



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2018-009

April 24, 2018

### Department of Transportation and Works

**Summary:**

An Applicant requested from the Department of Transportation and Works all emails, documentation and correspondence related to the Mobile High School Extension project, covering approximately a two-month period. The Commissioner found that the Department did not comply with the mandatory deadline to respond to access requests set out in section 16 of the *ATIPPA, 2015*. The Commissioner also found that the Department failed to fulfil the duty to assist set out in 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 deadlines.

**Statutes Cited:**

[\*Access to Information and Protection of Privacy Act, 2015\*](#), SNL 2015, c A-1.2, ss. 13 and 16.

**Authorities Cited:**

Newfoundland and Labrador OIPC Report [A-2018-006](#)

**Other Resources:**

[\*Access to Information Policy and Procedures Manual Annual Report 2016-2017\*](#)

## I BACKGROUND

- [1] On November 7, 2017 the Department of Transportation and Works (the “Department”) received an access to information request from the Applicant seeking:

*... any and all emails, documentation and correspondence related to the Mobile High School Extension project within Dept of Transportation and Works and between TW and Dept Education, Service NL and/or NLESD from the period of September 1, 2017 up to and including today.*

- [2] At the Department’s request, this Office granted a time extension of 15 business days to respond to the Applicant, extending the deadline for response from December 6, 2017 to December 28, 2017.
- [3] On January 19, 2018, the Applicant filed a complaint with this Office indicating the Department had not provided the records by the December 28, 2017 deadline and that she had not received an update or the records since her last communication with the Department on January 2, 2018.
- [4] The complaint proceeded to formal investigation under subsection 44(4) of the *Access to Information and Protection of Privacy Act, 2015* (the *ATIPPA, 2015*) on February 15, 2018.
- [5] Section 16(2) of the *ATIPPA, 2015* establishes that a public body is deemed to have refused access to a record if it has not been provided to the applicant within 20 business days, or an extended period (approved by the Commissioner). The Department provided the Applicant with a response to her request on March 9, 2018, 50 business days beyond the extended deadline approved by the Commissioner.

## II PUBLIC BODY’S POSITION

- [6] As an explanation for the delay, the Department noted that the request was broad and involved searching for and collecting a large volume of records through multiple employees. The search was completed on November 27, 2017, 7 business days prior to the original

deadline and 22 business days prior to the extended deadline. The Department also explained that at the time of this request, the access to information and protection of privacy (ATIPP) coordinator was the only coordinator responding to a number of access requests.

- [7] Once the search was completed, a line-by-line- review of approximately 3500 pages of records was required. The Department sought a 25 business day extension from this Office. Based upon the representations of the Department at that time, we determined that a 15 business day extension was sufficient, making the new deadline December 28, 2017. The Department stated that when the time extension for this request was approved (December 4, 2017), the Department was processing 10 access to information requests.
- [8] On December 21, 2018 the Department transitioned to a new ATIPP coordinator and as of that date it had 22 active access to information requests.
- [9] On January 2, 2018 the Department secured half time support from the ATIPP Office to help complete the request. The Department sent out consultations to other public bodies regarding the records on January 16, 2018. The Department received responses and applied recommendations by January 23, 2018, 32 business days prior to the Applicant's receipt of the responsive records.
- [10] It was determined that some records must be withheld based on section 27 (cabinet confidences) therefore revisions were made and documents were prepared on January 25, 2018 for Cabinet Secretariat. The Department explained that the protocol for a section 27 review by Cabinet Secretariat dictates that the records withheld under section 27 must be reviewed and discussed with the Deputy Minister with completion of a signed checklist. The meeting with the Deputy Minister (regarding the section 27 records) took place and the checklist was signed by the Deputy Minister on February 5, 2018, 9 business days after the recommended redactions were applied. Cabinet Secretariat received the records for review on February 7, 2018.

[11]The Department explained that Cabinet Secretariat takes 5 business days to respond and once they respond a meeting must be scheduled with the Deputy Minister to approve the final release of records.

[12] The Department advised that the approval was received from Cabinet Secretariat on or about February 14, 2018, however, the records were not provided to the Applicant until March 9, 2018, 17 business days later. The Department explained it anticipated that the remaining records would move through the approval stages during the time allocated for Cabinet Secretariat review. However, the approval stages took longer than anticipated as there were recommendations and corrections required at each stage which delayed the final release of the records to the Applicant.

### III POSITION OF THE APPLICANT

[13]The Applicant wanted to receive the information in a timely manner as it was time sensitive. The Applicant also advised that she had not received updates during the access request process despite the Department's representations that the access request was a priority and that she would get continuous updates.

### IV DECISION

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

1. Did the Department comply with the deadline set out in section 16?
2. Did the Department comply with the duty to assist set out in section 13?

#### **1. Did the Department comply with the deadline set out in section 16?**

[15]Section 16 of *ATIPPA, 2015* sets out the deadline 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.*

[16]The Department received the request on November 7, 2017. This Office granted a time extension to the Department in accordance with section 23, extending the response date to December 28, 2017. The Department did not meet that deadline, did not advise this Office that it had not met that deadline and did not advise the Applicant that there were further delays until January 2, 2018 and only then at the instance of the Applicant contacting the Department to check on the records.

[17] The Department took 13 business days to complete the search for records and then took another 39 business days to complete the line-by-line review and consultations with other departments. Then there was another 11 business day period between the Department's determination that records must be withheld under section 27 and the provision of those records to Cabinet Secretariat for review. Cabinet Secretariat required 5 business days for its review.

[18]The Department advised that Cabinet Secretariat finished reviewing the records on or about February 14, 2018, however it was not until March 9, 2018 that the Department finally provided the records to the Applicant. This was 50 business days after the extended deadline of December 28, 2018 and 85 business days after receipt of the request.

[19]Clearly, 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 this Office may have granted it if the Department established that despite due diligence, it could not meet the extended deadline. However, no such application was made. Also, the Department at the time of this request was operating with no backup coordinator which, given the size of the Department and the volume of access requests received, is inadequate resourcing. Because the Department did not respond to the requests within the deadline set

out in section 16, it “is considered to have refused access to the record” in relation to the access request.

[20]The Department stated that the delay in responding was due to the size of the request, the number of other access requests the Department was processing at the same time, and the fact that the ATIPP coordinator had changed during the processing of the request. None of these factors justify not responding to the access requests within the legislated deadline. The failure to respond is aggravated by the failure to provide adequate updates to the Applicant after the deadline passed.

[21]By not responding within the legislated deadline, the Department has committed a violation of section 16(1) and is deemed to have refused access to the records. Access delayed often equates to access denied. The rule of law applies to everyone equally, including government departments. The deadlines in the *ATIPPA, 2015* are not suggestions satisfied by best efforts. The deadlines are mandatory legal requirements that the Department failed to meet in this case.

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

[22]Section 13 of the *ATIPPA, 2015* 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.*

[23]As noted in Report A-2018-006, the *Access to Information Policy and Procedures Manual* prepared by the ATIPP Office of the Department of Justice and Public Safety sets out some of the obligations included in the duty to assist:

*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]The ATIPP Office Manual accurately reflects our views on this subject. The Department failed to meet its duty to assist the Applicant under the Act. While there was some communication with the Applicant (the Applicant did receive an acknowledgement letter, an advisory letter and a letter advising that a time extension was approved) the Department should have communicated with the Applicant when it became clear that the Department would not meet the statutory deadline. The Applicant contacted the Department on January 2, 2018 to ask why the December 28, 2017 deadline was not met. The Department ought to have contacted the Applicant in advance of the deadline to advise that it would not be met, offer an explanation and provide an estimate when a response would be received. The Applicant did not receive any further updates until she filed her complaint with this Office.

[25]The Department did seek help from the ATIPP Office early in January 2018 to assist in completing the request, however, this was after the Department failed to meet its deadline of December 28, 2017. The Department should have obtained assistance prior to its deadline.

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

## V CONCLUSIONS

[27] As the Department failed to meet its duties under sections 13 and 16 of the *Act*, it must closely examine its processing of access to information requests to find ways to avoid this in the future. Part of that review should assess the number of personnel presently required to 'sign off' on responses. Unfortunately, as of the date of this Report, we understand that the Department is alleged to be in a deemed refusal situation on 2 other requests.

[28] Commendably, the Department acknowledges that the present situation is unacceptable and is endeavoring to implement solutions to ensure that it replies to access requests in a timely manner. The Department advised this Office of some steps it is intending to implement to streamline the process, including a centralized email account and accessing resources from the information management staff of the Department. While a start, these measures are likely only a partial solution.

[29] The Department is not unique in terms of the challenges it is facing. As noted in our Annual Report for 2016-2017, ATIPP Coordinators in many departments are in an unenviable position. The frequent turnover of Coordinators is a symptom of that predicament. When they leave for other positions, often as they achieve true proficiency in the Coordinator role, their replacements start the learning curve all over again. For these Coordinators, achieving a role as envisaged in the *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, must appear unlikely, if not fanciful.

## VI RECOMMENDATIONS

[30] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Transportation and Works:

1. Comply with the statutory duties imposed upon it by section 13 and respond without delay to an applicant in an open, accurate and complete manner, including



maintaining contact with applicants to keep them advised of the status of their access requests.

2. Comply with the statutory duties imposed upon it by section 16(1) and respond to a request without delay and in any event within statutory deadlines.
3. Assign additional staff as early as possible, where necessary, to help process access requests.
4. Designate a backup Access and Privacy Coordinator who is fully trained and ready to assist in the processing of access requests.

[31]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 (in this case the Applicant) within 10 business days of receiving this Report.

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

[33]Dated at St. John's, in the Province of Newfoundland and Labrador, this 24<sup>th</sup> day of April, 2018.

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