

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2011-636-AP-320

April 13, 2012

Office of the Access to Information and Privacy Commissioner of New Brunswick

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office on December 16, 2011.
2. The present complaint matter concerns a request for access to information made by the Applicant to the Department of Transportation ("the Department") on November 4, 2011 which read as follows:

I am requesting wildlife collision statistics on Highway 7 from 2001 to 2010. I am interested in moose, deer, bear and any other animal collisions tracked by your department. I am also interested in death and injury statistics caused to people by these collisions – if they exist.

(the "Request")

3. The Department did not respond to the Request.
4. As a result, the Applicant filed a Complaint with this Office on December 16, 2011 given the lack of response from the Department ("the Complaint").

INFORMAL RESOLUTION PROCESS

5. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*.
6. The informal resolution process provides guidance to both public bodies and applicants with a view to better understand this new legislation. This process has been developed by our Office based on the spirit of the *Act* and in accordance with the parameters of the Commissioner's investigative powers under Part 5. It is hoped that in all cases, the informal resolution process will lead to a prompt and satisfactory outcome to the complaint (*Note: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report*).

7. The initial step undertaken by the Commissioner in this process was to review the Request and then meet with officials from the Department to determine why a response was not provided.
8. Officials from the Department informed us that staffing changes were taking place around the time of the Request. The Request was sent by email. The staffing changes resulted in a number of emails not receiving a timely reply, creating a backlog of emails, including the one containing the Request.
9. Since that time in November 2011, the Department has rectified its staffing issues to ensure that all emails receive proper attention.
10. Based on these discussions, we were satisfied that the single reason for the Department not providing the Applicant with a response to the Request was the Department's staffing changes. We found that the Department's failure to act on the Applicant's Request was unintentional.
11. We reminded the Department of its obligations to respond to a request and underlined the fact that a failure to respond to a request within a 30-day period can be treated as a refusal under subsection 11(2) of the *Act* giving rise to a right of complaint.
12. Given the facts of this case, the Department was eager to rectify the situation and to informally resolve the Complaint, if possible.
13. As a result, we invited the Department to provide a "revised response" to the Request as part of our informal resolution process.
14. The informal resolution process gives a public body a second opportunity to provide a response to the applicant's request with the Commissioner's assistance in ensuring that the "second" response is compliant with the *Act*. This step in the informal resolution process is referred to as the "revised response" to the request which is at the center of a complaint. The revised response must have all the components of a properly constituted response as per section 14 of the *Act*.
15. The facts of this case, however, are that a response was never provided to the Applicant in the first place. Therefore, referring to a "revised response" in this case is perhaps confusing; nevertheless, we took this opportunity to encourage the Department to prepare a "revised response" to the Request, that would be compliant with section 14 and could

serve as the basis of an informal resolution of the Complaint. The Department would do so with our guidance to ensure conformity with the *Act*.

16. The Department agreed to issuing said revised response. In addressing the Request, the Department advised us that it maintained statistics in relation to wildlife collisions involving moose, deer and other animals and this statistical information could be provided to the Applicant.
17. Statistics for moose, deer and other animal collisions on Route 7 between 2001 and 2010 were identified and compiled to form the basis of the response. The Department proceeded to issue its “revised response” to the Applicant on February 23, 2012 after it was vetted by our Office.
18. At the same time, we also advised the Applicant in writing that that the Department was willing to try to resolve the Complaint informally and would be providing a response to the Request. We invited the Applicant to provide us with comments in relation to the Department’s revised response as part of our continued effort to find an informal and satisfactory conclusion to the Complaint.
19. It is important to mention that the informal resolution process as developed by our Office requires input from the applicant before we can proceed to conclude a complaint matter. For instance, if the applicant is not satisfied with the revised response and provides comments to that effect, the Commissioner considers these comments before deciding how best to continue with the investigation of the complaint. In the final analysis, a complaint cannot be resolved informally if the applicant is not satisfied with the revised response provided during the course of our complaint process. The same holds true for a case where the applicant does not provide any input regarding the revised response.
20. When the revised response was issued to the Applicant in February of 2012, our Office tried to contact the Applicant to seek input in this matter. Despite our best efforts to reach the Applicant, we were unable to do so. We were advised that the Department was not contacted by the Applicant either.
21. As a result, the informal resolution process in this case could not continue. The Commissioner had no other option but to file the present Report of findings.

