



Report of Findings: 19/20-AP-010
Right to Information and Protection of Privacy Act
Department of Transportation and Infrastructure

December 11, 2019

Note: 2019 amendments to New Brunswick legislation transferred the responsibility for the access and privacy mandates from the Office of the Integrity Commissioner to the Office of the Ombud for New Brunswick.

Summary: In July 2018, the applicant made an access request to the Department of Transportation and Infrastructure (“the Department”). In August 2018, the Department self-extended the time limit to respond under s. 11(3)(c) (volume of records/unreasonable interference with operations) of the *Act*. In October 2018, the former Office of the Integrity Commissioner, who was the oversight body under the *Act* at that time (it has since been reassigned to the Office of the Ombud), granted the Department a further time extension until April 1, 2019.

The Department did not respond to the request by the extended time limit to do so and the Applicant subsequently submitted a complaint. While the Department responded on April 17, 2019, the Ombud decided that a formal investigation was warranted, given the applicant’s concerns with the lengthy time extension that was granted in this case and the Department’s failure to meet the extended time limit to respond, which was nine months after the applicant made the request.

The purpose of this Report is to address the reasons why the Department took nine months to respond to this request, the steps the Department is taking to improve its internal processes to reduce the risk of a similar delay occurring in the future, and to set out the changes adopted by this Office with respect to time extension applications from public bodies to address the concerns raised by the applicant in this case.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB, c. R-10.6 , ss. 9, 11(3)(c), 11(3)(d), and 11(4).

Authorities relied on: Duty to Assist and Meaningful Responses: Sections 9 and 14 of the *Right to Information and Protection of Privacy Act*, Office of the Ombud—Access and Privacy Division, Fredericton NB, October 2018 (updated: November 2019).

I BACKGROUND

1. On July 17, 2018, the Applicant made a request under the *Right to Information and Protection of Privacy Act* (“the Act”) to the Department of Transportation and Infrastructure for information about deficiencies encountered during the construction of a nursing home in the Dalhousie area, including inspection reports and related notes, memos, emails, and text messages, as well as communications relating to the Applicant’s requests to communications staff asking for information on this subject and any related internal communications. In making the request, the Applicant specified that the request includes any information that had not been previously disclosed by the Department in response to the Applicant’s previous access requests on this subject.
2. On August 23, 2018, the Department notified the Applicant that the time limit to respond was being extended for an additional 30 business days to October 11, 2018 under s. 11(3)(c) (volume of records/unreasonable interference with operations).
3. On October 4, 2018, the Department applied to the Office of the Integrity Commissioner for a further extension of time to respond to this request under s. 11(4) of the Act. The Department’s application cited the estimated large number of records to be searched (approximately 5,000) and the challenges involved in completing the search (s. 11(3)(c)), the need to conduct the third party notification process (s. 11(3)(d)), and indicated that the records relate to legal proceedings (s. 11(3)(f)). Based on the information provided by the Department, a further extension of five and a half months was granted, with the extended time limit to respond of April 1, 2019.
4. Although the Department was aware that it would not be meeting the extended time limit to respond, no update was provided to the Applicant about the status of the processing of this request. On April 9, 2019, the Applicant filed a complaint about the Department’s failure to respond by the extended time limit of April 1, 2019.
5. After receiving notice of the Applicant’s complaint, the Department took steps to expedite the remaining steps to complete the processing of this request and issued a response on April 17, 2019, nine months after receipt of this request and 12 business days after the extended time limit.
6. In our initial discussions with the Department about this complaint, Department officials informed us that staff assigned to conduct the search for relevant records did not meet the target of February 6, 2019 and that the relevant records were only returned for processing on March 27, 2019. The number of records submitted for processing was approximately 1,500 pages of records, with the final response package releasing 1,158 pages of records to the Applicant with some redactions.

7. Given that the Department missed the extended time limit to respond and did not meet its anticipated internal time lines to complete the search and issue a response, this complaint proceeded to formal investigation in accordance with s. 68(1) of the Act.
8. Also a factor in deciding to conduct a formal investigation is the fact that the Applicant expressed concerns to the former Integrity Commissioner after receiving notice of the further time extension to April 1, 2019. The Applicant was taken by surprise by this decision and questioned why the Applicant had not been informed or been given the opportunity to provide input.
9. While the time extension application process is not akin to a complaint process that requires an opportunity for both parties to be heard and the onus rests solely with the public body to establish facts to demonstrate that the application has merit, I could nevertheless appreciate the Applicant's concerns. As such, this Office treated this as an opportunity to review our process as well with a view to make improvements in the event of future cases where we find that a public body merits a substantial amount of additional time to respond to a request.

II REASONS FOR THE DELAYS IN THE DEPARTMENT PROCESSING THE APPLICANT'S REQUEST

10. During our discussions, Department officials indicated that conducting the search for the relevant records in this case would prove somewhat challenging, given that mid-summer is the peak of construction season and nearly all of the staff tasked with conducting searches would be working off-site until the end of November 2018.
11. While the Department's right to information staff at its central office have access to some of the requested records, such as inspection reports, the Department indicated that many of the records in question are held by one of the Department's regional operations divisions, including some paper records and these staff's email records. The regional Buildings Division that holds most of the requested information is responsible for looking after all construction projects for schools and hospitals. At the time this request was received, this Division had 22 major construction projects in progress and this was a priority for all staff at the Division.
12. The Division does not have its own staff assigned to assist with access requests and when a request is received that involves its records, Division staff are asked to complete these tasks as soon as is reasonably possible, in light of the other ongoing construction projects at the time.
13. After receiving this request, the Department's right to information staff issued a search request to the Buildings Division on July 25, 2018. At the time of the Department's application for time extension, it

was estimated that there were approximately 5,000 pages of relevant records to be searched and that the search effort would require approximately 600 hours to complete. The Department had developed a schedule to allot a certain amount of time per week to encourage continuous progress on the search efforts, and based on the time extension decision, set an internal time limit in early February 2019 to complete the search and have the records sent to the central office for processing.

14. Department officials explained that at no time did the search efforts stall or fall off the priorities list; however, they indicated that they encountered some additional delays. Department officials explained that during some weeks, staff at the Buildings Division were unable to devote the allotted time to search efforts as ongoing construction projects took precedence. Department officials also indicated that the search for electronic records, particularly emails, took additional time than anticipated due to the recent switch to a new email server, which seems to have removed some users' ability to conduct electronic searches of older emails that had been archived. One official indicated that this meant that the search for emails in the archived folder had to be conducted manually, which also required additional time to complete.
15. A further complicating factor was that the records contained a large amount of duplicate records and, as the Applicant had specifically asked that only records that had not been previously provided through previous access requests be provided, this meant that Department staff had to cross-reference previous disclosures with the search results for this request, which took additional time given the volume of records involved.
16. Despite the target date in early February 2019, the search for records in the regional Buildings Division was not completed until March 27, 2019, eight months and two days after the search request was issued. The records returned from these search efforts amounted to approximately 1,200 pages of records.
17. Once the records were received by the Department's right to information staff on March 27, 2019, much to their credit, significant efforts were expended to issue the response to the Applicant as soon as possible from that point. After the records were sorted and reviewed for duplicates, the Department was able to expedite the third party notification process as the Department had recently processed requests for similar information and was able to more quickly consult before arriving at a decision with respect to the Applicant's access rights.
18. Once this was complete, the Department was able to complete the sign-off process within two days and issued a response to the Applicant on April 17, 2019, 12 business days after the extended time limit and 6 business days after the Applicant filed this complaint.

19. The Department did not contact the Applicant during the extended time period to process the request to provide updates, nor was the Applicant contacted when it became clear that the Department would not be able to meet the extended April 1, 2019 time limit to respond. While contacting the Applicant would not have changed the fact that the Department failed to meet the extended time limit to respond or necessarily have prevented the Applicant filing a complaint, it may have been seen by the Applicant as a good faith effort on the Department's behalf.
20. When an applicant does not receive any update and the time limit to respond passes without any communication from the public body, this greatly increases the chances that the applicant will either complain to this Office or refer the matter to the court for review.
21. The Department informed us that it recognizes the importance of keeping in regular contact with applicants and has incorporated this into its routine practices in processing access requests; however, it admitted that it had not done so in this case.
22. During our discussions, the Department indicated that the main delay in responding to this request was the search process and acknowledged that it was not acceptable that the search took so long to complete in this case. Department officials stated that they had considered providing partial responses to the Applicant but given that most of the relevant records were held by the regional Buildings Division, that there were few records that could have been provided before the full search was complete.

III FINDINGS

23. Given the above, I must find that this complaint has merit as the Department did not meet the extended time limit to respond to the Applicant's request.
24. As indicated above, the main reason for the delay in the Department responding to this request was the length of time to complete the search of records held in one of the Department's regional branches and required operation staff's time and expertise to do so.
25. My comments on this issue are set out below, along with my reasons for finding that the Department did not fully meet its duty to assist by not keeping the Applicant informed as to the status of this access request, including when a response could be expected once the Department became aware that it would not be able to meet the extended time limit of April 1, 2019 to respond.

