



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-016

July 11, 2018

Department of Transportation and Works

Summary:

An Applicant requested from the Department of Transportation and Works all emails, documentation and correspondence related to the Mobile High School Extension project, covering approximately a three and a half month period. The same Applicant had previously requested similar records from a different two-month period, with the Department failing to comply with its legal obligations under the *ATIPPA, 2015*. The Commissioner found in the current matter that the Department again failed to comply with the mandatory deadline to respond to access requests set out in section 16 of the *ATIPPA, 2015* and that the Department failed to fulfil the duty to assist set out in section 13 of the *ATIPPA, 2015*. The Commissioner made further recommendations to the Department to improve its access to information process and to respond to access requests within legislated deadlines.

Statutes Cited:

[*Access to Information and Protection of Privacy Act, 2015*](#), SNL 2015, c A-1.2, ss. 13 and 16.

Authorities Relied On:

Newfoundland and Labrador OIPC Report [A-2018-009](#); [*Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*](#)

I BACKGROUND

- [1] On February 21, 2018 the Department of Transportation and Works (the “Department”) received an access to information request from the Applicant seeking:

Please provide any and all emails, documentation and correspondence related to the Mobile High School Extension project within Department of Transportation and Works and between TW and Department of Education, Service NL and/or NLESD from the period of November 8, 2017 up to and including today.

- [2] The deadline for response from the Department was March 21, 2018. The Applicant did not receive records responsive to the access request by that deadline and on April 10, 2018, filed a complaint with this Office indicating the Department had not provided the records by the statutory deadline.

- [3] Initially, the complaint was resolved informally as the Department advised that the final responsive package would be sent to the Applicant approximately mid to late May, 2018. Despite being well outside the deadline for a response, the Applicant agreed to this resolution, noting that Report A-2018-009, issued on April 24, 2018, addressed the Department’s failure to comply with the law. When, by June 7, 2018, the records had not been provided to the Applicant, it was decided that the complaint would proceed to formal investigation under subsection 44(4) of the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”).

- [4] Section 16(2) of the *ATIPPA, 2015* deems a public body to have refused access if it does not respond to the applicant within 20 business days, or an extended period approved by the Commissioner. The Department provided the Applicant with a response to her request on June 27, 2018, 66 business days (126 calendar days) beyond the statutory deadline.

II PUBLIC BODY'S POSITION

[5] The Department claimed that the request was broad and involved searching for and collecting a large volume of emails and other records from multiple employees. The Department advised that there were approximately 1,277 records totaling over 1,800 pages.

[6] The Department explained the initial timeline as follows:

- the access request was received by the Department on February 21, 2018 and forwarded to the Executive on the same day;
- the request for records was forwarded to employees on March 15, 2018 (16 business days after receipt of the request);
- responsive records were received from March 15, 2018 to March 26, 2018;
- the extensive process required to locate and extract the records was not completed until March 26, 2018 (3 business days after the final response was due).

[7] On March 7, 2018 an Advisory Response was sent by the Department advising that it was “processing” the request and that a “response will be provided to you by March 21, 2018”. However, the Department advised this Office that the ATIPP Coordinator was off on March 15, 2018 and on that same date the Manager of Information, after noticing that requests for record searches had not been sent out on several access requests, sent out all requests that had not gone out by that date. There was no explanation provided for the delay and there was no information provided regarding other work done on the file between February 21, 2018 and March 15, 2018. When asked why the Department did not seek an extension pursuant to section 23 of the *Act*, it advised that by the time management became aware that a time extension was not requested by the ATIPP Coordinator, it was too late to make a time extension request.

[8] The Department further explained that the organization of the records was an intricate process which took a number of days, and that a line-by-line review of the approximately 1,800 pages of records was required.

