



Order F24-28

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Lisa Siew
Adjudicator

April 11, 2024

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant made an access request to the Ministry of Children and Family Development (the Ministry). Despite two time extensions, the applicant submits the Ministry did not respond to their access request. The applicant asked the Office of the Information and Privacy Commissioner to review the Ministry's failure to respond to their access requests in accordance with the legislated response times under FIPPA. The adjudicator determined the Ministry did not perform its duty under ss. 6(1) and 7 to respond without delay in accordance with the required statutory deadlines. The Ministry was ordered to provide a response to the applicant's access request by a set date.

Statute and sections cited in order: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 6(1), 7(1), 7(2)(a), 8(1), 10(1)(b), 10(2)(b), 53(3), 58(3)(a), 58(4) and Schedule 1 (definition of "day"). *Interpretation Act*, RSBC 1996, c. 238, s. 29 (definition of "holiday").

INTRODUCTION

[1] This inquiry is about the Ministry of Children and Family Development's duty to comply with its obligations under ss. 6(1) and 7 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Those sections require public bodies to make every reasonable effort to respond without delay to an applicant's request for records, in accordance with the required statutory timelines.

[2] An applicant requested the Ministry provide access to records about themselves, their birth parents and all their case files for an approximately 18-year timeframe.¹ The applicant submits the Ministry did not respond to their

¹ I note that Information Access Operations (IAO) processes all access to information requests received by the provincial government. On behalf of the Ministry, IAO employees were involved in the events surrounding the applicant's access request. Therefore, throughout this order, any

access request. A public body's failure to respond in time to an access request, in accordance with the statutory time limits, is treated as a decision to refuse access to the record (a deemed refusal) under s. 53(3).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's failure to respond to their access request. In reviews where a deemed refusal is at issue, those files are generally resolved during the intake or investigation/mediation stage of the OIPC's review process by requiring the public body to issue a response to an access applicant within a reasonable timeframe. However, in this case, the OIPC's investigation and mediation process did not resolve the matter and it proceeded to this inquiry.

ISSUES AND BURDEN OF PROOF

[4] The issues I must decide in this inquiry are as follows:

1. Did the Ministry 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 in accordance with FIPPA, what is the appropriate remedy?

[5] The Ministry says it bears the burden of proof for this inquiry under s. 57(1) of FIPPA.² Recent OIPC orders have interpreted ss. 53(3) and 57(1) as assigning the burden on the public body to prove that it has complied with its duties under ss. 6(1) and 7.³ However, I find s. 57(1) sets out the statutory burden when a public body has responded and made a decision to refuse access and requires a public body to prove the applicant has no right of access to the record or part under FIPPA.

[6] In this inquiry, the issue is not about whether an applicant has no right of access under FIPPA to all or part of the requested records, but whether the public body complied with its duty under ss. 6(1) and 7 by responding to the applicant's access request in accordance with the statutory deadlines under FIPPA. Therefore, this is not a case where the public body has clearly informed the applicant that they have no right of access under FIPPA to all or part of the requested records. As a result, I do not find s. 57(1) identifies the burden of proof in these circumstances.

[7] There is no provision in FIPPA that identifies who has the burden to prove the public body did not respond to the applicant's access request in accordance

reference to the "Ministry" means the Ministry of Children and Family Development or IAO acting on behalf of the Ministry.

² Ministry's initial submission at para. 12.

³ For example, Order F21-33, 2021 BCIPC 41 (CanLII) at paras. 7-8.

with FIPPA. Instead, previous OIPC orders place the burden on the public body to prove that it fulfilled its duties and obligations under FIPPA.⁴ I agree and adopt this approach for this inquiry. Therefore, based on past precedent, I conclude the burden is on the Ministry to prove that it complied with its duty under ss. 6(1) and 7 by responding to the applicant's access request in accordance with the statutory deadlines under FIPPA.

DISCUSSION

Duty to respond without delay

[8] FIPPA requires a public body to respond to access requests within certain timelines. Section 7(1) states that a public body must respond no later than 30 days after receiving a written request for access to records. In complying with s. 7(1), a public body is required under s. 8(1) to tell an access applicant whether or not the applicant is entitled to access the requested record or only parts of the record. A public body that fails to respond, within the time required under s. 7(1) and in the manner prescribed by s. 8, will be in breach of its s. 6(1) duty to respond without delay.⁵

[9] The time required for a response, however, is subject to certain allowances. Subsections 7(2) to 7(7) and s. 10 set out circumstances where the statutory 30-day deadline for response may be extended or suspended.⁶ The sections that are relevant for this inquiry are ss. 10(1)(b) and 10(2)(b) which reads as follows:

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:

...

(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;

...

(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:

...

⁴ For example, Order 01-47, 2001 CanLII 21601 (BC IPC) at para. 9; Order No. 327-1999, 1999 CanLII 4131 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 14.

⁵ Order F06-04, 2006 CanLII 13533 (BC IPC) at para. 8.

⁶ The time periods under s. 7(1) are also subject to ss. 23 and 24(1) which suspends the response time where notice is given to third parties.

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

[10] If the time for responding to an access request is extended under s. 10, then s. 10(3) requires the public body to tell the applicant the reason for the extension and when a response can be expected.⁷

What was the Ministry's deadline to respond?

[11] As previously mentioned, public bodies are required to respond to an access request in the time specified under s. 7(1) unless the time for response is extended or suspended. Therefore, the first step is to determine the Ministry's response deadline for the applicant's access request.

[12] Section 7(1) states that a public body must respond no later than 30 days after receiving a written request for access to records. The Ministry says it received the applicant's access request on May 20, 2023.⁸ The applicant did not dispute this fact. However, May 20, 2023, falls on a Saturday and most public bodies are not open on weekends. Therefore, the question I must determine is whether the Ministry received the access request on May 20, 2023, or the next business day.

[13] The OIPC generally takes the position that access requests that are emailed to a public body during normal business hours are received that day and access requests emailed any time after business hours are received the next business day.⁹ I also note that Monday May 22, 2023 falls on Victoria Day which is a statutory holiday; therefore, the Ministry's offices would have been closed on that day. Therefore, I find the Ministry received the applicant's access request on the next business day which is Tuesday May 23, 2023.

[14] The Ministry was required to respond to the applicant no later than 30 days after receiving a written request for access to records. As noted, I find the Ministry received the applicant's access request on May 23, 2023. Under FIPPA, the determination of the number of days does not include Saturdays, Sundays and certain statutory holidays.¹⁰ Therefore, the Ministry was required to respond to the applicant's access request on or before July 4, 2023.

⁷ In the case of an extension under ss. 10(1)(a) to (c), the public body must also tell the applicant that they have a right to complain about the extension under ss. 42(2)(b) or 60(1)(a).

⁸ Manager's affidavit at para. 9.

⁹ Order F20-34, 2020 BCIPC 40 (CanLII) at paras. 33-37.

¹⁰ Definition of "day" under Schedule 1 of FIPPA excludes a "holiday or a Saturday." Under s. 29 of BC's *Interpretation Act*, RSBC 1996, c 238, a "holiday" includes Sunday, Victoria Day, Canada Day, BC Day. See also OIPC guidance document: *Guide to the Freedom of Information and Protection of Privacy Act (FIPPA) for individuals*, March 9, 2015 at p. 8.

[15] The next question is whether there were any applicable extensions or suspensions of time that apply in these circumstances. The Ministry says on July 4, 2023, it took a 30-day time extension under s. 10(1)(b). Therefore, the Ministry's new response deadline was August 16, 2023.¹¹

[16] On August 16, 2023, the Ministry says it received permission from the OIPC for an additional time extension under s. 10(2)(b). Therefore, the Ministry submits its new response deadline was November 15, 2023. Aside from an affidavit from a senior government employee, I was not provided with any supporting evidence that independently verifies the OIPC granted the Ministry an additional time extension under s. 10(2)(b). However, the applicant did not dispute the Ministry's assertions about this extension. I also note there is no evidence or arguments that any further time extensions were allowed. Therefore, I accept the Ministry was required under s. 10(2)(b) to respond to the applicant's access request by November 15, 2023.

Did the Ministry respond in time to the access requests?

[17] The second step in the analysis is to determine whether the Ministry responded to the applicant's access request by November 15, 2023. The Ministry admits that it did not provide a response to the applicant's access request by that deadline.¹² Therefore, I conclude the Ministry did not meet its obligations under FIPPA to respond to the applicant's access request by the required deadline.

What is the appropriate remedy?

[18] The usual remedy in such cases is to order the public body, under s. 58, to respond to the access requests by a particular date.¹³ I find a response deadline is an appropriate remedy in these circumstances. The parties requested this remedy but disagree on an appropriate response deadline.

[19] The Ministry submits an appropriate deadline is May 2, 2024. The Ministry says it has already gone through the process of gathering and compiling the responsive records which total 2,715 pages but now needs time to review and sever the records. The Ministry anticipates this task will be time-consuming and difficult.

[20] In support of its position, the Ministry provided an affidavit from a senior government employee (Manager) involved in the processing of the applicant's access request who says the records are "very sensitive in nature" and the

¹¹ This calculation of days does not include weekends and BC Day which occurred on Monday August 7, 2023.

¹² Ministry's initial submission at paras. 13 and 15 and affidavit of FR at para. 12.

¹³ Order F16-29, 2016 BCIPC 31 at paras. 8-11.

“severing is unusually difficult.”¹⁴ The Manager says the responsive records include many handwritten notes which are time-consuming to review and sever.

[21] The Manager also says staff will be required to consider and apply various provisions of FIPPA, the *Adoption Act* and the *Child, Family and Community Service Act* to the information in the responsive records. The Ministry submits it is important for staff to “work in an expedient, but careful manner” and that there are mandatory exceptions to disclosure that must be considered.¹⁵

[22] The Manager says, on or about March 7, 2024, an “FOI specialist” was assigned to work full-time on reviewing and severing the records and some overtime work was also approved to expedite the review.¹⁶ The Manager submits the review process will entail two reviews of the records by the FOI specialist, one peer review by a colleague or team lead and then approval of the severed records so they can be released to the applicant. The Manager says the FOI specialist estimates that this process can be completed, and a response provided to the applicant, on or before May 2, 2024.

[23] The applicant contends the Ministry’s proposed deadline of May 2, 2024 seems arbitrary and more evidence and explanation is needed to support this proposed deadline. The applicant submits the Ministry has not sufficiently explained how the records are complex, why the task is challenging or what steps are needed to process the responsive records. As one example, the applicant says the Ministry has not adequately explained why the review of handwritten notes in the responsive records makes processing the records more difficult.¹⁷ The applicant also says the Ministry has failed to explain what efforts or strategies the Ministry has tried to mitigate the supposed challenges or obstacles. Without these detailed explanations, the applicant says they are unable to agree or determine whether the Ministry’s proposed deadline is reasonable.

[24] The applicant also argues the Ministry’s proposed deadline should not be granted because the Ministry had sufficient time to respond to their access request within the legislated timeframe. The applicant attributes the Ministry’s delayed response to an intentional disregard of its FIPPA obligations, waiting to act only when the OIPC got involved and prioritizing other access requests over the applicant’s request.

[25] As an example, the applicant says they contacted the Ministry in December 2023 for an update about when the requested records would be delivered to them. The applicant says they were told on December 27, 2023, that

¹⁴ Ministry’s initial submission at para. 18.

¹⁵ Ministry’s reply submission at para. 6.

¹⁶ Manager’s affidavit at paras. 22-23.

¹⁷ Applicant’s submission at p. 2.

the Ministry had not even started the review of their file “due to a significant backlog of requests.”¹⁸ The applicant notes they were also told that their “file is quite large and will take some time to complete” and would be assigned to an analyst shortly.¹⁹ Among other things, the applicant submits this communication shows the Ministry’s complete disregard of the mandatory November 15, 2023 response deadline, a failure to acknowledge or explain why the deadline was missed, a lack of transparency about when the requested records would be provided and a lack of commitment to follow up and provide updates about their records request.

[26] The applicant also submits the Ministry’s excuses for the delay such as the volume and complexity of the records and staffing issues does not absolve the Ministry of their responsibility to adhere to FIPPA’s requirements. The applicant says the Ministry must allocate resources effectively to ensure timely responses to access requests and that it already had ample time to respond within the legally mandated timeframe.

[27] For all those reasons, the applicant submits a more appropriate deadline is April 11, 2024. The applicant says this proposed deadline would allow for a swift resolution and still give the Ministry adequate time to fulfill its obligations.

[28] As I will explain, I am not prepared to grant the Ministry’s request for a response deadline of May 2, 2024. The Ministry was required to provide the applicant with a response to their access request by November 15, 2023. It has now been over four months and the applicant is still awaiting a response. Therefore, I can appreciate the applicant’s frustration since they made their request almost a year ago and the Ministry still has not provided a response.

[29] I also note the Ministry had two time extensions under FIPPA and the applicant expected the Ministry would be working on their request during this time. Instead, after more than a month after the expiry of the November 15, 2023 deadline, the applicant discovered the Ministry had not even started a review of the responsive records. Therefore, it is understandable the applicant would be opposed to allowing the Ministry further time to complete the task the applicant expected the Ministry to have started sooner.

[30] I was also not provided with any evidence that shows the Ministry contacted the applicant after the expiry of the last time extension to offer an update about the applicant’s request. Instead, the applicant was the one who reached out to the Ministry for an update in December 2023. The applicant was told that their request would soon be assigned to an analyst. However, the Ministry’s evidence indicates that it only devoted a full-time staff member to review and process the applicant’s access request on or about March 7, 2024.

¹⁸ Applicant’s submission at p. 2.

¹⁹ *Ibid.*

The Ministry did not sufficiently explain why it could not have taken this action sooner.

[31] The Ministry partly explains its action by attributing the delay to an overall increase in the volume, size and complexity of access requests that it has received and on “staffing allocation.”²⁰ In the past fiscal year, the Ministry says it has seen an increase in the number of access requests and the number of pages involved in each request. I can appreciate the challenges that Ministry staff experience in meeting the continued and growing demand for access to records under FIPPA with limited government resources. However, as noted by the applicant, public bodies are required to ensure that adequate resources are available so that their access to information staff can process requests in compliance with FIPPA.²¹

[32] Ultimately, I am not prepared to grant the Ministry’s request for a response deadline of May 2, 2024, considering the Ministry’s actions, including its failure to acknowledge the missed deadline and allocate appropriate resources sooner or communicate with the applicant about the status of their access request, and also taking into account the length of time the applicant has been waiting for a response to their access request. I agree with the applicant that the Ministry needs to be held accountable for not meeting its legal obligations under FIPPA.

[33] However, I am unable to grant the applicant’s proposed deadline of April 11, 2024, considering the submission phase for this inquiry was completed recently on April 5, 2024, and this order will be issued on or after the applicant’s requested response deadline. I also need to consider the reality of the current situation which indicates the Ministry needs time to properly review and process the requested records.

[34] Therefore, without absolving the Ministry of its failure to respond to the applicant’s access request by the required deadline, I believe some accommodation is appropriate in these circumstances because of the large volume of records which spans an 18-year time period and the numerous statutes that may apply and affect the severance of the records.

[35] Taking all the above into account, I require the Ministry to provide the applicant with a response to their access request, in accordance with s. 8 of FIPPA, by April 26, 2024.

[36] If the applicant is not happy with the response they receive from the Ministry, then the parties are required to first attempt to resolve the matter between themselves. Where an applicant complains that a public body has not performed a duty under FIPPA or requests a review of a public body’s access

²⁰ Ministry’s initial submission at para. 19.

²¹ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 23.

decision, the OIPC requires the applicant to first allow the public body an opportunity to respond and attempt to resolve the matter.²² If the matter is not resolved, then the applicant may seek a resolution through the OIPC's complaint process or its review process.²³

CONCLUSION

[37] For the reasons given above, under s. 58(3)(a), I require the Ministry to perform its duty under s. 6(1) to respond to the applicant's access request, in accordance with s. 8 of FIPPA, by no later than 4:00pm on **April 26, 2024**.

[38] Under s. 58(4), the Ministry is required to provide the OIPC's registrar of inquiries with proof that it has complied with this order.

April 11, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F24-96106

²² See OIPC guidance document: *Guide to OIPC processes (FIPPA)* at <www.oipc.bc.ca/guidance-documents/1599>.

²³ Once the OIPC has accepted a complaint, however, they are usually investigated and resolved by a case review officer or investigator and not at a formal inquiry: Order F18-11, 2018 BCIPC 14 at para. 6 and Decision F08-02, 2008 CanLII 1647 (BC IPC) at para. 38.