

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Decision 05-19
May 2, 2005
Review File: 05-110-5

A. BACKGROUND

By a letter dated December 21st, 2004, received by fax in this office on December 23rd, the Applicant requested that I review the response which he received from the Department of Economic Development and Transportation to a request he made for certain information. Paraphrased, the information requested by the Applicant was:

correspondence from and between the Minister of the department and the Assistant Deputy Minister of the department between September 1st, 2004 and October 20th, 2004 with respect to a disciplinary matter involving the Applicant arising as a result of a complaint from clients and funding partners of the department, as well as all correspondence, letters, e-mails, (exchanged, sent and/or received) among certain named individuals both inside the department and outside the department relating to the Applicant.

The Department responded to the Applicant's request for information but indicated that some of the records which had been requested contained information that was "excepted from disclosure" under section 23(1) of the *Access to Information and Protection of Privacy Act*. Those sections identified by the public body as being exempt from disclosure were severed and the balance was provided to the Applicant.

In his request to me to review the matter, the Applicant indicated that he felt that he did not receive all of the relevant records. He pointed out that certain e-mail correspondence received by him, there were "cc's" noted as having been sent to other people within the government but there were no e-mails provided from the persons

copied in the original e-mail. Furthermore, he suggested that one of the individuals from whom correspondence was requested had indicated in an e-mail that a letter had been placed on the Applicant's official personnel file but no such letter was produced in response to the Applicant's request for information.

B. ISSUES

There are, in my opinion, three issues which arise in this Request for Review. The first is whether the department provided the Applicant with all of the relevant records. The second is whether section 23(1) of the Act was properly applied. The third, and perhaps most significant issue for me, is whether the public body complied with section 7 of the act which requires that "the head of a public body shall make every reasonable effort to assist the applicant and to respond to an applicant openly, accurately, completely and without delay".

C. DISCUSSION

1. Perceived "gaps" in the information provided

The first issue is that there appear to be "gaps" in the records provided. For example, the Applicant points out that there are some instances in which an e-mail was sent with copies to several people. Because his request was for all e-mails sent and received, he anticipated that he would receive not only the e-mail as sent from the originator's computer, but that he would receive a second copy of the same e-mail as received by the individual copied. He says this did not happen in all cases. He also noted that there was at least one letter which he was told had been placed on his personnel file that was not provided. The public body, in its response to me, suggested that the "gaps" in the documentation were "deemed by our legal counsel to be outside the "date" of the request or outside the "range" of the request. If the date of the record was not strictly within the dates provided by the Applicant in his request, the record was not provided. Further, if the record did not fit the exact description of the kind of record requested. For example, there were minutes of meetings and other notes which the department said were not "correspondence" and were not, therefore provided. If the

correspondence was sent or received from someone not specifically named in the Applicant's request, the record was also not provided.

On a very narrow reading of both the Act and the Applicant's request for information, the public body was technically correct in its determination that the records not provided did not fall within the scope of the request. However, I am troubled by the response provided in that it appears to me that the public body was actively seeking ways to limit the number and scope of the records being provided to the Applicant instead of complying with the spirit of the legislation and interpreting the request in its most expansive form. I will have more to say with respect to this issue later.

2. Section 23 deletions

Unfortunately, although the public body has provided me with copies of all of the records which they have **not** provided to the Applicant in response to his request for information, they have not provided me with copies of the records which they **have** provided to him in response to his request for information. Where, as here, there appears to have been some information severed from the records before providing them to the Applicant, and the Applicant is unhappy with the response, it is customary on review to provide the Information and Privacy Commissioner with a full copy of the records provided, along with an unsevered copy of the records and an explanation as to why the parts were severed. That did not happen in this case and I cannot, therefore, comment at this time on whether those portions were properly severed.

3. Did the public body use all reasonable efforts to assist the Applicant.

Dealing only with those records which were not provided to the Applicant, either because the records were said to be outside of the "date range" of the request or outside of the "range" of the request, I have to say, as an outside observer, that the public body appears to be actively seeking ways to limit the response provided to the Applicant. They did nothing, it seems, to communicate with the Applicant to confirm the

scope of his request or to work with him to ensure that he got the records he needed for his purposes. The Applicant was asking for records in which there were discussions about a disciplinary matter concerning his work in his position within the government. It was easy to determine why he was seeking this information. Quite apart from the access to information request, one would have thought that most, if not all, of this documentation would have been made available to the Applicant in the context of the disciplinary process. It appears that, although he asked for the records in that context, they were not forthcoming. This fact, combined with the perceived attempt to limit the information given to the Applicant on his access to information request, gives the appearance that the public body was trying to hide something. This is not to say that they were trying to hide something, just that it gives that appearance. This, in turn, raises suspicions in the mind of the Applicant. Section 7 of the *Access to Information and Protection of Privacy Act* requires every public body to “make every reasonable effort to assist the applicant and to respond to an applicant openly, accurately, completely and without delay”. There are any number of decisions across the country which have held that the access provisions of the Act should be read widely and that exemptions and exclusions should be narrowly applied.

In this case, the public body clearly had doubts about the scope of the request being made to the point that they sought legal advice as to what they “had to” disclose. It seems to me that if there was a question about the wording of the Request for Information, clarification should have been sought from the Applicant instead of seeking legal advice as to how to narrow the response provided to the Applicant. People who apply for access to records are not all going to be able to articulate their requests clearly. The legislation recognizes this and puts a positive onus on the public body to work with Applicants to ensure they get all of the information they are seeking. Failure to do this not only makes it look like the public body has something to hide, but it creates more work in the long run. I suspect that the Applicant in this case, having now received knowledge that there are other records which might contain the information he is looking for which are outside the date of his request or involve people not specifically named in his request, will be making a second request for information, creating the need to respond a second time to essentially the same request. This is an inefficient

use of time and resources. In my opinion, the public body failed, in this case, to comply with section seven.

C. RECOMMENDATION

In view of the above discussion, I make the following recommendations:

- a) that the public body consult with the Applicant to determine whether he wishes to receive records relevant to his request which are outside either the date and/or the range of his original request.
- b) in the event that the Applicant answers in the affirmative, that the records identified as having been responsive to the request but outside either the date or the range of the request be vetted in accordance with the Act and provided to the Applicant within 30 days of the date that this recommendation is accepted

I am reserving my decision with respect to the issue of whether or not section 23 was properly applied to the information severed from the records which were provided to the Applicant. On this issue I direct that the that the public body provide me with a copy of all of the records provided to the Applicant in response to his request for information in both their severed and unsevered form so that I can review these records to confirm the deletions were appropriately done under section 23. To this end, I will require an explanation, as well, from the public body for each item severed as to which subsection of section 23 is being relied on. This should be provided to me within 15 days of receipt of this recommendation.

Once I receive these records, I will review them and provide a supplementary review recommendation dealing only with those records.

In a more general way, I would encourage the Department of Economic Development and Transportation (and, in fact, all public bodies) to take all steps possible to accommodate persons seeking access to government records. The more thorough,

open and accommodating responses are, the less Applicants will feel the need to either complain to this office or make secondary requests which could have (and should have with a little bit of consultation) been dealt with in the first instance.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
July 31, 2005