Department's resources for processing access requests and workload issues of regional staff

26. The Department is routinely one of the busiest Provincial departments with respect to number of access requests it receives and processes per year. The Department is also relatively well resourced in terms of dedicated staff to help the Department fulfill its right to information obligations. I am aware from previous investigations, as well as this matter, that the Department's senior management is interested and invested in ensuring that the Department is meeting its access obligations under the *Act*.
27. While I am aware that the Department has encountered difficulties in meeting its timelines in processing larger and more complex requests at certain times in the past, over the last couple of years, the Department has only been the subject of a few complaints about its lack of timeliness in providing responses to applicants.
28. At the time the Department submitted the time extension application with respect to this request, it had 13 active access requests in total, five of which it had categorized as being large in volume and scope. Since April 1, 2018 to the time of the time extension application in October 2018, the Department had received 37 access requests. The Department indicated that this was not an unusual number of requests for it to receive during this time period; however, Department officials noted that some of these requests were larger in scope and required more time and resources to process than usual.
29. As the Department noted in our discussions, planning to have appropriate resources in place to meet a public body's obligations with respect to access requests at all times is an inexact science, as public bodies cannot always predict the volume or complexity of access requests it may receive at any given point in time.
30. In this case, the delay was not caused by a shortage in dedicated right to information staff or difficulties in locating and retrieving the relevant records, but rather the lack of time available for the staff in the regional Buildings Division who had custody of the relevant records and the appropriate subject-matter expertise to ensure that a meaningful search was carried out. In short, the delay was caused by workload issues in the Department's regional Buildings Division, which was tasked with a busy construction season that routinely required staff to be working off-site for an extended period of time when the call for relevant records was issued at the end of July 2018. As the ongoing construction projects were identified as the priority for the Buildings Division staff, searches for relevant records were conducted when these staff found time to dedicate to this task.

31. Despite routine follow-ups from the Department's right to information staff, the search results were provided by the Buildings Division for processing on March 27, 2019, eight months and two days after the Department received the request and 4 business days before the extended time limit to respond of April 1, 2017.
32. As indicated above, the Department recognizes that the time taken to complete the search for relevant records in this case is not acceptable and the Department has and will continue to explore ways to ensure greater efficiencies and timeliness when access requests involve records held in regional offices and require regional staff tasked with other duties to assist with search efforts.
33. I am pleased that the Department is taking the lessons learned from this case under consideration and is actively seeking ways to prevent a similar lengthy delay from recurring. To encourage the Department to continue with such efforts, a recommendation on this point will follow.

Section 9: Duty to assist

34. As set out in this Office's guidance document on the duty to assist and meaningful responses,¹ the duty to assist provision compels all public bodies to be helpful and assist applicants throughout the processing of an access request:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

35. The duty to assist includes having discussions with applicants to ensure that the public body understands what information he or she is seeking, that a reasonable search for the relevant records is conducted, and that the public body provide a timely and meaningful response to the access request.
36. As indicated above, I find that the Department did not complete the search for all of the relevant records in a timely manner, and that the Department also did not keep the Applicant informed of the status of the processing of the request, particularly when it realized that it would not be able to meet the extended time limit to respond to this request.
37. As the issue of the timeliness of the search has been addressed above, there is no need for me to make further comment on this point.

¹ [Duty to Assist and Meaningful Responses: Sections 9 and 14 of the *Right to Information and Protection of Privacy Act*](#), Office of the Ombud—Access and Privacy Division, Fredericton NB, October 2018 (updated: November 2019).

38. During our discussions with Department officials, they indicated that keeping in regular communication with applicants throughout the processing of access requests is part of its overall practice, including when access requests are received and as the processing of requests unfolds. In this case, the Department admitted that it failed to keep in touch with the Applicant, including when it realized that it would not be able to meet the extended time limit of April 1, 2019.
39. While better communications with the Applicant may not have solved the delay in the search process in this case, it may have helped the Applicant better understand the steps the Department was taking to address this request, the reason why it was encountering delays in being able to do so, and as to when the Applicant could expect to receive the response. If the Applicant had concerns about how the Department had interpreted the request or why the search was not able to be completed in a timelier manner, this may have allowed an opportunity for such discussions to take place.
40. As for future access requests, a recommendation will follow that the Department better comply with its duty to assist applicants by ensuring that it keeps in regular contact with all applicants throughout the processing of an access request.

