

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 19-200

Citation: 2019 NTIPC 17

File: 18-172-4
September 23, 2019

BACKGROUND

The Applicant made two requests to the Department of Finance (Human Resources) for access to his own employment records. One was dated July 23, 2018 and sought

all records in [the Applicant's] personnel file for the period September 1, 2016 to the date of this request.

The second request was also dated July 23, 2018 and sought records containing the personal information of the Applicant, specifically:

1. Information/records (hard copy or electronic), including all handwritten notes, under the custody, control or in the possession of six named employees;
2. Emails including any attachments, and text messages, as between, or copied to, or blind copied to, or sent on behalf of, each of the same named employees

for the period of July 1, 2016 to July 23, 2018.

On August 17th, the Department wrote to the Applicant, apparently in relation only to the second request advising that "...given the voluminous nature of your request we cannot process your request within the usual 30 day limit. As such, an extension of time to

October 1, 2018 will allow Finance to provide you with a complete response to your request”.

Because the letter appeared to address only the second request, the Applicant sent an email to the Department on the same date that the August 17th letter was received, asking for confirmation that both ATIPP requests had been received. No response was received.

As of the date of the Applicant’s Request for Review to my office on October 3rd, 2018, the Applicant had not received a response to either of his Requests for Information.

The Applicant, through his legal counsel, made a request that I review both requests on the basis of a deemed refusal. This review is with respect to the second Request for Information only and, because the records were eventually provided, deals only with the delay issue.

I wrote to the Department on October 3rd, 2018 providing them with seven days to respond to the Applicant’s request. If they did not do so, I indicated that I would be conducting a review on the basis of section 8(2) of the Act (deemed refusal). On October 11, the Department advised that they would not be able to comply with time frame set out in my letter. Furthermore, they advised that had yet to complete the review and processing of all of the responsive records and were not, therefore, in a position to provide my office with the responsive records any more than they were able to provide the Applicant with a response.

I requested that the Department’s submissions based on a deemed refusal, along with copies of all the responsive records, be provided to me by November 3rd. On November 13th, the Department wrote to the Applicant indicating that they were “close to” being able to finalize the review of the requested records and intended to “disclose the first

portion of processed records by next week” but anticipated that it would take at least an additional 30 days to finish processing the entire request.

Because the Act provided very little in the way of a means to enforce compliance, and because it appeared that the Department was, in fact, working on the response, my office suggested that the Applicant wait until December 15th (the date that a response had been promised) to see if the response was received. This was in an attempt to avoid even more delays that would result during the conduct of a review.

On December 20th, I wrote to the Department once again to determine the status of the response. We were advised the same day that the review was complete and ready for delivery and would be provided to our office by that afternoon. All GNWT offices closed at 5:00 pm on December 20th and remained closed until January 2nd for the Christmas mandatory leave period.

The Applicant finally received the responsive records on January 10th in a letter from the Department of Finance dated January 7th. The letter accompanying the response suggested that this was a partial response only.

The documents were provided in electronic format on a USB device which required a password to open. No password had been provided. The Applicant had to request the password from the public body. The password provided did not allow access to the USB device. It was not until January 18th that the Applicant was able to access the records with the assistance of a government IT expert. The records on the USB device were poorly organized and indexed. No hard copy of the records was provided.

APPLICABLE SECTIONS OF THE ACT

As always, I begin with reference to the relevant provisions of the *Access to Information*

and Protection of Privacy Act.

For context, we begin with Section 1 which sets out the purposes of the legislation. For our purposes, subsections 1(a) and (c) are relevant:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
 - (a) giving the public a right of access to records held by public bodies;
 - ...
 - (c) specifying limited exceptions to the rights of access;

The section clearly sets out a “right” to access to information, a right which Canadian Courts have defined as being quasi-constitutional in nature.

Section 6(3) provides that an Applicant may ask for a copy of the record(s) or ask to examine the record(s).

Section 7(1) of the Act provision sets out what is known as the “duty to assist and is extremely germane to this situation. It states that public bodies “shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and **without delay** (my emphasis).

Subsection 7(2) is also relevant. It provides that a public body “shall create a record for an applicant” where that record can be created from a machine readable record in the custody of the public body.

Section 8 of the Act requires a public body to respond to a Request for Information not later than 30 days after the request is received unless that time is extended under section 11.

Section 8(2) provides that the failure to respond within 30 days is deemed to be a decision to refuse access to the records.

Section 11 deals with the extension of time for responding to a request for information. It provides that the public body may extend the time for responding for a “reasonable period” in certain circumstances. In particular, the time may be extended where:

- (a) the applicant does not give 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 under this Act to access to a requested record; or
- (d) a third party asks for a review under subsection 28(2).

It would appear from the correspondence back and forth between the Applicant and the Department in this matter that the Department is relying on subsection (b) in this instance as no reference has been made by the Department to any of the other circumstances.

Section 11(2) requires the public body to advise an applicant “without delay” of:

- a) the reason for the extension;
- b) when the response can be expected;
- c) that the applicant may ask for a review of the extension of time.

ISSUES

A number of issues arise out of this situation, though in the end the question comes down to whether or not the public body in this case met their duty to assist as set out in Section 7.

It is to be noted, as a preliminary observation, that the Department went through three ATIPP Coordinators during the course of this request. The original request was made to ATIPP Coordinator #1 on July 23, 2018. ATIPP Coordinator #1 provided the initial response to the Applicant on August 17th. By October 11th, the person responding to our office in the review process was ATIPP Coordinator #2. By December 20th, when the records were said to be ready for disclosure, it appears that ATIPP Coordinator #3 had taken over. With three ATIPP Coordinators in five months, it is little wonder that the Department was having trouble dealing with this Request for Information. Every time a new coordinator takes over, not only do they have to take several steps back before they can go forward, but it is likely that each successive coordinator also comes into the job with little, if any, experience or expertise in responding to access requests. This was a fairly complex request involving a lot of records from a number of employees. A timely response would require a degree of expertise. That expertise clearly did not exist and was a major factor in the delay.

The Applicant in this case requested acknowledgment of receipt of the ATIPP request when the request was submitted and again two weeks later. The Department failed to acknowledge the Applicant's request on either occasion. This does not meet the duty to assist as set out in the Act.

Section 11 allows for public bodies to extend the time for responding to an ATIPP request for a "reasonable period". With a week left in the initial 30 day response period, the Department did take the necessary steps to take an extension of time of

approximately 39 days by giving notice of the extension, the reason for the extension, when the response could be expected and that the applicant could ask for a review of the extension of time. The length of the extension, in the circumstances, was not unreasonable.

The Department, however, did not respond within that extended time frame. Nor did they meet any of the three additional time frames provided. To make matters worse, they failed to pro-actively communicate with the Applicant about the additional delays, instead waiting each time for the Applicant (or my office) to inquire as to the status of the matter. This failure to communicate with the Applicant as to the status of the response except when prodded to do so does not meet the duty to assist requirement of the Act.

In the end, it took just under six months from the time that the Applicant made his request for information for the public body to provide its response. While this was a complex request, it should not have taken six months to complete. No real explanation was provided by the public body other than the number of records involved. As noted, it appears that there was a lack of expertise and experience at play. Regardless of these factors, six months is not a “reasonable” period of time for responding to an access to information request. The delay in responding to the Applicant did not meet the duty to assist.

It is to be noted that amendments to the *Access to Information and Protection of Privacy Act* which will come into effect in the coming months allow a public body to extend the time limit for responding to a Request for Information only once for up to 20 business days. Further extensions of time beyond 20 business days will have to be requested from and approved by the Information and Privacy Commissioner. Further, the Information and Privacy Commissioner will no longer only be “recommending” action, but will be making orders which public bodies must comply with. This public body in

particular, which deals with Human Resources matters and therefore receives many and complex requests for information, needs to be ready to deal with this new reality.

Finally, the Applicant complains about the form which the response took when finally provided. He notes that he requested the records in both paper and electronic format but received only an electronic version of the records.

Section 6 of the Act provides that an Applicant “may ask for a copy of the record or ask to examine the record.” Further, subsection 7(2) requires public bodies to “create a record for an applicant” where that record can be created from a machine readable record in the custody of the public body. Neither of these provisions require a public body to provide a response in more than one format. In this case, the public body chose to provide the records in easily readable electronic format. This meets their obligations under the Act. If the Applicant needed a paper copy of the records, he had the means to create those paper records from the electronic version.

Part of this aspect of the complaint also related to the use of an encrypted USB jump drive to transport the records. Although it was clumsily done, and problems were experienced with decrypting the device, this is an appropriate method of providing records. It meets the appropriate standards for the disclosure of records, particularly where, as here, the records contained significant amounts of personal information.

Finally, the Applicant felt that the records, when provided, were poorly organized and difficult to put into any reasonable order, which meant that he had to spend an inordinate amount of time trying to put them in some kind of order. It is unclear from the information received by my office if the records included an index or if the records had been assigned page numbers by the public body. Failure to reasonably organize records provided pursuant to an ATIPP request, particularly one with a large volume of

records, does not meet the public body's duty to accommodate. A response of any volume should include an index which includes, as a minimum, the order of the records (i.e. Record #1), information identifying each record (i.e. Email dated Jan 1, 2019 8:30am), the number of pages in each record, a statement indicating whether the record was disclosed, partially withheld or withheld in full, and a brief explanation outlining the exemption applicable for any record partially withheld or completely withheld. All records should be numbered sequentially from the first page to the last page so that it is easy to identify in the case of a review.

RECOMMENDATIONS

Clearly the Department of Finance struggled to respond to this Request for Information and failed to meet its duty to assist in a number of ways. Nothing can be done at this point to fix the poor response. Unfortunately, because of the way in which the Act is currently written, there was little that the Information and Privacy Commissioner could effectively do to influence the Department to provide a timely response. This will change with the amendments soon coming into effect and it is important that public bodies recognize the significant impact that these changes will have on the way in which ATIPP is administered and prepare for those changes ahead of the game. This is particularly true for a Department such as Finance which receives a large number of access to information requests which often involve large volumes of records.

I make the following recommendations:

- a) that the Department of Finance establish a dedicated full time position of "ATIPP Coordinator" within the Department with the necessary experience and/or expertise to appropriately respond to access to information requests. This position would also be the point person for all privacy related issues within the Department. The position needs to be established at a senior level so as to allow

the necessary decision making functions to be exercised by the position. This will help to resolve the situation which occurred here, where the named ATIPP Coordinators also had significant other responsibilities within their job descriptions. The key here is to establish a position which has ATIPP matters as its only focus and attracts and/or develops the necessary expertise that will be necessary in the new regime of orders from the Information and Privacy Commissioner.

- b) that the Department review its processes in relation to responding to ATIPP requests. If no written process document exists, I recommend one be developed on an urgent basis. In addition to the basic steps that need to be taken this document should dictate details such as a requirement to prepare a detailed index of all responsive records, a requirement to number each record and all pages sequentially and establishing appropriate protocols for disclosure, particularly with respect to requests which involve large numbers of pages or records.
- c) that the Department require ATIPP Coordinators to communicate often and effectively with Applicants and to respond to inquiries about a particular ATIPP request in a timely manner - not only is this a common courtesy, it will help to avoid misunderstandings and encourage more open discussions between the coordinator and the Applicant which may well serve to focus the request and/or clarify it.

Elaine Keenan Bengts
Information and Privacy Commissioner