



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-013

March 1, 2021

City of St. John's

Summary:

The Complainant made an access to information request to the City of St. John's for records relating to St. John's Sports and Entertainment and the Mile One Centre pursuant to the *Access to Information and Protection of Privacy Act, 2015* ("ATIPPA, 2015"). The City applied for, and received, several lengthy time extensions but still did not respond to the request by the mandatory deadline. After the time to respond to the request had expired the Complainant made a complaint to this Office, requesting that the Commissioner order the release of the records and make a finding that the city had acted in bad faith. The Commissioner found that the City had failed to respond in the designated time, and the City was deemed to have refused the request. The Commissioner ordered the release of the records within 50 business days of the release of this report, and declined to make a finding that the City had acted in bad faith.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 13, 16, 21, 26, 47 and 115.

Authorities Relied On:

[Access to Information Policy and Procedures Manual](#); 2017, ATIPP Office, Department of Justice and Public Safety.

NL OIPC Reports [A-2009-011](#), and [A-2021-011](#)

I BACKGROUND

[1] The Complainant made five access to information requests under the Access to Information and Protection of Privacy Act, 2015 (“ATIPPA, 2015” or the “Act”) to the City of St. John’s (the “City”) on September 3, 2019. The request which is the subject of this complaint asked for the following records:

Absolutely all documents/records, including draft documents, internal emails or other correspondence, relating to St. John's Entertainment, the St. John's Edge, and the St. John's Growlers and Mile One Centre during the years 2018/2019, particularly documents related to or connected with a memorandum of understanding and any other agreements/potential agreements involving Atlantic Sports Enterprises Ltd., Deacon Investments Ltd., St. John's Sports & Entertainment Limited, the City of St. John's, [and two named individuals].

[2] For clarity, St. John’s Sports and Entertainment Limited is a wholly owned subsidiary of the City of St. John’s, and is also a separate public body subject to ATIPPA, 2015. It is responsible for the operations of the Mile One Centre and the St. John’s Convention Centre.

[3] In response to the City’s request for clarification as well as a request to stagger the requests, the Complainant responded by declining to stagger their requests and updated (but did not narrow) the request at issue, stating:

I am primarily interested in documents that relate to/assess/analyze the MoU and any other agreements involving ASE, Deacon Investments/Deacon Sports and Entertainment, SJSE, the City of St. John's, [and two named individuals].

[4] The other requests made by the Complainant on the September 3, 2019 included:

- i. *Any and all corporate documents connected to St. John's Sports and Entertainment, including Articles of Incorporation and corporate by-laws, drafts and amendments of same, correspondence, in any form including emails, relating to same.*
- ii. *Any and all records, including any correspondence or external/internal communications, conducted by accounting or other professional firms relating to activities or economic impact associated with the City of St. John's/St. John's Sports and Entertainment, and Mile One Centre. Specifically, I request any and all reports, in any form, and any correspondence from KPMG relating to those same activities.*

- iii. *Any and all records, including correspondence and internal/external communications, drafts and related emails, connected to Mile One Centre, its economic impact in City of St. John's generally, downtown St. John's, or the province generally and the economic impact attached to the tenancy of sport entertainment entities (such as the St. John's Edge or Newfoundland Growlers).*
- iv. *Any and all audit reports conducted in relation to or connected with St. John's Sports and Entertainment or Mile One Centre and any and all records related to same.*

[5] By the time it assessed the scope of the requests, the City was beyond the five business day deadline set out in section 21 of *ATIPPA, 2015* to make an application to this Office to disregard this or any of the other above-noted requests. The City did not make an application under section 21 or, at that time, an application to extend the five business day deadline under the extraordinary circumstances provisions of section 24. The City did submit such an extraordinary circumstances application in February 2021. For various reasons, most centrally the time that had elapsed since the original request, this application was denied.

[6] On September 9, 2019, the City began to develop a plan to search for the records and process the requests. The Coordinator met with senior staff numerous times and developed a list of search terms for the email search. IT staff then conducted an initial email search which yielded 6,475 potentially responsive emails. In consultation with the IT department, the City procured a software program which could convert emails into a workable file format. The City also consulted with the ATIPP Office and this Office for Guidance.

[7] After the initial assessment, the City made an application to this Office for a 45 business day extension pursuant to section 23 of the *Act*. This extension was granted on September 19, 2019 and set December 5, 2019 as the new due date for the City's response to the access request. The approval was based on the number of requests, large number of records, and the need for the City to conduct consultations.

[8] The City determined that this request would require a cost to be paid by the Complainant pursuant to section 25 of the *Act*. The cost estimate letter was sent to the Complainant on September 18, 2019. On September 27, 2019, the Complainant applied to the City for a waiver of the cost estimate. This application was denied by the City.

- [9] On October 29, 2019 the Complainant made a request to the Commissioner for a review of the cost estimate. As per section 26(5) of the Act, the effect of this application was to pause the timeline for the City's final response to the request. On December 20, 2019, the Commissioner confirmed the cost estimate and upheld the City's decision not to waive the cost. The Applicant paid one half of the fee on January 13, 2020, which reactivated the timeline for the City's final response to the access request, making the deadline March 18, 2020.
- [10] An automatic six day extension was granted due to a state of emergency declared by the City of St. John's from January 17 to January 25, 2020, making the new deadline March 26, 2020.
- [11] On March 4, 2020, the City applied for a second extension, this time of 80 business days. This Office approved a partial extension of 60 days on March 6, 2020, giving a new deadline of July 21, 2020. It is accepted that there were significant impacts on the City's operations due to the pandemic which did not become apparent until after this extension was granted.
- [12] The City made a third and final extension application on July 8, 2020, seeking an additional 80 business days. This Office granted this extension in full and the deadline for the City's final response became November 16, 2020.
- [13] The City did not apply for any further extensions and failed to respond to the request by the final deadline of November 16, 2020.
- [14] The Complainant made a complaint to this Office on November 27, 2020. 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

- [15] The City does not dispute that the time to respond to this access to information request has expired. It has indicated that it has been working diligently on a final response to the

Complainant and that given the expansiveness of the request it has been unable to complete it in the mandated time.

- [16] The sheer number and size of the files to be processed caused much difficulty, creating strain with respect to man power and technological processing power. The City described the difficulties as follows:

These email searches are completed using Microsoft eDiscovery. Keywords and search parameters are inputted, the search is run, and the resulting file is exported and downloaded. The file format (EML) must be opened in Outlook and once in Outlook, the file appears as a folder in which emails can be removed from the file as needed. Once irrelevant and duplicate emails are removed, and the file is of a manageable size, the EML file is then converted to PDF using a conversion software (which was procured because of this file). Approximately 30 emails and their attachments can be converted in each batch (any more than that and Outlook crashes) and approximately 4-5 batches can be converted before my laptop [...] runs out of memory and needs to be restarted.

- [17] This work was quickly halted by the City's winter storm state of emergency from January 17 to January 25, 2020. At this time, the files became corrupted and it took the City's IT department until early February to resolve the issue. No work other than uncorrupting the files was completed during this period. Once the corruption issue was resolved, the City was able to remove 2,088 non-responsive or duplicate emails from the results, which still left 4,387 emails.

- [18] Soon after, a Public Health Emergency was declared by the Government of Newfoundland and Labrador on March 18, 2020, due to the global COVID-19 pandemic. As a result, all work by City staff had to be completed on laptops at home. Many public bodies in Newfoundland and Labrador, the City included, were not fully prepared for large numbers of their staff to work remotely. The City's ATIPP coordinator described that process as follows:

During this time, I was working from home and dealing with significant issues pertaining to (more) file corruption, VPN connectivity issues, etc. At the beginning of June, the file became unrepairable at 2413 emails [...] I then devoted an entire week (Friday, June 5th – Friday, June 12th) doing nothing else but converting all 2413 emails to PDF, approximately 30 emails at a time, with my laptop crashing numerous times in between.

[19] Once all of the remaining emails had been converted to PDF, it was determined that there were 17,265 pages of records. At the time of the complaint to this Office, the City had processed all but about 1,000 pages, extracting 6,178 pages of non-responsive/duplicate pages. This left just over 11,000 pages to be reviewed line-by-line for possible redactions.

[20] To illustrate the vast size of this request the City provided the following information:

To better illustrate the enormity of this request - which I estimate started with over 50,000 pages (considering one third of the emails resulted in 17,265 pages) - the total number of pages reviewed in 2018 was 8,614. The total number of pages reviewed in 2019 (closed files) was 11,733. This year, the most demanding year to date, has seen 27,088 pages reviewed (again, closed files only, not including this file). Processing this file has taken more time and effort than any other and it is the largest amount of records I have ever dealt with for one request. And as illustrated above, at its starting point of an estimated 50,000 pages, this file is larger than the cumulative amount of records reviewed over the past three years.

III COMPLAINANT'S POSITION

[21] The Complainant submits that the City has failed to respond to the request in the statutorily mandated time frame, despite numerous and generous extensions.

[22] The Complainant further accuses the City of acting in bad faith and of intentionally suppressing the Complainant's access to information rights.

IV ISSUES

[23] The issues to be dealt with in this report are:

1. Did the city fail to meet the statutory time limits set out in section 16 of the Act?
2. Did the city breach its duty to assist under section 13 of the Act?
3. Has the City acted in bad faith in not fulfilling its statutory duties?

V DECISION

[24] The City missed the deadline to respond to the original request. While the City has provided a detailed accounting of how it has been working to fulfill the request, there is no question that it has breached its statutory obligation under section 16 of *ATIPPA, 2015* to respond to the request in the mandated time. Section 16 states:

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

[25] The time to respond to an access request may be extended by this Office pursuant to section 23 *ATIPPA, 2015*. The City received multiple, lengthy, extensions from this Office under section 23. The sum of these extensions was 191 business days. When added to the general 20 business days provided by section 16, the City had a total of 211 business days to respond and failed to do so. It is granted that 6 business days were due to the weather-related state of emergency, and furthermore challenges presented by the early weeks of the pandemic appear to have impacted the City's rate of progress during that time. It cannot be denied, however, that a very long period of time was available to the City to respond to this request.

[26] Due to the City's failure to respond to the access request within the statutorily mandated deadline, it is deemed to have refused the request. As such the Complainant has exercised its right to make a complaint to this Office under section 42 of *ATIPPA, 2015*.

[27] Additionally, the City made the decision to not apply for another extension from this Office, despite knowing that it would be unable to respond by the November 16, 2020 deadline. This decision not to engage with this Office was a failure on the part of the City. It may have believed

that no further extensions would have been granted; however, to not engage and knowingly breach the mandated timeline was not an acceptable or advisable course of action.

[28] 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.

[29] 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.

[30] In this matter, the concern is with the City's failure to respond to the request, which it has yet to issue despite passing the deadline to do so.

[31] The general requirements under a public body's duty to assist have been interpreted many times by this Office. The ATIPP Office's Access to Information Manual at chapter 3.2.5 incorporates this Office's past decisions and describes the obligations of public bodies in assisting applicants with access requests in addition to those set out specifically in the Act. Some of the relevant obligations are as follows:

1. *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;*
2. *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;*
3. *Designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed; and,*

[32] Based on these and other relevant criteria, the City has taken some steps and not others. As established above, the time limits have not been met so this is an automatic breach of the statutory duty.

[33] The City had planned to hire additional staff for 6 months in early 2020 to assist the regular ATIPP Coordinator, however due to the global pandemic the position was not filled. The City has also noted that the Coordinator was supposed to receive assistance from other employees in the department, however a by-election called in late September 2020 required the assistance all staff, including the coordinator. On the positive side, now that the processing of the records has been completed the City has been able to bring in its legal department to assist with the line by line review of the records.

[34] The City has a designated back-up coordinator. However this person has a regular full time job with the City. The back-up coordinator was pulled in to work on various other requests over the last year to allow the main coordinator to continue working on this file as much as possible.

[35] Given the above, there is no doubt that the deadline to respond was not met, which in turn indicates that the City clearly breached its duty to assist under section 13 of the Act. The fact that the City has failed to respond to the request is also a clear breach of section 16 of *ATIPPA, 2015* as at this time we are well past the City responding “without delay”, as well as past the approved extended deadline of November 16, 2020.

[36] The Complainant’s submission sought a declaration that the City acted in bad faith. While I have found that the City clearly failed to meet its obligations under sections 13 and 16, the assertion that the City acted in bad faith is not supported by evidence. The evidence shows that the City, or at least its Coordinator, has worked diligently to respond to this very substantial request.

[37] While the City failed on some aspects of this matter and succeeded on others, the request was certainly far beyond the breadth and scope of most access to information requests. Despite a good faith effort on the part of the City to work with the Complainant in this regard, the Complainant declined to materially alter the scope. Unfortunately for the City, it was unable to fully assess the scope of the request, and the other related requests, within the five-

day deadline to apply to the Commissioner for approval to disregard the request. Had it been able to do so, it is likely that such an application to disregard the request would have been granted on the basis that it is excessively broad and that the request would unreasonably interfere with the operations of the public body. Despite some errors, we see nothing but a good faith effort to respond to an extremely burdensome request.

VI CONCLUSIONS

[38] In this particular case, the City has provided evidence that it has been working diligently to process the request. Given that the City is still working through a large volume of responsive records it would not be appropriate to order immediate release of all the records. However, it should be noted that, generally, in a deemed refusal scenario, I would recommend immediate release of the records upon release of the report. Not least of all, such a recommendation for immediate release may be necessary in order to preserve the Complainant's right to commence in appeal in the Supreme Court of Newfoundland and Labrador under section 54, which expires 10 business days after receipt of the decision of the head of a public body in response to our Report. Should the City agree with a recommendation to release records after the expiry of the statutory appeal period, but fail to do so, the Complainant may have lost his right to appeal. Public bodies should be aware that this is an exception to what would be the general practice and should not expect a similar result without persuasive evidence in support. As noted in Report A-2021-011, public bodies:

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.

[39] While I will not be recommending immediate release of the responsive records, I do consider the above-noted remedy of a court order an appropriate measure. Should the City fail to meet the deadline set for the release of the responsive records, my Office will file an order with the Supreme Court of Newfoundland and Labrador under section 51 to ensure that my recommendations remain enforceable.

VII RECOMMENDATIONS

[40] Under the authority of section 47 of *the Access to Information and Protection of Privacy Act, 2015* I recommend that the City of St. John's:

- 1) Review its access to information policies and processes in detail, with a particular focus on the adequacy of available human resources and technology, to determine the causes of the delays and failures, and implement measures to reduce or eliminate them in future;
- 2) Comply in future with the statutory duties imposed upon it by sections 13 and 16 of the Act; and
- 3) Provide the complainant with a final response within 50 business days of receipt of this report.

[41] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the City of St. John's 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.

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of March 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador