

**NORTHWEST TERRITORIES INFORMATION AND
PRIVACY COMMISSIONER
Review Report 20-217**

File: 19-278-4
March 10, 2020
Citation: 2020 NTIPC 10

BACKGROUND

By letter dated October 15th, 2019, the Applicant made a Request for Information to the NWT Housing Corporation pursuant to section 6 of the *Access to Information and Protection of Privacy Act* for the following records:

I request copies of all written correspondence (emails, memos, briefing notes, BF, letters, interviews, rBN eports(sic)) between NWT Housing corporation (Nahendeh district office and Head Quarters) and Fort Simpson Housing Authority (FSHA), [A.B.], [C.D.] Bradbury Electric, Rowe's Construction, CBC, GNWT (Justice, MACA, ECE, Education, HSSA, Housing), Premier Bob Mcleod, Dragon Toner Law Office, RCMP, [E.F.] - McLennan Ross LLP, [G.H.], [I.J.], MLA Shane Thompson, Indigenous and Northern Affairs, [K.L.], EPR Yellowknife, LKFN, CIBC and the FSHA board between September 15, 2018 & November 8, 2019. Specifically all communication that makes reference to [the Applicant] [(the Applicant's position)]

(For the purpose of this report, I have used initials in square brackets rather than the actual names used in the Request for Information)

The Applicant contacted us on November 24th, advising our office that he had yet to receive a response to this Request for Information and provided a Canada Post printout showing that a piece of registered mail from the Applicant's home community had been "Delivered" on October 21st. On November 25th, this office responded to the Applicant

and encouraged him to contact the public body directly to follow up on the matter. On December 10th, 2019, the Applicant contacted our office again, this time with a formal Request for Review, as he had still not received a response or, in fact, even an acknowledgment that the Request for Information had been received.

On December 13th, 2019, I wrote a letter to the NWT Housing Corporation (NTHC) advising them of the Request for Review. In this letter, and in an attempt to avoid the lengthy formal review process, I gave the NTHC the opportunity to respond to the Applicant's Request for Information on or before January 6th and indicated that if the response had not been provided by that date, I would proceed with the formal review and would require their submissions by January 20th.

On January 15th, 2020, having received no response whatsoever from NTHC, this office reminded the organization that its submissions were required by January 20th. On February 5th, 2020, having still received no response from the NTHC, I wrote again indicating that if I had not received their submissions by February 18th, I would be completing my Review Report based solely on the Applicant's submissions.

This office has never received any response whatsoever to any of our letters to the NTHC.

DISCUSSION

Section 1(1) of the *Access to Information and Protection of Privacy Act* (ATIPP, or the Act) sets out the purposes of the Act as follows:

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;....(emphasis added)

We begin, then, with the fact that ATIPPA makes clear that the public has a **right** of access to public records. There are a number of limited and narrow exceptions to this right, as outlined in the Act, but unless one of those exceptions apply, public records must be provided to an Applicant on request. This right has long been recognized in Canada as a quasi-constitutional right, which indicates its significance in terms of the relationship between public bodies and the public.

Section 2 of the Act defines the term “public body” as:

- (a) a department, branch or office of the Government of the Northwest Territories, or
- (b) an agency, board, commission, corporation, office or other body designated in the regulations.

Regulation 1(2) made under the ATIPPA provides that

- (2) For the purposes of paragraph (b) of the definition “public body” in section 2 of the Act, each agency, board, commission, corporation, office or other body listed in column I of Schedule A is designated as a public body.

Schedule A includes the Northwest Territories Housing Corporation. The NTHC, therefore, is a public body subject to the Act.

Section 3 of the Act goes on to set out that the Act applies to “all records in the custody or under the control of a public body” except for several classes of information which do not appear to be applicable to this case.

Section 6 of the *Access to Information and Protection of Privacy Act* outlines the steps for making a Request for Information under the Act:

- 6.(1) To obtain access to a record, a person must make a written request to the public body that the person believes has custody or control of the record.

I am satisfied, based on the information provided by the Applicant, that he made a request in writing as required by this section.

Section 8 outlines the obligations of a public body to respond to such a 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
 - (a) the time limit is extended under section 11; or
 - (b) the request has been transferred under section 12 to another public body.

Both sections 11 and 12 outline steps that must be taken to extend the time for a response under either of those provisions. As there have been no such steps taken by the NTHC in this case (and in fact no steps at all in terms of a response), the public body clearly missed the 30 day response time. The response should have been provided by no later than November 21st. It was not.

Subsection (2) of section 8 sets out the consequences for failure to respond within 30 days:

- (2) The failure of a head to respond to a request in time is deemed to be a decision to refuse access to the record.

In this case, the Applicant formally asked this office to review the “deemed refusal” on December 10th, 2019. Although there had clearly been a deemed refusal, I gave the NTHC another 21 days to respond, asking that they address the matter before January 6th. When the Applicant had not received any response to his Request for Information by that date, this office commenced its formal review of the matter on January 15th. At that time, the Applicant had still not received the requested records, nearly 90 days after the request had been made.

Also of relevance in this review are the following sections of the Act:

- 33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

Because the public body has, in this case, provided no information about the records themselves or their reasons for the refusal to disclose them, it has not met its onus to establish that the Applicant has no right of access to the records.

It is further to be noted that Section 7 of the Act places on public bodies a “duty to assist”, which has clearly not been met in this case:

- 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.

Finally, section 59(2) provides that:

- (2) Every person who willfully
 - (a) obstructs the Information and Privacy Commissioner or any other person in the exercise of the powers or performance of

the duties or functions of the Information and Privacy Commissioner or other person under this Act,
(b) fails to comply with any lawful requirement of the Information and Privacy Commissioner or any other person under this Act,...

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding \$5,000.

Again, the NTHC's failure to respond in any way to any of the several letters sent to them in relation to this matter, let alone to provide the required submissions and copies of the relevant responsive records, not only shows disrespect for the legislation and the quasi-constitutional rights embodied in the Act, but is actionable pursuant to section 59(2).

CONCLUSION AND RECOMMENDATIONS

It is to be noted that this is far from the first time that this particular public body has chosen to ignore its responsibilities under the Act. This is a public body which consistently fails to meet deadlines, to respond to correspondence from Applicants and from this office, and which generally shows disdain for its responsibilities under the Act. Ultimately, responsibility for this failure falls on the shoulders of the head of the public body, in this case the President of the organization. However, the employee of the organization tasked with the duties of responding to ATIPP requests and requests for review, is also responsible for the failures of this organization to comply with the legislation.

I make the following recommendations:

1. that all responsive records be provided to the Applicant on or before March 31st, 2020, subject only any mandatory exceptions under the Act (sections 13, 23 or 24) where applicable. The Applicant will have the right

to seek a review of any excepted material in accordance with section 28 of the Act.

2. that steps be taken to prosecute the President and the ATIPP Coordinator of the NTHC pursuant to section 59(2)(a) and (b) of the Act, taking into consideration not only the facts of this case, but also all other ATIPP files on which NTHC has failed to respond adequately or at all to lawful and appropriate requests from the Information and Privacy Commissioner.
3. that the President of the NTHC delegate his responsibilities to respond to these recommendations to the Minister Responsible for the NTHC in light of the clear conflict of interest arising out of Recommendation #2.
4. that the President of the NTHC take immediate and definitive steps to address his organization's utter failure to comply with the requirements of the ATIPP Act.

Elaine Keenan Bengts
Information and Privacy Commissioner