



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-003

February 14, 2013

Department of Justice

Summary:

The Applicant submitted two access to information requests to the Department of Justice dated June 15, 2012. The requests were for information regarding psychiatric services at Newfoundland and Labrador correction facilities, penitentiaries, jails or prisons and for payments made to external consultants for review of a psychiatrist at Her Majesty's Penitentiary. The Applicant received no response to his request for information regarding psychiatric services until November 9, 2012, when the Department responded to both this Office and the Applicant as a result of his Request for Review submitted to this Office in October. This four and half month delay occurred despite the fact that the majority of information was in the custody or control of the Department and required little redaction. The request with respect to payment information was responded to on August 24, 2012, when the Department notified the Applicant that no records existed. There was no communication with the Applicant to explain the reasons for the delay in either case. The Commissioner found that in both cases there was a breach of both sections 9 and 11 of the *ATIPPA*. As the Department had already committed to reviewing its policies and procedures for timely release of information, the Commissioner recommended that the Department make an effort to communicate with applicants when delays in responding are expected and unavoidable.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 9, 11 and 16.

Authorities Cited:

Newfoundland and Labrador OIPC Reports A-2012-012 and A-2013-001

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted two access to information requests dated June 15, 2012 to the Department of Justice (“the Department”). They were received by the Department on June 20, 2012. The first request (“First Request”) sought disclosure of records as follows:

Emails, briefing notes, memos, reports regarding psychiatric services at Newfoundland and Labrador Correction facilities, penitentiaries, jails or prisons.

This request was later narrowed in scope to include only information created after February 1, 2011.

- [2] The second request (“Second Request”), also received by the Department on June 20, 2012 was for the following records:

Payments made to external consultants for review of Her Majesty’s Penitentiary Psychiatrist [Name].

- [3] The Applicant emailed the Departmental Access to Information Coordinator on August 29, 2012 to check on the status of the First Request. On August 31, the Applicant was informed that the records were still being reviewed. Again, on September 21, 2012, the Applicant inquired as to the status of his request, and once more he was informed that the records were still being reviewed. Regarding the Second Request, on August 24, 2012, the Applicant was contacted by the Department and informed that there were no records responsive to his request.

- [4] The Applicant filed a Request for Review with this Office regarding both access requests on October 10, 2012. He still had not received any records with respect to the First Request and he was dissatisfied with the amount of time it took the Department to advise him that there were no records responsive to his Second Request. On November 9, 2012, the Department provided records responsive to both requests to the Applicant and this Office. The Applicant was still dissatisfied with the amount of time taken by the Department to respond to his requests for information and the file could not be resolved informally. By letters dated November 23, 2012 the parties were advised that the Request for Review had been referred for formal investigation as per 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 PUBLIC BODY'S SUBMISSION

[5] The Department's submission is set out in correspondence dated January 23, 2013. With respect to the First Request, the Department states that it identified some records responsive to the request which could have been released, but the record which was most responsive to the request (a Peer Review) was not received by the Department until September 19, 2012 (the Department knew this record was being prepared). Given the time that had already elapsed and the nature of the records that were to be released, a decision was made to deal with the Department's response to the Peer Review prior to responding to the Applicant.

[6] With respect to the Second Request, the Department states that after their initial search did not reveal any information relating to payment made to the external consultant, it carried out an additional search of records at Her Majesty's Penitentiary and the Department's Finance and General Operations Division. Once it was confirmed through these searches that no payment had been made, a further search was conducted to determine whether an invoice had been received. Again, this resulted in no records being found, and the Applicant was advised that there were no responsive records on August 24, 2012. Once the invoice was received by the Department on October 23, 2012, it was forwarded to the Applicant.

[7] Finally, in its submission the Department advises that in light of the concerns raised, it will be reviewing its "process for handling ATIPP requests with a view to streamlining procedures to allow a more timely processing of requests."

III APPLICANT'S SUBMISSION

[8] The Applicant did not provide a submission.

IV DISCUSSION

[9] Some of the records received in response to the First Request were severed under sections 20, 21 and 30, however, as the severing was not raised as an issue by the Applicant, I will not discuss the application of these sections.

[10] As discussed most recently in Reports A-2012-012 and A-2013-001, this Report again deals with excessive delay by a public body in responding to an access to information request. These requests were received on June 20, 2012, prior to the amendments to the *ATIPPA* (which came into force on June 27, 2012). The relevant sections of the *ATIPPA* were sections 9, 11 and 16:

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. (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.

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

(a) the applicant does not give sufficient details to enable the public body to identify the requested record;

(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;

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

(3) Where the time limit for responding is extended under subsection (1) or (2), the head of the public body shall notify the applicant in writing

(a) of the reason for the extension; and

(b) when a response can be expected.

(c) that the applicant may make a complaint under section 44 to the commissioner about the extension.

[11] While I do not doubt that the Department fully intended to provide access to the requested records, the fact remains that according to section 11(2), if a response is not received by the Applicant within 30 days of the public body's receipt of a request, the public body is deemed to have refused access to the records. In this case, the records consisted of mostly publically available information, such as news clippings, a public report by the Citizen's Representative, interview and radio transcripts, and press releases. The other material that was available consisted of e-mails.

[12] I see no reason why this information could not have been released within the statutory timelines set out in section 11. "Reasonable efforts", as required by section 11, should have been sufficient to enable the Department to respond to the Applicant within 30 days. The publically available information needed no redaction and the redactions contained in the e-mails are minimal. This information could have been sent to the Applicant with a letter explaining that the Peer Review had not yet been received by the Department and would be forwarded in due course. Alternatively, the Department could have contacted the Applicant, explained the situation and asked if he would prefer to wait to receive the entire responsive record once the Peer Review became available. However, there was no communication with the Applicant at all, except to respond to two inquiries initiated by him in late August and late September. Despite the fact that the majority of records were available, no records were received until four and a half months after the request was made.

[13] Section 9, the duty to assist an applicant, includes the obligation to "respond without delay". Most of the responsive record could have been sent out, in my opinion, within the 30 days, or at the very least a phone call could have been made to the Applicant explaining the situation, however neither of these options were chosen. The Department remained silent until it responded to both this Office (in connection with the Request for Review) and the Applicant on November 9, 2012.

[14] Again, with respect to the Second Request, the Department could have contacted the Applicant to let him know that they were undertaking a thorough search at several different locations, but that nothing had been found. I applaud the Department's efforts with respect to the thorough search

undertaken for the records, and the fact that the record was sent to the Applicant once it had been received, even though an official response to the access request had been sent out already saying that there were no responsive records. While the delay in responding to the Second Request (2 months) was not as long as the first request, it is still outside the statutory timelines.

V CONCLUSION

[15] At the time the Applicant submitted his Request for Review, he still had not received any response from the Department with respect to the First Request, despite the fact that the majority of records were in the custody of the Department and required minimal redaction. The Applicant finally received records in connection with the First Request four and a half months after his access request was submitted. There was no extension of time claimed by the Department. This is clearly a breach of section 11 of the *ATIPPA*. Further, I also find that there is a breach of section 9 of the *ATIPPA* as the duty to assist clearly requires the Department to respond without delay. The delay in this case was avoidable for all but a small portion of the records, and as noted above, the Department could have at least contacted the Applicant to inform him of the situation and determine how he wished to proceed in terms of receiving the records.

[16] With respect to the Second Request, there is also a breach of section 11, as the Department's response was outside the statutory time limit and no time extension was claimed. Also, I find that there is a breach of section 9 with respect to the Second Request. The duty to assist requires that the Applicant should have, at the very least, been informed of the searches that were being undertaken and that while no records were found in the initial search, additional searches in other places were being conducted to ensure he was provided with correct information. The Applicant would likely have appreciated knowing that his request was being actively worked on and that a thorough search was being conducted, and may have been less likely to file a complaint about the Second Request with this Office.

VI RECOMMENDATIONS

[17] As the Department has already committed, in its formal submission, to reviewing its policies and procedures to ensure more timely responses to applicants, I will not make any recommendation in this regard. However, under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department make a greater effort to communicate with applicants, especially in cases such as this one where additional searches are required (thus taking more time) or where the Department is aware that more responsive records will soon be available, and is deciding how best to respond to the access request.

[18] Under the 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 the final decision of the Department with respect to this Report.

[19] Please note that within 30 days of receiving the 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*.

[20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of February, 2013.

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