

Issues

[4] The only issue on this review is whether the Department of Education had a lawful reason for its failure to respond to the Applicant's request for records.

Facts

[5] On November 17, 2021, the Applicant requested certain records from the Department of Education. The details of the request are not relevant to this review, except to say there was nothing unusual about it in scope or complexity.

[6] Normally a public body acknowledges in writing that a request has been received, and gives to the Applicant a file number and a due date. The due date for responding to this Applicant's request would have been December 22, 2021, which is 25 business days after the request was received: ATIPPA, section 8(1). But Education never formally acknowledged the Applicant's request.

[7] Over the next two weeks, some e-mails were exchanged between the Applicant, the staff person at Education dealing with ATIPP requests, and the Territorial ATIPP Manager at the Department of Executive and Intergovernmental Affairs. The Applicant simply wanted to get a file number and due date, but was having trouble getting them. The Education staff person was new to ATIPP processing.

[8] On November 29, 2021, the Territorial ATIPP Manager informed the Applicant that the Education staff person handling the Applicant's request had left the position.

[9] On December 3, 2021, the Territorial ATIPP Manager informed the Applicant that Education's policy division was "in a transition", with all or most positions vacant, and there was nobody handling ATIPP files. He added:

Work arounds are being sought in the meantime. I will do [my] best to assist and provide updates. ...[P]rogress on your most recent Access Request has been arrested but hopefully only temporarily. Had everything gone smoothly from the beginning you could have expected a response before December 22, 2021 – which might still be met.

[10] There appears to have been no further correspondence on the file until March 18, 2022, when the Applicant wrote to the Territorial ATIPP Manager to ask “Has the dept of education found someone to take on the role as an ATIP coordinator?”.

[11] On March 29, 2022, the Applicant received an e-mail from Education’s Manager of Policy, who wrote:

I am back at Policy and catching up on ATIPP requests. I came across your request and according to what I’m seeing from correspondence, this has not been process[ed]. I can help you with your request if you would like to go ahead.

On the same day, the Applicant replied “Yes. Please proceed.” The next day, the Manager of Policy replied “I will proceed and keep you updated as I go along.”

[12] On May 20, 2022, the Applicant wrote to the Manager of Policy: “I wanted to follow up with this request as I have not received an update in almost two months.”

[13] On June 3, 2022, the Applicant received an e-mail from an Education staff person asking for a meeting to discuss the Applicant’s request. This staff person was the same person who had been assigned the file in November 2021 and who had left the ATIPP position shortly afterwards. The staff person had recently returned to Education.

[14] The Applicant wrote back to say that, based on the March e-mail exchange with the manager, they thought the request was already being processed. The staff person said they would check with the manager. The staff person added “I’ll be in touch on a day and time for us to meet next week.” That did not happen.

[15] On June 21, 2022, the Applicant, having heard nothing, followed up by e-mail with the Education staff person. The response was an auto-reply, saying that the staff person was on leave until July 12. The auto-reply added that the staff person’s manager or director could be contacted for immediate assistance. The manager was the same person with whom the Applicant had corresponded in March.

[16] On the same day, the Applicant filed with this office a request for review of Education’s failure to respond.

The department’s written submission

[17] On June 29, 2022, as part of this review, the deputy minister made a written submission to me by letter. The deputy minister acknowledges that the Applicant’s file was not properly handled, and offers some reasons.

[18] The deputy minister first refers to capacity issues:

Like all departments, the Department of Education faces capacity issues within all of its divisions, including Policy and Planning, where the ATIPP and Records Management Coordinator is located. While the current Director of Policy and Planning was on leave, between January 2021 and January 2022, the department cycled through five different individuals in the Acting Director of Policy and Planning role. Despite this, the department managed to keep up with numerous ATIPP Requests. Some ATIPP functions, however, as you are aware, were not completed appropriately.

[19] The deputy minister next says that “the majority of requests” have been handled correctly:

As a public body dealing with sensitive information and records related to minors, we receive requests that often involve a lot of work in processing and redacting. While [this file] was not processed properly, we have met the deadlines and have been diligently continuing to process the majority of requests.

[20] The deputy minister then refers to another factor that has slowed down the processing of ATIPP requests:

It is important to note that the Department of Education is also dealing with student record requests for a Federal Day School class action suit. We are prioritizing these requests for former students, especially recently, as the claim deadline for the suit (July 13, 2022) is fast approaching. To date, the department has received 115 record requests related to this suit. As you can imagine, processing these requests has taken up a significant portion of the department's time, but completing them to the best of our ability, is important on a number of levels.

[21] The deputy minister notes that the Applicant's file has been "escalated" to the Director of Policy and Planning. This is necessary in part because "the Department of Education's ATIPP and Records Management Coordinator position is currently vacant". The position will be advertised "in the coming weeks".

Applicant's reply submission

[22] The Applicant had an opportunity to respond to the deputy minister's written submission. The Applicant's response, in a nutshell, is that the GN as a whole has a responsibility to adhere to its statutory requirements, regardless of capacity issues.

[23] Finally, I will note that on June 30, 2022, Education's Director of Policy and Planning contacted the Applicant to discuss the Applicant's request. The result of the conversation was a common understanding of what the Applicant was seeking, and an approximate date for completion that was satisfactory to the Applicant.

Law

[24] When a public body fails to respond to an ATIPP request in time, the failure is treated as a decision to refuse access: ATIPPA, section 8(2). This is sometimes referred to as a "deemed refusal".

[25] Where there is a deemed refusal, an applicant may seek review from the Information and Privacy Commissioner, in the same way as if the refusal were explicit: ATIPPA, section 28(1).

[26] The ATIPPA also allows for an extension of time, but only in certain defined circumstances and only "for a reasonable period": section 11(1).

Analysis

[27] This is a deemed refusal case. As is painfully obvious from the facts recited above, the Department of Education dropped the ball, badly. The original due date for a response from Education was December 22, 2021. More than six months after the statutory due date, Education had not done any work on the file. It is only because of this review that Education picked up the file again and started working on it.

[28] The present case is not, unfortunately, the only time Education has fumbled the ATIPP ball. In *Department of Education (Re)*, 2021 NUIPC 22 (CanLII), a decision issued almost exactly one year ago, I wrote the following:

[22] ... It is apparent to me, from this file and other recent files, that there is a deeper problem with ATIPP processing at the Department of Education. I do not wish to be too hard on the department's current ATIPP Coordinators. There has been turnover in the ATIPPA Coordinator function, so those currently responsible are relatively new to the task. They seem uncertain how to approach the ATIPP work effectively and efficiently. They appear to have been assigned the ATIPP task on top of their regular duties, and they do not appear to have received sufficient training or resources. That is the department's responsibility.

[23] The department cannot go on like this. It must not go on like this.

[29] In the year since I wrote those words, the department did indeed "go on like this": more vacancies, more turnover, little evidence of training or management support, no apparent system. We see the results in the present case.

[30] To be clear, I am not suggesting that anyone at Education made an explicit decision to defy the ATIPPA. This is a case of neglect, not defiance. Nevertheless, neglecting one's ATIPP obligations has the same result as defiance – the work does not get done, and the purposes of the ATIPPA are defeated.

[31] In my Annual Report for 2021-22, tabled in the Legislative Assembly on May 25, 2022, I identified at least one of the roots of the ATIPP non-compliance problem across the GN: if a public body performs its ATIPP obligations poorly, there are no consequences for the public body.

[32] If a public body does not comply with the ATIPPA, all I can do is bring it to the attention of the public and the Legislative Assembly. That is weak sauce. I cannot enforce disclosure. I cannot enforce deadlines. I cannot enforce anything. When I do write a Review Report, it is a non-binding recommendation to the minister, which a minister may reject. Even if a minister accepts my recommendations, there is no mechanism to ensure implementation.

[33] Moreover, in a deemed refusal case like this one, the only statutory authority I have is to recommend to the public body that it respond – which the public body should, of course, have done in the first place. We see the result in paragraph 43 of this decision. That too is weak sauce.

[34] Given the lack of consequences for non-compliance, it is no wonder that some public bodies decide – consciously or subconsciously, directly or indirectly, by act or omission – to let ATIPP files gather dust. That is what Education did in this case.

[35] The deputy minister offers three reasons for the failure to respond to the Applicant's request. I appreciate the frankness of the minister's written submission. It gives us some insight into what was going on within Education. But I agree with the Applicant that none of the reasons offered by the deputy minister is a lawful excuse. If the ATIPP function was breaking down, it was management's job to identify the problem and fix it. The burden should not be borne by applicants.

[36] One piece of new information in the deputy minister's letter of June 29, 2022, is that Education has been working on 115 record requests related to the federal day-school class action lawsuit, with a claim deadline of July 13, 2022.

[37] Obviously it is important that the GN should do what it can to assist potential claimants in the day-school class-action litigation. I am puzzled, however, at the implication that Education's role in information-gathering for the litigation may have somehow displaced its regular ATIPP obligations. If more resources were needed to produce day-school records for potential claimants, then Education should have asked for more resources, and the GN should have

provided them. It should not have come down to a choice between day-school files and ATIPP files, if that is indeed what happened.

A few final comments

[38] When the Legislative Assembly enacts a piece of legislation, it is the law of Nunavut. It is not supposed to be optional. A law is not a suggestion, to be followed only if circumstances permit.

[39] Unfortunately, the scheme of the ATIPPA in Nunavut includes no consequences for non-compliance. As a result, some public bodies do treat their ATIPP obligations as optional – not every day, and not on every file, but too often. If the legislation is not amended to provide some consequences for non-compliance, we can expect to see more files like this one.

[40] The GN also needs to give serious consideration to re-organizing its ATIPP function so that ATIPP responses are consistent and reliable. In the present case, the ATIPP function at Education completely broke down. This is not an isolated case, and the situation is not new. Perhaps the time has come to revisit the notion that each public body is capable of doing its own ATIPP processing.

[41] Applicants deserve better. Nunavummiut deserve better. As I wrote a year ago in *Department of Education (Re)*, 2021 NUIPC 22 (CanLII) at paragraph 23, the department cannot go on like this. Or maybe it can. That is up to the minister, the Executive Council, and the Legislative Assembly.

Conclusion

[42] The Department of Education did not respond to the Applicant's request within the statutory deadline. There was no lawful excuse for the non-response.

Recommendations

[43] I recommend that the Department of Education respond to the Applicant's request for records no later than thirty days from the date of the minister's decision under section 36 of the ATIPPA, or such later date as may be expressly agreed to by the Applicant.

Graham Steele

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