OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-021

August 26, 2019

Intergovernmental and Indigenous Affairs Secretariat

Summary: Intergovernmental and Indigenous Affairs Secretariat received a request for records relating to its progress in responding to the Calls to Action of the Truth and Reconciliation Commission. The Office of the Information and Privacy Commissioner approved two applications by the Secretariat for extensions of the time limit to respond to the request, and denied a third. The Secretariat delivered the final response to the Complainant 14 months after the request was made, and 7 months after the extended deadline. The Secretariat withheld almost all of the responsive records on the basis of section 27 (cabinet confidences) and a few pages withheld on the basis of section 30 (solicitor-client privilege). The Commissioner found that the section 27 and 30 exceptions had been properly applied, and therefore did not recommend further disclosures. The Commissioner also found that the extraordinary delay in responding to the request was unacceptable, and that the delay resulted from a number of factors, including workload issues, consultations with other departments, and the application of a policy on consultations that resulted in conflict with the mandatory provisions of the *Act*. The Commissioner recommended that the Secretariat review its processes to reduce or eliminate such delays.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, ss. 14, 16, 27, 30.

Authorities Relied On: *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, Queen's Printer, St. John's, NL, 2015; *Access to Information Policy and Procedures Manual*, ATIPP Office, Department of Justice and Public Safety, St. John's, NL, 2017;OIPC Report A-2019-016.

File # 0005-124-19-002

I BACKGROUND

[1] On January 17, 2018 the Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*" or "the *Act*") to the Intergovernmental and Indigenous Affairs Secretariat ("IA" or "the Secretariat") for access to records as follows:

> *All records related to the department's progress in fulfilling the province's commitment to implement the Truth and Reconciliation Commission's Calls to Action – specifically those calls to action numbered 1, 2, 3 and 5. Please provide all records from Nov. 30, 2015 to Dec. 31, 2017.*

[2] The Truth and Reconciliation Commission ("TRC") was established in 2008 by the parties to the settlement of the class action lawsuit by survivors of the Canadian "Indian residential schools system." In 2015, the TRC released a report containing 94 "calls to action" addressed to various levels of government, churches and other bodies. The calls numbered 1, 2, 3 and 5 are primarily concerned with Aboriginal child welfare, and particularly children in care.

[3] The statutory deadline for responding to an access request is 20 business days, or approximately one month. The Secretariat's final response to the Complainant under the *Act* was due on February 14, 2018. On February 7, 2018 the Secretariat applied to this Office under section 23 of the *Act* for an extension of time to respond to the request. The application cited the large number of records to be searched, and the necessity of conducting consultations with other bodies. An extension of 35 business days was granted, with a new response deadline of April 6, 2018.

[4] On April 2, 2018 the Secretariat applied for a second extension of time, this time for an additional 95 business days. This application was more detailed, and in addition to the factors raised in the first application, cited the unanticipated volume of records and major issues with workload and resources. An extension of 95 business days was granted, particularly noting the unique workload challenges and the length of time anticipated for further consultations. This resulted in a new deadline of August 21, 2018. Our Office warned the Secretariat, however, that no further extensions would be granted.

[5] On August 15, 2018, the Secretariat nevertheless applied for a third time extension, this time for an additional 29 business days, citing repeated consultations and the necessity of sending the complete package of redacted records to Cabinet Secretariat for review. The request for a further extension was denied. Our Office was not convinced that an additional extension was justified, because in our view any required consultations could have been completed within the extended time periods already approved. Because the previously extended deadline had by then been reached, the Secretariat was in a position where its failure to provide a final response to the Complainant was deemed to be a refusal of access pursuant to section 16(2) of the Act.

[6] The Secretariat notified the Complainant on August 21, 2018 that its extension request had been denied, but it was still working on the request and that a few steps remained. It did not provide a new expected date of completion.

[7] After five more months had passed, the Complainant wrote the Secretariat on January 30, 2019 to ask for an explanation. The Secretariat replied that it was still finalizing the last of the consultations required, and hoped to be able to provide a response the following week.

[8] On February 8, 2018, as an interim response, the Secretariat provided the Complainant with a package of 296 pages of records. The final response did not arrive until April 3, 2019, and consisted of 4,380 pages, of which nearly 4,000 were completely withheld on the basis that they consisted of cabinet records pursuant to section 27 of the *Act*. That final response was sent 14 months after the date of the request, and 7 months after the extended final deadline. The Complainant then filed a complaint with this Office, asking that we investigate the delay in responding to the request, and also the very small number of records ultimately received.

[9] As an informal resolution could not be reached, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II DEPARTMENT'S POSITION

[10] In communications with the Complainant on February 1, 2019 the Secretariat explained that:

> *Indigenous Affairs is still in the process of finalizing the last of the interdepartmental consults on the records that are responsive to your request. As you may be aware Indigenous Affairs has a very small staff and processing ATIPP requests with a large number of responsive documents such as your request is very challenging.*

[11] In communications with our Office requesting time extensions, the Secretariat stated that the request involved large numbers of documents that originated with other government departments and agencies as well as outside bodies, which necessitated extensive consultations. The Secretariat also explained that it was a small department with no full-time ATIPP Coordinator; that it was required to produce records for the Muskrat Falls inquiry, and the magnitude of this task was unforeseen; that it had also been called upon to produce documents for upcoming litigation; and that there were unforeseen problems with staff resources. In addition, the Secretariat cited the process of consultation, in particular with Cabinet Secretariat, as contributing substantially to the delay.

[12] In its submissions in response to the complaint, the Secretariat set out its interpretation of section 27 (cabinet confidences), explaining at length the process it followed in determining whether records were subject to that exception. Its position was that the exception was properly applied, and that the Clerk of Executive Council had reviewed the records and had found no exceptional circumstances that would warrant disclosure.

[13] In further submissions the Secretariat elaborated on the primary reasons for the delay in responding to the request. It stated that it was the lead department for preparing a response to the TRC's Calls to Action. Extensive consultations with other departments were required in order to identify potential redactions from the perspective of the other departments which had provided the information to the Secretariat.

[14] The Secretariat outlined the consultation process involved in applying section 27. It took the position that all records for which the section 27 exception is being considered must be reviewed by Cabinet Secretariat prior to responding to the applicant, and must also be reviewed by the Clerk of Executive Council.

III APPLICANT'S POSITION

[15] The Complainant provided this Office with an account of the communications he received from the Secretariat, including explanations provided from time to time for the delays.

[16] The Complainant stated that of the thousands of pages the Secretariat had been working on for 15 months, he received only about 400 pages, with 4,000 pages being entirely redacted pursuant to section 27 of the *Act* (cabinet confidences).

[17] The Complainant stated that the sheer number of pages withheld warrants a review of the file, and that 15 months seems like a long time to determine that a broad classification of Cabinet confidentiality would be applied to almost all of the records in the final response.

[18] The Complainant added that "…I expect more from the government as a democratic institution in terms of quality and quantity of communication."

IV DECISION

A. Reasonable Search, Location and Redaction of Records

[19] There are two main issues to be dealt with in this Report. The first issue is whether the Secretariat has conducted a reasonable search for, located, and then appropriately redacted the records responsive to the request, in light of the fact that out of thousands of pages, only about 400 pages have been disclosed to the Complainant.

[20] The Secretariat has explained how it dealt with the access request. It discussed the request with the Complainant to ensure it was properly understood. It has explained that it

was the lead department in preparing the government's response to the Calls to Action, and as a result had gathered from other departments a very large number of records related to this task. The initial search resulted in over 10,000 pages, but after clarification with the Complainant and removal of non-responsive records, that was reduced to around 4,380 pages. It appears that this search phase was completed within the period of the second time extension approved by our Office, that is, by June 2018. The Secretariat had at that point fulfilled its duty to conduct a reasonable search for records, as part of its duty to assist the applicant under section 13 of the *Act*.

[21] Almost all of the pages that the Secretariat withheld from the Complainant were withheld pursuant to section 27(1)(h) and 27(2)(a). The relevant provisions of section 27 read as follows:

> *27. (1) In this section, "cabinet record" means*
>
> > *(a) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;*
> >
> > *(b) draft legislation or regulations submitted or prepared for submission to the Cabinet;*
> >
> > *(c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;*
> >
> > *(d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;*
> >
> > *(e) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;*
> >
> > *(f) a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy;*
> >
> > *(g) a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet;*
> >
> > *(h) a record created during the process of developing or preparing a submission for the Cabinet; and*

> *(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).*
>
> *(2) The head of a public body shall refuse to disclose to an applicant*
>
> *(a) a cabinet record; or*
>
> *(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.*
>
> *(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.*

