



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2011-006

April 6, 2011

Town of Brigus

Summary:

The Applicant submitted an access to information request to the Town of Brigus for records concerning the Town's contract with their scrap metal removal company. This Office received a Request for Review which cited a failure of the duty to assist pursuant to section 9 of the *Access to Information and Protection of Privacy Act*. The Town sent further information to the Applicant which caused a second Request for Review to be filed. In it the Applicant renewed his request for a response in writing including a statement of his right to appeal to Court or to seek a review by this Office. The Town provided a written response, however the Applicant also felt that this was still an incomplete response, and as such was tantamount to a deemed refusal. This Office then received a third Request for Review combined with a section 44 Time Extension Complaint which claimed that the Town had failed to request an extension of time to respond to the Access Request, as required under section 16 of the *Act* and reiterated the original Request for Review. The Commissioner determined that while there had been non-compliance with section 11 of the *Act*, there had been no failure in the duty to assist and that the Town had provided to the Applicant all assistance required under the *Act*. The Commissioner also determined that no extension of time was required as the Town had replied to the Access Request within thirty days of the original Request. The Commissioner had no recommendations to make to the Town.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 3(1)(a), 2(q), 11(1), 3(2), 9, and 12.

Authorities Cited:

Newfoundland and Labrador OIPC Reports A-2011-002 and A-2009-011; *McBreairty v. Newfoundland and Labrador (Public Service Commission)*, 2011 NLTD 12.

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (“ATIPPA” or “Act”) the Applicant made an Access Request to the Town of Brigus (the “Town”) on March 25, 2010 which stated:

Access to the Record/Information concerning the contract agreement between the town council of Brigus, Newfoundland and Newco Metal and Auto Recycling Limited, St. John's, Newfoundland concerning collecting of the car wrecks at their land fill site dump at Brigus, Newfoundland, and crush the car wrecks and remove them from the land fill site dump, and the amount Newco Metal and Auto Recycling Limited paid for the scrapped metal's. Access to how long this company Newco collecting scrapped metal's (carwreck's) at the dumpsite approximately. [a named individual] how long are you working with Brigus town Council approximately, and was their any other company collect carwreck's at the dump site or Brigus, and name if it was copy of contract and year started.

- [2] In a Request for Review dated April 27, 2010, the Applicant filed the following Request for Review with this Office:

Act or failure to Act by the head of the above noted public body, and a failure to fulfill the duty to assist Applicant. [A named individual] didn't like the Applicant making a Request and made it very clear when the applicant asked for a receipt for the \$5.00 fee, and looked at the request and gave a copy of the contract between Brigus and Newco Metal and Auto Recycling Limited 2 page's then and said that's all the F word you are getting this is only crap ATIPPA (Act) Liberal brought in and save me a stamp give you that contract now that is all you are getting. Remedy I am seeking that the Privacy Commissioner inform [a named individual] that the ATIPPA Act is LAW and if you don't want the Applicant to use the ATIPPA (Act) put it in writing to the Privacy Commissioner's office, the Applicant said you don't have to respond now you got 30 day's, and that is when [a named individual] got upset use the F word and that the ATIPPA (Act) was crap. The Applicant wants [a named individual] to comply with ALL of the Applicant's request, and reason why he didn't give written response within 30 day's.

- [3] On April 28, 2010 an analyst from this Office spoke on the telephone with the Town and confirmed that the Town employee who responded to the Access Request felt that it would be easier for all involved to simply provide the Applicant with a copy of the contract in question and did not feel that a written response was warranted. The Town also indicated that at no time did anyone at their office swear on the Applicant.

- [4] The conversation between the Applicant and the Town employee was reiterated in the Town's response of May 4, 2010. It stated:

On March 25, 2010, [the Applicant] presented me with a written request looking for information on the contract between the Town Council of Brigus and NEWCO Metal & Auto Recycling Ltd. of St. John's, Newfoundland with regards to the collecting of the car wreck's at the Brigus Landfill Site.

I told [the Applicant] that I could do this for him right away. I went to the filing cabinet, got the agreement for the Town of Brigus and Newco Metal, made two photo copies, one for [the Applicant] and one to place on file with [the Applicant's] request form.

[The Applicant] stated I had thirty days to do this but I said I had time to do this now, his responses to me was that I didn't know what I was doing. I understand I have thirty days to response to [the Applicant's] request but if the time permits I can't see why I couldn't do this right away, which I did, after all there is only one agreement with Newco Metal.

- [5] An analyst from this Office spoke to the Applicant by phone on May 5, 2010 and explained the Town's response. At this time the Applicant indicated that his concern was the unanswered questions in his Access Request, specifically the questions regarding the amount paid to Newco Metal, how long Newco had been collecting scrap metal, how long the Town employee had worked there and if there was any other company that had collected scrap metal from the Town.

