



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-031

December 3, 2019

Town of Happy Valley-Goose Bay

Summary:

The Complainant wrote to the Town in 2016 requesting approval for a business. Over three years the Complainant had meetings and other conversations with the Mayor, Councillors and Town Manager, with no response. The Complainant made an access request for records related to the application, and filed a complaint with this Office when the Town did not respond. The Town also did not initially respond to the complaint notification, but after several weeks began a search for responsive records. Ultimately the Town stated that no records could be found. The Commissioner found that the Town had failed in its duty to assist the Complainant under section 13, had failed to comply with the time limits for responding to an access request under section 16, and had failed to respond adequately to the complaint under section 44 of the Act. The Commissioner recommended that the Town review its access to information policies and practices and implement measures to reduce or eliminate future delays; review its information management and documentation policies and practices; and comply in future with statutory duties and requirements, including the requirement to cooperate in a timely manner with this Office.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, ss. 13, 15, 16, 44, 97, 109.

Authorities Relied On:

NL OIPC Report [A-2019-003](#);
[Access to Information Policy and Procedures Manual](#); 2017, ATIPP Office, Department of Justice and Public Safety.

I BACKGROUND

- [1] The Complainant, a business owner, wrote a letter of application in 2016 to the Town of Happy Valley-Goose Bay (“the Town”) requesting approval for another proposed business. Over the course of three years the Complainant had meetings and other conversations and correspondence with the Mayor, Councillors and Town Manager, with the aim of seeking approval, or at least a decision about the application, but no decision was ever received.
- [2] In July 2019 the Complainant’s lawyer made a request under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or “the Act”) on behalf of the Complainant, for all records related to the application. The Town did not respond to the request. The Complainant’s lawyer therefore filed a complaint with this Office in August 2019.
- [3] In early September, after notifying the Town of the complaint, our Office spoke with a senior official of the Town. We were assured that the formal response to the complaint would be provided within 10 days.
- [4] Despite repeated requests and two time extensions, and despite further conversations with Town officials, no satisfactory written response to the complaint was received until November 27, 2019. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] The Town was asked for submissions on the issues identified by this Office. In its last-minute submissions on November 27, 2019, the Town stated that at the time of the initial access to information request, the Town was in the process of hiring for several positions, and did not have a designated ATIPP Coordinator. An initial search did not yield any information. The Town became focused on the problem of not finding any records, and failed to provide timely responses to the Complainant or to this Office.

- [6] The Town believes that having filled the ATIPP Coordinator position, and having committed to ongoing training and process reviews, the Town will have resolved the issues that led to the failure to respond. A subsequent unrelated access request has been completed without any issues.
- [7] The Town states that the search for records eventually conducted was reasonable and thorough. The Town repeated some searches, but was unable to locate any responsive records.
- [8] The Town states it has procedures in place for receiving correspondence and applications, and those are reviewed periodically. While staff turnovers may have contributed to anomalies, the Town cannot say with certainty why no responsive records have been located.

III COMPLAINANT'S POSITION

- [9] The Complainant stated that they had provided a detailed application in writing to the Town on May 24, 2016, seeking approval to operate a new business at a particular address. The Complainant provided a copy of that letter to our Office. The Complainant stated that a response to that application letter was never received from the Town.
- [10] The Complainant recounted that on three different occasions over the ensuing three years, they had lengthy meetings with senior administrators or elected officials of the Town to discuss the application, without any response. On February 21, 2019 the Complainant sent an e-mail to the Town Manager (a copy of which was provided to our Office) mentioning previous meetings, requesting an appointment to discuss the application and pleading for a response.
- [11] Finally the Complainant retained legal counsel, who first filed the access request, and when no response was received, filed the complaint with our Office. In the Complainant's view, there ought to be records dealing with the application and any communications, discussions or decisions about it, and the Complainant is entitled to all such records.

IV ISSUES

[12] There are two separate aspects to this complaint: first, the way in which the Town dealt with the original access request from the Complainant, and second, the way in which the Town dealt with the complaint it received from our Office. We identified the following issues in our letters notifying the parties that the complaint had been referred to formal investigation:

1. why the Town failed to respond to the Complainant's initial access request;
2. whether the Town has resolved the issues that led to the failure to respond;
3. whether the Town has subsequently conducted a reasonable search for the responsive records;
4. if no responsive records have been located, whether there is a satisfactory explanation.

V DECISION

[13] Section 16 of *ATIPPA, 2015* provides for a specific time limit for response 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.

[14] Section 15 of the Act additionally provides that a public body must provide an applicant with an advisory response, within 10 business days, advising the applicant of the status of the request and of any factors or circumstances that may affect or delay the response. Further, the *Access to Information Policy and Procedures Manual*, issued by the ATIPP Office of the Department of Justice and Public Safety, states that a public body, on receiving a request, must write to the applicant acknowledging the request, and must also notify the ATIPP Office of the request. The Town did none of those things.

[15] Section 13 of the Act sets out the general responsibilities of a public body upon receiving an access request:

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.

That general requirement, known as the “duty to assist” has been interpreted over the years as including a number of specific tasks in addition to those explicitly set out in other provisions of the Act. For example, the *Policy and Procedures Manual* states:

- *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;*
- *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;*
- *Designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed; and,*
- *Provide interim releases of records to an applicant as records are processed to mitigate excessive delays.*

The Town appears not to have done any of those things.

[16] Section 16, above, provides that when a public body fails to respond to an access request within the prescribed time, it is deemed to have refused the request, and such a deemed refusal gives the applicant the right, under section 42 of the Act, to file a complaint with this Office, as was done in the present case. Deemed refusals such as this have become increasingly rare, since most public bodies have become familiar with the statutory requirements and the importance of meeting them. When they do happen, it is often the result of extraordinary circumstances or unforeseeable events, and in most such cases, the public body can have recourse to the section 23 provisions that allow for extensions of time for responding to a request.

[17] Therefore, when the present complaint was received, our Office was surprised, because the Town is one of the larger municipalities in the province, with a relatively large municipal administration composed of 11 departments (including Economic Development, Planning and Development and Finance) overseen by a mayor and six councillors. There are a large number of council committees (in particular Planning, Finance and Economic Development Committees, one of which would be the appropriate committee to respond to an application to establish a business) and the administration of the Town is overseen by a full-time Town Manager, a number of other managers or directors, and other full-time staff. Unlike hundreds of smaller municipalities in the province, which often rely on a single, part-time town manager and are often understandably challenged in meeting the demands of the Act, the Town should easily have sufficient capacity to respond to an ATIPP request of this sort.

[18] Immediately after sending the Town our formal notification of the complaint in early September 2019, our Office immediately contacted the Town Manager. He explained that the Town has had some major staff changes, and during the process “some things did not get done”. It appeared however that the Town understood the need to respond to both the access request and to the complaint. We were advised that most or all of the records requested would appear to be disclosable, but the records would have to be gathered and reviewed. We were assured that the formal response to the complaint would be provided to our Office within the requested 10 days.

[19] Unfortunately, that did not happen. In late September our Office again wrote to the Town requesting the response and an update on what actions the Town had taken. We pointed out that the time limits are statutory requirements, that the Town was in violation of the Act when it failed to respond to the access request, and that it was again in violation of the Act by not responding to this Office. We therefore requested the Town’s response, including a copy of the records, an explanation of the failure to reply to the Complainant, and an explanation of how the Town planned to proceed, as soon as possible.

[20] The Town replied that the file had been transferred to a new ATIPP Coordinator, and that all of the relevant and required documents were being actively retrieved. In early October our Office contacted the Town again to inquire about progress. We were first advised that the

Town was currently gathering all of the documents required to comply with the ATIPP request. However, by mid-October the Town advised that “...trying to locate the documents has been problematic...” and that different Town staff were searching various locations including computers, minutes of council and committees, and other departmental documentation.

[21] At this point our Office decided to grant the Town an extension to the informal resolution deadline until the end of October 2019 to enable it to continue the search. At the end of that time period, the Town had still not provided a full written response to the complaint. However, in an e-mail the Town advised that they had searched records in the Planning, Engineering and Development Departments, both electronic and physical files, and that no notes, minutes, e-mails, or other records had been found referencing the business application, nor any discussions, approvals or decisions related to it, either in those locations or in the Town Engineer’s and previous Planner’s files.

[22] *ATIPPA, 2015* imposes time limits on complaint investigations conducted by our Office. Ultimately an investigation must be completed and any report issued within 65 business days. Our Office reluctantly granted an additional extension, this time to mid-November, so that the Town would have more time to search through the previous Town Manager’s files and e-mails.

[23] Ultimately the Town provided a list of locations that had been searched without result. A communication sent from the Town to our Office on November 20, 2019 in response to a request for an update stated:

“I can confirm that any and all information that pertains to the ATIPP Request has been furnished across. I do not have the capacity to answer any of your questions referenced in the email below that relate to the existence of any other relevant information pertaining to this request.”

The Complainant confirmed, however, that they had received no records from the Town, except for the document summarizing the locations searched.

[24] On November 21, 2019 our Office sent the parties a notification that the complaint had been referred to formal investigation. As indicated above, it contained a list of unresolved issues, and requested a response. Unfortunately no response was received by our Office, and

telephone calls to senior Town officials went unanswered until an analyst from our Office was finally able to have a phone conversation with the Mayor and the Town Manager. During a lengthy discussion, in which the Town expressed concern about the clear lack of compliance with *ATIPPA, 2015*, and provided some further background information, the Town committed to producing a written response to our request for submissions on the outstanding questions and issues. However, although there were several subsequent telephone conversations, we received no written submission until November 27, 2019. At that point it was too late for any follow-up or further clarification. We are therefore left with no option but to deal with the issues arising from this complaint on the basis of the little information we have.

Failure to Respond to the Access Request

[25] The first issue is why the Town failed to respond to the Complainant's initial access request. We do not know the answer. The most we can say is that the Town advised that around that time the individual designated as ATIPP Coordinator left the employ of the Town, and it took some time to assign a replacement. In the process, "some things did not get done." It is very disturbing that there is no evidence that the Town ever acted on the Complainant's access request. There was no acknowledgment or response of any kind. It is difficult to understand how staff turnover could be a complete explanation.

[26] Municipalities in this province have been subject to modern access to information legislation since 2005. The ATIPP Office has produced and circulated successive editions of a comprehensive *Policy and Procedures Manual*, interpreting the provisions of the Act and covering every step of the process to be followed. They have also provided training to any public body that requested it, and have always been available to provide advice. At the same time, our Office has issued reports, guidelines and newsletters, and held training sessions for public bodies. We have also always been available to provide advice.

[27] This is a Town with forms and processes for almost everything, and a sophisticated division of labour for Town business. At the very least, someone should have opened a file, acknowledged receipt of the request, and then contacted the ATIPP Office or our Office for advice. It is discouraging that, by this time, a large municipality with a full-time administrative

staff would not, first of all, understand the importance of compliance with *ATIPPA, 2015*, and second, would not have established access to information policies, procedures and practices that could withstand staff turnovers, excessive workloads or other challenges. It is difficult to avoid the conclusion that the failure to respond was due to unconcern about a statutory obligation rather than incapacity. In any case such a complete failure of responsibility is unacceptable and an abdication of one of the core statutory duties of any public body to its residents.

Whether the Town has Resolved the Issues that Led to the Failure

[28] Plainly the Town has some work to do. At this date, it is still not clear to this Office that the Town management fully understands what factors caused the failure to respond to the access request. Once that is better understood, the Town must undertake the tasks of creating robust access to information procedures, training sufficient staff to handle access requests, including back-up coordinators and other staff who may have a role in handling access requests, and implementing sufficient oversight so that similar failures do not happen again.

Whether the Town has Conducted a Reasonable Search for the Records

[29] The Town asserts that, since our Office notified the Town of this complaint, there has been a thorough search for records responsive to the complainant's original access request (see paragraph 21 above). In most circumstances, it is sufficient for the public body to demonstrate that all of the locations where relevant records might reasonably be found, have been searched by an experienced person familiar with the system. In the present case, the Town reports that a number of different locations, both paper and electronic files, in the likely departments, have been searched by staff familiar with them, and four years of committee and council minutes have been examined, to no avail. On the evidence provided to this Office by the Town, the only reasonable conclusion is that there are presently no responsive records to be found.

If No Records Have Been Located, Is There a Satisfactory Explanation?

[30] As described above, the Town of Happy Valley-Goose Bay is one of our larger municipalities, with a relatively large administration overseen by a full-time Town Manager and a number of other full-time managers and staff. A review of the Town's website shows that there are numerous established processes for dealing with the Town, including downloadable application forms. A review of council minutes shows that various kinds of applications are routinely dealt with at committee meetings, and then described and voted on at full council meetings, with the results recorded in the minutes. Those minutes and other reports are posted publicly on the Town's website.

[31] The Town has indicated that its processes usually work well. Normally an application such as the one that led to this matter will be logged, and sometimes dealt with directly by staff. The Town's response to an application is also routinely logged. Other applications may go from staff to a committee, where there will be a note of discussion and a number of possible outcomes: denial with reasons, deferral for more information, or a recommendation to council. All three are usually documented. If a matter goes to council, there is documentation and ultimately there are minutes of the council decision.

[32] In the present case, the Town Manager advised that there is no documentation at any level, and there is no explanation for this. The Town Manager states that this is the only such case he has encountered. However, poor documentation and a failure to follow appropriate administrative processes are themes that run through this entire matter, from the original business application, through the access request, to the complaint to this Office.

[33] The Town does not dispute that the Complainant made the original business application in 2016, and agrees that there were meetings about it between the Complainant and Town councillors and staff since then. It is therefore disturbing that no record of the application, or of the meetings about it, can be found, even the original letter from the Complainant. A copy of that application letter was attached by the Complainant to the access request, and again to the complaint to our Office, so there could have been no doubt what the searchers were looking for. There is simply no explanation for the complete absence of records.

Documentation of core business processes is basic and fundamental to any type of administrative process and a municipality cannot function effectively without it. Furthermore, the rights established under *ATIPPA, 2015* are severely undercut unless public bodies fulfil their responsibilities to document essential business processes.

Lack of Cooperation with this Office

[34] In addition, we are concerned by the lack of response and lack of effective cooperation with this Office after being notified of this complaint. Our notification letter required a response from the Town within 10 business days, and explained that this is a time limit imposed by section 44 of the Act. Despite subsequent telephone calls and written reminders, it was long after that deadline had passed before the complaint was even provided to the individual who had been designated as the Town's ATIPP Coordinator. Despite further reminders, requests for updates, extensions to time limits, and warnings, no written response to the complaint notification letter was ever provided to this Office. Similarly, after the Town was formally notified that the complaint had been referred to a formal investigation, no response submissions were provided until the very last moment, despite commitment by the Town to do so.

[35] Report A-2019-003 addressed this issue at some length, as follows:

[34] This Office previously dealt with public bodies that have not fully cooperated with an investigation into a complaint. Report A-2016-023 addressed the failure of public bodies to provide representations and records during an investigation:

[42] Additionally, when a complaint is filed with my Office, we must attempt to resolve the complaint informally, and where that is not possible, to proceed to a Report. The City's effort and lack of cooperation fell far short of the usual responsiveness and efforts of other public bodies in dealing with complaints. If the City does not provide the records and representation required of it in a timely fashion, this Office is hindered in its review of the matter. The shortened timelines of the ATIPPA, 2015 do not allow waiting for a public body to decide to provide a response and requested information at its leisure. Failure of a public body to provide the records and representations requested at the outset of a file and after repeated requests indicates either

ignorance of or a lack of concern from a public body for this process.

[35] A lack of full cooperation of a public body during an investigation is rare. The failure of the Town of Gander to respond to letters, emails, and telephone calls in a timely manner during our attempt to resolve this complaint informally is particularly egregious as it undermines the role of the Commissioner, the function of this Office, and the Act itself. Even if the Town was given the benefit of a doubt regarding its claim to have erred, its conduct after that point was equally wanting.

[36] The Access to Information and Protection of Privacy Act is not a piece of legislation which a public body can choose to follow when it suits them or when it is convenient. The Act invests the Office of the Information and Privacy Commissioner with certain powers and authority, including the ability to investigate complaints. This process requires the full cooperation of public bodies in order to achieve its purpose. As referenced in Report A-2017-010, that a public body should “so completely disregard the mandatory provisions of the Access to Information and Protection of Privacy Act, 2015 is fundamentally unacceptable.”

[36] Finally, section 109 of the Act provides as follows:

109. (1) A local public body shall, by by-law, resolution or other instrument, designate a person or group of persons as the head of the local public body for the purpose of this Act, and once designated, the local public body shall advise the minister responsible for this Act of the designation.

The Town, as a local public body, is required to designate a head, but it is clear from inquiries to the ATIPP Office that the Town has never done so. In the absence of such a designation, this Report will be sent to the Coordinator, the Town Manager, and to the Mayor and Council. We hope that the Town will immediately take the necessary steps to designate a head in order to provide its response to this Report within the period of 10 business days after receiving it, as required by the Act.

VI RECOMMENDATIONS

[37] Under the authority of section 47 of *the Access to Information and Protection of Privacy Act, 2015*, I recommend that the Town of Happy Valley-Goose Bay:

- (a) review its access to information policies and processes in detail to determine the causes of the delays and failures, and implement measures to reduce or eliminate them in future;
- (b) review its information management and documentation policies and practices, so as to better support adequate municipal decision-making and administration and the delivery of municipal services as well as to better support the adequate handling of access requests;
- (c) 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;
- (d) commit to full and open communication with this Office on future investigations including timely responses to notification letters and requests for records within the legislated time periods;
- (e) if it has not already done so, take the necessary steps to comply with section 109 of the *Act* in designating a person or group of persons as the head of the public body for the purposes of the *Act*.

[38] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Happy Valley-Goose Bay 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.

[39] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of December, 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador