



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  

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NEWFOUNDLAND AND LABRADOR

## **Access to Information Timelines: Review of Delays**

Department of Fisheries and Land Resources  
(now Fisheries, Forestry and Agriculture)

October 30, 2020



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## Executive Summary

The Office of the Information and Privacy Commissioner of Newfoundland and Labrador (“OIPC”) provides independent oversight of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* and the *Personal Health Information Act (PHIA)* and related regulations.

The OIPC’s Audit and Compliance Program includes evaluating the adequacy of public body compliance with the access to information provisions of the *ATIPPA, 2015*. Audits are conducted under the authority of section 95(1)(b) and section 95(3) of the *ATIPPA, 2015*. Section 95(1)(b) empowers the Commissioner to “monitor and audit the practices and procedures employed by public bodies in carrying out their responsibilities and duties under this Act”. Section 95(3) extends the Commissioner’s investigative powers established elsewhere in Part IV to other activities, including audit.

Residents expect the OIPC, as the oversight body, to assess the level of compliance with the law, to advocate for best practice and to assist public bodies in establishing effective access to information management programs.

The purpose of this report is to document the Department of Fisheries and Land Resources’ handling of access to information requests during the 2017-2018 fiscal year. During that year, the Department of Fisheries and Land Resources processed 90 access to information requests, but failed to respond within the 20 business day time frame for 32, or 36%, of those requests.

The OIPC requested from the Department of Fisheries and Land Resources all records relating to the 32 late responses and reviewed them to understand the Department of Fisheries and Land Resources practices and procedures when processing requests and to determine causes of the delay and areas for improvement. Our review identified several sources of delay:

- Delays in responses from staff;
- Preparing Explanations or Additional Information for Applicants;
- Delays in Transmitting Records;

- Delays in Seeking and Obtaining Consultation;
- Delays in Obtaining Approval;
- Delays in Reviewing Records or delay otherwise unexplained.

Based on our findings, the OIPC makes several recommendations for the Department of Fisheries and Land Resources to improve the timeliness of its access to information responses.

While this audit details the Department of Fisheries and Land Resources performance in 2017-2018, since it was conducted there have been improvements in timeline compliance.

## Introduction

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Residents expect the OIPC, as the oversight body, to assess the level of compliance with the law, to advocate for best practice and to assist public bodies in establishing effective access to information management programs.

The Department of Fisheries and Land Resources (the “Department”) is a department of the Newfoundland and Labrador provincial government established in 2017 to address all aspects of the province’s natural renewable resources of fisheries, aquaculture, forestry, agriculture and agrifoods. The Department is responsible for supporting the advancement and development of the province’s fishing, aquaculture, forestry, and agriculture industries. During the time under review, it consisted of the following branches/divisions:

- Agriculture and Lands;
- Forestry and Wildlife;
- Fisheries and Aquaculture, and
- Enforcement and Resource Services.

The Access to Information and Protection of Privacy Office, within the Department of Justice and Public Safety, oversees the implementation and coordination of the *Access to Information and Protection of Privacy Act, 2015* within the provincial government and provides support to departments of the government's executive branch. The ATIPP Office also assists public bodies in complying with *ATIPPA, 2015*. This role includes maintaining statistics on access requests to departments and public bodies, including the outcome of requests, fees charged and response times.

In its annual report for the 2017-2018 fiscal year, the ATIPP Office reported that the Department of Fisheries and Land Resources had failed to meet the statutory timeline for responding to access to information requests in 32 of the 90 requests it received that year. This means for 36% of requests the Department did not provide a final response and responsive records, if any, to an applicant within the 20 business days required by section 16 of the *ATIPPA, 2015*.

Failure on the part of a public body to provide a final response within 20 business days is a deemed refusal of the applicant's request. Sections 16(2) and 42 of the *ATIPPA, 2015* allows an applicant to file a complaint with the OIPC in cases where a public body fails to respond within business days. However, for this time period the OIPC did not receive any complaints regarding the failure of the Department to meet the timeline. Nonetheless, this Office determined that a review of the Department's access to information responses was warranted in order to determine why it was unable to meet the statutory deadline in such a large number of cases.

#### *Audit Objectives:*

1. Determine the extent to which responses were beyond the timeline;
2. Examine the causes of late responses;
3. Make recommendations to improve the Department's policies and practices and response times.

