



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

**REVIEW REPORT 24-03**

**February 9, 2024**

**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 that the public body did not provide the responsive records to the administrator responsible processing the applicant's request in a timely fashion. 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*.

Responding to an access request in the time required by *FOIPOP* is not a choice. It is a legal obligation. This is the fourth report the Commissioner has had to issue in approximately six months because the public body has failed to respond to the applicant within the statutory deadline. For this reason, the Commissioner recommends that senior leadership at the public body address this ongoing problem by ensuring it has sufficient resources to fulfill its legal obligations. She also recommends that a decision be issued to the applicant within seven days.

**INTRODUCTION:**

[1] On November 23, 2023, the applicant requested records (access request) from the Department of Community Services (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 December 27, 2023, unless an authorized time extension was taken.

[2] A decision was due to the applicant on December 27, 2023. A decision was not provided as required by law. On January 3, 2024, the applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the public body's failure to respond to their access request.

[3] The OIPC's efforts to informally resolve this matter and facilitate a decision being issued were not successful. As such, this matter proceeded to this public review report.

## 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 described 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. 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 referred to as "deemed refusal".

[8] *FOIPOP* requires the public body to (1) collect the records, (2) process the records (i.e., apply any applicable exemptions) and (3) issue a decision to the applicant within 30 days. In this case, the public body did not collect all the responsive records within the statutory deadline. The applicant requested the records on November 23, 2023, meaning a decision was due to them on December 27, 2023. The public body collected one batch of responsive records in a timely manner and provided it to the administrator responsible for processing the records on November 30, 2023. It provided the second batch on December 29, 2023 (beyond the statutory deadline for response) and the final batch on January 18, 2024 (well beyond the statutory deadline for response). As of the date of this report, the applicant has still not received a response to their access request.

[9] The public body said that once it had finished gathering the responsive records on January 18, 2024, it identified that a consultation with another public body had to be completed before it could issue a decision to the applicant on the approximate 237 pages of responsive records. A decision to consult with another public body in this case is discretionary and not mandatory. The public body's representations do not explain why discretionary consultations were required. The public body did say that it should have sought a time extension, but the file was already in a deemed refusal at that point, so it did not. If not for the public body's delay in the record

collection, the discretionary consultation could have either been completed within the 30-day statutory timeline or the public body could have taken a time extension of its own accord to complete the consultation.<sup>1</sup> In addition, because consultations with other public bodies are discretionary, they should not be used to delay the decision to the applicant further.<sup>2</sup>

[10] The reason for the delay in this case is the same as that in *NS Review Report 23-06*,<sup>3</sup> *NS Review Report 23-07*,<sup>4</sup> and *NS Review Report 23-08*<sup>5</sup> – the public body failed to collect the responsive records and provide them to the administrator responsible for processing them in a timely manner.

[11] In *NS Review Report 23-07* I said:

[18] The actions of the public body are raising alarms for me in this case. Employees appear to be either failing to appreciate that they cannot simply ignore statutory deadlines, or they do not have enough resources to deal with access requests in a timely manner. Regardless of what is causing these actions, they need to stop. Employees either need education on their role or more resources to ensure that they have enough time to respond as required by law. If the public body is unable to meet its statutory timelines, it must retain additional resources to ensure that it stays in compliance with the law.

[12] In *NS Review Report 23-08* I said:

[13] The information supplied by the public body leads me to believe that the reason it cannot respond within the statutory time 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.<sup>6</sup>

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<sup>1</sup> Per s. 9(1)(c) of *FOIPOP*.

<sup>2</sup> *NS Review Report 23-06, Nova Scotia (Department of Community Services) (Re)*, [2022 NSOIPC 5 \(CanLII\)](#), at para. 16.

<sup>3</sup> *NS Review Report 23-06, Nova Scotia (Department of Community Services) (Re)*, [2023 NSOIPC 7 \(CanLII\)](#).

<sup>4</sup> *NS Review Report 23-07, Nova Scotia (Department of Community Services) (Re)*, [2023 NSOIPC 8 \(CanLII\)](#).

<sup>5</sup> *NS Review Report 23-08, Nova Scotia (Community Services) (Re)*, [2023 NSOIPC 9 \(CanLII\)](#).

<sup>6</sup> *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.

[13] This is the fourth deemed refusal complaint about this public body resulting from not collecting records in a timely manner that has proceeded to a public review report since August 2023. Responding to an access request in the time required by *FOIPOP* is not a choice. It is a legal obligation.

[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. Given that I am now issuing the fourth review report to address the same problem in such a short period of time, I have also included Recommendation #2 below.

#### **FINDING & RECOMMENDATIONS:**

[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 seven days of the date of this review report, the public body issue a decision in response to the applicant's access request, along with a copy of the records,<sup>7</sup> and provide the OIPC with a copy of the decision letter sent to the applicant.
2. Senior leadership at the public body address this problem by ensuring it has sufficient resources to fulfill its legal obligations under *FOIPOP*.

February 9, 2024

Tricia Ralph  
Information and Privacy Commissioner for Nova Scotia

OIPC File: 24-00006

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<sup>7</sup> Per s. 8(1)(a)(i) of *FOIPOP*.