those duties, the result may be a failure to comply with mandatory duties under the FOIP Act."⁵ In my view, that is what happened in this case. No matter how you slice it, the public body has not complied with its mandatory duty to make every reasonable effort to respond to the applicant openly, accurately, completely, and without delay as required by s. 7 of *FOIPOP*. The delays were preventable, inexcusable, and unreasonable.

[20] I find that the public body has failed in its s. 7 duty to assist obligations. 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:

[21] I find that the public body is in contravention of s. 7 of *FOIPOP* in that it has failed to respond to the applicant openly, accurately, completely, and without delay.

[22] I recommend that:

1. The public body issue a decision in response to the applicant's access request, along with a copy of the records,⁶ by October 13, 2023, and provide the OIPC with a copy of the decision letter sent to the applicant.

September 22, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 23-00433

⁴ Office of the Information and Privacy Commissioner for Nova Scotia (March 2019), online: <<https://oipc.novascotia.ca/sites/default/files/publications/18-00192%20Duty%20to%20Assist%20-%20Third%20Party%20Notice%20Guide%20%282019%20March%29.pdf>>

⁵ *AB Order F2018-10, Alberta Health (Re)*, [2018 CanLII 7385 \(AB OIPC\)](#), at para. 22.

⁶ Per s. 8(1)(a)(i) of *FOIPOP*.