IV PROCESS FOR ADDRESSING TIME EXTENSION APPLICATIONS

41. As indicated above, when the Applicant learned that a significant further extension of time had been granted to the Department to respond to this request, the Applicant was not only surprised, but also concerned about the fact that this had occurred without the Applicant's prior knowledge or the opportunity to provide input.
42. While this Office initially addressed these concerns directly with the Applicant by explaining that the time extension application process under s. 11 of the *Act* is not akin to a complaint process and the burden of proof is solely on the public body to demonstrate that factors exist to support a finding that the public body has met the test to merit additional time to respond to an access request, we could nevertheless appreciate the Applicant's dissatisfaction with this outcome, particularly where the extension granted in this case was significant: an additional five and a half months.
43. A decision by this Office to grant time extensions to public bodies effectively delays the response time to an access request and can have a significant impact on an applicant's access rights, particularly where a public body has established a case for a substantial extension of time to respond to an access request. While the onus is on the public body to establish that a time extension application has merit under the circumstances set out in s. 11(3) of the *Act*, and there is little an applicant would be able to contribute in the assessment of the time extension application process, as the *Act* presumes an

applicant's right to timely access, unless the public body can establish grounds to refuse access or take more time to respond.

44. That being said, we did consider whether better communication between the public body and the applicant during the initial timeframe to respond to the request, including where the public body realizes that it will not be able to meet its time limit to respond could alleviate some of the concerns raised in this case, and whether our process could be adapted to keep applicants better informed of the status of the processing of access requests.
45. As such, we took the opportunity to explore whether we could adapt our approach in cases where we find that the public body has established a case for additional time to respond to an access request.
46. As a starting point, to remove the element of surprise for an applicant who, in many cases, will be unaware that the public body has submitted a time extension application to this Office, we are now asking public bodies to contact the applicant to discuss the status of the request either before or when they submit a time extension application to this Office. The intent is to encourage better communications between public bodies and applicants about the current status of the access request and any issues the public body may have encountered in processing the request. It is hoped that a discussion at this point will allow the public body to explain to the applicant any challenges or issues it is facing in processing the request, which may in turn help the applicant better understand the work involved to process the request. If there was a misunderstanding as to the intended scope of the request or the records the applicant was hoping to receive in response from the public body, this would also allow for a discussion on this point to take place and, in some cases, may result in a narrowed scope or a focus on only the records that are of particular importance to the applicant.
47. In some cases, particularly where the public body only requires a few additional days to respond to the request, a discussion with the applicant may lead to an agreement between the parties as to the date on which the applicant can expect to receive the response, even if this is outside of the public body's legal time limit to do so. If the applicant is kept up-to-date on the status of the request and when to expect the public body's response, this can often alleviate the applicant taking the step of filing a formal complaint on timeliness.
48. In addition to asking public bodies to contact applicants about time extensions, in the event that this Office determines that a public body merits a substantial time extension to process and respond to an access request, when we issue such a decision, we will grant preliminary extensions and before granting a further extension, will require public bodies to report back on the progress that has been made to address the request since the previous time extension.

49. The anticipated benefits to this approach are:
- holding the public body accountable in ensuring that the remaining work that needs to be completed to provide a full and meaningful response to an access request is conducted in as timely a manner as possible, throughout the extended time period to respond;
 - allowing any unforeseen circumstances or changes in the time or resources required to process the request to be addressed, if necessary; and
 - keeping applicants updated on the status of the processing of the request during the extended time limit for the public body to respond.
50. We do not anticipate that this will place an onerous burden on the public body as we will only be looking for a brief update from the public body to verify that the processing is continuing in a timely fashion and to make a determination whether a further time extension is merited at that time.
51. In the event that a public body becomes aware that it will not be able to meet the extended time limit to respond, we will also be asking the public body to contact us as soon as possible to seek direction from this Office. If the situation merits a further time extension, this can be addressed at that time and if not, we will direct the public body to contact the applicant to advise as to when a response can be expected and of the applicant's right to either file a complaint with this Office under s. 67 or refer the matter to the Court of Queen's Bench under s. 65 of the *Act* if the public body does not meet the time limit to issue a response.

V RECOMMENDATION

52. As the Department did provide the Applicant with a response to this request, there is no need for a recommendation on this point.
53. Under the authority of s. 64.1(1)(h) of the *Act*, I recommend that the Department:
- (a) ensure that its right to information staff keeps in regular contact with all applicants throughout the processing of access requests, including when the Department is encountering difficulties or challenges in meeting the time limit to respond a particular request, in keeping with the duty to assist under s. 9 of the *Act*; and
 - (b) continue to review its access to information processes with a view to improve its internal practices when a request involves records held by any of its regional operations branches and implement measures to reduce or eliminate these kinds of delays.

54. As these recommendations are made under my general powers and duties under s. 64.1(1)(h) rather than s. 73 of the *Act*, the timelines for responding to these recommendations under s. 74 do not apply, nor do they trigger the appeal rights under s. 75 of the *Act*. Nevertheless, I ask that the Department notify this Office of its decision with respect to the recommendations above within 20 business days of receipt of this report.

This Report issued in Fredericton, New Brunswick this 11th day of December 2019.

original signed by _____

Charles Murray
Ombud for the Province of New Brunswick