

**NORTHWEST TERRITORIES INFORMATION AND
PRIVACY COMMISSIONER**

Review Report 19-209

Citation: 2019 NTIPC 26

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December 4, 2019

Background

On January 11, 2018, the Applicant sent a request for information to the Government of the Northwest Territories (GNWT), Department of Finance. As the contents of the request are not at issue in this review, I will not detail them here. On February 6, 2018, the access to information and protection of privacy (ATIPP) Coordinator for the Department of Finance wrote to the Applicant and explained that, due to the large volume of records at issue (approximately 375 pages), they were relying on section 11(b) of the *Access to Information and Protection of Privacy Act* (ATIPPA) to extend the time for responding to the request for information. The new date set for response was March 11, 2018. The Department of Finance also indicated that pursuant to section 50(2) of ATIPPA, they were requiring the Applicant to pay the \$0.25 per page fee for the requested documents. The ATIPP Coordinator stated that once they received the cheque for 50% of the fees, the Department would proceed with processing the request.

The Applicant mailed the cheque for the fee payment on February 9, 2018. It is unclear exactly when the cheque arrived at the Department of Finance. On March 6, 2018, the Applicant emailed the ATIPP Coordinator and asked whether the cheque had been received. The ATIPP Coordinator replied the same day indicating that the cheque had been received. The cheque was cashed on March 7, 2018. On March 19, 2018, having still not received the records he requested, the Applicant again wrote to the ATIPP Coordinator and asked for an update on the disclosure request. He received an out of office reply. On April 3, 2018 the Applicant received a call from a different Department of Finance representative, a Manager, who reportedly said that the request would take an additional "week or two". When he did not receive the records in a week or two, the Applicant wrote to the ATIPP Coordinator on May 14, 2018 and again

requested an update on his disclosure request. The Applicant states that he also called an ATIPP Coordinator on May 18, 2018 and left a voice message requesting a reply to his email. He called the Manager on May 31, 2018 and left a voice mail requesting an update on his disclosure request. He did not receive a reply from either representative. On May 31, 2018, he wrote an email to the Manager requesting an update on his request for information. He received an out of office reply. On June 28, 2018, having still not received either a reply from the Department of Finance, nor the response to the information he requested, the Applicant wrote to the Information and Privacy Commissioner (IPC) and requested a review.

The Department of Finance ultimately mailed the Applicant the disclosure package on July 19, 2018. This review will not deal with the contents of the disclosure package. Rather, this review will address the Department of Finance's delay in responding to the Applicant's information request.

Relevant Sections of the Legislation

The Act sets out the process for responding to an access to information request in sections 7 and 8 as follows:

- 7.(1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

8. (1) The head of a public body shall respond to an applicant not later than 30 days after a request is received unless
 - (a) the time limit is extended under section 11; or
 - (b) the request has been transferred under section 12 to another public body.

- (2) The failure of a head to respond to a request in time is deemed to be a decision to refuse access to the record.

Section 11 of the Act sets out circumstances in which a public body can extend the time for responding to an access to information request:

- 11.(1) The head of a public body may extend the time for responding to a request for a reasonable period where
 - (a) the applicant does not give enough detail to enable the public body to identify a requested record;
 - (b) a large number of records is requested or must be searched to identify the requested record and meeting the time limit would unreasonably interfere with the operations of the public body;
 - (c) more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record; or
 - (d) a third party asks for a review under subsection 28(2).
- (2) Where the time for responding to a request is extended under subsection (1), the head of the public body must tell the applicant without delay
 - (a) the reason for the extension;
 - (b) when a response can be expected; and
 - (c) that the applicant may ask for a review of the extension under subsection 28(1).

Issues

There are two issues raised in this review, which both come down to the same thing, which is whether the public body responded to the Applicant in a timely manner.

1. Did the public body comply with section 8 of ATIPPA?
2. Did the extension of time meet the criteria for extension set out in section 11(1)(b) of ATIPPA?

Discussion

1. Did the public body comply with section 8 of ATIPPA?

Section 8(1) of ATIPPA requires that public bodies respond to an access to information request within 30 days. That clearly did not happen here. After receiving the request on January 11, 2018, the public body indicated that they were implementing a 30 day extension to March 11, 2018. However they did not finally provide the Applicant with the responsive records until July 19, 2018. This is an obvious breach of their section 8(1) obligations to reply within 30 days.

This is not a new problem for the Department of Finance. In Review Report 17-162, another file in which the Department had failed to meet legislated time frames, I recommend that if not done already, the Department of Finance create and implement a "bring forward" system and a detailed procedure guideline that should help them in keeping track and on time. It appears that those recommendations, while accepted by the public body, were not implemented. I feel compelled to note that the Act has been in place for over 20 years. Given that, and given that I have already made this recommendation to this department, these kinds of delays should not be happening.

Section 8(2) of ATIPPA states that the failure of a public body to respond to a request in time is a deemed refusal to access the records. When I questioned the Department of Finance on this, the response from the ATIPP Coordinator on July 19, 2018 was "To clarify, the Department has not refused to provide the Applicant with the requested documents. A disclosure package has been prepared, with proposed redactions and is attached to this response for your review."

This statement shows a significant lack of understanding of the legislation. If you do not reply

within the legislated time frame, it is deemed to be a refusal to reply. The public body cannot simply say it is not a refusal and have that be true. When they did not reply within the legislated time frame, they were deemed, in law, to have refused access to the records. Thus I find that until they sent out the records on July 19, 2018, the public body inappropriately refused access to the records to the Applicant.

2. Did the extension of time meet the criteria for extension set out in section 11(1)(b) of ATIPPA?

In response to the Applicant's original request for information dated January 11, 2018, the Department of Finance took just under 3 weeks to respond indicating that due to the large volume of records at issue (approximately 375 pages), they were extending the time for response to March 11, 2018, pursuant to section 11(1)(b) of ATIPPA.

As a preliminary comment, I routinely deal with access to information requests involving thousands of records. Three hundred and seventy five pages is not, by any definition, a "large volume" of records such as to justify an extension of time. An ATIPP Coordinator should be able to review and redact that number of pages within a few days - certainly within the thirty days allowed for under the Act. The delay was not in any way justified pursuant to section 11(b).

Furthermore, instead of replying to the Applicant within the extended time frame as promised, and as required under the legislation, they simply ceased to communicate with the Applicant in any way. They ignored the Applicant's repeated requests for updates and did not ultimately send the records until July 19, 2018 after the Applicant had made a request for review to my office. This was over four months after their own extended deadline and over six months after the Applicant first submitted his request.

When this issue came to my attention, I asked the public body for their submissions on why the Department of Finance was so egregiously delayed in responding to the Applicant. Their response was as follows:

I understand that this response is late and accept that we should have updated the applicant of these delays in a timelier manner. However, it was important for the Department to ensure the disclosure packaged received the appropriate redactions and legal review. In addition to the extra time needed to assemble the documentary packages under these circumstances, the Department also expended additional unforeseen time dealing with the applicant's decision to contact past and current GNWT employees in connection with this matter. The GNWT considers the applicant's actions highly inappropriate and is considering its legal options.

When I received this response from the public body, I was confused by it in that it did not address in any specific way, with any reference to relevant sections of the Act, the reasons for the delay, or how those delays fell within either section 11 or 12 of ATIPPA. So I wrote back to the public body and asked for further explanation. This was the response I received:

I recognize that the Department was extremely late in providing this disclosure package to the Applicant. This delay was largely required to accommodate additional reviews of all documents by the Department of Finance and Justice related to s. 15(1)(a) of ATIPPA. In addition and although not a material cause of delay, the Department had a number of key personnel on vacation at various times throughout the summer which added to the time required to complete this request.

The Department had a number of telephone conversations with the applicant indicating there would be delay, however the Department failed to formally

notify the applicant as required under s. 11 or s. 12. I apologize for this oversight, but stress the nature of this request was unique.

I should first note here that the Applicant has contradicted the public body's claims that there were "a number of telephone conversations with the applicant indicating there would be delay". The Applicant says there was only one phone call about this. As the public body received the Applicant's submissions and did not contest this allegation, I accept that there was in fact only one phone call and that the public body's claims otherwise are exaggerated.

Despite being twice given the opportunity to provide submissions, I find that the Department of Finance did not provide this office or the Applicant with a single valid reason for their approximately four month delay in providing a response to the Applicant. In order for the public body to be able to rely on section 11(1)(b), it has to establish not only that a large number of records was requested or had to be searched to identify responsive records, but also that responding within the initial 30 days would unreasonably interfere with the operations of the public body. As noted above, although 375 pages to review is not insignificant, it is not of a magnitude sufficient to meet the threshold set out in section 11(1)(b).

More importantly though, the public body did not establish that responding within the initial 30 days would unreasonably interfere with the operations of the public body. One of the factors for the delay cited by the Department of Finance was key personnel were on vacation at various times throughout the summer which added to the time required to complete this request. While I can accept that this could have made the ATIPP Coordinator's job more difficult, I cannot accept that this could have warranted a four month delay. Even if these "key personnel" were on vacation for overlapping or consecutive periods, again, I very much doubt that these circumstances were ongoing for four full months. This points, in part, to a problem that I have commented on before (see Review Report 18-191) which is the way that public bodies deal with the absence of an employee. This is a department, in their role as the Government's human resources manager, that receives many access to information requests.

The reality is that there should have been someone within the absent employee's working group that could take over carriage of this file in their absence. As I stated in Review Report 18-191, this seems to me to be something that would go without saying. Given the clear time frames set out in the *Access to Information and Protection of Privacy Act* I find it hard to believe that no arrangements had been made for someone to monitor and do the work of the employee on leave. Presumably someone had to be assigned to do the work while the ATIPP Coordinator was away.

Furthermore, public bodies are expected to comply with their own legislation. There are many employees who work within the Department of Finance. Assuming that the ATIPP Coordinator was unable to review the 375 pages of records in a timely manner, I cannot imagine that taking one or even a couple of employees away from other duties to assist in the review would unreasonably interfere with the operations of the public body. As a sophisticated party, the public body should have anticipated that when persons tasked with handling ATIPPA obligations are on vacation, someone else within the public body will need to step up and take over that role. For that matter, if a request involving a truly large volume of materials (i.e. thousands of pages) comes in the door such that meeting the 30 day response period cannot be met by one employee, there are many other employees in this department who should be trained and able to assist. As I said in Review Report 18-191 lack of adequate staff is simply not one of the reasons for an extension of time contemplated by section 11 of the Act. While having some key personnel away may have caused difficulty in responding, this does not meet the test set out in the Act. The Act requires not that meeting the time line would unreasonably interfere with the work of the ATIPP Coordinator, but that meeting the time line would unreasonably interfere with the operations of the public body. That means the operations of the public body as a whole. The Department of Finance is a large public body within the GNWT system and I cannot believe that diverting one or two employees to assist the ATIPP Coordinator for a day or two or even a week would create so much disruption as to amount to an unreasonable interference with the operations of the public body. While it may be inconvenient, that is not sufficient to meet the criteria of section 11(1)(b).

Another reason provided by the Department of Finance for not meeting their obligations to respond in a timely manner was that "it is important for the Department to ensure the disclosure package received the appropriate redactions and legal reviews". Section 11(c) does contemplate an extension of time when "more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record". However, the public body did not refer to this section at all. Nor did they raise this excuse until well after the fact and only during the review process.

That it is important that the Department ensures that the disclosure package is appropriately redacted is simply stating the obvious. This step must be taken with every request for information. It is hardly something new. Nor is it a reasonable rationale for not providing a reply to the Applicant within the legislated time lines. It absolutely does not establish that to do this within the initial 30 days would unreasonably interfere with the operations of the public body.

Another reason cited by the Department of Finance for the delay was that the Department was dealing with the Applicant contacting past and current GNWT employees with this matter. While I have no doubt that the situation with the Applicant was frustrating, this does not absolve the public body of its duty to comply with its legislated obligations pursuant to ATIPPA. The fact that the Applicant was contacting other employees has nothing to do with processing an access to information request. There should have been enough resources allocated to processing the request for information regardless of what other actions the Applicant was taking in dealing with the public body.

Conclusion and Recommendations

The Department of Finance in this case failed to meet their obligations under ATIPPA. The breaches of section 8 and 11 also amounted to a breach of the public body's section 7 duty to make every reasonable effort to assist an applicant and to respond to an applicant openly,

accurately, completely and without delay. I reiterate that ATIPPA has been in place for over 20 years. Moreover, the obligation to respond within 30 days is arguably one of the most basic tenants of the legislation. The fact that the Department of Finance could not achieve this very basic obligation is very troubling, particularly as this appears to be a trend with this department. It demonstrates either a fundamental lack of a basic understanding of the purpose of the legislation or an intentional attempt to ignore or dismiss it. The Department of Finance, and in fact all public bodies, should take note that when the amendments to the *Access to Information and Protection of Privacy Act* contained in Bill 29 come into effect, failing to meet these basic requirements of the legislation will have far more serious implications for the public body and for the GNWT as a whole. I therefore make the following recommendations:

1. I recommend that the ATIPP Coordinator and any other persons that will be tasked with responding to ATIPP requests be provided with in depth training on ATIPP including the meaning of a deemed refusal pursuant to section 8(2) of ATIPPA.
2. I recommend that, if not done already, the Department of Finance create and implement a "bring forward" system and a detailed procedure guideline to track requests received and enable them to track response times.
3. I recommend a review of policies and procedures which deal with responding to an access to information requests when "key personnel" are on vacation. If no such policies or procedures exist, I recommend that they be created, and that the policy include a provision that where an employee is absent for more than a given number of days, another employee must take over their responsibilities with respect to ATIPPA.
4. I recommend that policies and procedures be put into place so that, when needed, other employees may be tasked with assisting the ATIPP Coordinator to meet the deadlines imposed by the Act. Other employees should be identified as those who might

be called upon to assist and these other employees should receive appropriate training so that they can jump into action when called upon.

5. I recommend that the Department of Finance advise my office when these recommendations have been implemented so that this can be reported in our next annual report.

Elaine Keenan Bengts
Information and Privacy Commissioner