NUNAVUT INFORMATION AND PRIVACY COMMISSIONER
Review Report 21-182
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Review File 20-148-5
January 7, 2021

BACKGROUND

On July 13th, 2020 my office received a request from the Applicant to review the failure of the Department of Health to respond to his requests for information. The Applicant had made 9 separate requests for information which, with his consent, had been combined into two requests - one to be dealt with by the Department of Health and one to be transferred to the Department of Human Resources pursuant to section 12 of the *Access to Information and Protection of Privacy Act*. These requests were made to the Department between November 29th, 2019 and December 4, 2019. The Applicant received partial responses to the request for information on January 17th and April 15th. He questioned the application of section 25.1(b) to certain information withheld from documents in the April 15th response. The Applicant also noted that the response was not complete and asked for a review of those parts of the request which had not been dealt with on the basis that there had been a deemed refusal.

On September 3, 2020, the Department wrote to the Applicant with a fee estimate of $21.50 for the balance of the records. Though it is not entirely clear, it appears that the total number of responsive records was 304 pages with the first release of 48 pages being completed without any fee assessed, as well as the second release of 145 pages. Before the last set of records was disclosed, however, a fee of $21.50 was assessed and payment requested. The Applicant paid the fees so as to be able to receive the records requested but asked me to review the timing of the fee assessment and whether it was in accordance with the *Access to Information and Protection of Privacy Act*. It is my understanding that after discussions with this office, the Department refunded the fees paid.

On October 9th, the Department advised me that it had disclosed the third and final set of responsive records to the Applicant. I advised the Applicant that, in light of the fact that the Department had rectified the deemed refusal, I would be reviewing the matter on the basis of the records actually disclosed and asked if he had any further concerns about exceptions applied to the last set of records disclosed. The Applicant did not raise any further concerns with the disclosure.

THE ISSUES

There are a number of issues to be addressed in this review.

1. The Department's obligation to respond to a Request for Information within 25 business days pursuant to section 8 of the Act and the Department's obligation to assist the Applicant and to respond to the Applicant "openly, accurately, completely and without delay" pursuant to section 7 of the Act.

2. The application of a fee nine months after the public body received the request for information.

3. The application of section 25.1(b) to a specific document.

DISCUSSION

1. <u>Sections 7 and 8</u>

Section 7 of the *Access to Information and Protection of Privacy Act* places a positive obligation on all public bodies to respond to access to information requests "openly, accurately, completely and without delay". The section is often referred to as creating a "duty to assist". It requires public bodies to be open and to communicate with the Applicant fully and accurately. This includes being honest with the Applicant when there are going to be problems in responding. In this case, the request for information was made after the

ransomware attack on the GN in early November, 2019 and at a time when the public body knew that, as a result, they could not access historical email which was temporarily unavailable. On January 15th, the ATIPP Coordinator for the Department of Health advised the Applicant as follows:

> We are still working on this request. As the Help Desk is still working on retrieving the back up emails before the malware attack, we are still awaiting to receive the electronic data pertaining to this request. We may need an extension for this request, which we will let you know on January 20th.

On January 17th, in conjunction with the release of the first batch of responsive records provided to the Applicant, the public body advised him:

> The records pertaining to the attached portion of the request will be released to you by early next week and we are currently working on this request. For the remaining portions of your request, an extension letter will be sent to you sooner.

In the letter of extension, also dated January 17th, the public body advised the Applicant that:

> Requests made under the *Access to Information and Protection of Privacy Act* are normally responded to in 25 business days, however due to circumstances beyond our control this is not currently possible.
>
> The Government of Nunavut is currently trying to restore operations after a ransomware attack on November 2nd, 2019. While many systems are now online, other data such as emails sent or received before November 2nd, 2019 have yet to be restored.

> We will provide you an update on progress responding to your request on February 14th.

Section 8 of the Act requires public bodies to respond to all access to information requests within 25 business days of their receipt of the request. The only exception to this time frame is if the time can be extended pursuant to section 11 of the Act. Section 11 allows for an extension of time in the following circumstances:

(a) the applicant does not give enough detail to enable the public body to identify a requested record;
(b) 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;
(c) more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record;
(d) a third party asks for a review under subsection 28(2); or
(e) a requested record exists in the control of the public body only in a language other than the Official Language of Nunavut requested by the applicant and additional time is required for translation.

Clearly none of these circumstances existed in this case. Nor did the Department of Health in any way suggest that they did. They simply took the position that they were unable to complete the request because of the ransomware attack.

It was not until October that the historical emails pertaining to this request were restored and the final part of the response could be provided to the Applicant.

While section 8 of the Act was clearly not complied with, the public body was up front with the Applicant about the reasons for the delay. Despite the fact that they were clearly in a deemed refusal situation (section 8(2) provides that when an access to information request

is not responded to within 25 business days or any extension properly taken, the public body is deemed to have refused access to the records), they continued to pursue the matter and were, eventually, able to provide the records to the Applicant. While I cannot (and do not) condone the delay, there is really nothing more that the public body could have done in this case to respond any more quickly to the request. Furthermore, they were honest with the Applicant throughout about the cause of the delay and provided him with regular updates. They did not, however, advise the Applicant at any time that he was entitled to seek a review of the deemed refusal by the Information and Privacy Commissioner.

2. The application of a fee nine months after the public body received the request for information.

Section 5(3) of the Act provides that the right of access to a record is subject to the payment of any applicable fee. Further, Section 50(1) provides that:

> The head of a public body may require an applicant who makes a request under section 6 to pay the prescribed fees for services provided.

Section 50(2) is also of importance. It provides that where an applicant is required to pay fees for services, the public body must give the applicant an estimate of the total fee **before providing services.**

Section 12 of the Regulations under the *Access to Information and Protection of Privacy Act* provides that the only fees that may be charged for the processing of a request for personal information (which is what was being requested in this case) is for photocopies required to respond to the request and where the amount of the fees does not exceed $25.00, no fee is to be charged. In this case, it appears that the public body requested fees totaling $21.50.

Section 13 of the Regulations provide that once a notice of the estimate of fees has been provided to the Applicant, the public body is to cease processing the request until the

Applicant agrees to pay the fees assessed and, where the fee is more than $150.00, pays half of the assessed amount.

Regulation 14 provides that the head of a public body may excuse the Applicant from paying all or any part of a fee if, in the opinion of the head, the Applicant cannot afford the payment or "for any other reason it is fair to excuse payment".

I have a number of concerns about the fees assessed in this case.

a) The Applicant initially made nine separate requests for information, two of which were combined and transferred to the Department of Human Resources and the remaining seven of which were combined into one request to be responded to by the Department of Health. In light of the total number of records involved in the response, it appears likely that if the public body had responded to each request separately, none of them would have met the $25.00 threshold for the application of a fee. The requests were combined at the behest of the public body. It makes absolute sense in a case such as this one to consider combining a number of similar or related requests into one so as to create efficiencies for the public body. I question, though, whether the Applicant should be required to pay to create those efficiencies where he would not otherwise have been required to pay a fee. When a public body suggests that a number of requests for information be combined into one, in my opinion one of two things should happen. Either the public body should waive or at least adjust the applicable fee or the Applicant should be advised of any additional costs associated with combining the requests so that he/she is fully informed about the consequences of agreeing to that combining of the requests.

b) The fee estimate in this case was not issued before the public body provided the services. The regulations require that the fee assessment be communicated to the Applicant before any records are disclosed. This gives the Applicant the opportunity to decide if they are prepared to pay the assessed fee or, alternatively, to amend or revise their request for information to reduce the number of responsive records and

avoid unnecessary costs. If no fee is assessed before records are disclosed, in my opinion the public body cannot charge fees at all and this is so whether the records are all disclosed at once or, as in this case, in parts. In this case the fees were assessed after the responsive records had been identified and after at least some of the records had already been disclosed.

c) Fees are not mandatory. A public body's ability to attach fees to an request is discretionary. It is, of course, important to have a clear policy as to when fees should be waived, including a non-exhaustive set of considerations that should go into the exercise of that discretion, so as to ensure fairness to Applicants. If the default position is to charge fees in all cases where those fees are more than $25.00, I have no real problem with that position. However, where the public body is unable or fails to meet its obligations under the Act in terms of time frames or some other aspect of its responsibilities under the legislation, it seems to me that this is a circumstance in which it is fair (and perhaps more than that, it is appropriate) to adjust or waive the payment of fees. In this case, whether it was the Department's fault or not, they were unable to respond fully to the Applicant until ten months after the request for information had been made. I would certainly consider this a circumstance in which it would be "fair to excuse the payment."

3. Section 25.1(b)

Section 25.1 of the Act is a fairly new provision, having come into effect only in 2017. It provides as follows:

> 25.1. The head of a public body may refuse to disclose to an applicant
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> (a) information relating to an ongoing workplace investigation;
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> (b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could

reasonably be expected to cause harm to the applicant, a public body or a third party; and

(c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.

In this case, the public body referred to section 25.1(b) to justify withholding most of one of the responsive records – a letter of complaint signed by several staff of the division in which the Applicant had been employed. The rationale provided by the public body in refusing to disclose information in this record to the Applicant was that the letter was used to evaluate the Applicant's performance. The Applicant however, argues that the original intent of the letter was to complain to the Applicant's superiors about him. He notes that his superior had reviewed the complaint and found that the complaints had no merit and chose not to investigate.

