

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*

Complaint Matter: 2013-1598-AP-852

February 3, 2014

"A Department failed in its duty to respond to a request for information within the time limit prescribed by the Act."

Please note: September 8, 2015 - Error on Page 3 has been corrected

INTRODUCTION

1. This Report of the Commissioner's Findings is issued under subsection 73(1) of the *Right to Information and Protection of Privacy Act*, c. R-10.6 (the "Act").
2. This Report is in response to a complaint filed on November 5, 2013, in which the applicant called on the Commissioner to investigate because the Department of Social Development (the "Department") failed to respond to his request for information dated September 23, 2013.
3. The applicant filed a complaint with our Office to find out whether the Department had complied with the time limits for responding to his request, as set out in the Act (the "complaint").
4. In addition, the applicant indicated that he did not receive any response from the Department following his request.
5. The complaint raises the following issues, which will be addressed in this Report:
 - a) a public body's overall obligation when responding to a request, including its duty to assist under section 9; and
 - b) a public body's duty to respond within the time limits set out in subsection 11(3) of the Act.

INVESTIGATION

6. The Act gives applicants the right to access information held by a public body, and the body in question is legally obliged to respond to such requests within a reasonable amount of time. Specifically, subsection 11(1) of the Act requires the head of a public body to respond to a request within 30 days of receiving it. Additionally, the duty-to-assist provision in section 9 further emphasizes the right of access:

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.

7. 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 able to respond to a request within 30 days, it should make every reasonable effort as early as possible to take the appropriate steps to avoid any further delay and possible complaints and to advise the applicant when he or she may expect a reply.

8. Following receipt of the complaint, we contacted the Department to find out why it did not respond to the request for information. The Department indicated that it had received the request but could not finish processing it at that time, as it had not completed the final review for approving and signing the reply before sending it to the applicant.
9. The Department stated that it had sent a reply to the applicant on November 6, 2013, or 14 days past the deadline. We can appreciate that delays can occur, but we reiterate that issuing a timely response is a lawful requirement under the Act.
10. For calculation purposes, the 30-day time limit (30th day included) is computed by excluding the day on which the request is received. For example, in the case of a request received on November 1, 2013, the initial time limit would expire on December 1, 2013. **If the 30th day falls on a Saturday, Sunday or statutory holiday, the deadline is extended to the working day immediately thereafter. (Correction: if the calculation determines the deadline to be on a Saturday, Sunday or statutory holiday, the deadline falls on the closest working day. For example, if the calculation determines the deadline to be on a Saturday, the deadline would be Friday).** In the above example, the 30th day is a Sunday, meaning the deadline would be Monday, December 2, 2013, which is the date on which the response must be sent to the applicant.
11. Once the employee has completed his or her work and the response is submitted to the head for approval and signature, the Act requires that the head perform this final task also within the time limit for issuing a response to the applicant.
12. 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 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 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.

13. 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 and when a response can be expected.

14. 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.

15. However, subsection 11(3) of the Act does not permit an extension of the time limit solely for the purpose of obtaining the approval and signature of the head of the public body. The Act does not grant additional time for completing the final task involved in making a decision and issuing a response, namely the thought process incumbent upon the head of the public body in approving and signing the response before issuing it. Indeed, while we recognize the seriousness of this act, the Act requires that the final decision, like the processing of the request, be made within the statutory time limit of 30 days.

16. In this case, the Department received the request on September 23, 2013, and therefore had until October 23, 2013, i.e., 30 days, to respond. The Department responded in a letter dated November 6, 2013. It therefore took 44 days to respond to the request, which is 14 days more than the Act allows. In this case, the Department failed in its duty under the Act to respond to the request in a timely manner.

17. We also note that the Department failed to assist the applicant by not informing him when he might expect to receive a response. Even a short electronic message to the applicant to advise of the anticipated delay would have demonstrated to him the importance of his request and respect for his right to information. However, it would not have taken away his right to file a complaint. Nonetheless, by taking such action, the Department would have discharged its duty to assist.
18. Based on all of the above, we find that the Department did not respond within the statutory time limit of 30 days. The Department sent a response to the applicant on November 6, 2013, i.e., 14 days after the initial time limit. It therefore failed in its duty under the Act, violated the applicant's right to access in a timely manner, and did not inform him of the delay.

RECOMMENDATION

19. Pursuant to paragraph 60(1)(h) of the Act, the Commissioner therefore recommends that the Department respond to requests for information in accordance with the Act, that is, by taking steps to accommodate within the time limit prescribed by section 11 of the Act the time needed for the head to complete the final review before approving and signing the response to be sent to the applicant.

Dated at Fredericton, New Brunswick, this _____ day of February, 2014.

Anne E. Bertrand, Q.C.
Commissioner