



REVIEW REPORT 033-2018

Ministry of Energy and Resources (formerly the Ministry of the Economy)

August 17, 2018

Summary: The Applicant submitted an access to information request to the Ministry of Energy and Resources (the Ministry), which formerly was the Ministry of the Economy. The Ministry extended the response period by an additional 30 days, citing subsection 12(1)(a)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its authority. The Applicant appealed to the Information and Privacy Commissioner (IPC). The IPC found that the Ministry was not justified to rely on subsection 12(1)(a)(ii) of FOIP. He recommended that the Ministry explore options on how it may resource the unit that processes its access to information requests.

I BACKGROUND

[1] On January 9, 2018, the Ministry of the Economy (Economy) received the following access to information request:

All emails without attachments, pertaining to the National Observer, Toronto Star and Global News investigation on hydrogen sulfide gas sent to and/or received by the following individuals: [name of Government of Saskatchewan employee] and [name of Government of Saskatchewan employee], between Sept. 10, 2017 and Oct. 5, 2017. Please remove all duplicate emails where possible.

[2] On January 31, 2018, Economy issued a fee estimate to the Applicant. On February 6, 2018, Economy received payment for the full amount of the fee estimate.

[3] On February 14, 2018, Economy sent a letter to the Applicant indicating it was extending the response period by an additional 30 days pursuant to subsection 12(1)(a)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] On February 15, 2018, the Applicant requested that my office review Economy's time extension.
- [5] On February 21, 2018, my office notified Economy and the Applicant that it would be undertaking a review.
- [6] It should be noted that Economy no longer exists. The Ministry of Energy Resources (ER) assumed responsibility for this review.

II RECORDS AT ISSUE

- [7] At issue in this review is Economy's/ER's decision to extend the time period to respond to an access to information request by an additional 30 days. Therefore, there are no records at issue in this review.

III DISCUSSION OF THE ISSUES

- [8] ER is a "government institution" as defined by subsection 2(d)(i) of FOIP.

1. Did Economy/ER meet legislated timelines?

- [9] Subsection 7(2) of FOIP requires government institutions to respond to access to information requests within 30 days after the requests are made. Subsection 7(2) of FOIP provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

- [10] When a government institution issues a fee estimate pursuant to subsection 9(2) of FOIP, then the time within which the government institution is to respond to an access to information request is suspended until the applicant notifies the government institution that

he or she wishes to proceed with the application, pursuant to subsection 9(3) of FOIP. Subsections 9(2) and 9(3) provide:

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

[11] Government institutions may extend the time period in subsection 7(2) for a reasonable period not exceeding 30 days pursuant to subsection 12(1) of FOIP. If a government institution determines that it needs to extend the time period in subsection 7(2) of FOIP, then it must give notice of the extension to the applicant within 30 days after it received the access request pursuant to subsection 12(2) of FOIP. Finally, the government institution must give written notice to the applicant pursuant to section 7 within the period of extension. That is, no later than 60 days after the access request is made. Section 12 of FOIP provides:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[12] In this case, Economy received the access to information request on January 9, 2018. As noted above, subsection 7(2) of FOIP requires that a government institution give written notice to the applicant within 30 days after the access to information request is made. Subsection 24(7) of *The Interpretation Act, 1995* provides:

24(7) A period of time expressed to be after, from or before a specified day does not include that day.

[13] Therefore, the 30-day time period began on January 10, 2018. Then, 22 days had elapsed when Economy issued a fee estimate to the Applicant on January 31, 2018.

[14] Pursuant to subsection 9(3) of FOIP, the time period was suspended at 22 days until February 6, 2018, when Economy received payment in response to the fee estimate. I note that subsection 26(6) of *The Interpretation Act, 1995* provides:

26(6) A period of time expressed to continue to or until a specified day includes that day.

[15] Then, eight days elapsed when Economy sent a written notice pursuant to subsection 12(2) of FOIP to the Applicant indicating it was extending the time period by an additional 30 days, on February 14, 2018. In other words, it was on the 30th day that Economy sent the notice to the Applicant.

[16] Based on the above, I find that Economy was within the legislated timeline when it sent the written notice pursuant to subsection 12(2) of FOIP.

2. Did Economy/ER appropriately extend the time period in subsection 7(2) of FOIP in accordance with subsection 12(1)(a)(ii) of FOIP?

[17] Subsection 12(1)(a)(ii) of FOIP, as quoted above, provides that a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days where it has a large number of access requests and completing the work within the original period would unreasonably interfere with the operations of the government institution.

[18] In order for a government institution to rely on subsection 12(1)(a)(ii) of FOIP to extend the time period set out in section 7 of FOIP, the following two-part test must be met:

1. Were there a large number of requests at the time?
2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

[19] Below is an analysis of the above two-part test.

1. Were there a large number of requests at the time?

[20] What constitutes a “large number” of access requests is not defined by FOIP. In Review Report 123-2015, my office found that the government institution in that case had a “large number” of access requests at the time it received the access request at issue in that case. The government institution had twice the monthly average number of open access requests it normally has when it received the access request at issue.

[21] In its submission, ER noted that it has experienced a significant increase in the number of access requests from 2015 to 2017 but it has not increased the number of full time equivalent employees as a result. In 2015, Economy received 97 access requests. In 2016, it received 161 access requests. And in 2017, it received 191 access requests. In other words, the number of access requests it received in 2017 is nearly double the amount of requests it received in 2015.

[22] ER notes that the increase in the number of access requests received by Economy in 2016 and 2017 is likely due, in large part, to current events. It also notes that many of the requests it received in 2017 have been for excessively large files and that the records are complex

and have a highly sensitive nature. It says that these access requests can take an “extraordinary length of time to complete”.

[23] ER indicates that it does not know if this trend will continue into future years so it has not increased the number of full time equivalent employees in the unit that processes access requests. It notes that 2018 has been “relatively quiet to date” (as of February 27, 2018, which is when my office received ER’s submission) since it has received only 19 access requests. Its position is that it is too soon to tell if the trend of increased access requests will continue.

[24] In summary, ER’s argument is that the workload has nearly doubled from 2015 to 2017 and the access requests have been increasingly complex to process but the number of full time equivalent employees has stayed the same. Economy’s/ER’s case is distinctly different from that of the government institution’s case in Review Report 123-2015. In Review Report 123-2015, the government institution’s number of open access requests had spiked to twice the monthly average number of requests it normally has *at the time* it received the access request in question. The government institution also had seven vacant positions it was attempting to fill. In contrast, Economy/ER has seen a near doubling of its yearly total number of access requests over the course of two years but it is undertaking an indefinite wait-and-see approach to determine if it will increase the number of full time equivalent employees. In other words, Economy/ER is insufficiently resourcing the unit responsible for processing access requests and its solution is to rely on section 12 of FOIP to delay responding to access requests.

[25] Before I make a determination if Economy/ER can rely on subsection 12(1)(a)(ii) of FOIP, I need to consider the second part of the test.

2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

[26] Section 43 of British Columbia’s *Freedom of Information and Protection of Privacy Act* deals with what would unreasonably interfere with the operations of the public body. The

Supreme Court of British Columbia at paragraph [37] of *Crocker v. British Columbia (Information and Privacy Commissioner)* (1997) provides as follows:

What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers.

[27] Further, in Order PO-2151, the Office of the Information and Privacy Commissioner of Ontario has stated that public bodies cannot claim interference when it has allocated insufficient resources to their freedom of information process:

...where an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference

[28] As mentioned earlier, ER indicated that its workload has nearly doubled from 2015 to 2017 and the access requests it receives have been increasingly complex to process. However, the number of full time equivalent employees it has to process access requests has stayed the same. Consistent with the Supreme Court of British Columbia and the Office of the Information and Privacy Commissioner of Ontario, I also find that Economy/ER cannot rely on limited resources as a basis for claiming interference.

[29] I find that the second part of the test is not met. Therefore, I find that Economy/ER was not justified to rely on subsection 12(1)(a)(ii) of FOIP. Government institutions should not expect to rely on section 12 indefinitely.

[30] I recommend that ER explore options on how it may sufficiently resource the unit that processes access requests.

IV FINDINGS

[31] I find that Economy was within the legislated timeline when it sent the written notice pursuant to subsection 12(2) of FOIP.

[32] I find that Economy/ER was not justified to rely on subsection 12(1)(a)(ii) of FOIP.

V RECOMMENDATION

[33] I recommend that ER explore options on how it may sufficiently resource the unit that processes access requests.

Dated at Regina, in the Province of Saskatchewan, this 17th day of August, 2018.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner