



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-001

January 25, 2013

Department of Natural Resources

Summary:

The Applicant requested records from the Department of Natural Resources regarding Chinese investment in Newfoundland and Labrador. The Applicant's request was received on May 16, 2012. There was limited communication in the beginning but over the next six months all contact was initiated by the Applicant and the records were not forthcoming. The records were finally received by the Applicant on November 9, 2012, almost seven months after the request was submitted and following a Request for Review being made of this Office. The Commissioner found that the delay was a breach of section 11(1) of the *ATIPPA* and also a breach of section 9 of the *ATIPPA* (duty to assist). The Commissioner recommended that the Department be mindful of the statutory duty imposed on it by sections 9 and 11 of the *ATIPPA*. He further recommended that the Department review its policies and procedures for handling access to information requests for the purpose of ensuring that it complies with its duty to assist in section 9 and meets the time limit for responding to access requests under section 11(1) of the *ATIPPA*.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, s. 9, 11 and 16.

Authorities Cited:

Newfoundland and Labrador OIPC Reports A-2012-012, A-2011-012 and A-2008-001. *Canada (Information Commissioner) v. Canada (Minster of External Affairs)*, [1990] 3 F.C. 514 (Fed. T.D.). Information Commissioner of Canada's Annual Report to Parliament 1995-1996.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request on May 16, 2012 to the Department of Natural Resources (the “Department”). The request sought disclosure of records as follows:

1. *Any and all ministerial communications regarding Chinese Investment in Newfoundland and Labrador for the period of Jan.1, 2010 to present, and*
2. *Any records relating to department-sponsored trade missions to/from Asia within the same period, including receipts related to departmental travel.*

[2] The Department acknowledged the Applicant’s access request with a letter on May 16, 2012, and on May 28, 2012, the Department’s Coordinator e-mailed the Applicant to inform her that after their preliminary review they had determined that “there [was] a large volume of records related to the trade mission portion of the request”. The Department indicated in this email that they were “likely looking at a fairly time-consuming and costly response if [they] proceed[ed] as is.” The Department requested that the applicant “be more specific about what [she was] looking for on this topic”. The Applicant clarified by email, dated the same day, that she was looking for a “summary of travel/trade missions” which she further clarified could be “a single sheet noting dates of trade missions, cost (single number including air, ground transport, hotel, meals) and one-line descriptor of reason for/goal of the mission.” The Department indicated an understanding of the revision on June 1 and also clarified that it could only search for records in their department’s possession.

[3] The Applicant checked on the status of her Request by email on June 18, 2012 and received a response the same day that stated “We have pulled together the files and are currently reviewing/redacting. We’ll get to it as soon as we can.”

[4] The Applicant, having still not received anything, emailed the Department again on August 27 requesting an update. At this time, the Department replied “There has been no change in status since the last time we spoke. As soon as the status changes, I’ll let you know. Again, my apologies for the delay.”

- [5] The Applicant, filed a Request for Review with this Office on October 1, 2012 indicating that she had yet to receive any records and seeking “an explanation as to why there has been a delay in responding on this file.”
- [6] Efforts were made through this Office to resolve the Request for Review informally. An analyst from this Office asked the Department, by letter dated October 2, 2012 to provide all correspondence involving the Applicant and any affected third parties, an explanation of the current status and why the timelines had been breached, as well as a copy of all responsive records.
- [7] The Department responded to this Office on November 9, 2012 enclosing all records requested but providing no explanation of the delay. The same day, the Department wrote to the Applicant enclosing a redacted version of the documents, citing sections 20 (Policy advice or recommendations), 23 (Disclosure harmful to intergovernmental relations), 24 (Disclosure harmful to the financial or economic interests of a public body), 27 (Disclosure harmful to business interests of a third party) and section 30 (Disclosure of personal information).
- [8] Ultimately, the Applicant was not satisfied with the Department’s response and requested a formal investigation of the Department’s handling of her access request. By a letter dated December 12, 2012 the Department was advised that the Request 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 PUBLIC BODY’S SUBMISSION

- [9] On January 9, 2013, the Department provided this Office with its formal submission which took issue with this Office referring to section 64(1) of the *ATIPPA* which discusses “...a decision to refuse access to a record...” in our letter requesting their formal submission. The Department explained that “at no time did the department decide to refuse access to the records associated with this request”. The Department recognized that according to section 11(2) of the *ATIPPA* “a failure to respond to an access request within the 30 day time limit is considered a refusal of access.” The

Department went on to state that “even though there was a delay in responding to the applicant, the department’s intent throughout the entire response period was to provide the applicant with the records requested.”

[10] The Department’s submission on the delay further stated:

...the consultations required for the processing of this request took significantly longer than expected and resulted in the time delay experienced. Consultation was required with senior management and communications staff within the department during the records search, review, and severing processes, as well as during the review and approval of the final response. In addition, the department was required to consult with other government entities due to exceptions to disclosure applied under sections 20 (policy advice and recommendations) and 23 (harm to intergovernmental relations) of the Access to Information and Protection of Privacy Act. As mandated in the ATIPPA Policy and Procedures Manual, departments must consult with Cabinet Secretariat and the Intergovernmental and Aboriginal Affairs Secretariat, respectively, when applying these exceptions to disclosure.

In closing, I would like to state that the Department of Natural Resources is committed to the access to information process and works hard to uphold the requirement of the ATIPPA. Unfortunately, in this case, the amount of consultation required hindered our ability to provide a timely response and, for that, I offer a sincere apology to the applicant. The department will make every effort to avoid this type of time delay in the future.

III APPLICANT’S SUBMISSION

[11] The Applicant did not make a formal submission but it should be noted that she indicated to this Office that her main concern was the delay, rather than the substance of the redactions.

IV DISCUSSION

[12] Sections 9 and 11 of the *ATIPPA* state as follows:

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.

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

(a) the time limit for responding is extended under section 16;

(b) notice is given to a third party under section 28; or

(c) the request has been transferred under section 17 to another public body.

(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.

16. (1) The head of the public body may extend the time for responding to a request for up to an additional 30 days where

(a) the applicant does not give sufficient details to enable the public body to identify the requested record;

(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body; or

(c) notice is given to a third party under section 28.

(2) Where the time limit for responding is extended under subsection (1), the head of the public body shall notify the applicant in writing

(a) of the reason for the extension;

(b) when a response can be expected; and

(c) that the applicant may make a complaint under section 44 to the commissioner about the extension.

[13] The topic of delay in responding to access requests was recently addressed in a news release issued from this Office following the release of Report A-2012-012. In this news release I noted a worrying trend regarding deemed refusals and stated that the applicants are not being informed of the status of their requests in a timely manner. As I said there, access delayed is access denied, in particular when the applicant needs the records within a certain period of time.

[14] In the case of this access request, I found no evidence in the records provided to this Office for review that would support the need for extensive consultations. Furthermore, other than the statement that consultations were required, I have no evidence before me which indicates the extent of those consultations – dates of meetings, letters or e-mails to and from the parties being consulted, the specific nature of the consultations, etc.

[15] The issue of delay and the potential causes was addressed in Report A-2008-001:

[73] 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. It is apparent to me, however, that the 30 day time frame in section 11, in addition to the 30 day extension provided for in section 16, were meant to give public bodies the necessary time to respond to access requests. These time frames are designed to account for holidays, weekends, and other interruptions which may interfere with the search and retrieval of requested records, while still giving the public body enough time to meet its statutory obligations...

[16] The Federal Court of Canada has also spoken on this ongoing issue of delay in responding to access requests. In *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 514 (Fed. T.D.), Justice Muldoon stated that processing access requests on a less than expeditious manner was, in fact, breaking the law:

[20]. . . . Confession that such requests ought to be processed as expeditiously as possible may be good for an individual's soul, but it has no didactic energy in gaining the attention of government departments. It has no effect in actually providing legally that less than expeditious processing of requests for information is breaking the law, as it surely is. The purpose of the review is not just to make the particular respondent acknowledge unreasonable tardiness. It is, also, to let all other potential respondents know where they stand in these matters. The Court is quite conscious that responding to such requests is truly "extra work" which is extraneous to the line responsibilities and very raison d'être of government departments and other information-holding organizations of government. But when, as in the Access to Information Act, Parliament lays down these pertinent additional responsibilities, then one must comply.

