



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-24

October 19, 2016

Department of Justice and Public Safety

Summary:

An Applicant requested from the Department of Justice and Public Safety correspondence relating to a particular position. Another Applicant requested all records from the office of a named individual. The Department did not respond to either of the access requests within the required statutory time lines. The Commissioner found in relation to both requests that the Department did not comply with the mandatory time period set out in section 16 of the *ATIPPA, 2015*. The Commissioner also found that in relation to both access requests the Department failed to fulfil the duty to assist imposed on it by section 13 of the *ATIPPA, 2015*. The Commissioner made recommendations to the Department 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, S.N.L. 2015, c. A-1.2, ss. 13 and 19.

Authorities Relied On:

Newfoundland and Labrador OIPC [Report A-2011-012](#), [Report A-2008-001](#) and [Report P-2016-001](#) at www.oipc.nl.ca.

Other Resources:

Access to Information Policy and Procedures Manual, ATIPP Office, Office of Public Engagement, November 2015 at: [Access to Information Manual](#).

I BACKGROUND

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

Request Number 1:

I would like to request all written correspondence (reports/emails/etc) relating to the Sheriff's Office Manager of Equipment, Training and Organizational Development position/competition (January 2014 to Current) including correspondence associated with [named issue].

The persons involved would include members from the former Premier's Office, Justice and Public Safety Department and PSC: [list of 22 individuals].

Request Number 2:

Any and all records, in any medium or format, from the office of [Named Individual, Position] for the period August 1st, 2009 – October 31st, 2009. Information to include, but shall not be limited to, notes and materials of any nature, messages of any kind, discussion papers and/or reports created, and/or received, during specified time period.

- [2] Request Number 1 was received by the Department on April 5, 2016. On May 2, 2016, this Office granted the Department a 10 business day time extension in which to respond to the access request. A further time extension of 20 business days was granted by this Office on May 13, 2016.
- [3] On July 20, 2016, the Applicant filed a complaint with this Office in relation to Request Number 1 indicating that there had been no response from the Department since being advised by the Department on May 13, 2016 of the 20 business day time extension to June 15, 2016.
- [4] The Department provided the Applicant a response to Request Number 1 on August 8, 2016. As a result the Department was in a deemed refusal position in accordance with section 16(2), which provides that where a public body fails to respond within the 20 day

business period set out in section 16(1) or an extended period of time, it is considered to have refused access to the requested records.

[5] Request Number 2 was received by the Department on July 11, 2016. The 20 business day period for responding to the access request ended on August 8, 2016. On August 17, the Applicant filed a complaint with this Office stating that there had been no response from the Department regarding the access request. The Department responded to the access request on August 23, 2016 by advising the Applicant that there were no records responsive to the request. Again, the Department's failure to respond within the legislated time line in section 16(1) placed it in a deemed refusal position.

[6] Attempts to resolve these complaints by informal resolution were not successful and the complaints were referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. The Applicants and the Department were given an opportunity to provide submissions.

II PUBLIC BODY'S POSITION

[7] The Department in its submission in relation to Request Number 1 addressed whether it complied with the duty to assist by stating:

The Department of Justice and Public Safety is of the view that it has fulfilled its duty to assist the applicant. The Department offered assistance to the applicant in every step of the process, from the first point of contact by the applicant on March 16, 2016 . . .

[8] The Department then outlined the various communications it had with the Applicant for Request Number 1 while processing the access request. The Department then stated:

To assist the applicant in obtaining all records he was seeking, and to reduce duplication, I acted as a single point of contact for retrieving all responsive records from appropriate Departments and Agencies. The applicant was advised of the extensions granted by your office which effectively deferred the response date to June 15, 2016. On June 13, 2016. . ., the applicant was

advised that unfortunately given the size of his request, several additional weeks would be required to process his request.

- [9] In relation to whether it complied with the time periods in section 16 the Department stated:

On the second issue, the Department acknowledges that it failed to comply with the time period for final response as set out in section 16 of the ATIPPA. As noted in our informal response, the delay in responding was due to the size of the request and the unprecedented volume of ATIPP requests the Department is receiving.

- [10] In relation to Request Number 2 the Department acknowledged that a response was not provided to the Applicant within the time period set out in section 16(1) but indicated a response was sent to the Applicant on August 23, 2016. The Department outlined the discussions it had with the Applicant regarding the responsive records and the difficulties it experienced searching for responsive records. The Department stated:

Please be assured that the department has and continues to strive to respond to every ATIPP request within the legislated timelines.

III POSITIONS OF THE APPLICANTS

- [11] The Applicant on Request Number 1 did not provide a written submission but stated in his Access Complaint form that the access request was made 120 days ago. The Applicant acknowledged receipt on May 13, 2016 of a letter from the Department advising of a time extension until June 15, 2016. The Applicant further indicated that it is now July 20, 2016 “and I have received nothing.”

- [12] The Applicant on Request Number 2 stated in her access complaint:

As of today's date, I have not received any written acknowledgment that this request was received, and/or is being processed. An e-mail was sent to [the Department's Access and Privacy Coordinator] on August 3, 2016 requesting the status of the request, and we subsequently spoke via telephone on August 4th, and again on August 9th. In our last conversation [the Department's Access and Privacy Coordinator] indicated that there appeared to be an absence of records, and that he found “zero” records for the time period specified in my request. Quite frankly, I feel very uncomfortable with

the manner in which this request is being handled, as it is not proceeding in the usual, or legislated way. As mentioned, I've had no formal acknowledgment, and no written correspondences of any nature since submitting the request, and am being told verbally that there are no records. [the Department's Access and Privacy Coordinator] did mention a physical search of a computer, and quite possibly he is working on that now, however, this is not in keeping with the timelines and procedures as outlined in the Act, and it brings about a great suspicion that information has been deleted since the unprocessed request was made.

