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Responding to FOIP Requests During the Pandemic: Time Limits Extended by Ministerial Order

By Rebecca Kos and Lorne Randa

On April 9, 2020, the Minister of Service Alberta issued Ministerial Order No. SA: 009/2020 ("SA: 009/2020") in response to the public health emergency in Alberta due to the COVID-19 pandemic. SA: 009/2020 varies the requirements of several pieces of legislation. This article addresses extensions to time limits established by the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (the "*FOIP Act*").

Please note that this article is current as of April 30, 2020. The response to the pandemic is rapidly changing. Before relying on this article, please confirm that no other announcements have been issued by the Province.

A. OIPC Announcements Respecting Responding to FOIP Requests

Prior to the passage of SA: 009/2020, the Office of the Information and Privacy Commissioner (the "OIPC") had issued a notice confirming that nothing in the *FOIP Act* itself allows for an extension on a time limit for responding to a request in the event of a public health emergency.

Instead, the OIPC suggested that if public bodies were unable to access or process responsive records due to the COVID-19 pandemic, that they inform applicants of that fact and advise that records would be processed as soon as circumstances would allow. If this was an issue for an applicant, the applicant could then request a review under section 65(1) of the *FOIP Act*, as failure to respond to the request within the time limits set out by the *FOIP Act* would be treated as a decision to refuse access to the record.

This notice suggested some leniency on the part of the OIPC with respect to responding to requests for access received during the pandemic. Now that SA: 009/2020 has been issued, which provides some extensive time limit extensions, public bodies should respond to requests in accordance with those time limit extensions.

B. What Requests are Subject to the Time Limit Extensions?

The extensions provided by SA: 009/2020 apply to:

- a. all requests for access to records to which the *FOIP Act* applies, received by the public body **on or after April 9, 2020**; and
- b. all existing requests for access to records to which the *FOIP Act* applies, **underway as of April 9, 2020, regardless of whether timelines have already been extended under existing provisions of the *FOIP Act*.**

The extensions will likely remain in place for as long as the Province maintains its declaration of a state of public health emergency.



C. What are the Time Limit Extensions?

i. 90 Days to Respond to a Request for Access

Typically, pursuant to the *FOIP Act*, a public body is required to make every reasonable effort to respond to a request for access to a record not later than 30 days after receiving the request, unless an extension is taken in accordance with section 14 of the *FOIP Act* or the request has been transferred to another public body under section 15 of the *FOIP Act*.

Pursuant to SA: 009/2020, this time limit for responding is extended such that a public body must make reasonable efforts considering the demands of the pandemic COVID-19 to respond to a request not later than **90 days after receiving the request**. This 90 day time limit will apply unless the time limit is extended under section 14 (as modified, discussed below), or the request has been transferred to another public body (as modified, discussed below).

If a public body fails to respond to a request within the 90 day period or any extended period, that failure to respond will be treated as a decision to refuse access to the record.

Of course, there is nothing that obligates a public body to take the full 90 days to respond to a request. If a public body is still able to respond within 30 days, it can do so. However, this automatic extension applies to all requests being processed as of April 9, 2020, or received on or after April 9, 2020, to assist during the pandemic.

ii. Time Limit for Responding may be Extended for up to 60 days

Pursuant to section 14 of the *FOIP Act*, the head of a public body may still extend the time for responding to a request for up to 30 days or, with the Commissioner'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 are requested or must be searched and responding within the period set out in section 11 (as modified, discussed above) would unreasonably interfere with the operations of the public body;
- c. more time is needed to consult with a third party or another public body before deciding whether to grant access to a record; or
- d. a third party asks for a review.

This 30 day extension would be in addition to the 90 days already established under the modified section 11 of the *FOIP Act*.

In addition to these grounds for a 30 day extension, SA: 009/2020 provides that the head of a public body may extend the time for responding to a request for up to **60 days** or, with the Commissioner's permission, for a longer period if, **in the opinion of the head of a public body, the pandemic COVID-19 unreasonably interferes with the operations of the public body**.



As always, if any extension is taken, the head of the public body must tell the applicant:

- a. the reason for the extension;
- b. when a response can be expected; and
- c. that the applicant may make a complaint to the Commissioner or an adjudicator, as the case may be, about the extension.

iii. Transfer a Request to Another Public Body Within 45 Days

Typically, pursuant to section 15 of the *FOIP Act*, the head of a public body may, within 15 days after a request for access to a record is received, transfer the request and, if necessary, the record to another public body if certain requirements are met. Once transferred, the head of the public body to which the request is transferred must make every reasonable effort to respond to the request no later than 30 days after receiving the request unless that time limit is extended under section 14.

Pursuant to SA: 009/2020, the head of a public body now has **45 days** to transfer the request and, if necessary, the record to another public body. Once transferred, the head of the public body to which the request is transferred must make reasonable efforts considering the demands of the pandemic COVID-19 to respond to the request not later than **90 days** after receiving the request unless that time limit is extended under section 14.

iv. Extensions for Third Party Notice Decisions

Pursuant to section 31(1) of the *FOIP Act*, within 30 days after giving a third party notice under section 30(1) or (2) of the *FOIP Act*, the head of a public body must decide whether to give access to the record or to part of the record, but no decision may be made before the earlier of:

- a. 21 days after the day notice is given to the third party, and
- b. the day a response is received from the third party.

Section 31(1) remains in the *FOIP Act*, but is now subject to section 31.1, which provides that a public body may extend the time for making a decision under section 31(1) for up to **60 days** or, with the Commissioner's permission, for a longer period if, in the opinion of the head of the public body, the pandemic COVID-19 unreasonably interferes with the operations of the public body.

The head of a public body who extends the time for making a decision under this new provision must give notice of the extension to the applicant and the third party.



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Questions?

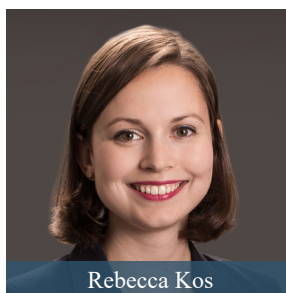
Should you have any questions with respect to this article, or require assistance with processing FOIP requests, please contact one of the following members of our team:



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