

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: 2014-1707-AP-925

Date: September 19, 2014

"Case about whether a public body may seek clarification from a person requesting information"

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*, S.N.B. c. R-10.6 ("the Act"). This report stems from a complaint filed with our office. The applicant requested that the Commissioner conduct an investigation into the matter at hand.
2. The applicant originally filed an information request with the Rural Community of Kedgwick ("the Rural Community") on December 1, 2013, as follows:

[translation]

This is a formal request under the *Right to Information and Protection of Privacy Act* (RTIPPA).

Please provide the following information, in whatever format you have it, up to November 2, 2013:

All e-mail correspondence between Jean-Paul Savoie and Regional Service Commission 2 and its employees, from January 1, 2013 to today.

Please note that according to Access to Information and Privacy best practices, you are required to produce and immediately retain a copy of the records requested, and to document all of your actions so that you can explain how you exercised your discretion, and to ensure that no record was destroyed, and no offence was committed under subsection 82(1) of the *Act*.

You may contact me and send the records to the following address, taking care to include our file number above.

3. The Rural Community received the access request. However, before processing it, the Rural Community decided, on December 16, 2014, to seek clarification from the applicant as follows:

[translation]

We have received your request for information. However, it does not contain enough details about what you are actually looking for in order for us to locate the record(s) in question. Once we have received this additional information, we will be able to begin processing your request. Please clarify your request and provide us any more information you may have to facilitate the search.

We would need your telephone number, as required by section 3(c) of New Brunswick Regulation 2012-111 made under the *Right to Information and Protection of Privacy Act*, in order for your request to be official and complete under the *Act*.

If we do not hear from you within 30 days of receipt of this letter, your request may be considered abandoned and we may decide to stop processing it. You will be informed in such case.

4. Following this request for clarification, the applicant notified the Rural Community by letter dated December 22, 2013, that the records he sought were electronic records commonly known as "e-mail" between the persons named in the request, and covered the period from January 1 to December 1, 2013.
5. That same day, the applicant filed a complaint with our office, which we received on January 2, 2014. The applicant maintained that the Rural Community was not fulfilling its duty to provide assistance, that it was not operating in accordance with the purpose of the *Act*, that it was claiming it could not locate the records in question, and that it was trying, using every avenue and excuse, to conceal and deny facts, and delay or adversely affect the processing of the request.
6. This Report of the Commissioner's Findings will determine whether the Rural Community was entitled to ask the applicant for clarification following the request for information.

INVESTIGATION

The request for clarification

7. The *Act* gives the public the right to request and receive information held by a public body. Similarly, the public body concerned is required by the *Act* to respond to the request for information within a specific time limit, i.e., as stipulated by subsection 11(1). The head of the public body must respond within 30 days after receiving the request.
8. This right to statutory access is also evidenced by the provision concerning the duty to assist the applicant, as 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.

9. The duty to assist applies throughout the whole processing of the request, and the public body is required to ensure that the applicant receives a satisfactory and relevant response to its request in a timely manner.
10. After receiving the complaint, we contacted the Rural Community to find out why it decided it needed to seek clarification before it could respond to the request for information in this case.
11. The Rural Community replied that it was unsure if the Applicant wanted all of the e-mails between Jean-Paul Savoie in his capacity as mayor of the Rural Community or as Chair of Regional Service Commission 2.
12. The Rural Community explained that the number of e-mails sought during the time period in question in the request was somewhere between 300 and 500, without knowing the specific subject sought. In addition, since the Rural Community is a small municipality of modest means, it was concerned that its operations would be compromised if it had to task its small staff with taking the time required to look for, gather and examine all of the e-mails in question. For those reasons, the Rural Community decided to seek clarification in order to be able to provide an accurate and focused response.
13. The Rural Community also indicated that, in its request for clarification, it asked the Applicant for his telephone number in order to facilitate and speed up communication, and serve him better.
14. As indicated above, the Applicant is of the view that the Rural Community had no right to ask him for clarification because, in his view, the request was clear and specific.

Applicant's statutory obligations

15. 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.
16. 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.

17. 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)).
18. 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.
19. 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 sign the request.
20. The request for information in this case did not include the Applicant's telephone number. As a result, the Rural Community was unable to expedite the process by telephoning the Applicant to discuss the request.
21. 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.

22. 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

23. 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).
24. 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,

25. 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*.
26. 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.

27. 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.

28. 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.
29. Even though the Applicant's request was not abandoned in this case, the Applicant did file a complaint with our office, and that complaint concerned only the fact that he had been asked for clarification.
30. In light of the facts in this case, we have determined that the request for access did not require clarification by the Applicant and that, consequently, the Applicant was not required to provide clarification. We shall elaborate.

Review of the request for access and the request for clarification

31. The Applicant sought access to e-mails between certain persons and/or bodies over a fixed period.
32. It matters little that the Rural Community was unsure if the Applicant was seeking e-mails between Regional Service Commission 2 and Jean-Paul Savoie in his capacity as mayor of the Rural Community or as Chair of Regional Service Commission 2, which the Rural Community said it needed to know in order to identify the records being sought by the Applicant.
33. On reading the request in question, we note that the requested records are clearly identified by the Applicant, i.e., e-mails between two managers of two known public bodies. The Rural Community did not need to seek further information in order to determine what records were involved.
34. In addition, as the head of the Rural Community, Mr. Savoie is required to abide by the *Act*, for the Rural Community, which he manages, and Regional Service Commission 2, which he directs, are both public bodies under the *Act*. It would seem that the Rural Community asked the Applicant for clarification because of the effort it anticipated would have to be expended to respond to his request.

35. The request for access in this case was neither vague nor imprecise, and there was nothing about it that would prevent the Rural Community from identifying the relevant records.
36. However, a request may be written in such a way that more effort may be required in searching for the records, or a large number of relevant documents is identified, requiring more time to respond to and follow up on the request.
37. In such cases, paragraph 11(3)(c) of the *Act* allows for an extension of the time limit beyond the 30 days normally granted, or the option to petition the Commissioner for more time to respond (subsection 11(4)). An extension of the time limit may be necessary if observance of the time limit would seriously interfere with the public body's activities.
38. Thus, in this case, we have determined that the request clearly indicates the records being sought: e-mails between Jean-Paul Savoie and Regional Service Commission 2 and its employees over a fixed period. As a result, the Rural Community need not have asked for clarification before identifying the records being sought, even though the request may have been broad in scope and caused a delay in responding beyond the usual 30 days. All the Rural Community had to do was extend the time limit for an additional period not exceeding 30 days, pursuant to paragraph 11(3)(c), or petition the Commissioner for more time, pursuant to subsection 11(4).

FINDING AND RECOMMENDATIONS

39. We find that, even though the Rural Community is entitled to request clarification under the *Act*, it need not have done so in this case, since the request for access was clear and specific, and the Applicant indicated what records he was looking for.
40. As a result, and under subparagraph 73(1)(a)(ii) of the *Act*, we recommend that the Rural Community respond to the Applicant's request for access dated December 1, 2013, pursuant to the *Act*, and that it do so by October 31, 2014.

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

Anne E. Bertrand, Q.C.
Commissioner