

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 07-29
December 30th, 2007
Review File: 07-218-5

A. BACKGROUND

By letter dated July 30th, 2007, the Applicant asked my office to review the failure of the Department of Education to respond to his Request for Information within 30 days as required by Section 8 of the *Access to Information and Protection of Privacy Act*. The Applicant indicated in his letter that he had made a Request for certain information on June 18th and had not received the response by July 30th.

On July 31st, I wrote to the department and asked them to confirm whether or not they had, in fact, responded to the Applicant and provide the details of the response provided.

By letter dated August 14th, 2007, the Department provided me with a copy of the letter they had sent to the Applicant, dated July 26th, 2007, in which they extended the time for response to the request to September 8th, 2007 pursuant to section 11 of the Act. In this same letter, the public body advised the Applicant that some of the records which had been requested consisted of "purchased materials" which were subject to copyright and advised the Applicant where he could purchase copies for his own use.

The Applicant was provided with a copy of the Department's response by letter dated August 27th, 2007 and asked for any further comments he might have. There was some confusion because the Applicant, apparently anxious to have matters dealt with as quickly as possible, took it upon himself to respond to the Department's submissions as soon as he received a copy of them from the department, so that my office received his "response" to the department's submissions before I received those submissions, causing some confusion which took some time to clear up.

B. BACKGROUND

It appears from the submissions received from the Department and the Applicant that the sequence of events in this matter were as follows:

- a) On June 18th, the Applicant made a request for certain records from the Department of Education
- b) On June 19th, the Department wrote a letter acknowledging receipt of the access request and advising the Applicant that, because the information requested was not personal information, a \$25.00 fee was applicable to the request before the request would be processed.
- c) By letter dated June 22nd, the Applicant forwarded a money order for \$25.00 by Xpresspost to the public body and it appears to have been delivered to the public body on June 28th
- d) The public body wrote back to the Applicant on July 3rd, 2007, acknowledging receipt of the payment "on June 29th, 2007" and indicating that they would provide a response on or before July 28th "unless circumstances require the Head of Education to extend the time for responding to the request under section 11 of the ATIPP Act".
- e) In a letter dated July 26th, 2007, which appears to bear a post mark of July 27th, the public body sent a letter to the Applicant extending the time for responding to the request to September 8th. In the same letter, the public body indicated to the Applicant that some of the materials being sought were "purchased materials" which were subject to copyright. The public body also provided the

Applicant with information as to how he could purchase his own copies of the requested documents.

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 30th 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.

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 from the time that the completed application is received. In this case, the application was complete when the fee was paid. The public body, therefore, had 30 days from either June 28th or June 29th, depending on which date you accept as the date the department received the \$25.00 fee, to "respond" to the request. That response came in the form of the letter extending time for response to September 8th.

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. As I noted in Review Recommendation 07-027, 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 should 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 prior to the end of the 30 day response period. 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.

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.

In his response, the Applicant took issue with the extension of time taken by the Department in their letter of June 26th. That issue, however, is not before me in this Request for Review. The letter of June 26th clearly indicated to the Applicant that he had the right to ask my office to review the extension of time within thirty days of his receipt of the letter, but he has not done so. I therefore decline to make any comment with respect to whether or not the extension was properly taken.

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 prior to the end of the 30 day response period. There is, therefore, no deemed refusal to disclose and nothing, therefore, for me to review.

In the circumstances, I therefore 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. These same recommendations have been made in several other recent Review Recommendations which I have made. Those recommendations are 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 or by e-mail 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.

These recommendations are very similar to those I made in Review Recommendation 07-027 which involved a similar fact situation.

Elaine Keenan Bengts
Information and Privacy Commissioner