- [9] When the Department responded to this Office on May 3, 2018, it explained that the analysis and redaction of the records was underway and that process was expected to take another 10 days due to the volume and detailed nature of the records. Furthermore, the Department explained that consultations with the Department of Education and Early Childhood Development and the Newfoundland and Labrador English School District were required after the analysis and redactions were completed.
- [10] The Department advised that it has one full time ATIPP Coordinator and it was using support resources of the ATIPP Office to process responsive records. As well, the Department's Manager of Information Management has been dedicated half-time to ATIPP duties.
- [11] The Department advised, as of May 3, 2018, it anticipated delivering the final responsive package to the Applicant by mid-to-late May 2018.
- [12] The Department provided updates to this Office on May 17, 2018 and May 22, 2018. The Department advised at that time that the file with its Executive for review, all the consultations were underway and the Department was waiting on feedback. At that time, the Department advised that it hoped the release date would be the week of May 28, 2018. On June 5, when contacted by this Office for an update on the status of the response, the Department advised the review of the records by the Assistant Deputy Minister was ongoing, that the response from Cabinet Secretariat needed to be reviewed, and that the Department was still awaiting a response on the review of solicitor client privilege.
- [13] The Department advised that the package of records was ready for Executive review on May 28, 2018, however, it was returned to the ATIPP Coordinator several times to address errors/omissions on June 4, June 11, and June 21, 2018.

III COMPLAINANT'S POSITION

[14] The Applicant wanted to bring attention to the fact the Department had again failed to comply with the law and hoped for recommendations requiring future compliance by the Department.

IV DECISION

[15] Report A-2018-009, issued on April 24, 2018, dealt with the Department's failure to respond to the Applicant within the Act's mandatory deadlines on a very similar access request. As discussed in that report, section 16 of *ATIPPA, 2015* sets out the deadline for responding to an access request, which is 20 business days after the public body receives it, unless the time limit for responding is extended under section 23.

[16] The Department received the access request on February 21, 2018, acknowledging receipt to the Applicant on that date. The Applicant asked for records spanning a three and a half month period. The Department did not commence searching for the records until 16 business days after receiving the request. The Department took 22 business days to search for and gather the responsive records and was already outside the legislated period for a final response to the Applicant at that point. This lengthy delay made it obvious that the Department could not meet the statutory deadline, especially given its performance in responding to the same request for a different time period.

[17] Section 23 allows a public body to apply, within 15 business days of receiving an access request, for an extension of the response deadline. As noted above, the Department only forwarded the request to the employees by the 16th business day, and had not completed the searching for and gathering of records until the 22nd business day from date of receiving the request. The Department did not apply to this Office for a time extension as it was already outside of the period in which an extension could be requested. These deadlines can be altered if a public body establishes that extraordinary circumstances exist. As the Department did not attempt to invoke that provision, it appears that there were no

extraordinary circumstances. One must ask whether anyone in the Department took the time to calculate the number of business days that had expired on discovering on March 15, 2018 that the request had not been actioned. If the Department had used the initial 15 business days to ascertain the extent of the access request, the Department could have considered applying for a time extension and this Office would have considered the circumstances.

[18] As of May 3, 2018 (business day 49), the Department advised that the “analysis and redaction of records is currently underway and expected to take another 10 days due to the volume and detailed nature of the responsive records.” May 3, 2018 was 25 business days after the Department had completed the searching for and gathering of the records. In advising on Day 49 that the response was expected to take another 10 days, the Department was taking approximately 25-35 business days to review and redact the records. Even considering that there was a large volume of responsive records, this timeframe is excessive, since a final response is due by law within 20 business days.

[19] The Department also advised that once the analysis and redactions were completed, there were still consultations required and on their completion, Cabinet Secretariat consultation had to take place along with reviews by the Assistant Deputy Minister and Deputy Minister.

[20] While the access request was for a large volume of records, these delays are unacceptable. Clearly, the Department did not comply with section 16 of *ATIPPA, 2015* in that it failed “to respond within the period of 20 business days or an extended period” and therefore, it “is considered to have refused access to the record” in relation to the access request.

[21] A large volume of records does not allow public bodies to ignore response deadlines. It does not excuse a failure to comply with legal obligations. The rule of law applies to the Crown. Imagine defending oneself on a charge of dumping garbage in the woods by claiming that you had so much refuse you could not take it all to a waste disposal site. It would not succeed, and yet the Department here flouts the law based on volume of work. Unlike the

depositor of garbage, the law does not provide for the imposition of a penalty or sanction on public bodies and as such, some feel free to ignore the law because the *Act* provides for no remedy other than my recommendation that this not be allowed to occur again.

[22] It is difficult to conceive of circumstances where government would ignore repeated violations of the law by its citizens. The Department's Executive must bear responsibility for these violations of the law. It is up to Government to decide how to hold them accountable in the absence of any real means in the *Act* to do so and their indifference to public opprobrium.

[23] The Department has again committed a violation of section 16(1) by not responding within the legislated deadline, and is deemed to have refused access to the records. As stated in Report A-2018-009, access delayed often equates to access denied.

[24] While there was some communication with the Applicant (the Applicant did receive an acknowledgement letter and an advisory letter), the Applicant had to contact the Department on April 2, 2018 (business day 26) inquiring about the status of the access request. The Department advised that, as it conducts most follow-up communication with applicants by phone and not email, the ATIPP Coordinator is unable to provide a definitive record of all communications with the Applicant.

[25] As noted in Report A-2018-009, the Department ought to have contacted the Applicant in advance of the deadline to advise that it would not be met, offer an explanation and provide an estimate when a response would be received.

[26] Again, in this case, the failure to respond is aggravated by the failure to provide adequate updates to the Applicant after the deadline passed. As such, I find that the Department has not met the duty to assist imposed upon it by section 13.

[27] The deadlines in the *ATIPPA, 2015* are not suggestions satisfied by best efforts, which is how the Department appears to be operating. The deadlines are mandatory legal requirements that the Department failed to meet again in this case.

[28] The Department previously advised it would institute measures to comply with the recommendations outlined in Report A-2018-009. It has taken some steps to help streamline the access process. For example, it has implemented a centralized email account to receive all access requests, send out the requests for records to relevant employees within the Department, receive records and act as the contact point for applicants. The Department advised that both the ATIPP Coordinator and the Manager of Information Management (as backup coordinator) have access to that email account.

[29] The Department has one full time ATIPP Coordinator, however, the ATIPP Office has provided a half-time Coordinator since January 2, 2018 and the Manager of Information Management is assigned as a half-time resource to ATIPP and is essentially the backup ATIPP Coordinator.

[30] Even with these changes in place, the Department has again missed the statutory deadlines by a grossly excessive period. Additional work is required. By way of an example, the Department has not explained why both the Deputy and Assistant Deputy Minister must review the responsive records after their redaction by the ATIPP Coordinator. The ATIPP Coordinator is the Departmental expert with respect to the application of the *ATIPPA, 2015* exceptions to disclosure and his/her opinions should be accorded a corresponding level of deference. Unfortunately, the present reality for many ATIPP Coordinators is that their roles bear scant resemblance to the role envisaged in the *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*. Multiple levels of surplus reviews create additional bottlenecks that contribute to response delays, undermine the authority of ATIPP coordinators and potentially lead to some Applicants raising the specter of political or other inappropriate interference (no such allegation was made in regard to this matter).

V CONCLUSION

[31] The Department failed to meet its duties under sections 13 and 16 of the Act.

VI RECOMMENDATIONS

[32] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the Department of Transportation and Works:

1. Review its access request process in detail to determine where there are delays and implement measures to reduce those delays, including:
 - a) delays in requesting searches be completed,
 - b) the amount of time spent on analysis and redaction,
 - c) the length of time used in consultations, and
 - d) excessive levels of review/approval.
2. Comply with the statutory duties imposed upon it by section 13 and respond without delay to an applicant in an open, accurate and complete manner, including maintaining contact with applicants to keep them advised of the status of their access requests.
3. Comply with the statutory duties imposed upon it by section 16(1) and respond to a request without delay and, in any event, within statutory deadlines.

[33] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department 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 (in this case the Applicant) within 10 business days of receiving this Report.

[34] Please note that within 10 business days of receiving the decision of the Department under section 49, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of July, 2018.



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

