

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-249

Citation: 2020 NTIPC 56

File: 20-202-4

November 16, 2020

BACKGROUND

On July 23rd, 2020 the Applicant in this matter made a Request for Information to the Business Development and Investment Corporation for “all and any information related to [a named company] in regard to my file and decisions to foreclose....2003 to date”.

The NWT Business Development and Investment Corporation (BDIC) acknowledged receipt of the request by letter dated August 20th, 2020. In that letter, BDIC also invoked section 11(1)(b) of the *Access to Information and Protection of Privacy Act*, extending the time for responding to the request by an additional 90 days as a result of the “volume of records involved”. The Applicant objected to the extension of time and asked this office to review the matter.

BDIC’s EXPLANATION

In addressing the challenge to the extension of time, BDIC provided its reasons for extending the time for responding to the request from 30 to 120 days as follows.

1. The public body indicated that there were two separate physical loan files pertaining to the request which each had to be scanned and re-created electronically for the purpose of responding to this review. In addition, email records from all employees who had dealt with the Applicant’s files had to be gathered and reviewed and records had to be recalled from the GNWT archives pertaining to financial transactions involving the Applicant’s business. In all, BDIC indicated that they needed to search approximately 770 documents.

2. The organization reported that the approximate number of pages that were responsive to the request was approximately 1400.
3. I asked BDIC for a detailed description as to how responding to the request in less than 120 days would result in unreasonable interference with the work of the BDIC. I was advised that at the time that this ATIPP Request was received there were three other active ATIPP files already in progress, one of which involved approximately 1300 documents amounting to many thousands of pages. They pointed out that BDIC was a small department with 15 full time equivalent positions and only 10 full-time staff employed because of unexpected vacancies. They also indicated that BDIC staff also had new and extra duties as a result of two new loan initiatives introduced in response to the COVID-19 crisis which resulted in hundreds of additional high priority client requests for loan payment deferments/reductions as well as new working capital loans to support NWT Businesses.
4. The organization had only one ATIPP Coordinator at the time, and this employee had other responsibilities within the organization, and was new to the ATIPP role.

The public body also indicated that a fee estimate letter had been sent to the Applicant on September 3rd, 2020 and that no response had been received to that fee assessment as of September 16th.

THE RELEVANT SECTIONS OF THE ACT

Section 8 of the *Access to Information and Protection of Privacy Act* requires public bodies who receive an access to information request to respond to that request “not later than 30 days after the request is received” unless the time for responding is extended pursuant to section 11 or the request is transferred to another public body pursuant to section 12.

Section 11(1)(b) of the legislation allows for an extension of time for a “reasonable” period in certain circumstances, including where

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.

DISCUSSION

The time limits for responding to access to information requests are defined for a reason. The right of access to information from public bodies is ineffectual if a public body can delay and put off a response indefinitely. As noted by Justice Muldoon of the Federal Court, Trial Division in *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* [1990] 3 F.C. 514 (F.C.T.D.) in relation to the *Federal Access to Information Act*:

These are not cases for declining to exercise the salutary powers of review conferred on the Court by Parliament. Confession that such requests ought to be processed as expeditiously as possible may be good for an individual's soul, but it has no didactic energy in gaining the attention of government departments. It has no effect in actually providing legally that less than expeditious processing of requests for information is breaking the law, as it surely is. The purpose of the review is not just to make the particular respondent acknowledge unreasonable tardiness. It is, also, to let all the other potential respondents know where they stand in these matters. The Court is quite conscious that responding to such requests is truly "extra work" which is extraneous to the line responsibilities and very raison d'être of government departments and other information-holding

organizations of government. But when, as in the *Access to Information Act*, Parliament lays down these pertinent additional responsibilities, then one must comply.

By my calculation, setting aside any delays as a result of the fee assessment as discussed below, the date by which the public body must respond to the Applicant under the extension is November 20th. This review and any recommendations I might make may, therefore, be moot by the time this report is issued. This is one of the problems with the way in which the current version of the legislation deals with extensions of time. While section 28 of the Act gives Applicants the right to seek a review of an extension of time, it takes time to do a review and, by the time the Information and Privacy Commissioner can issue a review report, the response has, typically, been provided. Allowing for a review of an extension of time is, therefore, mostly an empty option. That said, amendments to the ATIPP Act which are pending allow a public body to take only one 30 day extension, after which they must request permission from the Information and Privacy Commissioner for any further extensions. These provisions will bring far more certainty to Applicants.

The Applicant in this case asked my office to consider whether the extension of time from 30 days to 120 days was in accordance with the spirit and intention of the legislation and whether the extension was justified pursuant to section 11. So as to provide guidance and direction it is, I think, important for this Report to be issued, whether or not the questions are moot.

Extension of Time - Criteria

The first issue that we must consider is whether section 11(1)(b) was properly invoked in this case. That section provides that a public body may extend the time for responding to an access request where there are a large volume of records requested or which need to be searched to identify the requested record **and** meeting the time limit would unreasonably interfere with the operations of the public body.

In this case, the public body indicated that they estimated that there were approximately 770 records consisting of about 1400 pages of records. Keeping in mind that before anything is disclosed, every record has to be reviewed page by page, line by line and word by word, the review of 1400 pages of records is a significant task. For a large public body, 1400 pages would not likely amount to a sufficient number of pages to invoke section 11(1)(b) because the resources available in the large public body are significant and extra personnel can be seconded to address the request without grinding all of the other work of the public body to a halt. It is, therefore, unlikely that responding to a request of this volume on time would unreasonably interfere with the operations of a large public body. However, in a small public body with only 15 full time employees, particularly where those employees have recently been laden with significant additional responsibilities that were not planned for, the ability to pull in extra resources is very limited and is far more likely to interfere with the overall operations of the organization. In addition, in this case the organization was also dealing with several other ATIPP requests at the same time, one even larger than the one in this case.

I am satisfied, in these specific circumstances, that the request involved a large number of records and that responding within 30 days would have unreasonably interfered with the operations of the public body.

Reasonable Period

While the public body has met the criteria for taking an extension of time under section 11(1)(b), the section allows for an extension of time for only a “reasonable period”. This leaves a lot of room for interpretation. What the Applicant might consider “reasonable” may not coincide with what the public body considers “reasonable”. I would suggest that the term “reasonable” must be read objectively and be based on all of the circumstances.

In previous review reports dealing with this issue, I have held that normally, an additional 30 days would be considered a “reasonable” extension.

As discussed in Review Report 12-103,

The expression “justice delayed is justice denied” is equally applicable to access to public information. The Act itself requires public bodies to “make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and **without delay**” (emphasis added). It provides that responses to such requests must be made within 30 days, except in very limited and defined circumstances. The term “reasonable” in section 11 must be read in the context that this creates.

That said, the fact that the legislators chose to use the term “reasonable” also indicates that there should be some flexibility and that the circumstances of any particular request must be considered.

Circumstances that might be relevant to considering what is “reasonable” include the size of the public body and the scope of the Request for Information. In this case, the public body is a very small organization which does not normally deal with a large volume of Access to Information Requests. As noted above, while not overwhelming, the number of pages that the public body has to review and prepare for disclosure in this case is significant. Where, as here, the public body is also dealing with at least one other significant request at the same time, this is a factor that needs to be considered in terms of determining what is “reasonable”.

It is also significant that access to information has been determined to be a quasi-constitutional right. In my opinion, this means that access to information requests must be given a level of priority over other responsibilities of the public body.

In all of the circumstances, while I agree that the extension of time was appropriately taken, the extension was not for a “reasonable” period of time. Here the public body took an additional 90 days to respond when their initial obligation was to respond within 30 days - three times the initial time frame granted by the legislation. I would have

suggested that, at the most, an additional 45-60 days would have been “reasonable” in the circumstances.

The Effect of a Fee Assessment

The public body advised, during the course of this review, that a fee assessment had been issued to the Applicant on September 3rd and that, as of September 16th, the Applicant had not accepted the fee.

Section 50 of the Act provides that the head of a public body may require an applicant who makes a request for information pursuant to section 6 to pay the prescribed fees. Where a fee is assessed, the public body must give the applicant an estimate of the fee. The Regulations under the Act set out a number of guidelines and provisions with respect to fee assessments, including the applicable fees and what the fee estimate to the Applicant must include. Regulation 10(3) provides that:

- (3) An applicant has up to 20 days to indicate if the estimate of fees is accepted or to modify the request so as to reduce the amount of fees likely to be assessed.

Importantly, Regulation 13(1) requires a public body to cease processing a request once a notice of the estimate of fees has been sent to an applicant and that the processing is to recommence only after the applicant has agreed to pay the assessed fee and has provided a deposit for 50% of the total amount of the fees.

The effect of these provisions with respect to the fee assessment is that as of September 3rd, when the fee assessment was provided, the counting of days for responding to the request is suspended. If, therefore, the Applicant acknowledged and agreed to the fee assessment 20 days after he received it, the 90 day extension of time would be moved 20 days further down the calendar. If the Applicant has not acknowledged the fee assessment or has chosen not to pay the required deposit, the

time for responding is, effectively, also in suspension and will start to run again only if and when the Applicant complies with Regulation 13(1).

I have not been advised of the status of the fee assessment since September 23.

CONCLUSIONS AND RECOMMENDATIONS

I find that the Business Development and Investment Corporation met the criteria for an extension of time for responding to the Applicant's request pursuant to section 11(1)(b) of the Act, but that the extension was not for a "reasonable" period of time.

I **recommend** that the BDIC respond fully to the Applicant's access to information request within 30 days of the date of this Review Report, provided that the Applicant has accepted the fee assessment and paid the required deposit. If the fee assessment has not been accepted and/or the required deposit had not been paid, I **recommend** that BDIC respond fully to the Applicant's access to information request within 30 days of the Applicant's acceptance of the fee assessment and the deposit is paid.

Elaine Keenan Bengts
Information and Privacy Commissioner