

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2011-576-AP-293

February 10, 2012

Office of the Access to Information and Privacy Commissioner of New Brunswick

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed in which the Applicant requested that the Commissioner carry out an investigation into the matter of a time extension for responding to an access request for information.
2. The present Complaint concerns the Department of Wellness, Culture and Sports ("the Department"). The Applicant made a request to the Department on September 18, 2011 as follows:

On August 11, 2011 the Minister reversed his decision of May 25 to designate the Memorial Library at Mount Allison University (in Sackville) a Provincial Heritage Place. I am writing to you today as a request for information under the Right to Information Act for copies of the following documents:

1. the objections filed by Mount Allison University;
 2. supporting documents submitted by the university in connection with the hearings for this case;
 3. any other documents or information which contributed to the Minister's decision to withdraw his Notice of Intention to Designate the Memorial Library as a Provincial Heritage Place, including the evidence the Minister used to support his conclusion that a) the building is not at "a provincial level of significant", and that b) the memorial nature of the building "does not in itself exhibit significance at a provincial level." ("the Request")
3. During the processing of the Request, the Department determined that it needed to consult with third parties before making a decision regarding the release of some of the requested information. In that regard, the Department issued a notice to the Applicant on October 18, 2011 which stated:

...we have found that some of the record(s) you requested may contain information that could invade the privacy and/or harm the business or financial interests of a third party. We have notified the third party, who is being given an opportunity to consent to the disclosure or to give an explanation as to why they do not agree with the disclosure.

A decision respecting this information will be made **within 30 days** of this Notice, unless the time limit for providing you with a response has been extended, at which time we will notify you of the new deadline.

4. On the same day (October 18), the Applicant requested clarification from the Department about whether some information could be released while other records were the subject of a third party process. The Department gave the Applicant the following explanation:

Some of the records you requested cite a third party, and there are specific guidelines governing the release of information concerning third parties in the Act.

Some of the other records you requested are departmental records, and are being collected and reviewed in accordance to the Act.

I apologize for the length of the process, but you will receive a response to your request within thirty days.

5. The Applicant then asked the Department to explain why records were not being provided at that time, as follows:

As the departmental records are not amongst those affected by the department's third-party privacy and/or financial concerns, and do not require the approval of a third party, can I assume that a decision as to whether or not they will be provided will be conveyed to me by the end of the initial 30-day period—i.e. tomorrow?

6. The Department replied with the following:

All of the records available will be sent to you in one package on or before Nov. 18, 2011.

7. The Applicant was not satisfied with the Department's decision to refuse access to all of the records pending the outcome of the third party notification process, and the Applicant proceeded to file a complaint about the time extension on November 10, 2011:

1) The question is an extremely time-sensitive one, since demolition of this historic building has already begun. The Department had an opportunity to contact third parties when my request for information was submitted in September, but instead they waited a full 30 days before doing so, invoking at that time a further delay of 30 days. Given the time-sensitive nature of the request, this gives the impression that the Department is delaying their response so as to avoid the release of any information concerning the Minister's decision until such a time as demolition has begun and the information can no longer affect the outcome.

2) According to the Department's response, only some of the documents are affected by the potential privacy or financial interests which they claim require them to consult a third party for an additional 30 days; however, they refused to supply the remainder of the unaffected documents within the initial 30 day period, offering no reason for their refusal.

8. The Applicant was particularly concerned about the time-sensitive nature of the Request, as he was seeking information about a building that was in the process of being demolished. In that light, the Applicant raised concerns about whether the Department unnecessarily

delayed providing a response to the Request in order to prevent the disclosure of the information from having an effect on the demolition of the building.

9. The time limit provisions of the *Act* affirm the right of an applicant to have timely access to information he or she is entitled to receive. A public body may only take more than 30 days to provide a response in specific circumstances and whenever this occurs, it allows for the possibility of an independent review to ensure that the public body is not unduly delaying or interfering with the applicant's right to timely access.

Complaint Investigation

10. As the first step in our complaint resolution process, we met with officials from the Department to discuss the complaint, including the processing of the Applicant's Request.

11. At this meeting, officials from the Department indicated that they encountered a number of challenges in processing the Request, including that of following certain procedures under the *Act*. Their challenges included:

- an unfamiliarity with the third party process under the *Act*;
- an examination of the disclosure provisions found in the *Act* and their relationship with the disclosure and other provisions of the *Heritage Conservation Act* (the latter providing for limits or restrictions on the disclosure of the requested information) and the need to provide a response which was in conformity with both; and,
- the appointment of a new employee as Right to Information Coordinator in the midst of the processing of the Request.

Third party notification and Time limits for responding

12. We can appreciate that the Department encountered some difficulties in following the third party notification process as set out in the *Act*. Our experience has shown that it is not the first public body to find this part of the *Act* somewhat confusing. We hope that the comments found below will help clarify a public body's obligations when undertaking the third party notification process.

13. Where a public body finds it necessary to engage the third party process, the *Act* provides a mechanism to ensure that the third party is notified and has the opportunity to provide input about the potential disclosure of information that may be harmful to the third party. The applicant is notified that the third party process has been undertaken.

14. Having said this, however, when a public body decides to use the third party process, this does not remove the public body's obligation to respond to the request for information within the 30-day time limit. The reasons for this are provided below.

15. It is necessary to read section 11 (time extension) and sections 34 to 36 (third party process) together to ensure that both an applicant's right to timely response is upheld while also respecting a third party's rights under the *Act*.

16. Subsection 11(1) of the *Act* sets out the time limit for responding to a request, and that time limit can only be extended in certain circumstances. It refers to three instances when a public body does not have to respond within 30 days:

11(1) The head of a public body shall respond to a request for access to a record in writing within 30 days after receiving the request unless

- (a) the time limit for responding is extended under subsection (3) or (4),
- (b) the request has been transferred to another public body under section 13, or
- (c) an estimate is given to the applicant under section 80.

17. The third instance in regards to fees is no longer applicable in New Brunswick as fees for access requests have been eliminated.

18. In the first instance, the time limit for responding to a request may be extended beyond the initial 30 days. Under subsection 11(3), the public body can "self-extend", and under subsection 11(4), the public body can ask the Commissioner for approval to extend the time limit.

19. A public body can self-extend the time limit only in certain cases; there are six cases in total. Of those cases, paragraph (d) relates to the third party notification process:

11(3) The head of a public body may extend the time limit for responding to a request for up to an additional 30 days if...

- (d) time is needed to notify and receive representations from a third party or to consult with another public body before deciding whether or not to grant access to a record...

20. The public body is permitted to extend the time limit when having to use the third party process because the third party process has a separate timeline. Here are the relevant portions of the third party process found in sections 34 to 36:

34(1) If the head of a public body is considering giving access to a record the disclosure of which might result in an unreasonable invasion of a third party's privacy under section 21 or affect a third party's interests described in subsection

22(1) or (2), the head shall, where practicable and as soon as practicable, give written notice to the third party...

35(2) If notice is given under subsection 34(1), the head of the public body shall also give the applicant a notice stating that

- (a) the record requested by the applicant may contain information the disclosure of which might invade the privacy or affect the interests of a third party,
- (b) the third party is being given an opportunity to make representations concerning disclosure, and
- (c) a decision respecting disclosure will be made within 30 days after notice is given under subsection 34(1), unless the time limit for responding is extended under subsection 11(3).

21. The connection between the time limit set out in section 11 and the time limit in the third party process set out in sections 34 to 36 is not clearly delineated in the *Act*. A public body, however, is obligated to meet the requirements of both these time limits. A public body has an initial time limit of 30 days to respond to a request, but the third party process creates a parallel time limit which can also take 30 days. This is the reason why a public body needs to extend the time limit to ensure that the timelines for both the processing of the request and the third party process are respected in accordance with the *Act*.

22. Recognizing that the entire third party process allows for a maximum period of 30 days, it is important to remember that the public body must determine whether the third party process will cause it to delay its response beyond the original 30-day time limit. If this is the case, the public body must take the additional step of extending the time limit to provide the response to the applicant.

23. The public body may extend the time limit as its own accord under paragraph (d) of subsection 11(3) which allows a maximum of 30 additional days. Extending the time limit in this way means that the maximum time limit for responding to the request then becomes 60 days.

24. Having said this, however, whenever processing access requests where there is more than one relevant record, it is a good practice to distinguish between the access request as a whole and the individual records that are relevant to the request. This is in keeping with the wording of subsection 11(1), which states:

11(1) The head of a public body shall respond to a request for access to a record in writing within 30 days after receiving the request... (*Emphasis added*)

25. This permits each record or group of records to be treated separately where some of the records require different considerations. For instance, if a public body receives a request for access to several records, only some of which require third party notification prior to making a decision about their release, the third party notification process and corresponding time extension, if any, only applies to the records being considered under the third party process. If there are other relevant records that are not being considered as part of the third party process, these records can be considered separately and a decision regarding their release can be made and communicated to the applicant within the original 30-day time limit for response.
26. We are encouraging all public bodies to provide partial responses to records whenever reasonable to do so. Applicants have the right to timely access to information. Where some records require additional consideration prior to determining whether they can be released, that in and of itself should not be a reason to delay access to the rest of the relevant records.
27. If the public body needs to extend the time limit of its own accord under subsection 11(3), then it must notify the applicant that it is doing so. Notice is to be given in the following manner:
- 11(5) If the time for responding is extended under subsection (3) or (4), the head of the public body shall send a written notice to the applicant setting out
- (a) the reason for the extension,
 - (b) when a response can be expected, and
 - (c) if the time limit is extended without the approval of the Commissioner, that the person may file a complaint with the Commissioner about the extension.
28. Therefore, the public body must notify the applicant that it has undertaken the third party notification process, and, depending on the timing to complete that process, the public body must also notify the applicant of the extension of time.
29. It is important to note that while the *Act* will permit a public body to self-extend a time limit, doing so without the Commissioner's approval may attract a review of this decision by granting the applicant a right to complain. This is in keeping with the applicant's right to receive a timely response and to ensure a public body does not abuse its authority to self-extend the time limit.
30. Additionally, when a public body does not provide a full response to the request within the 30-day time limit and does not extend the time limit to respond in accordance with

subsection 11(3), this is deemed to be an automatic refusal of the request once the time limit has expired, thus triggering the applicant’s right to complain on the basis of not having received a response on time. This is reflected in subsection 11(2):

11(2) The failure of the head of a public body to respond to a request for access to a record within the 30 day period or any extended period is to be treated as a decision to refuse access to the record.

31. To illustrate the interplay between the two processes, we have prepared the following chart.

Day	Steps in Processing the request	Steps in Third Party Process	Day
1	Applicant files a request for information with Public body.		
2	Public body conducts a search of relevant records.		
15	Public body determines that some of the records will require third party notification before making a decision on disclosure.		
	<p>As the third party process will require additional time to complete beyond the original 30-day time limit to respond, the Public body has to notify the Applicant explaining that the deadline is being extended to complete the third party process.</p> <p>In this example, the Public body anticipates taking 25 days to carry out the third party process and arrive at a decision:</p> <p><i>30 days – 15 already expired = 15 days</i> <i>15 days + 25 for extra process = 40 days</i> <i>40 days – 30 to respond = 10 days of time extension</i></p> <p>The Public body must therefore extend the time limit by 10 days to remain compliant with the Act.</p>		
16	Public body continues to process other records not subject to the third party process.	The Public body issues notices to Applicant. Notice also includes the time extension of 10 days for the Applicant to receive the complete response. Notice	1

17	Public body may provide a partial response for records not subject to the third party process whenever a decision has been made respecting these records.	also indicates the date on which the decision on those third party records will be made (no later than 25 days from the date of the letter in this example). Public body starts the third party process and invites Third Party to give representations on the possible disclosure of these records. The Third Party has 21 days to reply.	
37		The Third Party provides feedback to the Public body.	22
39		The Public body considers the Third Party's representations, and makes a decision about whether to grant access to the Applicant.	24
40	Public body must provide a response for these records by this day as this is the last day to respond within the time limit.	Public body gives its decision to the Applicant and to the Third Party about granting access to records that were part of third party process. This decision must be made within the extended time limit.	25

32. To summarize the above, a public body has an initial time limit of 30 days to respond to a request. It also has the option of extending this time limit of its own accord for up to an additional 30 days in certain circumstances, including when additional time is required to complete the third party process. Given that the third party process creates a parallel 30-day process, an extension to the time limit for responding will most likely be required to ensure that the timelines for both the processing of the request and the third party process are respected in accordance with the *Act*. The public body will be required to notify the applicant that it has undertaken the third party notification process and, depending on the time to complete that process, also of the extension of time.

Duty to assist

33. While the *Act* does allow the authority to self-extend, a public body cannot use this provision in a way that will interfere with an applicant's right to receive a prompt and complete response to a request. The duty to assist provision found in section 9 of the *Act* obligates a public body to process requests in an expedient and transparent manner and provides as follows:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

34. The duty to assist applies throughout the request process and requires that the public body make a determination about whether to grant access in as timely a manner as possible. For that reason, the public body is obligated to identify any third party concerns and, where required, commence the third party process as early as possible.
35. As indicated above, given that third party concerns are not always immediately evident and given the challenges that many public bodies have faced in understanding how to process third party records, there are cases when it may take some time to identify these concerns and implement the necessary steps to complete the third party process.
36. In that regard, in our review of time extension complaints, we will examine whether the public body has shown that it has not failed in its duty to assist an applicant in making the determination to extend the time limit for response of its own accord.
37. Depending on the circumstances found in each case, we would encourage a public body to provide an applicant with a partial response to the request for access to records when reasonable to do so.

Application to the present case

Notice to the Applicant

38. With regards to the matter at hand, the Department decided to proceed with the third party notification process and notified the Applicant that it was doing so. We reviewed the notice provided to the Applicant in relation to the Department's third party process. We find that the Department met its notification obligations to the Applicant in that process.
39. The Department, however, did not notify the Applicant that it was extending the time limit of its own accord under paragraph 11(3)(d) of the *Act*. By extension, the Department also did not advise the Applicant of his right to complain in regards to the extension of time as was required by subsection 11(5). While the Applicant was aware of the right to complain in this case, not all applicants will have such knowledge of their rights.
40. We are aware that the rather complex third party process as set out in the *Act* has posed a number of challenges to public bodies and we will be issuing a best practice on this point. We find that the Department's failure to notify the Applicant of the time extension and of his right to complain was solely as a result of not having been well acquainted with the intricacies of both processes and notice requirements. As per our discussions with the Department's officials, including the Department's Right to Information Officer, and with

the benefit of this Report of Findings, we are confident that the Department will respect the rules regarding these issues from now on.

Delay in the decision and Duty to assist

41. In his Complaint, the Applicant raised concerns about the length of time which had already elapsed before the Department notified him of its decision to proceed with the third party process. The Applicant received the notice on the Day 31 of the Department receiving the Request. Specifically, the Applicant was concerned that the Department created an unnecessary delay in responding to the Request with the intent of negating the impact of any information that might be released as the demolition of the building in question was already underway.
42. While we appreciate the Applicant's concerns in light of the circumstances of the Request, we also recognize the challenges the Department encountered in processing the Request. According to our review of the matter, the Department fully understands that it is bound by its obligations under the *Act*, but the Department does not receive many requests for information and it had not previously dealt with the third party notification process as set out in the *Act*. Additionally, a key staff member—the Right to Information Coordinator—left this post and a new staff member was appointed during the initial 30-day time limit to process the Request in this case.
43. The Department was concerned about how to properly process the Request, including the third party concerns at play, and sought direction from the Information Access and Privacy Unit, which is a branch of the Department of Supply and Services charged with assisting public bodies in meeting their obligations under the legislation. We find this demonstrates a genuine effort on behalf of the Department to ensure it was properly handling and processing the Request.
44. Further, while internal operational issues are not a standalone reason to extend the time limit for responding to a request, in this case, it was only one of the factors that contributed to the Department taking additional time to initiate the third party process in the present matter.
45. Based on the above factors, we have not found any evidence that the Department intentionally delayed the decision to proceed with the third party process, or that the Department intentionally delayed the processing of the Request with the aim of thwarting the Applicant's right to receive a timely response. We are satisfied that the Department met its duty to assist under these circumstances.

Content of Response

46. In processing the Applicant's Request, we understand that the Department identified two categories of relevant records: one category required third party notification and input, while other did not.
47. One of the key issues raised in the Applicant's Complaint is that Department refused to grant access to any of the relevant records pending the outcome of the third party process, despite the fact that only some of the relevant records were subject to this process. We agree with the Applicant's concerns on this point.
48. In keeping with the duty to assist provision found in section 9, a public body makes every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner. Accordingly, the Department should have considered providing a partial response to the Applicant in relation to the records not subject to the third party process given the circumstances of this case.

Concluding comments

49. Based on all of the above, while we find the Department could have issued a better and timelier response to the Request, we do not find that the Department intentionally delayed responding to the Request nor do we find any evidence that the Department acted in bad faith in the processing of the Applicant's Request.
50. We also find that the Department did not notify the Applicant that it was extending the time limit of its own accord under paragraph 11(3)(d) of the Act as required by subsection 11(5).
51. Given the circumstances of this case and the Department's duty to assist, it would have been reasonable to have considered providing to the Applicant a partial response in relation to the records which were not subject to the third party process.
52. Based on the above facts and findings, there is no cause to issue recommendations in this complaint.

Dated at Fredericton, New Brunswick, this 10th day of February, 2012.

Anne E. Bertrand, Q.C.
Commissioner