

Office of the Access  
to Information and  
Privacy Commissioner  
New Brunswick



Commissariat à l'accès  
à l'information et à la  
protection de la vie privée  
Nouveau-Brunswick

## REPORT OF THE COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Matters: 2013-1608-AP-859, 2013-1609-AP-860, 2013-1610-AP-861,  
2013-1611-AP-862, 2013-1612-AP-863, 2013-1613-AP-864,  
2013-1614-AP-865, 2013-1615-AP-866, 2013-1616-AP-867

Date: September 19, 2014

*"Case concerning the statutory duties of a public body when responding to access requests"*

## INTRODUCTION AND BACKGROUND

1. This Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, SNB, c. R-10.6 ("the Act"). This report stems from nine complaints filed with our Office in which the Applicant requested that the Commissioner conduct an investigation.
2. On April 9, 2013, the Applicant filed three access requests with the Regional Service Commission 2 ("the Commission"), seeking to obtain the following records:
  - 1) Any and all information concerning 227 Victoria Street in Dalhousie, New Brunswick (sometimes also known as 225 Victoria Street, Dalhousie, New Brunswick), including photographs, maps and any archival records in the Commission's custody or control, including, but not limited to, permits and discretionary benefits concerning these addresses, and the Town of Dalhousie's most recent and previous land use plans. (AP-859)
  - 2) Any and all e-mails sent and/or received by Jason Bernatchez between December 6, 2012, and April 1, 2013. (AP-860)
  - 3) Any and all e-mails sent and/or received by Alain Arpin between December 6, 2012, and April 1, 2013. (AP-861)
3. The Commission responded to the first request in writing on April 22, 2013, providing access to two records: a copy of a building permit and section 5.1 of the municipal by-law setting out permitted uses in residential zones. In addition, the Commission provided the Internet address for the Town of Dalhousie's land use plan.
4. The Commission also indicated in its April 22 letter that with respect to the other two requests, it could not respond until the Applicant provided clarifications.
5. On April 29, 2013, the Applicant responded to the request for clarification, specifying that he wished to receive all of the e-mails. Dissatisfied with the Commission's approach, the Applicant filed three complaints with our Office on May 16, 2013.
6. At that time, the Applicant submitted six additional access requests to the Commission seeking to obtain the following records:

- 1) Any and all records as described in the Act and concerning and/or explaining how and/or why the property bearing PID 50102169, formerly a contaminated parcel of land containing two dumps and classified industrial, was reclassified residential. (AP-862)
  - 2) Any and all records as described in the Act, including, but not limited to, e-mails concerning and/or explaining how and/or why the Town of Dalhousie's new zoning map dated December 2010 was adopted, together with any amendments. (AP-863)
  - 3) Any and all e-mails between the Commission and the Town of Dalhousie. (AP-864)
  - 4) As indicated in Item B in the letter dated April 22, 2013, "Toxic waste will be disposed of at the Rest. Solid Waste site." Please send me any and all records concerning such disposal. (AP-865)
  - 5) Any and all records pertaining to delegation of a duty or power by the head of your public body under subsection 6(1) of the *Right to Information and Protection of Privacy Act*. (AP-866)
  - 6) Any and all records constituting, concerning or explaining the access requests made by me between December 8, 2012, and April 24, 2013, regardless of whether those requests were made formally or informally, orally or in writing. (AP-867)
7. Since the Applicant did not receive a response within the time limit required by the Act, the Applicant filed six complaints with our Office on June 6, 2013.

## INVESTIGATION

8. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations specified in the Act.
9. Our investigation of this case required a review of the substance of the complaints, the access requests and the Commission's replies, where applicable. We also met with members of the Commission's staff, including the Right to Information Coordinator, to review the relevant records and discuss the processing of the requests.
10. Given the general nature of the issues raised in this case and their scope, we decided instead to prepare a Report of the Commissioner's Findings to inform the public and other public bodies about these issues.

## GENERAL OBSERVATIONS

### General principles of the Act

11. The *Act* is based on principles of transparency and accountability, and governs access to information and protection of personal information held by public bodies. The *Act* requires public bodies such as the Commission to be open and transparent in the administration of public business and in the way in which they handle personal information in their custody.
12. Among other things, the *Act* gives individuals the right to access information held by public bodies, subject to the limited and specific exceptions set out therein. This means that anyone, no matter where they live, can use this fundamental right to submit an access request to a public body. It is also important to know that a person's reasons for making an access request to a public body are irrelevant when determining whether access will be granted.

### Delegation of authority by the head of a public body

13. Every public body must have a designated person in charge of administering the *Act* and making sure that the public body fulfils the obligations set out therein. That person, referred to by the *Act* as the "head," is also responsible for processing access requests that are made to the public body.
14. The head of a public body, however, may delegate to an employee of the public body any duty for which he or she is responsible under the *Act*, provided it is done in writing. In that regard, we learned during our meeting with the Commission that, even though a head and a coordinator had been appointed to oversee the administration of the *Act*, there was no written delegation of authority. It was agreed with senior officials of the Commission that a delegation of authority would be drafted, in accordance with subsection 6(1).

### Confidentiality of the access to information process

15. As a public body, the Commission must protect the personal information in its custody, including information relating to persons who make access requests. In that regard, the *Act* sets out rules that must be followed when a public body wishes to gather, use or

disclose personal information. Personal information means information about an identifiable person, for example, the person's name, address, e-mail address and telephone number.

16. Generally, public bodies may disclose personal information only if the person to whom it relates has consented to the disclosure. In addition, disclosure is limited to the minimal amount of information and to the employees who need to know the information to do their jobs.
17. These rules apply in every aspect of the public body's work, including when access requests are being processed. Consequently, this means that public bodies should not disclose personal information provided by an applicant without his or her consent, even if disclosure is made to another public body.
18. It is also essential that this information be disclosed only to the employees of the public body who need to know the information to do their jobs. Such information may not be disclosed to other employees, including those persons helping the head or delegate to process the request. For example, an employee who has to conduct a search to identify records, e.g., minutes of a meeting, that are relevant or related to an access request, does not need to know the identity of the applicant in order to perform that task.
19. In light of our discussions with the Commission, we would hope that it is better equipped to fulfil its obligations under the *Act* with respect to the protection of personal information, and that in the future, the Commission will make every effort to ensure that personal information relating to applicants will be protected, in accordance with the *Act*.

### **Duty to assist**

20. A fundamental aspect of the right to information is the duty to assist, which is set out in section 9 of the *Act*:

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.

21. This statutory provision creates a positive obligation on public bodies to offer assistance to applicants in order to ensure they receive a timely, appropriate and relevant response to their requests for information. This duty to assist applies throughout the request process, from the time the request is received to when a response is issued.

22. Below we will discuss a few aspects of the duty to assist.

### ***Acknowledgements of receipt***

23. While sending acknowledgements of receipt is not compulsory, we believe that such a practice is an important step in processing access requests, for it serves two purposes. First, it tells the applicant when the public body received the request and thus when the applicant can expect to receive a response. Second, the acknowledgement is a sign of respect for the applicant's request and shows that it is being processed. In our opinion, this practice lends itself well with the duty to assist and helps to dispel any confusion about the applicable timeline.

24. We therefore encourage the Commission to adopt the practice of acknowledging access requests.

### ***Requests for clarification***

25. When an access request is received, the public body must first review it to ensure the request is clear, and to determine its scope. This step is essential in order for the public body to identify all of the relevant information for the purpose of responding to the request, in accordance with the *Act*.

26. If the requested information is unclear, the public body should contact the applicant immediately and ask exactly what information he or she is seeking. Often, when applicants do not know exactly what information or records to ask for, they will go about it by submitting broad requests covering a large period of time to ensure they receive all of the information they are looking for.

27. Asking for clarification and discussing the scope of requests with applicants can simplify matters, both in terms of processing and in terms of the requests themselves. By engaging in such discussions, the public body will be better able to notify applicants about relevant information that exists, which will then, in many instances, enable applicants to clarify what information they would like to obtain.

28. If there is doubt about the nature of the information being sought and if informal communication has not produced the desired results, the public body may send a written request to the applicant to obtain further details.

