



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 112-2021

Ministry of Highways

October 20, 2021

Summary: The Ministry of Highways, in response to the Applicant's access to information request, notified the Applicant it was extending its response time by an additional 30 days pursuant to sections 12(1)(a)(i), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant asked the Commissioner to review Highways' response. The Commissioner found the conditions for Highways to extend the response time by an additional 30 days pursuant to section 12 of FOIP did not exist. The Commissioner recommended Highways address the pattern of delays occurring in its processing of access to information requests to ensure it is meeting its statutory obligations under FOIP.

I BACKGROUND

[1] On February 1, 2021, the Ministry of Highways (Highways) received an access to information request as follows:

Any and all correspondence, letters, emails, notes, telephone conversations and notes of a previous part of old highway 11 leading up the valley from the town of Lumsden to the top of the valley northwest. This paved and usable portion of a closed road is also named 8th. Avenue.

The Ministry of Highway assigned this property to the R.M. of Lumsden by a letter in or about the 1980's and can retake possession on 30 days' notice.

Of late we understand there has been both plans and correspondence between the Town of Lumsden, the R.M. of Lumsden and Saskatchewan Highways about the need to reopen this road to connect proposed service roads parallel to highway #11 west to #54 highway.

We seek all of that information, timing and data in any form.

- [2] In correspondence dated February 4, 2021, Highways provided a \$270.00 fee estimate to the Applicant. In correspondence dated February 18, 2021, Highways provided the Applicant a revised fee estimate for \$250.00 as the Applicant had already paid a sum of \$20.00 with their application. The Applicant paid their deposit on February 26, 2021.

- [3] In correspondence dated March 25, 2021, Highways advised the Applicant it was extending the 30-day response period by an additional 30-days pursuant to sections 12(1)(a)(i), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] On April 24, 2021, the Applicant asked my office to undertake a review as 61 days had elapsed from the date they made their access to information request.

- [5] In correspondence dated April 26, 2021, Highways advised the Applicant it was required, pursuant to section 34 of FOIP, to provide third party notice. Highways stated to the Applicant the third party had 20 days, or until May 17, 2021, to provide its representations to Highways.

- [6] On May 6, 2021, the Applicant stated they had paid their deposit to Highways, and would like to proceed with a review of Highways' late response as, "their request for a 3rd party delay should have been anticipated during the first 30 days or the second extension of 30 days".

- [7] On May 11, 2021, my office notified the Applicant and Highways of my office's intent to undertake a review of Highways' decision to extend its response time by an additional 30 days pursuant to sections 12(1)(a)(i), (b) and (c) of FOIP.

- [8] In correspondence dated June 9, 2021, Highways advised the Applicant, "further to our letter of April 26, 2021, we have received representations in regards to the records in question. We have taken these representations into consideration and have decided to give partial access to the records". Highways added it was relying on section 29(1) of FOIP to

deny access to portions of the record, and that it would release the records to the Applicant once they paid the balance of the deposit.

[9] On June 15, 2021, the Applicant paid the balance of their fees, and Highways released the responsive records to the Applicant on June 17, 2021.

[10] Before I proceed with my analysis, I add that Highways was asked on May 11, 2021, as part of the notification it received from my office, to provide a submission regarding its reliance on sections 12(1)(a)(i), (b) and (c) of FOIP. When my office provides notification, public bodies are given 30 days to provide a submission. If a public body makes a reasonable request to extend that time, my office may give an extension to provide a submission. In this matter, my office agreed to provide a couple of extensions to Highways, with the final agreed upon date for Highways to provide its submission being September 20, 2021. My office did not receive Highways' submission on this agreed upon date.

[11] On September 21, 2021, my office notified Highways that my office was proceeding with its review of file 112-2021, which is the subject of this Report, stating it only considered a single issue – Highways' decision to extend its timeline to respond by 30 days. On September 22, 2021, Highways responded, asking for an additional 30 days to provide a submission, stating as follows:

The ministry priority is currently processing three requests with very large volume, two with 500 plus pages and one greater than 1800 pages which include multiple third parties by one employee, in addition to managing this review and two other reviews. We fully intend to provide a submission on this review, however require additional time and request a 30 day extension.

[12] On September 22, 2021, my office responded to Highways that another 30 day extension would not be granted, but that if Highways provided its submission prior to the completion of my office's review, then my office would still consider Highways' submission. As of this date, my office has not received anything further from Highways, so my review will continue without a submission from Highways, and is based only on the information I have before me.

II RECORDS AT ISSUE

- [13] As this is a review of Highways' decision to extend the timeline by 30 days pursuant to sections 12(1)(a)(i), (b) and (c) of FOIP, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [14] Highways is a "government institution" pursuant to section 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Highways' extension of the response deadline satisfy the criteria set out by section 12 of FOIP?

- [15] Section 12 of FOIP is clear that a government institution can extend the initial 30 day response deadline for a maximum of 30 more days. This means 60 days in total. However, this is only in limited circumstances, which are outlined in section 12(1) of FOIP (IPC *Guide to FOIP*, Chapter 3: "Access to Records", updated: June 29, 2021, at page 72 (*Guide to FOIP*, Ch. 3)).

- [16] Highways stated it was relying on sections 12(1)(a)(i), (b) and (c) of FOIP to extend its deadline to respond. These sections of FOIP provide as follows:

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

...

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).

[17] Section 12(2) of FOIP states that a notice of an extension must be provided to an applicant within the first 30 days after the government institution receives an access to information request. Highways received the Applicant's access to information request on February 1, 2021, and provided a notification of extension to the Applicant on March 25, 2021. The clock on processing an access to information request stops when a government institution provides a fee estimate, and resumes once an applicant pays it. In this matter, Highways received the Applicant's deposit on February 26, 2021, according to the date stamp on the Applicant's letter to the Minister of Finance (where the deposit was to be paid). This was 27 days, which means Highways provided its notice of extension within the 30 days required by section 12(2) of FOIP.

[18] I will now assess sections 12(1)(a)(i), (b) and (c) of FOIP separately.

Section 12(1)(a)(i) of FOIP

[19] To rely on section 12(1)(a)(i) of FOIP, Highways needed to demonstrate that even if there is a large number of records, completing the work within the original 30 days would unreasonably interfere with its operations (*Guide to FOIP*, Ch. 3, p. 73).

[20] The following two-part test can be applied:

1. Are there a large number of records requested or needing to be searched?
2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

(*Guide to FOIP*, Ch. 3, p. 74)

1. Are there a large number of records requested or needing to be searched?

- [21] With respect to the number of records in a review, in Review Report F-2014-003 at paragraph [15], my office established that more than 500 records constitutes a large volume of records, so requiring additional time to review is warranted in order to “process and develop its response under section 7”.
- [22] Highways’ correspondence to the Applicant of June 9, 2021, included that it estimated there would be approximately 250 pages (on which Highways’ fee estimate was based), but that the record ended up being 447 pages. Highways added it took 7 hours to prepare the record for disclosure.
- [23] Preparation time includes the time spent physically severing a record, and not activities such as making decisions on what to sever, assembling and packaging records, and preparing an index of records (*Guide to FOIP*, Ch. 3, p. 53).
- [24] The file in this matter involves 447 pages. In order to determine if 447 pages would warrant excess time, I consider that Highways’ appears only to be relying on section 29(1) of FOIP to deny access to the record. Highways added it relied on section 29(1) of FOIP to sever the information of 25 individuals. I do not have enough information before me to understand why Highways could not apply these redactions within the first 30 days of receiving the access to information request, and so cannot consider 447 pages to be a large number of records.
- [25] As the first part of the test is not met, I find the conditions for section 12(1)(a)(i) of FOIP to apply do not exist.

Section 12(1)(b) of FOIP

- [26] Section 12(1)(b) of FOIP provides that an extension can be applied where the government institution needs more time to consult in order to process the request. The consultations must be necessary in order to comply with the application (*Guide to FOIP*, Ch. 3, p. 78).

[27] “Comply with” means to act in accordance with or fulfil the requirements (*Guide to FOIP*, Ch. 3, p. 78).

[28] The following two-part test can be applied:

1. Was the government institution consulting a third party or other public body?
 2. Was it not reasonable for the consultations to be completed within the first 30 days?
- (*Guide to FOIP*, Ch. 3, pp. 78 to 79)

1. Was the government institution consulting a third party or other public body?

[29] The government institution should be able to explain why it was necessary to consult with a third party or other public body in order to make a decision about access, including how the third party or other public body is expected to assist (*Guide to FOIP*, Ch. 3, p. 78).

[30] “Public body”, in this context, means a separate government institution or local authority as defined by *The Local Authority Freedom of Information and Protection of Privacy Act* or health trustee as defined by *The Health Information Protection Act* (*Guide to FOIP*, Ch. 3, p. 78).

[31] Some valid reasons for consulting include that a third party or other public body has an interest in the records, and that records were created or controlled jointly. Consultations with staff, program areas or branches within the government institution processing the access to information request do not qualify for this provision. Internal consultations are part of every government institution’s routine responsibilities when responding to access to information requests. In Review Report 021-2021, 022-2021, 023-2021 at paragraph [28], also concerning Highways, I stated that consultations with legal counsel, whether internal or external, would also not qualify for this provision. Therefore, activities that constitute consultations should be those outside of intrinsic and routine obligations of any government institution (*Guide to FOIP*, Ch. 3, p. 79).

[32] As I established previously in this Report, I do not have a submission from Highways. As such, I need to rely on the information I do have. From a review of the materials in the file, I am not able to determine whether Highways consulted with a third party or other public body. Without such information, the first part of the test cannot be met.

[33] As the first part of the test is not met, I find the conditions for section 12(1)(b) of FOIP to apply do not exist.

Section 12(1)(c) of FOIP

[34] Section 12(1)(c) of FOIP provides that an extension can be applied where the government institution needs to provide notice to third parties pursuant to section 34(1) of FOIP (Guide to FOIP, p. 80).

[35] In this context, a third party is a third party pursuant to section 19 of FOIP. FOIP defines a third party as a person, including an unincorporated entity, other than an applicant or a government institution.

[36] Highways stated to the Applicant in correspondence dated April 26, 2021 that it needed to provide third party notice. This was 84 days after it received the Applicant's access to information request. It was also the first my office heard that any third parties were even involved. To date, my office has no knowledge of which third parties Highways needed to notify, or confirmation that it did. If notification of a third party was required, Highways should have provided such notification within the first 30 days of having received the access to information request, not 84 days later. In the absence of any details regarding the third party, I find the conditions for section 12(1)(c) of FOIP to apply do not exist.

[37] In conclusion, I find Highways extension of the response deadline did not satisfy the criteria set out in section 12 of FOIP.

[38] This is the same conclusion I came to in Review Report 021-2021, 022-2021, 023-2021 concerning Highways, which I issued August 31, 2021. In that matter, Highways failed to

successfully argue it met the conditions to extend the deadline to respond to the access to information request pursuant to section 12(1) of FOIP, even with providing a submission. At the time I issued that report, it had also been 227 days and Highways had still not provided the Applicant in that matter with its section 7 responses. These delays are concerning and need to be addressed by Highways. I recommend Highways address the pattern of delays occurring in its processing of access to information requests to ensure it is meeting its statutory obligations under FOIP.

IV FINDING

[39] I find Highways' extension of the response deadline did not satisfy the criteria set out in section 12 of FOIP.

V RECOMMENDATION

[40] I recommend Highways address the pattern of delays occurring in its processing of access to information requests to ensure it is meeting its statutory obligations under FOIP.

Dated at Regina, in the Province of Saskatchewan, this 20th day of October, 2021.

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