

# COMMISSIONER'S RULING

## *Right to Information and Protection of Privacy Act*

Matters: 2012-905-AP-462; 2012-903-AP-460; 2012-904-AP-461; 2012-901-AP-458

Date August 31, 2012

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

## INTRODUCTION

1. The following sets out the Commissioner's decision on whether to exercise her discretion under subsection 67(4) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act") to extend the time in order to accept four late complaints:

67(4) The Commissioner may extend the period of time referred to in subsection (3).

2. The Applicant filed four individual complaints involving four separate public bodies on the face of which the complaints appear to have been filed beyond the 60 day time limit deadline.

## FACTS LEADING TO LATE COMPLAINTS

3. In the case at hand, the Applicant sent the same access to information request to six public bodies on January 26, 2012. As the request was large in scope, not all of the public bodies were able to respond within the initial 30-day period. The Applicant received responses from each of the six public bodies over a four-month period, the last of which the Applicant received in mid-June 2012.
4. Not being satisfied with the responses provided, the Applicant proceeded to file six complaints with our Office on June 7, 2012 about all six public bodies. We refer to these public bodies as Public Body 1, Public Body 2, and so on.
5. Upon our calculation of the time limits to file complaints, we noticed that only two complaints were filed on time, leaving four being late. In conformity with the Commissioner's process whenever a complaint is late, our Office contacted the Applicant to seek explanations for the late filings.
6. We set out below a chronological sequence of events provided by the Applicant to illustrate the manner in which the Applicant's many requests were processed by these public bodies, including their interactions with each other as they prepared to respond to the Applicant.

Date Applicant received or sent correspondence	DETAILS
<b>January 26, 2012</b>	<b>Access Requests for information submitted to six public bodies on same day</b>
<b>February 6, 2012</b>	<p>Letter from Public Body 1 (dated February 6, 2012)</p> <ul style="list-style-type: none"> <li>❖ Notice of time extension to respond due to large volume of records</li> <li>❖ Self-extended to respond by March 27, 2012</li> <li>❖ Indicates right to complain within 60 days of receipt of the notice</li> </ul>
<b>February 6, 2012</b>	<p>Second letter from Public Body 1 (dated February 6, 2012)</p> <ul style="list-style-type: none"> <li>❖ Notice of third party process</li> <li>❖ Will respond within 30 days</li> </ul>
<b>Mid-February 2012</b>	<p>Letter from Public Body 2 (dated February 7, 2012)</p> <ul style="list-style-type: none"> <li>❖ Acknowledged request and will respond within 30 days</li> </ul>
<b>Late February 2012</b>	<p>Letter from Public Body 3 (dated February 17, 2012)</p> <ul style="list-style-type: none"> <li>❖ Notice of time extension to respond due to large volume of records</li> <li>❖ Will respond by March 30, 2012</li> <li>❖ Indicated right to complain within 60 days of receipt of the notice</li> </ul>
<b>February 27, 2012</b>	<p>Public Body 4 provides response (dated February 22, 2012)</p> <ul style="list-style-type: none"> <li>❖ Records are not subject to the Act</li> <li>❖ No notice about the right to complain about the decision</li> </ul>
<b>Late February 2012</b>	<p>Letter from Public Body 5 (dated February 24, 2012)</p> <ul style="list-style-type: none"> <li>❖ Notice of time extension to respond due to large volume of records</li> <li>❖ Self-extended to respond by March 30, 2012</li> </ul>

	<ul style="list-style-type: none"> <li>❖ Right to complain within 60 days of receipt of the notice</li> </ul>
<b>March 13, 2012</b>	<p>Public Body 2 provides response (dated March 13, 2012)</p> <ul style="list-style-type: none"> <li>❖ Access to all records refused in full</li> <li>❖ Encloses forms for complaint, but does not specify timeline to complain</li> </ul>
<b>Mid-March 2012</b>	<p>Public Body 6 provides response (dated March 13, 2012)</p> <ul style="list-style-type: none"> <li>❖ Access to some records granted (with some information severed)</li> <li>❖ Encloses forms for complaint, but does not specify timeline to complain</li> </ul>
<b>March 26, 2012</b>	<p>Public Body 1 provides partial response (dated March 26, 2012)</p> <ul style="list-style-type: none"> <li>❖ Access to records granted</li> <li>❖ Advises that records held jointly with Public Body 3 and with Public Body 5 will be released directly by those public bodies</li> <li>❖ Decision about third party information to be provided later</li> <li>❖ Right to complain within 60 days of receipt of response</li> </ul>
<b>March 27, 2012</b>	<p>Meanwhile, Public Body 5 asked our Office to approve a further time extension— Our decision letter issues to Applicant</p> <ul style="list-style-type: none"> <li>❖ Deadline for Public Body 5 to respond - approved until April 26, 2012</li> </ul>
<b>March 28, 2012</b>	<p>Again, Public Body 3 asked our Office to approve a further time extension— Our decision letter issues to Applicant – Decision letter issued to Applicant</p> <ul style="list-style-type: none"> <li>❖ Deadline for Public Body 3 to respond – approved until May 18, 2012</li> </ul>
<b>Late April 2012</b>	<p>Public Body 5 provides response (dated April 24, 2012)</p> <ul style="list-style-type: none"> <li>❖ Access to all records refused in full</li> <li>❖ Records held jointly with Public Body 3 and with Public Body 1 will be dealt with by them</li> <li>❖ Right to complain within 60 days of receipt of response</li> </ul>