- [6] In an effort to resolve this matter, on June 7, 2010 an analyst from this Office wrote to the Town and obtained answers to these questions. These answers were then sent to the Applicant by mail by the Town. However, the Applicant expressed concern over the form of the answers by filing a separate Request for Review on June 14, 2010. It stated:

The policy of the ATIPPA (Act) when an applicant make's a request to any public body or town council like (Brigus Council) A written response is required not a copy of an email send to the Privacy Commissioner's Investigator send June 7th/2010 at 1:25 pm, and at the time you ask that [a named individual] give [the Applicant] a response in (writing)

Remedy I am seeking from [a named individual] written response within the ATIPPA (Act) Letter to be done up under the Act and complete at the end which you have a right to Appeal within 60 day's to the Privacy Commissioner's Office, and within 30 day's to the Supreme Court of Newfoundland and

Labrador trial Division and the section's to go by because a copy of this email of information or any distribution, is strictly prohibited of any means, so a written response is required.

[7] On June 15, 2010, this Office advised the Applicant that the Request for Review dated June 14, 2010 was covered by his Request of April 27, 2010. At this time an analyst from this Office advised the Applicant that the Town would be asked to provide a written response acceptable to the Applicant.

[8] On June 15, 2010 the Town wrote to the Applicant indicating that a copy of the Newco contract was enclosed and setting out his right to seek review by this Office or to appeal to the Supreme Court. This letter did not include responses to the Applicant's questions as they had been provided by way of a copy of the 7 June email.

[9] In a third Request for Review dated July 22, 2010, the Applicant stated:

Act and failure to Act by the head of the above noted public body, and a failure to fulfill the duty to assist applicant, and the extension of time for responding to ALL of the Applicant's request until [a named individual] give's a complete written response to the Applicant's request ALL of it on it face constitute's a refusal until complete under the Act, and to say he received Applicant's request on April 28th / 2010 is very misleading it was March 25th, 2010.

Remedy the Applicant is seeking complete written response to ALL of the Applicant's Request not just contract between the town of Brigus and Newco Metal and Recycling Limited. Attach again is the applicant's request dated march 25th / 2010, and the June 15th / 2010 half response by [named individual] because under the Act and the law a signature is required when given a response to a applicant email not signed won't stand up in court if the Applicant chose to take that step.

[10] Further attempts to resolve these Requests for Review by informal means were not successful and by letters dated 25 January 2011 both the Applicant and the Town were advised that the Requests for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II THE SUBMISSIONS

[11] The Town replied by fax dated 26 January, 2011 that they wished this Office to rely on their earlier correspondence on this file, which is summarized in the Background section of this Report.

[12] The Applicant did not make a formal submission.

III DISCUSSION

[13] The purpose of the *ATIPPA* is set out in section 3:

3(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records; ...

[14] “Record” is defined in subsection 2(q) as:

(q) "record" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

[15] Section 11 sets out the obligation of a public body when they receive an access to information request:

11(1) The head of the public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it...

[16] Section 3 is also clear that:

3(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

[17] The duty to assist is set out in section 9 of the *ATIPPA* and reads:

9. 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.

[18] When the Town initially received this Access Request they opted to provide the record in question immediately. By doing so, they did not meet the requirements of section 11 to respond in writing. Under a strict application of the *Act*, when the Town opted to provide the contract right away and without a response in writing, they should have waived the \$5 *ATIPPA* fee and provided the information under routine disclosure (which can be done on an informal basis when complete access to the requested record is given by public bodies). However, the intention of the Town was clearly to provide access immediately and that is not to be overlooked in our analysis here. Based on the description of the response provided by the Town, it is clear that they were attempting to comply with the purpose of the *Act* – to give “the public a right of access to records”. Further, the Town was also attempting to comply with their duty to assist as set out in section 9, to “respond without delay”.

[19] During informal investigation, when requested by this Office, the Town did provide a response in writing and therefore has rectified its failure to comply with section 11 of the *Act*.

[20] It should be noted that if the Town had offered to provide the records through routine disclosure, and therefore to not accept the Applicant’s fee and formal Access Request, that the Applicant would have been entitled to insist that the matter proceed as a formal access request and this preference must be respected as it is the Applicant’s right. Without a formal request, the Applicant does not acquire the statutory right to request a review from this Office or to appeal to Court, therefore there may be times when a formal request is preferable to an applicant.

[21] A concern raised by the Applicant in his June 7 Request for Review was that his right to appeal to this Office needed to be included in the response he received. I would note that while section 11 does require a response in writing, it is section 12 which sets out the required content, including when the right to seek review by this Office or to appeal to the Court is included. It states:

12.(1) In a response under section 11, the head of the public body shall inform the applicant

- (a) whether access to the record or part of the record is granted or refused;*
- (b) if access to the record or part of the record is granted, where, when and how access will be given; and,*
- (c) if access to the record or part of the record is refused,*

- (i) *the reasons for the refusal and the provision of the Act on which the refusal is based,*
- (ii) *the name, title, business address and business telephone number of an officer or an employee of the public body who can answer the applicant's questions about the refusal, and*
- (iii) *that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.*

[22] A close reading of section 12 shows that the right to appeal to the Court or to have a review performed by this Office is only required as part of the written response from the public body where there has been a refusal of the record or part of the record, which was not the case here. To be clear, this Office is not saying that a public body would be running afoul of the *Act* if they included it in all its responses to access requests, but only that it is not improper to fail to include this portion where access is being granted in full. It is important to note as well that in some cases public bodies may feel they have released all responsive records but when the matter comes before this Office for review, additional records are uncovered. So as a best practice, this Office recommends that the right to seek a review from this Office or an appeal to the Court be stated in all responses.

[23] The next issue of concern for the Applicant was that the response in writing he received did not answer the questions raised in his original Access Request. These questions were:

1. the amount Newco Metal and Auto Recycling Limited was paid for the scrapped metals;
2. how long Newco had collected scrapped metals at the dumpsite approximately;
3. how long [named individual] had been working with Brigus Town Council approximately;
4. had any other company collected car wrecks at the dump site or Brigus; and
5. the name of this other company, if any and a copy of their contract and the year it started.

[24] Questions 1 and 2 were answered by the record provided and there were no records responsive to questions 3, 4 and 5.

[25] Sections 3 and 2(q) (set out above at paragraph 13 & 14) read together make it clear that the right of access provided by the *ATIPPA* is to records. When an applicant includes questions in their access requests, the duty to assist under section 9 of the *Act* triggers an obligation on the public body to assist the applicant in the early stages of their Request. In Report A-2011-002 I recently referenced a Report of my predecessor, A-2009-011, that discussed the elements of the duty to assist:

[80] The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner. . .

This duty includes assistance in the formulation and clarification of their requests, which in turn, may include reformulating questions into requests for specific records.

[26] There is not however, an obligation to answer all questions. The public body must consider whether there are records that would be responsive to the questions asked by the applicant in an access request. If there are records that provide answers, they will be found to be responsive and should be provided as part of the response to the access request. If, however, there are no records responsive, there is no obligation under the *ATIPPA* to respond to these questions. A public body must then decide whether, in the spirit of open government, they wish to provide answers to these questions without the statutory obligation to do so. The Town in this case did choose to provide answers to all of the Applicant's questions during the course of the informal investigation of this Office even though some of these answers were not found in records.

[27] Lastly, the Applicant also indicated that the actions of the Town were tantamount to a deemed refusal because of their failure to request an extension of time when they failed to respond in a way acceptable to the Applicant within 30 days. Given my view of the other issues set out above, I find that no extension of time was required as the Town had replied to the Access Request within thirty days of the original Request, just not in writing.

IV CONCLUSION

[28] The Town's failure to comply with the letter of the *ATIPPA* in this case was, to quote Justice Peddle from *McBreairty v Newfoundland and Labrador (Public Service Commission)*, "inconsequential and not unreasonable." In that case, the response was provided one day outside the prescribed time period and the Court found that this technical breach had no impact on the rights of the parties. The Applicant in this instance received all relevant records and additional responses to inquiries, albeit not initially in the proper form.

[29] Therefore, while the Town was not compliant with section 11 when they chose to treat the Applicant's Access Request as a formal request under the *ATIPPA*, it was clearly not their intent to disregard the *Act* by not replying in writing. In fact the desire to comply immediately was in accordance with the spirit of the *ATIPPA*.

[30] When requested by this Office to rectify this non-compliance, the Town did so immediately. Further, the Town also cooperated fully with this Office when they also answered the questions of the Applicant and did so in writing.

[31] Therefore I have no recommendations to make to the Town in this particular matter. However, I would suggest that in future, when receiving an access request from a member of the public to either treat it as a routine disclosure and provide the requested documents without charge or, if by request or the Town's own choice, to reply in writing to all access requests made under the *ATIPPA*.

V RECOMMENDATIONS

[32] Having found that the Town has now rectified their non-compliance with section 11 and has provided all responsive records I have no recommendations to make under section 49(1) of the *ATIPPA*.

[33] Although I have made no recommendations, under the authority of section 50 of the *ATIPPA*, I direct the head of the Town of Brigus to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Town with respect to this Report.

[34] In addition, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that they have a right to appeal the decision of the Town to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of the Town referenced above.

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of April 2011.

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

