



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

REVIEW REPORT 24-13

July 9, 2024

Department of Finance and Treasury Board

Summary: The Department of Finance and Treasury Board (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 to the applicant and any third parties notified under s. 22 of *FOIPOP* within 45 days of the date of this review report.

INTRODUCTION:

[1] On March 20, 2024, the applicant submitted an application for access to records (access request) held by the Department of Finance and Treasury Board (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 within 30 days, which in this case was by April 19, 2024, unless an authorized time extension was taken.

[2] A public body may, on its own accord, extend the time to respond to an access request for up to 30 days if it meets one or more of the circumstances set out in s. 9(1) of *FOIPOP*. On April 15, 2024, the public body advised the applicant that it was taking a time extension under s. 9(1)(b) of *FOIPOP*. This section allows the public body to take a time extension if a large number of records was requested or must be searched for, and meeting the time limit would unreasonably interfere with the operations of the public body. This extended the public body's time to respond to May 21, 2024.

[3] The public body did not issue a decision in response to the access request by that time. On May 22, 2024, 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.

[4] 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:

[5] 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

[6] 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*?

[7] For the reasons provided 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.

[8] 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. This circumstance is referred to as a "deemed refusal."

[9] The reason for the delay in this case is related to the public body's search efforts. *FOIPOP* requires a public body to (a) retrieve or collect the records, (b) "process" the records (i.e., apply any applicable exemptions), and (c) notify third parties under s. 22. These steps must be taken within 30 days because a decision must be issued 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 Information Access and Privacy (IAP) Services² enough time to consider whether a time extension is warranted and if so, to take it and/or request permission from the OIPC to extend the time for response 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.

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>>, at p. 21 (Request Processing Checklist).

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.

[10] In this case, the public body was asked to retrieve the records on March 21, 2024, but did not provide them to IAP Services until May 28, 2024. This delay meant that IAP Services could no longer request permission from the OIPC to take an additional time extension, because the deadline to do so had passed.³ It also meant that the public body was now deemed to have refused to give the applicant records in response to their access request.

[11] Approximately four thousand pages of records were provided by the public body to IAP Services on May 28, 2024. After having reviewed the records, IAP Services said it must now engage in mandatory consultations with third parties pursuant to s. 22 of *FOIPOP*.

[12] As described in the OIPC's guide entitled *Duty to Assist #3: Third Party Notice, Guidelines for Public Bodies and Municipalities*,⁴ if the public body decides that a third party exemption might apply, then third party notice is required.⁵ The law provides that the 30-day time period for responding to requests is not extended by reason only that a notice has been given to a third party.⁶ *FOIPOP* provides 30 days to complete mandatory third party notice and issue decisions to the applicant and any notified third party. The time limit may be extended under s. 9(1) of *FOIPOP*.⁷ After a decision is issued, the public body must wait until the 20-day third party review period has passed before disclosing any third party records to the applicant.⁸ If a third party files a request for review, the public body cannot disclose any third party records subject to the review until the third party review process is complete.

[13] I discussed record collection delays in *Review Report 23-06* wherein that public body also failed to respond to an applicant within statutory timelines due to delayed record collection:

[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

³ Office of the Information and Privacy Commissioner for Nova Scotia, *Time Extension Request Guidelines for Public Bodies* (November 2022), online: <https://oipc.novascotia.ca/sites/default/files/forms/FOIPOP%20Forms/2022%2011%2001%20FOIPOP%20Time%20Extension%20Guidelines_0.pdf>, at p. 2.

⁴ Office of the Information and Privacy Commissioner for Nova Scotia, *Duty to Assist #3: Third Party Notice, Guidelines for Public Bodies and Municipalities* (March 25, 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>>, at p. 4.

⁵ Section 22(1) of *FOIPOP*.

⁶ Section 22(3) of *FOIPOP*.

⁷ Office of the Information and Privacy Commissioner for Nova Scotia, *Time Extension Request Guidelines for Public Bodies* (November 2022), online: <https://oipc.novascotia.ca/sites/default/files/forms/FOIPOP%20Forms/2022%2011%2001%20FOIPOP%20Time%20Extension%20Guidelines_0.pdf>.

⁸ Section 23(3) and s. 34(1)(c) of *FOIPOP*.

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 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.⁹

[14] 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.¹⁰ It is important that public bodies understand their legal obligation to conduct adequate and timely searches when collecting records in response to access requests.

[15] The public body did not undertake an adequate and timely search in this matter. This negated IAP Services' ability to request a time extension from the OIPC (which may or may not have been granted depending on the information provided to the OIPC). This action also meant that the public body was deemed to have decided to refuse to give the applicant access to the records they requested.¹¹ The public body did not provide any argument or rationale for why it took more than two months to retrieve the records.

[16] Overall, I strongly urge the public body not to take a similar approach in future. Its actions in this matter not only contravene s. 7 of *FOIPOP* but are also inconsistent with the purpose and spirit of the law.

[17] 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.

[18] In this case, I have recommended that the decision be issued within 45 days of the date of this review report because of the timeframes set out in *FOIPOP* related to mandatory third party notices. Typically, I would not recommend such a long period for issuing a decision. However, if the public body is required to engage in mandatory third party notices, then it must follow the timeframes set out in the law, which amount to 30 days. The additional 15 days are to allow the public body time to complete the processing of the records. I acknowledge that the public body has a large volume of records to process; however, I cannot sanction more time given the public body's avoidance of its legal obligations in *FOIPOP*.

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.

⁹ *NS Review Report 23-06, Nova Scotia (Department of Community Services) (Re)*, [2023 NSOIPC 7](#) (CanLII), at paras. 16-17.

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

¹¹ Section 7(3) of *FOIPOP*.

[20] I recommend that the public body issue a decision to the applicant in response to their access request within 45 days of the date of this review report.

[21] For the benefit of the applicant, I want to point out that once the public body issues its decision, by law it must wait 20 days to disclose any records to allow the third parties the opportunity to file a request for review with the OIPC if they do not agree with the public body's decision. This is part of the notice requirements set out in ss. 22 and 23 of *FOIPOP*.

July 9, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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