



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-004

February 6, 2014

Department of Advanced Education and Skills

Summary:

The Applicant requested from the Department of Advanced Education and Skills (the “Department”) copies of all funding proposals submitted to the Department from any organization from Bell Island and for details of any approved funding. The Department did not respond to the access request within the extended time period and did not respond until nearly four months after receiving the access request. The Commissioner found that the Department did not comply with the mandatory time period set out in section 11 of the *ATIPPA* and the Department failed to fulfill the duty to assist imposed on it by section 9 of the *ATIPPA*. The Commissioner made recommendations to the Department to improve its access to information process and to prevent late responses to access requests.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 9, 11, and 16.

Authorities Cited:

Newfoundland and Labrador OIPC Reports A-2008-001, A-2011-012 and A-2013-002.

Other Sources:

Office of the Information and Privacy Commissioner. News Release: January 8, 2013. Available at:

<http://www.releases.gov.nl.ca/releases/2013/oipc/0108n03.htm>

Access to Information Policy and Procedures Manual, August 2013. Government of Newfoundland and Labrador, ATIPP Office, Office of Public Engagement.

Available at:

http://www.atipp.gov.nl.ca/publications/ATIPP_Policy_and_Procedures_Manual.pdf.

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 October 3, 2012 to the Department of Advanced Education and Skills (the “Department”). The request sought disclosure of records as follows:

I am requesting under the Access to Information Act copies of all applications/proposals submitted to the Department of Advanced Education and Skills by any groups, associations, agencies, community groups, corporations, etc from Bell Island. In addition, I am requesting details of the funding for the associated approved proposals, budget breakdown for each contract and the associated sponsor of each program funded on Bell Island.

- [2] The Department’s response to the access request was due on November 2, 2012. The Department received approval from this Office, pursuant to section 16(2), to extend the time for responding to the access request for an additional 20 days to November 22, 2012.
- [3] The Department finally responded to the Applicant’s access request by letter dated January 25, 2013. The Applicant received the Department’s response on February 1, 2013.
- [4] In a Request for Review dated January 29, 2013 and received in this Office on February 1, 2013, the Applicant asked for a review of this matter. Specifically, the Applicant requested: “I am asking that all requested information be released and a full explanation as to why it was not done within the legislative time frames.”
- [5] Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated March 22, 2013 the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

II PUBLIC BODY'S SUBMISSION

- [6] The Department's submission is set out in correspondence dated March 31, 2013.
- [7] In its submission, the Department addressed the duty to assist imposed on public bodies by section 9 of the *ATIPPA*:

Section 9: Duty to Assist: The Department made every effort to ensure information was provided to the Applicant. The applicant requested records that totaled over 400 pages, and information that was not readily available. This information had to be created through various data capturing programs and OCIO assistance. The Department did not charge the Applicant for the request and it was not the intention of the Department to deny access to these records.

- [8] The Department also commented on section 11, which sets a time limit for responding to access requests:

Section 11: Time Limit for response: This request had a large number of records, records that needed to be created and at the time, the applicant had submitted three requests within a short time frame: two on October 3rd, and one on October 19th, 2012. The Department aims to meet all deadlines, but due to increased internal review processing time (due to large volumes of records), the department was late in responding.

- [9] The Department continued its submission by stating:

*The Department has engaged in further training of their staff for processing *ATIPPA* requests. This training is meant to increase employee knowledge regarding processing and aims to decrease the number of late requests.*

III APPLICANT'S SUBMISSION

- [10] The Applicant did not provide a submission.

IV DISCUSSION

[11] The following are the issues to be discussed:

- (1) Did the Department comply with Section 11 (time limit for response)?
- (2) Did the Department comply with section 9 of the *ATIPPA* (duty to assist applicant)?

(1) Did the Department comply with Section 11 (time limit for response)?

[12] Section 11 of the *ATIPPA* sets out the time limit for responding to an access request. Section 11(2) provides as follows:

(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.

[13] On October 22, 2012, the Department sought approval under section 16(2)(b) of the *ATIPPA* for a 20 day extension to respond to the access request that forms the subject matter of this Request for Review. Section 16(2) provides as follows:

(2) In addition to the authority under subsection (1), with the approval of the commissioner, the head of a public body may extend the time for responding to a request as follows:

(a) where one or more of the circumstances described in subsection (1) apply for a period of longer than the 30 days permitted under that subsection;

(b) where multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other; or

(c) where the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate.

[14] This Office reviewed the circumstances involved and granted an extension of time to respond to the access request under section 16(2)(c), rather than section 16(2)(b). This Office considered it fair and reasonable to allow a 20 day extension to November 22, 2012 to respond to the access request.

[15] The Department made no further applications to this Office for extensions of time and did not release the information until its correspondence dated January 25, 2013, which correspondence was received by the Applicant on February 1, 2013.

[16] It is clear that section 11(2) is applicable here. The Department failed “to respond within the 30 day period or an extended period”. This Office extended the time for responding to November 22, 2012 but the Department did not send its response until January 25, 2013, with the Applicant receiving the response on February 1, 2013. It may be that if the Department had made a further application to this Office for an extension of time then such an extension might have been considered. No such application was made. The result is that the Department is “considered to have refused access to the record” in accordance with section 11(2) of the *ATIPPA*.

[17] The Department stated in its submission that “it was not the intention of the Department to deny access to these records.” However, section 11(2) applies regardless of the intention of the public body involved. Once there has been a failure to respond within the prescribed time period, the public body is considered to have refused access. In other words, there is a deemed refusal to provide access to the requested records.

[18] This Office has commented upon deemed refusals in several reports. In Report A-2011-012, the Assistant Commissioner stated at paragraph 38:

[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. . . . 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. . . .

[19] In Report A-2008-001, the Commissioner stated at paragraph 73:

[73] 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 deadlines. . . .

[20] At about the time the Department was dealing with the access request that forms the subject matter of this Request for Review, this Office was concerned about the number of deemed refusals this Office was dealing with. I issued a press release on January 8, 2013 indicating that this Office was dealing with 12 files involving deemed refusals and I stated:

From time to time, my Office has received complaints about a failure on the part of a government department or agency to meet these time limits, but for some reason there seems to be a lot more of this happening now than ever before, and I'm concerned about it. Applicants are being left hanging for months after filing a request that should usually only take 30 days to process, and in some cases no one from the public body is even bothering to pick up the phone and let the applicant know what's going on with their request. There is a saying in the access to information world that 'access delayed is access denied' – sometimes applicants need information within a certain period of time or it is simply no good to them any more.

[21] A similar concern regarding deemed refusals was expressed in the recently released Policy and Procedures Manual of the ATIPP Office of the Office of Public Engagement, where it was stated on page 29 in a discussion of the duties placed on public bodies:

- *requests must be answered within 30 days, unless an extension is permitted – some public officials appear to have decided to amend the law to a “do-your-best” deadline;*

[22] A “do your best deadline” is not what section 11 of the *ATIPPA* mandates. Rather, it requires a public body “to respond within the 30 day period or an extended period.” In this case, the Department did not respond by the November 22, 2012 extended deadline. The Applicant did not receive the Department’s response until February 1, 2013, which is over 2 months beyond the extension granted by this Office and nearly 4 months after the access request was received by the Department on October 3, 2012.

[23] Thus, the Department has failed to comply with section 11 of the *ATIPPA*.

(2) Did the Department comply with section 9 of the *ATIPPA* (duty to assist applicant)?

[24] Section 9 of the *ATIPPA* imposes on a public body a duty to assist applicants 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.

[25] This Office has commented many times on the components of the duty to assist, most recently in Report A-2013-002 I stated in paragraph 10:

[10] To paraphrase my comments in Report A-2009-011, the duty to assist has three separate components: the public body must first assist an applicant in the early stages of making a request; it must then conduct a reasonable search for the requested records; and finally, it must respond to the applicant in an open, accurate and complete manner. It has been widely accepted by this Office and other Commissioners across the country that the standard against which the duty to assist is measured is reasonableness, not perfection, and the public body bears the burden of proving that the duty to assist has been fulfilled. . . .

[26] The Policy and Procedures Manual of the ATIPP Office (referred to above) sets out some of the obligations included in the duty to assist on page 29:

In meeting the duty to assist an applicant, some additional obligations include the following:

- *clear communication between the ATIPP Coordinator and an applicant is crucial;*
- *it is incumbent on the ATIPP Coordinator to ensure that time limits are met – if a public body does not provide records within the statutory deadline, it will be in default of its statutory responsibility;*
- *where a public body finds itself in a deemed refusal situation, they must take whatever actions are available to it to mitigate the imposition of the applicant's right of access and such measures should begin as soon as it is apparent that the extended time frame cannot be met;*
- *assign additional staff as early as possible, where necessary, to help process requests;*
- *designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed;*

[27] In the present case, there is no indication that when it found itself in a deemed refusal situation the Department took “whatever actions are available” or that such measures began as soon as it was “apparent that the extended time frame cannot be met.” For example, the Department did not assign additional staff as soon as possible to help process the request. Nor did it contact this Office to ask for another extension of time to respond to the request.

[28] In short, the Department has not met the burden of showing that what it did was reasonable in the circumstances. As such, I find that the Department has failed to fulfill the duty to assist imposed on it by section 9 of the *ATIPPA*.

[29] I am pleased that the Department indicated in its submission that it has engaged in further training of its staff in relation to the handling of access requests with a view to increasing employee knowledge regarding the access to information process. However, I am disappointed that the Department has stated that it “aims to decrease the number of late requests.” The goal of the Department should be to eliminate late responses in compliance with the mandatory deadlines set out in the *ATIPPA* and in accordance with its duty to assist applicants.

V CONCLUSION

[30] The Department has failed to comply with section 11 of the *ATIPPA*.

[31] The Department has failed to fulfill the duty to assist imposed on it by section 9 of the *ATIPPA*.

VI RECOMMENDATIONS

[32] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department of Advanced Education and Skills:

1. Be mindful of the statutory duties imposed on it by sections 9 and 11 of the *ATIPPA*.
2. Assign additional staff as early as possible, where necessary, to help process access requests.
3. Designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed.
4. Continue with the training of staff regarding the access to information process with the goal of eliminating late responses to access requests.

[33] 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.

[34] 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*.

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of February 2014.

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