*Audit Focus:*

This audit focuses on the processing of access to information requests by the Department, from initial receipt of a request from an applicant to transmitting the final response.

*Audit Scope:*

On November 23, 2018, this Office communicated to the Department its intention to conduct an audit of the 32 access to information requests for the 2017-2018 fiscal year for which the Department failed to respond within the statutory timeline under the *ATIPPA, 2015*. On December 11, 2018 this Office received: submissions from the Department; all records related to the 32 access to information requests identified in the Annual Report as having been late; and its Protocol for Access to Information Protection of Privacy (ATIPP) Requests.

*Methodology:*

The Office of the Information and Privacy Commissioner reviewed all correspondence and other records relating to each access to information request that did not meet the statutory deadline, in order to develop a timeline of the progress of each request, from initial request to final response. The individuals involved, their roles, time spent on tasks, and decisions to consult with third parties or other public bodies were all taken into consideration. Reference to “days” throughout this document should be understood as business days as defined in *ATIPPA, 2015* unless stated otherwise.

The Government of Newfoundland and Labrador operates an online archive of completed access to information requests for provincial government departments. The responses to most, but not all, access to information requests are available to the public. This service was also used to review access to information requests to the Department which were completed on time.



## Policies and Procedures

The Department has provided this Office with its current access to information policy, entitled “Protocol for Access to Information Protection of Privacy (ATIPP) Requests”. The current policy, enacted April 1, 2018, was not in force during the period subject to the present audit. However, the document does address many of the issues observed in our review. Issues with the Department’s responses to access to information requests, and our recommendations, are considered with reference to the new policy.

In its submissions, the Department notes that in addition to the development of its new policies, it hired a dedicated ATIPP Coordinator for the Department in May, 2018. The Department’s Manager of Information Management also assists the Coordinator. As of December, 2018, further efforts by the Department to improve its compliance with the *ATIPPA, 2015* included meetings with the Departmental Executive to provide education about the Department’s responsibilities and weekly updates on the status of all access to information requests.

## Access to Information Process

The *ATIPPA, 2015*, requires that an access to information applicant receive a final response within 20 business days. It also allows a public body to seek approval for a time extension from the Office of the Information and Privacy Commissioner.

Within this 20 day period a public body, usually through its coordinator, must complete a number of steps to move the request along through the process, from initial receipt through to final response. The [Access to Information Policy and Procedures Manual](#) produced by the Department of Justice and Public Safety’s ATIPP Office provides guidance to coordinators on every step of the process. A succinct summary of all of an ATIPP Coordinator’s duties when processing an access to information request is provided by the Alberta Office of the Information and Privacy Commissioner in investigation report F2017-IR-03 (“Investigation into allegations of delays and possible interference in responding to access requests”). While

referring to the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, it is also fully applicable to the *ATIPPA, 2015*:

- [12] At a high level, the steps taken by public bodies to respond when they receive written requests for access to information from an applicant include:
- Receive request, confirm it is a request under the Act
  - Consider routine disclosure of information
  - Clarify the time period, scope and wording of the request with the applicant, as applicable
  - Acknowledge request with applicant
  - Send out a call for records, provide guidance to department employees (if needed) to ensure a thorough search of records and that all responsive records are identified and provided to the FOIP office
  - Consider need to consult third parties affected by release of records, if applicable
  - Receive records from program areas
  - Review records and prepare them for disclosure, which includes a review of:
    - The provisions of the FOIP Act, such as mandatory and discretionary exceptions to disclosure
    - Legal precedents such as orders published by the OIPC
    - The opinion of subject matter experts in the department
    - The opinion of legal counsel
    - The impact of the disclosure on third parties identified in the records, such as individuals, organizations or other public bodies
  - Obtain approval from the head of the public body prior to responding
  - Respond to applicant
  - Release records to applicant, as applicable
  - Ensure that all of the above happens within 30 calendar days of receiving request, unless circumstances warrant more time, as authorized by the FOIP Act and Regulation

Under *ATIPPA, 2015*, as opposed to Alberta's FOIP, public bodies are additionally required to provide applicants with an advisory response at 10 business days (section 15) and the time limit for completing a request is 20 business days, rather than 30 calendar days.

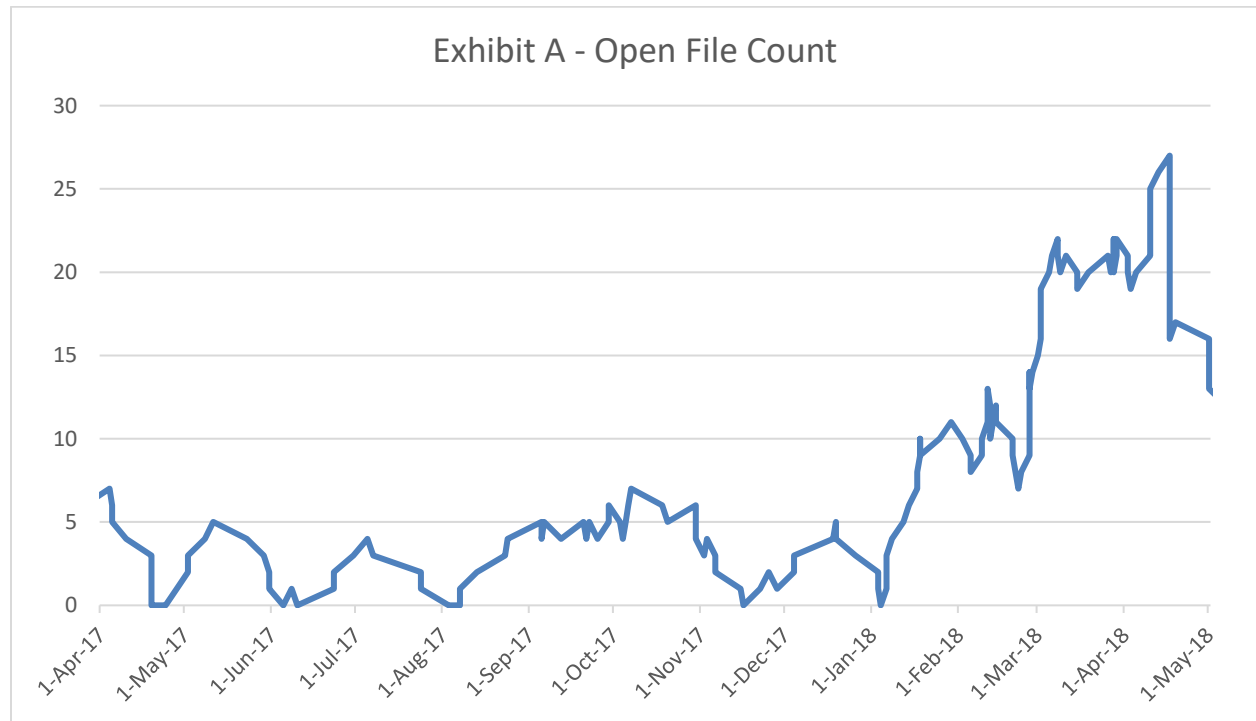
## Observations

Following a review of the 32 files, it was determined that 31 indeed took longer than 20 business days for a response to be sent to the applicant. In one case (FLR/58/2017), the

response had in fact been sent in time (at day 19) and was reported to the ATIPP Office as being late in error.

The 31 delayed responses ranged in time from 1-5 days late (9 requests) to more than 30 days late (1 request). On average, those files which were late took approximately 3 days for the Department to send its response. Of all files over this period for which response time is known, the Department responded, on average, in 26 business days.

The Department’s failure to meet the statutory deadline was not constant throughout 2018-2019. Rather, it was clear that responding in time became an issue starting in February 2018. 25 of the 31 late access to information requests were received in February and March. At the time FLR/16/2018 was received on February 11, 2018, the Department was already processing at least 11 other access to information requests. When FLR/36/2018 (the request with the longest response time, at 52 days) was received on March 6, 2018, the Department had at least 21 other open access to information requests.



See also: Exhibit B which illustrates when requests were started and completed.

Our review also notes that there was no apparent relationship between the size of responses and the delay in responding (Exhibit C). The largest late request (FA/44/2017), with 603 pages of responsive records only missed the deadline by 2 days. Meanwhile numerous final responsive records advising that there were no responsive records took 30 or more business days to send to applicants.

## **Fisheries and Land Resources Practices**

The general process taken by the Department in responding to the access to information requests we reviewed was as follows:

1. Receipt of an access to information request, either through the Online ATIPP Request System, directly from an applicant, or from another Department employee who has received a request directly from an applicant;
2. Distribute the content of the request to the Department's senior staff. In nearly all cases, requests were sent to the following:
  - a. Deputy Minister;
  - b. Four (4) Assistant Deputy Ministers;
  - c. Director of Policy and Strategic Planning, and
  - d. Director of Communications;
3. The request is circulated to relevant staff to conduct a search;
4. Staff transmit responsive records to the Department's Coordinator. Our review has observed several methods for providing the Coordinator with responsive records:
  - a. directing the Coordinator to a particular reference in TRIM/HPRM;
  - b. directing the Coordinator to a location on a shared drive, and
  - c. sending the responsive records as email attachments;
5. Records are reviewed;
6. Consultation with other public bodies, third parties or legal counsel;
7. Responsive records are provided to the Deputy Minister or Assistant Deputy Minister for approval, and
8. The final response is sent to the applicant.

## Issues Observed

Through our review, the reasons for the late responses could be placed into several categories:

- Delays in responses from staff;
- Preparing Explanations or Additional Information for Applicants;
- Delays in Transmitting Records;
- Delays in Seeking and Obtaining Consultation;
- Delays in Obtaining Approval;
- Delays in Reviewing Records or delay otherwise unexplained.

However, most delays were the result of a combination of the above factors.

## Delays in Responses from Staff

The role of the coordinator under section 110 of the *ATIPPA, 2015* is to receive and process requests, communicate with applicants and third parties and to educate their respective public body and its staff of their duties under the *ATIPPA, 2015*. While it is helpful, it is not required and not expected that a coordinator will be fully familiar with the subject matter of the public body's lines of business. As such, coordinators rely on staff members throughout a public body to understand the content of a request and to locate responsive records. It is therefore imperative that requests are forwarded to relevant staff in a timely manner, that staff act on requests they receive from the coordinator, and that staff are familiar with the *ATIPPA, 2015* and the need to meet deadlines.

As noted above, standard practice within the Department is for the Coordinator to distribute an access request to the following persons:

- Deputy Minister
- Four (4) Assistant Deputy Ministers

- Director of Policy and Strategic Planning
- Director of Communications

It therefore appears to be the responsibility of the above individuals to recognize whether a request is relevant to their line of business and to ensure that it is properly directed to the correct employees who will be able to respond to it.

In all files reviewed by this Office, it is readily apparent that the Coordinator completed the first step in this process – disseminating requests to the above list of senior staff – on either the day the request was received from the applicant or the next day. However, there were issues with staff then conducting a search and responding to the Coordinator, either as a result of senior staff not in turn being timely in disseminating the request to their respective staff or following-up on late responses from staff:

- FLR-12-2018 – while the request was distributed to senior staff on the day it was received, it does not appear to have reached those employees most familiar with the subject matter of the request. As late as day 10, the Coordinator was involved in discussions with staff as to who would be able to respond to the request.
- FLR-24-2018 and FLR-25-2018 – No response from staff following distribution of request. Coordinator sent a reminder on day 7 and responsive records were provided by staff on day 10.
- FLR-28-2018 – no response from staff. However, no follow-up by Coordinator until day 19.
- FLR-33-2018 – staff did not provide responsive records until day 19, after Coordinator followed-up on that date with a reminder.

**Recommendations: greater staff awareness of the obligations under the *ATIPPA, 2015*. Senior Leadership must take the lead on ensuring that this message is sent and understood by all staff. Senior leadership and Coordinator must be proactive in following-up with staff when responses and records are not forthcoming.**

We note that the Department's current policies and procedures include a requirement that all employees are familiar with the *ATIPPA, 2015* and provide for training on the *ATIPPA, 2015* for all employees, conducted by the Department's information management team.

The policies and procedures also call for a search to be conducted by staff on or before day 3, with an estimate of responsive records to be provided to the coordinator by day 3. Instructions from the Assistant Deputy Ministers to their respective staff are to be copied to the coordinator. This is a positive step by the Department, and it must ensure that the procedure is enforced in order for it to contribute to improvements in the timeliness of responses.

### **Preparing Explanations or Additional Information for Applicants**

Section 3(2)(a) of the *ATIPPA, 2015* states that the purpose of the legislation is to “[give] the public a right of access to records”. The access to information process is predicated on responding to an applicant's request by providing responsive records, not information. For a further discussion of the provision of “records” versus the provision of “information”, please see our [Report A-2017-023](#). While further explanations – especially when a search returns no responsive records – and other ancillary information is likely helpful, a public body must still ensure that its final response, and the transmittal of any responsive records, still occurs within the 20 business day deadline set by the *ATIPPA, 2015*.

In several files reviewed by this Office, there were instances of the Department delaying its final response to an applicant in order to prepare explanations or ancillary information. These efforts often involved consultation with Department staff to draft statements.

- FLR-04-2018 – several days were spent consulting with staff to draft an explanation for the limited number of responsive records (in this case, the only responsive record was the agenda of a meeting) and to put them into context.
- FLR-35-2018 – time was spent on consultations and drafting an explanation for the Department’s decision to not take action on the subject matter of the request.

**Recommendations:** while additional information may be helpful, the Department must ensure that it meets its obligations under the *ATIPPA, 2015* to provide responsive records within 20 business days. If the Department determines that additional information or explanations are warranted, it should consider the preparation of such messaging separate from the access to information process, and possibly as a follow-up after a final response has been sent.

### Delays in Transmitting Records

The Department has offices throughout the province and is divided into several service branches. When responsive records are located, staff must transmit them to the Coordinator for review and eventual disclosure to the applicant. The files reviewed by this Office reveal that staff in the Department employ numerous methods for transmitting records, and in some cases this process has resulted in delays in the processing of access to information requests.

As noted above, our review has found instances of responsive records being transmitted to the Coordinator via reference to a specific record in TRIM/HPRM, a directory on a shared drive, and emailing records as attachments.

Using shared drives has resulted in delays in transmitting records, which have caused the loss of time. For example:



- FLR-04-2018 and FLR-46-2018 – several days lost because the Coordinator did not have access to a shared drive where responsive records were located. Staff members eventually had to attach and email records.

**Recommendations: greater access for coordinator, so that they can access all Department resources from their location without relying on emailing records.**

### Delays in Reviewing Records or Delay Otherwise Unexplained

Our review has been limited to records kept by the Department while processing access to information requests. Such records are typically emails documenting communication with senior staff, receiving responsive records and consulting with outside parties. The review of records and the application of mandatory and discretionary exceptions would generally not be documented through emails or other records. However, where it appears that records have been provided and there are no other apparent reasons for delay, we have considered the potential for delay arising from the review process.

- FLR-16-2018 – records received from staff at day 4, but no further apparent action taken until day 21.
- FLR-20-2018 – consultations with legal counsel introduced significant delay, but a further 18 days elapse (day 16 to day 34) after receiving legal advice.
- FLR-21-2018 – records received on day 4, no action documented until approval sought at day 19. Approval process pushed response over 20 days, but dates suggest further inaction from day 23 (when approval was received) to day 38 (when final response was sent).
- FLR-31-2018 – records received day 2, approvals sought day 22.

- FLR-41-2018 – confirmed around day 22 that there were not any responsive records, but final response not sent until day 31.

### Delays in Seeking and Obtaining Consultation

From time-to-time, the Department and its Coordinator may need to refer an issue for legal review, or consult with a third party. In the Department's case, these third party consultations are typically with the federal Department of Fisheries and Oceans or private businesses (fish harvesters, fish plants, and aquaculture operators, etc.). In order to avoid unnecessary delays in responding to access to information requests, such consultations should only happen when necessary and occur as early in the process as possible.

Unfortunately, in many cases consultations happened late in the process, or even after the 20 business day deadline had been exceeded.

- FLR-18-2018 – issues referred to legal counsel for advice at day 18. Response took another 10 days.
- FLR-19-2018 – contacted legal counsel for advice at day 17. While response was relatively timely (3 days), it contributed to missing the deadline.
- FLR-20-2018 – Legal advice sought at day 16. However, it appears that a response was received shortly afterward and the 14-day delay is not explained.
- FLR-36-2018 – contacted legal counsel at day 21 and further involved the federal Department of Fisheries and Oceans at day 31. Further consultations with legal counsel were occurring as late as day 40.
- FLR-43-2018 – decision made to contact a private third-party at day 15, and the Department was still seeking the third party's consent as late as day 29, prior to sending its final response at day 33.

- FLR-44-2018 – a “courtesy notice” was sent to a private third party at day 16, though this did not appear to cause any delay in the process.
- FLR-45-2018 – federal Department of Fisheries and Oceans contacted at day 20, and consultation process took a further 10 days.

Our Office does note that notices to third parties under section 19 were rare and that the Department appears to be properly applying sections 19 and 39, making decisions to release information and following through without unnecessarily engaging third parties and delaying the access to information process.

**Recommendations: determine required consultations as early as possible in the process. Since a review of the responsive records may be needed first (to determine whether other parties are involved, or if there are particularly complex issues requiring legal advice), general improvements in 1) completing searches, 2) transmitting records and 3) reviewing records are also necessary in order to provide time for consultations.**

The Department’s current policies and procedures call for consultations to start “as early in the process as possible”, and they are scheduled for days 13-18.

### **Delays in Obtaining Approval**

A public body’s duties under the *ATIPPA, 2015* fall on either its coordinator or the head of the public body. In the case of the Department, the head of the public body is the minister, but this authority is delegated to the Deputy Minister. While the *ATIPPA, 2015* assigns responsibility for much of the process to the coordinator, final decisions to release or not to release records are ultimately made by the Deputy Minister. This step introduces another risk of delay, as a coordinator must brief the head of the public body, and the head must consider the request and communicate their decision. In the case of the Department, there were several instances where the approval process delayed a final response.

- FLR-29-2018 and FLR-30-2018 – approvals sought at day 19, but the process was not complete until day 31.
- FLR-31-2018 – approval sought at day 21, and took another 8 days until a final response was sent on day 29.

## Extensions

Under sections 23 and 24, a public body may request from the Office of the Information and Privacy Commissioner an extension of a time limit when processing an access to information request. This Office has produced a [guidance document](#) for public bodies requesting a time extension.

The Department sought a time extension from this Office on only one of the requests reviewed in this audit: FA-44-2017. This request was denied on the basis that the request had been made beyond the 15 business days required by section 23(1) and that the matter did not qualify for an extension under the extraordinary circumstances provisions of section 24. In total, the Department only submitted a total of 3 extensions requests since *ATIPPA, 2015* came into force. Since the reorganization of the Department as the Department of Fisheries, Forestry and Agriculture in 2020, there has been a significant increase in extension requests as the Department utilizes this tool to manage its workload.

**Recommendations: where appropriate, engage with the Office of the Information and Privacy Commissioner for an extension of a time limit when processing requests.**

## Conclusions

Our audit of the Department's 32 late responses from the 2017-2018 fiscal year has revealed several areas for improvement in the Department's processing of access to information requests.

Many delays can be attributed to the failure of staff to search for responsive records and provide a response to the Coordinator in a timely manner. This can be improved through better staff awareness of their obligations under *ATIPPA, 2015* as well as a more proactive approach by senior leadership and the Coordinator.

In several cases, further delays were caused by difficulties transferring records, or otherwise making them available, to the Coordinator. This suggests that the Department should implement a more consistent process for conveying responsive records to the Coordinator for review, and ensure that the Coordinator has access to all necessary networks and drives where records may be stored.

Consultations with legal counsel or external parties (businesses and other public bodies) lead to many of the delays. Identifying when such consultations will be necessary as early as possible in the process will avoid unnecessary delays. This will also require improvements in staff response and transmitting records to allow the Coordinator to review responsive records early on and identify parties to be consulted.

While it is admirable that the Department on several occasions made additional efforts to assist applicants and provide them with additional information, the Department must ensure that it still meets its obligations to provide records within the 20 business days set by *ATIPPA, 2015*.

As noted above, this audit was initiated based on the discovery that the Department had failed to meet the statutory deadline on 36% of access to information requests in the 2017-2018 fiscal year. A review of the ATIPP Office's 2018-2019 annual report indicates a modest improvement by the Department in 2018-2019, with 21% of responses missing the deadline.

While the ATIPP Office has not, as of this date, released its statistics for 2019-2020, a review of publicly available access to information request responses indicates a further improvement with responses failing to meet the deadline dropping to 10%-15%.

Exhibit B

