



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2011-014

September 21, 2011

### Town of St. George's

**Summary:**

The Applicant made an application to the Town of St. George's (the "Town") under the *Access to Information and Protection of Privacy Act* (the "ATIPPA") for access to records related to a specific item of the Town's 2009 audited financial statement. The Town extended the time to respond under section 16 of the ATIPPA and then failed to respond within this extended period. The Town is considered to have refused access to the records as per section 11 of the *Act*. When asked to explain this deemed refusal, the Town stated it would have to re-engage its accountant to find the responsive records. The Commissioner determined the Town had failed in its duty to assist the Applicant by extending the time frame to respond without just cause and by failing to conduct a reasonable search for the records. The Commissioner recommended the Town conduct a proper search and release any records found to the Applicant and to this Office in accordance with the ATIPPA.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, ss. 2(e), 3, 7(1), 9, 11(2), 16(1)(b), 44(a) and 52(1); *Public Inquiries Act, 2006*, S.N.L. 2002, c. P-38.1, as amended, s.9.

**Authorities Cited:**

Newfoundland and Labrador OIPC Report A-2006-009, A-2009-011;  
Ontario OIPC Order M-909.

## I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*” or the “*Act*”) the Town of St. George’s (the “Town”) received an access to information request on September 13, 2010 as follows:

*In the 2009 audited financial statement note 6 acct receivable other \$91,517*  
*Provide breakdown*  
*Name on receivable for each amount*  
*Nature for each receivable*  
*Amount of each*  
*Schedule payment and when amount received in 2010*

- [2] In a letter dated October 12, 2010, the Town Manager wrote to the Applicant to indicate that the 30 day time limit for responding to his request had been extended for an additional 30 days under paragraph 16(1)(b), which states that:

*16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where*

*(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body.*

- [3] The extended period passed with no response from the Town to the Applicant and as per section 11(2) of the *Act*:

*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.*

- [4] In a complaint dated and received November 9, 2010 the Applicant asked this Office to review the time extension. This was followed by a request for review received December 6, 2010 in which the Applicant stated that:

*Initial request received September 13, 2010 by Town*  
*Had the request extended 30 days by Town*  
*No reply received or documents provided by today December 6, 2010*

[5] In response to his time extension complaint, an Analyst wrote to the Town's Access & Privacy Coordinator on November 10, 2010 to notify the Town of the complaint and asked for a detailed explanation of the estimate of time required to process this request. The Analyst suggested that the detailed explanation should "cover such issues as the volume of records involved, the extent of the work required to compile them, where and how these records are stored, etc."

[6] The same Analyst wrote to the Town again on December 7, 2010 asking for a response to the request for review which had been filed by the Applicant on December 6, including copies of records responsive to the access request. There was no response forthcoming from the Town to either of these letters.

[7] The Assistant Commissioner wrote to the Town on December 10, 2010 and indicated that there were a number of files between this Office and the Town with outstanding matters that needed to be addressed. He explained that information was required in order for this Office to facilitate the resolution of these files. Part of the list of Town files included the access request relevant to this Report.

[8] In accordance with section 52(1) of the *ATIPPA* and section 9 of the *Public Inquiries Act*, (which empower this Office to compel production of records) on January 19, 2011 the Town Manager was served with a Summons to Produce regarding several of the files referenced in the Assistant Commissioner's letter of December 10. In the letter accompanying this Summons, our legal counsel requested a response to this Office's inquiries on this file. Our counsel reminded the Town in this letter of its duty to assist an Applicant and its obligation to provide information to this Office when requested under the *ATIPPA*.

[9] An Affidavit dated February 10, 2011 from the Town Manager contained the following explanation of the time extension:

*- The Town retained an independent accountant retained for the purpose of preparing its 2009 audited financial statement. In order to assist the accountant with the preparation of same, the Town provided the accountant with access to all of the Town's financial records;*

*- The Town's 2009 audited financial statement is a matter of public record;*

- *None of the Town's employees are sufficiently familiar with accounting practices to be able to determine what would have been considered by our accountant to be "other accounts receivable";*
- *This request was made in September and the extension was requested on October 12, 2010. This was a particularly busy time for the Town, as this is when the Town was working on its budget for 2011; and,*
- *To respond to this request within the normal time, particularly when considered in conjunction with the other outstanding Access to Information requests submitted by [the Applicant] and the resources of the Town, would have unreasonably interfered with the operations of the Town.*

[10] After this Affidavit was received, an Analyst from this Office contacted the Town to determine its position on providing responsive records for the original access request. The Town stated that it was not willing to pay the accountant to find the records responsive to the access request. The Town also indicated that they were unable to locate the records themselves as Town staff did not have the expertise required to properly identify which records would be responsive.

[11] Attempts to resolve the time extension complaint and the request for review by informal means were not successful and by letters dated July 19, 2011 both the Applicant and the Town were advised that both had been referred for formal investigation, in keeping with 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 TOWN SUBMISSION

[12] The Town provided a written formal submission. Regarding the time extension, it states:

*The Town is firmly of the opinion that the extension of time under section 16 of the ATIPPA was justified...the extension was requested on October 12, 2010, as this was a particularly busy time for the Town as it was preparing its 2011 budget, and as the Town was, at the time, in the course of responding to numerous other information requests from [the Applicant]...the Town has three (3) full-time employees and six (6) part-time employees, which include labourers and other non-administrative positions, and the Town did not have the capacity to respond to this request, or even consider it, within the initial legislated response period. To*

*do so would have unreasonably interfered with the Town's operations. In fact, although not material to the ongoing investigations, the Town states that even with the extensions in respect of [the Applicant's] numerous requests, responding to same is in fact interfering with the Town's operations to a significant degree.*

[13] On the issue of the responsive records, the Town's submission states:

*With respect to the substance of the documents requested, the Town states that they do not exist...the Town's audited financial statements were prepared by an independent accountant retained by the Town, and the statements are in fact a matter of public record. The Town does not have the expertise with accounting practices to be able to breakdown the accountant's work, nor is it sure what the accountant considered to be "other accounts receivable" for the purpose of Note 6 of his audited report. The Town cannot respond to this request absent involvement by the accountant. The Town is not legislatively required to actually retain and pay a third-party to conduct the work necessary to respond to this request, nor does it have the financial capacity to do so.*

### III DISCUSSION

[14] Under section 44 of the *ATIPPA* this Office is empowered to carry out investigations of time extension complaints. Section 44 states:

*44 The commissioner may investigate and attempt to resolve complaints that*

*(a) an extension of time for responding to a request is not in accordance with section 16.*

[15] Regarding the time extension the Town Manager relies upon the timing of the request (during their budget time) and the time involved in processing the other outstanding access to information requests submitted by the Applicant as his evidence of the Town's need for the extension.

[16] I have no doubt that the Town employees were quite busy at this time of year and that there had been other outstanding Requests from this Applicant. I further realize that these tasks, which are carried out under the *ATIPPA* are in addition to the other full-time duties which occupy the Coordinator and the Town Manager. The accumulation of the outstanding access to information requests, however, is in large part due to the failure of the Town to respond promptly as the

Requests were filed. This delay appears to have been a conscious decision, one which is contrary to the spirit and intent of the *ATIPPA*.

[17] I say a “conscious decision” because the Applicant advised this Office that the Town Council had passed the following motion in their October 18, 2010 meeting (during the 30-day extension on this matter) under the heading “Appoint New ‘Head’ for *Access to Information and Protection of Privacy Act*”:

*After some discussion, council’s recommendation was that staff refuse to deal with nuisance requests for information as they are tying up office staff.*

[18] There is no provision in the *ATIPPA* that would allow such a course of action.

[19] Furthermore, the *ATIPPA* does not set out in section 16, or elsewhere, any provision for an extension of time based on the position that the public body is busy with both the demands of its core operations and the demands of responding to other access requests. The *ATIPPA* is a statute with which every public body is required to comply and the cost of complying with legitimate requests for access to information is a cost that the public body is required to bear even if the public body considers such requests to be a “nuisance”. There is no more excuse for failing to comply with the *ATIPPA* than there is in failing to comply with the requirements of the *Municipalities Act, 1999*, or any other law of this province.

[20] In this instance, the Town has failed to provide any evidence in support of its position that an extension of time was necessary, in particular in light of the Town’s position that there were no responsive records. I, therefore, conclude that the Applicant’s complaint is well founded. Any further use of the 30 day extension by the Town in future access requests must be clearly supported by section 16.

[21] As to the request for review involving the Town’s failure to respond within the extended time period as well as its position that there are no responsive records, the relevant sections of the *Act* state:

*3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

(a) *giving the public a right of access to records;*

7. (1) *A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body....*

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.*

11. (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] I discussed the duty to assist, from section 9 of the *Act*, in detail in Report A-2009-011 at paragraph 80:

*The duty to assist, then, may be understood as having three separate components. 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.*

[23] In that same decision the standard to be applied and the burden of proof involved regarding the duty to assist were discussed at paragraph 79:

*...the standard against which the duty to assist is measured is reasonableness, not perfection. I would also observe that while the overall burden of proving that the duty to assist has been fulfilled rests with the public body, it may be the case that on any specific issue, the burden of proof of a particular proposition may rest with the party that is asserting it.*

[24] My predecessor discussed the burden of proof borne by the Applicant in A-2006-009:

*It is important to note that when an Applicant, in a Request for Review, takes the position that a public body...has not undertaken an adequate search for a record, there is some onus on the Applicant to present a reasonable basis for that position. As I noted in my Reports 2005-003 and 2006-006, adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that:*

*Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.*

[25] In Ontario Order M-909 the Inquiry Officer also stated that a reasonable search for records “must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.”

[26] The existence of the category of “accounts receivable other” in the audited financial statement, and the fact that it represents over \$91,000 is evidence enough to establish a “reasonable basis” for concluding that records must exist that are responsive to the Applicant’s access request. Although the Town has explicitly stated that records do not exist, they have also stated that the issue is actually that the request cannot be answered without communicating with the accountant, which could come with a cost, although they do not say how much.

[27] The central issue here is: if a reasonable search had been conducted, could the Town have produced these records? The Town Manager has said that no Town employee has the required expertise to know which records fall under the specific heading of “accounts receivable other”. Even if I accept the assertion that the Town cannot identify this large category of accounts receivable, this does not end the matter. The Town Manager refers to the accountant who prepared the audited financial statement as a “third-party” and asserts that this person could indeed identify such records. The accountant was retained to prepare the audited financial statement of the Town, which could only have been done based on records provided by the Town. At most, the accountant would simply have to tell the Town which records were placed in that category.

[28] The definition of “employee” under section 2(e) of the *ATIPPA* includes “a person retained under a contract to perform services for the public body”. Therefore, the independent accountant retained by the Town qualifies as an employee of the Town under the *ATIPPA* and is not a third-party. This is further support for the view that these records are in the custody and control of the Town and that the Town has an obligation under the *ATIPPA* to respond to this request.



[29] Furthermore, the Town has not met its burden of proof that a reasonable search, as defined in the Ontario Order and accepted in past Reports from this Office, that is, one conducted “by knowledgeable staff in locations where the records might reasonably be located,” was conducted for records responsive to the Applicant’s request.

#### IV CONCLUSION

[30] I conclude that the Applicant’s time extension complaint is well founded.

[31] I also conclude that the Town failed to meet the extended time period, which is a deemed refusal. I note this even though later, during this review, an explicit refusal was forthcoming to this Office.

[32] Further, I conclude that the Town did not fulfill its duty to assist the Applicant in that they did not conduct a reasonable search for records responsive to the Applicant’s access request, nor did they ever actually issue a response to the Applicant.

[33] When a citizen reviews the audited financial statements of their town and seeks information to help them understand an item involving \$91,517 of accounts receivable, I think they have a right to receive that information. In fact, the ability of citizens to understand how their government operates is the very purpose of the *ATIPPA*, because only an informed citizen can hold his or her government accountable.

#### V RECOMMENDATIONS

[34] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that:

1. the Town conduct another search for records responsive to the Applicant’s access request. I recommend this be “conducted by knowledgeable staff in locations where the records in question might

reasonably be located” and if necessary, contact the accountant to get a list of accounts receivable in the relevant category which would assist the Town in identifying the responsive records;

2. if any records are located as a result of this search, I recommend they be released within 30 days of receipt of this Report to this Office (so we may ensure full compliance with these recommendations) and to the Applicant as appropriate under the *Act*;
3. any further use of the 30 day extension by the Town be clearly supported by section 16;
4. regardless of the motion passed by the Town Council, I recommend that the Town reply to all access requests in an open, accurate and complete manner, as required by the *ATIPPA*; and,
5. the Town ensure that it makes a full and reasonable search for all records that may be responsive to any access requests it receives in the future and respond within a timely manner, as required by the *ATIPPA*.

[35] Under authority of section 50 of the *ATIPPA* I direct the head of the Town 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.

[36] Please note that within 30 days of receiving a decision of the Town 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*.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of September, 2011.

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

