



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-013

August 2, 2022

Department of Environment and Climate Change

Summary:

The Complainants made two separate access requests under the *Access to Information and Protection of Privacy Act, 2015* to the Department of Environment and Climate Change. The Department did not respond to either request within the 20 business days as required by the Act. Each of the Complainants filed a complaint with this Office asking that the Department's deemed refusal be investigated. The Commissioner found that the Department had not complied with its obligations under the Act. The Commissioner found the Department's sharing of ATIPP staffing resources with another department on a long-term basis inconsistent with the Act. The Commissioner recommended the Department provide a final response as it relates to one complaint where none had yet been provided. The Commissioner recommended that the Department review its policies, assign additional staff as early as possible, maintain communication with applicants and our Office, and to comply with its statutory duties in the future.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 16, and 110.

Authorities Relied On:

NL OIPC Reports: [A-2021-027](#), [A-2019-015](#), [A-2019-031](#), [A-2018-009](#).

ATIPP Office Manual: [Access to Information Policy and Procedures Manual, Dec 2021](#).

BACKGROUND

[1] This Report addresses two unrelated complaints that were filed with our Office as both complaints involve the same public body and the same subject matter.

Complaint #1

[2] On March 2, 2022, the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to the Department of Environment and Climate Change (the “*Department*”).

[3] Pursuant to section 16 of *ATIPPA, 2015*, the Department’s final response to the Complainant, consisting of its decision letter and accompanying responsive records, was due within 20 business days, on March 30, 2022. The Department did not apply to the Commissioner for an extension of this time limit.

[4] After the legislative deadline had passed on April 5, 2022, the Department provided an update to the Complainant advising “It shouldn’t be too much longer [it is] currently in the last stages of its release.”

[5] The Department stopped responding to the Complainant’s follow-up communications thereafter.

[6] Notwithstanding its previous update, on May 4, 2022, the Department still had not provided its final response to the Complainant and a complaint was filed with our Office (“*Complaint #1*”).

[7] The matter was not resolved informally, therefore the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

[8] The Department provided the Complainant with its final response to the Complainant’s access to information request during our formal investigation.

Complaint #2

- [9] On May 3, 2022, the Complainant made an access to information request under *ATIPPA, 2015* to the Department.
- [10] Pursuant to section 16 of *ATIPPA, 2015*, the Department's final response to the Complainant was due within 20 business days on June 1, 2022. The Department did not seek an extension of this time limit with our Office.
- [11] On June 6, 2022, the Complainant followed up with the Department advising the deadline had passed and asking if there was going to be a reply.
- [12] On June 7, 2022, the Department advised they were still working on records for the request and hoped to have it out to the Complainant as soon as possible with apologies for the delay.
- [13] The Complainant filed a complaint with our Office on June 7, 2022 ("Complaint #2").
- [14] Informal resolution was unsuccessful, and the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.
- [15] The Department has still not provided the Complainant with its final response to the Complainant's access to information request as of the date of issuance of this Report. The Department recently indicated that the release of its final response is imminent.

ISSUES

- [16] The following are the issues to be decided:
1. Did the Department comply with the deadline set out in section 16?
 2. Did the Department comply with the duty to assist set out in section 13?

DECISION

Did the Department comply with the deadline set out in section 16?

[17] A public body must respond to an access to information request within the legislative time frame set out by section 16 of *ATIPPA, 2015*, which 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.*

[18] Clearly, the Department failed “to respond within the period of 20 business days or an extended period” with respect to both access requests. It may be that if the Department had requested a time extension this Office may have granted it if the Department established that, despite due diligence, it could not meet the statutory deadline. However, the Department made no such application in relation to either access request. Because the Department did not respond to the requests within the deadline set out in section 16, it “is considered to have refused access to the record” in relation to the access requests.

Did the Department comply with the duty to assist set out in section 13?

[19] Under *ATIPPA, 2015* a public body has a duty to assist an applicant who makes an access to information request pursuant to section 13 which states:

- 13.(1) *The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
- (2) *The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

[20] The ATIPP Office has released an *Access to Information Policy and Procedures Manual* that was prepared by the Department of Justice to assist public bodies in their application of *ATIPPA, 2015*. This Manual sets out some of the obligations included in the duty to assist:

The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty that must be upheld throughout the entire request process. The duty to assist is generally summarized as “a duty to make every reasonable effort to identify and locate records responsive to a request, and to provide the applicant with information regarding the processing of the request in a timely manner.”[Footnote: The Duty to Assist: A Comparative Study, Office of the Information Commissioner of Canada]

The duty to assist also entails clear communication between the ATIPP Coordinator and an applicant occur at all stages of the request to keep the applicant informed throughout the process. Subsection 13(2) of the Act requires that all communications between an applicant and the head of a public body occur through the ATIPP Coordinator. The Coordinator is also the point of communication for third parties (subsection 19(9)).

The ATIPP Coordinator should develop a working relationship with the applicant in order to better understand the applicant’s request and what information they are looking for, and to ensure that he or she understands the process.

In meeting the duty to assist an applicant, some general obligations may include, but are not limited to:

- *providing the necessary information to an applicant so that they may exercise their rights under the Act;*
- *clarifying the request with an applicant, where necessary;*
- *performing full and adequate searches for records responsive to an access request; and*
- *responding to an applicant openly and without delay.*

[21] The ATIPP Office Manual accurately reflects the views of our Office on this subject. The Department failed to meet its duty to assist the Complainants under *ATIPPA, 2015*. In each request, the Department should have communicated with the Complainants when it became clear that the Department would not meet the statutory deadline. The Department ought to have contacted the Complainants in advance of the deadline to advise that it would not be met, offer an explanation and provide an estimate when a response would be received.

[22] It is also alarming that even after our Office became involved in Complaint #1, the Department's final response to the Complainant continued to be delayed. The actions of the Department, or lack thereof, as it relates to this particular complaint give cause for concern:

- a. As noted above, after the 20 day deadline passed, the Department told the Complainant the request was in its "last stages". The Complainant sent three follow-up emails over the span of a month and the Department failed to respond at all. There was almost a month of complete silence on the part of the Department.
- b. After our Office sent the Department notice of the complaint, the Department failed to respond to this Office within the deadline set by section 44(2), and failed to respond to our initial follow-up emails. There was complete silence on the part of the Department in the initial stages of our investigation during the informal resolution period.
- c. When the Department finally did respond, it confirmed in an email that this access to information request had been "overlooked", blaming the delay on request case load and large volume of records.
- d. At that point, the Department provided our Office with the same update that it had provided to the Complainant *36 business days prior*: that the request was in its "final stages".
- e. Notwithstanding the update of the final response being in its "final stages", it then took an additional *15 business days* for the Department to actually provide the response to the Complainant.

[23] In all, it took the Department a total of *74 business days* to provide the Complainant with its final response to the access to information request in Complaint #1. The responsive records totaled less than 100 pages with limited redactions made therein.

[24] In Complaint #2, while the Department did maintain communication with our Office throughout our investigation, unfortunately the Department still has not provided any final response to the Complainant nor any indication as to when the Complainant might receive

this response. As of the date of issuing this Report the Department's final response to the Complainant is more than 40 business days overdue.

[25] The Department provided near identical explanation letters for both complaints, stating in a letter dated June 6, 2022:

The Department and [sic] Environment and Climate Change and the Department of Municipal and Provincial Affairs (formerly the Department of Environment, Climate Change and Municipalities) currently have one designated full-time ATIPP coordinator that provides ATIPP support to both departments and one back-up coordinator who also serves as a Policy and Program Development Specialist in the Policy, Planning and Natural Areas Division. The ATIPP coordinator for the two departments is new to the role of ATIPP coordinator, having started in February 2022. The Manager of Information Management also provides oversight, support and guidance to the ATIPP coordinator and assists in filing extension requests with the Office of the Information and Privacy Commissioner.

Since January 1, 2022, the two departments have received approximately 120 ATIPP requests (as of June 1, 2022)¹. This is a significant increase in the number of requests received by the departments. The largest volume of requests received in a fiscal year since 2013-14 was last year, with a total of 226 requests received. In addition, a number of the ATIPP requests that the departments are receiving involve large volumes of records and relate to complex and sensitive matters (e.g. municipal complaints and investigations). [Footnote Added].

Between the two departments, there are approximately 60 active ATIPP requests that are being processed. Given the work required to process requests, the increased number of requests has resulted in the delay responding to this request.

In an effort to respond to the increase in the number of ATIPP requests received, the Department of Environment and Climate Change has recently hired a departmental program coordinator to provide administrative support to the ATIPP coordinator. Additionally, as noted above, other staff within the division have been providing support where possible.

[26] While the Department provided this general explanation and confirmed in an earlier email that Complaint #1 had been "overlooked", there is nothing in the above to explain why

¹ In Complaint #2, the reasons for the delay in the Department's letter dated Jun. 24, 2022 are identical to those listed in Complaint #1. However, the total number of ATIPP requests noted as being received by the Department since January 1, 2022 increased (as of June 14, 2022) by 12 for a new total of 132 requests.

Complaint #1 continued to be “overlooked” after receiving notice of the complaint and our investigation. Our Office’s involvement specifically signaled to the Department that something was missed here and it still took another 29 business days for the Department to respond to an access request that it had maintained was in its last or final stages. In addition, nothing above fully explains the lack of communication with either the Complainant in that matter or our Office. In Complaint #2, again, the Department has still not provided its final response to the Complainant.

[27] While mistakes can happen, and requests can inadvertently fall through the cracks or be overlooked on occasion, there is a clear problem here acknowledged by the Department in its correspondence to our Office. The issues demonstrated by the within complaints are not new to the Department as can be seen from a pattern of missed statutory deadlines set out in the most recently published annual reports posted by the ATIPP Office². During this time period when the Department was combined with the Department of Municipal and Provincial Affairs (“MAPA”), our Office highlighted its concern as to the Department’s workload and resourcing issues at that time (see Report A-2019-015 at paragraph 41).

[28] The Department is aware that it has serious workload and resourcing issues and while it has hired one additional staff member and has looked to other internal staff, this evidently is not enough to address these problems. It appears that the Department’s current issues may be exacerbated by the Department sharing its ATIPP staffing with MAPA. Normally our Office does not question the allocation of resources by a public body as we are mindful that often public bodies must make do with the limited resources they have. However, the *Act* clearly envisions that each public body will have its own ATIPP coordinator. Section 110(1) requires that “The head of a public body shall designate a person *on the staff of the public body* as the coordinator...” (our emphasis). It is normal and desirable for public bodies, particularly within core government, to deal with temporary staffing shortages or unanticipated workload by temporarily sharing resources. When the sharing of ATIPP coordinators between the then

² In the 2019-2020 Annual Report, the Department (when it was combined with MAPA and known as the Department of Municipal Affairs and Environment) had 212 information access requests and in that the timelines in 23 requests were not met. This was a gradual improvement from the previous year’s statistics, namely the 2018-2019 Annual Report, where the Department had 174 access requests with the timeline in 33 requests not met. As of the date of this Report, the ATIPP Office has not posted its Annual Reports for 2020-2021 and 2021-2022.

recently split departments was put in place, we were under the understanding that it was a temporary arrangement until the position could be filled. It is inconsistent with the Act that two line departments would share the same ATIPP coordinator on a long-term basis and the departments should remedy this³.

[29] It should be noted that the Department is by no means alone in demonstrating a pattern of missed statutory deadlines. There are other public bodies that are now demonstrating a concerning pattern of missing statutory deadlines for access requests and in some cases the delay is extraordinary. While not every missed statutory deadline results in a complaint, our Office can otherwise monitor such situations with review of posted ATIPP requests⁴, together with review of the ATIPP Office Annual Reports, the latter of which specifically identifies if public bodies are failing to meet legislative times lines. At times we have used this information to conduct audits as part of our Office's *Audit and Compliance Program* under the authority of section 95(1)(b) and section 95(3) of the *ATIPPA, 2015*.

[30] For the Department and other public bodies that are struggling to meet the legislative timelines as set out by *ATIPPA, 2015* it may be of assistance to review our Office's audit titled "*Access to Information Timelines: Review of Delays*" of the then Department of Fisheries and Land Resources (now Fisheries Forestry and Agriculture) dated October 30, 2020. That Department had struggled with meeting its access to information timelines and after our Office conducted a thorough review, we made several recommendations which the Department and other public bodies may find useful.

³ Our Office recognizes that it is common for a departmental ATIPP coordinator to also serve as the coordinator for the agencies, boards, and commissions under that departmental minister's purview in such cases where these bodies have few or no staff. At present our Office does not take issue with such practice and notes that this is distinguishable from the within matter where two different line departments are sharing an ATIPP Coordinator and staff on a longer-term basis.

⁴ The website <https://atipp-search.gov.nl.ca> is a government website where public bodies may voluntarily post their received access requests and responses to access requests.

RECOMMENDATIONS

[31] As the Department failed to meet its duties under sections 13 and 16, under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department:

- a. 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 an applicant informed, maintaining open communication throughout the process, and providing an 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;
- b. Within 90 days of release of this Report arrange for training or retraining of the Head of the Public Body, the Coordinator, backup Coordinator and any assisting staff, regarding statutory requirements and appropriate procedures for responding to access requests;
- c. Commit to full and open communication with this Office on future investigations including timely responses to notification letters;
- d. Assign additional staff *as early as possible*, where necessary, to help process access requests;
- e. Review its access to information policies and processes in detail to determine if newly implemented measures have addressed all issues, or otherwise identify additional or contributory causes of the delays and failures, and implement additional new measures to reduce or eliminate them in future; and
- f. Provide the Complainant in Complaint #2 with its final response within 10 business days of issuance of this Report.

[32] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Environment and Climate Change 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.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of August 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador