

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 19-202

Citation: 2019 NTIPC 19

File: 18-169-4
September 30, 2019

BACKGROUND

This review deals with the issue of delay in responding to an access to information request by the Department of Finance. The following is the time-line for the request in question:

- May 16, 2018 - the Applicant, a lawyer, makes a request to the Department of Health and Social Services requesting certain personal information on behalf of a client;
- May 22, 2018 - the Applicant receives an email from the Department of Health and Social Services advising that the request had been transferred to the NWT Health and Social Services Authority for processing in accordance with Section 12(1) of the *Access to Information and Protection of Privacy Act*.
- May 23, 2018 - the Applicant receives an email from the NWT Health and Social Services Authority acknowledging receipt of the request and advising that a portion of the request had been transferred, again in accordance with Section 12(1) of the Act, to the Department of Finance.
- July 11, 2018 - because he has heard nothing from the Department of Finance, the Applicant sends an email to the ATIPP Coordinator for the Department asking for a status update "by end of day July 13".
- July 17, 2018 - as no response has yet been received, another email is sent, requesting a response by the following day

- July 18, 2018 - the Applicant receives the following email from the Department of Finance:

Thanks for your email. Our team met yesterday on this matter and I can confirm we are actioning this request. I hope to have our response to you very shortly.

- September 7, 2018 - having received nothing further from the Department, the Applicant writes another email asking for a status update and advising that if no response is received by September 11, the Applicant will be referring the matter to the Office of the Information and Privacy Commissioner.
- September 14, 2018 - the Applicant seeks a review by the Information and Privacy Commissioner based on a deemed refusal (Section 8(2))
- October 2, 2018 - the Information and Privacy Commissioner (IPC) writes to the ATIPP Coordinator for the Department of Finance advising of the review and asking for certain information by October 18, indicating that in the circumstances, this deadline needed to be strictly adhered to.
- October 29, 2018 - the IPC writes again to the ATIPP Coordinator asking for a response to the October 2 letter and pointing out the offence provisions of the Act which make it an offence to fail to comply with a lawful requirement of the IPC
- November 2, 2018 - the new ATIPP Coordinator for the Department of Finance writes to the IPC indicating that “while all of the responsive records have been collected, we have not yet finished cataloguing or reviewing them. I expect that this work will be completed within the next 5 days, before November 12, 2018”.
- November 15, 2018, the IPC receives a letter from the Department of Finance confirming that the request for information had been received by the Department of May 24 but that

“through an internal administrative error, the original request was not recorded as having been received. This resulted in the confusion and delays in the processing of this request.

This letter indicates that a partial response had been sent to the Applicant on November 15 and that the Department would continue to release documents as they were processed but they anticipated that it would take at least an additional 30 days.

- November 27, 2018 - Applicant receives first batch of records from the Department
- December 27, 2018 - Applicant receives second batch of records from the Department

ISSUE

The sole issue in this case is whether the Department of Finance met its duty to assist in accordance with section 7 of the *Access to Information and Protection of Privacy Act*.

RELEVANT SECTIONS OF THE ACT

Section 8 of the *Access to Information and Protection of Privacy Act* requires public bodies to respond to a request for information under the Act within 30 days. If the response is not provided within that time frame, section 8(2) provides that this constitutes a deemed refusal which allows the Applicant to request a review from the Information and Privacy Commissioner. There are provisions to extend that time frame in certain circumstances. Section 11 allows a public body to extend the time for responding to a request for information “for a reasonable period of time” where:

- a) the applicant has not given enough detail to enable the public body to identify the 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 a public body (my emphasis);

- c) more time is needed to consult with a third party;
- d) a third party asks for a review under subsection 28(2)

Section 11(2) provides that when the time for responding is extended under subsection (1), the public body must tell the applicant “without delay” the reasons for the extension, when a response can be expected and that the applicant may request a review of the extension.

DISCUSSION / RECOMMENDATIONS

Not only did the Department in this case fail to meet its duty to assist, it appears that it actively ignored the request for extended periods of time. It also failed to cooperate with the review process initiated by the Office of the Information and Privacy Commissioner.

The Department received the request on either May 23rd or May 24th. Almost two months later, and only after two follow up emails from the Applicant, did the Department respond in any way to the Applicant. The email sent at that point rather flippantly advised the Applicant that the Department was “actioning” the request and that “I hope to have our response to you very shortly”.

Clearly this did not meet the requirements for an extension of time under section 11(2) in any way. The correspondence was sent long after the initial time limit for a response. There was no explanation for the delay, there was no indication as to when the response could be expected (“shortly” is not an adequate expression of when the response will be ready) and there was no indication that the Applicant could ask for a review of the extension.

Almost two months after that inadequate and flippant email and without any further communication from the public body having been received, the Applicant once again

inquired as to the status of the matter. A week later, when still no response had been received, the Applicant sought a review through my office.

Even a letter from the Office of the Information and Privacy Commissioner did not kick-start the Department's response. The Information and Privacy Commissioner's first letter asked for a response by October 18th. In the letter, she noted that she would be holding the Department to strict time lines because delay had already been a factor. By October 29th when the Information and Privacy Commissioner (IPC) had still not receive a response, a second letter was sent to the Department which included a reference to section 59 of the Act which makes it an offence to fail to comply with a lawful request from the IPC.

A new ATIPP Coordinator finally responded to the IPC on November 2nd indicating that all responsive records had been identified but that they had not yet been vetted for disclosure. There was an indication that they would be provided to the Applicant and to the IPC "within 5 days" but gave a November 12th date (a ten day time frame). On November 15th, a letter was sent to the IPC with an explanation for the delay indicating only that there had been "an internal administrative error" and that the receipt of the Request for Information had not been recorded, which "resulted in the confusion and delays in the processing of this request". They indicated that the Department of Finance was "taking steps internally to address the capacity issues that have led to the confusion and delays related to this file". Finally this letter indicated that while some records had been disclosed to the Applicant it would be at least another 30 days before the remaining records could be processed and provided to the Applicant. The records were finally provided to the Applicant on December 27th, just over 7 months after the request for information had been received by the Department.

This is unacceptable and amounts to a blatant disregard for the legislated duties of the public body under the Act, with no explanation except that there had been an "internal

administrative error” made. There is no explanation why the Applicant’s several requests for a status report had been ignored, why the public body chose not to comply with provisions surrounding extensions of time, or why correspondence from my office had been ignored and left without any response. While I might understand an administrative error which resulted in the request for information not being properly recorded initially, that does not in any way explain why this error was not addressed when the Applicant requested status update, not once but twice. Nor does it explain the flippant and unhelpful response to the Applicant’s second such request for a status update. Nor has any explanation been provided as to why correspondence from my office received a similar non-response.

Unfortunately, because of the way in which the Act is currently written, and as demonstrated by the facts of this case, the Information and Privacy Commissioner has very little ability to influence departments or enforce the Act. That said, Bill 29 (An Act to Amend the Access to Information and Protection of Privacy Act), which has received royal assent and is pending an implementation date will provide a much more structured approach and give the Information and Privacy Commissioner the ability to make orders against public bodies, enforceable in the Supreme Court of the Northwest Territories. When these provisions come into effect, public bodies will have to be far more vigilant and far more respectful of the Act and its processes in order to avoid court sanctions. Public bodies will have only 20 business days to respond to an Access to Information Request and will only be able to extend that time frame for an additional 20 business days without the approval of the IPC. The IPC is unlikely to give extensions except where there is a demonstrated and legitimate reason provided for the delay. The new provisions will also require public bodies to be far more diligent in dealing with the Office of the Information and Privacy Commissioner and to provide full explanations when requested.

There is, however, at this point and under the existing legislation, no recommendation that I can make in this case that will assist the Applicant. I do, however, make the following recommendations with a view to preventing similar unacceptable delays in the future:

I recommend:

1. That the Department of Finance review its organizational chart such as to ensure that those tasked with responding to access to information requests are not overburdened with other job responsibilities and that sufficient resources are committed to its legislated responsibilities under the Act;
2. That leadership in the Department of Finance send clear and unequivocal messages to those tasked with responding to access to information requests that this is their primary responsibility and a legislated requirement to be given priority, and not simply an “add-on” to other job responsibilities;
3. That ATIPP Coordinators be provided with adequate training to be able to effectively and efficiently respond to an Access to Information request;
4. That the Department of Finance require ATIPP Coordinators to maintain a written register of access to information requests received, when they are received, the time taken to process the request, the steps taken in responding to the request, including extensions taken and the reason for such extensions of time and that this register be used as part of the job evaluation process for ATIPP Coordinators to ensure they are meeting their responsibilities under the Act. It is to be noted that Bill 29 contains a new provision requiring this kind of record keeping.

5. That the Department of Finance review its policies, procedures and protocols with respect to responding to Access to Information Requests such as to ensure proper recording of ATIPP requests received, appropriate written follow up with the Applicant, and that these policies, procedures and protocols be updated so as to recognize the increased vigilance that will be required once pending changes to the ATIPP Act come into effect.

6. That the Department of Finance report back to the Information and Privacy Commissioner on or before December 7th, 2019 with respect to steps taken to implement these recommendations.

Elaine Kennan Bengts
Information and Privacy Commissioner