



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
TEC-08-02

Report Release Date: January 15, 2009

Public Body: South Shore Health

Issue: Whether South Shore Health was in compliance with s. 9 of the *Freedom of Information and Protection of Privacy Act* [“the *Act*”] when it took an additional 30 day extension to provide a decision to the Applicant with respect to his/her Application for Access to a Record.

Record at Issue: There is no Record at issue.

Summary: An Applicant requested a Review of South Shore Health’s decision to take an additional 30 days to process his/her Application for Access to a Record. The Applicant submitted that the request did not involve a large volume of records and that the process was delayed by departmental vacations. South Shore Health submitted that others within South Shore Health who were in possession of the Record delayed forwarding the Record to the Freedom of Information and Protection of Privacy [“FOIPOP”] Administrator in part because of vacations and in part due to those in possession of the Record seeking a legal opinion before forwarding the Record to the Administrator. South Shore Health also submitted that once the Record was forwarded to the Administrator, it was determined that nine Third Parties needed to be notified necessitating a time extension in which to consult with these Third Parties.

The Review Officer found that the FOIPOP Administrator's decision to take an additional 30 days under s. 9(1)(c) of the *Act* in order to consult nine Third Parties is a reasonable one and in accordance with the statute and found that it is not appropriate for any other person within the public body to delay in providing the FOIPOP Administrator with a record regardless of the reason for doing so.

Recommendation:

The Head of South Shore Health and the FOIPOP Administrator distribute a copy of this Review Report to all departments within South Shore Health to ensure everyone has a clear understanding of the importance of providing records to the FOIPOP Administrator immediately upon receiving a request to do so. This will enable the FOIPOP Administrator to respond to an Application for Access to a Record from an applicant in a timely manner.

Key Words:

frustrated by, time extension, timely manner, unreasonably interfere with the operations of the public body.

Statutes Considered:

Nova Scotia Freedom of Information and Protection of Privacy Act ss. 2, 7(1), 7(2), 9(1), 9(2).

Other Cited:

FOIPOP Review Office Request for Time Extension Policy [September 10, 2007]@www.foipop.ns.ca [Policies and Procedures].

REVIEW REPORT TEC-08-02

BACKGROUND

In a letter dated August 6, 2008, the Applicant made an Application for Access to a Record to South Shore Health, which stated:

I am writing to you to make a request under The Freedom of Information and Protection Of Privacy Act. Under this Act, I am requesting a copy of the entire file of information (ie. Any and all information) that relates to the investigation that was recently conducted on me by both [Name and title of employee] and [Name and department of second employee]. My request of information includes any and all information held by both [Names of both employees] regarding their investigation of me.

By letter dated August 14, 2008, South Shore Health acknowledged receipt of the Applicant's Application for Access to a Record. South Shore Health advised the Applicant that s. 7(2) of the *Freedom of Information and Protection of Privacy Act* ["the Act"] required them to respond to the Application for Access to a Record within 30 days and that s/he could expect a response by September 5, 2008. In the same letter, South Shore Health also advised the Applicant that the 30 day deadline was subject to a determination being made of the need to consult with Third Parties, in which case South Shore Health would be advising him/her in writing of the need for an extension.

In a letter to the Applicant dated September 2, 2008, South Shore Health made a decision with respect to the need for an extension of time, which stated:

We wish to advise you that South Shore Health has found it necessary to extend the 30 day decision response time on your application for an additional 30 days to October 5. The reason for the extension is that the information you requested contains information which relates to third parties. As per Section 9(1)(c) South Shore Health requires additional time to consult with third parties before deciding whether or not to grant access to the requested record.

As provided under Section 22 of the Freedom of Information and Protection of Privacy Act, we have written to third parties in a letter dated September 2 advising that we have received a request for records that may affect their interests of personal privacy. We have asked whether they consent or object to the disclosure of the information.

We did not identify you as the person requesting access to the information, nor can we give you the names of the third parties involved. Third parties have 14 days to reply to our request. If you are not in agreement with our decision to extend our response date, you may complain directly to the Review Officer. . .

On September 8, 2008 the Applicant filed a Form 7 with the Review Officer requesting a Review, which stated:

The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body – the failure to provide the requested information within 30 days.

The applicant requests that the review officer recommend that – the head of the public body give access to the record as requested in the Application for Access to a Record;

I am recommending that the information I requested be provided to me immediately as 30 days has passed. Considering that I was informed that there only 6 people “interviewed” in this matter, an extension of another 30 days seems unnecessary.

There is not a huge volume of information involved and it took [Name of the Freedom of Information and Protection of Privacy Administrator] until Sept. 02/'08 to write to the Third Parties – almost one full month from the date of my Request.

