

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 07-27
September 12, 2007
Review File: 07-210-5

A. BACKGROUND

By letter dated July 20th, 2007, the Applicant asked my office to review "the failure of the Department of Education to give me access to documents responsive to my access request" within the time allotted for in Section 8 of the *Access to Information and Protection of Privacy Act*. On July 23rd, I asked the public body to provide me with their explanation with respect to the matter. The public body responded to me by letter dated July 26th, 2007 which was received in my office on August 9th. The Applicant was provided with a copy of the response and asked for any further input he might have by September 10th.

No further input was received from the Applicant.

B. THE PARTIES' POSITIONS

The Applicant made a Request for Information of the Department of Education by letter dated June 4th, 2007. That Request for Information appears to have been delivered to the Department either by e-mail or by facsimile transmission. By letter dated June 7th, 2007, the Department wrote to the Applicant acknowledging the receipt of the Request for Information and advising the Applicant that there was a \$25.00 fee payable and providing information as to how that fee could be paid. The letter to the Applicant also advised him that the imposition of the fee could be appealed to this office.

The Applicant paid the \$25.00 fee by way of a postal money order which was apparently delivered to the Department on June 19th, 2007.

The Applicant's Request for Review indicates that he had not received a response to his Request for Information as at the date of his Request for Review, which was July 20th and, therefore, that by virtue of Section 8(2) of the Access to Information and Protection of Privacy Act the Department was deemed to have refused to provide the requested records.

The public body provided me with a copy of correspondence addressed to the Applicant and dated June 28th, 2007 in response to his Request for Information. The letter advised the Applicant that it was extending the time for responding to the Request for Information to August 2nd, 2007. They advise that the letter was placed in the mail to the Applicant on June 28th.

Unfortunately, they did not send the letter by registered mail or by any other means which would allow them to track deliver and they could not, therefore, provide documented proof of the date of mailing. I accept that the letter was mailed through Canada Post on or about the 28th of June.

It is unclear from the materials before me when that letter was received by the Applicant.

C. DISCUSSION

Part I of the Access to Information and Protection of Privacy Act outlines the procedure for requesting information from a public body. The relevant portions of the legislation are the following:

8. (1) The head of a public body shall respond to an applicant not later than 30 days after a request is received unless
 - (a) the time limit is extended under section 11; or
 - (b) the request has been transferred under section 12 to another public body.

- (2) The failure of a head to respond to a request in time is to be treated as a decision to refuse access to the record.
- 11(1) The head of a public body may extend the time for responding to a request for a reasonable period where
- (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; or
 - (d) a third party asks for a review under subsection 28(2).

As has been pointed out by the Applicant, Section 8(2) of the Act provides that if no response is received to a Request for Information, the matter is to be treated as if there was a refusal to disclose the records requested. In order for this "deemed refusal" to arise, however, the public body must fail to "respond" to the Request for Information within 30 days that the completed application is received by them. In this case, the Application was complete when the fee was paid. The public body, therefore, had 30 days from June 19th to "respond" to the request. That response came in the form of the letter extending time for response to August 2nd, 2007.

Keeping in mind the wording of Section 11, it is clear that a letter advising the Applicant of an extension of time to provide the requested records is a "response" as contemplated by section 8 of the Act.

The real question is whether the response has to be actually received by and in the

hands of the Applicant within the 30 days or whether it merely has to be sent to the Applicant before the end of the 30 day period. Although public bodies should always endeavor to have responses actually delivered into the hands of Applicants within 30 days, in my opinion, it is sufficient if the letter is postmarked within the 30 days. If the legislation intended otherwise, it would have been more specific. The Meriam-Webster Dictionary provides the following definition for the term "response":

something constituting a reply or a reaction

In my opinion, the Act requires only that the public body have "responded" in writing within the 30 days and sent that response by some reasonable means in order to have "responded" within 30 days. Otherwise, the legislation would have specifically stated that the public body was required to "deliver" its response within 30 days. In this case, the letter was put in the mail more than 20 days ahead of their deadline. Once placed in the mail, there is no control over how long it might take to be delivered to the Applicant, particularly where, as in this case, the Applicant resides in a small, relatively isolated community. There is also no control over when the Applicant might pick up his mail. For all we know, the letter was in the Applicant's post office box long before the end of the 30 day response period, but for one reason or another had not been picked up. I am satisfied that in this case, the public body "responded" to the Applicant within 30 days and that there was, therefore, no deemed refusal to disclose pursuant to Section 8(2) of the Act.

D. CONCLUSION AND RECOMMENDATIONS

As noted above, it is my opinion that the public body in this instance complied with Section 8(1) of the Act by mailing a letter to the Applicant almost three full weeks before the end of the 30 day response period. That the Applicant did not actually receive the letter within the 30 days is somewhat anomalous and not something that was within the control of the public body. In most situations, one would expect that it would take less than three weeks to deliver such a letter within the Territory, even to a small, isolated community.

In the circumstances, therefore, I make no specific recommendations with respect to the Applicant's Request for Review.

In an effort to avoid similar situations in the future, however, I would make some general recommendations applicable to all Requests for Information as follows:

1. Where the Applicant provides a private facsimile number, it would be appropriate for public bodies to send responses by fax before dropping them in the mail to ensure a timely delivery. It is to be noted that, in this case, the Applicant does not appear to have a private fax machine available to him. It appears that the Applicant has from time to time used a fax machine owned by a public body to send fax transmissions, however it would be inappropriate for responses to be sent to him through that number for a number of reasons, including concerns about confidentiality.
2. It may be appropriate, in some circumstances and where a telephone contact number has been provided, to contact the Applicant by telephone to advise him or her that a response has been forwarded and by what means it has been sent.
3. When a response is sent to an Applicant by mail, it should be sent in such a way that its delivery can be traced and verified, such as registered mail.

Elaine Keenan Bengts
Information and Privacy Commissioner