REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2011-430-AP-228
January 20, 2012
Office of the Access to Information and Privacy Commissioner of New Brunswick

INTRODUCTION and BACKGROUND

1. The present Report of 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 matter stems from a Complaint made by the Applicant to this Office on August 12, 2011.

2. The background of this case is as follows. On May 26, 2010, the Applicant submitted a request for information addressed to "Hon. David Alward, President, Executive Council Office", requesting the following:

> The information and records sought are for pension eligibility approved by Cabinet, Executive Council Office or Board of Management for individuals who would not ordinarily be eligible for an existing public sector pension plan.
>
> Please provide any information and records answering these questions:
> 1) How many such pensions have been granted since Jan. 1, 2006?
> 2) How much is the province paying on a monthly basis to fund these pensions?
> 3) How much is the province paying on a monthly basis for any other such pensions?
>
> Please provide the reasons for the awarding of the pensions and the dates they were issued.
>
> Please provide any available Orders-in-Council, minutes or other directives or records issued by Cabinet, Executive Council Office or Board of Management on such decisions.
>
> Also, please provide any reports, records, studies, or calculations of such pensions provided for individuals or groups to Cabinet, Executive Council Office or Board of Management—and also for any correspondence or documents relating to any such reports, records, studies, or calculations, including any e-mails, handwritten notes and minutes of cabinet or Board of Management between January 1, 2006 and today.
>
> Also, please direct us to line items in provincial budgets that show payments made for specially approved pensions.
>
> ("the Request")

3. As indicated above, the Request was addressed to the Honorable David Alward as President of the Executive Council Office. The Honorable David Alward is also the Premier of New Brunswick, and the Office of the Premier is a separate office from that of the Executive Council Office.

4. While Premier Alward is the head of both these offices, the Office of the Premier is separate and distinct from the Executive Council Office. This can lead to confusion in some instances, and it did in this case.

5. When the Applicant's Request was received by the government's internal mail, it was directed in error to the Office of the Premier instead of to the Executive Council Office. For this reason, the Office of the Premier alone received the Request on June 2, 2011 and that Office did not notice that the Request was addressed to the Executive Council Office. Instead, the Office of the Premier immediately began preparing a response to the Request.

6. On June 13, 2011, the Office of the Premier provided a response in which it informed the Applicant that the Request was being transferred to the Office of Human Resources with the following explanation:

> We have transferred your request (along with your $5.00 application fee) to Human Resources, as per section 13(1) of the *Right to Information and Protection of Privacy Act.* You can expect to receive a response to your request within 30 days unless otherwise notified by Human Resources. Human Resources will be in contact with you shortly to acknowledge receipt of your request.

7. As in the case of the Office of the Premier, the Office of Human Resources did not notice that the Request was addressed to the Executive Council Office. As a result, the Executive Council Office was not made aware of the Request in this case, and consequently, the Executive Council Office did not provide a response to the Applicant although the Request had been specifically addressed to it.

8. The Applicant did not receive a response from the Executive Council Office and proceeded to file a complaint with the Commissioner's Office on August 12, 2011.

9. The Applicant's complaint provided in part the following:

> This complaint arises out of a request for access to a record submitted to the Premier David Alward, president of the Executive Council, on the 26th day of May, 2011
>
> (…)

> I am asking you to carry out an investigation into the matter in question which was related to a request for access filed to the Executive Council. Please include the Executive Council in your investigation.

10. A copy of the complaint was submitted to the Executive Council Office at the outset of this review process in August of 2012. The present Report of Findings constitutes the Commissioner's investigation into the Applicant's complaint involving the Executive Council Office.

INFORMAL RESOLUTION PROCESS

11. 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*.

12. The informal resolution process provides guidance to public bodies and applicants with a view to better understand this new legislation. Ideally, this process will encourage 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.)

13. The initial step undertaken by the Commissioner was to review the Request to try to determine why no response had been provided. In that regard, we met with officials of the Executive Council Office and inquired as to why it had not responded to the Request while the Office of the Premier had done so. This is when the mail processing error was revealed, and officials confirmed to us that the Request was mistakenly received and processed by the Office of the Premier and the Executive Council Office was not made aware of the Request at that time. In fact, the Executive Council Office only became aware of the Request itself when we initiated the complaint process in this case.

14. At this time, we invited the Executive Council Office to participate in the informal resolution process, particularly with the view that the Executive Council Office had not had the opportunity to provide a response to the Applicant given the circumstances of

the error in the directing of its mail. We explained to the Executive Council Office that the informal resolution process was a means to resolve the complaint provided the response issued was compliant with the *Act* and that the Applicant was satisfied with the response.

15. The Executive Council Office indicated its willingness to proceed with the informal resolution process. To provide the Executive Council Office with sufficient time to complete this step, our Office decided to extend the deadline to complete our investigation on three occasions, with a final deadline of today's date, i.e., January 20, 2012.

16. Despite the Executive Council Office's initial willingness to undertake the informal resolution process, it has since informed our Office that it does not believe it is required to provide a response to the Applicant, thus triggering the necessity for the Commissioner to issue a Report of Findings with regards to this complaint.

17. In deciding not to provide a response to the Applicant, the Executive Council Office raised three points:

    a) Firstly, that the Applicant cannot have access to the records in any event for the reasons that the records relate to Executive Council confidences; thus, there would be no benefit to providing the Applicant with a response;
    b) Secondly, that the Applicant did not raise the issue of the transfer of the Request to the Office of Human Resources, and by not having done so, the Applicant is in no position to complain; and,
    c) Thirdly, that the substance of the Request concerns the Office of the Human Resources, and the complaint was not specifically addressed against the Executive Council Office.

18. We address each point in our findings below.

FINDINGS

Requirement of a Response

19. The Executive Council Office is a public body, and as such, it must comply with the provisions of the *Act,* including that of providing a response to an access request.

Section 11 confirms the mandatory requirements for issuing a response to an access to information request:

> 11(1) The head of the public body shall respond to a request for access to a record in writing within 30 days after receiving the request…
>
> (Emphasis added)

20. Consequently, it is clear that the law does not permit a public body from relying on the fact that when an applicant cannot have access to the records, there is no obligation to provide a response. Such a held view does not respect the mandatory obligation to provide a response under section 11.

21. Moreover, section 14 sets out the mandatory requirements for the content of a response to an access for information request:

> 14(1) In a response..., 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…
>
> (Emphasis added)

22. Again, in all cases, a response must be issued and the response must identify which records will be granted and naming the specific exception to disclosure if access to any of the requested information is being refused. Providing a brief explanation as to why the claimed exception applies will also assist the applicant to understand why access is being refused.

23. The Executive Council Office is of the view that access to all records in its custody relevant to the Applicant's Request would simply be refused under subsection 17(1) as a whole. Subsection 17(1) contains five separate categories of records that fall within the scope of the mandatory exception provision, and the Executive Council Office is of the opinion that to provide a response in this case would be of no benefit given that access would be refused under all five categories in any event.

24. We do not dispute the fact that subsection 17(1) provides a broad ranging and mandatory exception to the disclosure of records which would reveal the substances of deliberations of the Executive Council. Regardless of subsection 17(1), there is a mandatory requirement of the *Act* for the Executive Council Office, as in the case of other public bodies, to provide a response to all access to information requests.

25. We must highlight the importance on the part of all public bodies to meet their obligations under the *Act*.

26. We find that the Executive Council Office has failed to provide a response to the Applicant's Request in this matter.

Transfer of Applicant's Request

27. Regarding the second point of the Applicant not to be permitted to file a complaint on the basis of not having raised the issue of the transfer of the Request to the Office of Human Resources at the time of the transfer, we find that this point has no relevance to the matter at hand. The Executive Council Office was not involved in the decision to transfer the Request and the transfer has no bearing on the Executive Council Office not providing a response to the Applicant.

28. We will indicate that while section 13 regarding transfers of access requests does not expressly mention a right to complain, the decision or act of transferring a request is regarded as a decision or an act of the head of the public body in relation to the request. Under subparagraph 67(1)(a)(i), an applicant can complain on that issue when not satisfied with such a decision.

29. There is no merit to the assertion that the Applicant cannot complain to the Executive Council Office by reason of the fact no issue was raised when the Request was transferred by another public body in this case. We find that the Applicant's complaint is properly constituted.

Substance of the Request

30. As for the third point raised by the Executive Council Office in this matter, that the substance of the Applicant's Request concerns the Office of the Human Resources and that the Applicant's complaint was not specifically addressed against the Executive Council Office, we refer to the Applicant's Request and the complaint filed in this case. Both are reproduced at the beginning of this Report. The complaint in full was submitted to the Executive Council Office by the Commissioner's Office in August of 2011. Again, there is no validity to this point, and the Applicant's complaint is properly constituted and is specifically addressed to the Executive Council Office.

Failure to Provide a Response

31. The facts uncovered during the investigation of this matter revealed an issue with the processing of internal mail to offices which are closely linked in name and proximity: that of the Premier's Office and that of the Executive Council Office. While we can appreciate that the name of the Premier as the head of both these offices is understandably confusing, directing the mail to its proper destination, however, remains of utmost importance and must be addressed. We have been informed that the Executive Council Office has indicated that there was indeed such an error made in this case, and of its intentions of addressing this issue to prevent it from occurring in the future.

32. Nevertheless, the facts remain that in this case, an important document was not remitted to the proper office, that of the Executive Council Office, and as a result of this error, the Executive Council Office was not even made aware of the Applicant's Request.

33. For this reason, the Executive Council Office did not respond within the prescribed time to do so, i.e., within 30 days, as required by the *Act*. It is important to remember that the act of responding to an access for information request is mandatory for all public bodies pursuant to section 11 of the *Act*. By virtue of the fact that Executive Council Office failed to respond within the 30-day delay, the Applicant had the right to file a complaint involving the Executive Council Office under section 67(5).

34. Again, it is an undisputed fact that the error in the processing of internal mail was the sole reason for Executive Council Office's failure to respond in time to the Applicant's Request in this case. With this in mind, it was believed that the matter could be easily resolved by having the Executive Council Office file a response in conjunction with the informal resolution process of the Commissioner's complaint process. Unfortunately, this did not occur.

35. We therefore find that the Executive Council Office did not provide a response to the Applicant's Request in this matter. By refusing to do so, the Executive Council Office is not upholding its legal obligations mandated by section 11 of the *Act*.

RECOMMENDATION

36. Based on all the above facts and findings, the Commissioner issues the following recommendation:

> The Commissioner recommends that the Executive Council Office issue a response to the Applicant in accordance with sections 11 and 14 of the *Act* to the Request in this matter. The response should be provided no later than Friday, February 3, 2012, and the Executive Council Office must confirm with the Commissioner that a response has been issued to the Applicant.

Issued at Fredericton, New Brunswick, on this 20th day of January 2012.

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Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2011-430-AP-228
January 20, 2012
Office of the Access to Information and Privacy Commissioner of New Brunswick

"Complaint Process"

January 2011

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

Complaint Process
Right to Information and Protection of Privacy Act (chap. R-10.6)

The New Brunswick *Right to Information and Protection of Privacy Act* allows for the Access to Information and Privacy Commissioner to establish the process in investigating a complaint. In that regard, the *Act* allows the Commissioner to proceed in two ways upon the receipt of a complaint: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally.

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. The complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and for both parties to become more familiar with their rights and obligations under the new legislation. Educating the public of the application of this new law is an important part of the mandate of the Commissioner's Office.

It is hoped that such a process will pave the way for improved requests for information and response procedures in the future and limit the need for the filing of complaints. The informal approach to the investigation of all complaints is intended to encourage both cooperation and transparency, all the while intending to reach a satisfactory resolution to both the public and the public body in accordance with the requirements of the *Act*.

In an informal resolution process, it is incumbent upon the Commissioner to resolve the complaint to the satisfaction of all the parties, and in a manner consistent with the purposes of the *Act*.

Below are the 6 Steps involved in the complaint investigation process.

Informal Resolution Process
Step 1 – Review

In all cases, upon receipt of a complaint, letters are issued 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 nature of the 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, and this may include requesting further information in order for us to fully understand which records may be relevant to the request. This meeting should be held shortly after the initial letter to the parties.

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, our Office then examines the initial response given by the public body against all records now provided in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings in writing to the public body by letter, with a suggestion that a 'revised response' to the applicant's request for information be considered, if necessary. 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.

In the event the public body chooses to proceed by proposing a revised response, a timeline during which the 'proposed revised response' must be submitted to the Commissioner is set based on the complexity of the work involved to prepare the proposed revised response. In most cases, and depending upon the complexity of the matter, it is hoped that the proposed revised response can be submitted to the Commissioner within 30 days of the date of receipt of the complaint.

Informal Resolution Process
Step 3 – Proposed Revised Response

In the event the public body chooses to provide the Commissioner with a proposed revised response, the Commissioner reviews the proposed revised response 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 to the applicant as a revised response, i.e., as a revised response in answer 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. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to assist the public body in its obligations under the *Act* to encourage the public body to provide a lawful response to the request for access.

Informal Resolution Process
Step 4 – Applicant's Comments

If the public body has provided and is prepared to issue a revised response which honors its obligations under the *Act*, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant. The public body issues the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response which he or

she will receive from the public body, and to provide comments regarding the revised response to the Commissioner. The applicant is usually accorded a period of 10 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 issues letters to both parties informing them that the initial response to the request for information was appropriate and in conformity with the *Act.* In her letters to the parties in such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why he or she is of the view that the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 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 these steps in the informal resolution process to date have gone beyond the initial 45 day timeframe allotted, our Office 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.

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. In this regard, both parties will become more familiar with their rights and obligations which will lead to improved requests for information and response mechanisms in the future.

Informal Resolution Process
Step 5 – Revised Response Satisfactory to Both Parties

In the event the applicant is satisfied with the revised response, or that the applicant provides comments which indicate that he or she is satisfied with the Commissioner's preliminary findings that the initial response is in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed by letters to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In such an instance, there is no requirement for the Commissioner to file a formal report as 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 to Both Parties

In the event the applicant is not satisfied with the revised response, and 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.

At the conclusion of the further investigation, if any, the Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The report will also be made available to the public on the Commissioner's Office website after de-identification (website has not yet been created).