



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-010

April 12, 2017

Department of Justice and Public Safety

Summary:

The Applicant requested certain records from the Department of Justice and Public Safety. The Department failed to respond to the request or communicate with the Applicant. The Applicant filed a complaint with this Office. The Commissioner found that the Department had failed in its duty to assist the Applicant and its duty to comply with the *ATIPPA, 2015*. The Commissioner recommended that the Department apologize to the Applicant, conduct a review of its practices and procedures to determine how the failure could have been prevented, and take whatever steps are necessary to ensure future compliance with the Act.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015, SNL 2015, c.A1.2](#), sections 2, 5, 13, 14, 15, 16, 17, 18, 23.

Authorities Relied On:

Lavigne v. Canada (Office of the Commissioner of Official Languages), [\[2002\] 2 SCR 773, 2002 SCC 53](#) (CanLII); OIPC Reports [A-2016-024](#), [A-2015-010](#), [P-2016-001](#).

Other Resources:

[Access to Information: Policy and Procedures Manual](#), NL Access to Information and Protection of Privacy Office, November 2015.

I BACKGROUND

[1] On December 2, 2016 the Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015” or the “Act”) to the Department of Justice and Public Safety (the “Department”) for the following records:

...a copy of the Minutes of Council from Judicial Council wherein the Code of Ethics was adopted... [and]...a copy of the Judicial Council Rules of Procedure....

[2] The Applicant received no response from the Department, and on January 30, 2017 filed a complaint with this Office.

[3] As attempts to resolve the complaint by informal resolution were not successful, the complaint was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II THE DEPARTMENT'S POSITION

[4] During the course of the investigation, the Department provided submissions containing explanations of the reasons for its failure to respond to the request and to communicate with the Applicant. I will comment on those explanations in the Decision section of this Report.

III APPLICANT'S POSITION

[5] No submissions were received from the Applicant.

IV DECISION

[6] There are two issues arising from this complaint. First, the ultimate goal of any access to information request is to obtain the requested records. The access request in this case was not vague or ambiguous. Indeed, the request contained additional descriptive and background information (not reproduced above) that makes it abundantly clear what

records were sought. During the course of our investigation the Department advised our Office that it did not have custody of the requested records. An Analyst from this Office confirmed this in a visit with an appropriate official within the Department. The Department made the determination that it did not have the records early in the process, although it failed to inform the Applicant of that fact. The failure to provide the records to the Applicant is not an issue in this Report, because I am satisfied that the Department does not have them.

- [7] The main issue arising out of this complaint is the way in which the Department dealt with the access request. After a great deal of public consultation the *ATIPPA, 2015* came into force on June 1, 2015 as largely new legislation. It contains clear, explicit and mandatory provisions setting out the steps that must be followed by public bodies in responding to access requests. Mandatory time limits are imposed for the completion of required actions. Despite 18 months of experience in dealing with the new Act the Department disregarded every mandatory step and deadline.
- [8] On receipt of an access request a public body must first determine whether the request was sent to the appropriate public body, and to transfer the request if it was not. This must be done within the first 5 business days after receiving the request, and the applicant must be notified of the transfer in accordance with section 14.
- [9] The public body must send an advisory response to the applicant within 10 business days, stating how it intends to deal with the request in accordance with section 15.
- [10] If particular circumstances appear to necessitate an extension of time for responding to the request, the public body must, within the first 15 business days, request approval of such an extension from our Office in accordance with section 23.
- [11] Finally, the public body has 20 business days from receipt of the request to provide a final response to the applicant, either enclosing the requested records or explaining why they have been withheld in whole or in part, and advising the applicant of the right to complain to this Office or appeal to the Trial Division if the applicant is not satisfied with the

response (see sections 16–18). In the present case, the deadline for such a final response was January 3, 2017.

[12] The Department did none of those things. In fact, I have been provided with no evidence that the Department took any action at all to process the request, until at least January 17, 2017, more than six weeks after the request was received, and two weeks after a final response should have been sent to the Applicant.

[13] The Department states that the advisory response deadline was missed through inadvertence. However, it asserts that the remaining delays were due to the fact that the Department was “trying to determine whether or not the Judicial Council was a public body.”

[14] This response is puzzling. First, the access request was made to the Department, not to any other body. It was a simple matter to determine, first of all, whether or not the Department had custody of the requested records. For that determination there was no need to decide whether the Judicial Council was a public body, because that was irrelevant to the question. The Department could have, and should have, told the Applicant at an early stage that it did not have the requested records.

[15] Determining whether the Judicial Council was a public body would have been important if the Department had been considering transferring the request. In that case, however, it ought to have been a matter of minutes, not months, to answer that question. The Judicial Council is a body appointed pursuant to the *Provincial Court Act* by the Minister of Justice and Public Safety. Its primary function is to review all applications from persons who wish to be appointed a judge of the Provincial Court, and to make recommendations for such appointments to the Minister.

[16] The definition of a public body under subsection 2(x) of the *ATIPPA, 2015* includes:

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister, . . .

The Judicial Council falls squarely within that definition.

- [17] Moreover, the Access to Information and Protection of Privacy Office maintains and publishes an online directory of public bodies and the contact information for all access and privacy coordinators. The Judicial Council is one of a dozen organizations listed as public bodies under the Department of Justice and Public Safety. In those same listings the access and privacy coordinator assigned to the Judicial Council is also listed as the coordinator for the Department. The Access to Information and Protection of Privacy Office resides within and is the responsibility of the Department.
- [18] The Department, having 'determined' that the Judicial Council is in fact a public body, then spent another month corresponding, at the Assistant Deputy Minister level, with the Chair of the Council, asking whether the Council could supply copies of the requested records. Making such a request of another public body is generally not practical or appropriate under the *ATIPPA, 2015*, simply because unless the request is formally transferred, the other public body is under no statutory obligation to adhere to the time limits, and the requesting body is powerless in the face of a refusal to cooperate (which was what ultimately happened in this case).
- [19] The appropriate course of action would have been for the Department, after determining it did not have the requested records, to formally transfer the access request to the Judicial Council, if it believed that the Council had custody of the records. All of the obligations under the Act would then have become the responsibility of the Council, just as though the request had been made directly to it. In this case the same coordinator would have been able to oversee the process.
- [20] Regrettably, the Department got bogged down in a month-long process of debating issues of judicial independence. That debate was premature, because the Department at no point had custody of any responsive records. Until the actual records could be reviewed, the Department could not determine whether any exceptions to access might apply to the information contained in them, or indeed whether the records might be altogether exempt from the provisions of the *ATIPPA, 2015* under section 5.

[21] It appears that the Department then simply gave up. None of the above was communicated in any way to the Applicant, there was no transfer of the request from the Department to the Council, and as noted above, the deadline for final response was January 3, 2017. The Department was spurred to action only on January 31, 2017 when this Office forwarded the complaint from the Applicant to the Department.

[22] During the course of our investigation into this complaint, the Department suggested that as it did not have custody of the responsive records, and as the Judicial Council had declined to provide them, this Office or the Applicant should deal directly with the Council regarding the content of this request. This is a complete abdication of responsibility.

[23] Under subsection 13(1) of the *ATIPPA, 2015* the Department is under a duty to “...*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.*” The Department violated every aspect of this duty, as well as all of the other provisions of the *Act* that set out the required steps in responding to an access request.

[24] The Applicant had a right to make an access request under the *ATIPPA, 2015*, and a corresponding right to expect that the Department would deal with it appropriately, effectively and expeditiously, in accordance with the provisions of the *Act*. To suggest that the Applicant should now abandon the access to information process and “deal directly” with another body is, in effect, to say to the Applicant: “you’re on your own”.

[25] The suggestion that the OIPC “deal directly” with the Judicial Council is also an abdication of responsibility to this Office. If the request could more appropriately have been made to another public body, then the Department should have transferred it to that body – or, at the very least, should have advised the Applicant that it did not have the responsive records and to make a request to that body. To suggest that this Office should “deal directly” with the Council is to propose that this Office should somehow become involved in an access request process that the Department has never completed. Alternatively, it suggests that this Office should somehow involve the Judicial Council in an access complaint to which the Council is not a party. Either way, the suggestion reveals a complete misapprehension of the simple, straightforward, orderly, speedy and mandatory processes set out in the *Act*.

[26] The Department of Justice and Public Safety, above all others, should provide leadership in the administration and enforcement of the laws of the Province. In addition, the Supreme Court of Canada has signalled the importance of access and privacy legislation such as the *ATIPPA, 2015* by declaring that it has quasi-constitutional status. For any public body to deal with an access to information request in the way that the Department has done would be a matter of serious concern. For the Department of Justice and Public Safety to so completely disregard the mandatory provisions of the *Access to Information and Protection of Privacy Act, 2015* is fundamentally unacceptable.

[27] Unfortunately, the Department has previously been put on notice of other related deficiencies in earlier Reports from this Office (see for example Reports A-2016-024, A-2015-10, P-2016-001). What more is needed to demonstrate to the Department that it must make improvements to the way in which it responds to access requests?

V RECOMMENDATIONS

[28] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Justice and Public Safety write a letter of apology to the Applicant for the way in which the access to information request was handled and for its failure to respond to the request or communicate in any manner with the Applicant.

[29] I further recommend that the Department immediately conduct a thorough review of its current access to information practices and procedures to determine how the failure to comply with the *ATIPPA, 2015* in the present file could have been prevented, and take whatever steps are required and make whatever changes are necessary to prevent future failures and to ensure that all future access to information requests are dealt with expeditiously in full compliance with the *Act*. I would be remiss if I did not point out that, from the information provided by the Department, it appears that its Coordinator was aware of all of the necessary actions but was unable to carry them out.

[30] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Justice and Public Safety must give written notice of his or her decision with respect to these

recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[31] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of April 2017.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

