Office of the
Information &
Privacy Commissioner
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GUIDANCE DOCUMENT

TIME EXTENSION GUIDELINES FOR PUBLIC BODIES

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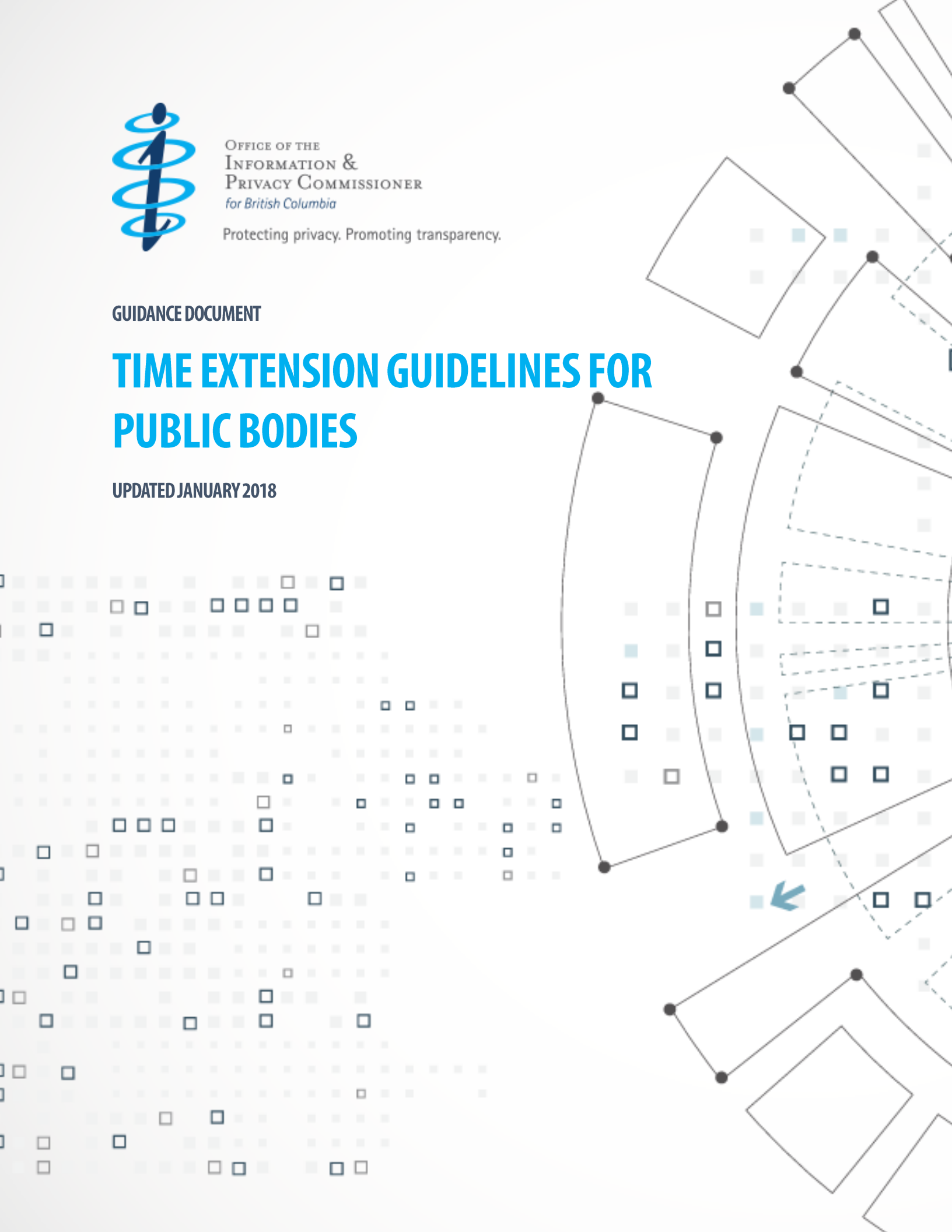

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INTRODUCTION

The OIPC case review team receives approximately 1500 time extension requests per year. Approximately 90% of these requests are approved in full or in part. Case Review Officers are in a better position to approve time extension requests when public bodies make applications that include all the necessary information. Applications that are missing information or that include incorrect information are more likely to be declined. The guidelines below are intended to assist public bodies to submit time extension requests that contain the information required by the OIPC.

