NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 18-180

File: 17-216-4
June 15, 2018
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BACKGROUND

The Applicant made a request to the Department of Justice for the following information:

> As per information provided to ADM Aitken, Legal Counsel Brad Patzer in respect to purpose and parameter of requested information - Email/Correspondence/Notes of Anne Mould/Jeff Round and between [A.B.], 26 Sept 2016 to March 2017.

The subject matter of the information requested is in relation to a complaint filed by or against the Applicant to a professional association. In the request, the Applicant made specific reference to the meeting notes of a particular meeting and for any information in relation to a specific topic.

There were a number of missteps and problems with dealing with the request which resulted in a very slow response. The Applicant made a request for the information first on May 2nd. However, for some reason, the request was not treated as a request under the Act. The Applicant was not informed until June 1st that a formal request under the ATIPP Act would be required. The formal request was made on June 6th. The Department identified 84 pages of responsive records and, on June 21st advised the Applicant that they would have to consult a third party in accordance with section 12 of the Act before they could be released. The third party consultation, however, was not initiated until July 6th. The Third Party registered objections to the proposed disclosure by letter of July 13th. In September, the Applicant inquired as to the status of his request. The public body responded to the Applicant's inquiries on September 21st, advising that they were giving notice of their decision to disclose records to the Third Party and that the Applicant could

expect to receive the responsive records by the end of October. This letter included a list of the records that had been identified as being responsive. On the same date, the Department wrote a letter to the Third Party advising of their decision to disclose and giving them 30 days, as required by the Act, to allow them time to ask my office to review that decision, should they wish to do so.

The list of responsive records provided to the Applicant made no reference to two of the sets of records that the Applicant had specifically requested. The first set of “missing” records was with respect to a specific topic and the second set was the meeting notes of a particular meeting. Because of this, and because the Applicant had yet to receive ANY records, he asked my office to review the response by letter of September 26th. Essentially he was asking that I address it as a “deemed refusal” pursuant to section 8 of the Act.

When I advised the public body that the Applicant had asked me to review the matter, two things happened. First, the Department ceased processing the request but did not advise either my office or the Applicant that they were doing so. Second, they discovered that in conducting the third party consultations, they had neglected for some reason to include the meeting notes in the records on which they consulted the third party. When this came to light I suggested that they complete that part of the response on which the Third Party consultation was complete, which they did, after giving the Third Party notice of their decision. They also took steps to consult the third party with respect to the meeting notes.

While there was some discussion between the public body and the third party about the possibility that the third party would request a review from this office, no request for review was submitted and the records were finally disclosed in mid- November.

When the Applicant finally received the first set of responsive records in late November, he advised that, insofar as those records were concerned, he did not require me to review any of the redacted portions of the response so far received.

In the circumstances, however, he expressed concerns about whether or not the response was complete. He also asked me to “direct the Department to update its disclosure of documents for the time period March 2017 to date which referred to the ‘harassment complaint’ or ‘conduct’ of [Applicant].”

DISCUSSION

As the Applicant has indicated that he does not require me to review whether or not the redactions contained in the first set of responsive records were appropriate, I will not comment further except to comment that, for the most part, I agree with the redactions done by the public body. I note, however, that the disclosure of business contact information (including physical address, phone and fax numbers and business email addresses) would not normally be considered an unreasonable invasion of privacy pursuant to section 23(1) of the Act, particularly when an individual is communicating with a public body in the capacity of a representative of a business. This point, however, is moot in this case since the Applicant has indicated that he is not concerned about the redacted material.

The Applicant has, however, asked me to “direct” the public body to expand the scope of his request from March of 2017 to November 29th of 2017.

As I pointed out to the Applicant in my first letter to him, I have no power to “direct” or “order” a public body to do anything. The power given to me in the *Access to Information and Protection of Privacy Act* is limited to that of an ombudsperson. I can make recommendations, but have no power to direct or order a public body to take any particular step.

Further, as I have commented in previous reports, once a Request for Information is made, the date of the request limits the search parameters. If an Applicant wants or requires records post-dating the date of the request, he or she must make a new application. I therefore decline to “direct” or even “recommend” that the Department disclose records post-dating the dates indicated in the original request. I do, however,

encourage the Applicant to submit a new Request for Information to cover the period after the date of the original request.

Having said this I do appreciate the Applicant's frustration with the response of the Department, in particular with the delays involved. While some of those delays were dictated by the processes outlined in the Act, there were still a number of delays outside of the legislatively mandated processes/procedures. When an Applicant is already feeling like a public body is not anxious to disclose information requested, errors and delays merely create more suspicion. While I do not believe that there were any inappropriate motives on the part of the ATIPP Coordinator in responding to the request, serious errors were made.

Section 6 of the Act provides that, to obtain access to a record, a person must make a written request to the public body which has control of the record. In this case the Applicant's initial requests to the public body for the required records did not make reference to the *Access to Information and Protection of Privacy Act* and, apparently, was therefore not treated in accordance with a formal ATIPP Request. This was the first delay that should not have happened. There is no requirement for a request for information to make reference to the Act. While many requests can and probably should be dealt with in a less formal manner and records produced without the need for a formal request under the Act, where a request is for information that will likely require third party consultations or where the records will clearly need to be vetted before disclosure, it should not take the public body more than a few days to advise the Applicant to make a formal request. In this situation, section 7 of the Act requires that the public body should offer what assistance it can to help the Applicant make that request in accordance with the Act "without delay".

Section 8 of the Act provides that a public body must respond to a Request for Information within 30 days of the request unless this time limit is extended pursuant to section 11 of the Act or the request is transferred to another public body.

Section 11 of the Act allows for an extension of the time to respond to a request for a "reasonable period" where, among other things, more time is needed to consult with a

third party before the public body can decide whether or not to disclose the information.

Section 26 provides that where a public body is considering giving access to a record that may contain information, the disclosure of which might be an unreasonable invasion of a third party's privacy, the third party must be given notice of the proposed disclosure and be given the opportunity to provide their consent or raise objections. Under section 26(2)(c), the public body must give the Third Party 60 days to respond. Section 27(1) requires that the public body must decide whether or not to disclose the requested records "not later than 90 days after notice is given under section 26(1)" but notes that "no such decision may be made before the *earlier* of "61 days after the day on which the notice is given" or "the day a response is received from the third party". This, particularly when read in conjunction with section 7 which requires public bodies to respond to requests for information "without delay", implies that if a response from the third party is received the day that the notice is sent out, the public body should be ready to make a decision that same day or at least within 30 days of that day. While a public body may take "up to" 90 days to make that decision, it should be making the decision at the earliest possible time. In this case, the public body gave the Applicant notice that they would be doing a third party consultation within 15 days of the date they received the Request for Information. For some reason, however, the notice to the Third Party, however, is not dated until July 6th, a full 31 days after the date of the request. The Third Party answered very quickly, sending a letter dated July 13th objecting to the disclosure of the records to the Applicant.

Once the public body hears from the third party, it must make a decision about the disclosure of the records and give notice of that decision to the Applicant and to the third party. In this case, that decision should have been made as soon as possible after receipt of the third party's letter of objection. Instead, it appears that no such decision was made until September 21st, more than 60 days after the Third Party's response and then only because the Applicant made inquiries. At this point, the public body sent out a notice to the Applicant and to the third party. The third party was given 30 days to ask for a review by my office, as outlined in section 27(3). This subsection provides that where the decision is to give access to the record or part of the record, notice must be given to the

third party which states that the Applicant will be given access unless the third party asks for a review within 30 days. When the third party chose not to ask for a review by day 30 (October 21st), the records should have been disclosed immediately. Instead, the records were not provided to the Applicant until November 16th, a full 133 days after the Third Party notice was sent out and 126 days after the Third Party's response was received. Part of the reason for this, according to the Department, is because they ceased processing the request when the Applicant asked my office to review the matter. There is nothing in the Act or the Regulations which would justify this and I am not sure why they decided to do this. This delay was further exacerbated by the fact that it was not until September that the public body discovered that it had not provided the third party with all of the responsive records which delayed the disclosure of the meeting notes by a significant additional period of time.

The third party consultation process contained in the Act is a long one to begin with....too long for most Applicants. I have commented on this in various submissions to the Government of the Northwest Territories, including previous Review Reports. In this case, however, the public body took much longer than it was entitled to, even after dragging out the process far longer than was necessary to meet the goals of the Act. There is no reason for a public body to miss the time frames connected with a third party consultation. In this case, even giving the public body the full 90 days from the date of the notice, they missed the deadline by 43 days - a month and a half.

At this point, all of this is moot because the records were finally disclosed, though on a delayed schedule. I do, however, recommend that the Department of Justice take steps to ensure that they ensure that, particularly when it comes to third party consultations, they adhere to the time frames set out in the Act and that, where possible, they always respond within the shortest time frame possible.

Elaine Keenan Bengts
Information and Privacy Commissioner