The letter in question appears at page 50 of the responsive records. It is a handwritten letter. The signatures at the bottom have not been redacted but the entire body of the letter has been withheld pursuant to section 25.1(b). In order for section 25.1(b) to apply, the record must meet the following criteria:

a) it must be information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place;
b) and the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party.

As the Applicant suspected, the content of the letter is a complaint against the Applicant. It has been signed by a number of employees in the Applicant's work group, and the names of those individuals have been disclosed.

The Department has not addressed the reasons for their decision to redact this material in any detail. The document must therefore be evaluated largely on the basis of the record

itself. I am prepared, for the purposes of this review, to concede that when this letter was written it was the hope of the authors that it would lead to a “workplace investigation”. It therefore meets the first part of the test. There is, however, no evidence provided that the release of the information could reasonably be expected to cause harm to the Applicant or to any other person. The information in question is opinion about the Applicant and his management style. Disclosure of this opinion to the Applicant is unlikely to result in any harm to him. There is nothing to suggest that the disclosure of the complaint/opinion could reasonably be expected to harm the public body. This leaves only the third party authors of the letter. If the Applicant were in a position of authority over the individuals named in the letter, it might be reasonably expected that disclosure of the record might cause harm to them. But the Applicant is no longer employed by the GN. No specific harm has been identified as possible, let alone reasonably expected. Without something more, one cannot conclude that any of these third parties might be harmed by the disclosure of this letter in these circumstances. This letter does not meet the second of the criteria necessary for its application. And even if it could be said that there is a reasonable expectation that disclosure might result in harm, it must be noted that the content of the letter relates to the opinions of the authors about the Applicant’s management style and this is by definition the personal information of the Applicant. Individuals, except in very narrow circumstances, are entitled to know what information the public body has about him. In fact, had I been reviewing this record for disclosure, I would have been inclined to withhold the names of the individuals who signed the letter pursuant to section 23 of the Act. The identity of those who signed the letter may well be personal information of those individuals, the disclosure of which would constitute an unreasonable invasion of their privacy pursuant to section 23. While the identity of the person who expressed the opinion is the personal information of the person providing the opinion, the opinion itself is the personal information of the individual the opinion is about.

FINDINGS

I find that the Department of Health failed to comply with either section 7 or section 8 of the *Access to Information and Protection of Privacy Act*. It appears that the ransomware attack

in November was a large part of the reason that the Department could not comply with the Act. This, however, is not a reason for delay contemplated by the Act so as to extend the time for responding to a request for information. I suspect that part of the delay was also a result of the “work from home” requirements brought on by COVID-19 pandemic, though the Department did not make reference to this issue. Regardless, neither of these reasons are listed in the legislation as justification for the delay of 10 months in responding to a request for information. Nor was the fee properly assessed under the Act. A fee, if one is to be assessed, must be assessed before the end of the 25 business day response period or any properly taken extension of time. In these circumstances, I find that it would have been “fair” in all of the circumstances, to waive any applicable fees, with or without a request from the Applicant.

Finally, I find that the document at page 50 of the second responsive package did not meet the criteria for an exception to disclosure section 25.1(b) of the Act because there is no evidence to suggest that the disclosure could reasonably be expected to cause harm to the Applicant, the public body or any other person.

RECOMMENDATIONS

I make the following recommendations:

1. That in any case in which the Department of Health (or any other public body under the Act) is in a deemed refusal situation pursuant to section 8(2) of the Act, the Applicant be pro-actively advised that he/she has the right to seek a review of the deemed refusal to the Information and Privacy Commissioner. Alternatively, I recommend that the public body’s acknowledgment letter to the Applicant contain a statement that, in the event that the public body does not respond to the Access to Information Request within 25 business days (or any extension properly taken pursuant to section 11 of the Act), there is a deemed refusal and that the Applicant is entitled to seek a review by the Information and Privacy Commissioner.

2. That where a fee is to be assessed on an access to information request, that the fee assessment be provided to the Applicant within the first 25 business days and that such assessment contain the information required by section 50 of the Act and section 10 of the Regulations. In the event that no fee assessment is made prior to disclosure of records, no fees should be assessed.

3. That the Department of Health establish a written protocol with respect to the application of fees, including not only a step by step guideline for compliance with the Act and Regulations when assessing fees, but also criteria for the waiver or reduction of fees in appropriate circumstances, including circumstances in which the Department (or any other public body) is unable to meet its obligations under the ATIPP Act for any reason.

4. If not already done, I recommend that the Department in this case refund the Applicant any fees paid by him in relation to this request.

5. I recommend that the Department disclose the body of the letter contained at page 50 of the second set of responsive records (handwritten letter dated October 24th, 2019)

Elaine Keenan Bengts
Information and Privacy Commissioner