IV DECISION

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

1. Did the Department comply with the time periods set out in section 16?
2. Did the Department comply with the duty to assist imposed by section 13?

1. Did the Department comply with the time periods set out in section 16?

[14] Section 16 of *ATIPPA, 2015* sets out the time period for responding to an access request:

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] Request Number 1 was received by the Department on April 5, 2016. This Office granted two time extensions to the Department in accordance with section 23 bringing the response date to June 15, 2016. On June 13, 2016, the Department advised the Applicant that given the size of the request several additional weeks would be required to process the request. No extension was sought by the Department to allow it to continue to process the request after the June 15, 2016 deadline. The Department responded to the access request on

August 8, 2016. This was 37 business days after June 15, 2016, the extended time granted by this Office, and 87 business days after the request was received by the Department on April 5, 2016.

[16] Request Number 2 was received by the Department on July 11, 2016 with a required response in accordance with section 16(1) due on August 8, 2016. The Department issued its response letter to the Applicant on August 23, 2016, which is 11 business days after the statutory due date and only after the Applicant filed her complaint with this Office.

[17] Clearly, section 16(2) is applicable to both access requests. The Department failed “to respond within the period of 20 business days or an extended period”. It may be that if the Department had requested a further time extension on Request Number 1 or a time extension on Request Number 2 this Office may have granted the time extension. However, no such applications were made. Because the Department did not respond to the requests within the time period set out in section 16, it “is considered to have refused access to the record” in relation to both access requests.

[18] This Office has commented upon deemed refusals in previous reports. In Report A-2011-012, the Assistant Commissioner stated at paragraph 38:

[38] The PSC has also stated that this access request involved a large volume of records and that the redaction of information is a process that requires strict attention to detail. I accept this as true, however, these assertions do nothing to relieve a public body from its obligation to respond to an access request within the statutory timelines. . . . If a public body does not provide the records within the statutory deadline, it will be in default of its statutory responsibility. While the volume of records involved and the strict attention to detail inherent in reviewing information may present challenges, it is not an acceptable justification for a public body to exceed the statutory response deadlines. . . .

[19] In Report A-2008-001, the Commissioner commented on deemed refusals under the former ATIPPA:

[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 deadlines. . . .

[20] The Department has stated that the delay in responding was due to the size of the request and the number of other access requests the Department had received. These factors would have been taken into account when this Office granted the two time extensions on Request Number 1 and may have been taken into account if the Department had sought a time extension in relation to Request Number 2. However, neither of these factors would justify not responding to the access requests within the legislated time lines.

[21] In conclusion, the Department, by not responding within the legislated time lines, has committed two violations of section 16(1) and is considered to have refused access to the records for both access requests.

2. Did the Department comply with the duty to assist imposed by section 13?

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

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.

[23] The *Access to Information Policy and Procedures Manual* prepared by the ATIPP Office of the Office of Public Engagement sets out some of the obligations included in the duty to assist on page 38:

In meeting the duty to assist an applicant, some additional obligations include the following:

- *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 with 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;*
- *designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed;*
- . . .
- *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.*

[24] A review of the obligations described in the ATIPP Office Manual makes it clear that the Department has failed to fulfil a number of obligations in relation to the two access requests. There does not appear to have been clear communications between the coordinator and the two access applicants. The Coordinator did not provide a response to the applicant within legislated time lines and appears to have adopted what the Manual calls a “do-your-best” deadline. The Department did not request a further extension from this Office on Request Number 1 and made no application for an extension on Request Number 2.

[25] The Department when it found itself in the deemed refusal situation did not, as the ATIPP Manual suggests, “take whatever actions are available to it to mitigate the impact on the applicant’s right of access”. The Department did not assign additional staff to deal with the processing of the requests and had not at that time designated a trained back-up ATIPP Coordinator who was ready to assist in the processing of the request.

[26] In these circumstances, I find that in relation to both access requests the Department has not met the duty to assist imposed upon it by section 13.

V CONCLUSION

[27] My determination that the Department has twice violated section 16(1) and has failed to meet its duty to assist in relation to two access requests is particularly troubling given the responsibilities of the Department of Justice and Public Safety. The Department is charged with the enforcement of laws in this Province. Yet, it failed to comply with the provisions of the *ATIPPA, 2015* on two occasions. Given that the Department is now responsible for the administration of the *ATIPPA, 2015* it should demonstrate leadership with regard to the processing of access to information requests.

[28] This is the first report regarding deemed refusals under the *ATIPPA, 2015*, which came into force on June 1, 2015. It is disappointing that the report involves two instances of refusal by the Department of Justice and Public Safety and that these refusals occurred after the issuance of Report P-2016-001. That report recommended the Department “be more diligent and timely in its approach to fulfilling its duties and obligations under the *ATIPPA, 2015*”.

VI RECOMMENDATIONS

[29] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Justice and Public Safety:

1. Comply with the statutory duties imposed upon it by section 13 and section 16(1).
2. Assign additional staff as early as possible, where necessary, to help process access requests.
3. Designate a backup Access and Privacy Coordinator who is fully trained and ready to assist in the processing of access requests.
4. Be mindful of its role as the overseer of the access to information process by completing access to information requests within legislated time lines and complying with the duty to assist imposed on it by section 13.

[30] 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 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] Please note that within 10 business days of receiving the decision of the Department under section 49, the Applicant and any Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of October, 2016.

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