

**NORTHWEST TERRITORIES INFORMATION AND  
PRIVACY COMMISSIONER  
Review Report 20-218**

File: 19-270-4  
March 10, 2020  
Citation: 2020 NTIPC 11

**BACKGROUND**

The Applicant made a request to the Northwest Territories Housing Corporation on July 16, 2019 for the following information:

I am requesting copies of written correspondence (letters, emails, briefing notes, memos, reports) between NWT Housing Corporation Nahendeh Office staff - [A.B.], [C.D.], [E.F.] - and the NWT Housing Corporation Head Quarters staff [G.H.], [I.J.], [K.L.],[M.N] and [O.P.]. Specifically I am requesting communication that is relating to or makes reference to the Fort Simpson Housing Authority manager and the Fort Simpson housing authority board between January 2, 2019-July 31, 2019.

I am also requesting all documents contained in my personal (sic) file [Q.R.] on the NWT Housing Corporation database

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

Initially, the NWT Housing Corporation failed to respond to the Request for Information and on August 27, 2019, the Applicant requested this office to review the matter on the basis of a deemed refusal. On September 6<sup>th</sup>, 2019, this office wrote to the 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 September 13<sup>th</sup> and indicating that if

the response had not been provided by that date, I would proceed with the formal review and would require their submissions by September 27<sup>th</sup>.

On September 13<sup>th</sup>, the NTHC advised that they had mailed a response to the Applicant, theoretically on September 13<sup>th</sup>. On October 10, 2019, the Applicant confirmed that he had received the package of responsive records. On October 13<sup>th</sup>, the Applicant wrote to this office requesting that we review the response received on the basis that:

NWT Housing Corporation has submitted several redacted documents and have not fully complied with my request

This office wrote to the NTHC on November 25<sup>th</sup>, advising the public body of the Request for Review and asking that they provide the information required by the Information and Privacy Commissioner to conduct her review pursuant to section 31 of the *Access to Information and Protection of Privacy Act* (the Act or ATIPPA) including:

- a) a copy of the Request for Information;
- b) a copy of all records identified as being responsive to the Applicant's Request for Information in unedited form;
- c) a copy of all records identified as being responsive to the Applicant's Request for Information as disclosed to the Applicant;
- d) an index of the responsive records and;
- e) a detailed explanation for the Corporation's decision not to disclose any record or partial record that was withheld from the Applicant.

The response was requested by January 2<sup>nd</sup>, 2020.

On January 14<sup>th</sup>, 2020, another letter was written to the NTHC indicating that the Office of the Information and Privacy Commissioner had not yet received a response to our November 25<sup>th</sup> letter and requesting an immediate response. On February 4<sup>th</sup>, 2020,

another letter was written to the NTHC indicating that if the NTHC's submissions were not received by February 18<sup>th</sup>, we would be proceeding to complete our review and make recommendations based solely on the basis of the information provided by the Applicant.

As of the date of the writing of this Report, the Information and Privacy Commissioner has not received any response to our letter of November 25<sup>th</sup>. The only evidence before me, therefore, is that received from the Applicant.

## **DISCUSSION**

Section 1(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA, 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.

Section 28 of the Act outlines the right of an Applicant to request a review of a response received:

28.(1) A person who makes a request to the head of a public body for access to a record .... may ask the Information and Privacy Commissioner to review any decision, act or failure to act of the head that relates to that request.

Section 31 of the Act requires the Information and Privacy Commissioner to conduct a review when a request is received pursuant to section 28 and “may decide all questions of fact and law arising in the course of the review”.

Section 32 of the Act requires the Information and Privacy Commissioner to give the Applicant and the public body involved in the review process “an opportunity to make representations to the Information and Privacy Commissioner” during the review. In this case, I provided the public body with three opportunities to provide the information and its submissions with respect to this review, but received nothing.

Importantly, section 33 of the Act provides that, on a review, the onus is on the public body to establish that an Applicant has no right to a record or to part of a record:

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. This should result in a recommendation to disclose all of the records, without edits or redactions. However, there are three “mandatory” exceptions to disclosure contained in sections 13, 23 and 24 of the Act. Section 13 prohibits the disclosure of records that would reveal a confidence of the Executive Council. Section 23 prohibits the disclosure of personal information where that disclosure would amount to an unreasonable invasion of a third party’s privacy. Section 24 prohibits the disclosure of information that might affect the business interests of a third party. To the extent that the public body relied on these sections of the Act, out of an abundance of caution, these records still require independent assessment.

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 wilfully
  - (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.

The NTHC's failure to provide any submissions or representations with respect to this matter, or to provide the Information and Privacy Commissioner with copies of the responsive records as necessary to an independent review 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 refuse to respond to requests from the Information and Privacy Commissioner. This is a public body which consistently fails to meet deadlines, to respond to correspondence from Applicants (as is evidenced by the fact that the Applicant in this case did not receive a timely response to the Access to Information Request, as described above) 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 documents identified as being responsive to the Applicant's Request for Information be provided to the Applicant, on or before March 31<sup>st</sup>, 2020 except those records which the public body claims are protected from disclosure pursuant to sections 13, 23 or 24 of the Act, without redactions

2. that within 30 days of the date of this Report, NTHC provide the Information and Privacy Commissioner with copies of all records which have been withheld, in full or in part, pursuant to sections 13, 23 and/or 24 of the Act, for independent assessment and review by this office along with a detailed statement outlining NTHC's reasoning as to how the section or sections apply. The IPC's review of these records will be conducted in accordance with the normal review process.
3. 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.
4. 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.
5. that the President of the NTHC take immediate and definitive steps to address his organization's failure to comply with the requirements of the ATIPP Act.

While these are recommendations only, I point out that when the pending amendments to the ATIPP Act come into effect in the next few months, this office will be making orders, enforceable in law. It is important for this, and all public bodies, to understand the implications of this change and to take steps to ensure full compliance with the law and the duties imposed by the legislation.

Elaine Keenan Bengts  
Information and Privacy Commissioner