[17] As stated in Report A-2011-012, the approach taken by the Department here bears some resemblance to the one described by the Information Commissioner of Canada in the 1995-1996 Annual Report, at page 13:

...The law of course says requests must be answered within 30 days (unless an extension is justifiable). Many public officials appear to have decided, in days of dwindling resources, to amend the law to a "do-your-best" deadline.

[18] Regarding this access request the Department responded three months after the access request had been received, when it was then 60 days beyond the statutory deadline, that "there has been no change in status since the last time [the Department and Applicant had spoken]" and that "as soon as the status changes, [the Department would] let [the Applicant] know". The Coordinator for the Department then offered her "apologies for the delay".

[19] In the present case, the time it took the Department to respond was not reasonable. Section 11 (1) of the *ATIPPA* clearly sets out the circumstances in which the 30-day time limit may be extended. In this case, no section 16 extension was ever applied by the Department. When such an extension is to be applied, the applicant must be notified in writing. In this case, there was no communication forthcoming unless it was initiated by the Applicant. This is not acceptable.

[20] While there were redactions to be carried out on this file, the total number of pages to be reviewed was only 48, much fewer than was discussed in Report A-2012-12. Further the time lapse between request and release was significantly longer. In this case almost seven months passed before a response was received by the Applicant.

[21] As I stated in Report A-2012-12 “a thorough review could have been done in far less than the three months it took the Department to complete this task.” In this case, with fewer records and more time taken, I must state even more strongly that the amount of time lapsed is not reasonable and is a clear breach of the *ATIPPA*. In addition, the duty to assist under section 9 to “respond without delay” and to “respond in an open, accurate and complete manner” requires the Department to keep an applicant informed as to the progress of their request.

[22] I must note as well, that even if an explanation is made of the delay, it does not remedy the breach of section 11. Once the 30 day time limit has passed, if no extension has been made under section 16, the *ATIPPA* has been breached. And in this case, even if evidence had been before me of the need for consultations, a seven month delay is significantly “over the line” in terms of a reasonable response period.

[23] In addition, the duty to assist under section 9 to “respond without delay” and to “respond in an open, accurate and complete manner” requires the Department to keep an applicant informed as to the progress of their request. In this case (as it was in Report A-2012-12) all communications with respect to the status of the request were initiated by the Applicant. As stated in that Report, “this does not help to foster a cooperative and respectful relationship between an applicant and a public body”.

V CONCLUSION

[24] The Applicant did not receive the records responsive to her access request until almost seven months had passed, and then only after she had initiated a Request for Review with this Office. She also had not received any notice that a time extension was being claimed. Thus, I find that both sections 9 and 11 of the *ATIPPA* have been breached and that section 16 was not properly availed of by the Department.

[25] I will reiterate the conclusion I came to in Report A-2012-12 that:

One of the main purposes of access to information is to make public bodies more accountable to the public. This purpose would certainly be undermined if disclosure of records was intentionally delayed so that government could not be legitimately questioned on issues of public importance in the House of Assembly. In many cases information requested by applicants is needed for a specific purpose which is often time sensitive. The timelines for responding to an access request as set out in the ATIPPA are there for this very reason - to ensure timely access to records. Thus, applicants have a right to expect public bodies to abide by these timelines and receive requested records while the information is still relevant and useful to them.

[26] I again note that this instance represents a worrying trend in deemed refusals and in applicants not being informed of the status of their requests in a timely manner.

VI RECOMMENDATIONS

[27] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department be mindful of the statutory duties imposed on it by sections 9 and 11 of the *ATIPPA*. I also recommend that the Department review its policies and procedures for handling access to information requests for the purpose of ensuring that it complies with its duty to assist in section 9, meets the time limit for responding to access requests under section 11(1), and, if necessary, avails of the extension provisions under section 16 of the *ATIPPA*.

[28] Under the authority of section 50 of the *ATIPPA*, I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[29] Please note that within 30 days of receiving the decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of January, 2013.

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

