



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-013

October 6, 2010

Department of Health and Community Services

Summary:

The Applicant made two separate applications under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) to the Department of Health and Community Services (the “Department”) for access to records relating to an air ambulance report and a series of ministerial briefing notes. In both cases, the Department did not respond to the Applicant’s request within the 30 day time limit specified in section 11(1) of the *ATIPPA*. Although the Department offered an explanation for the delay in responding to the Applicant’s access requests, it did not claim a time extension under section 11(1)(a), (b) or (c). The Commissioner found that the Department failed to fulfill its duty to respond to the Applicant’s requests within 30 days of their receipt. The Commissioner also found that both the Department’s delay in responding to the Applicant’s access requests and its failure to communicate the delay to the Applicant constitute failures to fulfill the Department’s duty to assist the Applicant under section 9 of the *ATIPPA*.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 9, 11(1), 11(1)(a), 11(1)(b), 11(1)(c), 11(2), 68(2) and 68(4).

Authorities Cited:

Newfoundland and Labrador OIPC Report A-2009-011.

Other Resources:

Newfoundland and Labrador, Access to Information and Protection of Privacy Office, *Access to Information ATIPPA Act: Part I-III, Policy and Procedures Manual* (St. John’s: Department of Justice, 2008), online: <http://www.justice.gov.nl.ca/just/info/access_policy_and_procedures_manual.pdf>.

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “ATIPPA” or “Act”) the Applicant submitted two access to information requests on March 31, 2010 to the Department of Health and Community Services (the “Department”), in which she requested disclosure of records, as follows:

I am requesting under the Access to Information Act details on air ambulance report that was completed by [a named consultant], completion date March 19, 2010. This request includes details of:

- *When the consultant was hired*
- *Remuneration to consultant for report and any other expenses*
- *A copy of the MOU with [the consultant]*
- *Copy of air ambulance statistics provided to consultant in preparation of report*
- *List of stakeholders contacted regarding this report, in preparation of writing this report*
- *Copy of email communications between government and [the consultant] regarding this report*

(first access request)

- [2] The second access request reads:

I am requesting under the Access to Information Act copies of briefing notes prepared for the Minister of Health between the dates January 4, 2010 to March 26, 2010.

(second access request)

- [3] The Department acknowledged receipt of both access requests with letters to the Applicant dated March 31, 2010. In accordance with section 68(2) of the *ATIPPA*, the Department then wrote to the Applicant on April 26, 2010 to indicate that a fee was being levied under section 68(1) of the *Act* for processing each of the two access requests. The Applicant paid both fee estimates by cheque dated May 6, 2010.

- [4] Having received no further contact from the Department, the Applicant telephoned the Department’s Access to Information and Protection of Privacy (ATIPP) Coordinator on June 14, 2010 to express her concern about the Department’s delay in providing records in response to her

access to information requests. During the same telephone call, the Applicant asked the Department's ATIPP Coordinator to pinpoint precisely when the Department would make its final decision in relation to the disclosure of records. The ATIPP Coordinator was unable to do so and on June 14 the Applicant filed a Request for Review in relation to both of her access requests. In both cases, the Applicant asked this Office to conduct a review to find out why the records she requested had not been released within the time limit stipulated in the *ATIPPA*.

- [5] Efforts were made through this Office to resolve these two Requests for Review informally. An investigator from this Office asked the Department to explain the lengthy delay in providing records in response to the Applicant's access requests. In each case, the Department was prepared to explain its delay to this Office and did so on July 20, 2010 (first access request) and June 30 (second access request). The Department's explanations will be presented in Part II of this Report.
- [6] On July 20, 2010, the Applicant received a final decision letter from the Department in relation to the first access request. This letter was accompanied by 232 pages of responsive records. On July 21, 2010, the Applicant received a final decision letter from the Department in relation to the second access request. This letter was accompanied by 25 pages of responsive records.
- [7] Upon receiving and reviewing the responsive records for her two access requests, the Applicant communicated to this Office that she would not accept an informal resolution of her two Requests for Review. The Applicant maintained that she was not satisfied with the explanation for the length of time that had passed since she first filed her access requests with the Department on March 31, 2010, and requested a formal investigation of the Department's handling of her access requests.
- [8] Due to the inability to resolve these two Requests for Review informally, both the Applicant and the Department were advised by letter dated August 17, 2010 that the Requests for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the *Act*.

II HEALTH AND COMMUNITY SERVICES' SUBMISSION

[9] The Department did not provide a formal submission to this Office in relation to its delay in responding to either of the Applicant's two access requests. Instead, the Department referred this Office to the explanations already on file. In both explanations, the Department pointed out that it had not intended to deny the Applicant access to the requested records. Instead, in both cases circumstances were present which delayed provision of a final decision regarding the Applicant's access requests until after the timeframe stipulated in the *ATIPPA*.

First Access Request

[10] In its July 20 explanation of the delay in responding to the Applicant's first access request, the Department stated:

A large amount of records had to be searched in order to identify all email communications that occurred between the Department and [the consultant] regarding the air ambulance report. Once these emails were compiled, it was determined that some of the information contained in them had been provided by officials at Eastern Health in reference to a broader review of all government air services. Eastern Health had to be consulted in order to determine whether the information relevant to them should be disclosed or exempted from disclosure under Part III of the Act. Additionally, searching for all statistics provided to the consultant in the writing of the report proved to be a lengthy process which also delayed the drafting of the response.

In short, the Department's explanation of the delay points to a combination of factors: the large number of records that had to be searched, the need to consult another public body from which some records originated, and the time taken to search for the statistics requested by the Applicant.

Second Access Request

[11] In its June 30 explanation of the delay in responding to the Applicant's second access request, the Department stated:

Firstly, once a search for all records responsive to the request was complete it was determined that several of the records contained information pertaining to other public bodies. These public bodies had to be consulted in order to determine whether the information relevant to them should be disclosed or exempted from disclosure under Part III of the Act. Additionally, a legal opinion had to be obtained regarding the disclosure of a briefing note which contained information about legal proceedings. Finally, the sensitive nature of the documents contained within the response required

rigorous review to ensure that information exempt from disclosure under Section 18 of the Act was not released.

In brief, the Department's explanation indicates that the time taken to consult other public bodies and also to obtain a legal opinion regarding disclosure of records were factors in the delay in providing the Applicant with a final decision regarding her access request.

III APPLICANT'S SUBMISSION

[12] The Applicant provided this Office with formal submissions for each of her two access requests on September 1, 2010. In her submissions, the Applicant stated that there is little or nothing in the two files to justify the more than three months it took the Department to respond to her access requests. (The Applicant submitted her access requests on March 31, 2010 but did not receive a decision letter and records from the Department until July 20 and 21, respectively.) In turn, the Applicant expressed concern that the Department had, at no time prior to the involvement of this Office, provided her with an explanation or justification of its handling of her two access requests.

[13] In particular, the Applicant indicated that she believed the Department violated sections 9 (duty to assist) and 11 (time limit for response) of the *ATIPPA* in handling her access requests.

First Access Request

[14] In her submission the Applicant indicated that, despite the quantity of responsive records, their review and severing could easily have been completed within the 30 day time limit. To defend this position, the Applicant itemized the redactions done to the responsive records. She received 232 pages of records in response to her access request. From that substantial number of records was severed 116 email addresses or other forms of contact information, a column from a table of flight information and eight other one or two line redactions. An additional nine items were deemed non-responsive to the access request. All email correspondence included in the responsive records came from the email addresses of just two public servants and covered a period of approximately four months.

[15] In turn, the Applicant pointed out that her access request involved a government program that had been a controversial public issue at the time the request was submitted to the Department. Moreover, some information contained in the responsive records “would have created more controversy for government had the information been made public at an earlier time.” With respect to the first access request, the Applicant concluded that “the delay appears to be based on something other than the work required to gather and review this information.” I would note that the Applicant’s concern in relation to her two access requests appears to be well encapsulated by the often used, but still apt, expression: “access delayed is access denied.”

Second Access Request

[16] In her submission, the Applicant reiterated her suspicion that the Department intentionally delayed responding to her access requests. The Applicant stated that she eventually received eight briefing notes consisting of a total of 25 pages. Two pages were severed completely but very little other information was withheld. The Applicant highlighted the fact that all eight of the briefing notes she requested on March 31, 2010 had been finalized by April 3, leaving plenty of time for the Department to review the records and undertake any necessary severing of information well within the 30 day time limit. Nevertheless, the final decision letter releasing them in part was not sent to the Applicant until July 20.

[17] In both submissions the Applicant urged this Office to:

...make every attempt and explore every avenue available under the legislation to ensure the spirit of openness and accountability is maintained, that public debate and scrutiny is protected and that information release is completed within a timely manner free of manipulation.

IV DISCUSSION

[18] While the Applicant in the just-quoted passage implies that the Department’s delay in responding to her access requests was the result of an effort to undermine the *ATIPPA*’s “spirit of

openness and accountability,” the Department conveyed to this Office its position that the delays were in no way intended to deny the Applicant access to the records she requested.

[19] I have not been presented with evidence that would permit me to make a finding in relation to the Applicant’s allegation that the Department intentionally delayed its final decisions in response to the Applicant’s access requests. Nevertheless, this Office’s investigation of the Department’s handling of the Applicant’s access requests does permit me to make a finding in relation to the Applicant’s submission that the Department has violated sections 9 and 11 of the *ATIPPA*.

[20] Section 9 reads:

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.

[21] Section 11 reads:

(1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it, unless

(a) the time limit for responding is extended under section 16;

(b) notice is given to a third party under section 28; or

(c) the request has been transferred under section 17 to another public body.

(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.

[22] Beginning with the latter provision, section 11 of the *ATIPPA* requires the head of a public body to make every reasonable effort to respond to a request in writing within 30 days after receiving it. This time limit may be set aside only if a) it is extended under section 16 of the *Act*, b) a third party is notified of the request under section 28, or c) the request is transferred to another public body under section 17. If the head of a public body exceeds the 30 day time limit without properly invoking sections 11(a), (b) or (c) (each of which requires the public body to notify the Applicant of the claimed extension), then the head is considered to have refused the record (section 11(2) of the *ATIPPA*).

[23] While the Department identified a number of reasons for its delay in providing the Applicant with a final, written response to her access requests, the Department submitted no evidence to this Office that the 30 day time limit was extended under section 16, that a third party had been notified under section 28 or that the request was transferred to another public body under section 17 of the *ATIPPA*. This fact, combined with the knowledge that the Applicant waited more than three months for a final response from the Department, obliges me to find that the delay constitutes a breach of the section 11(1) of the *Act*.

[24] Before disposing of this issue, however, it is necessary to inquire into the handling of the Estimate of Cost (fee estimate) letters associated with the Applicant's two access requests. Doing so is necessary in order to be precise about the length of the delay experienced by the Applicant in the two access requests investigated in this Report.

[25] Section 68(4) of the *ATIPPA* provides that the 30 day clock for responding to an access request will be frozen pending the provision of a response by the Applicant to the fee estimate. Public bodies should send a fee estimate to an applicant as quickly as is reasonable after an access request has been received. In the present case, the Applicant made no issue of the timing of delivery or of the amount of the two fee estimates.

[26] The fee estimates were dated April 26, 2010 and were both paid in full by the Applicant on May 6. Thus, the countdown of the Department's 30 day time limit for responding to the Applicant's access requests was frozen for the 10 days it took the Applicant to respond to the Department's fee estimates. This effectively increased the length of the time limit within which the Department had to respond to the Applicant's access request to 40 days. (Again, the only other way the 30 day time limit could have been lengthened under the *Act* was if the Department had properly claimed a time extension under section 11(1), which it did not do.)

[27] The Department thus had a duty under the *ATIPPA* to respond to the Applicant's two access requests by May 10, 2010. Because it did not provide the Applicant with final decisions in response to her two access requests until July 20 and 21, I find that the Department failed to fulfill its duty under section 11(1) to make every reasonable effort to respond, in writing, to the Applicant's access requests within 30 days of receiving them. Furthermore, even though the Department eventually did

provide the Applicant with written responses to her access requests (including records), I find that the Department's failure to provide the Applicant with a response within 30 days must be considered a refusal of access to the records under section 11(2) of the *ATIPPA*.

[28] Turning to section 9 (duty to assist), I begin by pointing out that the Applicant had no qualms about the accuracy or completeness of the Department's handling of either access request; moreover, I note that the Department promptly acknowledged receipt of the Applicant's access requests and provided a fee estimate under section 68 of the *ATIPPA* within the 30 day time limit for responding to the Applicant's access requests. On the other hand, section 9 of the *ATIPPA* clearly includes within the scope of the duty to assist an applicant, the obligation to respond to an access request "without delay." Having already stated my finding regarding the Department's failure to fulfill its duty under section 11(1), it is a straightforward matter also to find that the Department failed to fulfill its duty to assist the Applicant without delay when it provided final decisions to her two access requests 71 and 72 days after their May 20, 2010 due date.

[29] As I indicated in paragraph 79 of my Report A-2009-011, a public body's execution of its duty to assist an applicant should be measured on a standard of "reasonableness, not perfection." In the present case, the Department's delay in responding to the Applicant's access request does not meet a reasonableness standard. Indeed, section 11(1) of the *ATIPPA* provides the Department with an opportunity to extend the 30 day time limit for reasons that fall within subsections (a),(b) or (c). The Department, however, made no attempt to utilize this provision in the *Act* and as a result its delay in responding to the Applicant's access requests was unreasonable.

[30] In paragraph 80 of my just-quoted Report, I also indicated that the duty to assist an applicant includes three components in addition to the duty to respond to an access request without delay:

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.

[31] The ATIPP Office in the Department of Justice provides a useful synopsis of the duty to assist an applicant on page 3-4 of its ATIPP Manual:

The Act requires that public bodies try to respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible.

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.

The duty to assist the applicant is an important, underlying provision of the Act. *It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.*

Both the applicant and the public body will benefit from a cooperative, respectful relationship.

[emphasis in original]

[32] Had the Department informed the Applicant of its delay in responding to her access requests, a cooperative and respectful relationship between the Department and the Applicant might have developed. In turn, if this relationship had been cultivated by the Department, it might have been possible to avoid the need to get this Office involved in the investigation of the Applicant's access requests. In the present case, however, the Department's failure to inform the Applicant of delays in the completion of responses to her access requests is also a failure of the Department to fulfill its duty to assist the Applicant in an open, accurate and complete manner.

V CONCLUSION

[33] At the time the Applicant submitted a Request for Review of the Department's handling of her two access to information requests on June 14, she had received neither a final written response to her March 31 access requests, nor written acknowledgement that a time extension was being claimed for either request under section 11(1) of the *ATIPPA*. The Applicant had also received neither warning of the Department's delay in responding to her access requests, nor any explanation of it. The Department eventually did provide a decision letter and responsive records for both requests. Nevertheless, the *ATIPPA* does not permit me to ignore a public body's failure to respond to an access request within 30 days, unless the public body 1) claims a time extension before the 30 day time limit expires, 2) refers to the relevant provision of the *Act* that justifies the extension, and 3) explains in full and to my satisfaction why the public body is justified in claiming an extension under the *Act*.

[34] It is common for an applicant not to insist that a Request for Review of a delayed response to an access request undergo a formal investigation. Indeed, an applicant may be satisfied to consider the matter resolved once the records are received in good order, even if there has been considerable delay in getting a response from a public body. For example, this Office received a Request for Review that was very similar to the two addressed in this Report that also involved the Department of Health and Community Services. That Request for Review was settled informally. The Applicant referred to in this Report, however, requested that I investigate the Department's delay in responding to her two access requests.

[35] Based on her formal submissions, it appears that the Applicant's decision to proceed with a formal investigation of her access requests, despite having since received responsive records, is based on her suspicion that the Department's delay was an intentional act. In particular, the Applicant expressed concern that the Department's handling of her access requests was designed to prevent her from obtaining records to which she had a right of access under the *ATIPPA* at a time when the issue was receiving attention in the media. While I did not find any evidence of intentional delay on the part of the Department, I sympathize with the Applicant's concern that the ability of the *ATIPPA* to fulfill the purpose of making public bodies more accountable to the public (section 3(1)) would indeed be undermined if public bodies delay disclosure of records until after an issue had faded from the minds of the attentive public.

[36] As I have already indicated, I find that the Department failed to make every reasonable effort to respond to the Applicant's access requests within 30 days, and, in turn, the Department failed to assist the Applicant when it failed to respond to her access requests without delay and failed to respond to her access requests in an open, accurate and complete manner.

VI RECOMMENDATIONS

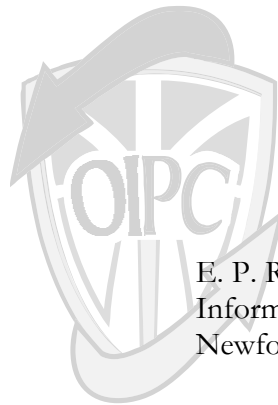
[37] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Department, in future access requests, be mindful of the statutory duty imposed on it by section 9 and section 11 of the *ATIPPA*. I also recommend that the Department review its policies and procedures for handling access to information requests for the purpose of ensuring that it complies with its duty to

assist in section 9 and meets the time limit for responding to access requests under section 11(1) of the *ATIPPA*.

[38] Under 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 its final decision with respect to this Report.

[39] Please note that within 30 days of receiving a 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*.

[40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of October, 2010.



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