

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matters: 2013-1665-AP-898, 2013-1700-AP-921
2014-1727-AP-937

Date: August 28, 2014

“Case about failure to properly respond to access requests”

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 three Complaints regarding two access to information requests in which the Applicant asked the Commissioner to carry out an investigation.
2. The Applicant sought information from the Department of Social Development about changes to the Department's specialized care home policy, changes that had taken effect in 2012. On the same day, October 8, 2013, the Applicant prepared and submitted two separate requests for access to information under the Act.
3. The first request was for "the make-up, mandate and tenure of the DSD Strategic Steering Committee including the names, professional designation and work title/affiliation of the chair and members."
4. The Department issued as response by letter dated November 4, 2013, indicating to the Applicant that the information requested did not exist as there was "no such Committee as the DSD Strategic Steering Committee."
5. The Applicant was not satisfied with this response and filed a complaint with our Office on December 6, 2013. The Applicant provided some details that led the Applicant to believe the Committee did exist, adding that the Committee members had contributed to the recent changes to the Department's Specialized Care Bed Home admission criteria policy. In essence, the Applicant wanted to know who contributed to the strategic development and change to the admission criteria.
6. In the Applicant's second request, access to information dating back to 1996 specifically to:
 - the research backing the Specialized Care Bed Home admission criteria including literature and numerical statistics, pilot studies, etc.
7. On October 15, 2013, the Department informed the Applicant that it was extending the time limit to respond to the request for an additional 30 days under paragraph 11(3)(c), given the large number of records involved with the second request. When the Applicant did not receive a response in that time period, the Applicant filed a "no-response" complaint with our Office on December 5, 2013.

8. The Applicant received the Department's response a few days later on December 10, 2013. In that response, the Department provided the Applicant with a list of the compiled research documentation along with full copies of each document.
9. The Applicant was not satisfied and January 22, 2014, filed a further complaint regarding the response itself. The Applicant believed there existed more information, namely, regional pilot projects or studies specific to New Brunswick, and in addition, the Applicant wanted access to existing information in support of the Department's decision to change the Specialized Care Bed Home admission criteria.
10. It appeared that the Applicant disagreed with the change in the admission criteria and was seeking information as to how the Department had reviewed the criteria and what research upon which it had relied in making this change.

Role of the Office of the Access to Information and Privacy Commissioner

11. It is important that we point out our role as oversight under the *Act* when we investigate complaints. We ensure that the government, in this case the Department, presented a full and frank disclosure of all the relevant information in its possession and that any withheld information was done within the acceptable exceptions found in the *Act*. Our role does not include how governments arrive at administrative decisions, that being exclusively in the domain of the Office of the Ombudsman. It follows that in this case, we did not investigate and we will not comment as to how the Department made changes to the policy in question.

CONTEXT OF THE CASE

12. The Department regulates and provides some funding for long-term care facilities in the Province, including nursing homes, under the authority of the *Family Services Act* and its Regulation 83-77, Community Placement Residential Facilities. As part of the Department's regulatory role, the Department reviews its long-term care strategy to ensure that the existing facilities and services are meeting the needs of those who require them. In 2008, the Department released its Long-Term Care Strategy for the following ten-year period, and 2009, announced its Nursing Home Renovation and Replacement Plan.
13. Two years later in 2011, the Department undertook a review of the 2009 Nursing Home Renovation and Replacement Plan. That review consisted of an examination of

demographics, an assessment of the existing facilities and their conditions, and a review of design standards with a view to improve the existing nursing home infrastructure, and resulted in the Department developing a new five-year plan entitled the *2011-2016 Nursing Home Renovation and Replacement Plan*.

14. The new plan calls for the construction of new nursing home facilities and the creation of additional beds in existing facilities, as well as renovations to existing facilities.
15. In March 2012, as part of this plan, the Government of New Brunswick announced that it would be creating 704 specialized care beds in the private sector throughout the Province over five years for people suffering from Alzheimer's disease and dementia. The Government believes that these efforts will help reduce waiting lists and transfer seniors suffering from these afflictions out of hospital settings and into long-term care.
16. As part of this plan, the Department developed new admission criteria for special care bed homes. Under the new plan, the Province subsidizes placements for individuals with dementia who have a high level of care needs but who do not require 24-hour care or supervision. Prior to these changes, a diagnosis of dementia or Alzheimer's was not required in order for an afflicted individual to qualify for subsidized placements (formerly referred to as "Level 3B").

FINDINGS OF THE INVESTIGATION

17. We present our findings in relation to each of the Requests in this case.

REQUEST A: INFORMATION ABOUT STRATEGIC STEERING COMMITTEE

18. As stated above, the Applicant was looking for information about the make-up, mandate and tenure of the Department's Strategic Steering Committee including names, professional designations, and work title of its Chair and its Members. The Department informed the Applicant that the Strategic Steering Committee did not exist.
19. When filing a complaint with our Office, the Applicant provided us with a printout of a website page of an official from a special care home (Shannex Incorporated) whose credentials indicated being a current member of "the Strategic Steering committee with the New Brunswick Department of Social Development."

20. The Department's officials did not understand the Applicant's reference to a 'strategic steering committee' involving the Department. For this reason, the Department did not contact or follow-up with the Applicant to seek clarification or ask for further details in order to determine exactly what committee the Applicant was referring to.
21. Instead, the Department made an assumption that the Applicant's request was in relation to special care homes, that being the subject matter of the other request filed at the same time. As there was no strategic steering committee on this particular subject matter, the Department responded by saying no such committee existed.
22. Had the Department contacted the Applicant, it would have immediately understood what the Applicant meant and the Department would have been able to provide the appropriate explanations and respond accordingly. This is evidenced by the fact that when we presented the Department with a copy of the website page submitted to us by the Applicant, these officials immediately recognized that the Applicant was referring to a joint steering committee with the Department and the New Brunswick Association of Nursing Homes.
23. The Department provided us with a copy of the steering committee's Terms of Reference setting out the information being requested by the Applicant.
24. Given these facts, we can completely appreciate why the Applicant found the Department's response unhelpful. The steering committee had been referenced on a publicly available website. We accept that a complaint had to be filed to get answers.
25. In this regard, we find that had the Department respected its duty to assist obligation found in section 9 of the *Act*, it would have taken a single step in contacting the Applicant to obtain a better understanding of the information sought and this would have avoided unnecessary confusion and incorrect assumptions. It would also have permitted the process to unfold as it should and the Applicant would have received a meaningful response.
26. Instead, the Department faced a complaint filed with our Office and ensuing investigation that could have been avoided entirely, an investigation that was most unnecessary and used invaluable time and resources needlessly.
27. We have reminded the Department of its duty to assist applicants in the past, most recently in our Report of Findings dated April 7, 2014 (**2013-1670-AP-902**). In that

Report, we found that Department failed to fulfill its duty to assist by not seeking necessary clarifications from the applicant in that case so as to be able to respond to a request in a timely fashion.

28. We do wish to mention that the Department was processing the present Requests around the same time as that which culminated in our Report in complaint matter **2013-1670-AP-902**, i.e., the Department was processing all of the requests received during that time in the same incorrect manner without seeking the necessary clarifications from applicants.
29. As indicated to the Department in our previous Report of Findings, the Department's approach to treating access requests in this matter is unacceptable, as per section 9 of the *Act*:
 - 9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.
30. To make matters worse, the Department did not indicate in its response that the Applicant had the right to complain to our Office or to refer the matter to the courts, as required by subparagraph 14(1)(c)(iv) of the *Act*. There is no excuse for this non-conformity with the *Act*, given that the Department is well aware of its obligations in responding to requests under the *Act*.
31. In failing to fulfill these obligations, the Department also failed to uphold the Applicant's access rights. Section 9 requires public bodies to be forthcoming and helpful in treating access requests.
32. As a result, we must find that the Department has failed in its duty to assist the Applicant in not following up to obtain further details or clarification in order to provide a meaningful response to the request, and in not informing of the Applicant's right to complain about the response if dissatisfied.
33. We will be recommending that the Department undergo revisions to its current procedures for processing access to information requests so that the Department take its statutory obligations seriously and be compliant with the *Act*. These revisions will include the practice of seeking clarifications from applicants whenever necessary.

34. In addition, we will also recommend that the Department provide the steering committee information to the Applicant.

REQUEST B: INFORMATION ABOUT RESEARCH MATERIALS

COMPLAINT ABOUT TIMELINESS

35. By letter dated October 15, 2013, the Department advised the Applicant that it was extending the time limit to respond to the other request for an additional 30 days. The self-time extension was being advanced in accordance with paragraph 11(3)(c) of the *Act* on the basis that the request called for the processing of a large number of records.
36. We find that the Department did not fully meet the requirements of subsection 11(5) as it did not indicate the date on which the Applicant could expect to receive a response. In addition, the Department did not inform the Applicant of the right to file a complaint with our Office about the decision to extend the time limit to respond without the Commissioner's approval, as required by paragraph 11(5)(c).
37. Also, even where the Department required the entire extra 30 days (from the initial 30 days) to process and provide a response to the Applicant's second request, we calculate that 60 days from October 8, 2013 meant that a response ought to have been issued on December 6, 2013.
38. The Applicant did not receive any further communication from the Department and filed a complaint with our Office on December 5, 2013. The Applicant later indicated that the Response was received on December 10, 2013, thus after 65 days.
39. The Response was dated December 3, 2013, yet issued only on December 9, 2013.
40. In investigating the matter, we obtained the circumstances that led the Department to respond to Request B outside of the time limit. It appears that the response was ready on December 3, 2013 and awaited the Minister's approval and sign-off before it could be issued to the Applicant. This final step took six more days before the response could be sent out to the Applicant by mail. Ministerial sign-off is not a proper basis to delay the issuance of a response under the *Act*.
41. We have explained this point to the Department in previous cases. Applicants are waiting for responses and have the right under the law to receive them in a timely

fashion. To ensure the right of timely access, the default rule is that public bodies must respond to an access request within 30 days after receiving it, unless the time limit to do so is extended in accordance with section 11. The date of the response letter is not relevant to the timeliness of the response, i.e., in all cases, it is the date on which the response is issued to the applicant, by mail or electronically, that matters. It is not proper to state that a public body has issued a response as of a certain date while it is still awaiting the Minister's signature before it can be sent to the applicant.

42. We also note that this is not the first time the Department found itself the subject of a no response complaint with our Office on the matter of timeliness.
43. Our Office issued a Report of Findings to the Department dated February 3, 2014 (**2013-1598-AP-852**) with a recommendation to the Department that it take measures to ensure that responses issue within the time limits under section 11, including sufficient time for the Minister to approve and sign the response so that it can be issued to an applicant on time. In the Report of Findings referenced above (**2013-1670-AP-902**), we also found that the Department failed to respond to a request for correction under the *Act* in a timely fashion.
44. The facts show that the Department received all three of these requests (including the late complaint that is the subject of the present Report) within a one-month period between September and October 2013. In our view, this events point to a common issue surrounding the timeliness of processing of multiple requests and given our previous Reports of Findings and recommendation to the Department on this same issue. We are concerned that the Department continues to struggle with the timeliness of responses. Therefore, we will recommend that the Department meet with the Commissioner's Office with a view to explain its process and identify the difficulties being encountered to respond on time. At that time, the Commissioner's Office will recommend modifications that ought to correct the problem and ensure that the Department meet the timeliness requirements under the *Act*.
45. In addition, we recommend that the Department take steps to ensure that any self-extension of the time limit to respond to an access request will meet all of the requirements of subsection 11(5).

COMPLAINT ABOUT CONTENTS OF THE RESPONSE

46. As stated above, the Applicant asked the Department to provide access to research that supported the admission criteria for the Specialized Care Bed Home, including such records as resource materials, numerical statistics, pilot studies, and so on. The timeframe specified for the requested information dated back to 1996 to present day, or 17 years.
47. When filing the complaint on the content of the Department's response, the Applicant commented on the fact that additional information should exist and believed that Department officials had cited other research sources in public venues. On that point, the Applicant questioned why the research materials provided did not reference regional pilot studies specific to New Brunswick.
48. In other words, the Applicant was challenging whether the Department had properly identified and provided access to all of the relevant research materials. We therefore investigated the steps that the Department had undertaken to search for and compile the relevant records during the processing of the request.
49. On the question of regional pilot projects, the Department confirmed to our Office that there were no official pilot projects undertaken in relation to specialized dementia care facilities or beds; however, the Department indicated that in 1998, three nursing homes received authorization to provide services for clients not requiring regular nursing care, which was believed to be the reasons why the Applicant was asking about pilot projects.
50. In continuing its work with nursing home facilities, the Department only began to explore the option of specialized dementia care facilities in 2008 as part of its research into the 2008 Long Term Care Strategy. The Department provided this research to the Applicant with the Response.
51. Department staff checked the records dating back to the mid-1990s and did not find any additional documentation in its files about pilot projects or other research that had been reviewed on the topic of specialized dementia care services.
52. While the Response provided a list of research materials consulted, along with copies of these documents, it did not address the question of pilot studies, which, as stated above, was unhelpful as it did not provide a full response to the Applicant's request.

53. As for the search for research materials, we were informed that the Long Term Care & Disabilities Support Services ('Branch') of the Department was responsible for conducting this search because the subject topic fell within the area of expertise of that Branch. It is the staff of this particular Branch that conducted the research on Long Term Care issues.
54. Staff at this Branch contacted individuals who had been involved in the research portion regarding the need for specialized dementia care units, and those involved in the jurisdictional research and demographics portion of the 2011-2016 Nursing Home Renovation and Replacement Plan. These individuals were current and past staff members of the Long Term Care & Disability Support Services of the Department and Nursing Home Services staff, including a retired staff member. They were asked to identify the sources they had consulted prior to and since the change in admission criteria.
55. The Department indicated that these staff members regularly consult in the scope of their work materials containing best practices and that the documentation compiled was based on the "memories" of all involved, i.e., the relevant records identified in this case were based on what the staff remembered as having referenced as resource materials.
56. It may be that the Department took adequate steps to search for and compile the relevant information to fully answer the Applicant's request; however, it is not possible for either the Department or our Office to be certain of this because at the operative time, the Department did not create a file or maintain a list of the research materials consulted during the research process. Had the Department done so, it would have been able to consult the file or refer to the list created at that time and be in a better position to lawfully respond to the request, i.e., to respond with the assurance that all of the relevant documents had been found and probably by expending less time to do so.
57. It is essential that public bodies document in all cases their work in support of how they arrive at decisions that affect the public and call upon expenditures of public funds. Only in documenting their entire decision-making processes will public bodies be in a position to properly and fully respect the public's right to know, a statutory right such as that which was exercised in this case by the Applicant.

58. The lack of documentation in this regard raises concerns for our Office and with the important reforms brought about since the 2010 enactment of the *Act*, it is incumbent upon the Commissioner to send a clear message that the lax practices of the past must be corrected. The Department's inability to confirm with certainty, beyond relying on individual staff members' memories, the research materials consulted, raises serious questions about whether the Department did conduct thorough research to ensure that it took all relevant considerations into account in making the decision to change the admission criteria in this fashion.
59. Not being able to demonstrate with certainty the work that was done in support of the decision-making process not only undermines the Department's ability to defend the decision, but also interferes with access rights, as the public has the right to know how public bodies make decisions. It is imperative that the Department compile and maintain a list of research materials consulted in relation to a particular policy development or change to ensure that it is better prepared to respond to a similar access request in the future.
60. The Commissioner will thus recommend that improved documentation practices be developed within 3 months of the date of this Report by which the Department will be able to determine with relative ease the research conducted on a particular topic and information relied upon in properly documenting its decision-making process.

RECOMMENDATIONS

61. Based on all of the above findings, the Commissioner issues the following recommendations:
- a) In accordance with subparagraph 73(1)(a)(i) of the *Act*, that the Department release to the Applicant the information about the Strategic Steering Committee;
 - b) In accordance with paragraph 60(1)(h) of the *Act*, that the Department develop new and improved practices to modify its current processing of access to information requests filed under the *Act*. These improved practices are intended to correct the following:
 - the Department's duty to assist obligations as per section 9 of the *Act*;

- the Department's respect of time limits under the *Act*, and ensuring that Ministerial sign-off is not a relevant consideration to delay issuing a response;
 - the Department notify applicants of self-extensions in accordance with the requirements set out in section 11, including notifying applicants in writing of the date on which a response can be expected when self-extending the time limit, and the right to file a complaint with our Office;
 - the Department's compliance with the requirements of section 14 of the *Act* when preparing a response, including taking steps to ensure that its responses contain all of the required elements, meaningful explanations, and addressing all aspects of requests;
- c) In accordance with paragraph 60(1)(h) of the *Act*, the Commissioner also recommends that the Department establish, within 3 months of the date of this Report, practices that will improve the Department's documentation of its decision-making process and that will enable the Department to determine with relative ease the research conducted on a particular topic and information it relies upon when making decisions;
- d) In light of all of the above, and in accordance with paragraph 60(1)(h) of the *Act*, the Commissioner also recommends that the Minister and senior staff of the Department meet with the Commissioner at their earliest opportunity to discuss how the Department intends to implement the above recommendations.

Dated at Fredericton, New Brunswick, this _____ day of August, 2014.

Anne E. Bertrand, Q.C.
Commissioner