



**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Carmen Stuart**

REVIEW REPORT FI-14-01

June 2, 2014

Council on African Canadian Education

Summary

The Applicant made an Application for Access to a Record [“Access Request”] that was transferred in part, by the Department of Education and Early Childhood Development [“Education”] to the Council on African Canadian Education [“CACE”] under the *Freedom of Information and Protection of Privacy Act* [“Act”]. CACE did not provide a response to the Applicant.

The Applicant filed a Request for Review [“Review”] of CACE’s failure to provide a response [“deemed refusal”]. CACE was unresponsive to the Review Office’s attempts to gather information. After more than five weeks, CACE informed the Review Office that it did not believe it was a public body.

Representations were requested from both the Applicant and CACE; the Applicant provided Representations outlining his/her position on the matter and CACE did not.

The Review Officer found that CACE is a public body, that CACE failed to respond to the Applicant’s Access Request and that CACE failed to meet its duty to assist the Applicant. The Review Officer recommended CACE acknowledge that it is a public body, issue a disclosure decision, get training and set up a FOIPOP regime for future Access Requests.

Statutes Considered

Freedom of Information and Protection of Privacy Act, sections 3(1)(j), 3(b)(ii), 7(1)(a), 7(2), 49(1)(f); Freedom of Information Act; Interpretation Act; Education Act, sections 139(3), 139(5); Ministerial Education Act Regulations, section 43.

Other Sources

Cayer v. South Shore Development Authority, 2008 NSSC 349; McLaughlin v. Halifax-Dartmouth Bridge Commission, 1993, 125 N.S.R. (2d) 288; McLaughlin v. the Halifax-Dartmouth Bridge Commission, 1993, CanLii 3116 (NS CA); Iannetti v. Cosmetology Association of Nova Scotia, 2000 CanLII 5614 (NSSC); Order in Council 97-710.

Background

On December 6, 2013 the Applicant made an Access Request to Education for records relating to an advisory board and its subcommittee. On December 19, 2013 Education, under 10(1) of the *Act*, transferred part of the Access Request to CACE – three of five specifically identified items were transferred.

On January 20, 2014 the Applicant contacted CACE to remind it of its 30 day obligation to provide a response. CACE did not acknowledge the Applicant’s email or issue a response.

On January 28, 2014 the Applicant filed a Review. CACE was contacted on January 31, 2014; a message was left which included the nature of the call and a request to call the Review Office “as soon as possible”. No call was returned.

On February 4, 2014 the Review Office sent CACE a letter via email, outlining the nature of the Review and requesting specific actions to be completed within 15 days of receipt [February 19, 2014].

On February 7, 2014 CACE indicated that it had not received the transfer from Education. CACE confirmed an earlier conversation with Education about whether or not CACE was subject to the *Act*, however that was the last CACE heard of the matter so it thought it was settled.

The Review Office sought additional information from Education in order to shed light on the sequence of events relating to the transfer and to the scope of the Access Request before CACE. The Applicant was not able to provide a copy of the Access Request and CACE indicated that it had never received the transfer. Education was able to provide a copy of the Access Request on February 21, 2014.

On February 24, 2014 a copy of the Access Request was forwarded to CACE along with instructions to respond to the February 4, 2014 letter on or before February 28, 2014. The letter included notice that if no response was received, the file would be forwarded to the Review Officer for formal Review. The letter was couriered to CACE, confirmation of receipt was

obtained. No response to this letter was received from CACE. A copy of the Access Request and transfer letter was also sent by Education to CACE via email on February 27, 2014.

On March 4, 2014 the file was forwarded to the Review Officer. CACE was contacted the same day and an urgent message was left with the request to call before the end of the next day. An email with the same details was also sent. The Applicant was contacted the same day with a status update.

On March 5, 2014 CACE contacted Education by email acknowledging receipt of the correspondence Education sent on February 27, 2014. The e-mail was also sent to the Applicant and Review Officer. **In that email, CACE indicated “we do not have a final answer on the question of whether CACE is subject to FOIPOP.”** The Applicant immediately contacted the Review Office with concerns that CACE should have raised this at the very onset. CACE contacted the Review Office by email and left a message at approximately the same time as the Applicant. A return call was attempted within minutes, however CACE was unreachable. Voicemail messages were received from CACE on March 7, 2014 and March 10, 2014 as well as an email on March 10, 2014.

Given the turn of events - 36 days into the Review CACE questioning whether or not it was a public body, on March 10, 2014, I referred the file to a Portfolio Officer for investigation. The only issue up until that point was whether or not CACE was in a deemed refusal situation. The day after assigning the file, CACE contacted me. I confirmed my understanding of the recent revelation – that CACE is questioning its status as a public body, and the need for this to be resolved. I also questioned why this had not been resolved sooner, given the Applicant first contacted CACE on January 20, 2014. CACE indicated that it gives people information all the time outside of the *Act*. I indicated that if CACE is a public body, it will need to operate within the timeframes of the *Act*. CACE indicated that it is not going to go any faster; there is no internal capacity; there is no one authorized to make those decisions; and the scope is seven years of documents.

I acknowledged the challenges faced by CACE but the Review Office requires CACE to respond to our requests. CACE informed me: that it is not accurate to say that it is not responsive; that is not the character and nature of the organization; and that CACE employees answer to the Board of Directors, not the Review Officer, so CACE will not work within the Review Officer’s timelines. Various tools were offered and I also strongly suggested that FOIPOP be placed on the agenda for the next Board meeting that was scheduled for later in March. CACE voiced the need for a legal opinion.

Informal resolution was attempted but it was unsuccessful. On April 25, 2014 the Applicant and CACE were given Notice of Formal Review. Representations on the three issues outlined below

were solicited and due May 12, 2014. Both parties were given information on how to make Representations and provided tools to assist.

On April 30, 2014 the Portfolio Officer had a conversation with CACE, followed up by an email, regarding “the process so far and going forward.” During that conversation, it was strongly suggested to CACE to seek assistance to process the Access Request if this was the opinion of CACE that it was a public body. CACE was given the contact information of the Chief Information Access and Privacy Officer whose role is to assist government public bodies in the day-to-day application of the *Act*. CACE requested an extension to provide Representations until June 11, 2014. An agreement to the extension was sought from and rejected by the Applicant.

On May 6, 2014, CACE was informed that the Applicant was not in agreement with the extension. CACE informed the Review Office that it would not be submitting Representations by the deadline provided and CACE was being disenfranchised as a result of the deadlines – the main reasons being that the Board cannot participate due to the infrequency of meetings and unfamiliarity of the *Act*, and the Applicant is able to respond more quickly due to his/her profession. CACE was invited by the Portfolio Officer to request an extension from the Review Officer. No such request was made.

The Applicant’s written Representations were provided to the Review Office and CACE on May 12, 2014. No written Representations have been submitted by CACE.

Issues

The issues I must decide are the following:

1. Whether CACE is a public body under the *Act*.

If yes to Issue # 1, then:

2. Whether CACE complied with the statutory timelines to respond to an Access Request, as required by section 7(2) of the *Act*; and
3. Whether CACE has met its statutory duty to assist the Applicant under section 7(1) of the *Act*.

Discussion

Issue #1: Is CACE a Public Body?

The Supreme Court of Nova Scotia, in *Cayer v. South Shore Development Authority* [2008 NSSC 349], has found that the onus is on the organization to prove that it does not fall under the *Act*.

CACE did not provide Representations on this Issue. The only information from CACE that I have to rely upon comes from its email to Education on March 5, 2014 which was shared with our office. It included:

...we do not have a final answer on the question of whether CACE is subject to FOIPOP. At present we still do not have a response to this question. It was my hope that your role as Information Officer for the Department of Education, would be of assistance in answering this question. CACE still welcomes your input.

There is often a misunderstanding as to how provincial legislation applies to CACE. As we both know, CACE is not a branch or division of the Department of Education or government, but rather an advisory body to the Minister of Education. Its board is a voluntary body only and CACE staff are not provincial government employees - thus not governed by NSGEU or other employee governing units within government. In addition CACE has a very unique mandate making it difficult to be categorized.

My own best practices support the idea of providing information to all citizens providing the request is reasonable. However, in the absence of: A ruling on whether CACE is indeed subject to FOIPOP; A board policy on FOIPOP; internal knowledge and administrative capacity to comply with such a request, I therefore believe it is necessary that I seek clarification and direction from appropriate decision makers – including the Chair of CACE and others in authority over such matters - before proceeding further.

The Applicant provided comprehensive and well organized Representations. I have chosen to include them in their entirety, with some minor formatting alterations, and have adopted them as the analysis of this question.

The *Freedom of Information and Protection of Privacy Act*, is the public sector privacy and access law for the Province of Nova Scotia. The *Act* applies to provincial public bodies in the Province of Nova Scotia and deals specifically with access to records in the custody and control of public bodies, and also regulates the collection, use and disclosure of personal information by those public bodies.

It is trite law that the *Act* should be construed liberally in light of its stated purpose [*McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993) 125 N.S.R. (2d) 288, at page 5]. It is suggested that the entire statute should be read in light of its clear statement of legislative

intent. If any ambiguity exists, the purpose clause, reinforced by the mandate contained in the *Interpretation Act* [RSNS 1989, c. 235], for liberal construction of statutes, should mitigate in favour of disclosure.

The purpose of the FOIPOP Act is set out in section 2:

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,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

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

(iv) preventing the unauthorized collection, use of disclosure of personal information by public bodies, and

(i) providing for an independent review of decisions made pursuant to this Act; and

(b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to

(i) facilitate informed public participation in policy formulation,

(ii) ensure fairness in government decision-making,

(iii) permit the airing and reconciliation of divergent views;

(c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

The term "public body" is defined in section 3(1)(j) of the Act and includes: provincial government departments, agencies, boards, commissions, some crown corporations, public universities, school boards and hospitals. Section 3(1)(j) reads as follows:

Interpretation

3(1) In this Act,

(j) "public body" means

(i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which

(A) are appointed by order of the Governor in Council, or

(B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,

and includes, for greater certainty, each body referred to in the Schedule to this Act but does not include the Office of the Legislative Counsel,

(ii) the Public Archives of Nova Scotia,

(iii) a body designated as a public body pursuant to clause (f) of subsection (1) of Section 49, or

(iv) a local public body

The Nova Scotia Court of Appeal decision in *McLaughlin v. the Halifax-Dartmouth Bridge Commission* [1993, CanLii 3116 (NS CA)] remains a leading case in determining what constitutes public officers for purposes of the *Act*. In that case, the Halifax-Dartmouth Bridge Commission denied the Applicant release of all its meeting minutes for the years 1969 and 1973 on the grounds the Commission was not a "department" as defined in the predecessor *Freedom of Information Act* [S.N.S. 1990, c. 11]. The Commission argued that it was not a "department" because the commissioners were appointed by municipal units and not by the Province or the Governor in Council. The Supreme Court of Nova Scotia agreed with the Commission and dismissed the appellant's application.

On appeal to the Nova Scotia Court of Appeal, the main issue for determination was whether or not the Commission was a department under s. 3(b) of the *Freedom of Information Act* or, more specifically, whether or not the Commissioners are public officers under s. 3(b)(ii) of the *Freedom of Information Act*.

In reversing the lower court's decision, the Court of Appeal conducted a functional assessment of the Halifax-Dartmouth Bridge Commission to determine whether the Commissioners were acting on behalf of the public in the discharge of their duties. The Court of Appeal found that the Commissioners positions were created by the Legislature and that delegated statutory power had been conferred on them making them public officers for the purpose of the *Freedom of Information Act*.

Further on in its analysis, the Court of Appeal determined that the trial judge erred when he focused not on the duties and powers of the Commissioners but rather on the fact the

Commissioners were independent of any control by the bodies that appointed them to the Commission. The Court of Appeal stated in this regard:

In my view the definition of "department" is sufficiently wide to include independent boards, commissions, agencies and foundations. Section 3(d) of the Freedom of Information Act is as follows:

"(d)" 'minister' means a member of the Executive Council and, in the case of a board, commission, foundation, agency, association or other body of persons not reporting directly to a minister in respect to its day-to-day operations, means the chief executive officer,"

This definition implies that it is not necessary for an independent commission to be reporting directly to a minister in order to be subject to the Freedom of Information Act.

The Court of Appeal also took the opportunity to interpret the term "in the discharge of their duties" as it was found in s. 3(b)(ii) of the *Freedom of Information Act*. The Court stated in this regard:

In my view, it is clear that the Commissioners are acting on behalf of the public in the discharge of their duties and powers. The Bridge Commission is not a private corporation. It is similar to the university board in the Hill case, in that although members are appointed from various sectors, it is a statutory body created by statute and given the power to act by statute. The Commissioners' positions are created and defined by the statute. In my opinion they are public officers.

The Court of Appeal concluded as follows:

I conclude that the Commissioners are public officers as defined in the Act and that the Halifax-Dartmouth Bridge Commission is a department subject to the Act. This conclusion is in keeping with the object and purpose of the Act as interpreted liberally and, as indicated by Associate Chief Justice Jerome in the Maislin Industries case, "ought not be frustrated by the courts except upon the clearest grounds".

CACE was created pursuant to the *Education Act* [ss. 139(5) of C. 1 of the *Acts of 1995-96*]. Subsection 139(3) of the *Education Act* sets out the duties and responsibilities of CACE, and these legislative provisions make it imperative upon CACE to promote the rights and interests of African-Nova Scotians by providing recommendations to the Minister on programs and services in public schools and on adult education. These legislative provisions also make it imperative upon CACE to perform such other duties as determined by the regulations. Section 139 of the *Education Act* reads as follows:

AFRICAN-CANADIAN EDUCATION

Council on African-Canadian Education

- 139 (1) *There is hereby established a Council on African-Canadian Education.*
- (2) *The Minister shall establish the terms of reference for the Council on African-Canadian Education in consultation with the Black Learners Advisory Committee.*
- (3) *The Council shall*
- (a) *promote the rights and interests of African-Nova Scotians by providing recommendations to the Minister on programs and services in public schools and on adult education; and*
 - (b) *perform such other duties as determined by the regulations.*
- (4) *Pending the appointment of the members of the Council pursuant to subsection (5), the Council is composed of the members of the Black Learners Advisory Committee.*
- (5) *Members of the Council shall be appointed by the Minister for such terms and upon such conditions as determined by the regulations.*
- (6) *The Council shall meet at least four times a year.*
- (7) *Meetings of the Council shall be presided over by a member of the Council chosen by the Council.*
- (8) *The members of the Council are entitled to such remuneration and shall be reimbursed for such reasonable expenses as are necessarily incurred in carrying out their duties, as the Governor in Council determines by regulation.*

In keeping with the findings by the Court of Appeal in *McLaughlin v. Halifax-Dartmouth Bridge Commission*, a functional assessment of the duties and powers of CACE makes it abundantly clear that CACE members satisfy the criteria of "public officers" pursuant to s. 3(1)(j)(i)(B) of the *Act*. In particular, CACE is appointed by the Minister of Education and Early Childhood Development for such terms and upon such conditions as determined by the *Regulations*. Statutory power has been conferred on CACE to promote the rights and interests of African-Nova Scotians by providing recommendations to the Minister on programs and services in public schools and on adult education.

In accord with the reasoning of the Court of Appeal in *McLaughlin v. Halifax-Dartmouth Bridge Commission*, "[T]he fact that the positions are created by the Legislature and delegated statutory power has been conferred on them is what makes the Commissioners public officers." The same premise holds true for CACE, the positions are created by the Legislature and

delegated statutory power has been conferred on them. In addition, CACE board members receive remuneration and are reimbursed for expenses incurred in fulfilling their duties and responsibilities [OIC 97-710].

Furthermore, the *Ministerial Education Act Regulations* set out the regulations with respect to CACE. Subsection 43 of the *Regulations* states as follows:

Council on African-Canadian Education

43 In addition to the duties prescribed pursuant to clause 139(3)(a) of the Act, the Council shall

- (a) in respect of the Black Learners Advisory Council Final Report, provide guidance to the Minister on the development, implementation, evaluation and finding of educational programs and services for Black learners;*
- (b) advise the Minister respecting the ways the programs and services of the Division are meeting the needs of Black learners, and the ways they may be improved to better serve Black learners;*
- (c) recommend to the Minister policies, initiatives, and ideas that foster the educational development of Black learners and advance African Canadian education;*
- (d) solicit the views of members of Black communities across the Province respecting the education of Black learners, and bring matters of interest and concern to the attention of the Minister;*
- (e) make recommendations to the Minister in respect of research on matters relevant to Black learners;*
- (f) where possible, participate in education planning on committees and commissions related to African Canadian education;*
- (g) liaise with the Division in respect of its programs and services to Black learners;*
- (h) advise the Minister on the establishment, role, and ongoing operations of an Afrocentric Learning Institute;*
- (i) support the regional educators program as a community-based resource and review its activities on an annual basis with the Minister and the organization responsible for the program;*
- (j) advise the Minister on the Black Incentive Fund and make recommendations respecting other scholarships and initiatives to support Black learners.*

The *Regulations* support the conclusion that CACE is performing public functions in the discharge of their duties. For instance, CACE is required by the *Regulations* to, among other things, provide guidance and make recommendations to the Minister of Education and Early Childhood Development on educational programs and initiatives in respect of Black learners in the Province of Nova Scotia. CACE is also required by the *Regulations* to solicit views of members of the Black communities across the Province respecting the education of Black learners. Ultimately, the *Education Act* and the *Regulations* make it clear that CACE is acting in the public interest - African-Nova Scotian and African-Canadian education - in the discharge of the duties. Therefore, CACE board members satisfy the definition of public officers for purposes of s. 3(1)(j)(i)(B) of the *Act*.

In *Iannetti v. Cosmetology Association of Nova Scotia* [2000 CanLII 5614 (NSSC)], the Supreme Court of Nova Scotia dealt with the issue of whether the Cosmetology Association of Nova Scotia ["Association"] was subject to the *Act*. The sole issue for determination by the Court was whether the Association constituted a "public body" within the meaning of s. 3(1)(j) of the *Act*.

In its analysis the Supreme Court relied on the Court of Appeal decision in *McLaughlin v. Halifax-Dartmouth Bridge Commission* and conducted a functional assessment of the Association. The Supreme Court addressed this issue as follows:

It appears that at least prior to the substitution of the phrase "public body" for the word "department" in order to be subject to the Act, the institution, organization or association would have had to have been an "arm of the government" having in mind the statement to this effect by Justice Roscoe in McLaughlin v. Bridge Commission., supra. Whether Justice Roscoe intended that only "arms of government" were subject to the then version of the Act is not altogether certain. However, the review of function she addressed in respect to the Bridge Commission together with the statement the Commission was in effect an "arm of government" and that its "operations are of concern to many citizens of the province who pay for it as users of the bridges and as tax payers" is suggestive of the need for a direct link between the duties and responsibilities of government and the operations of the "particular organization, institution or association."

Despite its finding that the Cosmetology Association of Nova Scotia was not a "public body" for purposes of the *Act*, it did confirm the validity of the functional assessment approach laid down by Justice Roscoe in *McLaughlin v. Halifax-Dartmouth Bridge Commission*. The Court stated:

Recognizing, therefore that the Legislature has extended the scope of the Act beyond "arms of government", it is further clear the functional approach ascribed by Justice Roscoe in McLaughlin, supra, is still applicable in assessing whether this scope has been so enlarged as to encompass "self governing" professions and, in particular, in the context of this application, the Association.

The Supreme Court further stated that,

"... it is further clear that by substituting "public bodies" for "department" the Legislature was intending to alter and clearly to expand on the scope of the application of the Act. If it were not so intended, then there would be, in our view, no reason for the Legislature to have made the amendment which it did."

The issue of whether CACE is a public body for purposes of the *Act* can be answered by analogy. As stated by the Court of Appeal in *McLaughlin v. Halifax-Dartmouth Bridge Commission*, and relied on by the Supreme Court of Nova Scotia in *Iannetti v. Cosmetology Association of Nova Scotia*, 'Its duties and operations are of concern to many citizens of the province who pay for it as users of the bridges and as tax payers. It is, in my view, appropriate that it is subject to the *Freedom of Information Act*.' The Supreme Court in *Iannetti* also suggested, "the need for a direct link between the duties and responsibilities of government and the operations of the "particular organization, institution or association.""

With respect to CACE, its operations are of concern to many citizens of the province who rely on it to promote the rights and interests of African-Nova Scotians by providing recommendations to the Minister on programs and services in public schools and on adult education. There is a direct link between the duties and responsibilities of the Minister of Education and Early Childhood Development and CACE. Accordingly, there can be no doubt that CACE is a public body pursuant to s. 3(1)(j) of the *Act*.

Subsection 3(1)(j)(iii) of the *Act* states that a "public body" is a body designated as a public body pursuant to section 49(1)(f) of the *Act*. Section 49(1)(f) states as follows:

49 (1) The Governor in Council may make regulations

(f) designating

(i) any agency, association, board , commission, corporation, office, society or other body

(A) any member of which is appointed by the Governor in Council or a minister

as a public body;

The *Education Act* and its *Regulations* establish that CACE members are all appointed by a minister, the Minister of Education and Early Childhood Development. Each of its members receives remuneration and is reimbursed for expenses by Order in Council [OIC 97-710].

Furthermore, CACE is a non-adjudicative board listed among Nova Scotia's Agencies, Boards and Commissions (ABC Membership).

In addition to the Applicant's Representations, following Justice Hood's approach in *Cayer, v. South West Shore Development Authority*, I am lead to the same conclusion in this case:

*In my view, based upon the intention of the legislature in enacting Part XX of the MGA, the provisions of the MGA ought to be interpreted liberally. A liberal interpretation of the definition of "municipal body" includes SWSDA. **The Legislature could not have intended that an organization like SWSDA, with the objectives set out in its Memorandum of Association, with the membership it has and provided with government funding (municipal, provincial and federal), would be an organization to which freedom of information legislation would not apply.***
[emphasis added]

I find CACE is a public body under the *Freedom of Information and Protection of Privacy Act* and was/is required to process this Access Request.

Giving my Finding that CACE is a public body under the *Act*, and was required to process the Access Request, I will go on to examine the other two issues.

Issue #2: Whether CACE complied with the statutory timelines to respond to an Access Request, as required by section 7(2) of the *Act*.

Section 7(2) of the *Act* sets out the time limit for providing a disclosure decision in response to an Access Request and the elements that are required to be included in the response, as follows:

(2) The head of the public body shall respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirements of clauses (b) and (c) of subsection (1) of Section 6, stating

(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.

For the purposes of deciding these issues, I have decided to use February 24, 2014 as the date the Access Request was known to have been received by CACE. I have not investigated whether or not it had actually received the transfer from Education earlier, on December 19, 2013.

If the Applicant's Access Request was received on February 24, 2014 by CACE, the due date for a disclosure decision was March 26, 2014. No response has been given.

I find CACE has failed to comply with the timelines set out in section 7(2) of the Act; it is in default of its statutory responsibility.

Furthermore, to date no disclosure decision has been issued. Section 7(3) of the Act states:

(3) 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 to give access to the record.

I find CACE has refused access to the Record in accordance with section 7(3) of the Act. In other words, there is a deemed refusal to provide access to the requested Records.

Issue #3: Whether CACE has met its statutory duty to assist under section 7(1) of the Act.

Section 7(1)(a) of the Act imposes a duty to assist Applicants on CACE 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...***

[Emphasis added]

There is no indication that when it became aware that an Access Request had been filed and that a decision needed to be made, CACE made any effort, let alone "every reasonable effort", to assist the Applicant; therefore CACE has not responded "openly, accurately and completely".

I find that CACE has failed its duty to assist the Applicant by not fulfilling these two components required by section 7(1) of the Act.

Conclusion

It is possible that prior to receiving this Applicant's Access Request, CACE did not know that it was a public body under the *Act*. However, as soon as it became aware that this was something that it would have to decide, CACE should have taken the necessary steps to make a decision on the matter and inform the Applicant. CACE has provided no evidence to suggest that any effort was made to determine the matter internally or to seek guidance from the avenues suggested by the Review Office. The only rationalization CACE provided was that the decision and direction must come from the Board and it meets very rarely making it impossible for a decision to be made within the timelines set by the Review Office process and by the *Act*.

Because it did not make a decision about whether or not it was a public body, CACE did not consider its responsibilities under the *Act* and its duty to assist the Applicant.

This non-responsiveness shows a lack of respect for the Applicant's fundamental right to access information guaranteed by the *Act* and shows a disregard for the Review Office as the independent impartial oversight body that has the statutory authority to review CACE's decisions, acts and failures to act under the governing legislation.

The entire access to information process is dependent on public bodies being timely and comprehensive in their responses to Applicants, to the Review Officer and to Review Office staff. Our mutual goal must always be to serve the public in responding to their right to access information to which they are entitled.

Recommendations

Under the authority of section 39 of the *Act*, I recommend that CACE:

1. Send the Applicant an acknowledgment letter indicating: that CACE is a public body, that it will process the Access Request within the timelines of the *Act* and the reasons for not addressing the issue earlier. This letter must be copied to the Review Officer. The acknowledgment letter is to be sent immediately upon acceptance of this Recommendation.
2. Issue a disclosure decision to the Applicant, with a copy to the Review Officer, which is compliant with section 7(2) of the *Act*. As required by section 8(1)(a)(i) of the *Act*, a copy of the Record or part of the Record must be provided along with the response. Any necessary extension to the time to provide a response must be done in accordance with section 9 of the *Act*. Day one of processing starts immediately upon acceptance of Recommendation #1.

3. Request training, from the Nova Scotia Access and Privacy Office with the Department of Internal Services, so that CACE is fully aware of its roles and responsibilities under the *Act*. This request must be made immediately upon acceptance of this Recommendation.
4. Set up internal policies and procedures for addressing future Access Requests and Reviews so that CACE ensures it is compliant with the *Act*. These policies and procedures are to be completed within six months of acceptance of this Recommendation and a copy must be provided to the Review Officer.

Carmen Stuart, CIAPP – M

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