



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

**REVIEW REPORT 23-14**

**November 7, 2023**

**Department of Public Works**

**Summary:** The Department of Public Works (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 related to the public body's search actions. The applicant appealed to the Office of the Information and Privacy Commissioner. The Commissioner finds that the public body is in contravention of s. 7 of *FOIPOP* and recommends that a decision be issued by November 23, 2023.

**INTRODUCTION:**

[1] On September 14, 2023, the applicant submitted an application for access to records (access request) held by the Department of Public Works (public body) under the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. Section 7(2) of *FOIPOP* required the public body to issue a decision in response to the access request by October 16, 2023, unless an authorized time extension was taken.

[2] On October 16, 2023, the public body advised the applicant that its decision was delayed, and it would not be able to respond as required by its statutory due date of that same day. On October 17, 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 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] The reason for the delay in this case is related to the public body's search efforts. The public body initially sent its records collection request to four employees. These employees said there were no records that were responsive to the applicant's access request. However, on the October 16, 2023, due date, the public body sought to extend the deadline. It thought that not all potential record holders had been asked to search for records and it wanted to take the time to do another search. Information Access and Privacy (IAP) Services<sup>1</sup> explained to the public body that a time extension could not be taken because the public body was already deemed to have refused the request by virtue of s. 7(3) of *FOIPOP*.

[9] The public body has since completed its second search, which resulted in finding 136 pages of responsive records. The public body said that a third party consultation and two public body consultations are required prior to the release of the records.

[10] The time limits imposed by *FOIPOP* are reasonable. They require a response within 30 days but also permit the extension of time in limited circumstances. This balance is a recognition that the value of information often decreases with delay.<sup>2</sup> It is important that public bodies understand their legal obligation to conduct adequate searches when collecting records in response to access requests.

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<sup>1</sup> 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.

<sup>2</sup> *AB Order F2022-10, Environment and Parks (Re)*, [2022 CanLII 14907 \(AB OIPC\)](#), at para. 13.

[11] 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:**

[12] 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.

[13] I recommend that the public body issue a decision in response to the applicant's access request by November 23, 2023, along with a copy of the records,<sup>3</sup> and provide the OIPC with a copy of the decision letter sent to the applicant.

November 7, 2023

Tricia Ralph  
Information and Privacy Commissioner for Nova Scotia

OIPC File: 23-00539

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<sup>3</sup> Per s. 8(1)(a)(i) of *FOIPOP*.