



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-003

January 15, 2019

Town of Gander

Summary:

The Town of Gander received an access to information request for all emails sent and received by a Town Councillor. The Town sought and obtained an extension from this Office. The Town failed to provide a final response to the Applicant and refused to cooperate with this Office during the investigation. The Commissioner concluded that the Town failed to comply with sections 13, 16, 44(2) and 97(4) the *ATIPPA, 2015* and recommended that it take action to provide the Applicant with a response to the access request.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, ss. 13, 16, 44(2), and 97(4).

Authorities Relied On:

Newfoundland and Labrador OIPC Reports [A-2008-001](#); [A-2011-012](#); [A-2018-006](#); [A-2016-023](#); [A-2017-010](#); [Access to Information Policies and Procedures Manual](#)

I BACKGROUND

- [1] On July 12, 2018, the Applicant submitted an access to information request to the Town of Gander seeking all correspondence sent from and received via a named Councillor's public body email account.
- [2] Due to the volume of records, the Town sought an extension of 30 business days from the Office of the Information and Privacy Commissioner to respond to the request. On July 31, 2018, this Office granted the extension to respond to the Applicant's request in accordance with section 23(2) of the *ATIPPA, 2015*, rendering their response to the Applicant due on or before September 21, 2018.
- [3] The Town advised the Applicant that it received an extension and expected to respond to the request by the new response deadline. The extension equated to allowing the Town 50 business days to process the request. The Town did not make any prior applications seeking approval to disregard this request.
- [4] The Town failed to provide the Applicant with a final response to the request before expiration of the extended statutory deadline. On October 17, 2018 the Complainant filed a complaint with this Office asking the Commissioner to investigate the failure of the Town to respond to the request.
- [5] We notified the Town of Gander of the complaint on October 24, 2018 but it failed to provide a response within 10 business days as required by the *ATIPPA, 2015*. On November 8, 2018, an Analyst with this Office telephoned the Town's ATIPP Coordinator, but there was no answer. The Analyst left a message and followed up with an email. On November 9, 2018, the Analyst again telephoned the Town's ATIPP Coordinator and again there was no answer. The Analyst left another message and again followed up with an email, stating a response to this Office was due on November 7, 2018.

- [6] This Office received no communication from the Town until November 26, 2018, when the Senior Analyst with this Office telephoned the Town CAO to discuss the lack of response to the complaint. The CAO advised that the ATIPP Coordinator would be in touch shortly.
- [7] On November 27, the Analyst spoke with the ATIPP Coordinator, who explained that the Complainant had decided to pursue an alternative route to resolution rather than a complaint with this Office. The alternative route related to a different request. The Town was alerted to its 'error' on November 27, 2018 and advised to answer the notification letter, as the time for informal resolution would shortly expire.
- [8] On November 29, the Analyst called the ATIPP Coordinator but received no answer. A message was left for the Coordinator that if this Office did not receive a response by the end of the day, the Act required moving to a formal investigation.
- [9] On November 30, this Office notified the Town of the formal investigation and provided a period of five business days for the Town to reply. The Town did not respond by the deadline.
- [10] The Town finally addressed the complaint when I contacted the Mayor on December 10, 2018, providing a response to my Office on December 19, 2018, 8 business days after its due date, and 39 business days after being notified of the complaint.

II PUBLIC BODY'S POSITION

- [11] The Town's position is that the non-compliance was a result of the confusion and frustration of the Town's ATIPP Coordinator. The Town asserts that it has received over sixty access requests in the last two years, many of which were from the Complainant.
- [12] The Complainant submitted two access requests within a short period in July 2018, which resulted in identifying approximately 8,000 responsive records. The particular request relating to the named Councillor's emails resulted in over 3500 responsive records. The Town asserts that the work involved exceeded its operational capacity.

[13] The Town maintains that the Complainant's intention is to overburden the resources of the Town. However, the Town acknowledged that the access request was not being processed by the ATIPP Coordinator at the time I spoke with the Town, and it was their understanding that the access request had not been reviewed in some time. The Town's CAO advised that despite realizing the 'error', no work was done on this request. It also appears that lack of work included a course of ignoring correspondence from OIPC staff.

III COMPLAINANT'S POSITION

[14] The Complainant submits that he should have received a final response to his access to information request by September 21, 2018.

IV DECISION

[15] Three issues must be addressed:

- 1) Did the Town fail to comply with the timelines set out in section 16?
- 2) Did the Town fail in its duty to assist the Complainant as set out in section 13?
- 3) Did the Town's fail to cooperate with this Office's investigation into the Complaint?

Did the Town fail to comply with section 16 of the Act?

[16] Section 16 of the *ATIPPA, 2015* stipulates the time period in which a Public Body must provide a final response to a request:

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18, without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23 .

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

- [17] The Town received the request on July 12, 2018. On July 31, 2018 the Town notified the Applicant that it had been granted a 30 day extension by this Office under s. 23(2) of the *ATIPPA, 2015*. The records were to be provided to the Applicant by September 21, 2018. Despite the significant extension, the Town still did not provide the Complainant with a final response by the statutory deadline.
- [18] The Town stated in its response on December 19, 2018 that the large volume of records in this request, together with the number of requests the Town had received, exceeded the Town's operational capacity, as the ATIPP Coordinator is the sole person responsible for the review of records. However, the Town does have a backup coordinator.
- [19] The Town chose not to seek a further extension on the request, although it appears they knew they would be unable to meet the extended deadline. Instead of seeking a further extension from this Office, the Town ignored the extension date and informed neither the Complainant nor this Office that it would be unable to complete the review of the records and provide a final response within the deadline. This is frankly unacceptable and flies in the face of the purpose of the Act. As noted many times in our previous reports, access delayed is access denied.
- [20] The claim that the Town confused the two requests is dubious. They received an extension on both. The fact that the Applicant appealed directly to Court on the lack of response to one has no bearing on the second request and I doubt the *bona fides* of the claim that error lead to the Town's deemed refusal to provide the responsive records to the Complainant on this request.
- [21] I conclude that owing to the relationship between the Complainant and the Town, stemming in part from his availing of access to information request processes, the Town's ATIPP Coordinator decided to simply ignore the request in question.
- [22] In choosing not to provide a final response to Complainant's access request, the Town is in a deemed refusal position pursuant to section 16(2).

Did the Town fail in its duty to assist the Applicant?

[23] The ATIPP Office's *Access to Information Manual* describes the obligations of public bodies in assisting applicants with access requests:

- 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 impact on 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;
- Designate a back-up ATIPP Coordinator who is trained and ready to assist in the processing of requests, as needed; and,
- Provide interim releases of records to an applicant as records are processed to mitigate excessive delays.

[24] The Town did not fulfill its responsibility to assist the Applicant in accordance with section 13. Further, despite the Town's statement to this Office that its ATIPP Coordinator is the only person responsible for processing access to information requests, the Town appears to have a backup Coordinator available.

[25] In fact, the Town has yet to provide any records to the Complainant having ceased processing of the records until December 19, 2018.

[26] I find that the Town breached section 13 of the *Act*, as it failed in its duty to assist the Applicant.

Did the Town fail to cooperate with the OIPC's investigation into the Complaint?

[27] Section 44 provides that the parties shall be informed of the complaint and may make representations to this Office:

44. (1) The commissioner shall notify the parties to the complaint and advise them that they have 10 business days from the date of notification to make representations to the commissioner.

(2) The parties to the complaint may, not later than 10 business days after notification of the complaint, make a representation to the commissioner in accordance with section 96.

[28] Section 97(4) also provides that:

97(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

[29] We notified the Town of this complaint on October 24, 2018. The notification letter requested from the Town the following information:

1. the Applicant's access to information request to the Town of Gander
2. The Town of Gander's decision letter in response to the request, if any;
3. any correspondence to or from the Applicant or any affected third parties regarding the request; and
4. any other information you think appropriate to provide in response to this complaint.

[30] The Town did not reply to the notification letter within 10 business days as required, nor did the Town respond to follow up emails from this Office on November 8 or November 9, or return telephone calls.

[31] As set out above, the Town advised this Office on November 27 that it was not responding as the Complainant had decided to pursue an alternative route to resolution other than a complaint with this Office. As already noted, the alternative route related to a different file. The Town was alerted to its 'error' and advised to answer the notification letter, as the deadline for informal resolution was quickly approaching.

[32] After the OIPC received no further contact with the Town, we sent a notification letter on November 30 to the Town advising of the move to formal investigation. With the Town having an additional five business days to submit any representations it might have.

[33] When the Town failed to answer the formal notification letter, I contacted the Town Council and Mayor, who were confused and unaware of this matter. Their cooperation with the investigation was readily forthcoming, stating that they accepted full responsibility for the mishandling of the file. However, it was no longer possible to informally resolve this matter due to the Town's previous actions during the informal resolution period. The Town was also long past deemed refusal at that point.

[34] This Office previously dealt with public bodies that have not fully cooperated with an investigation into a complaint. Report A-2016-023 addressed the failure of a public bodies to provide representations and records during an investigation:

[42] Additionally, when a complaint is filed with my Office, we must attempt to resolve the complaint informally, and where that is not possible, to proceed to a Report. The City's effort and lack of cooperation fell far short of the usual responsiveness and efforts of other public bodies in dealing with complaints. If the City does not provide the records and representation required of it in a timely fashion, this Office is hindered in its review of the matter. The shortened timelines of the ATIPPA, 2015 do not allow waiting for a public body to decide to provide a response and requested information at its leisure. Failure of a public body to provide the records and representations requested at the outset of a file and after repeated requests indicates either ignorance of or a lack of concern from a public body for this process.

[35] A lack of full cooperation of a public body during an investigation is rare. The failure of the Town of Gander to respond to letters, emails, and telephone calls in a timely manner during our attempt to resolve this complaint informally is particularly egregious as it undermines the role of the Commissioner, the function of this Office, and Act itself. Even if the Town was given the benefit of a doubt regarding its claim to have erred, its conduct after that point was equally wanting.

[36] The *Access to Information and Protection of Privacy Act* is not a piece of legislation which a public body can choose to follow when it suits them or when it is convenient. The

Act invests the Office of the Information and Privacy Commissioner with certain powers and authority, including the ability to investigate complaints. This process requires the full cooperation of public bodies in order to achieve its purpose. As referenced in Report A-2017-010, that a public body should “so completely disregard the mandatory provisions of the *Access to Information and Protection of Privacy Act, 2015* is fundamentally unacceptable.”

[37] I find that the Town of Gander breached sections 44(2) and 97(4) of Act by failing to provide a response to this Office in relation to a complaint.

V CONCLUSIONS

[38] The Town failed to respond to the Complainant’s access to information request within the statutory deadline, despite receiving a time extension from this Office, and is a breach of section 16 of the Act.

[39] Further, the total lack of cooperation with this Office prevented the OIPC from carrying out its duties in relation to the investigation and resolution of a complaint that might have been relatively uncomplicated. A failure to provide a response to this Office contravenes section 44(2) and subsequent failures to respond or provide records to this Office breaches section 97(4).

VI RECOMMENDATIONS

[40] Having concluded that the Town failed to meet the statutory deadline to respond to a request set out in section 16, and failed to adhere to its duty to assist as set out in section 13 of the *ATIPPA, 2015*, I recommend under the authority of section 47(d) of the *ATIPPA, 2015* that the Town:

- a. Review and adhere to published guidance provided by the Access to Information and Protection of Privacy Office for responding to access and privacy requests;

- b. Provide the Coordinator and backup Coordinator with training on how to respond to access requests within 90 days of the release of this Report;
- c. Implement internal procedures to ensure statutory time limits are met in future;
- d. Consider interim releases of records in future when requests involve a large volume of records and approval for a time extension has been granted by this Office;

[41] In response to the Town's failure to cooperate with the investigation by this Office, I recommend under section 47(d) of the *ATIPPA, 2015*:

- f. Full and open communication with Analysts and Senior Staff of this Office on future investigations;
- g. Timely responses to notification letters and requests for records within the legislated time periods;

[42] Finally, I recommend a full review of the records requested by the Complainant in his request dated July 12, 2018. Under the authority of section 47(a) of the *ATIPPA, 2015*, the Town must provide all records to which the Applicant is entitled by February 1, 2019.

[43] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Town of Gander 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.

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of January 2019.



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