

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 98-08**

November 15, 1998
Review File: PC8128

BACKGROUND

On October 9, 1997, the Applicant applied under the *Access to Information and Protection of Privacy Act* (the "Act") to the Financial Management Board Secretariate (FMBS) (the "Public Body") for information with respect to the government's records in connection with the "pay equity" issue which is currently being dealt with by the government and its union, specifically:

- a. Since 1992/93, reports, draft, interim, final and notes and presentations by consultants Dr. Nan Weiner (N.J. Weiner Consulting Ltd., Toronto), Keith Davis, then with Norman D. Willis and Associates or since 1992/93, others on pay equity, personnel classification structure and related issues;
- b. Since 1992/93 a record or list of professional service contracts, preferably by vendor, brief title or project description, duration, amount awarded, including amendments, sole source or competitive, and if possible, an indication of whether a report was done;
- c. Data assessments as a result of the Joint Equal Pay Study by Willis and Associates, including other data collected in addition to this study and assessments done, including comparisons to the Willis Study;
- d. Department assessment of joint equal pay steering committee, committee meetings minutes, and briefing notes or issues sheets on pay equity and personnel classification structure issues and their resolution/settlement.

Not having received any documentation by February 25, 1998, the Applicant requested that I review the matter.

An explanation was requested from the FMBS as to the reasons for the delay on March 2nd, 1998 and a response was received on March 9th, at which time it was suggested that some of the information requested was "sensitive" and could have a "negative economic impact on the GNVVT in the collective bargaining and pay equity processes".

The letter further went on to suggest that, as a result of this risk, a detailed review of the information would be required to "ensure that the GNWT's negotiating strategies and positions were not compromised". The letter further suggested that the staff who could do such a review were otherwise occupied and not able to commit the time to this project and that the necessary review of documentation would unreasonably interfere with the operations of the public body. The public body indicated that a letter would be sent to Mr. Rubin under section 11 of the Act, extending the time for replying to the request for information, along with an estimate of the time and cost to complete the review of the documents requested. It also suggested that many of the documents requested would be available in a public forum within six months and that the Act provided for a delay in such circumstances.

On March 10, 1998, a letter was sent by this office to FMBS indicating that I did not consider lack of manpower a sufficient reason for failure to respond to the request for information under the Act. On March 16th, a letter was received from the Applicant strongly complaining about the further delay and suggesting that the time to advise of any extension under the Act was long since past. By the end of April, nothing had yet been received by the Applicant, despite an undertaking by FMBS to identify and provide non-controversial documents.

A further letter was sent to FMBS by this office on April 29, providing a timetable for dealing with the Applicant's request, with FMBS to provide me with a list of all documents responsive to the request by May 15, copies of all documents (unedited) and any submissions that FMBS might have with respect to proposed deletions by May 30th . The Applicant was to have until June 20th to reply to those submissions,

with a recommendation to be made by my office by the end of July.

On May 15th, 1998, a letter was received from FMBS indicating that there were "thousands" of records related to the general issue of pay equity and that these records were not catalogued or indexed in any way and that it would take approximately 18 months to do so. It was suggest that it would be necessary to develop a computerized system to organize the documentation such as to allow FMBS to properly reply to the request for information. This letter also indicated, however, that a partial response to the Applicant was possible. Specifically:

- a) the reports outlined in part (a) of the Application for information were claimed as privileged (prepared for the purpose of litigation)
- b) the information requested in part (b) of the Application for information did not exist (i.e. there was no record or list of professional service contracts relating to pay equity issues)

It is to be noted that earlier correspondence did acknowledge the existence at least a partial list of the latter kind of information, although it was stated that it may not be very useful to the Applicant.

On May 21st, the Applicant provided some comments in response to the statements made in FMBS's May 15th letter, including a clarification of the specifics of the information he was requesting. He pointed out that, although FMBS may have "thousands" of documents to sort through, he was requesting only very narrow and specific information which should be easily identifiable.

Further correspondence was send by this office to FMBS suggesting certain steps be taken to further the process and that certain information which had already been identified as responsive to the Request for Information be provided.

By letter dated June 15th, 1998, FMBS provided the Applicant with a package of information which they identified as being in "partial" reply to the Applicant's October, 1997 request for information. In this letter, privilege is claimed for most of the documents requested in parts (a) (b) and (c) of the Applicant's request. Specifically, the reports requested in part (a) of the request are claimed as being privileged on the basis that they were prepared after a complaint had been filed by the union and that the issue is now the subject of litigation and is, therefore, protected from disclosure pursuant to section 15 of the Access to Information and Protection of Privacy Act. Exemptions were claimed for other documents pursuant to sections 14 (advice from officials) and 17 (economic and other interests of public bodies) of the Act, although no specifics of these claimed exemptions are provided. There is also a claim for exemption under sections 13 (cabinet confidences) and 18 (testing procedures, tests and audits) of the Act. These claims for confidentiality related to parts (a) to (c) of the Request for Information. With respect to part (d) of the application's request for information, it was suggested that much of the documentation which would be responsive to this request for information would also very likely be subject to the protections set out in the Act, but, as the cataloguing of these documents was not yet complete, a full response to this part of the request would have to await that cataloguing.

On June 24th, the Applicant replied to FMBS's letter of June 15. This letter, in essence, is a request for me to review the denial of access to information contained in FMBS's letter of June 15th and a further comment on the failure of FMBS to provide the necessary resources to the organization of their own records such as to allow them to reply to the last part of this fairly simple request for information.

Subsequent to this correspondence there was some delay in this office resulting from the fact that the Commissioner was away from the office on vacation. However, in September and October, there were further discussions with FMBS with respect to the progress being made on cataloguing the information in their possession so as to

allow them to reply to the last part of Mr. Rubin's request. On October 29th, a letter was received from FMBS confirming that on October 19th a request for proposals was published seeking proposals from contractors to build a more efficient and effective information retrieval system for the GNWT. No indication was given that there had been any further attempts to provide the Applicant with an answer to the final part of his request for information.

ISSUE:

The sole issue in this review application is whether or not FMBS has made reasonable efforts to provide the Applicant with the information which he requested. I will deal with the Applicant's request that I review the public body's refusal to release the information requested in parts (a) to (c) of his request in a separate recommendation.

DISCUSSION

The explanation provided by the FMBS with respect to its inability to reply to the Applicant's request for the information requested in part (d) of his request is, without any doubt, unacceptable. In fact, the admission that these records are in such a state of disarray that it will take 18 more months to reply to the Applicant's request for information is cause for considerable concern. The public body can give me no good explanation why this is so, except to suggest that the information has been "recentralized" from government offices from various communities throughout the Northwest Territories and that there was no consistent system for record keeping among the various government offices. I am not an expert in record management. However, it is clear that for any modern office to work effectively and efficiently, there must be an identifiable and consistent "records system" in place. This is particularly true where not all of the records are centralized in one place. Clearly there has been a breakdown of the system with respect to these particular records. It is not acceptable

for FMBS simply to use this deficiency as an excuse for not providing the information being requested.

During the course of this investigation, it has been hinted at in some of the discussions and correspondence that if the Applicant wants the information he has requested, he may have to bear the cost of organizing and cataloguing the information and getting it to the point that the responsive information can be identified. Although section 50 of the Act provides that the head of a public body may require an applicant who makes a request for information to pay the prescribed fees, and section 10 of the Regulations allows the public body to charge a fee for any cost to the government over \$150.00 in answering a request, there is an underlying assumption here that the government maintains an adequate records system. That assumption, at least in this instance, clearly is not well founded. There is a clear and unequivocal admission on the part of FMBS that the documentation which the Applicant seeks is part of a cache of "thousands" of documents which do not appear to be in any way catalogued or indexed. This is simply not acceptable.

Nor is it acceptable that no real steps have been taken to correct this situation, despite the fact that the situation has been apparent for at least a year since the Applicant first made his request. Only in the last month has there been a call for proposals to contract someone to create a computerized system to correct this record keeping problem. There is no indication that the call has identified a contractor, or when (or, for that matter, if) the system will be in place. I assume that after the system is in place, it will still be necessary for somebody to review the "thousands" of documents in question and to appropriately catalogue them. There is no indication that any steps whatsoever have been taken to have someone start reviewing and cataloging these documents, which will be a necessary step even after a computer system has been devised.

The Applicant's request was in no way unreasonable. The inability of the public body to meet his request is solely as a result of a poor (non-existing?) system for filing and recording documents. For a number of reasons, many of them quite outside of this specific Applicant's right to receive the information he has requested, this situation cannot be allowed to continue.

SUMMARY AND RECOMMENDATION:

In summary, I find that the filing and document recording system with respect to these particular records is completely inadequate and not acceptable. I recommend that resources and manpower be made immediately available to sort through, organize and record the nature of the "thousands" of documents in question and that in the course of this exercise, documents which might be responsive to the fourth part of the Applicant's request for information be identified. It is further my recommendation that this process be completed within one month of the date on which this recommendation is accepted by the Minister. It may be necessary to hire one or more casual employees to achieve this deadline and, if necessary, I suggest that that be done. It is further my recommendation that the Applicant be provided with all documents which are responsive to the fourth part of his request before January 31, 1999, with any deletions and editing fully explained, including a list of any documents identified but withheld in full. Finally, I recommend that, in the circumstances, the information requested by the Applicant under the fourth part of his initial request for information be provided to him without further cost being assessed to him.

My recommendation might have been less restrictive with respect to the time lines suggested had there been any indication of good faith on the part of FMBS to correct this glaring clerical hole in the months since the Applicant made his first request for information. Unfortunately, despite my attempts to ensure that this matter be given the priority that the *Access to Information and Protection of Privacy Act* demands, there has been little movement by FMBS. The Applicant has been more than patient in

waiting for a response to his fairly simple and straight forward request for information and he is entitled to receive it without further delay.

I further strongly recommend that a full and thorough review be done of this public body's record keeping systems and that expertise be employed to ensure that this kind of problem does not occur again. There may already be some progress in this regard with the "Request for Proposals" which appeared in September publications, seeking assistance in dealing with the matter. The scope of that Request for Proposals, however, is not clear. In fact, my discussions with several different departments over the course of the last year suggest to me that there is no consistent or uniform system of recording and maintaining government records, but that each department, and in some cases, each division of each department, has its own system of record keeping. It is my suggestion that there be a comprehensive review of record keeping systems maintained by the government to ensure that they are both adequate and, to the degree possible, consistent throughout the government. It may be that, with division of the Northwest Territories now imminent, it is more sensible to wait until after Division Day for such a review to be done by each new territory so that the recommendations can be fashioned in such a way as to be specific to what will undoubtedly be unique circumstances in each new Territory. This project should, however, be undertaken as a priority in both territories after division.

Elaine Keenan Bengts
Information and Privacy Commissioner