

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2013-1281-AP-619

June 13, 2013

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

Case about failure to respond to a request

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., chapter R-10.6 ("the Act").
2. This Report stems from a Complaint of March 4, 2013, in which the Applicant asked the Commissioner to carry out an investigation into the lack of response to a request made to the Department of Environment and Local Government ("the Department").
3. The Applicant submitted an access Request to the Department on November 14, 2012. The Applicant claims that the Department never provided a response, or any communication regarding the Request. On January 9, 2013, the Applicant received a letter from another public body in response to the Request that informed the Applicant the Department had transferred part of the Request on December 6, 2012 to this public body. Despite the partial transfer of the Request, the Department still had not provided a response to the Applicant regarding the Request.
4. As the Applicant did not receive any response from the Department, a complaint was filed at our Office on March 4, 2013, in which the Applicant sought answers to whether the Department acted lawfully by transferring part of the Request to another public body, and whether the Department respected the time limits as set out by the Act ("the Complaint").
5. The Applicant's Complaint raises the following four issues which we address in this Report:
 - a) a public body's overall obligation when responding to a request, including its duty to assist;
 - b) the Department's processing of requests;
 - c) a public body's duty to respond within statutory time limits; and,
 - d) a public body's lawful requirements when transferring a request or part thereof.

INVESTIGATION

6. Once our Office received the Complaint, we communicated with the Department in order to find out the reason(s) why it did not respond to the Request, whether it had transferred part of the Request to another public body, and if so, why it did not notify the Applicant of the partial transfer.

7. During our discussions, the Department confirmed having received the Request, but explained that it had not completed the processing of the Request at that time due to the large number of requests the Department received. The Department is reporting over 130 requests for information per year; or, approximately 11 requests per month. As each request is processed in sequential manner, and some requests are larger in scope than others, this means that not all requests can be processed within the allotted 30-day time limit, hence creating a backlog.
8. The Department confirmed that part of the Request was transferred to another public body based on the fact that some of the requested records were in the custody or under the control of that other public body. We then raised the Applicant's concerns as to why the Department had not notified the Applicant of the partial transfer. The Department informed our Office that it had in fact notified the Applicant about the transfer in a letter dated December 6, 2012, reproduced as follows:

(...) Upon review, it has been determined that some of the requested documents are in the custody or control of the [public body]. This portion of your request was transferred to [public body] on December 6, 2012, as per section 13(1) of the Right of Information and Protection of Privacy Act. You can expect to receive a response to your request within 30 days of [public body] receiving it, unless otherwise notified. (...)
9. In addition to this letter, the Department provided us with a copy of the acknowledgement of receipt of the Request that it had sent to the Applicant on December 3, 2012.
10. In the Complaint, the Applicant alleges that he did not receive any communication from the Department after having filed the Request, but it is unclear as to the reasons why. Upon verifying the address indicated on the letters dated December 3 and 6 sent by the Department to the Applicant's contact information provided in the Complaint, it appears the Department used the correct address and we were told these letters were in fact sent. We do not know why the Applicant did not receive these letters.
11. It appears that in this case, some event prevented the Applicant from receiving these letters, and therefore notification as to the status of the Request. Having said this, however, the issues in this case regarding the timeliness of the response, the transfer of the Request, and the Department's overall duty to assist the Applicant have to be addressed.

A PUBLIC BODY'S OVERALL OBLIGATION WHEN RESPONDING TO A REQUEST

12. The *Act* grants applicants a right to access information held by a public body and it is the public body's statutory obligation to respond to such in a timely manner. Specifically, subsection 11(1) of the *Act* requires the head of a public body to respond to a request within 30 days after receiving it.

13. Additionally, the duty to assist provision found in section 9 further emphasizes the right of access by directing the public body to process a request in an expedient and transparent manner:

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.

14. The duty to assist provision applies throughout the request process and requires the public body to assist the applicant in receiving a timely, appropriate, and relevant response to his or her request for information. For instance, if a public body knows that it may not be possible to respond to a request within 30 days, every reasonable effort should be made by the public body, as early as possible, to take the appropriate steps to avoid further delays and possible complaints.

15. We can appreciate that delays may occur where a public body receives a number of access to information requests at any given time. Having said this, we reiterate that issuing a timely response is a lawful requirement under the *Act*. In this regard, it is incumbent upon any public body to ensure that its lawful obligations are met and where necessary, to provide the necessary resources to do so. Other options are to apply for an extension of time to enable the public body to better handle the overall processing of the multiple requests. We elaborate on this option further in this Report.

THE DEPARTMENT'S PROCESSING OF REQUESTS

16. During our investigation of this Complaint, we asked the Department about its process for access to information requests. We also asked as to the timeliness of the Department's actions in this particular case and also how the partial transfer was undertaken.

17. We understand that one employee is assigned the duties of processing all access requests made to the Department, and as stated above, this signifies over 130 requests per year, or an average of 11 requests per month. We can appreciate that this number of requests

would be a substantial undertaking for only one employee on a full-time basis. Moreover, this can be particularly overwhelming where the employee is also responsible for other duties outside of processing access requests.

18. Given this situation, we can appreciate that a backlog is the resulting effect. Having said this, we reiterate that issuing a timely response is a lawful requirement under the *Act*. In this regard, it is incumbent upon the Department to ensure that its lawful obligations continue to be met.
19. As for processing, when a request is received by the Department, the employee mentioned above reviews the request and first identifies whether the requested records are in the custody or under the control of the Department, or whether the request, as a whole, or parts of it need to be transferred to another public body. Once the employee determines that the requested records are with the Department, the employee identifies which of the Department's divisions holds the requested information, and then sends an internal request for relevant records to the appropriate divisions. The divisions are given a short internal deadline by the employee to perform the search and locate any records relevant to the request in order to send the records to the employee during a quick turnaround. Once the employee has gathered all the relevant information, the employee prepares a response, which means that each record must be reviewed to ensure that appropriate access is granted. Then, the response is submitted to the Minister for approval and signature, and then, the response is issued to the applicant.
20. From our discussions with officials of the Department, however, we understand that the employee tasked with processing the requests faces additional challenges within the Department itself: when the employee sends an internal request to the appropriate division to search and locate any record relevant to the request, the division's staff is given a short turnaround time to find the records so that the employee may review all of the relevant records and make a determination as to whether all or any should be released. It is our understanding, however, that the turnaround time is not always respected by the division's staff, which inevitably delays the whole access process, including providing a timely response to the applicant.
21. Again, providing a timely response is a statutory obligation for the entire Department. We find that the Department's staff may benefit from training sessions in relation to these obligations, especially to educate staff on the importance of working with the access to information coordinator to ensure that the Department meets the timelines set out in the *Act*.

22. In this case, the Department failed to fulfill its statutory obligations under the *Act* to respond to the Request in a timely manner. The Department did not provide the requisite resources to enable its staff to process the Request in accordance with the time limits for doing so, especially when the Department is aware that it must process several other requests each month.

A PUBLIC BODY'S DUTY TO RESPOND WITHIN STATUTORY TIME LIMITS

23. The time limit is computed by excluding the 1st day the request is received and including the 30th day. Therefore, if a request is received on November 1, 2012, the initial 30 day deadline would be December 1, 2012. If the 30th day falls on a Saturday (or Sunday or statutory holiday) as it does in this example, the closest work day to the 30th day becomes the deadline. In this example the 30th day would consequently fall on the Friday, November 30, 2012. This deadline indicates the day the applicant must be in receipt of the response.

24. While a public body has an initial time limit of 30 days to respond to an access request, the *Act* has recognized that there may be specific circumstances where it is not possible to search, review and prepare the requested documents for disclosure within that timeframe. In those specific cases, as set out under subsection 11(3), the public body may self-extend the time limit for 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.

25. Should the public body self-extend the time limit under subsection 11(3), a written notice must be sent to the applicant, as a requirement of the *Act*, setting out the reason for the extension, when a response can be expected and if the time limit is extended without the approval of the Commissioner, that the applicant has a right to complain to the Commissioner's Office about that extension.
26. We emphasize that, while the *Act* will permit a public body to self-extend the time limit to respond, doing so without the Commissioner's approval may attract a review of this decision through the applicant's 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.
27. Where the public body does not provide a full response to the request within the 30-day time limit and does not extend 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.
28. In this case, the Department received the Applicant's Request on November 14, 2012; hence, the 30-day deadline fell on December 14, 2012. According to the Department, the Applicant was advised by letter on December 3, 2012 that the Request was received, and by letter dated December 6, 2012, the Department advised the Applicant that part of the Request had been transferred to a different public body.
29. The Department did not self-extend the time limit to provide a response and since only part of the Request was transferred to another public body, the Department was still obligated to provide a response to the Applicant no later than December 14, 2012 regarding the part of the Request that was not transferred.
30. As explained above, where applicable, public bodies may self-extend the time limit by 30 days, resulting in a total of 60 days to respond to a request. In cases where responding to a request for information may require more than 60 days, a public body may apply for a time extension to be approved by the Commissioner.

31. This is done by submitting a completed application that presents the special circumstances under which the public body finds itself unable to meet its deadline to respond. The Commissioner may grant a time extension for any period deemed reasonable in those circumstances, as per subsection 11(4). The Commissioner's ruling on a time extension application equally recognizes the importance of respecting an applicant's right to a timely response and the public body's ability to respond properly; for those reasons, it is not an easy test. The Commissioner's ruling to grant a time extension does not trigger an applicant's right to complain.
32. Again, subsections 11(3) and (4) of the *Act* recognize that specific circumstances may challenge the initial 30-day deadline and allow the public bodies to extend the time where it is appropriate to do so.

***A PUBLIC BODY'S LAWFUL REQUIREMENTS WHEN TRANSFERRING A REQUEST
OR PART THEREOF***

33. Upon receiving an access request, the public body may determine that the request, as a whole, or part of the request may be better processed by another public body because the requested information is in records under its custody and control. In such cases, the *Act* allows the public body to transfer the request in its entirety or in part where applicable.
34. Section 13 sets out that the transfer of the request must occur within 10 days of having received the request and the applicant must be advised of such as soon as possible. For its part, the public body which receives the transfer must then provide a response to the applicant within 30 days of receiving the said transfer.
35. To clarify the rules regarding transfers, we provide the following two examples:
- I. Where public body A receives the request but transfers it in its entirety to public body B, there is no longer a requirement for public body A to provide a response. As for public body B, it will be required to provide a response to the applicant within 30 days from the date it received the transferred request.
 - II. Where public body A transfers the request only in part, it is still required to respond to the remainder of the request within the initial 30 days. Public body B, for its part, has to respond independently and within 30 days from the date it received the transferred request.

36. In keeping with the duty to assist provision in section 9 and subsection 13(2), the applicant should be advised:

- whether the entire request was transferred,
- if only a part of the request was transferred, which part,
- to which public body as well as on which date the transfer took place,
- and of the date a response can be expected.

37. While the Department sent a letter to the Applicant on December 6, 2012, it only explained that part of the Request was transferred to another public body. The Department did not indicate which part of the Request had been transferred, or when the Applicant could expect to receive a response by the other public body or by the Department on the remaining part of the Request.

38. Additionally, the Department was late in transferring part of the Request to the other public body. The Request was made on November 14, 2012, and as the *Act* states that a transfer must occur within 10 days after receiving the Request, the Department could only transfer all or part of the Request no later than November 23, 2012 (as November 24, 2012, being the 10th day, fell on a Saturday). In this instance, the Department only undertook the transfer on December 6, 23 days after the Request was received.

39. As the Department was late in transferring a portion of the Request to another public body, it consequently delayed the time in which a response from that public body would be eventually issued.

40. For these reasons, we find that the Department failed to undertake the transfer of part of the Request in a timely fashion, contrary to subsection 13(1) of the *Act*, and the Department's letter of December 6 also lacked the requisite notification to the Applicant.

FINDINGS AND RECOMMENDATIONS

41. It is a public body's responsibility to ensure that a response be provided in a timely fashion, i.e., within 30 days. Where the public body finds itself in circumstances that renders it unable to meet this deadline, then the public body should take steps to either:

- self-extend the time limit up to an additional 30 days to respond and notify the applicant thereof, where the circumstances permit as per subsection 11(3); or,
- in special cases, apply to the Commissioner for a time extension.

42. Where a public body does not act when faced with a pending deadline, it may face a complaint for having failed to provide timely access. A public body cannot shirk its obligations and must take the appropriate steps to ensure compliance with this essential piece of legislation.
43. While we can appreciate that the Department receives a significant amount of access to information requests each month and that it intended to respond in this case when it could, the fact remains that the Department neither transferred nor responded in a timely fashion. In doing so, the Department did not uphold its statutory obligations and it failed to respect the Applicant's right to timely access.
44. When faced with this Complaint investigation, however, the Department undertook to process the Request as a priority and issued a response to the Applicant on April 29, 2013.
45. Based on all of the above, we find the following:
- a) The Department failed in its obligations to provide timely access to information by not providing a response to the Applicant until 136 days beyond the initial deadline;
 - b) The Department failed in its obligations to transfer part of the Request to another public body in a timely fashion; and,
 - c) The Department failed in its duty to assist the Applicant by not properly informing the Applicant of the status of the Request.
46. Pursuant to paragraph 60(1)(h) of the *Act*, the Commissioner therefore recommends that the Minister and senior staff of the Department meet with the Commissioner at their earliest opportunity to discuss how best to enable the Department to fulfill its statutory obligations set out in the *Act*.

Dated at Fredericton, New Brunswick, this _____ day of June, 2013.

Anne E. Bertrand, Q.C.
Commissioner