[22] The definitions in section 27(1) are extensive, and section 27 is a mandatory exception. All records that relate to the Cabinet decision-making process must be withheld from disclosure. This Office has received and reviewed a complete copy of the responsive records, including the approximately 4,000 pages withheld from the Complainant, and we are satisfied that the records withheld fall into the definition of cabinet records pursuant to section 27(1)(h) - a record created during the process of developing or preparing a submission for the Cabinet. Therefore they must be withheld from the Complainant, subject only to the possible exercise of discretion by the Clerk of the Executive Council under the provision of section 27(3). The Secretariat has advised that the records were sent to Cabinet Secretariat for review, and that the Clerk of the Executive Council has reviewed the records and is satisfied that the records do not meet the test for disclosure in the public interest under section 27(3).

[23] The Secretariat also redacted a small amount of information on the basis of section 30 (solicitor-client privilege). The Secretariat provided those records to our Office for review, and we are satisfied that the exception has also been properly applied.

B. Extraordinary Delay

[24] The second issue to be dealt with in this Report is the issue of the extraordinary delay in the Secretariat's response to the request. In addition to the delay covered by the extensions

that were granted by this Office, which amounted to 130 business days, or a little over 6 months, the Secretariat took an additional 7 months to produce a final response to the Complainant. On review of the Secretariat's submissions and the detailed chronology provided to our Office by the Secretariat, it appears that there are a number of causes of this delay.

(a) Staffing Resources and Workload

[25] This request involved a very large number of records – the second largest request the Secretariat had ever received. The Secretariat is small – under 40 staff in total, of whom 12 work in the Indigenous Affairs division. There is no full-time ATIPP Coordinator. In accordance with its usual practice the Secretariat assigned the request to an existing staff member. In this case it was a Senior Land Claims Negotiator, who had to process the request alongside the rest of her other duties. There was a backup coordinator, at least for part of the period covered by this task, but that person also had other regular duties. The Secretariat also lost staff during this period. In the ordinary course, having to compile, review, assess and redact a larger number of records will require a greater expenditure of time. In most cases, if a staffing resources problem is temporary or otherwise unforeseen, it can be managed by an approved time extension. If that were the only factor contributing to the delay in the present case, perhaps a response could have been provided to the Complainant within the extended time.

[26] The Secretariat needed additional resources, but it had no budget to acquire more staff. For a period of time, at the request of the Secretariat, the ATIPP Office seconded an additional part-time coordinator to assist with the processing of this request. This was useful, but did not completely resolve the problem.

(b) Other Demands

[27] The Secretariat also had to produce records for litigation and to respond to the needs of the Muskrat Falls inquiry. The Secretariat has stated that the latter task in particular was a direction from government that had to be given priority, and it appears that no additional resources were provided to accomplish it. Clearly a small number of staff can only do so much.

As with other temporary staffing or workload issues, an approved time extension can sometimes provide the answer.

[28] In the present case, however, there were other unforeseen demands. For example, the federal government in 2018 launched several major initiatives involving Indigenous peoples, and these required the engagement of the provincial government, in particular Indigenous Affairs, at short notice, leading to unanticipated periods of intense activity.

(c) Consultations

[29] In our view, the most important contributor to the delay was the multi-fold consultation process that the Secretariat followed. Intergovernmental and Indigenous Affairs had previously been designated as the lead department in preparing the government's response to the TRC Calls to Action. As a result, it had gathered a very large number of records from quite a few other departments and agencies. Because of the nature of the present request, the majority of the records responsive to the request were part of the collection of records that had been gathered for the government's response to the TRC. Although these records were in its custody, the Secretariat considered that it was not in the best position to understand the sensitivity of much of the information, and therefore it decided that it was necessary to consult with subject matter specialists in some of the other departments, in order to determine what exceptions to access might apply.

[30] The chronology provided by the Secretariat shows that the process of consultation with other departments began at an early stage. Discussions with the Department of Children, Seniors and Social Development ("CSSD") commenced in February, 2018, within weeks of receiving the access request. Consultations with eight other departments began in July, 2018, during the period of the second approved time extension. The ATIPP coordinators consulted were asked for their feedback on records relevant to their respective departments. According to the chronology, this consultation process continued more or less continuously through the rest of 2018, even though the Department's third request for a time extension had been denied.

[31] The consultation issue was recently discussed in Report A-2019-016 from this Office. It was acknowledged that while consultations with other bodies in the course of responding to access requests are not specifically addressed by the *ATIPPA, 2015*, they are often required in practice. The Access to Information Policy and Procedures Manual issued by the ATIPP Office provides the following guidance to public bodies:

> *An examination of the request and a thorough review of the records will often require internal consultations. When a public body receives a request that deals with records originating in another public body or deals with matters in which another public body has direct interest, it should consult with that public body. This will ensure that all relevant factors are taken into consideration when deciding whether or not to sever information that falls under a discretionary exception to disclosure.*

[32] As stated in Report A-2019-016, neither ATIPP coordinators nor the heads of public bodies to whom they report can be experts on everything. Therefore it is often necessary for a coordinator to consult internally, or with other public bodies. However, in the present case, it was apparent as early as June 2018 (during the period of the second time extension) that the major issue with these records would be the section 27 exception, because those records had been gathered by the Secretariat specifically for the purpose of preparing a submission to Cabinet on the government's response to the TRC Calls to Action. This is precisely what paragraph 27(1)(h) was designed to protect from disclosure. Section 27 is a mandatory exception, and therefore those records would all have to be withheld.

[33] By early July, 2018, IA had completed preparation of the consultation packages of records that were to be sent to other departments for their assessment. The Secretariat's chronology provided to this Office shows that, by that date, the Secretariat had already concluded that the majority of the records would be subject to the mandatory section 27 exception.

[34] In the end, the final response provided to the Complainant many months later contained no redactions at all based on exceptions that were applied on behalf of any of the other government departments or agencies or outside organizations, to protect information that had been contributed by them. The only exceptions claimed were section 27 and a few pages protected by solicitor-client privilege.

[35] It is therefore difficult to escape the conclusion that by July, 2018 the Secretariat could have determined that the consultation with the other departments was unnecessary, because it was already certain that the section 27 exception would apply, and all of the records that were affected by that exception would have to be withheld. If it had done so, then the records could have been sent to the Clerk for review by the end of July, 2018 at the latest, within the period of the second time extension.

[36] However, it appears that the Secretariat considered it necessary to adopt what amounts to a three-stage consultation process. First, that it was necessary to complete the process of applying other exceptions, in consultation with other departments, before it could consult with Cabinet Secretariat. The second stage was the preparation of a complete package for Cabinet Secretariat, for consultation on the application of section 27. The third stage was a review of the records, by the Clerk of Executive Council, to determine whether pursuant to section 27(3) the public interest mandated the disclosure of any of the records.

[37] In our view this consultation process is problematic due to the lateness of the response, as it appears to presuppose that it is Cabinet Secretariat that makes the final decision on whether and how section 27 applies to records. That however is not what the *ATIPPA, 2015* requires. As indicated in Report A-2019-016:

> *[40] The entire scheme of the access request process in the ATIPPA, 2015 places the work of responding to requests in the hands of the ATIPP coordinator. This was one of the main themes in the Report of the 2014 Statutory Review Committee, which emphasized that coordinators ought to be "situated high enough up in the organization where they work to command automatic respect for their functions", that they be trained, and provided with the resources needed to carry out their work. The Policy Manual, on page 27, states:*
>
> > *As stated by the 2014 Statutory Review Committee, "ATIPP Coordinators assure the efficiency and the credibility of the entire process on a day-to-day basis." The ATIPP Coordinator should be professionally trained and hold a senior position in the organization in order to command respect for their functions under the Act.*

[41] The Policy Manual also affirms, on page 28, that:

> *The ATIPP Coordinator should have sole responsibility handling requests made under the Act within the public body. Coordinators may consult others within their public body, but only to receive advice on the interpretation or application of the Act, or to receive assistance in locating or obtaining the information needed to respond to a request.*

[38] The provisions of the *ATIPPA, 2015* dealing with the processing of access requests (for example, sections 8 to 26) are clear and consistent. The authority to make decisions, including final decisions, in response to access requests is granted to the head of the public body. Public bodies are defined in section 2 of the *Act,* and in the case of the provincial government, are defined as a department created under the *Executive Council Act*, or a branch of the executive government of the province. In the present case the public body to whom the request was made, and which was required to process the request, is the Intergovernmental and Indigenous Affairs Secretariat.

