NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 12-103

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BACKGROUND

This Review Report is in relation to three separate, but related, Requests for Information. Each of the three Applicants made requests for information from a public body in relation to their employment situation. Each had been subjected to disciplinary proceedings and each was seeking information which would provide them with background regarding the reasons for the disciplinary action and to help them to make some decisions about how to proceed going forward. It appears that each of the three Applicants requested information in relation to an investigation which was done in their workplace over a period of five months. They were also seeking all written e-mail and other written materials between certain individuals within the workplace in relation to the issues raised. The request made by each of the three Applicants was virtually identical, but for the fact that they were each seeking only information which related to them personally. Each of the requests was made in early July (two were received by the public body on July 8th, the third on July 19th). In each case, the Applicants received letters informing them that the request would take longer than the 30 days normally allowed for a public body to respond to a Request for Information. In each case, the letter indicated that the public body was extending the time for responding to the Request pursuant to section 11(1)(b) of the Act to September 23rd. By letter dated September 21st, the public body sent a second letter to each of the Applicants extending the response date further, this time to December 19th, 2011. The Applicants each objected to the second extension and asked me to review the extensions taken by the public body.

THE RELEVANT SECTIONS

Section 7 (1) of the Act describes a public body's duty to assist an Applicant making an access request. It states:

> 7.(1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

Section 8 establishes the time limit for a public body to respond to an access request:

> 8.(1) The head of a public body shall respond to an applicant not later than 30 days after a request is received unless
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> (a) the time limit is extended under section 11; or
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> (b) the request has been transferred under section 12 to another public body.

Finally, section 11 describes the situations in which the time limit under section 8 can be extended:

> 11.(1) The head of a public body may extend the time for responding to a request for a reasonable period where
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> (a) the applicant does not give enough detail to enable the public body to identify a requested record;
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> (b) a large number of records is requested or must be searched to identify the requested record and meeting the time limit would unreasonably interfere with the operations of the public body;
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> (c) more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record; or
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> (d) a third party asks for a review under subsection 28(2).

THE PUBLIC BODY'S POSITION

In response to my request for their explanation as to the reasons for the extensions, the public body indicates that when they did their preliminary assessment of the requests, they determined that the volume of records requested was significant. They also determined that the ATIPP Coordinator who would normally have addressed the request was in a conflict of interest and it was going to be necessary to have someone else within the department deal with the request. As a result, the public body sent the first extension letter to each of the Applicants advising them that their response would be delayed for an additional 30 days (approximately) from date of the requests. As they got further into the processing of the requests, they identified a much larger volume of records than they had anticipated there would be, which resulted in additional searching and handling to identify all of the responsive records. They estimated that the number of records was in the thousands of pages. As a result, they sent the second letter extending the time further to December 19th, approximately 5 months from the date of the original applications.

In response to specific questions from my office, the public body told me that they had identified 872 documents amounting to just over 5,500 pages. They estimated the time they needed to respond to the request as follows:

- 5 hours to locate and print records
- 183 hours to index and scan the records (2 minutes per page)
- 458 hours to assess and prepare each record (5 minutes per page)

They therefore estimated the total time needed to respond to the request at 646 hours or 86 working days.

They cited as one of the reasons that the response was taking so long to complete was that the person in the office who had the greatest knowledge of the Act and the greatest experience responding to requests was in a conflict and could not deal with the file. It therefore took longer for others, not so experienced, to do the work required. Accordingly, they say, the indexing and scanning of the information was assigned to

two personnel in the Department's Directorate, and the assessment of the information for applicable exceptions to the right of access was assigned to the Legal Division, all of whom had other primary responsibilities within the department. For both of these functions, they say, the work was given priority but it was in addition to other existing duties, and the legal personnel involved were not able to dedicate their time exclusively to responding to the requests. Further, they say, the Department was not in a position to hire additional legal or ATIPP staff solely for the purpose of handling these three requests.

Prior to my intervention, no effort or thought had been given to providing information to the Applicants as it became available. Nor had there been any discussions with the Applicants about the possibility of refining the number of records required to meet their respective needs, although they were in the process of preparing fee estimates. It is the public body's position that the delay in this case is unusual for this department, which responds to many, many significant requests for information. However, the circumstances of these three cases were such that the Department simply could not handle the required workload.

THE APPLICANTS' POSITIONS

Each of the three Applicants are facing significant disciplinary consequences arising out of the investigation in question. Each is anxious to receive more information about how and why they find themselves in their position. The information, they say, is required for upcoming arbitration hearings and to help them consider their own positions and how to move ahead. Each of them takes the position that 6 months to respond to the Request for Information is not a "reasonable" extension of time pursuant to section 11.

DISCUSSION

The *Access to Information and Protection of Privacy Act* imposes on public bodies certain obligations, including the positive duty to respond to access requests within

30 days except in narrow and defined circumstances. The onus of establishing that those circumstances exist lies squarely on the public body. Even if the public body can meet that onus, the section allows only that the public body can extend the time for response for a "reasonable" period of time.

There are, therefore, two issues in this case:

a) were the extensions of time necessary because of the large number of records requested or to be searched such that meeting the time limit would unreasonably interfere with the operations of the public body;

b) was the length of the extension of time "reasonable"

Based on the detailed information provided to me with respect to the number of records involved, as well as the circumstances which prevented the ATIPP Coordinator in the department from assuming responsibility for the three requests, I am satisfied that an extension of time from the original 30 days was justified pursuant to section 11(1)(b) of the Act. In this case, the public body has provided me with enough detail and explanation to satisfy me that not only were the number of records significant, but that, because of the circumstances, answering within 30 days would have unreasonably interfered with the operations of the public body.

The second, and to me more important question in this case, is whether the extension to December 19th was "reasonable" in all of the circumstances.

The expression "justice delayed is justice denied" is equally applicable to access to public information. The Act itself requires public bodies to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and **without delay**" (emphasis added). It provides that responses to such requests must be made within 30 days, except in very limited and defined circumstances. The term "reasonable" in section 11 must be read in the context that this creates. In *Canada (Information Commissioner) v. Canada (Minister of External*

Affairs) [1990] 3 F.C. 514 (F.C.T.D.) Justice Muldoon of the Federal Court, Trial Division made the following observations with respect to the Federal Access to Information Act:

> These are not cases for declining to exercise the salutary powers of review conferred on the Court by Parliament. Confession that such requests ought to be processed as expeditiously as possible may be good for an individual's soul, but it has no didactic energy in gaining the attention of government departments. It has no effect in actually providing legally that less than expeditious processing of requests for information is breaking the law, as it surely is. The purpose of the review is not just to make the particular respondent acknowledge unreasonable tardiness. It is, also, to let all the other potential respondents know where they stand in these matters. The Court is quite conscious that responding to such requests is truly "extra work" which is extraneous to the line responsibilities and very *raison d'être* of government departments and other information-holding organizations of government. But when, as in the Access to Information Act, Parliament lays down these pertinent additional responsibilities, then one must comply.

What then, in this context, is reasonable? Is it reasonable to take more than 150 days when the basic time limit is only 30 days? Is it reasonable public body (a large public body, with many employees) does not have enough people sufficiently trained to deal with an Access to Information Request such as the one represented by these three individuals?

This issue was considered by the Ontario Information and Privacy Commissioner's office in Order PO-2168, at 3-4 as follows:

> The [Ontario FOIP Act] provides institutions with a clear and relatively short time limit for responding to requests. This time limit can be

> extended only in the circumstances set out in [counterpart to our section 11]. Further, in my view, in invoking [counterpart to our section 11], the head must address him or herself to whether any particular request involves a large number of records or consultations that cannot reasonably be completed within the 30 day time limit. ....
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> ...I am fully aware of certain of the problems created for institutions by the [Ontario FOIP Act]. Institutions are faced with a "requester driven" system. There appears to be no way that the institution can accurately predict when a large number of requests will come in, whether or not that large number is from the same individual. Therefore, it is difficult to plan for adequate staff and resources.
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> On the other hand, if I were to take the view that a large number of requests coming from one individual has a legitimate impact on the interpretation of [counterpart to section 11], it seems to me that such an approach would be open to potential abuse.

In another Ontario Order, (Order M-850) the Assistant Commissioner made the following observation:

> It is not possible to establish a finite set of criteria that will demonstrate "interference with the operations as used in [counterpart to our section 11]. It is important to bear in mind that interference is a relative concept which must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government Ministry, and the evidentiary onus on the institution would vary accordingly.

While I accept that these three Access to Information requests placed a significant strain on the Department's ability to respond within thirty days, I see no reason for a delay which lasted for longer than the initial investigation which prompted the ATIPP

request. Despite the fact that the senior ATIPP Coordinator was unable to participate in preparing the response, there should be others within the department who have the necessary experience and knowledge to step in and get the job done. Nor do I necessarily accept the public body's estimate of the time needed to complete the process. My office has only one person. I understand exactly how much time it takes to go through these documents manually, page by page, to evaluate them for the purpose of meeting the requirements of the Act. I've done page by page reviews of matters where there are thousands of pages involved. Even if all the work were being done manually, however, I also know that it should not take five minutes per page to process a document once it has been identified. And this is a department which should be able to rely in part on the use of redaction programs to make the process much less onerous and time consuming. If this department does not have such software, it should have. Furthermore, there is no indication whatsoever that, in these cases, the public body made any effort to work with the Applicants to determine if their requests could be refined in any way so as to reduce both the workload and the wait. In a situation like this, I would always encourage public bodies to engage in conversation with the Applicants. Even providing the Applicant with a copy of the index of records identified as being responsive and asking whether there is anything that stands out that might be omitted from the response would help to focus the process. Based on the information provided by the public body, the responsive records were identified with no more than 5 hours of work - hardly a significant commitment of time. Producing a list of the 872 records with a short description of the contents might take a couple of days. This could all easily have been done within the first 30 days. I don't understand why there wasn't any further interaction with the Applicants at this point to see if there were any of the records which might have stood out as outside the scope of their needs. It might well have saved everyone, particularly the department, a lot of time and energy.

It should be noted that it wasn't until well into the second extension that the public body also provided the Applicants with significant fee estimates. This tactic served to further delay the response because under the scheme of the Act, when a fee

estimate is provided, further work on responding to the access request is to cease until a deposit of half of the fee estimate, along with a commitment to pay the balance, is received. At the very latest, that fee estimate should have been provided to the Applicants at the time that the second extension was taken. By the time the Applicant's received the fee estimates, the public body had had their requests for more than 120 days. I am at a complete loss as to why this was not done at a much earlier stage. That said, that issue is before me as well and will be dealt with in another Review Recommendation.

The last extension was to December 19th. Because of the fee issue, I am not aware whether or not any of the Applicants have received any responsive records. It is now the middle of January and the Requests for Information were submitted in early and mid-July. Regardless of any exigent circumstances, I cannot accept that this is in any way a "reasonable" extension of a 30 day normal response period. It is to be noted that in at least one other jurisdiction (Saskatchewan) the similar section of their Act allows for a "reasonable extension not to exceed 30 days".

Finally, I cannot conclude these recommendations without commenting on the fact that the Act does not provide for an extension of an extension. The Act allows for one extension, not multiple extensions. If the legislature had intended that a public body could take multiple extensions, in my opinion, the legislation would have specifically stated so.

In all of the circumstances, I am not satisfied that the extension of time, though appropriately taken in the first instance, was for a "reasonable" period of time. The lack of response is, therefore, contrary to the terms of the *Access to Information and Protection of Privacy Act*. This, however, does very little to assist the Applicants who, apparently, have yet to receive any of the records which they had requested.

CONCLUSIONS AND RECOMMENDATIONS

At this point, the second extension date has passed. Neither the public body nor any of the Applicants has confirmed to me whether the requested documents have been provided, though I am assuming that because of the fee estimates and requests for payment which were sent to each of the three Applicants just prior to the second extension date, no records have yet been provided.

It is, therefore, my recommendation:

a) in the circumstances, that the public body waive any fee applicable to these Requests for Information in light of the completely unreasonable length of time that it has taken to respond to the Applicant's requests;

b) that the public body provide the department's response to each of the three Applicants within 10 days that these recommendations are provided. This is notwithstanding the fact that pursuant to section 36 of the Act, the head of the public body formally has 30 days from the date of receipt of my recommendations to make a decision based on these recommendations. The delay in this case argues for a much swifter response than is formally allowed under the Act;

c) if this department does not have appropriate redaction software to assist in the review and processing of ATIPP requests, that it invest in such software forthwith so as to avoid unreasonable delays in responding to access requests in the future;

d) that this public body take steps to ensure that there is more than one person within the department who has the ongoing expertise and ability to deal with Access to Information requests. This is a department which receives many requests for information and many of those requests are extensive. What happens when the one person who has the primary

job of dealing with requests takes a month long holiday, or falls ill and is away from work for an extended period of time, or quits unexpectedly on short notice or, as in this case, finds herself in a conflict? It is not an acceptable excuse for delay to say that the only person with the requisite knowledge is not available to do the work. There must be a reliable backup.

Elaine Keenan Bengts
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