

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-245

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File: 20-168-4 and 20-187-4

October 8, 2020

**BACKGROUND**

On April 20<sup>th</sup> and April 21<sup>st</sup>, 2020, the Applicant, a member of the press, made two separate requests to the Department of Health and Social Services. The first of these requests was for:

Any and all correspondence between the NWT Chief Public health Officer, her office, the Department of Health and Public Health Authorities and Health Departments in other Canadian jurisdictions related to the response to COVID-19. This includes but is not limited to e-mail correspondence, reports, records of phone conversations, including any analysis or reports of the data provided by other jurisdictions completed by the Northwest Territories Health Department.

The second request for information was made on April 21 and requested:

Any and all communications, including but not limited to emails, phone records, text messages, investigation reports, investigation notes from public health officers, related to investigations into breaches of a public health order in Norman Wells N.W.T. covering April 14 - 21 including all communications related to a media request from CBC News on April 20 seeking information about an investigation involving Paulie Chinna, including but not limited to emails, phone records, text messages,

The Department sent letters to the Applicant on May 22<sup>nd</sup>, 2020 in which they advised that the Department would not be responding to the requests because they were

focusing their resources elsewhere. Both letters contained the following paragraph:

In response to the COVID-19 pandemic and Public Health Emergency, the DHSS has an essential services focus including reassignment of resources where necessary. The information requested in your Request for Access to Information is within the Office of the Chief Public Health Officer and others working directly to respond to the public health emergency. Diverting those essential resources from their critical activities would compromise public health and safety. As a result, the DHSS is requiring more time to respond to the access requests.

We will be in touch with you within the next 60 days to provide updates on your requests.

As of the date of the writing of this report, nearly six months after the requests for information were made, there is no indication that the Department has responded to either of the requests.

On May 26<sup>th</sup>, 2020, the Applicant asked this office to review the proposed extension of time taken by the Department and its deemed refusal with respect to each of the requests.

## **THE DEPARTMENT'S SUBMISSIONS**

The Department responded to my requests for an explanation as to the reasons for the extension of time for responding to the request. In both cases they acknowledged that they were not in compliance with their legislated obligations under the *Access to Information and Protection of Privacy Act*.

We acknowledge this extension request does not meet our legislative obligations under Section 11 however these are unprecedented times that

were not anticipated in legislation. We are dealing with operational shortages that have left us unable to process these requests under legislative timelines.

## THE RELEVANT SECTIONS OF THE ACT

The *Access to Information and Protection of Privacy Act* is quasi-constitutional in nature. It takes precedence over all other legislative requirements and obligations, except in circumstances in which another piece of legislation specifically and clearly says otherwise.

Section 1 of the Act sets out the purposes of the legislation:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
  - (a) giving the public a right of access to records held by public bodies; ...

This section clearly outlines that the legislation provides for a **right** of access by the public. This is not a benefit or a privilege, but a right.

Section 3 provides that the Act applies to all records in the custody or under the control of a public body.

Part I of the Act sets out the process for making an access to information request. Section 5, once again, reiterates that “a person who makes a request under section 6 has a **right** to any record in the custody or under the control of a public body” (my emphasis).

An important section in the context of this review is section 7, which requires public bodies to “make every reasonable effort to respond to an applicant openly, accurately,

completely and **without delay**" (again, my emphasis).

Section 8 of the legislation outlines the time within which a public body must respond to an access to information request:

- 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; ...

If a public body does not respond within 30 days (or any extension properly taken under the Act) section 8(2) provides that that failure to respond is "deemed to be a decision to refuse access to the record".

Finally, section 11 of the Act allows a public body to extend the time for responding to a request for information in four narrow circumstances:

- 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).

It is also relevant that on June 12<sup>th</sup>, 2020 the Legislative Assembly passed *Bill 10 - Temporary Variation of Statutory Time Periods (Covid-19 Pandemic Measures) Act*. That Act allows the Commissioner in Executive Council to adjust “a date, deadline or other time period prescribed in an Act and substitute a different date or deadline or specify a different time period”. However, section 2(4) of that legislation specifically excepts time frames provided for in the *Access to Information and Protection of Privacy Act*.

- (4) An order may not be made under subsection (1) that would have the effect of adjusting a date, deadline or other time period prescribed in this Act or in any of the following statutes:
  - (a) *Access to Information and Protection of Privacy Act*;
  - (b) *Health Information Act*;
  - (c) *Legislative Assembly and Executive Council Act*

## **DISCUSSION**

In both of these cases, the Department of Health and Social Services has freely admitted that they had no legal basis upon which to extend the time for responding to the Applicant’s request for information. They have admitted that they were aware that section 11 does not contain any exception which would allow them to refuse to respond to an access to information request within the specified 30 days. Accordingly, as of May 21<sup>st</sup>, the Department’s failure to respond constituted a deemed refusal pursuant to section 8(2).

The *Temporary Variation of Statutory Time Periods (Covid-19 Pandemic Measures) Act* discussed above clearly recognizes the importance of the right of the public to access government records which is entrenched under the *Access to Information and Protection of Privacy Act*. While virtually any other time frame provided for in legislation can be extended or varied under Bill 10, the time frames under the ATIPP Act and its sister legislation, the *Health Information Act* are held fast. This is because the ATIPP

Act plays a major role in the protection of democracy. It is in times of crisis that governments often overstep and take actions that suspend, curtail or remove basic democratic rights. This has clearly been demonstrated during the management of this global pandemic. Throughout the world, governments have taken unprecedented steps in an attempt to control the pandemic. Even in a pandemic, however, where the health of the people must be addressed and protected, the right of access to information must be upheld. As stated by Canada's Information Commissioner in a statement issued by her office on April 2<sup>nd</sup>, of this year:

In these extraordinary times, it is understandable that our collective focus as a society is on existential matters of public health and security. We all acknowledge the need for our leaders and decision-makers to be able to react quickly to events and make timely decisions in the best interests of Canadians.

In such circumstances, access to information and information management may not currently be top-of-mind within government institutions, where day-to-day work is focused on rapid decision-making and delivering on issues of prime importance, such as public health and essential financial support to Canadians, among other things.

Nevertheless, if the government is to inspire the confidence in Canadians that will be required to successfully navigate this challenging period as a nation, timely decision-making and the proper documentation of both the decisions and any resulting actions must go hand-in hand.

...

The right of access is a means by which we not only hold our government to account, but determine how and why decisions were made and actions taken, in order to learn and find ways to do better in the future. It is only by being fully transparent, and respecting good information management practices and the right of access, that the government can build an open

and complete public record of decisions and actions taken during this extraordinary period in our history—one that will inform future public policy decisions.

The pandemic cannot be used as an excuse to set aside quasi-constitutional rights which are critical tools which allow us to hold our governments accountable. The Department in this case has openly admitted that it had no legal reason to delay its response to the Applicant. It chose to prioritize COVID-19 response over democratic rights. Addressing the pandemic does not happen in a vacuum. The protection of our democracy is of equal importance. There is nothing in the *Access to Information and Protection of Privacy Act* which allows any public body, including the Department of Health and Social Services, to disregard an access to information request because they are dealing with other issues, regardless of how vital those other issues might also be.

## **RECOMMENDATIONS**

The Department of Health and Social services has chosen, quite deliberately, to avoid accountability for their actions during the pandemic on the basis that they are too busy managing the pandemic to be dealing with what they consider to be the less important task of protecting democracy. They have, of their own admission, diverted resources away from their legal obligations to provide access to public records in order to address COVID-19. This is not a legally supportable position, nor is it acceptable.

I therefore **recommend** that the Department of Health and Social Services disclose the requested records in each of the above requests for information within 10 days of the date of this Review Report.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**