



## **Report of Findings: 23/24-AP-046 and 23/24-AP-047 Department of Environment and Local Government**

**December 4, 2023**

**Citation:** New Brunswick (Environment and Local Government) (Re), 2023 NBOMBUD 7

**Summary:** The Applicant made two access requests to the Department of Environment and Local Government for copies of complaints made to and details of inspections conducted by the Department about a crustacean shell drying facility since 2016. In response, the Department provided the Applicant with copies of complaints and inspection records and related documents. The Applicant noted that there were missing records and after contacting the Department to follow up, filed complaints with this Office raising concerns about whether the Department conducted a reasonable search and the delay in obtaining the missing records.

The Ombud found that the Department did not meet the duty to assist under section 9 as the search verification and review process did not identify the gaps in the initial search.

The Ombud recommended that the Department make a number of improvements to its internal practices to better meet its duty to assist obligations in conducting reasonable searches and reviewing responses for completeness and to protect the identity of applicants during the processing of access requests.

**Statutes Considered:** [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, section 9.

**Authorities Considered:** N/A

**Other Resources:** Office of the Ombud, [Best Practice: Reasonable Search](#); Office of the Ombud, [Anonymity of Applicants](#).

## INTRODUCTION

[1] The Applicant made two access requests under the *Right to Information and Protection of Privacy Act* (“the Act”) to the Department of Environment and Local Government (“the Department”) on June 12, 2023 for copies of complaints made to and details of inspections conducted by the Department about a crustacean shell drying facility since 2016.

[2] The Department responded on July 11, 2023, providing over 800 pages of records, consisting of logged complaints and compliance actions taken by the Department, as well as related photographs and emails. Access to some information was refused under subsection 21(1) (unreasonable invasion of third-party privacy) and paragraph 30(1)(b) (disclosure harmful to economic and other interests of a public body).

[3] After reviewing the Department’s response, the Applicant immediately noted that the links to some of the records identified did not work and they were unable to access them. On July 11, 2023, the Applicant followed up with the Department to advise of this and asked that the missing records be provided as soon as possible. On July 12, 2023, the Department advised the Applicant that it believed that the attachments had been provided in response to a different request but committed to follow up internally to confirm.

[4] On July 24, 2023, the Department confirmed to the Applicant that several records were missed in the responses to these two requests and that it was opening a new access request as of July 12, 2023 (the day the Department received the Applicant’s email about the missing records) to process these records. The Department also included a list of the outstanding records.

[5] As the Applicant was not satisfied with how the Department had handled these requests, they filed the present complaints with this Office on July 27, 2023. The Applicant did not raise objections to the claimed exceptions and only raised concerns about the missing records and the delay in the Department providing them.

[6] At the time the Applicant filed these complaints, the Department was in the final stages of the approval process to disclose the missing records to the Applicant and issued a further reply to the Applicant with the missing records on August 2, 2023.

[7] While the disclosure of the missing records resolved the question of the Applicant’s access rights to this information, the Applicant continued to be dissatisfied with how the Department handled these requests, raising concerns that this may have been an intentional delay. This led me to conduct a formal investigation under section 68(3) of the Act.

## **ISSUES**

[8] The issue to be addressed is whether the Department fulfilled its duty to assist obligations under section 9 of the *Act* by conducting a reasonable search and in treating the Applicant's follow-up about missing records as a new access request, thus triggering a further 30 business day time limit to respond.

## **APPLICANT'S POSITION**

[9] The Applicant was seeking access to this information as part of their efforts to understand the complaints made against the facility and compliance actions taken by the Department. The Applicant was aware that the facility's approval to operate was up for review by the Department at the time of these requests and had concerns about its continued operation.

[10] The Department approved the facility's continued operations on August 1, 2023, the day before the Department provided the Applicant with the disclosure of the missing records, which the Applicant believes may have been an intentional delay in providing the full picture of the situation to the public until after the approval decision was made.

[11] The Applicant also had concerns that the Department had not taken appropriate steps to prevent a similar omission in the future and submitted that this situation had left them questioning the integrity of the overall right to information scheme.

## **DEPARTMENT'S POSITION**

[12] Prior to the Applicant filing these complaints, the Department had already acknowledged that several records were missed during the initial processing of these requests and submitted that this was an unintentional oversight on its part.

[13] As to why some of the records were missed, the Department submitted that this appeared to be an unintentional error, which the Department believed was caused by: miscommunications between regional and Departmental staff on who would be responsible for which records; a narrow interpretation of the request that excluded a small amount of relevant information; as well as the fact that the Department had received a number of requests related to the same issue with overlapping records that needed to be searched and processed during the summer vacation season.

[14] As for treating the follow up for missing records as a new request, the Department submitted that it opted to proceed in this way given the amount of personal information in the records and that following the standard review and approval procedures would be prudent. The Department further submitted that treating this as a new request as of July 12, 2023 would allow for the inclusion of records which were outside the scope of the previous requests submitted in June 2023.

[15] The Department stated that it attempted to process the missing records as quickly as possible and was able to provide them to the Applicant by August 2, 2023, which was 15 business days after the Applicant followed up with the Department about the missing record and 37 business days after the receipt of the Applicant's requests.

[16] In addition to taking steps to rectify the gaps in the initial search and to provide further disclosure of the missing records to the Applicant, the Department advised this Office that it is undertaking process improvements as a result of the circumstances of this case, which will be described in further detail below.

## **ANALYSIS AND DECISION**

[17] The relevant provision of the *Act* is as follows:

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.

[18] The duty to assist obligation compels all public bodies to be helpful and assist applicants throughout the processing of an access request. The duty to assist includes having discussions with applicants to ensure the public body understands what information they are seeking, conducting a reasonable search for the relevant records, and providing meaningful responses to requests.

### **Duty to assist: reasonable search**

[19] In this Office's guidance document on reasonable searches, we indicate that a reasonable search should include the following steps:

- identify which staff members have knowledge of or have worked on the subject matter of the access request and ensure that they are asked to assist with search efforts;
- provide those who are asked to conduct searches for relevant records with written instructions that set out the appropriate parameters to undertake a search, including:
  - types of records to be searched (paper files, electronic files, emails, handwritten notes, databases, etc.);
  - keywords for conducting searches of electronic records;
  - date range for the search; and
- staff members who are asked to search should provide the Right to Information Coordinator with all actual and potentially relevant records (staff members should not assess relevancy of a particular record that comes up in their search efforts) and to provide their search results in writing.

[20] When we notify public bodies of a complaint involving search issues, we ask that the public body provide explanations of the search undertaken and the accompanying search documentation to allow us to assess whether a reasonable search has been conducted or if additional search efforts are required to address a complaint.

[21] In this case, Department officials advised that the Applicant's requests were forwarded to the administrative assistants in the divisions that may have relevant records. This step confirmed that the relevant records were held by the Department's Authorizations and Compliance Division.

[22] Staff in the regional office as well as Departmental staff were then tasked with searching for the relevant records, which is held in the Department's Electronic Occurrence System. A member of the regional staff conducted the search and extracted the relevant occurrence file and related attachments (emails, photographs, etc.). The Department explained that the regional staff member reviewed the attachments against the wording and timeframe of the request and decided to exclude a number of records as not being directly relevant to the request, including records that were created outside the time frame of the request. For example, some records were dated June 13, 2023 and June 14, 2023 were not included as the requests were received on June 12, 2023, and logs of voice mail complaints were not included as the staff member interpreted the request as only being for written complaints.

[23] Departmental staff also conducted a search and identified the same occurrence file as being relevant to the request. When they realized that the file had already been provided by regional staff, they assumed that all the relevant attachments had also been provided and, on this basis, concluded that there were no further records to provide.

[24] By way of further explanation, the Department indicated that it had received 26 different requests from several different applicants about this situation between May 10, 2023 and August 1, 2023, and that the scope of and records involved with these requests often overlapped to some extent. Given the large number of records associated with each of these requests, paired with shifting roles and responsibilities during the summer vacation period, the Department submitted that there might have been a miscommunication amongst staff members that resulted in the records being missed in this case.

[25] The Department confirmed that the responses to both requests, including the relevant records that were to be disclosed to the Applicant, were vetted through the Department's internal approval process. The Department explained that typically directors from the relevant business areas review the proposed response and disclosure prior to review by the relevant Assistant Deputy Minister. In this case, the Director of the Department's Compliance branch reviewed the proposed responses and disclosure on July 29, 2023; however, this was not forwarded on to the Assistant Deputy

Minister for review as they were on vacation the following day and the Director of the Compliance branch took on the acting role in their absence.

[26] While I find that the appropriate staff members with knowledge of the subject matter of these requests were tasked with conducting searches for relevant records, I find that the initial search conducted by regional staff was flawed as they were assessing for relevancy based on their own reading and interpretation of the request, which resulted in some relevant information being excluded (i.e., details of complaints received by voice mail as not being directly relevant, based solely on their interpretation of the requests).

[27] It appears that staff members were able to access the log of all related attachments to the occurrence file, following which they needed to manually extract each relevant attachment to include in the records package. Unfortunately, several attachments were missed in this process. The documentation submitted by regional staff included a list of the related attachments that were accessible by clicking on a link; however, several links were inactive (which is how the Applicant was able to readily identify that some records were missing from the Department's initial responses).

[28] Departmental staff did not review or verify the search results provided by regional staff. This was a missed opportunity to double check and verify the search results.

[29] The review process by Department management also did not pick up on the fact the some of the links to the relevant records did not work, which was another opportunity to identify the gaps in the response package prior to the Department responding to the Applicant.

[30] While I find that the Department involved knowledgeable staff in the search efforts, I nevertheless find that it failed to meet its duty to assist the Applicant. Several records were missed in the initial search and other staff members tasked with conducting searches of their own accord and reviewing the proposed response package for completeness apparently did not realize or verify that some of the identified records were not accessible.

[31] While the standard that a public body must meet in conducting a search for records is reasonableness, not perfection, I find that there were a number of opportunities that could have prevented this situation before the responses were first issued to the Applicant.

[32] As a result of this situation, the Department has undertaken process improvements to prevent a similar situation from happening again.

[33] Given that the Department's Electronic Occurrence System used to track complaints and compliance actions does not automatically append attachments to

occurrence reports, the Department met with IT services and developed a step-by-step guide to extract attachments with occurrence reports, which has been shared with the Department's Regional Directors.

[34] While the Department has been documenting its search efforts through email communications, as a result of these complaints, the Department has undertaken initial discussions on implementing a standardized form that would track the progress of searches for all access complaints.

**Duty to assist: Treating the Applicant's follow up for the missing records as a new request**

[35] As for the Department's decision to treat the Applicant's follow up about the missing records as a new request as of July 12, 2023, while I noted the Department's stated reasons for doing so, I also appreciate that this was the main reason for the Applicant filing the present complaints as they were concerned that this was being used as a means of further delaying access to the information in questions. By starting a new request as of July 12, 2023, the 30 business day time limit to respond would be August 23, 2023, whereas the Applicant was expecting a fulsome response to both requests before the end of July, having submitted these requests on June 11, 2023.

[36] I also note that the Department was in the final phases of the review process for the missing records the last week of July and was able to provide them to the Applicant on August 2, 2023. Instead of advising the Applicant that it was treating the missing records as a new request on July 24, 2023, the Department could have advised the Applicant of its progress in treating the missing records and an anticipated timeframe as to when they could expect to receive the Department's further response. This would have given the Applicant a better understanding of the steps the Department had already taken to rectify the situation and when they could expect a reply.

[37] As for the Department's submission that treating the missing records as a new request would allow it to disclose further records that were deemed out of scope as they were created after the Applicant's requests on June 12, 2023, I note that there is nothing in the *Act* that prevents a public body from disclosing additional information beyond the exact wording and timeframe of an access request. When a public body receives an access request about a particular matter and it has additional records that were created shortly after the request is received, it may be able to prevent a subsequent request through proactive disclosure of additional records and will usually be seen by applicants as a good faith effort to be transparent.

[38] I find that the Department erred in starting a new request as of July 12, 2023 to rectify the issues identified above in relation to the missing records stemming from the initial search.

## **Anonymity of Applicants**

[39] In reviewing the Department's search results that were provided for our review, I noted that the Department shared not only the wording of the Applicant's access request, but also their identity with staff members who were asked to assist with the processing of these requests.

[40] The obligation to keep the identity of applicants confidential during the processing of access requests is found under Part 3 of the *Act* (Protection of Privacy). Part 3 governs how public bodies are to handle personal information during their day-to-day operations. Processing access requests is part of the public body's day-to-day operations. The identity of an applicant who made an access request is their own personal information and thus this can only be disclosed, including to other employees or officials of the public body, as permitted under Part 3 of the *Act*.

[41] In making access requests, applicants generally do not need to explain why they are looking for certain information, and in processing requests, public bodies should not generally consider the reasons behind an access request or the identity of the applicant in determining access rights under the *Act*.

[42] Ensuring that the identity of applicants is protected during the processing of requests help public bodies demonstrate that a request has been handled in an open and accurate manner and without bias or interference for any motive.

[43] Generally, the identity of the applicant will be known by the employee or official who received the request, the Right to Information Coordinator who is tasked with processing the request, and the head of the public body (or their designate, if delegated to do so on the head's behalf) who signs the public body's response.

[44] Employees and officials who are asked to assist with search efforts will need to know the content of the access request, but they have no reason or need to know who is asking for the requested information and the identity of the applicant should not be shared with them.

[45] As such, the Department should revise its right to information procedures to ensure that the identity of applicants is only disclosed as is appropriate to process and respond to an access request.

## **RECOMMENDATION**

[46] In light of the above, under the authority of section 64.1(1)(h) of the *Act*, I recommend that the Department:



- continue to develop and implement a standardized form to track and document the progress and accuracy of searches undertaken for all access requests;
- provide training to staff on conducting reasonable searches and reviewing search results to ensure better compliance with section 9 of the *Act*; and
- revise its right to information practices and procedures to ensure that the identity of applicants is only disclosed as is appropriate to process and respond to an access request.

[47] While recommendations issued under section 64.1 are not subject to the legislated time periods for the Department to inform of its decision on whether it will accept recommendations on access rights as per section 74, I nevertheless ask that the Department inform this office whether it accepts the above recommendations within 20 business days of receipt of this Report of Findings.

This Report issued in Fredericton, New Brunswick this 4th day of December, 2023.

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**Marie-France Pelletier**  
Ombud for New Brunswick