

# PRACTICE BULLETIN

## *Responding to a Commissioner's Report*

This Practice Bulletin provides guidance to public bodies when issuing a response to a Commissioner's Report in accordance with sections 49 and 78 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*.

The *ATIPPA, 2015* requires the Commissioner to prepare a Report following an investigation into an access or correction complaint, or a privacy complaint.

### Report Outcomes

In relation to access or correction complaints, pursuant to section 47, a Report may contain recommendations from the Commissioner that:

- the head of the public body grant or refuse access to a record or part of a record;
- the head of the public body reconsider its decision to refuse access to a record or part of a record;
- the head of the public body either make or not make a requested correction to personal information; or
- certain improvements for access to information be made within the public body.

In relation to privacy complaints, pursuant to section 76, a Report may contain recommendations from the Commissioner:

- that the head of a public body stop collecting, using or disclosing personal information in contravention of the *Act*;
- that the head of a public body destroy personal information collected in contravention of the *Act*;
- that an information practice, policy or procedure be implemented, modified, stopped or not commenced; or
- on the privacy aspect of the matter that is the subject of the privacy complaint.

Reports must also advise the head of the public body of its obligation to notify the relevant parties of the public body's decision in response to the recommendations of the Commissioner within 10 business days of receipt of a Report.

Sections 49 and 78 of the *ATIPPA, 2015* outline this obligation in further detail:

*49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,*

- (a) decide whether or not to comply with the recommendation in whole or in part; and*
- (b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.*



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*(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.*

*(3) The written notice shall include notice of the right*

- (a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or*
- (b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in subsection 51(1).*

[...]

*78. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,*

- (a) decide whether or not to comply with the recommendation in whole or in part; and*
- (b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.*

*(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.*

#### Notice of Decision Requirements

#### **Is Notice Required if a Public Body Decides to Comply with the Recommendations?**

The requirement to provide written notice to the Commissioner and all persons who received a copy of the Commissioner's Report exists regardless of whether or not a public body agrees to comply with the recommendations of the Commissioner.

#### **When Should Notice be Provided?**

Notice must be provided in writing not later than 10 business days after a public body receives a Commissioner's Report containing recommendations. Public bodies who fail to provide notice within this timeframe will be considered to have accepted the recommendations and compliance will be expected.

#### **What Should the Notice Contain?**

The notice must be in writing.

It is best practice to copy the Commissioner on the notice sent to the parties who received a copy of the Report. In this manner, the Commissioner is made aware that notice has been sent to the parties and can ensure that the notice is in proper form. By copying the Commissioner on the notice to the parties, notice will also be effected on the Commissioner and a separate notice to the Commissioner is unnecessary. There is, however, no requirement within the Act to copy the Commissioner on the notice sent to the parties and public bodies may, at their discretion, send separate notices to the parties and the Commissioner. Regardless of to whom the letter is addressed, if parties other than the Commissioner are copied on the notice, public bodies must not disclose personal

information in the copy line. The copied parties should simply be referred to as "Applicant", "Third Party", etc.

It is also best practice for public bodies to send the notice to the parties via a method which allows the public body to track its receipt. This will allow the public body to determine when the time period for an appeal by the complainant commences and concludes.

All notices must advise the parties of the decision of the public body whether to comply with the Commissioner's recommendations in whole or in part.

Notices in response to a Commissioner's Report relating to an access or correction complaint must also advise parties of:

- their right to appeal to the Trial Division under section 54;
- the time limit for an appeal - 10 business days after receiving the written notice from the public body indicating its decision in relation to the Commissioner's recommendations; and
- the right of the Commissioner to file an order with the Trial Division where: i) the head of the public body fails to comply with the agreed to recommendations within 15 business days of receiving the Commissioner's recommendation; or ii) the head of the public body fails to apply for a declaration;

and, where applicable, it is best practice to also advise the complainant of:

- when they can expect to receive the responsive records; and
- the requirement to serve a copy of the notice of appeal on the Commissioner, the Minister responsible for the Act and the head of the public body, if an appeal is filed by the complainant. It is best practice for public bodies to follow-up with complainants before the expiration of the appeal period to determine if an appeal has been or will be filed by the complainant.

### Seeking a Declaration

#### **Declarations and Orders do Not Apply to All Recommendations**

Recommendations made under section 47(a) and (c) and 76(1) are the only recommendations that are subject to declarations or orders. If a recommendation is made by the Commissioner under section 47(b) or (d) or 76(2), all notification requirements still apply but proceeding to Court for a declaration or an order is not possible under the Act.

#### **Commissioner's Reports Resulting from Access or Correction Complaints**

Where a public body decides not to comply with a recommendation of the Commissioner under section 47 (a) or (c) to grant access to or correct a record, the public body must apply to the Trial Division for a declaration. This declaration, if granted, will allow the public body not to comply with the relevant recommendation(s).

#### **Commissioner's Reports Resulting from Privacy Complaints**

Where a public body decides not to comply with a recommendation of the Commissioner under section 76(1) to stop collecting, using or disclosing personal information in contravention of this Act; or to destroy personal information collected in contravention of

this Act, the public body must apply to the Trial Division for a declaration. This declaration, if granted, will allow the public body not to comply with the relevant recommendation(s).

### **When Must a Declaration be Sought?**

A declaration must be sought, via application at the Trial Division, within 10 business days after a public body receives a Commissioner's Report containing recommendations pursuant to either of sections 47(a) and (c) and 76(1)

A public body intending to seek a declaration must still provide notice of its decision in relation to the Commissioner's Report in accordance with section 49 or 78.

### **Who Must be Notified of an Application for a Declaration?**

A copy of the application for a declaration must be served on the Commissioner, the minister responsible for the administration of this Act, and all parties who were sent a copy of the Commissioner's Report. While the Complainant must be served with a copy of the application for a declaration, the Complainant is not a Respondent to the application and should not be named in the application.

Service must be carried out within 10 business days after a public body receives a Commissioner's Report containing recommendations.

### **Failure to Follow Recommendations or Seek a Declaration**

In respect of an access or correction complaint, where a public body agrees or is considered to have agreed to comply with the recommendations made by the Commissioner under either section 47(a) or (c) but fails to do so within 15 days of receipt of the recommendations, the Commissioner may file an order with the Court directing the public body to grant access or make the requested correction.

Similarly, in respect of an access or correction complaint, where a public body fails to apply for a declaration not to comply with the recommendations made by the Commissioner under either section 47(a) or (c), the Commissioner may file an order with the Court directing the public body to grant access or make the requested correction.

In respect of a privacy complaint, where a public body agrees or is considered to have agreed to comply with the recommendations made by the Commissioner under section 76(1) but fails to do so within one (1) year of receipt of the recommendations, the Commissioner may file an order with the Court directing the public body to stop collecting, using or disclosing personal information, or to destroy personal information collected in contravention of the Act.

Similarly, in respect of a privacy complaint, where a public body fails to apply for a declaration not to comply with the recommendations made by the Commissioner under section 76(1), the Commissioner may file an order with the Court directing the public body to stop collecting, using or disclosing personal information, or to destroy personal information collected in contravention of the Act.

An order filed by the Commissioner with the Trial Division is enforceable against the public body as if it were a judgment or order made by the Court.