[39] There is nothing in the *ATIPPA, 2015* providing that the head of a public body may delegate duties under the *Act* to another public body, or that empowers a public body to direct how another public body carries out its duties under the *Act*. The ultimate responsibility for dealing with an access request, and for responding to it in accordance with the statutory requirements, is the head of the public body to whom the request is addressed. Therefore any suggestion that, through the consultation process, Cabinet Secretariat is empowered to make final decisions on how another public body responds to an access request, is inconsistent with the *ATIPPA, 2015*.

[40] However, the ATIPP Policy Manual has this specific guidance on certain types of consultations:

> *Depending on the nature of the request, the following may be consulted in addition to appropriate officials within a public body:*
>
> *• Cabinet Secretariat – If the records being sought may contain cabinet confidences (section 27), the public body must consult Cabinet Secretariat before releasing any records or information. The public body must also obtain*

> *sign-off from Cabinet Secretariat before a final response is sent to the applicant (see section 4.6.1 of this manual, "Cabinet Confidences" for further information).*

[41] It is of course true, as stated earlier, that the consultation process is often necessary. However, the requirements of Part II of the *ATIPPA, 2015*, including the mandatory time limits for responding to an access request, must be respected. As this Office observed in Report A-2019-016:

> *It is the prerogative of the Minister responsible for the ATIPPA, 2015 to create policies that are intended to support the implementation of the Act. It is important, however, that policy should not interfere with complying with the Act and in meeting statutory timelines for responding to access requests. Regardless of what other factors contributed to the 14 months' delay in providing the Complainant with a response, it appears that by following the policy of submitting the records to Cabinet Secretariat before releasing its final response, the Department added at least six months' delay in responding to the Complainant, contrary to the statutory time limit provided in section 16 of the Act, without any additional records being disclosed to the Complainant as a result.*

[42] If a public body intends to disclose to an applicant records to which section 27 might apply, or if the public body is uncertain whether section 27 applies, consultation with Cabinet Secretariat would be justified, given that it may be only Cabinet Secretariat that can advise whether certain records actually were part of a Cabinet process. However, if a Department has concluded that the documents are cabinet records and intends to withhold such records, then consultation would appear on its face to be superfluous. In either case, the final decision that the mandatory section 27 exception applied still lies with the head of the public body. In the present case, where it appears to have been abundantly clear that at least 4,000 pages were cabinet records, it should have been possible for the head of the Secretariat, on the advice of the Coordinator, to make the decision to withhold those pages much earlier than it did.

[43] There is, however, an additional policy issue, which concerns the interpretation of section 27(3). That provision reads:

> *(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance*

> *of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.*

[44] This provides an exception to the rule that all cabinet records must be withheld, by granting to the Clerk of Executive Council the discretion to apply a public interest assessment to the disclosure of cabinet records. The Policy Manual has, on page 80, interpreted this provision as requiring that every record which would otherwise be withheld under section 27 must be submitted to the Clerk:

> *In order for the Clerk of the Executive Council to exercise his or her discretion under subsection 27(3), all records to which section 27 applies must be forwarded to the Clerk for review prior to finalizing a response to an applicant.*

[45] Section 27(3) was recommended as a safeguard by the 2014 Statutory Review Committee. The Report explained (page 109) that its recommended changes to the cabinet confidences exception were intended to reduce delays when dealing with access requests for cabinet records:

> *With those safeguards in place, using a basic list of records that are Cabinet confidences and according those records absolute protection from disclosure should result in more efficient management of access to Cabinet records. It should also be easier to use and reduce delays and costs for both the requester and public bodies. In short, it would help to make the ATIPPA more user-friendly.*

[46] The importance of cabinet confidences to our system of parliamentary government can hardly be overstated. There is an extensive discussion of the subject in the Report of the Review Committee, on pages 84 to 93, followed by a lengthy comparison of the ways in which cabinet confidences are treated in other jurisdictions. It is clear that any policy dealing with cabinet records under the *ATIPPA, 2015* must recognize the fundamental constitutional principle that cabinet records are granted absolute protection from disclosure. Therefore the policy that requires a public body to submit to Cabinet Secretariat records that it intends to disclose, and to which section 27 might apply, is an important safeguard against inadvertent disclosure of cabinet records.

[47] In the present case, however, the Secretariat was already well into the second time extension period before the package of records to be provided to Cabinet Secretariat was prepared. When the Secretariat's third time extension request was denied, in August 2018, it had only days remaining to meet the statutory deadline for a final response to the Complainant. At that point it could have made the decision to withhold the section 27 records, and notified the Complainant accordingly and then send the package of records to the Clerk for consideration of her discretion. Instead, it continued the consultation process, which resulted in the records being provided to Cabinet Secretariat finally in February 2019. It was only on March 20, 2019 that the Department was notified that the Clerk of Executive Council had reviewed the records and was satisfied that the records did not meet the test for disclosure.

