



REPORT

**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-55**

- Report Release Date :** March 18, 2008
- Public Body:** Environment and Labour
- Issues:** Whether Environment and Labour failed to respond to the Applicant's Application for Access to a Record in a manner consistent with the *Freedom of Information and Protection of Privacy Act* ["Act"].
Whether Environment and Labour abrogated its duty to assist contrary to the *Act*.
- Summary:** An Applicant made an Application for Access to a Record to Environment and Labour requesting information concerning the number of oil spill contaminations on residential properties reported to the Department of Environment and Labour since 1999. Environment and Labour did not provide a formal response to the Applicant. Subsequently the Applicant requested a Review and Environment and Labour provided a response 131 days after the initial access request. The Review Officer questioned whether the response provided was accurate and complete and requested Environment and Labour to make another decision. After repeated attempts to elicit a response from Environment and Labour were unsuccessful, the file was forwarded to formal Review.
The Review Officer found that Environment and Labour had failed to respond without delay to the Applicant, contrary to s. 7(1) of the *Act* and inappropriately referred the Applicant to another division of the same Department.

Recommendations:

1. There is an announced plan to divide Environment and Labour into two separate Departments. It is recommended that each new Department take this occasion to review its procedures with respect to meeting the timelines and fulfilling its duty to assist under the *Act* for all requests for access to information. Included in those deliberations could be recognition by government that once the Departments are separate entities, they should each have a dedicated FOIPOP team;
2. Environment and Labour provide an immediate [prior to the division of the Department] and full explanation to the Applicant. This explanation should include the reason for how the delay went from reviewing boxes of information to no such Record existing and an apology for the unexplained and extensive delay when in fact there was no responsive Record at all;
3. Notwithstanding the mandatory nature of the \$25 application fee required to file an access request, due to the inordinate delay and lack of an accurate and complete response in this instance, this fee and any handling fee that was charged to the Applicant should be returned along with the letter of explanation by Environment and Labour referred to in Recommendation #2;
4. Environment and Labour should turn its attention to whether or not the information requested by the Applicant can be provided by creating a Record from an existing database. If that is found to be possible, the Record would then be considered as responsive to the Applicant's request and subject to the provisions of the *Act* with respect to possible exemptions, if any. There should be no fees whatsoever charged to the Applicant for providing access to this Record;
5. Where a public body wants to provide assistance to an Applicant by providing alternate information sources outside the parameters of the *Act*, it should do so with the explicit and written consent of the Applicant.

Key Words:

deemed refusal, duty to assist, duty to create a record, officer or employee of the public body, permission for an extension of time, statutory timelines, systemic problems

Statutes Considered :

Nova Scotia Freedom of Information and Protection of Privacy Act s. 2, 3(1)(k), 7(1), 7(2), 7(3), 8(3), 9(1), 9(2)

Case Authorities Cited :

FI-98-15, FI-05-21

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BACKGROUND

On May 25, 2007, the Applicant made an Application for Access to a Record by filing a Form 1 with Environment and Labour for the following Record:

Number of oil spill contaminations on residential properties reported to the Department of Environment and Labour since 1999.

On September 12, 2007, the Applicant filed a Form 7 requesting a Review for the following reason:

I have not received any reply formally from the Department of Environment and Labour.

The Applicant requested that the Review Officer recommend that:

The head of the public body give access to the record as requested in the Application for Access to a Record.

The date of the original Application for Access to a Record was May 25, 2007. Environment and Labour did not contact the Review Officer to seek an extension of time as is required by the Act.

On September 13, 2007 the Review Office requested that Environment and Labour forward copies of the documents requested by the Applicant to our Office within 15 days as follows:

- 1. Any correspondence to the Applicant or to any affected third parties regarding the application;*
- 2. A copy of the records in your custody or control relating to the request; and*
- 3. Environment and Labour's reasons for not disclosing the records with relevant sections of the Act cited.*

On September 28, 2007, the Review Office spoke with Environment and Labour and was advised by the Department as follows:

[Environment and Labour] has spoken to the Applicant via phone several times to discuss the access request. [Environment and Labour] currently has 2 boxes of responsive records to be perused in order to process the request. [The Review Office] advised [Environment and Labour] to email the Applicant and update [the Applicant] on this and give [the Applicant] a delivery date and to copy [the Review Office] on this email. [Environment and Labour] stated that [Environment and Labour] would try and respond by the end of next week,

October 5, 2007 but cannot make any promises because of the staff shortage and overload.

The Review Office impressed upon the Department the importance of copying the Review Office on any and all correspondence exchanged with applicants once a Request for a Review had been filed. In addition, the Review Office restated the importance of the need to document phone calls throughout the entire access process to ensure there is a record of all relevant contact.

On October 3, 2007, Environment and Labour responded by letter to the Applicant, the first response from the Public Body to the Applicant since the Application for Access to a Record on May 25, 2007. That letter provided, in part, as follows:

*Having done a search of the record system, as well as the tracking system(s) and databases used by the Environmental Monitoring & Compliance Division of the department I have been unable to identify a way to quantify the statistics you are looking for. Each oil spill required to be registered with the department is recorded and addressed on a case-by-case basis, searchable by civic address. The issue of identifying a specific statistic in this instance is compounded by the type of spill, how it is reported, domestic vs commercial vs industrial, the definition of an oil spill, and what role the department plays in the particular case. **Therefore, your request for access to the information has been denied, as we do not readily have a defined record of the number of oil spill contaminations on residential properties reported to the department.**
[Emphasis added]*

The Applicant was not supplied with any statutory provision for the denial of the access request.

The letter also refers the Applicant to a Supervisor of Pollution Prevention within Environment and Labour as someone who may be able to assist in a different manner to respond to the Applicant's concerns. A name and phone number were provided. The letter stated:

*However, may I direct your attention to the Environmental & Natural Areas Management Division of the department and refer you to contact Brent Baxter, Supervisor of Pollution Prevention **who may be able to assist you in a different manner to respond to your concerns.***
[Emphasis added]

There is no reference to any statutory provision related to the referral. The letter concludes by advising the Applicant, appropriately, of the right to seek a Review of the Department's decision by the Review Officer and by providing the Applicant with a Form 7.

In an email dated October 10, 2007, the Review Officer sought an explanation from the public body with respect to the referral to the Supervisor within Environment and Labour, which query can be summarized as follows:

1. How can an administrator refer a request for access to someone else within his/her Department?
2. Under the duty to assist, is it not for an administrator to respond to an applicant and not refer him or her to someone else within the same Department who may be unfamiliar with access requests?

The response to that request for an explanation was requested on or before October 12, 2007, but no response was received.

In correspondence to the Review Office dated October 17, 2007, the Applicant confirmed that s/he remained dissatisfied with Environment and Labour's response and with their explanation for the referral to the Supervisor within the Department.

In a letter dated November 5, 2007, the Review Officer requested Environment and Labour to send a decision letter to the Applicant stating that either no record exists or if a record exists that is responsive to the access request, under what sections of the *Act* it is being withheld. The decision to the Applicant, in accordance with this letter, was to be sent by November 9, 2007 with a copy being provided to the Review Officer.

No response was forthcoming. The Review Office engaged in multiple communications with Environment and Labour including a follow-up email on November 28, 2007, by telephone on December 6, 2007, in-person visit by the Environment and Labour FOIPOP Administrator to the Review Office on December 10, 2007, an email December 12, 2007, with Environment and Labour promising a response by December 14, 2007.

No response was received. On December 21, 2007, the Applicant and Environment and Labour were notified by the Review Office that the matter had been referred to formal Review. Representations were due by January 7, 2008. The Applicant's representations were received by the deadline. Environment and Labour's representations were received on January 21, 2008.

RECORD AT ISSUE

No Record has been identified by Environment and Labour as being responsive to the access request. This is a deemed refusal.

APPLICANT'S SUBMISSION

The Applicant made a written submission to the Review Officer dated January 7, 2008. That submission can be summarized as follows:

1. There was extensive delay in receiving any reply to the access request or even an acknowledgement of it. After several phone calls and messages, the Applicant spoke to Environment and Labour for the first time in July. The Environment and Labour FOIPOP Administrator indicated that this was the first opportunity to review the file due to being away from the office.

2. The Applicant did not receive a formal reply from Environment and Labour until October 3, 2007 and remained dissatisfied with the response in the letter as it did not explain why the Applicant could not obtain the information that had been requested or provide any explanation for the delay in responding to the original request in May.

PUBLIC BODY'S SUBMISSION

In a memorandum received January 21, 2008 addressed to the NS FOIPOP Review Office [sic], Environment and Labour made a submission, which can be summarized as follows:

1. The Department's response indicated that statistics for the number of oil spills are not maintained.
2. Oil spills may be domestic, industrial, or even non-reported. Spills vary in size from small to extremely large.
3. Some reported oil spills, most often complaints from third parties, are found after an investigation not to be oil spills.
4. The intent of Environment and Labour legislation and processes is to ensure that environmental issues are addressed in a stewardship manner with emphasis and assistance on a case-by-case basis. This is one of the main reasons Environment and Labour indicated that there was no database of statistics on oil spills. The Department indicated that this reasoning was reflected in the response to the Applicant's access request.
5. The FOIPOP Administrator worked with Brent Baxter, the Supervisor to whom the Applicant was referred [though the identity of the Applicant remains unknown to anyone in the Department] to try to determine if there was a way to quantify statistics to meet the request for access.
6. Mr. Baxter had offered to the FOIPOP Administrator to allow the Applicant to contact him with any questions regarding generic oil spills in the province. The intent of the offer was to assist the Applicant in another way, if possible, in the interest of environmental stewardship.
7. The offer of assistance was intended to be in keeping with the duty to assist and if done in error – providing a different kind of assistance with respect to the issue of hydrocarbon pollution in Nova Scotia – it was done with good intent.

There was no discussion or submission from Environment and Labour with respect to the deemed refusal or the time delays.

DISCUSSION

The purpose of the *Act*, which has been a broad and purposeful interpretation, provides:

2 The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

(i) giving the public a right of access to records...

(iii) specifying limited exceptions to the rights of access,

Under the *Act*, the Applicant has a right of access to any record in the custody of or under the control of a public body pursuant to s. 5, once a request has been received and is in compliance with s. 6. The Applicant made a request in writing to Environment and Labour that specified the subject matter of the request with sufficient particulars in accordance with s. 6 of the *Act*.

Duty to Assist

All public bodies are under a duty to assist applicants when a request is made in accordance with the *Act*. Section 7 of the *Act* details the statutory duty to assist and provides as follows:

7(1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and

(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or

(ii) transfer the request to another public body in accordance with Section 10.

[Emphasis added]

Section 7(2) of the *Act* further provides the time lines in which a public body is to respond to an applicant, stipulating that within 30 days of the application being received the public body is to advise as follows:

(a) whether the applicant is entitled to the record or part of the record and (i) where the applicant is entitled to access, stating that access will be given on payment of the prescribed fee and setting out where, when and how, or the manner in which, access will be given, or

(ii) where access to the record or to part of the record is refused, the reasons for the refusal and the provision of this Act on which the refusal is based;

(b) that the record is not in the custody or control of the public body; or

(c) where the record would contain information exempted pursuant to Section 15 if the record were in the custody or control of the public body, that confirmation or denial of the existence of the record is refused, and stating

(d) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the decision; and

(e) that the applicant may ask for a review by the Review Officer within sixty days after the applicant is notified of the decision.

[Emphasis added]

Section 7(2)(d) refers to the contact information of the person who has made a decision in response to an Application for Access to a Record under the *Act*, namely the FOIPOP Administrator. In this case, Environment and Labour may have misinterpreted this section to mean that a FOIPOP administrator can refer an Applicant to someone else for an answer in response to an access request. However, this is not clear as Environment and Labour did not provide a clear and accurate explanation for the referral.

Request for an Extension of Time

Where public bodies require an extension of the statutory timelines, they are entitled to take an additional 30 days or, pursuant to s. 9(1) of the *Act* may request additional time for specific purposes with the permission of the Review Officer. That section provides:

*The head of a public body may extend the time provided for in Sections 7 or 23 for responding to a request for up to thirty days or, **with the Review Officer's permission, for a longer period if***

- (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 and meeting the time limit would unreasonably interfere with the operations of the public body; or*
- (c) more time is needed to consult with a third party or other public body before the head of the public body can decide whether or not to give the applicant access to a requested record.*

[Emphasis added]

If a public body wishes to extend the response time past the initial 30 days, it must inform the Applicant in writing within the initial 30 days. Environment and Labour did not inform the Applicant of any time extension.

No request seeking an extension of time was received from Environment and Labour by the Review Officer at any time.

Where the head of the public body fails to give a written response to the Applicant within the timelines as is the case here, s. 7(3) of the *Act* provides:

*The head of a public body who fails to give a written response pursuant to subsection (2) is **deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse access to the record.***

[Emphasis added]

Creation of a Record

Section 3(1)(k) of the *Act* defines record as follows:

“record” includes...papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

Where, after a search to determine if there is a record responsive to the access request, where appropriate, public bodies should consider the duty to create a record pursuant to s. 8(3) of the *Act*, which provides:

The head of a public body shall create a record for an applicant if
(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and
(b) creating the record would not be unreasonable in that it does not interfere with the operations of the public body.
[Emphasis added]

There was no discussion by Environment and Labour with the Applicant or with the Review Office as to whether it was possible to create a record that was responsive to the access request pursuant to s. 8(3). Given the nature of the information requested – number of oil spill contaminations since 1999 – it is reasonable to assume Environment and Labour would give consideration to the creation of a record or, alternatively, provide an explanation as to why it was not possible to generate those numbers from an existing database.

This Review bears great resemblance to a matter that was reviewed by my predecessor in 1998 – ten years ago. It is disturbing that the conclusions reached in FI-98-15 resemble this Review’s findings so closely. The Review Officer in that case stated:

The failure to respond to the Applicant has never been explained to me satisfactorily. There’s no doubt that the Department did not live up to any of its obligations under the Act with regard to this Application, including its obligation to assist the Review Officer:

-Section 7 requires a public body to “make every reasonable effort to assist the applicant and respond without delay...openly, accurately and completely.” This was not done.

-Section 9 says a public body can delay a response by 30 days, and longer with the Review Officer’s permission, if certain circumstances apply, but it says the Applicant must be told the reason and when a response can be expected. The Applicant says no reasons were provided...

It is obvious that this Department, which has considerable experience dealing with Applications under this Act, was aware it was not meeting its obligations. The Review Officer should not be put in the position where [s/he] has to continually prompt a public body to respond to an Application.
[Emphasis in original]

Given the fact that over a decade has passed since the Review *FI-98-15* and nearly 30 years has passed since the access to information legislation came into force in Nova Scotia, it is very disappointing that there is still this kind of approach to an access request by a public body. In particular, with respect to Environment and Labour, I point to Review Report *FI-05-21* where the Review Officer had similar problems with this Department where he was left with doubt as to whether a search for a record had been completed and was concerned about the delay in responding to the Review Office.

It is the intention of the Review Officer to be on heightened alert for systemic problems with respect to timeliness and duty to assist applicants in future Reviews.

FINDINGS

1. Environment and Labour's response to the Applicant was 131 days after receiving the Applicant's Form 1.
2. The public body failed to respond without delay to the Applicant, contrary to s. 7(1).
3. Environment and Labour did not provide any explanation to the Applicant for the delay in responding in accordance with s. 9(2).
4. Environment and Labour did not request a time extension from the Review Officer, contrary to s. 9(1).
5. Under the Regulations for the *Act*, a public body has 15 days to provide a response to the Review Officer. Environment and Labour's initial response to the Review Office was received on the twentieth day.
6. Environment and Labour did not ever respond to the Review Officer's request for an explanation of the referral made in its response to the Applicant.
7. While the public body's referral to another person within their Department was done with a view to assist and with good intentions, it was confusing and inappropriate. If there was information available through Supervisor Baxter, it was incumbent on the Environment and Labour FOIPOP Administrator to obtain that information and to provide it to the Applicant. To make this referral convolutes the process and does not meet the test of "openly, accurately and completely" under the duty to assist.
8. A referral under s. 7(2)(d) of the *Act* can only be made in reference to providing the Applicant with a further explanation of a "decision" made under the *Act* and is to be done by a designated FOIPOP administrator.
9. Environment and Labour's response to the Review Officer's request for Representations was 14 days late.
10. The "decision" letter from Environment and Labour bordered on a non-decision. A decision letter must make it clear to the Applicant that a Record does or does not exist that is responsive to the access request. If the Record does exist but is not going to be released reasons must be given. If a Record does not exist that

must be stated clearly. Environment and Labour did not claim that the Record does not exist. The decision seems to imply that the data is available, but not easy to compile. Therefore, Environment and Labour is denying access rather than embarking on a laborious task.

11. Given the nature of the information that was the subject of the request, the Public Body failed in its duty to create a Record or at least give consideration to the creation of a Record and an explanation to that effect to the Applicant.
12. There is a need for the Review Officer to monitor future FOI POP activity for systemic problems.

RECOMMENDATIONS

1. There is an announced plan to divide Environment and Labour into two separate Departments. It is recommended that each new Department take this occasion to review its procedures with respect to meeting the timelines and fulfilling its duty to assist under the *Act* for all requests for access to information. Included in those deliberations could be a recognition by government that once the departments are separate entities, they should each have a dedicated FOIPOP team;
2. Environment and Labour provide an immediate [prior to the division of the Department] and full explanation to the Applicant. This explanation should include the reason for how the delay went from reviewing boxes of information to no such Record existing and an apology for the unexplained and extensive delay when in fact there was no responsive Record at all;
3. Notwithstanding the mandatory nature of the \$25 application fee required to file an access request, due to the inordinate delay and lack of an accurate and complete response in this instance, this fee and any handling fee that was charged to the Applicant should be returned along with the letter of explanation by Environment and Labour referred to in Recommendation #2;
4. Environment and Labour should turn its attention to whether or not the information requested by the Applicant can be provided by creating a Record from an existing database. If that is found to be possible, the Record would then be considered as responsive to the Applicant subject to the provisions of the *Act* with respect to possible exemptions, if any. There should be no fees whatsoever charged to the Applicant for providing access to this Record;
5. Where a public body wants to provide assistance to an Applicant by providing alternate information sources outside the parameters of the *Act*, it should do so with the explicit and written consent of the Applicant.

Respectfully,

Dulcie McCallum

Freedom of Information and Protection of Privacy Review Officer for Nova Scotia