



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-011

February 19, 2021

Town of Northern Arm

Summary:

The Complainant filed an access to information request to the Town of Northern Arm (the “Town”) for the Town Clerk’s journal and any records referencing him pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). The Complainant filed a complaint with this Office when the Town did not respond. The Town also did not respond to this Office’s investigation notice, but began a search for responsive records once the file moved to formal investigation. 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 *ATIPPA, 2015*. 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](#), SNL 2015, c. A-1.2, ss. 13, 16, 44.

Authorities Relied On:

NL OIPC Reports [A-2019-031](#), [A-2019-003](#), [A-2016-023](#), and [A-2009-011](#).

I BACKGROUND

- [1] The Town of Northern Arm (the “Town”) received an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for records referencing the Applicant (emails, letters, notes on telephone calls), as well as the Town Clerk’s journal. The Town did not respond to the request, so the Complainant therefore filed a complaint with this Office.
- [2] After notifying the Town of the complaint and failing to receive a response within 10 business days as required by section 44, this Office emailed the Town to remind it of its legislative obligations. The Town indicated that it had believed it did not need to respond because of confusion related to a separate privacy complaint it was concurrently dealing with. This Office explained that the matters were separate and a response to our notification of complaint was required, but the Town still failed to respond to this Office.
- [3] 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

- [4] The Town was asked for submissions on the issues identified by this Office. In its last-minute submissions, the Town stated that, at the time of the initial access to information request, the Town was dealing with several issues, including: under-staffing and turnover in staffing, particularly in the role of ATIPP Coordinator; ongoing legal actions with the Complainant; and an additional privacy complaint, the latter of which it initially believed was tied to our correspondence on this matter and therefore it did not think required a separate response. The Town acknowledged that it had, subsequent to our initial notification, been notified that this matter is separate and required its own response, which it failed to produce.
- [5] Once the Town was notified the matter had moved to formal investigation, it provided the above information and started the work of responding to the original access request.

Additionally, the Town identified that the request involves a large number of records and would take some time given the small number of staff at its disposal to work through the request.

III APPLICANT'S POSITION

- [6] The Complainant seeks a response to his access request and disclosure of the records sought.

IV DECISION

- [7] 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.

- [8] 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. The Town failed to do so.

- [9] 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. As previously outlined in Report A-2009-011, the duty to assist has three components:

[80] ...First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

Without any acknowledgement of the Complainant's request or any correspondence with the Complainant, in addition to failing to meet the statutory deadline at section 16, the Town did not meet its duty to assist.

[10] 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 administrative errors, 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.

[11] After this Office's initial notification to the Town of this complaint, the Town failed to provide a response within the 10 business day legislative deadline. When this Office contacted the Town to inquire why a response had not been provided, the Town indicated it believed that the notification involved another matter that had been addressed and that no response was required, as noted above. This Office then advised that this complaint is in fact a separate matter requiring its immediate attention because it is a complaint related to its failure to respond to an access request. This Office conveyed that the Town was already in contravention of its legislated time requirements for response to this Office, so immediate attention was required. However, again the Town did not respond to this Office's correspondence, necessitating the matter moving to formal investigation.

[12] It was only once notification of formal investigation was sent that the Town responded, agreeing it had failed to address both the access request and the complaint to this Office, citing its confusion given the separate privacy complaint it is dealing with as well as legal matters involving the Complainant, turnover in staff, and general lack of understanding of the requirements of the legislation and obligations they have under it. It also then committed to the process of responding to the Complainant's access request, noting that the request involves a large volume of records and that its staff is small in number.

[13] 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 *Access to Information Policy and Procedures Manual* as well as reference material specifically for municipalities: [ATIPP – Guidelines for Municipalities](#), 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.

[14] While this is a smaller Town perhaps lacking much experience with access and privacy matters, 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 disappointing that, by this time, even a smaller municipality would not understand the importance of compliance with *ATIPPA, 2015*.

[15] In addition, this Office is concerned by the lack of response and lack of effective cooperation from the Town 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 communication, clarity and reminders, it was not until notice of formal investigation was sent before the Town finally began addressing the initial access request, acknowledged its previous failure to act and provided some explanation for this failure.

[16] Reports A-2019-031 and 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."

[17] While this Office acknowledges the smaller size of this municipality, its staffing issues and its relative lack of familiarity with ATIPPA, 2015, as the above sets out, this is no excuse for its lack of response to both the access request and the complaint to this Office.

V CONCLUSIONS

[18] We have accepted the explanation that the Town made an administrative error in failing to processing this access request and, later, responding to the related complaint because it was confused with a related and ongoing privacy complaint. Errors sometimes happen, but

we were and remain disappointed with the Town's responsiveness to the error once it was identified.

[19] In this particular case, the access request involves many records to which numerous exceptions may be applicable and therefore we think it inappropriate to recommend immediate and full disclosure of the records in this instance. However, public bodies should not assume that this will be our response to any given deemed refusal. Instead, they should assume that our response to a deemed refusal may well be full and immediate disclosure and also note that such a recommendation is a "hard recommendation" under section 47(a), which carries the possibility, should the public body continue not to respond, of being filed as a court order.

VI RECOMMENDATIONS

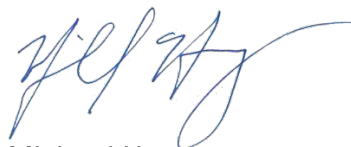
[20] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town of Northern Arm:

- (a) provide its final response to the Complainant's access to information request within 10 business days of its receipt of this report;
- (b) review its access to information policies and processes in detail (create such policies and procedures where none exist), and implement measures to ensure legislative compliance in future;
- (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.

[21] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Northern Arm 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.

[22] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of February 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador