

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 18-191**

File: 18-147-4
October 1, 2018
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BACKGROUND

This matter arises out of delay in responding to an Access to Information request made to the Northwest Territories Health and Social Services Authority. A request for information was made on May 24th, 2018. The request was for general information about the awarding of a tender for ground transportation services in a community and covered a five month period. Receipt of the request was acknowledged on May 28th. As part of that acknowledgement, the public body noted that the request “may result in a high volume of documents that will need to be reviewed” and that “the volume of records involved cannot be processed within the usual 30-day limit”. The Authority indicated that it was, therefore, taking an “extension of time of ninety (90) days” and that the response would be provided “no later than August 22nd”.

The Applicant objected to the extension of time and on June 1st asked my office to review it. In particular, the Applicant pointed to the speculative nature of the Authority’s estimation of the number of records involved:

In order to determine whether an extension to respond to my request was required, [the ATIPP Coordinator] had to first conclude that a large number of records had in fact been requested. In determining whether a large number of records was requested, [the ATIPP Coordinator] was compelled to conduct an actual preliminary assessment of the potentially disclosable records. In other words, a preliminary assessment as to the number of records requested cannot be based on bare speculation, which, given the language used by [the ATIPP Coordinator] in her response (i.e., "may result in" and "I anticipate"), is clearly the approach she took.

The Applicant noted that, based on his knowledge of the tender/procurement process” and the number of bids received (1 bid, later withdrawn, following which another single bid was received) the number of records involved would not have been large. Further, he argued that this was a tender issued by the Stanton Territorial Hospital, not the Government at large and that there is a very discrete group at the Stanton Territorial Hospital who handle the tenders/procurement for that entity. He noted that subsection 7(1) of the *Access to Information and Protection of Privacy Act* compels the head of a public body to make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay. He noted that:

Given the above noted, it is apparent that [the ATIPP Coordinator’s] conclusion that an extension was required in order to respond to my request, was made out of hand, that is, it was made arbitrarily and without any analysis as to the actual volume of potentially disclosable records encompassed by my request. As such, [the ATIPP Coordinator] breached both section 7(1) and 11(1)(b) of the ATIPP Act.

THE PUBLIC BODY’S RESPONSE

The Northwest Territories Health and Social Services Authority responded quickly to my request for their explanation. They noted that section 11(1) of the *Access to Information and Protection of Privacy Act* allows the head of a public body to extend the time for responding to a Request for Information for a “reasonable” period where:

- a) the applicant does not provide enough detail to enable the public body to identify a requested record;
- 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;

- 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 to access to the record.

In this case, the issues for the public body were as follows:

- a) In order to respond to the request, the ATIPP Coordinator needed to access the files and conduct the search herself because the staff member at the Stanton Territorial Hospital otherwise responsible for such searches was on leave. It was therefore necessary to obtain the assistance of the Technology Service Centre to access the staff member's electronic records. She noted that this was a difficult exercise because she had no insight into how or where the records were filed. Once the file system was understood, she would then have to review all relevant records to determine which of them were responsive to the specific question asked and that this would be a difficult and time consuming process.
- b) Given the nature of the Request for Proposal process, the ATIPP Coordinator anticipated a large volume of documents to search, review and potentially prepare to redact. She also anticipated that third party consultations would be necessary, particularly as the Applicant was not the successful bidder. She noted, however, that she had not been able to determine whether or not this was so when she responded to the Applicant but further noted that if a third party consultation was necessary, the Applicant would be provided with third party notice pursuant to section 26 of the Act.
- c) Two other very large ATIPP requests had been received by the Coordinator's office around the same time as this request. Because of this, the ATIPP Coordinator was simply unable to respond to all of them within 30 days.

There was, the ATIPP Coordinator argued, simply “no operational way to deal with this request any faster than stated in my letter to the Applicant”.

THE APPLICANT’S RESPONSE

In response to the public body’s submissions, the Applicant made the following observations:

- a) Section 11 does not permit the public body to extend the time for responding to a Request for Information for the reason provided by the public body (i.e. that the staff member responsible for the program was on extended leave) and if the legislative drafters intended to provide an “out” for responding to requests as a result of employee absences, they could have written that into the legislation. Moreover, in large organizations like the GNWT employee absences are frequent and if the GNWT were to be able to rely on employee absences to extend the time to respond, the 30 day time frame would have no meaning.

Arguably and impliedly that right of access is a right of “timely” access to records held by public bodies given section 8 of the ATIPP Act. Unless there is an exception as enumerated in section 11(a) to (d) or section 12(2)(b), the public body is compelled to produce the records within 30 days post receipt of a request.

- b) The Authority continues to speculate as to the number of records that need to be searched despite the fact that no searches have yet to be conducted. Further, the public body should be able to redact the responsive records and disclose the records without the need to conduct third party consultations.

- c) It is irrelevant that the public body received two other Requests for Information at the same time as the Applicant's.
- d) The Authority did not provide evidence that responding to the request within the 30 day time frame would unreasonably interfere with the operations of the public body.

DISCUSSION AND RECOMMENDATIONS

The *Access to Information and Protection of Privacy Act* gives the public the right to have access to government records and sets out the process and time frames for responding to such requests. The adage "justice delayed is justice denied" applies equally to access to information. In this case, I am assuming that any comments I might make are, essentially, moot because the extension period has come and gone and I have received no Request for Review from the Applicant indicating that he is unhappy with the response. My analysis and recommendations in this report are, therefore, aimed at improving the system in the future.

Before commenting on the way in which this request was handled by the public body, I would like to address a preliminary point. While this office has the jurisdiction to review a decision to extend the time for responding, rarely will it be able to address the issue before the response is actually due under the extension. This arises largely from the way in which the *Act* is currently written. It requires the Information and Privacy Commissioner (IPC) to consider the input of the public body, the Applicant and any interested third parties before completing a report and making recommendations under the Act. Even in the best of circumstances, this takes time. The Act allows for 180 days for the Information and Privacy Commissioner to complete a Report. Clearly, in a case such as this one, the IPC will make efforts to complete the review in a shorter time frame, but at this point, a minimum time frame for such a report will be 30 to 45 days. When one takes into account the number of other reviews before the IPC (upward of 100 files at any one time) and that each of those also has deadlines that must be met, it is unlikely that most reviews of an

extension of time will be completed before the response is actually provided. The Applicant expressed extreme frustration that this could not be dealt with more expeditiously and I understand that frustration. Until the legislation is changed to allow for a more expedited process, however, this is the reality. I have advised the Government of the Northwest Territories of my concerns about this process several times and it is hoped that when new legislation is tabled (hopefully within the next few months), a more expedited process will be available to deal with the review of extensions of time.

With respect to the extension of time taken by the NTHSSA, in order for the public body to be able to rely on section 11(1)(b), it has to establish not only that a large number of records was requested or had to be searched to identify responsive records, it also has to establish that responding within the initial 30 days would “unreasonably interfere with the operations of the public body”. It is with respect to this second requirement that the public body in this case fell short.

I begin with the Applicant’s allegation that the extension of time was based only on assumptions and speculation on the part of the ATIPP Coordinator about the number of records involved. I agree that it is clear that when the ATIPP Coordinator wrote to the Applicant on May 28th, no attempt had yet been made to ascertain the actual number of responsive records and she could not state with any certainty how many records there may be. She did know, however, that because of the absence of a key employee, who could have done the searches most efficiently and quickly, the searches would be far more complicated and time consuming and that far more records would have to be reviewed than if the employee had been there. In the absence of the employee who collected and filed the records with respect to the Request for Proposals, the ATIPP Coordinator, not being familiar with the employee’s filing system, would not know specifically where to focus her searches and would have to review far more records in order to satisfy herself that she had identified all of the responsive records. I am satisfied that this information was sufficient for the ATIPP Coordinator to conclude that a large number of records would have to be searched to respond to the request.

I accept that the extended leave of a key employee, who would have been able to review the relevant records quickly and efficiently, made the ATIPP Coordinator's job much more difficult and that the employee's absence increased, probably dramatically, the number of records that had to be searched to find the responsive records. I do not read this as saying that the absence of the employee was the reason for the delay, but that the absence of the employee resulted in a far more complicated and complex search for the records in question. It points, in part, to a problem that I have commented on before and that is the fact that records management in the age of digital records is inconsistent in that every employee is responsible for his/her own filing of records within the system. Every employee will do things a little differently and have his or her own methods of record keeping. This makes searching for records by someone other than the one who created or stored the record much more difficult. It also points to the way in which the GNWT or, in this case, the Stanton Territorial Hospital, deals with the extended absence of an employee. There should have been someone within the absent employee's working group who had access to her records in her absence and knowledge of the file management system used by the employee so that her records could be searched without having to involve Technical Services. This seems to me to be something that would go without saying. I find it hard to believe that no arrangements had been made for someone to monitor and do the work of the employee on an extended leave. Presumably someone would have had to be assigned to do her work while she was away.

I **recommend** a review of policies and procedures which deal with access to digital records during an employee's absence. If there are no such policies or procedures, I recommend that such policies be created, and that the policy include a provision that where an employee is absent for more than a given number of days, another employee be given access to and the ability to search through the employee's digital files (including email) so that access to information requests can be dealt with on a more timely basis.

While I am prepared to accept that the circumstances of this particular situation resulted in the need to search a large number of records, I agree with the Applicant that the Authority did not provide any evidence that meeting the time limit would unreasonably

interfere with the operations of the public body. Public bodies are expected to comply with the government's own legislation. There are many employees within the NTHSSA. While the ATIPP Coordinator may be primarily responsible for responding to ATIPP requests, it is a position that requires backup so that when there are multiple requests received at the same time, more than one person can be tasked with gathering the necessary information. One wonders what happens when the ATIPP Coordinator goes on holidays. Do ATIPP requests simply sit on her desk until she returns? The organization must devote the necessary resources to meet the requirements of the *Access to Information and Protection of Privacy Act* and/or the *Health Information Act*. The work load is clearly dictated by outside forces - public demand for access to information varies over time. When the workload is high, there should be enough individuals trained to take on some of the load from the ATIPP Coordinator, just as there needs to be others within the organization who can assume the ATIPP Coordinator's responsibilities if she is away for any reason. Lack of adequate staff is not one of the reasons for an extension of time pursuant to section 11 of the Act. While it may well have been "operationally impossible" for the ATIPP Coordinator to respond to this request and the other two she was also dealing with at the same time all within 30 days, this does not meet the test set out in the Act. The Act requires not that meeting the time line would unreasonably interfere with the work of the ATIPP Coordinator, but that meeting the time line would unreasonably interfere with the "operations of the public body". That means the operations of the public body as a whole. This is one of the largest public bodies within the GNWT system and I cannot believe that diverting one or two employees to assist the ATIPP Coordinator for a day or two or even a week would create so much disruption as to amount to an "unreasonable interference with the operations of the public body". While it may be inconvenient, that is not sufficient to meet the criteria of section 11(1)(b). This may be different for a small public body with fewer employees, but for this public body, it would require a much more significant set of circumstances for me to conclude that section 11(1)(b) applied.

I **recommend** that policies and procedures be put into place so that, when needed, other employees within the NTHSSA can be conscripted to assist the ATIPP Coordinator to

meet the deadlines imposed by the Act. Along with this, I **recommend** that several other employees be identified as those who might be called upon to assist and that these employees all received appropriate training so that they can jump into action when called upon.

I also would like to comment on the length of the extension. I have previously commented that given that the original response period is 30 days, a “reasonable” extension period would, in most cases, be no more than an additional 30 days. In this case, although the letter to the Applicant indicated an extension of 90 days, the extension of time was, in fact for about 60 days. This does not change my position that in cases in which an extension is necessary, an extension of more than 30 days will not be considered “reasonable” except in unusual circumstances or where the extension is for the express purpose of consulting with third parties. In this case, while there was an anticipation of having to consult third parties, that need had not been determined when the extension was taken, so this should not have been a factor in the length of the extension. If a third party consultation was determined to be necessary, the steps set out in section Part I, Division C of the Act would have to be implemented. This process, when necessary, will potentially delay the response by more than 90 days. In this case, however, that determination had not been made and was not, therefore, properly a factor in the extension taken.

As noted above, my review of this matter in terms of making recommendations that can assist the Applicant is moot. The recommendations made, however, may assist to improve the system for responding to access to information requests in the future. The recommendations included, while addressed to the head of the NTHSSA, are instructive for application throughout the GNWT and I would finally, therefore, **recommend** that this Report be shared widely throughout the GNWT.

Elaine Keenan Bengts
Information and Privacy Commissioner