



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2018-011

May 17, 2018

Town of Conception Bay South

Summary:

The Applicant sought records from the Town dating back to 2007. The Town provided responsive records but advised that further records could not be located, indicating that they may have been destroyed. An investigation by this Office concluded that the Town had made a reasonable search for responsive records and that any records which had been destroyed were not destroyed in contravention of the *ATIPPA, 2015* but rather were destroyed in accordance with the Town's own record retention policies.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), ss 5, 13, 15, 16.

Authorities Relied On: [Report A-2018-005](#); [Report A-2009-011](#); [Report A-2007-009](#); [Report 2018-004](#)

Other Resources:

OIPC NL [Practice Bulletin on Reasonable Search](#), March 2017.

I BACKGROUND

[1] On December 11, 2017 the Applicant made an access to information request to the Town of Conception Bay South as follows:

7 years whatever is on file regarding:

- *Meeting with myself and Town Manager 2007-2010*
- *Any and all records for the scrapyard located on Pocket Road under the names of: NL Recycling, NL Salvage, Walker Enterprises, Walker Recycling any and all records for the same. Could be others as well.*

[2] The Town responded to the Applicant on or about January 12, 2018 and provided 174 pages of records, which included various notes, e-mails, reports and photos of the site in question. The records date back to 2009, with the vast majority of the records (approximately 150 pages) relating to the Town's activity in relation to the Pocket Road issue between 2009 and 2011. In its final response, the Town advised the Applicant that it had interpreted the request as being for "All records currently in the control of the Public body regarding the scrapyard located on Pocket Road under all names mentioned above". The Town advised that some information was severed under section 40. The Town also advised the Applicant that any notes regarding meetings between the Applicant and the former Town Manager no longer exist as they would have been considered transitory and destroyed on or before his retirement in February, 2015.

[3] The Applicant was not satisfied with the response provided by the Town and filed a complaint with this Office on February 19, 2018 with respect to the destruction of records, the non-disclosure of meeting notes and records relating to the closure of the site, and alleging that the Town failed to assist the Complainant with the access request.

[4] No further responsive records were located during the course of our investigation. At the conclusion of the informal resolution process the Complainant remained dissatisfied and the matter was referred to formal investigation under section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [5] The Town submits that it thoroughly searched its physical files as well as its electronic document system for all responsive records. The Town's search for responsive records was conducted by knowledgeable staff, including the Access to Information and Protection of Privacy Coordinator, the Director of Engineering, the Director of Planning, the Enforcement Manager, and Planning and Enforcement Clerks.
- [6] The Town noted that one record sought by the Complainant was a Ministerial Order to close the scrapyards operated at Pocket Road. The Town submitted that this record was not in its custody or control and its understanding was that it had been issued by the Department of Environment directly to the owner of the property and a copy was not received by the Town.
- [7] The Town provided this Office with its records retention policy. Under that policy, correspondence and photographs are kept for three years. There are no provisions for retention or destruction of such records as meeting notes, though a potential comparator would be reports not forming part of council minutes, which also have a three-year retention period. The Town also provided this Office with further information explaining the destruction of records. First, the Town Manager (with whom the Complainant had met) retired in 2015 and at that time records not required to be retained under the retention policy were destroyed. Similarly, the Director of Planning retired in 2016 and his records were destroyed. In addition, the Town moved into a new town hall in November 2015 and in the course of moving its records and other assets, the Town took this opportunity to destroy records eligible for destruction pursuant to their retention schedule.
- [8] The Town did not make submissions regarding its failure to meet the statutory deadline or the allegation that it failed to meet its duty to assist the Complainant.

III COMPLAINANT'S POSITION

- [9] The Complainant submits that the Town's response failed to produce all responsive records and that the Town failed to justify the allegedly missing records. The Complainant identified e-mails that she herself had sent to the Town, as well as the lack of more recent information, from 2015 to present, in support of the position that the search was not adequate.
- [10] The Complainant also submits that the Town failed to meet its duty to assist during the request process and that it did not communicate effectively with the Complainant. The Complainant alleges that despite repeated attempts to contact the Town, she was required to attend at the Town Hall in person to fill out an access request. Once the Complainant's request had been made, she received no further contact from the Town, which the Complainant submits was a lost opportunity on the part of the Town to engage with the Complainant and clarify the request. Once the Town sent its final response to the Complainant, the Complainant had several follow-up questions relating to information that was allegedly missing as well as technical problems with accessing electronic copies of some of the records. The Complainant states that she did not receive any response to these inquiries.
- [11] The Complainant further notes that the Town failed to meet the statutory deadlines imposed by the *ATIPPA, 2015* because a final response was not provided within the 20 business day period prescribed by the Act.

IV DECISION

Statutory Deadlines

- [12] The Complainant raised concerns about the timeliness of the Town's response to the access to information request. The *ATIPPA, 2015* provides explicit deadlines for a public body to respond to an access request. In the absence of this Office granting an extension under section 23, a final response is due within 20 business days of receiving the request

(section 16). As an extension was not sought, the 20 business day deadline applied. In addition, a public body is required to provide an advisory response within 10 business days of receiving a request (section 15) in order to confirm receipt of the request and the status of the response.

[13] The Complainant's access to information request was received by the Town on December 11, 2017. The only communication after this date was the Town's final response which was sent on January 12, 2018. The final response was provided electronically, with all records in PDF format and sent to the Complainant as attachments to twenty-five e-mails. There was no advisory response prior to the final response. The response, although due by January 10, was not sent until January 12, two business days late and therefore a deemed refusal.

[14] Copies of e-mails provided by the parties indicate that the Town had advised the Complainant that the Town would likely miss the deadline. Other than notifying the Complainant of an expected delay, the Town has not offered any further explanation for missing the statutory deadline.

Duty to Assist

[15] Section 13 of the *ATIPPA, 2015* imposes a duty to assist on public bodies and requires that they 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. The Complainant alleges that the Town failed to meet this duty when it did not respond in a timely fashion to her follow-up e-mails and phone calls after the Town's final response was provided on January 12, 2018.

[16] The duty to assist, discussed in Report A-2009-011, has three components:

[80] . . . First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the

requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

The standard for assessing a public body's efforts is reasonableness, not perfection.

- [17] This Complaint deals with all aspects of the duty to assist: the actions of the Town in assisting the Complainant with making the request; the completeness of the records that were provided; and the Town's communications with the Complainant.
- [18] First, the Complainant notes significant difficulties with initially contacting the Town to make her request. The role of an access to information and protection of privacy coordinator is a public-facing one, and contact information for the relevant individuals within a public body should be readily available to the public. The Department of Justice's ATIPP Office maintains a list of ATIPP Coordinators and every public body should ensure that its contact information is current. Every public body should be prepared to provide copies of the access to information form on request and to facilitate the making of an access request.
- [19] The Town's website does not provide contact information specifically for access to information requests. To its credit, the Town does publish some completed access to information requests and records on its website under "publications". It lacks other essential information in regards to its access to information processes. Updating the Town's website to provide specific contact information for the ATIPP Coordinator as well as providing a link to the ATIPP Office's website and the access to information request form would improve accessibility significantly.
- [20] Second, the Complainant alleged that records are missing or improperly destroyed. With regard to searching records, our Practice Bulletin on "Reasonable Search" directs that searches must be conducted by knowledgeable staff in locations where relevant records are likely to be located. The Town submitted that its physical and electronic records were searched by senior staff in relevant departments. We are therefore satisfied that a reasonable search was conducted.

[21] Third, this complaint concerns the Town's communications with the Complainant, in particular once the final response had been sent to the Complainant. The content of a public body's final response to an applicant is dictated by section 18, and is required to include instructions for the applicant to file a complaint with this Office or with the Supreme Court of Newfoundland and Labrador if they are dissatisfied with the response. This suggests that following the public body's final response, any outstanding issues with regard to the access request must be addressed in a different forum than between the applicant and the public body.

[22] However, the duty to communicate with an applicant goes beyond simply notifying them of their statutory rights to appeal. Where an applicant has follow-up questions about the final response they received public bodies will likely find it to their advantage to engage with the applicant to work to resolve these issues if there is the potential of avoiding an appeal to either this Office or to the Supreme Court of Newfoundland and Labrador. I would note however, for the benefit of potential complainants, that the deadlines set by the *ATIPPA, 2015* for filing an appeal would continue to apply notwithstanding any efforts to resolve a matter informally with the public body.

[23] One issue raised by the Complainant was technical difficulties in accessing some of the records sent by the Town. The Complainant was ultimately able to resolve this problem themselves, though in the interim the Town did not respond to requests for assistance. Ensuring that a Complainant has actually received, and is able to access, responsive records sent by a public body is part of the duty to assist. In not responding to the Complainant's follow-up inquiries and requests for technical assistance the Town has failed to meet its duty to assist the Complainant.

Destruction of Records

[24] As noted, we are satisfied that the Town conducted a reasonable search of its records in response to the Complainant's access request. However, in addition to alleging that the search was inadequate, the Complainant has also alleged that some records were destroyed improperly.

[25] While the Complainant's request is not entirely clear (though it is the duty of a public body, under section 13, to work with an applicant to resolve any ambiguity), it appears that many of the records sought would have dated back to between 2007 and 2010 and would have been between seven and ten years old at the time of the request. Several records were provided from this period, while the Town admits that some records may have been destroyed.

[26] The *ATIPPA, 2015* permits the destruction of records in accordance with the by-laws or resolution of a local public body (section 5(2)(b)) and we have commented in the past that public bodies are permitted to establish their own retention schedules for their records and to destroy records in accordance with such policies (see Report A-2018-004). During our investigation, the Town provided our Office with a copy of its record retention policies, approved on October 16, 2007 by a resolution of the Town Council. A public body will only run afoul of the *ATIPPA, 2015* in the event that it has destroyed records after an access to information request has been received, or in contravention of other legislative requirements. There is no evidence to suggest that any of the missing records were destroyed subsequent to the Complainant's access to information request. Rather, it is apparent that the records had likely been destroyed several years ago in accordance with the Town's retention policy.

V CONCLUSIONS

[27] The Town fulfilled its obligations to conduct a reasonable search for responsive records. Regarding those records which are admitted – or presumed by the Town – to have been destroyed, we conclude that such destruction does not violate the *ATIPPA, 2015* as the destruction predates the access to information request made by the Complainant and was carried out pursuant to the Town's retention policies.

[28] The Town, however, failed to provide an advisory response as required by section 15 and failed to meet the statutory deadline for providing its final response to the Complainant as required by section 16.

[29] The Town also failed to meet its duty to assist, in terms of failing to assist the Complainant with the process of making an access to information request and in failing to communicate with the Complainant in an open, accurate and complete manner during and after the access to information process.

VI RECOMMENDATIONS

[30] Having concluded that the Town conducted a reasonable search and that if records were destroyed, they were destroyed lawfully, we have no recommendations regarding the release of records.

[31] Having concluded that the Town failed to adhere to the requirement for an advisory response in accordance with section 15 and the deadline set by section 16 for making its final response to the Complainant, I recommend that the Town review its access to information policies and practices to ensure that it meets its obligations under the *ATIPPA, 2015*.

[32] Having concluded that the Town failed to meet the duty to assist set out in section 13 by failing to respond to the Complainant's technical difficulties with accessing the records, I recommend that the Town in future respond to complainants who advise of such problems.

[33] Having concluded that the Town failed to meet the duty to assist set by section 13 generally, I recommend that the Town also review its policies and practices regarding contact information, communication with the public and training for staff. At a minimum, the Town's website should be updated to provide specific contact information for access to information requests and instructions for making a request.

[34] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Town of Conception Bay South 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 17th day of May 2018.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