<b>May 11, 2012</b>	<p>Applicant sends letter to Public Body 2</p> <ul style="list-style-type: none"> <li>❖ Asks for list of documents not provided</li> <li>❖ Asks to reply by May 25, 2012</li> </ul>
<b>May 11, 2012</b>	<p>Applicant sends letter to Public Body 6</p> <ul style="list-style-type: none"> <li>❖ Asks to confirm all records accounted for in the response</li> <li>❖ Asks if request transferred to Public Body 3</li> <li>❖ Asks for a list of documents it thinks Public Body 3 has in its possession</li> </ul> <p>Note: Applicant did not receive a further reply from Public Body 6</p>
<b>May 15, 2012</b>	<p>Applicant sends letter to Public Body 4</p> <ul style="list-style-type: none"> <li>❖ Asks to explain duties and functions</li> <li>❖ Asks to provide list of all records in its possession</li> </ul>
<b>May 15, 2012</b>	<p>Applicant sends letter to Public Body 1</p> <ul style="list-style-type: none"> <li>❖ Asks to confirm all records accounted for in the response</li> <li>❖ Asks that records also held by other public bodies be provided</li> <li>❖ Still no decision about third party information</li> </ul>
<b>Late May 2012</b>	<p>Public Body 3 provides response (dated May 18, 2012)</p> <ul style="list-style-type: none"> <li>❖ Access to some records provided, with some information severed</li> <li>❖ Other records withheld in full</li> <li>❖ Right to complain - no time limit specified</li> </ul>
<b>June 7, 2012</b>	<p><b>Complaints filed with our Office—all six public bodies</b></p>
<b>June 13, 2012</b>	<p>Applicant receives reply from Public Body 2 (dated June 6, 2012)</p> <ul style="list-style-type: none"> <li>❖ Confirms it has two records</li> <li>❖ Both refused in full under claimed exceptions</li> </ul>
<b>June 18, 2012</b>	<p>Applicant receives reply from Public Body 4 (dated June 11, 2012)</p>

❖ Outlines its duties and functions

❖ Refuses to provide list of records

**June 21, 2012** Public Body 1 provides second and final partial response (dated May 28, 2012)

❖ Decision on third party information—refused in full

❖ Informs that all records were released by it, and Public Body 3 or Public Body 5

❖ No notice of the right to complain about decision

**June 27, 2012** Applicant files new complaint about final response by Public Body 1 (dated June 25, 2012)

❖ Additional comments asking for extension to accept late complaint

## TIMELINESS OF THE SIX COMPLAINTS

7. As part of our intake process, and in cases where a response was provided by the public body, we first determine if the applicant has submitted all of the necessary documentation and whether his or her complaint was filed within the 60-day period as allowed under paragraph 67(3)(a) of the *Act*:

67(3) A complaint to the Commissioner under subsection (1) shall be in writing and filed

(a) in the case of an applicant, within 60 days after the date the applicant was notified of the decision of the head of the public body or the date of the act or the omission of the public body, as the case may be...

8. In the present case, the Applicant submitted the necessary documentation to file all six complaints on the same date. We first determined that the complaints regarding Public Body 5 and Public Body 3, in which the Applicant received responses in late April and mid-May 2012 respectively, appeared to have been filed within the 60-day period. We proceeded to accept these two complaints and notify both the Applicant and Public Bodies 5 and 3 of same.

9. As for the remainder of the complaints, the documentation submitted by the Applicant indicated that the responses of the other four public bodies had been issued between the end of February and the end of March. It appeared that these complaints were outside the 60-day time period, therefore late, triggering a separate procedure for consideration. This

is a procedure that requires the Commissioner to consider exercising her discretion to accept a late complaint by extending the time period. This procedure is explained below.

## **RULE REGARDING LATE COMPLAINTS**

10. If the Commissioner finds that a complaint has been filed late, an applicant may be faced with the fact that his or her complaint will not be accepted by our Office. When this occurs, the applicant will be notified immediately and asked to provide reasons for the delay in filing. The onus is on the applicant to provide reasons for the delay in filing the complaint.
11. We do not contact public body for its input because we have to determine first whether the complaint will be accepted, or whether there is cause to extend the time limit in order to accept it. Only when a complaint is accepted do we contact the public body.
12. This procedure requiring the Commissioner to make a decision whether to extend the time period to permit a late complaint to be accepted is similar in many respects to that of a time extension application by a public body to the Commissioner under subsection 11(4). In both cases, it is not necessary to seek input from the other party as the party seeking the time extension alone has onus to prove the time extension is warranted.
13. It is important to state that while the *Act* does afford the Commissioner the discretion to extend the time in order to accept a late complaint as per subsection 67(4), her discretion will only be exercised in exceptional cases and will depend upon a number of overriding considerations.
14. The Commissioner will examine the facts surrounding the late filing to decide whether to extend the time limit to accept the late complaint. In an effort to arrive at a just decision on whether to exercise her discretion to accept a late complaint, the Commissioner will be mindful of the parameters of the *Act*, recognized legal principles, and that the exercise of her discretion respects the spirit of the legislation. Only where there are compelling reasons or overriding considerations will the Commissioner exercise her discretion to extend the time period to accept a late complaint.

## **APPLICANT'S EXPLANATIONS**

15. As we could not automatically accept the four late complaints in this matter, we issued a letter to the Applicant on June 14, 2012 advising of the situation and asking the Applicant to provide our Office with an explanation for these delays.

16. The Applicant promptly provided written comments to us on June 21, 2012, detailing the Applicant's concerns in regards to how the requests were handled, including the Public bodies' feedback pursuant to subsequent attempts by the Applicant to receive clarification on their responses. Here is the basic tenet of the Applicant's explanations:

As a result of the failure of these four public bodies to provide adequate responses to my requests, or to respond or to provide adequate responses to my follow-up requests for clarification, I filed my Complaints with you.

It is my respectful submission that the 60 day time limit did not begin until these public bodies had either failed to respond to my clarification requests or responded but did so inadequately. Alternatively, if it is your view that the time limits have expired, it would be appropriate for you to exercise your discretion to extend such time periods because:

- (a) the record clearly shows that I was attempting to resolve these issues without taking up public resources
- (b) there would be no prejudice suffered by any of these public bodies
- (c) the intent and spirit of the Act is to allow access to information and technical arguments should not operate so as prevent such access, and
- (d) the heads of these public bodies have a duty under Section 9 of the Act to assist me, without delay, fully and in an open and accurate manner and they have clearly failed to do so.

17. The Applicant provided additional comments to our Office on June 27, 2012, indicating that a further response had been just received from Public Body 1 (on June 21, 2012, although dated May 28, 2012).

18. The Applicant further requested that the Commissioner accept the late complaint with the following:

In the May 28, 2012 letter, [Public Body 1] simply states that any documents in their possession have been released either by them, [Public Body 3] or [Public Body 5]. However, [Public Body 1] has again not provided a listing of documents in its possession or control and has not provided a list of the documents it says have been released by [Public Body 3] or [Public Body 5].

Firstly, without such a list, I cannot determine what documents are being referred to and if in fact these other public bodies have released the documents [Public Body 1] appears to have in its possession or control.

Secondly, notwithstanding the advice from [Public Body 1] that [Public Body 5] has released documents to me, in fact I have not received any documents whatsoever from [Public Body 5].

The May 28, 2012 letter from [Public Body 1] also states that is refusing to grant me access to a third party document... Accordingly, I have enclosed a Complaint relating to the refusal by [Public Body 1] to provide access to the third party document.

In conclusion, I reiterate the position I stated in my June 19, 2012 letter that, in a case such as this where there has been a continuing exchange of correspondence between a public body and a person seeking access to information, in this case [Public Body 1], it is appropriate that you exercise your discretion and extend the time for filing a Complaint.

#### **CALCULATION OF TIME LIMITS FOR THE FOUR LATE COMPLAINTS**

19. As explained above, the first step in our review of a complaint that appears to have been filed late is to determine the date that triggered the start of the 60-day time limit.
20. We recognize that there may be a number of events which can trigger the applicant's right to file a complaint with the Commissioner during the course of a single request. When a public body self-extends the time limit to respond to a request, third party notification decisions, the failure to respond within the time limit to do so are all examples of decisions, acts or omissions of the public body that are *in relation to the request* (as per subsection 67(1)).
21. While an applicant may have multiple opportunities to complain to our Office throughout the processing of a single request, we generally encourage applicants to allow the public body to complete the processing of the request before filing a complaint. We believe that multiple complaints filed throughout this process may have a negative effect upon the cooperation between the parties which may very well allow the parties to resolve the issues themselves without the need to engage the complaint process. In addition, each complaint process requires additional resources on behalf of the public body and our Office and it is often preferable to all involved to consolidate all of an applicant's concerns into one complaint and investigation process.
22. Furthermore, in keeping with the duty to assist, we encourage all public bodies to issue partial responses whenever possible, in order to avoid delays in granting access to those

records not subject to further consideration. This approach reassures the applicant that the request is being processed in a timely manner and supports the cooperation that should exist between the parties while the public body arrives at a final decision regarding the request.

23. Where a public body issues partial responses to a request, we therefore look carefully at the date upon which the applicant has received a full and final response to the request, i.e., after the public body has completed the processing of the request. We calculate the time limit from the date the Applicant received the final and full response to determine the time period within which the applicant should have filed his or her complaint with our Office.
24. Therefore, if the applicant chooses to wait to receive a further response in relation to his or her request, in our view, this approach will not affect the applicant's ability to file a complaint about the entire matter as long as the 60-day period from the date of receipt of the final response is respected.
25. With this in mind, we will now consider whether the four complaints in question were filed outside the 60-day period. As the Applicant received responses from the four public bodies on different dates, we will consider the timelines for each complaint separately.

#### *Public Body 1*

26. As set out above, Public Body 1 issued an initial partial response to the Applicant's request on March 26, 2012, providing its decision about the records in its custody and control, except those subject to the third party notification process. The partial response indicated that a decision in regarding the third party information was to be made later, but no date was specified as to when the Applicant could expect to receive this information.
27. Not having heard anything further from Public Body 1, the Applicant sent a follow-up letter on May 15, 2012 by asking first for clarification of the March 26, 2012 partial response, and second, for a decision about the third party information. By early June, the Applicant had not received any further response from Public Body 1 and proceeded to file a complaint regarding Public Body 1 with our Office on June 7, 2012.
28. Meanwhile, Public Body 1 had made a decision about the remaining issue of third party information on May 28, 2012 and replied to the Applicant's questions about the first partial response. The Applicant, however, indicated that despite the date of the letter of May 28, 2012, it was only received on June 21, 2012. In support of this assertion, the Applicant

provided us with a photocopy of an envelope from Public Body 1 showing the postage stamp of June 20, 2012, and we find this to be sufficient proof of the date of receipt.

29. The processing of the Applicant's request by Public Body 1 therefore occurred as follows:

- a) an initial partial response was issued in March 2012, with intent to address the third party information later (no specific date given);
- b) the Applicant sent a letter in May of 2012 asking for clarification and a decision on the third party information;
- c) Public Body 1 answered those questions and prepared a final response on the third party information dated May 28, 2012 but it was only issued to the Applicant on June 20, 2012.

30. It is clear that the Applicant had the opportunity to file a complaint about the initial partial response issued in March 2012 within 60 days of receiving it; however, the Applicant was advised at that time that the response was incomplete and that a further response would be provided later, although when was not specified. At that time, the Applicant had the right to complain both about the partial decision as well as the failure to provide a decision on the third party information. Public Body 1 indicated in its letters of February 6, 2012 and March 26, 2012 that a decision about the third party information was forthcoming, and the Applicant opted to wait for this decision, and sent a follow-up letter on May 15, 2012. We recognize that it can be difficult for any applicant to assess whether a further response will be provided at all before making a decision whether to file a complaint while being mindful of the time limits, as in this case.

31. Public Body 1 did not provide its final response until two months after the first partial response. We find that Public Body 1's failure to provide the Applicant with a decision about the third party information until June 21, 2012 amounts to an on-going "omission in relation to the request". Public Body 1 indicated to the Applicant that a decision about the third party information was forthcoming but it did not indicate when it would be issued, i.e., there was no basis upon which to determine a time limit in order to file a complaint. This is why we consider the failure to provide the final response during that time to be an on-going omission.

32. We consider the June 7, 2012 complaint about Public Body 1 to have been filed within the 60-day period based on Public Body 1's on-going omission to provide its second and final decision about the remainder of the relevant records.

33. More importantly, the Applicant's reliance on Public Body 1's assurances that a second decision was forthcoming and opting not to complain at an earlier time should not now be used against the Applicant so as to remove the right to complain. To do so would not be in keeping with the spirit and intent of the legislation, nor would it be a just result.
34. As for the further and final response from Public Body 1 on June 21, 2012 that provided the decision about the remaining third party information, the Applicant correctly filed, in our view, a complaint on June 27, 2012 in order to ensure these further issues were also addressed. The Applicant filed that complaint within six days of receiving the decision, which was well within the time period for doing so. It should be noted that while that complaint only specifically addresses the decision regarding the third party information, we would have accepted a complaint on June 27, 2012 about the entire matter at that time for the reason that the entire processing of the request made to Public Body 1 was not complete until the final decision was issued on June 20, 2012.
35. In this regard, each complaint involving Public Body 1 is timely and we accept both.

*Public Body 2*

36. As per the facts above, Public Body 2 issued its response to the request on March 13, 2012 and the Applicant received it on the same day. The 60-day period for the Applicant to file a complaint began on the day the Applicant received the response, i.e., on March 13, 2012 and ended on May 11, 2012. The Applicant filed a complaint involving Public Body 2 on June 7, 2012, thus 27 days late.
37. The Applicant's explanations about the delay indicate that the Applicant sent a follow-up letter to Public Body 2 on May 11, 2012, "within the 60 day period after the initial response..." For 27 days, the Applicant did not receive a reply to this follow-up letter and filed a complaint with our Office on June 7, 2012.
38. Again, we appreciate any effort made to resolve issues directly with the public body, and it is important this approach be encouraged; however, if an applicant chooses to do so, the time lines to file a complaint within the 60-day period must also be observed. The 60-day period provides a two-month window for the Applicant to ask questions and seek clarifications about the public body's response before deciding whether to engage the complaint process, and this is considered ample time. The Applicant sent the follow-up letter to Public Body 2 only on the 60<sup>th</sup> day after receiving the response.

39. The complaint involving Public Body 2 is clearly late. This will require further consideration as to whether discretion should be exercised to extend the time in order to accept it. This will be addressed below.

*Public Body 4*

40. Public Body 4 responded to the Applicant's request by letter dated February 22, 2012, which the Applicant received a few days later on February 27, 2012. The 60-day period for the Applicant to file a complaint with our Office began on the day it was received, i.e., on February 27, 2012 and ended on April 26, 2012. The Applicant filed the complaint with our Office on June 7, 2012, making the complaint 42 days late.

41. The response indicated that it had relevant records but added that the *Act* did not apply to them. The Applicant was not informed of the right to complain about that decision.

42. A few days after sending a follow-up letter to Public Body 2, the Applicant issued a follow-up letter to Public Body 4 asking to be provided with a list of the records referred to in the response which were not provided. The letter was issued on May 15, 2012, 79 days after receiving the response or 19 days beyond the 60-day time limit for complaining about the response. Again, an applicant cannot extend or restart the 60-day time period to complain by contacting the public body to ask questions or for clarification about the response.

43. The complaint about Public Body 4 is also clearly late. This will require further consideration of whether to exercise discretion to extend the time to accept it and we address this question below.

*Public Body 6*

44. Public Body 6, for its part, issued a response to the request on March 13, 2012. It is not clear from the information provided the exact date on which the Applicant received the response, but the Applicant did not indicate that there was any significant delay in receiving it. If we calculate the 60-day period from the date of receipt of the response, the timeframe to make a complaint ended on May 11, 2012. Even if we allow up to a week of additional time for the response to have reached the Applicant by regular mail, the 60-day period would have expired on May 18, 2012 at the latest. The Applicant only filed the complaint with our Office on June 7, 2012, therefore 27 days late or 20 days if we allow a mail delay.

45. As with Public Bodies 1, 2, and 4, the Applicant sent a follow-up letter to Public Body 6 with questions about the response. The Applicant sent this letter on May 11, 2012, which was also Day 60 after receiving the response. As stated above, an applicant cannot extend or restart the 60-day time period to complain by contacting the public body to ask questions or for clarification about the response, even where the Applicant states no response was provided to the follow-up questions, as in this case.

46. As a result, the complaint involving Public Body 6 is also clearly late. Question as to whether to exercise discretion to extend the time in order to accept this complaint is discussed below.

### **FINDINGS - TIMELINESS OF COMPLAINTS**

47. These are the findings in regards to the timeliness of the four complaints described above.

48. We find that the complaint of June 7, 2012 involving Public Body 1 was filed on time on the basis that there existed an on-going omission to provide the Applicant a full and complete response to the request.

49. As for the remaining three complaints, we find that:

- a) the complaint involving Public Body 2 was filed 27 days late;
- b) the complaint involving Public Body 4 was filed 42 days late; and,
- c) the complaint involving Public Body 6 was filed between 20 and 27 days late, depending when received by the Applicant.

50. We must now consider whether the Commissioner should exercise her discretion under subsection 67(4) to extend the time to accept any of these three late complaints.

### **FACTORS TO CONSIDER - WHETHER TO EXTEND TIME LIMITS**

51. The *Act* does not set out the factors upon which the Commissioner relies to use her discretion to extend the time period within which she will accept late complaints. In keeping with the jurisprudence across Canada in relation to late filings, the Commissioner will examine the relevant facts surrounding the delay in filing, with a particular focus on these factors:

### Number of days beyond the deadline for filing the complaint

- Was the complaint filed a day late or many days late?
- When did the applicant send the complaint versus the date our Office actually received it?

### Knowledge of the rules

- Does the applicant have experience with prior access to information requests?
- Is the applicant knowledgeable about the right to file a complaint?
- Was the applicant expressly notified of the right to complain by the public body in the present case?
- Was the applicant aware or should the applicant have been aware of the requirement to file a complaint within the fixed time limits set out in the *Act*?

### Bona fide intention to make a timely complaint

- Was the applicant attempting to resolve issues informally with the public body before deciding to file a complaint?
- Did the applicant seek clarification from the public body after receiving a response to the request before deciding to file a complaint?
- If the applicant asked for clarification, did the public body communicate with the applicant in a timely manner?
- In his or her effort to arrive at a decision whether to file a complaint, did the applicant act overall in a timely fashion (in other words, acted early on after having received the response as opposed to on Day 58)?

### Complicating aspects

- Was the applicant required to review an unusually large number of relevant records before deciding whether to file a complaint?
- Did the applicant make multiple requests with several public bodies for the same information? Were there extenuating factors which affected the timing of the applicant's decision to complain?
- Were there circumstances beyond the applicant's control which prevented the complaint from being filed on time?
  - Delay in method of delivery (ex: unanticipated mail strike or courier delays)
  - Personal circumstances of the applicant (ex: pressing matters that required the applicant's immediate attention, such as serious illness, family crisis, etc.)

52. In most cases, not one of the above factors is necessarily determinative of whether the Commissioner will accept a late complaint, and depending on the circumstances, one or more factors may have more weight than others. In each case, we look at all of the relevant facts and circumstances to determine whether it would be appropriate for the Commissioner to exercise her discretion to accept a late complaint.

## **APPLICATION OF THE FACTORS IN THIS CASE**

### *Explanation for number of days beyond the deadline*

53. A few days delay in filing a complaint, which would be considered minor, can sometimes be explained either due to a lack of knowledge regarding the rules for filing on time or some other reason. In contrast, a delay of several days or weeks will be much more difficult to explain.

54. In this case, the complaints involving Public Body 2, Public Body 4, and Public Body 6 were filed well beyond the 60-day period after receiving the respective responses. Delays of 21 to 42 days are considered significant. In that regard, there must be compelling reasons for the Commissioner to exercise her discretion to extend the time limits in order to accept late complaints.

55. This is where we looked carefully at the Applicant's full explanations for these significant delays. What we observed is that this case constitutes not four late complaints in isolation, but rather a larger picture. There was a concerted effort involving six public bodies at the same time to obtain all of the information held by the New Brunswick government on a particular subject matter. These events took place between January 26, 2012 and five months later on June 21, 2012 when the last of the responses was received. This brought about, understandably, delays in searching, identifying, and reviewing the relevant records, not to mention consultations among the public bodies before making decisions about access.

56. In our view, this big picture is central to the Applicant's requests and it is also central to the question of the exercise of discretion to extend time in order to accept three late complaints in this matter.

57. The Applicant's requests and subsequent actions, including filing all six complaints with our Office at the same time, indicate that the Applicant does not consider this to be six separate matters but rather one overall matter that involves six public bodies of the Province.

58. We consider this multifaceted approach and the sequence of events which resulted from it to be relevant factors and key complicating aspects of this case. These factors have an impact on all the other relevant factors, such as the Applicant's *bona fide* intent to file timely complaints.

59. We therefore begin our discussion with the complicating aspects of this case.

### Complicating aspects

#### *Multiple requests to several public bodies*

60. The Applicant filed the same request to six public bodies believed to have relevant records in their custody or control. The Applicant therefore began the process with the intent to obtain whatever information the Province as a whole holds about the subject matter of the requests.

61. Some of the public bodies not only consulted with each other during the request process but in a number of cases, issued responses that cross-referenced the expected responses of other public bodies. In order for the Applicant to determine what information was being received, what information was withheld, and what other information was yet to be decided upon, the responses from the public bodies had to be read in conjunction with the others. To treat any of the requests and responses in isolation is to miss the larger context.

### Complicating aspects

#### *Extenuating factors affecting timing*

62. To address this factor, we find it helpful to begin with a summary of the circumstances relating to the request as well as the responses from the public bodies in order to better understand the circumstances in which the Applicant filed the complaints on June 7, 2012.

63. While jurisdiction to accept the complaints regarding Public Body 3 and Public Body 5 is not at issue, their respective responses are relevant in the overall context and are included in the summary and our analysis below.

64. On day one (end of January 2012), the Applicant submits the same request for information with six public bodies. At first, these public bodies acknowledge and process the requests.
65. Within 10 days, Public Body 1 states that there is a large volume of records and for this reason it will need more time to process the request. Then, it adds that some records contain third party information and a decision regarding that information is to be made later. Public Body 2 also acknowledges the request within 10 days, and says that a response is to come in 30 days.
66. Approximately a month after submitting the request, the Applicant is advised by Public Body 3 that there is a large volume of records and that it will need more time to process the request. A response is provided by Public Body 4 after 30 days. It informs the Applicant that it has relevant records, but the *Act* does not apply to them. There is neither an explanation as to why the records are not subject to the *Act*, nor an indication that the Applicant can complain about this response.
67. At that same time, Public Body 5 also gives notice to the Applicant that there is a large volume of records and that it will need more time to process the request.
68. Therefore, during the first month after receiving the Applicant's requests, namely in February 2012, three public bodies state that there are a lot of records and more time will be needed for processing, one says a response is coming later, and one says it has records but the *Act* does not apply to them. The sixth public body has not provided any direction during this first 30 days.
69. During the second month after receiving the Applicant's requests (in March 2012), Public Body 2 refuses access to all records in full, Public Body 6 provides some access and severs some of the information, while Public Body 3 and Public Body 5 both inform the Applicant that they have sought approval for more time based on the volume of records and a response will not be expected until mid-May and the end of April, respectively. Meanwhile, Public Body 1 is now providing a partial response, adding that a decision regarding third party information will be made later, and then also informing the Applicant that records held by Public Body 3 and 5 will be released by them instead of by Public Body 1:
- Any information we have regarding this matter that is also held by [Public Body 3] and [Public Body 5] will be released by them.
70. Therefore, during the second month after receiving the Applicant's requests, namely in March 2012, one public body refuses access in full, one provides some access with some

information severed, two public bodies require more time due to the volume of records and responses are expected in four to six weeks, one provides some records with an indication of a further response to issue later and stating that two other public bodies which have been approved for more time have records and will release them.

71. During the third month, the Applicant receives one response. It arrives at the end of April as expected by Public Body 5 which was processing a large volume of records. Access to all records is refused. More confusing, Public Body 5 adds that records held by Public Body 1 and 3 will be accounted for by them:

Please be advised that these records in the possession of this Office that are also held by [Public Body 1] and by [Public Body 3] will be dealt with in the responses you receive from those public bodies.

72. Nothing else happens during the month of April 2012.

73. Therefore, during the third month after receiving the Applicant's request, namely in April 2012, Public Body 5, which claims to have a large volume of records, and had been identified by another public body as the one which will release them, refuses access in full. Public Body 5 adds that two other public bodies that jointly hold certain records will address those records, including the one which has been approved for more time to provide its response. Surprisingly, it was Public Body 5 which had initially been identified by Public Body 1 as having these same records and would be releasing them.

74. Consequently, in late April 2012, out of six requests, one public body states the *Act* does not apply to the records in its possession without explanation, one public body has refused access in full, two have provided some access with severed information, with a promise of release by the two who required more time due to large volume of records.

75. Given these responses after four months, it is conceivable that the Applicant would want answers or seek clarification. This is what takes place in early May. At this time, the Applicant sends follow-up letters to Public Body 1, Public Body 2, Public Body 4, and Public Body 6. Meanwhile, the Applicant is awaiting a response from Public Body 3 which is expected soon.

76. The response by Public Body 3 is issued in mid-May and grants access to some records with information severed, and other records are withheld in full.

77. When we refer back to this summary, we find that the Applicant was only able to piece together the true results of the entire access requests process long after Public Bodies 2, 4, and 6 had provided their responses:

- Public Body 4 stated the *Act* did not apply to the records in its possession without explanation as to why this was so (late February);
- Public Body 2 refused access in full (mid-March);
- Public Body 6 provided some access with severed information (mid-March);
- Public Body 5 refused access in full (late April);
- Public Body 3 provided some access with severed information and refused access in full to other records (mid-May); and,
- Public Body 1 had not provided further response by then regarding remainder of the information (by end of May).

78. The Applicant made a decision to file complaints regarding all six responses and submitted them to our Office on June 7, 2012, a few days after getting the entire picture from the responses received by that date.

79. It was only near the end of that month that Public Body 1 refused access in full to the remaining third party information, which completed the picture.

80. We therefore can appreciate from an objective standpoint that the decision to file a complaint involving any one of these public bodies could not have been easy considering the timing these responses were received and their content, with the expectation perhaps that access would be granted by other public bodies at a later date.

81. There is no indication that Public Bodies 1, 3 and 5 set out to confuse the Applicant by cross-referencing each other's anticipated responses. We appreciate that this probably intended to be helpful to the overall processing of the requests; however, it inadvertently placed an expectation upon the Applicant to wait for all the responses before acting on the filing of the complaints.

82. Having found that this case does indeed present a series of complicating aspects and that they are very relevant to the overall present consideration, we now examine the remaining relevant factors in light of these complicating aspects.

*Bona fide intention to make a timely complaint*

*Did the Applicant attempt to resolve issues or seek clarification informally with the public bodies?*

83. After receiving the responses from Public Body 2, Public Body 4, and Public Body 6, the Applicant did make efforts to obtain clarification and additional information, including whether the Applicant had received all of the relevant records held by each public body and to ask for a list of the records that were refused under one or more of the exceptions to disclosure. By following up with the public bodies directly with these questions, the Applicant was seeking to resolve these issues informally without resorting to the complaint process.
84. In doing so, however, the Applicant was not prompt in bringing these concerns to the public bodies' attention. In the case of Public Bodies 6 and 2, the Applicant did not follow-up for 60 days after receiving their responses. In the case of Public Body 4, the delay was even longer as the Applicant only followed up 79 days after receiving the response.
85. If we were to examine each case in isolation, it would appear that the Applicant did not bring the additional concerns and questions about the responses to the public bodies in a prompt and timely fashion. One could easily question the Applicant's genuine interest in obtaining clarification and additional information about the responses by only following up after a two-month and longer delay after receiving the responses.
86. In contrast, considering the Applicant's decision to wait until mid-May to attempt to follow-up with these public bodies in the context of the entire matter sheds a very different light on the Applicant's actions. As explained above, by mid-May, the Applicant had received full responses from three public bodies, two of which refused access in full. Public Body 1 had issued a partial response with some access, but stated that records jointly held would be released by Public Body 3 and Public Body 5. The Applicant was waiting on these responses in order to fully understand the partial response from Public Body 1. Public Body 5 provided its response at the end of April 2012, but refused access in full to all records in its custody and control, and stating that records jointly held with Public Body 1 and Public Body 3 would be addressed in their respective responses. Public Body 1 and Public Body 5's respective responses are contradictory and make it impossible for the Applicant to have any sense of what records are jointly held by these public bodies. The Applicant was still waiting for Public Body 3's response, which was to be provided by May 18, 2012.

87. We can appreciate that by-mid May, the Applicant would seriously begin to question whether access to the bulk of the relevant records was indeed forthcoming. At this time, the Applicant began the process of following up with the public bodies who had already responded in order to understand which public body held what records, with the goal of determining what information was not provided and for what reason.

*Bona fide intention to make a timely complaint*

*Did the public body communicate in a timely manner?*

88. With the exception of Public Body 6 that did not appear to reply to the Applicant's follow-up letter, both Public Body 2 and Public Body 4 provided timely replies (less than 30 days later) to the Applicant's subsequent letters.

*Bona fide intention to make a timely complaint*

*In deciding to file a complaint, did the Applicant act overall in a timely manner?*

89. Again, if we were to look at each of the three late complaints in isolation, there would be a good reason to question whether the Applicant made the decision to file the complaints in a timely manner. The Applicant received the responses between late February and mid-March, waited at least two months to send follow-up questions and ask for clarification, and an additional three more weeks before filing the complaints with our Office. Based on the significant amount of time that elapsed between the Applicant receiving the responses and making the complaints, it raises genuine questions about the lateness of the complaints, particularly if considered separately from the entire matter.

90. To complicate the matter further, Public Body 4 informs the Applicant that its records are not subject to the *Act* without providing further explanation. It follows that the Applicant did not know what these records were, but more importantly, the Applicant did not know that a complaint could be filed to challenge whether or not the *Act* did apply to these records. Generally, applicants are aware of the right to complain where a public body has claimed a particular exception to disclosure; however, it may be confusing to an applicant to know how to proceed, if he or she can even proceed, when a statement is made that the *Act* does not apply at all and the applicant is not informed that he or she can complain.

91. Based on the overall situation, however, we appreciate that the Applicant was trying to sort out which records existed, which public bodies held which records, and why some records were not being released before deciding whether to file complaints.

92. In our view, the Applicant had a genuine intent to file timely complaints about all the responses received. The evidence shows that the Applicant was not in the best position to do so by virtue of the fact that the Applicant was awaiting the receipt of responses from all six public bodies before this decision could be made. The Applicant's goal was to obtain all information on a particular topic found in records held by the Province, thus the reason for submitting the same requests to multiple public bodies. All of the requests were related, as were the responses of all six public bodies.

93. Also relevant to this point is the fact that the Applicant's request was large in scope, and three of the six public bodies required additional time to process the request due to the large volume of relevant records. Three public bodies extended the time limit of their own accord, while two of these public bodies sought authorization for our Office for additional time to provide a response. Collectively, it took a period of approximately five months for all of the public bodies to process the relevant records and to provide responses to the Applicant. Once the Applicant had received all of the responses, save for the outstanding second response from Public Body 1, the Applicant filed the six complaints with our Office shortly thereafter.

#### *Applicant's knowledge of the rules*

94. A final relevant factor to be considered is whether the Applicant knew or ought to have known to be mindful of the rules regarding the filing of complaint on time.

95. While it is not certain whether the Applicant has prior experience requesting information under the *Act*, it is evident from the format of the Applicant's request (which was the same for all six public bodies) and subsequent follow-up questions with these public bodies that the Applicant has a general understanding of the request process, the timelines for the public bodies to respond, and that there are in fact time limits for filing complaints.

96. The Applicant's comments to our Office about the delay in filing some of the complaints indicate that the Applicant is knowledgeable about the right to complain as well as the fact that there are time limits to do so and that these time limits are set out in the *Act*.

97. Most of the public bodies fulfilled their obligation to notify the Applicant of the right to file a complaint with our Office about their respective responses. Public Body 1 and Public Body 5 indicated the Applicant had 60 days from receipt of the decision to do so. Public Body 2, Public Body 3 and Public Body 6 only informed the Applicant of the right to complain but did

not specify the time period in which to do so. Only Public Body 4 did not notify the Applicant of the right to complain.

98. In addition, three of the public bodies chose to self-extend the time limit to respond (Public Body 1, Public Body 3, and Public Body 5) in February 2012. In the notice letters issued to the Applicant, all three public bodies informed the Applicant of the right to complain to our Office about the decision to extend within 60 days of receipt of the notice.

99. While one of the public bodies did not inform the Applicant of the right to complain, and others did not indicate the time period in which to do so, we find that the Applicant was generally aware that the *Act* sets out specific time lines for public bodies to respond to requests as well as for applicants to file complaints if they are not satisfied with the responses received.

100. Again, in light of the recognizable and persistent complicating aspects of this case, we do not find this factor to be particularly determinative.

#### **EXERCISE OF DISCRETION**

101. In the present case, the Applicant submitted the same request to six public bodies in a concerted effort to obtain all information held by the Province on a single topic. Responses from all six were received during a five month period ending in mid-June 2012. Several of these responses had referred to records being released or dealt with by other public bodies in that group of six.

102. The Applicant filed six complaints on the same day, that of June 7, 2012. In relation to the date when responses were received, the Applicant was significantly late in filing the complaints involving Public Body 6, Public Body 2 and Public Body 4. Based on a thorough review of the Applicant's explanations for the late filings along with a consideration of all the relevant factors and circumstances described above particular to this case, however, we are satisfied that there are compelling reasons requiring the Commissioner to exercise her discretion to extend the time period in order to accept these late complaints.

103. Our review indicates that the multifaceted approach of requests submitted to several public bodies at the same time seeking the same information led to a sequence of events that constituted relevant factors and key complicating aspects of this case. We found that these factors had an impact on all the other relevant factors, including that of the Applicant's genuine intent to file timely complaints. The Applicant demonstrated that a

continued intent to complain but the special circumstances in this case affected the timeliness of the filings.

104. Furthermore, this multifaceted approach resulted in partial responses, time extensions, references to other public bodies dealing with same records, that some records were not subject to the *Act*, and so on, complicating the Applicant's ability to appreciate the results of the entire process as to which information had been released, that which had not, and by which of the six Public Bodies. In some cases, a real expectation was placed upon the Applicant that the information would be "released" at a later date. This would have had an impact on the overall decision when to complain and about which Public Body.
105. When the Applicant realized that the information was not forthcoming as expected, complaints about all six responses were filed with our Office on the same day. Three complaints were found to be timely; the remaining three complaints were filed significantly late.
106. In a thorough review of all the facts which led to the filing of the complaints, we find that the timing of the three late complaints cannot be treated in isolation having regard to the entire sequence of events in this case. Their lateness is a direct cause of the very relevant and overlapping circumstances of the various responses provided by the other public bodies involved over that period of time.
107. In our view, the Applicant understood the need to act in a timely manner, equally in following up with the public bodies for clarification as to file complaints with our Office. The Applicant did not act in a timely manner in this regard. The Applicant established a *bona fide* intention to make timely complaints, but we find, however, that the complicating aspects of this entire matter contributed to the Applicant's delay in filing the complaints.
108. We are therefore satisfied that the Applicant has met the onus and does present an exceptional case with overriding considerations for the significant delays in filing these three complaints. There is no doubt that the events of the processing of the six requests in this matter constitute compelling reasons which warrant the exercise of the Commissioner's discretion to extend the time period to accept these late complaints.

## CONCLUSIONS AND RULINGS

109. Based on all of the above, we find as follows:

- a) that the Applicant's complaint filed on June 7, 2012 involving the partial response issued by Public Body 1 was filed within the 60-day time period due to an on-going omission to provide a full response in relation to the request;
- b) the June 25, 2012 complaint involving the final response by Public Body 1 about the remainder of the records was timely. Both complaints will be addressed in a single investigation;
- c) the Applicant's complaints filed on June 7, 2012 about the responses received from Public Body 6, Public Body 2 and the Public Body 4 were not filed within the respective 60-day time periods to do so and were significantly late. The Commissioner finds that the Applicant has met the burden in establishing an exceptional case in which there is compelling reasons to exercise her discretion and extend the time period to accept these late complaints in the circumstances.

110. The Public Bodies 1, 2, 4, and 6 will be advised of these rulings and that the investigation into those complaints will begin as of today's date.

Dated at Fredericton, New Brunswick, this \_\_\_\_\_ day of August, 2012.

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Anne E. Bertrand, Q.C.  
Commissioner