[48] In its submissions to this Office, citing section 27(3) and the applicable sections of the Policy Manual, the Secretariat explained the position that it found itself in as follows:

> *The Act requires that all records deemed to fall within Section 27 must be provided to and reviewed by the Clerk of Executive Council. IA does not have the authority to make that decision.*

This referral to the Clerk, given the lateness of the response, could have occurred after a final response was sent to the Complainant, including all responsive records with redactions applied based on the decisions of the head of the public body in question, i.e. the Secretariat. The Applicant could have, at that juncture, been advised that the head had concluded that section 27 applied to the bulk of responsive records and that such records were being advanced to the Clerk of the Executive Council for her review of the public interest override per section 27(3). Additional consultation with Departments about these records would not have been required at this stage, particularly given the timeframes involved – the head had concluded that section 27 applied, i.e. the decision that it was within his authority to make, and the decision left to the Clerk related to whether or not there was a public interest in disclosure that outweighed the harm, not whether any additional exceptions applied, decisions regarding which would be outside of her authority. Should the Clerk have decided to exercise her discretion under section 27(3), the Applicant could have been advised of that and the records could have been appropriately processed at that time for additional

exceptions by the public body, with additional consultations with Departments as required. As the present case and the case dealt with in Report A-2019-016 demonstrate, the result of taking the position that this referral must be done before advising the Complainant of the application of section 27 can result in the public body finding itself in violation of the *Act*. In our view that is not acceptable.

[49] Alternative ways must be found to create policy, or to conform to existing policy, while still complying with *Act*. As acknowledged above, it is the prerogative of the Minister to create policies to support the *Act*. However, it is also the duty of this Office, under section 95 of the *Act*, to comment on the implications for access to information of programs or practices of public bodies, and to make recommendations about the administration of the *Act*. It is in this spirit that we suggest that the principles underlying the consultation policies could perhaps be preserved by applying them in a different way.

[50] Above all, heads of public bodies must ensure that coordinators are empowered to make decisions about access requests in a way that does not cause them to violate statutory time limits. The *ATIPPA, 2015* was intended to be a complete legislative scheme that establishes a rights-based statute with limited exceptions. Among the most important of the rights provided for in the *Act* is the right of access to information. The emphasis placed by the 2014 *ATIPPA* Review Committee in its report on the importance of a timely and user friendly *Act* is clear through the establishment of the many statutory deadlines in the *Act*, included among which is the time within which public bodies must respond to an access request.

[51] Consultation with other departments is very important, but in some cases it will be necessary to issue a decision withholding records from an applicant without consultation, if that is the only way to meet a statutory time limit. That is in conformity with both the words and the underlying principles of the *Act*, since an applicant who is denied access is free to make a complaint to this Office, and that affords a timely opportunity for review.

[52] As was summarized in Report A-2019-016:

> *The exercise of discretion under section 27 should be done within the statutory timelines, but when a public body finds itself already beyond, or imminently at risk of exceeding those timelines, and further extensions are not available, it is consistent with the duty to assist and the scheme of the Act as a whole to provide a response as soon as possible, in order to allow the Applicant to avail of appeal processes without further delay.*

V RECOMMENDATIONS

[53] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act*, *2015*, I recommend that the Intergovernmental and Indigenous Affairs Secretariat:

> 1. continue to withhold from the Complainant the records originally withheld pursuant to section 27 and 30 of the Act;
>
> 2. review its access to information process in detail to determine the causes of delays, and implement measures to reduce or eliminate such delays, including (a) staff resources tasked with dealing with access to information requests, and (b) the length of time devoted to consultations;
>
> 3. comply in future with the statutory duties imposed upon it by sections 13 and 16 of the *Act*, to respond to an applicant in an open, accurate and complete manner, without delay, and in any event within the statutory deadlines, including keeping the applicant informed, maintaining open communication throughout the process, and providing the applicant with the necessary information so they can exercise their rights under the *Act*, including the right to file a complaint regarding a deemed refusal.

[54] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Intergovernmental and Indigenous Affairs Secretariat 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.

[55] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of August, 2019.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador