

Issues

- [4] The only issue in this review is whether the time extension taken by the Department of Education is reasonable in the circumstances.

Facts

- [5] On May 18, 2021, the Applicant requested information from the Department of Education about the Student–Educator Ratio (SER). The SER is an important measurement within the education system. Its importance is underlined by the fact that, under s 123 of the *Education Act*, “the Minister shall ensure that the student-educator ratio for each education district for a school year is lower than the most recently published national student-educator ratio”. Because of this legislated ceiling, the calculation of the SER is of substantial public interest and can be contentious.
- [6] The exact wording of the Applicant’s request is relevant to this review, so I reproduce it here in full:
- Information regarding the “new calculation” of the “Student Educator Ratio” (SER). We require all documents, including but not limited to emails, policy documents, recorded meetings regarding the calculation of the SER from January 1, 2016, to May 18, 2021. This information is required as quickly as possible.
- [7] The Department of Education received the request the following day, on May 19, 2021. Although that should have given the department until June 23, 2021, to respond (25 business days from May 19), the department gave itself until June 29 to respond. (I cannot make out how the department made this calculation.)
- [8] On June 28, 2021, the department sent a letter to the Applicant. The letter stated that the time for response is extended by 60 business days, to September 20, 2021. (Again, I cannot make how the department made this calculation.) The substantive portion of the letter reads as follows:

Normally, the Department of Education responds to a request for information within 25 business days after receiving the request. However, in limited circumstances, the Access to Information and Protection of Privacy Act provides that a public body may extend this time limit.

Your request involves a large volume of records that cannot be processed within the usual 25 business days limit. Therefore, an extension of 60 business days will allow the Department of Education to provide you with a complete response to your request.

A response to your request will be ready no later than September 20, 2021. We will try to respond sooner, if possible.

- [9] This office received the Applicant's request for review on July 3, 2021.
- [10] On July 5, 2021, I wrote to the department asking for more information about the department's search efforts and the reason for the extension. I received the department's reply on July 13, 2021. The reply included the department's "activity log" for the ATIPP application. I will have more to say about the activity log in the Analysis section below.
- [11] I offered the Applicant the opportunity to comment on the department's letter, but no further submission was made.

Law

- [12] Every public body has a duty to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay": s 7(1).
- [13] The public body must respond to an applicant not later than 25 business days after a request is received, unless the time limit is extended under section 11: s 8(1)(a). This section was amended by S.Nu. 2017, c. 26, s. 5, to change "thirty days" to "25 business days". The failure to respond to a request in time is to be treated as a decision to refuse access to the record: s 8(2).

[14] Section 11(1) says that a public body may extend the time for responding to a request “for a reasonable period” where one of the following conditions is met:

- (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;
- (d) a third party asks for a review under subsection 28(2); or
- (e) a requested record exists in the control of the public body only in a language other than the Official Language of Nunavut requested by the applicant and additional time is required for translation.

Of these, only paragraph (b) is claimed by the department in this case.

[15] An applicant may request review of the time extension. When a request for review is filed, the Commissioner reviews the extension for compliance with s 11(1), i.e. for reasonableness.

[16] In *Review Report 18-147 (Re)*, 2018 NUIPC 12 (CanLII), the public body had extended the response time by 120 days in order permit third-party consultation. The former Commissioner considered whether this was a “reasonable period” for an extension:

Section 11(1) allows only for an extension for a “reasonable period”. I would suggest that, except in very unusual circumstances, anything more than 30 additional days is not reasonable. The legislation itself deems thirty days as a reasonable response period. A “reasonable” extension then, in most cases, would be no more than that. If an extension of more than an additional 30 days (in this case, 120 days) is taken, it is incumbent on the public body to justify that extremely significant delay. Even if I were to accept that meeting the initial 30 day time frame would unreasonably interfere with the operations of the public body, I am not satisfied that four additional months is a “reasonable” period of time. There is an onus on the public body to get the response completed in the

shortest amount of time necessary even if that means bringing in more resources on a temporary basis.

Review Report 14-077 (Re), 2014 NUIPC 7 (CanLII) also expresses 30 days to be the outer limit of reasonableness for most cases.

[17] In *Review Report 16-104 (Re)*, 2016 NUIPC 8 (CanLII), the Department of Community and Government Services extended the time by 60 calendar days, to allow for consultation with a hamlet. The Commissioner was blunt: “With respect to the extension of time, there is absolutely no justification for it.”

[18] Most of the rest of the Nunavut time-extension cases, of which there are about a dozen, concern a public body’s failure to follow the correct procedure for a time extension, or failure even to acknowledge that they had missed a statutory deadline. Neither applies in this case.

Analysis

[19] Section 11 is an unsatisfactory provision, both from an applicant’s and a public body’s perspective.

[20] From an applicant’s perspective, it gives a public body too much leeway to extend the deadline for response. In Nunavut, unlike most Canadian jurisdictions, a time extension does not need to be approved by the Information and Privacy Commissioner, nor is there a statutory limit to the length of an extension.

[21] The possibility of a review by the Commissioner is a weak constraint because the Commissioner has to review the file and make a recommendation to the minister, who then has thirty days to decide what to do with the recommendation. All of this takes time. As a result, review of a time extension is often rendered moot because the extension has already expired by the time the Review Report is issued and the minister makes a decision: e.g. *Review Report 14-086 (Re)*, 2014 NUIPC 16 (CanLII).

- [22]** Section 11 is also unsatisfactory from the public body’s perspective. It does not allow for any extension due to catastrophic data loss, such as a ransomware attack, nor for civil emergency, such as a pandemic. Both situations arose in the 2019-21 period in Nunavut, with the consequent inability to produce records within the legislated deadlines: e.g. *Review Report 21-182 (Re)*, 2021 NUIPC 1 (CanLII); *Department of Human Resources (Re)*, 2020 NUIPC 13 (CanLII).
- [23]** In this case, I have made a conscious effort to expedite the issuing of this decision, in order that the recommendation might still have some utility to the Applicant.
- [24]** I start by noting that the department has taken an extension of 60 business days. In this case, that was equivalent to 89 calendar days.
- [25]** The former Commissioner recommended that an extension of 30 calendar days be considered the outer limit of reasonableness “except in very unusual circumstances”. The former Commissioner was writing before the 2017 amendment, so perhaps we can now say that the outer limit of reasonableness is an extension of 25 business days. Other than that, I agree with the former Commissioner.
- [26]** Does this case demonstrate “very unusual circumstances” that would justify an extension beyond 25 business days? On balance, I find that it does not.
- [27]** On the one hand, the Applicant’s request is broadly worded. It covers more than five years, and asks for “all documents, including but not limited to emails, policy documents, recorded meetings” about the SER.
- [28]** There is some publicly-available information about the SER, though not a great deal. We know the calculation of the SER is a complex and contentious topic that is often raised in the Legislative Assembly. The method by which the SER is calculated is not entirely clear, and a new method is currently being introduced over several years by the

department. We can reasonably expect that five years' worth of "all documents" related to the SER will take some time to gather.

[29] In my view, it was always likely that a time extension would be required in this case. The Applicant wrote a broad request and should not have been surprised that an extension was needed. If, as the ATIPP application says, "this information is required as quickly as possible", the Applicant would have been well-advised (and still is) to refine the scope of their request.

[30] On the other hand, a public body that wishes to take an extension of 60 business days or 89 calendar days, which is unusually long, has to meet certain requirements. Section 11(1)(b), the paragraph relied upon by the department, says that an extension may be taken if

(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;

There are two parts to this test: (1) a large number of records, and (2) unreasonable interference with the public body's operations. To correctly claim an extension under s 11(1)(b), both requirements must be satisfied. There is also a third, implicit requirement, namely that the department has demonstrated diligent effort during the initial response period of 25 business days. This third requirement is reinforced by the public body's duty, stated in s 7(1), to respond "without delay".

[31] In this case, I am willing to assume, given the scope of the request and the topic, that the first requirement (a large number of records is requested) has been met. I find, however, that the department has not met the second and third requirements.

[32] The "unreasonable interference" requirement in s 11(1)(b) requires real evidence. Mere assertions will not do. Operational constraints may include factors such as the size of the public body, the volume of ATIPP requests at a given time relative to the norm, and any other unusual calls on the public body's resources. This list is not exhaustive.

- [33]** Lack of ATIPP staffing, however, will generally not be an acceptable factor in determining “unreasonable interference”. Otherwise, a public body could frustrate the objectives of the ATIPPA merely by failing to staff adequately the ATIPP function. There are times when additional ATIPP staffing may be required: see, for example, *Review Report 18-147 (Re)*, 2018 NUIPC 12 (CanLII), where the former Commissioner wrote “there is an onus on the public body to get the response completed in the shortest amount of time necessary even if that means bringing in more resources on a temporary basis”.
- [34]** The right of Nunavummiut to information about their government is a legislated, quasi-constitutional right. We must not allow it to be easily defeated. If a public body wants to delay its response, the onus of proof is on the public body to show why. In this case, the department has not shown evidence that responding to the Applicant’s request would cause unreasonable interference with its operations. Indeed, in its extension letter of June 28, the department does not address this requirement at all.
- [35]** In my view, the factor that really tips the balance in favour of the Applicant in this case is that the department did not put nearly enough effort into meeting the request within the first 25 business days.
- [36]** The department’s ATIPP activity log was produced to me in the department’s letter of July 13, 2021. The following is a condensed version of file activity:
- a. May 19: Request for information received.
 - b. May 21: New file created. Due date set for June 29.
 - c. May 27: Acknowledgement letter sent.
 - d. June 10: Discussed response.
 - e. June 15: Review request again.
 - f. June 23: Extension will be needed.

- g. June 28: Extension letter sent. New due date set for September 20.
- h. July 7: Conversation with [senior official] about where information about SER can be obtained.
- i. July 7: Start receiving records from [senior official].

[37] It is evident from this activity log that little work was done on the file during the first 25 business days. The first conversation with the senior official with primary responsibility for the SER did not occur until July 7, which was 33 business days after the ATIPP application was received.

[38] In these circumstances, I find that the department's taking a 60 business-day extension is not reasonable.

[39] So what, at this point, is reasonable? What is done is done. We cannot get back the time that was lost between May 19 and July 7. Nor is there any point in now imposing on the department a deadline it cannot possibly meet. Besides, the minister has 30 days to respond to the recommendations in this decision, and is not required to accept them.

[40] Taking into account all the circumstances, I recommend that the department respond in full to the Applicant's request for information no later than 30 calendar days from the date of this decision, which is August 19, 2021. That may require some dedicated effort by the department.

[41] The Applicant can still help speed matters along by working with the department to refine the request.

Conclusion

[42] The 60 business-day time extension taken by the Department of Education to respond to the Applicant's request for information is not reasonable.

Recommendations

- [43] I **recommend** that the Department of Education review its ATIPP processing procedures and staffing to ensure that they are adequate to ensure statutory deadlines are routinely met and that extensions are required only in unusual circumstances.
- [44] I **recommend** that the Department of Education work with the Applicant to see if the request can be refined.
- [45] I **recommend** the Department of Education respond in full to the Applicant no later than August 19, 2021.

Graham Steele

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