LEGISLATION

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 (c) 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.

(3) If the time for responding to a request is extended under this section, 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) In the case of an extension under subsection (1), that the applicant may complain about the extension under section 42 (2) (b) or 60 (1) (a).

A NOTE ABOUT STATUTORY TIMELINES

Sections 5 and 7 of FIPPA are crucial to understanding and applying the statutory timelines for responding to access requests. If an access request fulfills the requirements under s. 5, the public body has 30 days to respond to the access request. Public bodies may only suspend a statutory timeline if it is authorized to do so by one of the provisions under s. 7. A public body's decision to put a request "on hold" does not suspend the statutory timeline if there is no authority to do so under s. 7. Please note that s. 7 not only authorizes the suspension of the statutory timeline, it also indicates when the time starts to run again.

If the statutory deadline for responding has passed without a response, s. 53(3) of FIPPA states that a public body has made "decision to refuse access" if it does not respond within the time required by FIPPA. Consequently, the timeline for responding to a request cannot be extended or suspended. In other words, a public body is not authorized by s. 10(1) to extend its time for responding when it has already made a "decision". Similarly, if the deadline for responding has passed the OIPC cannot grant a time extension under s. 10(2). See Order F13-26.

APPLICATION

Under s. 10(2) of FIPPA, there are four circumstances in which the Commissioner may give a public body permission to extend the time for responding to an access request. Permission may be granted if one or more of ss. 10(1)(a), (b), (c) or (d) apply or if, under s. 10(2)(b), the Commissioner considers it fair and reasonable to do so.

A. If section 10(1)(a) applies

This provision applies when an applicant does not give enough detail to enable the public body to identify a requested record.

Test: When applying for a time extension, the public body must explain why more detail is required to identify a record.

Other Relevant Information:

- Dates of request and follow up with applicant, including efforts made by the public body to contact the applicant and clarify the request.
- If the public body has already obtained further details, what is the expected response date?

B. If section 10(1)(b) applies

This provision applies when a large number of records have been requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body.

Test: The public body must demonstrate that:

1) a large number of records have been requested or must be searched, and
2) that meeting the time limit would unreasonably interfere with the operations of the public body.

Volume:

- How many pages?
- Do the records require special handling?)
- Does the type of record require different methods of searching or handling?
- How does volume compare with average request volume?

Circumstances that may contribute to unreasonable interference:

- Significant increase in FOI requests (e.g., sharp rise over 1-4 months)
- Significant increase in analysts caseloads (sharp rise in average caseload)
- Computer systems or technical problems
- Unexpected analyst leave (analyst on file?)
- Unusual number (high percentage) of new analysts-in-training
- Cross government requests
- Program area discovers a significant amount of additional records
- Type of records (maps, etc.)
- Number of program areas searched
- Location of records

Invalid Circumstances:

- The operation has not been allocated sufficient resources
- Long term or systemic problems
- Vacations
- Office processes (e.g., sign-off)
- Personal commitments
- Pre-planned events (e.g., retirements)
- Previous s. 10(1) extension taken and no work done on file
- Type of applicant (media, political, etc)

Other Relevant Information:

- The public body made attempts to correct a mistake in processing the request
- The public body communicated with the applicant
- The public body made a phased release
- The public body provided reasonable release dates
- The public body waived fees

Case Law: Unreasonable Interference

Authorization (s. 43) 02-01, September 18, 2002

[27] **3.4 Unreasonable Interference with the Ministry's Operations** – The next question is whether the Ministry has established that responding to the existing requests would unreasonably interfere with its operations. Section 43 gives no explicit guidance as to what is meant by the "operations" of a public body. I consider that the impact on a public body's "operations" can be gauged in relation to the access and privacy operations of the public body. This approach is supported by the remedial nature of s. 43, my predecessor's s. 43 decisions and by *Crocker*. In finding that my predecessor took the proper approach to interpreting and applying s. 43, Coultas J. said the following in *Crocker*, at para. 46 (B.C.J.), about the issue of unreasonable interference with operations:

… the determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. 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...[emphasis added]

Ontario ORDER PO-2752, Appeal PA06-230, Ministry of Community Safety and Correctional Services

In Order PO-2151, Adjudicator Laurel Cropley identified the nature of the information required to establish an "unreasonable interference with the operations of an institution" as follows:

Previous orders of this office have considered the meaning of the term "unreasonable interference with the operations of an institution" in the context of claims that a request is frivolous or vexatious. Although made in a different context, they provide some guidance in assessing this issue.

Applying the findings in these previous orders, it appears that in order to establish "interference", an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities" (Order M-850).

…

…[W]here 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 (Order MO-1488).

In Order M-583, former Commissioner Tom Wright noted that, "government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed."

Similarly, government organizations are not obligated to retain more staff than is required to meet its operational requirements. I qualify this point, however, by adding, as I noted above, that an institution must allocate sufficient resources to meet its freedom of information obligations (Order MO-1488).

In my view, a determination that producing a record would unreasonably interfere with the operations of an institution is dependent on the facts of each case.

In Order MO-1989, the subject of the judicial review and subsequent appeal in *Toronto Police Services Board*, cited above, Adjudicator DeVries determined that an institution must provide sufficient evidence beyond stating that extracting information would take "time and effort" in order to support a finding that the process of extracting the information would unreasonably interfere with its operations. This finding was not challenged on judicial review.

C. If section 10(1)(c) applies

Section 10(1)(c) applies when more time is needed to consult with a third party or other public body[1] before the Head can decide whether or not to give the applicant access to a requested record. The implication is that consultation is done for the purpose of deciding whether or not to give access.

Test: The public body needs to explain why it is 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. Also, the public body needs to explain why it needs more time to do this.

Some valid reasons for consulting:

- Third party or other public body has an interest in the records
- Records created or controlled jointly

Other Relevant Information:

- When did public body initiate consultation?
- Large number of consultations required
- Availability of third party or public body contacts
- Did public body set deadline expectations for third party or other public body?
- Is time required for consultation reasonable?
- Has the public body followed up on consultation request?
- Has the public body proceeded with a phased release?

Invalid Circumstances:

- Consultations with staff in same public body, e.g., legal counsel or program area
- Consultations for a purpose other than deciding whether to give access

Note: Consultation under s. 10(1)(c) is distinct from the obligation of a public body to notify third parties under ss. 23 and 24 of FIPPA. See case law about ss. 23 and 24 timelines in the Appendix A.

[1] Includes separate public bodies and, in case of government, separate ministries. Does not include consultation with programs or branches within same public body or ministry.

D. Section 10(1)(d) Applies

The applicant has consented, in the prescribed manner, to the extension. The OIPC strongly suggests that public bodies, prior to submitting a time extension request to our office, attempt to obtain the applicant's consent for the time extension in the manner prescribed in Regulation 10 of FIPPA.

Test: Section 10 of the FIPPA *Regulations* requires the consent to be in writing and to include the period of time of the extension that is being consented to. This can take the form of a document that the applicant signs or an email that the applicant responds to. In either case the public body must clearly state either the number of business days the due date is being extended or simply state the new due date (the OIPC recommends the latter as this eliminates mistakes in counting days). The applicant's response must clearly indicate consent or agreement. If the public body submits a conditional consent such as "I consent, but on the condition you…" the OIPC will assume that the public body has accepted the conditions but will not consider whether the conditions have been met. A response such as, "I guess I have no choice" or "the only way I will consent is if…" will not be considered valid consent.

Other Relevant Information:

- The OIPC requires consent to be direct and clear. The optimal consent, for example, would be, "I consent to extending the due date 30 days". Alternatively, it is acceptable if the applicant provides responses such as "I consent" or "I confirm" or "I agree" to the analyst's question, "Please confirm that you consent to a further 30 day extension of the due date"

- The OIPC does not accept as consent responses from the applicant such as "Great!", "Ok", or "Thanks". If you have received a verbal consent over the phone, please ensure the agreement is laid out in writing and that the applicant clearly consents to the agreement.

- If the applicant clearly consents but imposes conditions on the public body, the OIPC will accept the consent. However, it is the public body's responsibility to address the conditions.

Invalid Circumstance:

- The public body had already run out of time when the consent was requested.

E. If section 10(2)(b) applies

With the Commissioner's permission, a public body may extend the time for responding to a request if the Commissioner otherwise considers that it is fair and reasonable to do so, as the Commissioner considers appropriate.

Test: Generally, time extension requests under s. 10(2)(b) must be for the purpose of alleviating short term, time-limited, unexpected delays that are not covered by ss.

10(1)(a), (b) or (c). The public body must show that meeting the deadline would unreasonably interfere with the operations of the Ministry.

Factors to Consider:

- Will applicant be prejudiced (assume so if public body has not contacted the applicant)?
- Are circumstances causing delay short term or chronic?
- Was cause of delay planned or forseen?
- How long is the delay?
- When is estimated response date?

Some Valid Circumstances:

- Forest fires
- Labour unrest
- Court involvement
- File specific staffing issue
- Unforeseeable moving mishaps

Notice: These guidelines are for information only and do not constitute a decision or finding by the Office of the Information and Privacy Commissioner for British Columbia with respect to any matter within the jurisdiction of the Freedom of Information and Protection of Privacy Act ("FIPPA"). These guidelines do not affect the powers, duties or functions of the Information and Privacy Commissioner regarding any complaint, investigation or other matter under or connected with FIPPA, respecting which the Information and Privacy Commissioner will keep an open mind.

APPENDIX A: WHAT RECORDS ARE AFFECTED BY A THIRD PARTY REVIEW?

Case Law – Section 7 time lines and sections 23 and 24

In upholding the Commissioner's decision in Decision F08-07, Justice Grauer, in *British Columbia (Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1700, agreed with the Commissioner's view that a postponement of time under s. 7(6) only affects those records that are the subject of a third party review.

[38] I am unable to fault the approach taken by the Commissioner in this case. As Mr. Loukidelis noted in his decision, it would be quite wrong to view s. 7(6) in isolation as the petitioner would suggest. It is but a subsection of s. 7, which itself is part of a complex statutory scheme. Section 7 begins in subsection (1) by providing for a time period of 30 days for a response to a request subject to "this section and sections 23 and 24(1)". Subsections (2) through (5) deal with various extensions agreed to by the Commissioner, or where fees are charged. Subsection (6) harkens back to the reference in subsection (1) to sections 23 and 24(1) by referring to a third party request for a review under s. 52(2).

[39] In my view, taking into account this context, and the scheme and the object of the *Act* as reviewed by the Commissioner and set out above, it is eminently reasonable to interpret the postponement of time in subsection (6) to apply only to those matters that are the subject of the third party review. This is because what is postponed is the running of the "30 days referred to in subsection (1)". In subsection (1), that 30 day period is subject to sections 23 and 24(1), which give rise to the review process discussed in subsection (6).

[40] Reading these subsections together, it is reasonable to conclude that those records or parts of a record that are not subject to sections 23 and 24(1) remain subject to the 30 day response provision with which s. 7 opens. Further, it is reasonable to conclude that where the records or parts of a record *are* subject to sections 23 and 24(1), then once the process contemplated by those sections is complete, those portions as to which there is no dispute to be resolved by mediation or inquiry should then be produced. Those records or parts of a record that are the subject of the third party review contemplated by subsection (6) will attract that subsection's further extension.