[Emphasis in the original]

Due to the time-sensitive nature of Time Extension Complaints, the Review Office launched an investigation immediately. The Applicant and South Shore Health were contacted by phone on September 12, 2008.

By letter dated September 23, 2008, the Review Office acknowledged receipt of the Request for Review from the Applicant. On the same date, the Review Office advised South Shore Health that the Applicant had filed a Request for a Review with respect to the time extension of the additional 30 days. South Shore Health was given 15 days to respond to the Review Office.

RECORD AT ISSUE

There is no Record at issue in this Review. The time extension decision by South Shore Health is the only issue in this Review.

APPLICANT'S SUBMISSION

The Applicant's submission, dated December 10, 2008, provided background information for the formal Review process with respect to his/her Time Extension Complaint. The Applicant's submission to the Review Officer included the following:

1. Based on information s/he received from South Shore Health regarding a work-related matter, the Applicant submitted that the matter did not comprise huge

- volumes of information. Rather it involved a relatively small amount of information held by two people;
2. Relying on the Review Office Investigation Summary, the Applicant noted that the initial delay in the Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator receiving the responsive Record was due to vacation by one of the named employees. The Applicant then queried the periods of vacation;
 3. The Applicant wanted to know why there was a significant delay in the Record being handed over to the FOIPOP Administrator by another department, particularly given that the Record did not involve a huge volume of information; and
 4. The Applicant submitted that the delay in handing over the Record to the FOIPOP Administrator subsequently delayed the entire process because Third Parties had to be consulted afterwards.

PUBLIC BODY'S SUBMISSION

In response to being notified that a Request for Review had been received from the Applicant, South Shore Health provided the following submission to the Review Officer:

1. The same day the Application for Access to a Record was received, the FOIPOP Administrator sent an email to the employees whose files were the subject of the request;
2. A representative of the department at South Shore Health where the files were located advised the FOIPOP Administrator that due to vacation time, the files could not be forwarded until August 22, 2008;
3. The FOIPOP Administrator did not receive the files as promised on August 22, 2008;
4. When the FOIPOP Administrator followed up, the same representative indicated that due to the sensitive nature of the files requested, that department would be seeking a legal opinion before giving her the files;
5. On August 27, 2008, the same representative of the department received the legal opinion and forwarded the opinion and the files that same day to the FOIPOP Administrator;
6. The FOIPOP Administrator reviewed the file and determined that nine Third Parties needed to be notified as the file contained their personal information;
7. On September 2, 2008, the Applicant was advised of the South Shore Health's intention to take an additional 30 days in which to respond under s. 9 of the *Act*; and
8. The Applicant and the Third Parties were advised on September 22, 2008, that partial access would be given subject to any of the Third Parties making a Request for a Review.

After the matter had been referred to the Review Office for formal Review, South Shore Health made a submission to the Review Officer dated December 9, 2008. South Shore Health indicated the following were the reasons for the time extension:

1. The FOIPOP Administrator was initially notified by the department who held the information that due to vacation of employees involved there would be a delay but the files would be sent by August 22, 2008;
2. The files were not received on August 22, 2008 as requested. The FOIPOP Administrator followed up and was advised that that department was seeking a legal opinion;
3. The files and the legal opinion were forwarded to the FOIPOP Administrator on August 27, 2008;
4. After a review of the files, the FOIPOP Administrator made a determination that there was personal information relating to Third Parties. South Shore Health decided that some of the information could automatically be severed under s. 20 of the *Act* but notification to Third Parties was necessary;
5. The Applicant was notified on September 2, 2008, that a time extension was required to notify the Third Parties under s. 9 of the *Act*. On the same date, nine Third Parties were notified of the Application for Access to a Record by the FOIPOP Administrator; and
6. After receiving all the representations from Third Parties, the FOIPOP Administrator notified the Applicant and the Third Parties that partial access had been granted and if no Third Party requested a Review, the files were to be sent to the Applicant on October 14, 2008.

South Shore Health made a decision on October 15, 2008 granting partial access to the Applicant. That decision and the partial Record released to the Applicant are not at issue in this Review.

DISCUSSION:

The Applicant's right to access information under the *Act* is stated in the purpose section, which provides:

2 The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

(i) giving the public a right of access to records,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves. . .

[Emphasis added]

Section 7 of the *Act* imposes a duty to assist on the public body and stipulates the timeframe in which it is required to respond to an Application for Access to a Record from an Applicant. The relevant portion of s. 7 provides as follows:

7(1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

*(a) make every reasonable effort to assist the applicant and to **respond without delay** to the applicant openly, accurately and completely. . .*

*(2) The head of the public body shall respond in writing to the applicant **within thirty days** after the application is received. . .*

[Emphasis added]

The statute allows a public body to take an extension of time in which to respond to an Application for Access to a Record. Section 9 of the *Act* allows a public body up to thirty additional days [or longer with the permission of the Review Officer – Refer to *Requests for Time Extension Policy [FOIPOP Review Office – September 2007]* in the following circumstances:

9 (1) The head of a public body may extend the time provided for in Sections 7 or 23 for responding to a request for up to thirty days or, with the Review Officer's permission, for a longer period if

(a) the applicant does not give enough detail to enable the public body to identify a requested record;

(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body; or

*(c) **more time is needed to consult with a third party or other public body before the head of the public body can decide whether or not to give the applicant access to a requested record.***

(2) Where the time is extended pursuant to subsection (1), the head of the public body shall tell the applicant

(a) the reason;

(b) when a response can be expected; and

(c) that the applicant may complain about the extension to the Review Officer.

[Emphasis added]

In accordance with s. 9 of the *Act*, South Shore Health wrote to the Applicant on September 2, 2008 advising him/her that it required an additional 30 days to respond and indicated s/he had the right to complain to the Review Officer if s/he was not in agreement with that decision.

The FOIPOP Administrator attempted to meet her statutory duty to assist the Applicant under the *Act* to the extent possible given the responses she received from the others within South Shore Health who had the files making up the Record. She was

diligent about responding in a timely way to the Applicant. She notified those who held the Record promptly upon receiving the Application for Access to a Record. She kept the Applicant apprised of the process including his/her right to request a Review to the Review Officer of decisions made by her including the decision for an extension of time. Had the Record been provided to her in a timely manner from the other department, the FOIPOP Administrator may not have needed to seek the additional 30 day time extension.

Section 9 of the *Act* clearly contemplates that there will be circumstances where a public body may need additional time to make a decision with respect to an Application for Access to a Record. The statute allows for that in the following two ways:

1. A public body can decide to take an additional 30 days without the permission of the Review Officer. This decision must be conveyed to the Applicant with the reason for the additional 30 days and when the Applicant can expect a decision; or
2. A public body can ask for the permission of the Review Officer for a period longer than 60 days.

Both of these options for a time extension include a duty on the public body to advise the Applicant of his or her right to request a Review of the time extension decision to the Review Officer. The Applicant was advised by South Shore Health's FOIPOP Administrator of the right to request a Review, which the Applicant chose to exercise, thus this Review. Only the first option is relevant to this Review but it is important to put South Shore Health's request for an additional 30 days into the context of what other time extensions are possible under the statute.

There are only three grounds upon which a time extension can be taken by a public body or allowed by the Review Officer. Those are specifically outlined in s. 9 of the *Act*. In this case, South Shore Health advised the Applicant that the reason a time extension was required was to consult with Third Parties before a decision with respect to access could be made. This is one of the three grounds on which a public body can make a decision to take an additional 30 days to process an Application for Access to a Record.

The Applicant did not address the issue of Third Parties in either the Form 7 or in his/her representations to the Review Officer during the formal Review. The Applicant submitted that because there is not a huge volume of materials involved in the Application for Access to a Record based on what s/he has been told about the file, a time extension should not be necessary. While this is another statutory ground upon which a public body can seek a time extension – a large number of records is requested – this is not a ground relied upon by South Shore Health.

The Applicant also responded to the fact that South Shore Health had advised him/her that some of the individuals involved were on vacation. While advising an applicant of the impact of vacation time on his/her Application for Access to a Record is in accordance with South Shore Health's duty to assist under s. 7(1)(a) of the *Act*, it is irrelevant with respect to a time extension under s. 9(1)(c) of the *Act*. While South Shore

Health did advise the Applicant of this, this is not a reason for a time extension under the *Act* and was not claimed as such by the FOIPOP Administrator. It is acknowledged that vacations can impact on the operations of a public body. Section 9 of the *Act*, however, only takes the operations of a public body into account when the reason for a time extension is that there are a large number of records that are requested or must be searched and this would unreasonably interfere with the operations of the public body. That was not the submission of South Shore Health in this case.

The Applicant rightly points out in his/her final submission to the Review Officer that what was of major concern to him/her was the significant delay involved in the files being given to the FOIPOP Administrator. I agree completely and that leads me to what is really at issue in this case. In that regard, I comment as follows:

1. The FOIPOP Administrator is *the* delegated authority under the *Act* authorized to make decisions with respect to Applications for Access to a Record including a decision to take a time extension up to 30 days;
2. When a file/record is requested by the FOIPOP Administrator, it is not appropriate for any other person within or representative of the public body to delay providing her with that information. The statutory deadlines imposed on the FOIPOP Administrator cannot be “frustrated” by the actions of others;
3. If another department wishes to obtain a legal opinion or consult in any other fashion, they can do so by retaining a copy of the Record and consulting accordingly. This consultation would be done, however, parallel to the FOIPOP Administrator being given the original Record to enable her to organize a response to the Application for Access to a Record;
4. A legal opinion could assist the FOIPOP Administrator in deciding what exemptions may or may not be applied to the Record but would not justify others within a public body not giving the Record to the FOIPOP Administrator. In other words, having the legal opinion in advance would not have changed the statutory obligation on the department at South Shore Health to hand over the Record to the FOIPOP Administrator as the delegated authority – the only person who can make a decision under the *Act*;
5. Had the Record been delivered promptly, the FOIPOP Administrator could have given notice to the nine Third Parties at the same time as the other department was seeking a legal opinion;
6. Given that s. 7 of the *Act* requires the FOIPOP Administrator to respond to the Applicant *without delay* and the other department was aware of the imposed timelines, withholding the file while obtaining a legal opinion was wholly inappropriate;
7. The department also indicated to the FOIPOP Administrator that the Record could not be provided as the individual(s) involved were on vacation. Whether or not the individuals involved are on site or on vacation or on any other leave is irrelevant. Their consent is not required in order to give a copy of the Record to the FOIPOP Administrator. Again, this should not have been a justification for not giving the Record to the FOIPOP Administrator; and

8. It is important to state, however, that all of the concerns that made the department withhold the Record from the FOIPOP Administrator may be relevant as to whether or not the Record should be released to the Applicant. These can be raised with the FOIPOP Administrator to enable her to make the appropriate decision under the *Act* but cannot be used as the basis for withholding the Record from the FOIPOP Administrator.

The FOIPOP Administrator made every effort to comply with the statute with respect to responding to the Applicant, the Application for Access to a Record and the time extension. The FOIPOP Administrator's efforts were "frustrated" by those in another department who did not forward the Record when requested to do so by the FOIPOP Administrator.

The only basis on which South Shore Health seeks to justify taking an additional 30 days to respond to make a decision is to enable it to notify nine Third Parties whose personal information is in the Record. The FOIPOP Administrator advised the Applicant of the need for the additional time on September 2, 2008 at which time Third Party notifications were also sent. On September 22, 2008, the Applicant and Third Parties were advised that there would be a partial release. The release of the severed file to the Applicant was completed on October 15, 2008.

Once the FOIPOP Administrator had received the Record on August 27, 2008, she was able to give notice to the Third Parties and make a decision about access well within 60 days of that date.

I appreciate the Applicant being upset because of the delay caused by the department not giving the Record to the FOIPOP Administrator in a timely fashion. I find, however, the FOIPOP Administrator's decision to take an additional 30 days under s. 9(1)(c) of the *Act* to consult with nine Third Parties to be a reasonable one and in accordance with the statute. Once she identified that there was personal information regarding nine Third Parties in the Record, the FOIPOP Administrator had no choice under the *Act* but to consult them prior to the release of any or all of the Record.

This is the first occasion that this Review Office has issued a Review Report regarding a Time Extension Complaint of a public body's decision to extend the time to respond to an Application for Access to a Record by an additional 30 days.

FINDINGS:

1. The FOIPOP Administrator's decision to take an additional 30 days under s. 9(1)(c) of the *Act* in order to consult nine Third Parties is a reasonable one and in accordance with the statute;
2. Once she identified that there was personal information regarding nine Third Parties in the Record, the FOIPOP Administrator had no choice under the *Act* but to consult them prior to the release of any or all of the Record;

3. The FOIPOP Administrator is *the* delegated authority under the *Act* authorized to make decisions with respect to Applications for Access to a Record including a decision to take a time extension;
4. The FOIPOP Administrator made every effort to comply with the statute with respect to responding to the Applicant, the Application for Access to a Record and the time extension;
5. The FOIPOP Administrator's efforts were "frustrated" by those in another department who did not forward the Record when requested to do so by the FOIPOP Administrator; and
6. When a file/record is requested by the FOIPOP Administrator, it is not appropriate for any other person within the public body to delay in providing her with that information regardless of the reason for doing so. The statutory deadlines imposed on the FOIPOP Administrator cannot be "frustrated" by the actions of others, regardless of the reason for retaining the Record.

RECOMMENDATION:

I recommend the following to South Shore Health:

The Head of South Shore Health and the FOIPOP Administrator distribute a copy of this Review Report to all departments within South Shore Health to ensure everyone has a clear understanding of the importance of providing records to the FOIPOP Administrator immediately upon receiving a request to do so. This will enable the FOIPOP Administrator to respond to an Application for Access to a Record from an applicant in a timely manner.

Respectfully submitted,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer