



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-006

February 26, 2018

Town of Portugal Cove-St. Philip's

Summary:

The Complainant submitted six access to information requests to the Town of Portugal Cove-St. Philip's (the "Town") between August and October 2017. After the Town was late in replying to two of these requests and failed to reply to the remaining four, a complaint was made to the OIPC. The Commissioner concluded in relation to all of the requests that the Town failed to comply with the statutory deadlines for final response in section 16 of the *Access to Information and Protection of Privacy Act, 2015*. The Town also failed, in regards to three of the requests, to comply with the statutory deadlines for an advisory response, as set out in section 15. Lastly, the Town failed to fulfil the duty to assist imposed on it by section 13 of the *Access to Information and Protection of Privacy Act, 2015*. The Commissioner made recommendations to the Town to improve its access to information process and to respond to access requests within legislated time lines.

Statutes Cited: [Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c.A1.2, sections 13, 15, and 16.

Authorities Cited: OIPC Reports: [A-2011-012](#); and [A-2008-001](#).

Other Resources: [Office of the Information and Privacy Commissioner Annual Report 2016-2017, Access to Information Policy and Procedure Manual](#).

I BACKGROUND

- [1] The Complainant submitted access requests to the Town of Portugal Cove-St. Philip's (the "Town") on August 18, 25 and 31, 2017.
- [2] The Town responded to these three requests with advisory responses (dated August 25 and September 4, 2017), in accordance with the *Access to Information and Protection of Privacy Act, 2015* (the "ATIPPA, 2015"). For one of the requests, the Town sought and received approval from this Office for an extension until October 10, 2017 to provide its final response.
- [3] While awaiting final responses from the Town on his initial three requests, the Complainant submitted another three requests: one on October 16, 2017 and two on October 25, 2017.
- [4] When the Complainant had received late final responses for the first two requests and no final response from the Town on his third request, nor advisory or final responses from the Town on his second three requests (numbers 4-6), he filed a complaint with this Office on November 24, 2017.
- [5] Its failure to provide a timely final response to two of the requests, or any final response to four of the six requests put the Town in a deemed refusal position in accordance with section 16(2):
- 16(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.*
- [6] As informal resolution failed, the complaint proceeded to formal investigation pursuant to section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[7] In its response to this Office, the Town acknowledged its delay in providing responses to the Complainant's requests. During the course of the review by this Office, the Town provided advisory responses to the Complainant for the latter three access requests on November 24, (on the same date this Office received his complaint). The Town sent final responses to all of the requests on October 4, November 20, November 30 (3) and December 14, 2017.

[8] The Town explained the reason for its delay was municipal elections that took place at the end of September 2017. The Town ATIPP Coordinator was also acting as its Election Coordinator, and elections took priority at that time. The Town noted that the ATIPP Coordinator was primarily focused on preparing for elections during all of September and "very little else besides regular Council meeting preparation and minutes." After the election the ATIPP Coordinator focused on orienting the new Council in October while also trying to "catch up on ATIPP requests."

[9] The Town's position is that, while it had sought and received an extension from this Office, it "would have asked for more extensions" if it had realized that elections would have taken up as much of the ATIPP Coordinator's time as they did. The Town also pointed out that it, "has the highest number of ATIPPA requests and OIPC complaints than any other public body and we were doing exceptionally well with deadlines up until the elections."

[10] Finally, the Town noted that it had communicated the above to the Complainant and "believed the Complainant knew we were putting requests on the back burner until elections were over and that a catch up period would go with that." It also acknowledged that it should strive to keep Applicants better informed on the status of requests.

III COMPLAINANT'S POSITION

[11] The Complainant argued that he has tried to be tolerant and cooperative and "give leeway in the time for responding to ATIPP requests," but had become exasperated with the

delay and lack of information provided by the Town. The Complainant delayed complaining until November 24, 2017 even though the Town was first in a deemed refusal position on September 19, 2017.

[12] Additionally, the Complainant noted that without timely responses he failed to see any point in the access to information process, given that some of the information requested was time sensitive.

IV DECISION

[13] The following are the issues to be decided:

1. Did the Town comply with the mandatory statutory deadlines in sections 15 and 16?
2. Did the Town comply with the duty to assist imposed by section 13?

Did the Town comply with the deadlines set out in sections 15 and 16?

[14] Sections 15 and 16 of the *ATIPPA, 2015* set out the time periods for responding to access requests:

15. (1) The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing to

(a) advise the applicant as to what will be the final response where

(i) the record is available and the public body is neither authorized nor required to refuse access to the record under this Act, or

(ii) the request for correction of personal information is justified and can be readily made; or

(b) in other circumstances, advise the applicant of the status of the request.

(2) An advisory response under paragraph (1)(b) shall inform the applicant about one or more of the following matters, then known:

- (a) a circumstance that may result in the request being refused in full or in part;
- (b) a cause or other factor that may result in a delay beyond the time period of 20 business days and an estimated length of that delay, for which the head of the public body may seek approval from the commissioner under section 23 to extend the time limit for responding;
- (c) costs that may be estimated under section 26 to respond to the request;
- (d) a third party interest in the request; and
- (e) possible revisions to the request that may facilitate its earlier and less costly response.

(3) The head of the public body shall, where it is reasonable to do so, provide an applicant with a further advisory response at a later time where an additional circumstance, cause or other factor, costs or a third party interest that may delay receipt of a final response, becomes known.

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18 , without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23 .

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

[15] The Town complied with section 15(1) in relation to the first three requests, providing advisory responses within the required 10 business day timeframe. As noted above, the Town sought and received from this Office an extension for providing its final response to the Complainant in relation to the second of these requests. However, for all three, the Town was outside the time lines set out in section 16(1) in providing final responses to the Complainant. It took the Town thirty-two business days to provide a final response to the Complainant's first access request, fifty-nine to respond to his second (twenty-four business days past its extension), and sixty-three to respond to his third.

[16] The Town did not provide advisory responses within ten business days in relation to the last three requests. The Town sent advisory responses on November 24, 2017. These advisory responses were eleven and sixteen business days overdue. The Town received the Complaint from our Office on the same day it sent these advisory responses. Although the twenty business day period to respond had already elapsed on these requests, the Town was still unable to respond in a timely manner. The Complainant was eventually provided final responses on these three requests on business day thirty-two (twelve business days overdue), business day twenty-five (five business days overdue), and business day thirty-five (fifteen business days overdue), despite a complaint having been made on all three.

[17] Clearly, section 16(2) is applicable to all six access requests. The Town did not respond to the requests within the deadlines set out in section 16, so it “is considered to have refused access to the record” in relation to all six of them.

[18] This Office has commented on deemed refusals in previous reports, including where public bodies are struggling with a heavy workload. Report A-2011-012 noted that issues such as a large volume of records or a request requiring a strict attention to detail are not sufficient “to relieve a Public Body from its obligation to respond to an access request within the statutory timelines.” This requirement to comply with statutory obligations applies whether workload is attributed to other access requests or other duties, such as coordinating an election.

[19] Report A-2008-001 states that “there is no doubt that the *ATIPPA* can represent, at times, an inconvenience, or even a challenge for public bodies who find themselves struggling to meet statutory deadlines,” a reality that still exists. In our Annual Report for 2016-2017 it is noted that “the burden on ATIPP Coordinators associated with the significant increase in access to information requests ... is now the normal volume of requests,” however “[T]he right to timely access to information cannot be routinely abridged where resources have not kept pace with substantial increases in demand.”

[20] The Town states that the delay in responding was due to the September election process and afterwards orienting the new Council, combined with the fact that the Town receives a

higher volume of requests and complaints “than any other public body”. We considered these factors in approving the extension sought on one of the six requests. However, these factors do not excuse not responding to the access requests within the legislated (or extended) deadlines. All public bodies are required to seek the OIPC’s approval to extend deadlines for responses where they believe they will be unable to comply. Public bodies can seek approval to extend a previously extended deadline. Public bodies cannot choose to ignore the deadlines as if they do not exist. Just as municipalities do not ignore violations of their by-laws, they cannot ignore mandatory requirements in provincial legislation.

[21] The situation at hand is disappointing because the Town clearly knows the difference. This is hopefully an isolated blemish on what was previously a decent record of compliance. In 2016-2017, the Town met the deadlines in regards to 72 of the 77 requests it received, requesting extensions on only two of them. Also, we note that while the Town did in fact receive the most access requests of all local public bodies (primarily municipalities), they did not receive the most of any public body for that time period.

[22] It is pointless now to speculate as to whether time extensions would have been granted on the other requests. It is wholly unsatisfactory that the Town did not bother to seek approval for extensions in relation to 5 of the 6 requests. These omissions are aggravated by the fact that when we asked whether any other extensions would be requested, the Town advised that no others were being sought. Even where the Town received approval for an extension for one request, it failed to meet that extended deadline. The ability to request an extension of time to respond to a request can accommodate the many challenging situations faced by public bodies. The OIPC approved, in whole or in part, 93 percent of all extension requests it received in 2015-2016. Failure to seek extensions is truly a failure to appreciate the purpose of the Act. Access delayed is access denied, a truth recognized by deadlines in the Act that only the OIPC, the independent oversight body, can extend.

[23] In conclusion, the Town, by not responding within the legislated deadlines, breached section 15(1) three times and section 16(1) six times and is considered to have refused access to the records responsive to the six access requests.

Did the Town comply with the duty to assist imposed by section 13?

[24] Section 13 of the *ATIPPA, 2015* imposes on public bodies a duty to assist access to information applicants:

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.

[25] Page 38 of the ATIPP Office's *Access to Information Policy and Procedure Manual* lists some of the obligations included in the duty to assist:

- Clear communication between the ATIPP Coordinator and an applicant is crucial;
 - It is incumbent on the ATIPP Coordinator to ensure that time limits are met – if a public body does not provide records within the statutory deadline, it will be in default of its statutory responsibility;
 - Advisory responses must be provided within 10 business days (section 15) and requests must be answered within 20 business days (section 16), unless an extension is granted by the Office of the Information and Privacy Commissioner – public body officials cannot operate on a “do-your-best” deadline;
 - Where a public body finds itself in a deemed refusal situation, they must take whatever actions are available to it to mitigate the impact on the applicant's right of access and such measures should begin as soon as it is apparent that the extended time frame cannot be met;
 - Assign additional staff as early as possible, where necessary, to help process requests;
- ...

- Develop a cooperative working relationship with the applicant – this may include working with an applicant to narrow large requests, prioritizing records or providing interim releases to the applicant.

[26] The Town failed to fulfil a number of obligations in relation to the six access requests. There does not appear to have been clear communications between the ATIPP Coordinator and the Complainant. The ATIPP Coordinator did not provide a response to the Complainant within legislated time lines and appears to have adopted what the Manual calls a “do-your-best” deadline. The Town did not request extensions from this Office in relation to five of the six requests.

[27] The Town, when it found itself in the deemed refusal situation did not, as the ATIPP Manual states, “take whatever actions are available to it to mitigate the impact on the applicant’s right of access.” The Town did not assign additional staff to deal with the processing of the requests during this period, for example.

[28] In these circumstances, this Office finds that in relation to all six access requests the Town failed in discharging its duty to assist.

V CONCLUSION

[29] The Town breached section 16(1) of the *ATIPPA, 2015* in all six of the Complainant’s access requests and violated section 15(1) in the latter three requests. The Town also failed to meet its duty to assist in relation to all six access requests.

VI RECOMMENDATIONS

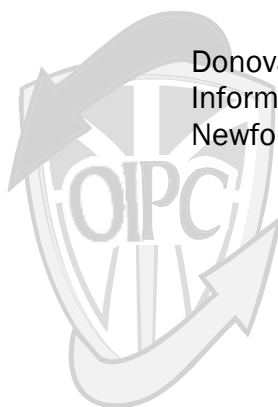
[30] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the Town of Portugal Cove-St. Philip’s:

1. Review its policies and procedures for responding to access requests, in particular, identifying circumstances when additional resources may be required; and,

2. Otherwise comply with the Act, in particular, in respect to response deadlines and extensions.

[31] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Town 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 (in this case, the Complainant) within 10 business days of receiving this Report.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of February, 2018.



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