



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-023

October 21, 2022

Department of Health and Community Services

Summary:

The Complainant, the Office of the Official Opposition, made an access request under the *Access to Information and Protection of Privacy Act, 2015* to the Department of Health and Community Services. The Department did not respond to the request within the timeframe required by section 16 of the *Act*. Section 16 says that a failure to respond by the deadline is considered to be a refusal of access, so the Complainant asked the Commissioner to investigate the Department's deemed refusal. The Commissioner found that the Department had not complied with its obligations under the *Act*, in particular sections 13 (duty to assist) and 16 (time limit for final response). A final response to the access request was provided to the Complainant during informal resolution, 213 business days after the request had been made to the Department. The Commissioner recommended that the Department review its policies, assign additional staff as early as possible, maintain communication with applicants, and 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 and 16.

Authorities Relied On:

NL OIPC Reports [A-2022-013](#), [A-2021-027](#), [A-2019-015](#), [A-2019-031](#), and [A-2018-009](#). ATIPP Office Manual: [Access to Information Policy and Procedures Manual, Dec 2021](#).

BACKGROUND

- [1] On November 10, 2021, the Complainant, the Office of the Official Opposition, 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 Health and Community Services (the “*Department*”) seeking the following information:

Please provide all correspondence, emails, texts, notes from meetings and telephone conversations, key messages, briefing notes relating to cardiac care for the period of Monday, October 18, 2021 to Friday, November 5, 2021.

- [2] 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 December 9, 2021. However, the Department applied to this Office under section 23 (extension of time limit) for additional time to respond to the request. This Office approved a 34-day extension of time, making the new due date January 27, 2022. The Department applied for a second time extension on January 13, 2022, which was not approved by this Office and the deadline remained January 27, 2022.

- [3] On January 31, 2022, two business days after its final response was due, the Department contacted the Complainant to seek further clarification of the request, to which the Complainant replied on that same date. On February 9, 2022, the Complainant received an email with a reworded request to which it agreed on February 14, 2022. The updated request wording was as follows:

Please provide records (Emails, Meeting Notes, Key Messages, Briefing Notes) related to the cardiac care surgical waitlist between the period of Oct 18, 2021 and Nov. 5, 2021. This would include communication between the Regional Health Authorities (CEO of the RHAs, Sean Connors, and VPs responsible) and HCS (Minister, Deputy Minister, ADMs responsible, Karen Nolan, directors, and the Minister’s Executive Assistant).

- [4] On March 28, 2022, the Complainant asked for an update on the request and the Department advised on March 30, 2022 that subject matter experts were currently reviewing the file and that the Complainant should receive a response very soon. On April 22, 2022, the

Complainant requested another status update and the Department advised that it had still not processed the request. At the time of making its complaint to this Office (July 28, 2022), the Complainant had not received any response or any further updates. The Complainant telephoned the Department on July 28, 2022, prior to submitting its complaint, and received no information about its request other than that an official was looking into the delay.

[5] On September 15, 2022, during the course of informal resolution, the Department provided the Complainant with a final response to its access to information request. This was approximately 10 months after the access to information request was made to the Department.

[6] Though the Complainant received a response to its access to information request, the matter was not resolved informally and, therefore, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

[7] On receipt of the complaint, this Office spoke with the Department regarding its handling of this access request and was advised that there were a number of contributing factors including: increased requests for information, understaffing in the access and privacy division, undertrained staff, and turnover in staff. The Department provided more specifics in written submissions from the Manager of Privacy and Information Security who acknowledged that the Department “was unable to respond to this request as per the legislative timelines.”

[8] The Department noted an increase in access to information requests it had received in 2021 over its 2020 numbers, highlighting that a majority of the requests received fell between October and December of 2021. It acknowledged some requests can be straightforward, but the Department submitted that “most requests are complicated and/or contain multi-part inquiries,” requiring, “additional work with the applicant, legal, other public bodies, and/or subject matter experts,” that, “can take time and relies on responses from the applicant and/or other entities.”

[9] The Department also acknowledged it has:

... experienced fluctuations in the ATIPP staff complement over the last several months, with more experienced staff moving on and new, less experienced staff commencing. Given these staffing changes, as well as the significant learning curve associated with working in this area, processing requests may take more time.

[10] The Department further noted events of October 2021 that impacted these consultations as follows:

In October, the Province experienced a resurgence in COVID-19 with the new Omicron variant, which required the attention and priority of Public Health and Regional Services Divisions within HCS. In the same month, the Province experienced one of the largest cyber security attacks in the country. The Department's resources and attention were required to handle these two significant unprecedented events affecting the Province. While the volume of access requests increased over this period, the ability to conclude consultations was impeded due to human resources demands caused by these events, both within the Department and across other impacted public bodies.

From October to December, HCS ATIPP division was processing requests with a staff of four. In the New Year, HCS had a staff of three individuals devoted to processing requests, along with two employees from two other divisions assisting with record searches and administrative work. However, in January and February, HCS received a record 89 requests in addition to the backlog of 2021, and further changes in ATIPP staffing occurred.

[11] Additionally, the Department submitted that extensions and disregards, “are the only tools coordinators have at their disposal to help meet deadlines;” that the Act doesn’t allow the “Department to pause requests in order to address the backlog before proceeding. Therefore, staff are continually balancing new and old requests;” and that “executive departmental officials have been understanding, supportive and have communicated the gravity of the situation faced by the staff and the Department with the Office of the Information and Privacy Commission.”

[12] The Department also highlighted its efforts to address what it refers to as its “backlog of requests,” noting that as of April 1, 2022 it had 77 outstanding requests from between 2021 and early 2022, and at the time of its submission to this Office there are 38 remaining outstanding requests (23 from 2021 and 15 from early 2022). It went on to note that from

April 1, 2022 to August 16, 2022 it had processed 82 current files and 39 backlog requests for a total of, “121 files in less than 5 months; a total equivalent of a year’s worth of ATIPP requests for some departments.”

[13] The Department acknowledged that additional resources are required to address the issue of overdue access requests and noted its intentions to enhance its “ATIPP staff complement.” However, it also submitted that “these issues cannot be solely addressed through more resources,” and highlighted the ongoing, “[Government of Newfoundland and Labrador] consideration of the 2021 [ATIPPA statutory review] recommendations.”

[14] With regard to the specific request for information at the center of this complaint, the Department noted this Office has approved an extension of time making the due date January 27, 2022 but that this Office subsequently denied a second extension request made on January 13, 2022. In its initial submission in response to this Office’s investigation, the Department stated that:

Based on the volume of ATIPP requests and a second extension denied, the staff during that time did their best. Communication was kept with the applicant and effort was made to have this file released to the applicant. However, with staff changes, continued influx of ATIPP requests, in addition to working through the backlog of requests, this file remains with HCS.

HCS-352-2021 was partially completed by former staff. It is currently being reviewed for responsive records. If new records are discovered, the file still requires records to be redacted, a consultation then review by Executive. The anticipated release date is September 8, 2022 considering there has been another staff change at HCS and the Department has 20 active files.

The Department of Health and Community Services is committed to responding to all access to information requests received while moving forward and meeting legislative timelines under ATIPPA, 2015.

[15] Subsequently, the Department completed the request and provided its final response to the Complainant on September 15, 2022, 33 days after the present complaint was made to this Office.

COMPLAINANT'S POSITION

[16] The Complainant sought the completed request for information in making its complaint to this Office, as well as for the Commissioner to “examine whether or not the delay was justified and in accordance with legislation.”

[17] After reaching out to the Department for the last time (on July 28, 2022), prior to making a complaint to this Office, the Complainant received an email response from the Department, which it provided as an additional submission. The email from the Manager of Privacy and Information Security, dated August 3, 2022 stated:

HCS has a number of outstanding files it is working through in addition to the current files coming in daily. As stated previously, due to the number of requests and resources, I am not able to provide a timeline when this file will be completed.

[18] Upon receipt of the final response to its access to information request on September 15, 2022, the Complainant noted it is:

...very disappointed in the Department's blatant disrespect for compliance with the legislation, specifically, the significant amount of time it took to compile a response. Clearly not the spirit and intent of the legislation. I believe the Department should be held accountable for this lack of compliance.”

ISSUES

[19] 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?

[20] 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.

[21] Clearly, the Department failed “to respond within the period of 20 business days or an extended period” with respect to the Official Opposition’s request. The extended time limit for responding after this Office approved an extension of time was January 27, 2022. While the Department requested a second extension, it failed to establish that, despite due diligence, it could not meet the statutory deadline and a further extension was not approved. Because the Department did not respond to the request within the deadline set out in section 16, it is, per section 16(2), “considered to have refused access to the record” in relation to the access to information request.

[22] This Office takes particular issue with the Department’s contention that, when this Office did not approve a second extension of time, its officials “did their best.” The facts of the file prove this notion wrong. Instead, the Department gave itself a *de facto* extension. If it had done what was appropriate and in keeping with its legislative requirements, it would have recognized that it must reprioritize the files that it was juggling and make sure that this one was completed in accordance with the legislative requirements. This is not optional: compliance with the law is not a matter for “best efforts” and, in any case, the Department’s processing of the request does not indicate that it in fact made its best effort.

[23] Moreover, in its lengthy submissions, portions of which are quoted above, the Department did not explain what exactly it was about this request that was so complicated and which necessitated additional time to process. It is a discrete matter and very limited in time. It is not at all obvious what degree of technical review would be necessary to identify which exceptions apply. Instead of a long submission about volume of requests, general staffing and compliance issues, for which this Office is already well apprised and therefore regularly approving extension requests, the Department failed to provide a detailed explanation about what in particular happened with this specific request to explain such a delay in response. Ultimately, the Department's final response to the Complainant consisted of only 35 pages of records, with limited redactions to remove some personal information under section 40.

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

[24] Pursuant to section 13 of *ATIPPA, 2015*, a public body has a duty to assist an applicant who makes an access to information 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.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

[25] The ATIPP Office has released an [Access to Information Policy and Procedures Manual](#), which was prepared by the Department of Justice to assist public bodies in their application of *ATIPPA, 2015*. The 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.*

[26] As noted in Report A-2022-013, the ATIPP Office Manual accurately reflects the views of this Office on this subject. The Department failed to meet its duty to assist the Complainant under *ATIPPA, 2015*. It should have communicated with the Complainant when it became clear the Department would not meet the statutory deadline, preferably in advance of the deadline and advising it would not be met, offering an explanation, and providing an estimate for when a response would be received. However, its August 3, 2022 response to the Complainant, nearly nine months after the access to information request had been made, still did not do this.

[27] Even after this Office became involved in the complaint, the Department's final response to the Complainant continued to be delayed and was not provided until over a month later, on September 15, 2022. The actions of the Department, or lack thereof, as it relates to this particular complaint give cause for concern:

1. The Department reached out to the Complainant on February 9, 2022, long after both the original time, and the extended time, for responding to the request had expired. This should have been done in the earliest stages of receiving and handling an access request.
2. The Complainant initiated communication with the Department seeking updates on the status of the access request multiple times over the course of the nine months

leading up to its complaint to this Office and the Department failed to provide any meaningful response with months of complete silence on its part. At one point, the Complainant was told the request was with subject matter experts and a response would be forthcoming very soon, only to be told a month later that the request still had not been addressed. More concerning is that despite this, the Department claimed to this Office that, “communication was kept with the applicant and effort was made to have this file released to the applicant.”

3. Months later, responding to another Complainant inquiry, the Department informed the Complainant that it could not provide a timeline for when the request would be completed. However, just five business days later on August 10, 2022, and after being made aware a complaint had been filed with this Office, the Department was able to indicate a priority would be placed on responding to this request for information and that it could likely be done within 20 business days (but certainly within the 30 business day informal resolution timeframe). Notwithstanding this promise, the Department took an additional five business days beyond the agreed-to completion date of September 8, 2022 to provide the final response to the Complainant.
4. When the Department provided its formal written submissions to the complaint to this Office on August 16, 2022, it blamed delays in the Department generally on access request caseload, staffing issues, and need for consultations, but failed to provide any specifics as to why this particular access to information request had been left without a response for so long.

[28] In all, it took the Department 213 business days to provide the Complainant with its final response to the access to information request. The responsive records totaled less than 35 pages with limited redactions made therein.

[29] While sympathetic to the Department’s myriad issues, its handling of this file, and requiring 10 months and a complaint to this Office to achieve a response is particularly egregious. Not only did it fail to provide a response within the legislative timeframe, it appears that no meaningful work was done towards completing this request until a complaint was made to this Office. Correspondence from the Department to the Complainant on August 3,

2022 before it responded to the complaint to this Office on August 10, 2022, indicate it had no intention of prioritizing this request or in fulfilling its duty to assist through communication with, and status updates to, the Complainant in the absence of a complaint. It should not take a complaint to this Office to ensure prompt attention to an outstanding request for information, and nothing in the final communication between the Department and Complainant on August 3, 2022 indicate that, had the Complainant not made a complaint to this Office, it would have received a response to its access request by now.

[30] It is worth noting that we have chosen, with its express agreement, to name the Complainant in this file – the Office of the Official Opposition – as it plays an integral role in our democracy in ensuring government accountability. Without transparency made possible through the access to information process, it is difficult to see how true accountability is possible.

[31] The Department is aware that it has serious workload and resourcing issues and while it has expressed intention to hire additional staff, this evidently is not enough to address these problems. This file is not an isolated case, as the Department has been demonstrating a concerning pattern of missing statutory deadlines for access requests. However, even among a pattern of late-responses to access requests, this file stands out through the extraordinary delay in a response, the deficiencies in the duty to assist, and the overall lack of an explanation for why this occurred. While not every missed statutory deadline results in a complaint, as noted in Report A-2022-013, this Office can otherwise monitor such situations by reviewing completed ATIPP requests posted at <https://atipp-search.gov.nl.ca/>, together with 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*.

[32] 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 the Department of 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.

RECOMMENDATIONS

[33] 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:

1. 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;
2. 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;
3. Assign additional staff as early as possible, where necessary, to help process access requests, and
4. 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.

[34] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Health and Community Services 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.

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of October 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador