



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2015-010

December 9, 2015

Department of Justice and Public Safety

Summary:

The Applicant requested from the Department of Justice and Public Safety all costs for the work of the Electoral Boundaries Commission, including itemized costs for each of the Hearings in costs per hour. The Department provided two records in response to the Applicant's access request, however, the Applicant was not satisfied with the Department's response and filed a complaint with this Office. Attempts to resolve this file were not successful due to the lack of response from the Department until the very end of the informal resolution period. The Commissioner found that the Department did not appropriately discharge its duty to assist the Applicant and that the Department did not fully participate in the informal resolution process with this Office during the investigation. The Commissioner recommended that the Department review section 13 (duty to assist applicant) of the *Access to Information and Protection of Privacy Act, 2015* ("ATIPPA, 2015") along with resources from the Access to Information and Protection of Privacy Office relating to the duty to assist. The Commissioner further recommended that the Department review the sections of the *ATIPPA, 2015* relating to an investigation from this Office so that the Department is aware of the timelines and requirements of a public body during an investigation.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, s.13.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicant submitted an access to information request to the Department of Justice and Public Safety (the “Department”) seeking disclosure as follows:

All costs, itemized, for the work of the Electoral Boundaries Commission. Include itemized costs, for each of the Hearings in costs per hour.

- [2] Following receipt of the request, the Department informed the Applicant that it had decided to provide access to the information and provided the Applicant with two records. One record included a cost break down of the work of the Electoral Boundaries Commission and showed the total costs per year for the years 2014-2015 and 2015-2016 for various categories. The second record showed the rate of remuneration and expenses for the members of the Commission. Members and the Deputy Chairperson were paid on a half day or full day basis. In its decision letter, the Department explained to the Applicant that the Department did not track the costs per hour for hearings held by the Electoral Boundaries Commission and that the cost figures provided did not include miscellaneous expenditures yet to be processed or some salary and overtime costs. The Department explained that it was waiting for payments to be processed and to receive the journal entries from the relevant departments prior to finalizing these amounts.
- [3] The Applicant was not satisfied with the Department’s response and filed a complaint with this Office. The Applicant explained that in order for the rate of remuneration to be useful to him, he needed to know the number of hours per hearing and specifically if the Commissioners were paid by time in attendance or for allotted time at a hearing site (whether they were in attendance or not). The Applicant also specified a particular date he was interested in. Initial discussions with the Applicant revealed that he thought there may be more information regarding the pay of the Commissioners for the date in question and he explained that further information may help resolve his complaint informally. He also discussed the fact that should there be no further information available then help from the Department in ascertaining which other government department might have the information he was searching for may also help resolve his complaint informally. The Applicant’s views and possible resolutions were conveyed to the Department during the informal resolution stage.

[4] The Department was provided with a copy of the complaint and was requested to provide this Office with a number of documents along with a response to the complaint. The documents requested included a copy of the Applicant's original access request, the Department's response to the Applicant, any correspondence between the Applicant and the Department, a copy of the records provided to the Applicant and any records responsive to the Applicant's request. The documents and response requested from the Department are the same for every public body when this Office begins an investigation from a complaint. Section 97(4) of the *ATIPPA, 2015* provides me with the power to require production of documents within 10 business days and section 44(2) requires that any representation be provided not later than 10 business days after notification of the complaint.

[5] This Office has 30 business days from receipt of a complaint to resolve the complaint informally. In working through the informal resolution process, the documents requested provide the Analyst assigned to the file the opportunity to assess the Applicant's original request, the Department's response and the Applicant's complaint. A representation from a public body can provide important information regarding exceptions claimed or an explanation regarding why there are no responsive records to an access request. Also the representation can include important background information regarding what has already occurred on the access request and the public body's position regarding the Applicant's complaint. The documents in conjunction with the representation from the public body allow the Analyst to fully comprehend the Applicant's complaint and public body's position in order to work toward a resolution.

[6] During the informal resolution stage, the access to information and protection of privacy ("ATIPP") Coordinator for the Department verbally explained that the Department had provided all records it had to the Applicant. When a public body claims that there are no responsive records to a request or that it has provided all responsive records to an applicant it must provide an explanation and evidence of a reasonable search, especially where an applicant suggests that there may be more information available. I must be able to satisfy myself that a public body has searched properly and thoroughly for responsive records. An Analyst from my Office requested that the Department provide an explanation and evidence of a reasonable search and further indicated to the Department that if information detailing the steps taken to conduct a reasonable search were satisfactory then this could be conveyed to the Applicant in an attempt to resolve the file informally.

[7] The Department did not provide any explanation or evidence of a reasonable search during the informal resolution stage other than to verbally state that all records were searched. Even the Department's correspondence on the final day of the 30 day informal resolution period simply stated that "the records searched included all documents held by our departmental controller." This is not a sufficient response to a request for information about steps taken to ensure that a reasonable search has occurred.

[8] While the ATIPP Coordinator stated that he would try and determine if there was any further information available that might assist the Applicant, he did not appear to appreciate that if there were no further responsive records that evidence of a reasonable search was necessary. The Coordinator did attempt to reach out to another government department to ascertain if that department had any records that may satisfy the Applicant's request but due to an employee being on leave was unable to get an answer until extremely late in the informal resolution process. This effort should have been made much earlier in this process and potentially could have been explored with the Applicant during the initial access request and prior to the Applicant filing a complaint with this Office.

[9] The Department did not provide a written response or the majority of documents initially requested until the last day (day 30) of the informal resolution process at approximately 2:00 p.m. A response and documents this late in the informal resolution process is unacceptable. Normally the Analyst assigned to the file is able to review a public body's response and documents provided, discuss issues with the Applicant that may arise from a public body's response and work toward a resolution, if possible. A reply from the Department this late leaves no time to resolve anything. The *ATIPPA, 2015* provides legislated timelines and public bodies need to adhere to those timelines if they are interested in trying to resolve a complaint informally.

[10] Based on the late reply by the Department informal resolution was not possible and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*. No submissions were sought from either the Applicant or the Department.

[11] During the formal stage of this investigation the Department provided correspondence, dated November 12, 2015, that provided more detail regarding the Applicant's complaint. The Department explained how the Electoral District Boundaries Commission ("EDBC") is separate

from the Department and that payments required to be made by the Crown in carrying out the Commissioner's functions (including remuneration of the Commissioners) were paid by the Minister of Finance on the request of the Minister of Justice and Public Safety out of the Consolidated Revenue Fund as required by section 12 of the *Electoral Boundaries Act*. The Department went on to provide a more detailed explanation of the search performed for records and the Department concluded that other than not providing a response and information requested as outlined in the initial correspondence from this Office, that it had acted in good faith and done all it could to assist and resolve the file informally.

II DECISION

[12] Section 13 of the *ATIPPA, 2015* states:

13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

[13] The Applicant was not satisfied with the Department's response to his access request and as indicated above, there were a few unexplored options available for resolution. The options for resolution discussed with the Applicant are things that should have been discussed with him during the initial access request by the ATIPP Coordinator. The possibility of another government department being better suited to respond to his access request could have been ascertained by the ATIPP Coordinator initially and the access request transferred or in the very least could have been conveyed to the Applicant in the Department's decision letter. Narrowing the Applicant's access request to a particular time and information could have also been explored with the Applicant. This is where it is paramount that public bodies and specifically ATIPP coordinators do their utmost to assist Applicants. The *Access to Information: Policy and Procedures Manual November 2015* from the Access to Information and Protection of Privacy Office provides a detailed overview of the duty to assist (section 13). This is a file where the Applicant may not have needed to file a complaint with this Office had there been discussions with and assistance provided to the Applicant.

[14] I must stress that it does not matter who the Applicant is or why they want the information requested. Public bodies and especially ATIPP coordinators must always do their best to assist applicants and comply with the *ATIPPA, 2015*.

[15] Once a complaint is filed, it is my job to attempt to resolve the complaint informally and should that not be possible, to proceed to a Report. I am disappointed with the Department's effort and lack of cooperation with this Office during the informal resolution stage. If the Department is not providing a response, documents or updates on a file then there is nothing this Office can do to progress a file through informal resolution. A response on the afternoon of the last day of informal resolution is not sufficient and frankly pointless. At that point there is no possibility that this Office can do anything substantial on a file to consider resolving it informally.

[16] The shortened timelines of the *ATIPPA, 2015* do not allow me to wait for a public body to decide to provide a response and requested information at its leisure. No response or minimal engagement on a file indicates a lack of concern from a public body for this process.

[17] The correspondence provided by the Department during the formal investigation process, dated November 12, 2015, was detailed and covered many of the issues on this file. A response such as this, detailed and thorough, is what I expect from public bodies during the ten business days after notification of a complaint during the informal resolution process. Much of the information contained in the Department's correspondence should have been provided initially and would have assisted in resolving this file informally.

[18] I find that the Department did not appropriately discharge its duty to assist the Applicant and that it did not fully participate with this Office in the informal resolution process during the investigation.

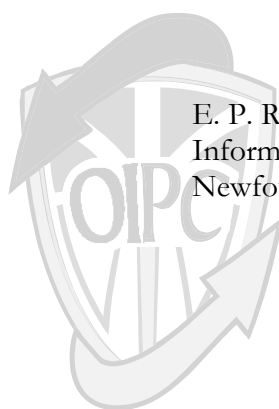
III RECOMMENDATIONS

[19] I recommend that the Department review section 13 (duty to assist applicant) of the *ATIPPA, 2015*; the Duty to Assist section in the *Access to Information: Policy and Procedures Manual November 2015* from the Access to Information and Protection of Privacy Office; and the *Duty to Assist Handout* from the Access to Information and Protection of Privacy Office. I further recommend that the

Department review the sections of the *ATIPPA, 2015* relating to an investigation from this Office as well as the *Public Body Guidelines for Preparing for an Access Complaint* which this Office provides to each public body at the beginning of a complaint.

[20] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report (the Applicant) within 10 business days of receiving this Report.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of December 2015.



E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador