



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2012-012

December 31, 2012

Department of Health and Community Services

Summary:

The Applicant requested records from the Department of Health and Community Services comprising what is commonly referred to as the Minister's "briefing book." The Applicant's request was dated March 21, 2012. With the exception of a letter acknowledging receipt of her request and an e-mail stating that the record consisted of approximately 270 pages, the Applicant heard nothing from the Department until she e-mailed the coordinator to check on the status of her request two months later. She was informed that the delay was due to the large number of records and the time necessary to redact the information in accordance with the *ATIPPA*. The records were finally received by the Applicant in July 2012, more than three months after the request was submitted. The Commissioner found that the delay was a breach of section 11(1) of the *ATIPPA* and also a breach of section 9 of the *ATIPPA* (duty to assist). The Commissioner recommended that the Department be mindful of the statutory duty imposed on it by sections 9 and 11 of the *ATIPPA*. He further recommended that the Department review its policies and procedures for handling access to information requests for the purpose of ensuring that it complies with its duty to assist in section 9 and meets the time limit for responding to access requests under section 11(1) of the *ATIPPA*.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, s. 9, and 11.

Authorities Cited:

Newfoundland and Labrador OIPC Reports A-2010-013, A-2011-012.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request on March 21, 2012 to the Department of Health and Community Services (the “Department”). The request sought disclosure of records as follows:

... a copy of the Department of Health and Community Services briefing notes prepared for the House of Assembly, 47th General Assembly – first Session – 2011-12. This is often referred to as the minister’s house of assembly briefing book.

- [2] The Department acknowledged the Applicant’s access request with a letter on March 28, 2012 and on April 4th, 2012, the Department’s Coordinator e-mailed the Applicant to inform her that the responsive record consisted of approximately 270 pages. Having received no further correspondence from the Department, the Applicant e-mailed the Coordinator on June 14, 2012 to express her concerns about the significant delay in receiving the records. The next day the Coordinator e-mailed the Applicant to let her know that the delay was due to the large number of responsive records and the time required to review the record to ensure compliance with the *ATIPPA*.
- [3] On June 28, 2012, the Applicant again e-mailed the Coordinator asking for an update as to the status of her request. On July 3, the Applicant completed a Request for Review form, which was received at our office on July 4, 2012. Also on July 4, 2012, the Coordinator responded to the applicant’s e-mail and advised that the record was still being reviewed and the Department would provide the records as soon as possible. On July 13, 2012, the Applicant (and this Office) received a copy of the record.
- [4] The Applicant, in her Request for Review, expressed concern about the length of time it took for the Department to respond to her request. Efforts were made through this Office to resolve the Request for Review informally, and an analyst from this Office asked the Department to explain the lengthy delay in providing the records to the Applicant. The analyst also asked the Department to provide a timeline or chronology of events detailing what specific actions were taken on the file and when, but this information was not forthcoming.

[5] Ultimately, the Applicant was not satisfied with the Department's explanations and requested a formal investigation of the Department's handling of her access request. By letters dated October 18, 2012 both the Applicant and the Department were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* ("ATIPPA"). As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II PUBLIC BODY'S SUBMISSION

[6] On November 9, 2012, the Department provided this Office with written correspondence stating that they had no further submissions to make and that it was relying on earlier correspondence provided to this Office on July 16, 2012 and September 27, 2012. As stated in those letters and reiterated in this submission, the Department acknowledged that the statutory timeline was not met and apologized for the delay in responding to the Applicant's access request. The Department also stated that it was not their intention to deny access to the requested information. In the September 27, 2012 correspondence the Department explained that:

...a lot of consultation and consideration went into this file and the materials were voluminous. The response contained 259 pages of responsive materials. Preparing and reviewing the responsive information was a detailed process that required a great deal of time. As with all ATIPPA requests the Department conducted a detailed, thorough review which included consultations with the authors of the notes as well as senior management to ensure compliance with ATIPPA.

III APPLICANT'S SUBMISSION

[7] In her submission, the Applicant set out the chronology of events as set out in the "Background" section above to illustrate the delay in responding to her access request. She notes that of the 259 pages delivered to her, there were only 70 redactions. She then also notes that the records were delivered to her two weeks after the House of Assembly closed and states as follows:

These briefing books would have provided significant information that could have been used by our office to question government during question period.

I believe the information I have provided shows that while government took nearly 4 months to respond to this request, there is little in the file to justify government's failure to meet the statutory timelines. It is difficult to conclude other than that the delay appears to be based on something other than the work required to gather and review this information.

- [8] The Applicant then stated that this is not the first time she has had this issue with the Department:

...even more troubling is that almost the exact situation occurred when I asked for briefing material back in 2010. Back then, the documentation provided by DHCS was 234 pages. At the time I was surprised to see just how few redactions were in the file given that they claimed the same reason of significant information/redacting...In that instance, the file arrived July 20/10, a few weeks after the House of Assembly closed on June 24/10....I am concerned that this is becoming a pattern for government.

- [9] The Applicant is concerned that the Department violated section 16 of the *ATIPPA* (which sets out the circumstances for extending the statutory time limit for a response) and section 9 of the *ATIPPA*, which is the duty to assist an applicant in making an access to information request. Included in this duty to assist is the duty to respond without delay to an applicant in an open, accurate and complete manner.

IV DISCUSSION

- [10] Sections 9 and 11 of the *ATIPPA* state as follows:

9. 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.

11. (1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it, unless

- (a) the time limit for responding is extended under section 16;*
- (b) notice is given to a third party under section 28; or*
- (c) the request has been transferred under section 17 to another public body.*

(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.

[11] As the Applicant stated in her submission, this issue arose with the same department back in 2010, and I issued Report A-2010-013. As in that instance, the Department has again submitted no evidence to this Office that the 30 day time limit was extended under section 16 (which provides for an extension when there are a large number of records to be searched), that a third party had been notified under section 28 or that the request was transferred to another public body under section 17 of the *ATIPPA*. Thus, I find that that the delay constitutes a breach of section 11(1) of the *ATIPPA*. Further, the Applicant again waited more than three months for a response to her access request. Under section 11(2), failure to respond to an applicant within 30 days is deemed to be a refusal to provide access to records.

[12] In Report A-2011-012, the Assistant Commissioner discussed the issue of deemed refusal at length. I feel these comments need to be reiterated to underscore once again the importance of a timely response to an access to information request. In that case, the public body did extend the timeframe for responding under section 16, but it did not provide any of the responsive records (which totaled more than 3500 pages) to the Applicant until more than six months after the request was made. In that Report, the Assistant Commissioner stated as follows:

[37] In relation to the PSC's statement that consultations were necessary with two other departments regarding the release of the responsive records, I note that the PSC did not provide this Office with any details to substantiate this claim other than simply identifying the department. This Office needs to understand why the PSC was unable to conclude its consultations within the response deadlines in order to consider this claim. To meet the burden of proof set out in section 64 of the ATIPPA, the PSC must provide sufficient evidence as the nature, complexity and/or number of the consultations undertaken. The evidence before me is insufficient for me to accept this as a satisfactory justification, or even a contributing factor, for the unreasonable delay.

[38] The PSC has also stated that this access request involved a large volume of records and that the redaction of information is a process that requires strict attention to detail. I accept this as true, however, these assertions do nothing to relieve a public body from its obligation to respond to an access request within the statutory timelines. A public body is limited to the reasons set out in section 16 when it comes to extending its response time beyond 30 days, and the absolute maximum is a 30 day extension, for a total of 60 days. If a public body does not provide the records within the

statutory deadline, it will be in default of its statutory responsibility. While the volume of records involved and the strict attention to detail inherent in reviewing information may present challenges, it is not an acceptable justification for a public body to exceed the statutory response deadlines. In Report A-2008-001, the Commissioner stated:

There is no doubt that the ATIPPA can represent, at times, an inconvenience, or even a challenge for public bodies who find themselves struggling to meet statutory deadlines. It is apparent to me, however, that the 30 day time frame in section 11, in addition to the 30 day extension provided for in section 16, were meant to give public bodies the necessary time to respond to access requests. These time frames are designed to account for holidays, weekends, and other interruptions which may interfere with the search and retrieval of requested records, while still giving the public body enough time to meet its statutory obligations...

[39] In the Federal Court of Canada case Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 514 (Fed. T.D.), Justice Muldoon stated in the following paragraph that processing access requests in a less than expeditious manner was, in fact, breaking the law:

20. . . . Confession that such requests ought to be processed as expeditiously as possible may be good for an individual's soul, but it has no didactic energy in gaining the attention of government departments. It has no effect in actually providing legally that less than expeditious processing of requests for information is breaking the law, as it surely is. The purpose of the review is not just to make the particular respondent acknowledge unreasonable tardiness. It is, also, to let all other potential respondents know where they stand in these matters. The Court is quite conscious that responding to such requests is truly "extra work" which is extraneous to the line responsibilities and very raison d'être of government departments and other information-holding organizations of government. But when, as in the Access to Information Act, Parliament lays down these pertinent additional responsibilities, then one must comply.

[40] Similarly, the PSC must comply with the statutory timelines set out in the ATIPPA. There is nothing in the ATIPPA to excuse the PSC from its statutory duties because its Coordinator did not have time to carry out those duties. The PSC has to accept the fact that its obligations under the ATIPPA must be complied with despite the challenges presented by an access request.

[41] In addition to its serious failure to meet the statutory timelines, the delay in responding to this application for access is exacerbated by the PSC's seemingly relaxed attitude regarding the fact that they were in a deemed refusal situation. The approach taken by the PSC bears some resemblance to the one described by the Information Commissioner of Canada in relation to federal government departments in the 1995-1996 Annual Report. At page 13 of this Report, the then Commissioner stated:

...The law of course says requests must be answered within 30 days (unless an extension is justifiable). Many public officials appear to have decided, in days of dwindling resources, to amend the law to a "do-your-best" deadline. A passage from a letter written to the commissioner by a Deputy Minister who had failed to meet response deadlines illustrates this point:

"I regret that the Department was not able to meet the September 15 deadline for releasing the requested information to (the requester). As you know this date was negotiated in good faith and was overtaken by events This has meant that a greater number of the Branch's resources from an already shrinking base have had to be deployed in those areas.

". . . The present climate is, as you know, such that doing more with less means that we will all be pulled in competing directions and frequently faced with difficult choices and compromises."

There it is in a nutshell: the view that public officials can somehow exempt themselves from the obligation Parliament imposed to give timely responses. This notion that other departmental priorities, especially the need to service the Minister, take precedence over the edicts of the law is not uncommon.

[13] With respect to the duty to assist, a public body's execution of its duty to assist an applicant is measured against a standard of reasonableness, not perfection. It is my opinion that in the present case, the time it took the Department to respond was not reasonable. Section 11 (1) of the *ATIPPA* clearly sets out the circumstances in which the 30-day time limit may be extended, none of which have been claimed by the Department. The record has been reviewed by this Office and while the redactions contained therein are not numerous, I can certainly appreciate that reviewing responsive records to determine what can and should be released in response to an access to information request can be time consuming. However, the entire record consisted of just 259 pages, and in my opinion, a thorough review could have been done in far less than the three months it took the Department to complete this task. If the Department felt the volume of records was sufficient to warrant an extension of time, it should have applied section 16 and notified the Applicant accordingly. As noted in Report A-2010-013, whatever the reason for the delay, the Department should have at least communicated with the Applicant and kept her updated as to the status of her request. All communications with respect to the status of the request were initiated by the Applicant. This does not help to foster a cooperative and respectful relationship between an applicant and a public body. Therefore, I find that there has also been a breach of section 9 of the *ATIPPA*, as the Department failed to "respond without delay to an applicant in an open, accurate and complete manner."

[14] With respect to the Applicant's concern that that the delay in responding is due to something other than the amount of time taken to prepare a response, there was no evidence before me that this was the case.

V CONCLUSION

[15] At the time the Applicant submitted her Request for Review, she still had not received a final response from the Department. She had been advised that the responsive record contained approximately 270 pages, but she had not received any further correspondence from the Department with respect to the status of the access request. She also had not received any notice that a time extension was being claimed. Thus, I find that both sections 9 and 11 of the *ATIPPA* have been breached.

[16] While I cannot make any finding that the Department's delay was intentional, I understand the Applicant's suspicions, especially since this exact same situation occurred with this Department in the recent past. One of the main purposes of access to information is to make public bodies more accountable to the public. This purpose would certainly be undermined if disclosure of records was intentionally delayed so that government could not be legitimately questioned on issues of public importance in the House of Assembly. In many cases information requested by applicants is needed for a specific purpose which is often time sensitive. The timelines for responding to an access request as set out in the *ATIPPA* are there for this very reason - to ensure timely access to records. Thus, applicants have a right to expect public bodies to abide by these timelines and receive requested records while the information is still relevant and useful to them.

[17] I also wish to note, as a postscript, that owing to the government's recent amendments to the *ATIPPA*, section 7(4)(b) makes it clear that there is no longer a right of access to "a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the House of Assembly." In this case, the Applicant's request was filed prior to the coming into force of the *ATIPPA* amendments and therefore it was processed by the Department and reviewed by this Office under the *ATIPPA* as it existed prior to the amendments coming into force.

VI RECOMMENDATIONS

[18] Under the authority of section 49(1) of the *ATIPPA*, I once again recommend that the Department be mindful of the statutory duties imposed on it by sections 9 and 11 of the *ATIPPA*. I will also reiterate my prior recommendation that the Department review its policies and procedures for handling access to information requests for the purpose of ensuring that it complies with its duty to assist in section 9 and meets the time limit for responding to access requests under section 11(1) of the *ATIPPA*.

[19] Under the authority of section 50 of the *ATIPPA*, I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[20] Please note that within 30 days of receiving the decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31st day of December, 2012.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador

