



Order F22-19

MINISTRY OF HEALTH

Celia Francis
Adjudicator

April 26, 2022

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Summary: The applicant complained that the Ministry of Health (Ministry) had failed to respond in time to his request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records related to the Order of the Provincial Health Officer of September 10, 2021. The Ministry conceded that it had not met its duty under s. 6(1) of FIPPA to respond without delay and had not complied with its duty under s. 7 to respond within legislated time lines. The adjudicator agreed and ordered the Ministry to respond no later than April 29, 2022.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7(1), 7(2), 10(2)(b) and Schedule 1 (definition of “day”); *Interpretation Act*, s. 29.

INTRODUCTION

[1] In this order, I find that the Ministry of Health (Ministry) did not comply with its duties under ss. 6(1) and 7 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) in responding to the applicant’s access request.

[2] The applicant submitted the following request to the Ministry on October 13, 2021:

All emails, correspondence, opinions and memoranda sent or received by [the Provincial Health Officer, two Deputy Provincial Health Officers and the Minister of Health] concerning the possibility, planning, preparation and implementation of the "GATHERINGS AND EVENTS – SEPTEMBER 10, 2021" order of the Provincial Health Officer [PHO].

[3] The Ministry requested and received permission from the Office of the Information and Privacy Commissioner (OIPC) for two 30-day extensions. The

day after the second extension expired, the applicant complained to the OIPC that the Ministry had failed to respond to his request.

[4] Mediation did not resolve the complaint and it proceeded to inquiry. Both parties provided submissions. As of the date of the inquiry, the Ministry still had not responded to the request.

ISSUES

[5] The issues I must decide in this inquiry are these:

1. Did the Ministry make every reasonable effort to respond without delay to the applicant's access request as required by ss. 6(1) and 7 of FIPPA?
2. If the Ministry failed to respond without delay, what is the appropriate remedy?

[6] Section 53(3) of FIPPA says that the failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record.

[7] Section 57(1) of FIPPA says that, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the records or part.

DISCUSSION

Background

[8] The Ministry's FOI, Litigation and Reporting office provides service and advice to the Ministry regarding its obligations under FIPPA.¹

[9] Information Access Operations (IAO), part of the Ministry of Citizens' Services, provides service and advice to provincial ministries and the Office of the Premier regarding their FIPPA obligations. IAO also processes FIPPA requests on behalf of all government public bodies. This includes reviewing requested records for exceptions to disclosure and consulting with third parties who may have an interest in the records. IAO's Justice/Health team is processing the request at issue here.²

¹ Affidavit of Ministry's Director, FOI, Litigation and Reporting, Corporate Issues and Client Relations (Director), para. 3.

² Affidavit of Justice/Health Team Lead, IAO (Team Lead), paras. 3-4.

Duty to Respond Without Delay

[10] FIPPA imposes obligations on public bodies to respond to access requests within certain timelines. The relevant sections of FIPPA read as follows:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Time limit for responding

7(1) Subject to this section and sections 23 and 24(1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).

(2) The head of the public body is not required to comply with subsection (1) if

(a) the time limit is extended under section 10, ...

Extending the time limit for responding

10(1) The head of a public body may extend the time for responding to a request for up to 30 days if one or more of the following apply:

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

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

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

(d) the applicant has consented, in the prescribed manner, to the extension.

(2) In addition to the authority under subsection (1), with the permission of the commissioner, the head of a public body may extend the time for responding to a request as follows:

(a) if one or more of the circumstances described in subsection (1)(a) to (d) apply, for a period of longer than the 30 days permitted under that subsection;

(b) if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate.

...

[11] Schedule 1 of FIPPA says that “day” does not include a holiday or a Saturday. The *Interpretation Act* clarifies that holidays include Sundays.³

Chronology

[12] There is no dispute about the dates on which various events occurred, which I find were as follows:

- October 13, 2021 – the applicant submitted his request to the Ministry;
- October 18, 2021 – IAO sent a call for records to the PHO’s office;
- October 20, 2021 – IAO acknowledged receipt of the request to the applicant and said it would respond by November 25, 2021 (i.e., 30 business days after it received the request);
- November 22, 2021 – IAO told the applicant that the OIPC had approved a 30-day extension under s. 10(2)(b) of FIPPA and the new response date would be January 11, 2022;
- January 10, 2022 – IAO told the applicant that the OIPC had approved another 30-day extension under s. 10(2)(b) and the revised due date would be February 23, 2022;
- February 24, 2022 – the applicant complained to the OIPC about the delay, noting that it had been three months since he submitted his request; he added that he had learned from IAO the day before that the “search for records is still in progress”;
- mediation by the OIPC then took place;
- March 15, 2022 – the applicant asked that the matter proceed to inquiry;
- March 16, 2022 – the OIPC issued the notice for this inquiry; the Ministry’s legal counsel told the OIPC that IAO was still awaiting the records from the Ministry;
- March 29, 2022 – the Ministry received the records from the PHO’s office and in turn sent them on to IAO; and
- April 20, 2022 – the inquiry closed.⁴

³ *Interpretation Act*, RSBC 1996, c 238, s. 29, definition of “holiday”.

⁴ These dates are drawn from the access request and inquiry documents and the parties’ submissions.

Ministry's submission

[13] The Ministry outlined the remaining steps in responding to the request:

- the Ministry received the records from the PHO office on March 29, 2022;
- the records were then transferred to IAO for “deduplication” [presumably, this entails the removal of duplicate records];
- after deduplication is complete, the PHO’s Office will conduct a “harms assessment” [presumably, determination of any exceptions to disclosure];
- this will involve a line-by-line review of the 1,340 pages of responsive records and “detailed consultations” with 10 other bodies;⁵
- once this stage is complete, the PHO’s office will provide “severing requirements” to IAO which will produce a “redline” [i.e., a set of records with any excepted information outlined in red]; and
- the package will be routed through the approvals process.⁶

[14] The Ministry admitted that, as of mid-March 2022, it had not yet provided the applicant with any records. The Ministry conceded it had failed to respond to the request in accordance with s. 7 of FIPPA and that it was therefore also in breach of s. 6(1) of FIPPA. The Ministry said it anticipated that it would be able to respond to the request on or before April 29, 2022.⁷

[15] The Ministry explained the delay as follows:

- the past year has been “extraordinarily busy” for the Ministry and its employees, due to COVID-19 and the Ministry’s related responsibilities;
- the “extraordinary burden” of COVID-19 related work has had an impact on the Ministry’s timeliness in processing FIPPA requests;
- IAO’s Justice/Health Team lost nearly half of its staff at the beginning of summer 2021 and had only hired new staff in August and October 2021;
- the necessary training of new staff was still ongoing and some FIPPA requests were backlogged;

⁵ Alberta Health; BC Office of the Human Rights Commissioner; Ministry of Citizens’ Services; First Nations Health Authority; Government Communications and Public Engagement; Interior Health Authority; Ministry of Attorney General; Provincial Health Services Authority /BC Centre for Disease Control; Office of the Premier; and Ministry of Tourism, Arts, Culture and Sport.

⁶ Ministry’s initial submission, para. 23; Director’s Affidavit, para. 9; Ministry’s reply submission paras. 1-2.

⁷ Ministry’s initial submission, paras. 12-13; Director’s Affidavit, para. 14; Team Lead’s Affidavit, para. 17.

- as of March 22, 2022, the Ministry had 374 open FIPPA requests, of which 174 were directed at the PHO;
- the PHO's office had only one person (a Deputy PHO) reviewing FIPPA packages from August 2021 to January 2022;
- his work has since been spread amongst all three Deputy PHOs who have authority to give final approval of any severing of records; and
- staff must compare this response package to other similar ones, to ensure consistency.⁸

Applicant's submission

[16] In the applicant's view, the Ministry has not made every reasonable effort to respond to his request without delay. He pointed out that his request was limited to the records of four people and suggested that a "broad search" would not have been necessary. He asked that I confirm the Ministry's response date of April 29, 2022.⁹

Discussion and findings

[17] The Ministry's submissions raised a number of questions in my mind:

- why did the office of the PHO take more than five months to produce the responsive records to the Ministry and IAO?
- where, and for how much time, did PHO staff search for the records?
- did the Ministry consider charging fees or asking the applicant to narrow the request, to help manage the process?
- was IAO able to re-assign staff to its Justice/Health team, to assist it with its loss of staff and backlogs?
- why did the Ministry not make at least a partial disclosure of records within the extended time lines?
- what, if any, relevance or impact did the redistribution of the Deputy PHO's workload in January 2022 have on the initial gathering of the records?
- why did the PHO's office not provide its harms assessment, along with the records, when it sent them to the Ministry and IAO, rather than waiting until after "deduplication"?
- why are so many other bodies involved in the consultations, including the Premier's Office, and how long has this phase been going on?

⁸ Ministry's initial submission, paras. 26-235; Director's Affidavit, paras. 6-13; Team Lead's Affidavit, paras. 6-9.

⁹ Applicant's response submission paras. 10-11.

- why does the response package still need to go through levels of approval, when the Deputy PHOs have sign-off approval?

[18] Sadly, I saw no answers to these questions in the Ministry's submissions. However, it seems to me that, with only a few adjustments to its FIPPA processes, the Ministry could have responded in time, as suggested by my questions. The Ministry and IAO may wish, as a result, to consider whether to make changes in their FIPPA processes.

[19] Nevertheless, I recognize that the past year has been challenging, to say the least, for both the Ministry and IAO, due to COVID-19 and other issues as I described above. I also accept and agree with the Ministry's concession that it has not met its duties under ss. 6(1) and 7 of FIPPA. In my view, the proposed response date of no later than April 29, 2022 is reasonable in the circumstances.

CONCLUSION

[20] For the reasons given above, I make the following order under s. 58 of FIPPA:

- 1) I find that the Ministry has failed to meet its duties to respond to the request without delay under s. 6(1) and has violated its duty to respond within the period required under s. 7.
- 2) I require the Ministry to respond to the applicant's request by no later than April 29, 2022.

April 26, 2022

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F22-89030