***Applicant's statutory obligations***

29. The *Act* does not specify the circumstances that must be present in order for a public body to seek clarification. However, the *Act* specifies what must be included in a request for information, as well as a process that can be followed if the request is unclear.
30. Pursuant to section 8, the applicant must meet certain conditions in making a formal access-to-information request under the *Act*, in accordance with the applicant's statutory right to the information under section 7.
31. First, the applicant must make a request for information in writing or by electronic means to the public body that the applicant believes has custody or control of the record (subsection 8(1)).
32. In addition, pursuant to subsection 8(2), the applicant shall indicate, where possible, what he or she is looking for so that the public body can identify the information or records being sought and thus respond to the request:

8(2) A request for access to a record shall

(a) specify the record requested or where the record in which the relevant information may be contained is not known to the applicant, provide enough particularity as to time, place and event to enable a person familiar with the subject matter to identify the relevant record, and

(b) include any information prescribed by regulation.

33. The information prescribed by regulation (section 3, *Regulation 2011-46*) is as follows:
- the applicant's name and mailing address;
  - the applicant's e-mail address, if any;
  - the applicant's telephone number where the applicant can be reached;
  - the date of the request;
  - that the request is being made as a request for access to a record under the *Act*;
  - the name of the business or organization on behalf of which the applicant is making the request, if any;
  - whether the applicant is asking to examine a record;

- whether the applicant is asking for a copy of a record and, where it is possible to send the record electronically, whether the applicant is able to receive the record by electronic means; and
  - the applicant signs the request.
34. On reading paragraph 8(2)(a) above, we note that the request must specify the record, and not the information, being sought. And, if the applicant does not know in which record the relevant information is contained, the *Act* requires that he or she provide more information to enable the public body to identify and thus locate the relevant record or records.
35. This leads us to the question: In what circumstances does the public body have the right to seek clarification from the applicant? And, in such a case, what duty does the applicant have? Will the applicant have to provide clarification?

#### ***Need to seek clarification***

36. The *Act* does not contain any provisions concerning the need to request clarification from an applicant. As a matter of fact, the *Act* merely makes passing reference to such a need, for example in section 11 (time limit within which the public body has to respond to the request for information) and section 12 (possible outcomes if a request for clarification is made but is not acted upon).
37. In that regard, we note in paragraph 11(3)(b) that the public body may extend the time for responding to a request if
- the applicant does not respond to a request for clarification by the head of the public body as soon as practicable,
38. In our view, the *Act* appears to acknowledge the importance of seeking clarification, for it allows the public body to extend the time for responding to the request beyond the 30 days normally required under section 11 of the *Act*.
39. In addition, subsection 12(1) stipulates that if the applicant does not respond to the request for clarification within 30 days, the request for access shall be deemed abandoned:

12(1) If the head of the public body sends to the applicant a request for clarification in writing... and the applicant does not respond to the request within 30 days after receiving the request, the request for access to a record shall be deemed abandoned.

40. Once again, the *Act* would seem to acknowledge the importance of providing clarification, for the *Act* removes from the applicant the right of access he or she exercised when the request for access was first made.
41. That fact notwithstanding, we would add that the *Act* requires the public body to advise the applicant in writing of his or her right to file a complaint with our Office concerning abandonment of the request (subsection 12(2)). Such a complaint would trigger a review by us to determine if the public body was entitled to make a request for clarification under the circumstances, and to determine why the applicant did not respond by providing the requested clarification within 30 days.

#### **Search for relevant records**

42. All records in the public body's custody or control are subject to the *Act*. Consequently, the public body must conduct a thorough and complete search in looking for records relevant to access requests.
43. Searching for relevant records is a critical step in processing access requests. The public body must identify and retrieve all relevant records in its custody before it can examine them and determine whether the records will be disclosed to the applicant.

#### **Time limit for responding**

44. A public body must respond to access requests within time limits required by the *Act*. Subsection 11(1) requires that the head of the public body respond within 30 days of receiving the request. The failure to respond to a request within that time is to be treated as a decision by the public body to refuse access to the record, unless an extension is requested.

#### *Extension under subsection 11(3)*

45. Although a public body initially has 30 days to respond to access requests, the *Act* acknowledges that certain circumstances could prevent the public body from finalizing the processing of requests within that time period. In those particular instances, set out

in subsection 11(3), the public body may, without the Commissioner's approval, extend the time limit by an additional 30 days:

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

- (a) the applicant does not give enough detail to enable the public body to identify a requested record,
  - (b) the applicant does not respond to a request for clarification by the head of the public body as soon as practicable,
  - (c) a large number of records is requested or must be searched or responding within the time period set out in subsection (1) would interfere unreasonably with the operations of the public body,
  - (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,
  - (e) a third party refers the matter to a judge of The Court of Queen's Bench of New Brunswick under subsection 65(1) or files a complaint with the Commissioner under paragraph 67(1)(b); or
  - (f) the applicant requests records that relate to a proceeding commenced by a Notice of Action or Notice of Application.
46. If the public body self-extends the time period under subsection 11(3) without the Commissioner's approval, the *Act* requires that a written notice be sent to the applicant setting out the reason for the extension and when a response can be expected.
47. In addition, the notice must also inform the applicant that he or she can file a complaint with the Commissioner about the extension. 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.

*Extension with the Commissioner's approval under subsection 11(4)*

48. In certain exceptional cases, the public body may not be able to finish processing the request within the extended time limit of 60 days.
49. If that is the case, the public body may ask the Commissioner for more time to respond to the request, in accordance with subsection 11(4). However, such requests may be made only for the reasons set out in subsection 11(3). In addition, no further time may

be granted if the 60-day limit has lapsed by the time the request is made to the Commissioner.

### Contents of the Response

50. In its response, the public body shall inform the applicant, as directed in subsection 14(1) of the *Act*,
- (a) as to whether access to the record or part of the record is granted or refused,
  - (b) if access to the record or part of the record is granted, of the manner in which access will be given, and
  - (c) if access to the record or part of the record is refused,
    - (i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,
    - (ii) in the case of a record that exists and can be located, of the reasons for the refusal and the specific provisions of this Act on which the refusal is based;
    - (iii) of the title and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal; and
    - (iv) that the applicant has the right to file a complaint with the Commissioner about the refusal or to refer the matter to a judge of The Court of Queen's Bench of New Brunswick for review.
51. In responding to an access request, the public body must identify all of the relevant records to indicate whether access is granted or refused.
52. In addition, if access is refused wholly or in part, the response must indicate the reasons for the refusal and the section of the *Act* on which the refusal is based, as well as the contact information of an employee of the public body who can answer the applicant's questions about the refusal. Such a written response will enable the applicant to understand exactly what records the public body has in its custody, and if the applicant will be granted access.
53. The response must also indicate that the applicant has the right to file a complaint with our Office if access is refused, or to refer the matter to a judge of The Court of Queen's Bench of New Brunswick.
54. We also encourage the Commission to respond to each access request individually so as to dispel any possible confusion for the applicant. This is consistent with the duty to assist, which holds that responses to access requests must be clear and specific.

55. With regard to request AP-859 in this case, and to be in compliance with section 14, the Commission should not have combined the response with its requests for clarification concerning the other access requests, namely matters AP-860 and AP-861. Furthermore, the Commission did not advise the Applicant of his right to file a complaint with the Commissioner or to refer the matter to a judge of The Court of Queen's Bench, if he was dissatisfied with the response.

## FINDINGS

56. Our investigation concerns nine complaints, only one of which concerns the substance of the response provided, while three have to do with the fact the Commission asked the applicant for clarification, and five, the fact that the Commission did not respond to the access requests.

57. We will address each of the nine complaints separately.

- **Complaint AP-859 – substance of the response**

58. Our review of the facts of this complaint leads us to conclude that the search for relevant records for this request was thorough, and that the response given to the applicant was adequate and timely. Consequently, we find this complaint to be unfounded.

- **Complaints AP-860 and AP-861 – request for clarification**

59. These requests, in which the Applicant requested all of the e-mails sent and/or received by Jason Bernatchez, and all of the e-mails sent and/or received by Alain Arpin between December 6, 2012, and April 1, 2013, were received by the Commission on April 9, 2013.

60. On April 22, 2013, the Commission sought clarification from the applicant for each of these two requests. On April 29, 2013, the Applicant indicated that he wished to receive all of the e-mails. The Applicant filed a complaint with our Office on May 16, 2013, as he did not receive a response within the 30-day time limit. Our investigation showed that the Commission did not respond to the requests until May 29, 2013.

61. As indicated above, access requests must be sufficiently detailed to enable the public body to identify the records being sought. If requests are not sufficiently detailed, the public body may seek clarification.

62. In the case of requests AP-860 and AP-861, we have no doubt as to the possible identification of the records that the applicant wanted: all of Mr. Bernatchez's e-mails and all of Mr. Arpin's e-mails between December 6, 2012, and April 1, 2013. In our view, the requests are clearly stated and make it possible for the Commission to locate the records being sought. While the requests are broad in scope, we do not believe it was necessary for the Commission to seek further details in order to locate the relevant records.
63. When the complaints were filed with our Office on May 16, 2013, the Commission had asked the Applicant for clarifications concerning requests AP-860 and AP-861, but had not issued a response to these requests.
64. Having determined that clarifications were not needed to process requests AP-860 and AP-861, the Commission must process the requests in question for all of the e-mails, and the Commission has to issue a response to the Applicant in each case, in accordance with the provisions of the *Act*.
- **Complaints AP-862, AP-863, AP-865, AP-866 and AP-867 – no response**
65. The Commission received requests AP-862, AP-863, AP-865, AP-866 and AP-867 on April 29, 2013. However, the Applicant still had not received a response by June 6.
66. In our investigation, the Commission informed us that responses were sent to the Applicant between June 21 and 29, 2013, i.e., outside the prescribed time limit of 30 days. Furthermore, this time period was not extended by the Commission under subsection 11(3). We have determined that the complaints concerning requests AP-862, AP-863, AP-865, AP-866 and AP-867 are founded. However, we note that the Commission informed the Applicant that the responses for two of the requests would be forthcoming, although that notice was not sent to the Applicant until June 21, i.e., after the 30-day time limit had lapsed.
67. As indicated above, the duty to respond to access requests within a certain period of time is clearly spelled out in section 11 of the *Act*, and there are mechanisms for extending the 30-day deadline under certain circumstances. It is important that the Commission familiarize itself with the procedures established in the *Act*, and that it develops a system for managing access requests to ensure that deadlines for responding as set out in the *Act* are met.

- **Complaint AP-864 – request for clarification**

68. With regard to complaint AP-864, the Applicant wished to obtain all of the e-mails between the Commission and the Town of Dalhousie. The Commission sent a request for clarification to the Applicant on June 27, 2013, to which he did not respond.
69. In our view, there was no need for the Commission to seek clarification in order to process the request, as the records sought were clearly identified. As in the case of complaints AP-860 and AP-861, while the scope of the access request at issue in complaint AP-864 is broad, it is not ambiguous. Consequently, the Commission must process this request and issue a response to the Applicant.
70. In sum, our findings are as follows:
- a) complaint AP-859 is unfounded;
  - b) complaints AP-860 and AP-861 are founded, as there was no need for the Commission to seek clarification from the Applicant in order to respond;
  - c) complaints AP-862, AP-863, AP-865, AP-866 and AP-867 are founded, because the Commission did not respond to the requests within the time limit prescribed by the *Act*; and
  - d) complaint AP-864 is founded, as there was no need for the Commission to seek clarification from the applicant in order to respond.

## RECOMMENDATIONS

71. In light of the above, the Commissioner recommends, pursuant to paragraph 60(1)(h) of the *Act*, that the Commission
- prepare a written delegation of authority, in accordance with subsection 6(1) of the *Act*;
  - develop a process for managing access requests received in accordance with the *Act*, including acknowledgements of receipt, to ensure that time limits under the *Act* are met; and
  - amend the letter it uses in responding to access requests in order to ensure that responses include all of the information required by section 14 of the *Act*.

72. The Commissioner also recommends, in accordance with subparagraph 73(1)(a)(ii) of the *Act*, that the Commission process the requests at issue in complaints AP-860, AP-861 and AP-864 without delay, and that the Commission issue a response to the Applicant in each case, in accordance with the provisions of the *Act*, by November 28, 2014.

Dated at Fredericton, New Brunswick, on this 19th day of September, 2014.

---

Anne E. Bertrand, Q.C.  
Commissioner