LAW AND ANALYSIS

Obligations of a Public Body

22. As discussed above, a public body has a statutory obligation to respond to a request for access to information in a timely manner, and a failure to do so gives rise to the applicant's right to file a complaint.
23. Obligations on the part of a public body when receiving a request for access to information include providing a response to the request within 30 days (in most cases), or transferring the request to another public body within 10 days of receipt of the request and informing the applicant of such. Where a public body fails to do so, the onus is on the public body to provide reasons why an applicant was not provided a response or why an applicant was not advised of the transfer of the request.
24. When providing a response to a request, a public body must follow the requirements of section 14 to ensure that its contents constitute a proper response within the purview of the Act. The components of section 14 are straightforward. In essence, they direct the public body to identify which records are under its care and control that are relevant to the request, list and provide copies of those which can be disclosed, and finally, list those records or portions thereof which are being withheld while providing reasons why these records or information will not be released to the applicant.
25. If access is refused for any reason, the public body must also inform the applicant in its response of his or her right to file a complaint in relation to the response.
26. Finally, section 14 requires that the response be in writing and that it address all aspects of the request, as evidenced from its components found below:
 - 14(1) In a response under subsection 11(1), the head of the public body shall inform the applicant
 - (a) as to whether access to the record or part of the record is granted or refused,
 - (b) if access to the record or part of the record is granted, of the manner in which access will be given, and
 - (c) if access to the record or part of the record is refused,
 - (i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located;

- (ii) in the case of record that exists and can be located, of the reasons for the refusal and the specific provision of this Act on which the refusal is based;
- (iii) of the title and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal; and
- (iv) that the applicant has the right to file a complaint with the Commissioner about the refusal or to refer the matter to a judge of The Court of Queen's Bench of New Brunswick for review.

Informal resolution

27. In the present case, we worked with the Department in reviewing the Request and to ensure that the Department identified all records relevant to the Request. Then, the Department provided us with the records and informed us which records could be disclosed to the Applicant without exception.
28. Having reviewed the Department's revised response, we are satisfied that it met the requirements of section 14 and we are confident that the Department fully understands its obligations under the legislation.

CONCLUSION

29. As explained above, our Office made efforts to resolve this Complaint in an informal manner as per the informal resolution process through the Department's revised response to the Applicant.
30. Unfortunately, we were unable to complete the informal resolution process as we did not have the benefit of the Applicant's input, and for that reason we cannot confirm whether the Applicant received the revised response or whether the Applicant found the revised response with its accompanying records to be an acceptable resolution to the Complaint.
31. We are confident in stating that our Office exhausted every effort in trying to contact the Applicant to seek input in regards to the revised response. Without the benefit of the Applicant's comments, however, the Commissioner cannot deem this Complaint to be resolved informally.

32. Notwithstanding, we conclude this Complaint by making the following findings:

- a) while the Department initially failed to provide a response to the Request due to an oversight in monitoring its in-coming emails, the Department's explanation was based in fact;
- b) the Department took immediate action to rectify the situation when our Office advised it of the Complaint;
- c) the Department did not intentionally fail to act on the Applicant's Request;
- d) the Department is fully cognizant of its obligations to provide timely responses under the *Act*; and,
- e) the revised response provided to the Applicant by the Department during the course of the resolution of the Applicant's Complaint was in conformity with section 14 of the *Act*.

33. For these reasons, there is no need to issue a recommendation in this matter.

Dated at Fredericton, New Brunswick, this _____ day of April, 2012.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

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Office of the Access to Information and Privacy Commissioner of New Brunswick

“Complaint Process”

The Commissioner's Policy on the Complaint Process is designed to respect the Right to information and Protection of Privacy Act, to encourage both cooperation and transparency, and all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the Act. Below is an explanation of the distinction between what is referred to as an informal resolution process and a formal complaint investigation more commonly recognized by the public, along with timelines. This Complaint Process is communicated to both the applicant and the public body at the outset of a complaint matter filed with our Office.

Commissioner's Policy on the Complaint Process

Upon the receipt of a complaint, the *Act* allows the Commissioner to proceed in two ways: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally. For all intents and purposes, in both the informal resolution process and the formal investigation the Commissioner's work constitutes an 'investigation' into the merits of the complaint; however, in the informal resolution process, the Commissioner takes all steps necessary to resolve the complaint to the satisfaction of all involved, and in a manner consistent with the purposes of the *Act*. When this is not possible, the Commissioner concludes her work by a formal investigation which leads to the publication of a formal Report of the Commissioner's Findings.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted a policy to treat all complaints in the first instance by way of informal resolution. Our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and to become more familiar with their rights and obligations under the legislation. Educating the public of the application of this new law is an important part of the mandate of this Office. We are of the view that such a process will make way for improved requests for information and response procedures in the future, which may limit the need to file complaints.

Informal Resolution Process

Step 1 – Review

In all cases, upon receipt of a complaint, we issue letters to both the applicant and the public body indicating that the Commissioner seeks to resolve the matter informally. A deadline is initially set to try to do so within 45 days of the date of receipt of the complaint to our Office.

Although it is called an 'informal resolution process', the Commissioner's Office must review the full substance of the complaint, which includes the initial request for information and the response by the public body, which are the same steps undertaken in any investigation process. Our Office then meets

with the public body's officials to review all relevant records relating to the request. This review of all relevant records may include requesting further information from the public body in order for us to fully understand which records may have been overlooked and which could be relevant to the request. Such a meeting is held shortly after receipt of the complaint to begin the process without delay.

Informal Resolution Process

Step 2 – Preliminary Findings

Where the Commissioner is satisfied that the public body has made an adequate search and has identified and provided to the Commissioner all records relevant to the request for information, or where the Commissioner believes there are issues regarding the application of the rules of the *Act* which inhibit a full review of all relevant records, our Office analyzes the initial response given by the public body against all records provided to the Commissioner in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings to the public body by letter. Those preliminary findings inform the public body of the direction of the investigation and of the remaining issues, if any, which must be addressed before we can proceed to the next step, i.e., inviting the public body to submit a 'revised response' to the applicant's request for information. If a revised response is not required, the complaint process proceeds to Step 4.

The suggestion to consider a revised response is made with the continued intent of resolving the complaint informally and with a view to provide the applicant access to the information that the *Act* deems should be disclosed.

If the public body agrees to prepare a revised response, a timeline is set during which the 'proposed revised response' must be submitted to the Commissioner. That timeline is based on the complexity of the work involved to prepare the proposed revised response in each case.

Informal Resolution Process

Step 3 – Proposed Revised Response

When the public body provides a proposed revised response, the Commissioner reviews it to ensure that it also meets the requirements of the *Act*. If the proposed revised response meets the requirements of the law, the Commissioner invites the public body to submit it directly to the applicant as a revised response to the applicant's initial request for information.

If the proposed revised response does not meet the requirements of the law, the Commissioner will provide additional comments to the public body as required in order for the public body to achieve a properly constituted revised response. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to encourage the public body to provide a lawful response to the request for access to information under the *Act*.

Informal Resolution Process

Step 4 – Applicant's Comments

In the case where the public body is ready to issue the vetted revised response to the applicant, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant and the public body sends the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response and to provide comments in relation thereto to the Commissioner. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the revised response. The Commissioner then reviews the applicant's comments on the revised response.

Or, in the event that a revised response was not required, the Commissioner informs both parties that the initial response to the request for information was appropriate and in conformity with the *Act*. In such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why it is believed the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the matter. The Commissioner then reviews the applicant's comments.

If the culmination of the above steps to date exceeds the initial 45 day timeframe allotted, the Commissioner may decide to continue with the informal resolution process if there is a belief that a satisfactory resolution in accordance with the *Act* is possible. The timeframe at this stage is based on completing the process within the 90 day investigation deadline set by the *Act*.

In complex matters, the timeframe for the continued work on a revised response may extend beyond the 90 day period to complete the matter. In such a case, the Commissioner notifies both parties in writing of an extension of time to complete the matter as permitted by section 72. The notification indicates the new deadline within which the case will be concluded, and the reasons why the extension of time is necessary, e.g., to bring an informal resolution to the complaint.

Again, it is important to reiterate that our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and all efforts are deployed within the allotted timeframe (or extension thereof permitted by the *Act*) to make this happen, whenever possible.

Informal Resolution Process

Step 5 – Revised Response Satisfactory

In the event that the applicant is satisfied with the revised response, the Commissioner concludes her investigation as one having been resolved informally to the satisfaction of both parties and in conformity with the *Act*. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally.

In the event the applicant provides comments which accept the Commissioner's preliminary findings that the public body's initial response was in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In both above instances, there is no requirement for the Commissioner to file a formal report under section 73 for the reason that there is no recommendation to be made to the public body on its response (revised or initial) to the request for information.

Informal Resolution Process – Formal Investigation

Step 6 – Revised Response Not Satisfactory

In the event that the Commissioner finds that the public body's revised response is not in conformity with the *Act* and the public body decides not to consider proposed changes thereto, or in the event that the applicant is not satisfied with the revised response, upon reviewing the comments obtained from the applicant the Commissioner may decide to further investigate the matter. This step brings the informal resolution process to an end and converts the matter into a formal investigation process which will eventually lead to the issuance of a formal report under section 73.

The Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The de-identified report will also be made available to the public on the Commissioner's Office website (*NB*: website under construction).

This complaint process is intended to encourage both cooperation and transparency, all the while remaining confidential and with the intent to reach a satisfactory resolution in accordance with the requirements of the *Act*.