

Issues

[4] There is only one issue in this review: is there legal justification for HR's delay in responding to the Applicant's request for records?

Facts

[5] The Applicant is a former employee of the Government of Nunavut (GN). The Applicant had a complex employment record, involving grievances, harassment complaints, leaves, re-entries, and sundry other matters.

[6] The Applicant had previously filed a variety of ATIPP requests for employment-related records. Some of these requests were considered in *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII), which is also known as Review Report 21-196. That case involved over 2000 pages of records.

[7] On July 23, 2022, the Applicant filed new requests for records. The requests were distributed to HR, the Department of Finance, and the Department of Community and Government Services. The three requests were worded similarly if not identically. The request to HR asked for

My entire, comprehensive, FULL, all-inclusive, exhaustive ER/HR file with my name [omitted] and/or employee # [omitted]".

The acronym "ER/HR" refers to the Employee Relations division within the Department of Human Resources.

[8] Finance and CGS responded to the requests that were sent to them. The Applicant has not requested review of those responses. This Review Report therefore deals only with the request sent to HR.

[9] Following the request, there was some correspondence and at least one meeting between the Applicant, the ATIPP Coordinator at HR, and the Territorial ATIPP Manager. The Territorial ATIPP Manager has a coordinating function but does not themselves process ATIPP responses except at their home department, which is the Department of Executive and Intergovernmental Affairs (EIA). The purpose of this communication was to try to refine the Applicant's request,

especially in light of the fact that the Applicant had, in response to previous ATIPP requests, already received a substantial number of records from HR.

[10] Meanwhile, HR received a large number of potentially relevant records from the Employee Relations division of HR. The number is described variously as 800 records, or 890 records, or 1000 records. Whatever the correct number, the number of potentially responsive records is large.

[11] As of the date of this decision, HR has not disclosed any records to the Applicant in response to the request, nor has it sent to the Applicant any time-extension letters.

Law

Deadlines and time extensions

[12] A public body must respond to a request within 25 business days, unless the time has been extended under section 11: ATIPPA, section 8(1). Failure to respond to a request in time is to be treated as a decision to refuse access: ATIPPA, section 8(2).

[13] In certain circumstances, the time limit for a response may be extended. The list of acceptable circumstances for an extension is in section 11(1) of the ATIPPA:

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;
 - (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.

[14] The list in section 11(1) is an exhaustive list. If a case does not fit within one of the five paragraphs, then a time extension is not allowed. Even if a case does fit within one of the five paragraphs, the time extension is limited to “a reasonable period”.

[15] The law on ATIPP time extensions is straightforward. I explained it in *Department of Education (Re)*, 2021 NUIPC 21 (CanLII) at paragraphs 12 to 16 and paragraph 25; *Nunavut Liquor and Cannabis Commission (Re)*, 2023 NUIPC 2 (CanLII) at paragraphs 11 to 14. A time extension of 25 business days, beyond the initial deadline of 25 business days, is considered to be “the outer limit of reasonableness” and should not be exceeded except in very unusual circumstances.

[16] When a public body does not respond to an ATIPP request within the statutory deadline, the failure to respond is to be treated as a decision to refuse access to the record: ATIPPA, section 8(2). The failure to respond is, in ATIPP jargon, referred to as a “deemed refusal”.

Scope of the ATIPPA

[17] The ATIPPA applies broadly to records held by the GN:

5. (1) A person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, but where that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[18] The “Division B” referred to in section 5(2) contains all the exemptions to disclosure. One of the exemptions, in section 25.1 is for employee-relations records, subject to certain conditions:

- 25.1. The head of a public body may refuse to disclose to an applicant
- (a) information relating to an ongoing workplace investigation;
 - (b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party;
 - and
 - (c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.

[19] Section 25.1 is not a blanket exemption for employee-relations records. Sections 25.1(a) and (b) both contain a condition that must be met before information can be withheld: *Department of Justice (Re)*, 2022 NUIPC 17 (CanLII) at paragraphs 20 to 23. In Section 25.1(a), the condition is that the workplace investigation must be “ongoing”. In Section 25.1(b), the condition is that there must be a reasonable expectation of harm. The burden of proof is on the public body.

Analysis

[20] In a previous decision, I wrote that the Applicant’s battle with the GN over access to their employment records could fill a book: *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 9. This decision is another chapter in that book. The book is not finished.

[21] Despite the complexity of the background, this decision is simple. The Applicant requested certain records. HR acknowledges that there are responsive records in the ER division that have not been previously disclosed. Ten months later, HR has not disclosed any records, nor has it issued time-extension letters, nor has it told the Applicant when disclosure might be expected. HR has far exceeded the statutory deadlines for disclosure. HR needs to fulfill its statutory duty as quickly as possible.

[22] I am sympathetic to HR. This Applicant has a complex employment history. The ER division of HR holds a large number of responsive records which have not

been previously disclosed to the Applicant. These records have to be analyzed for appropriate exemptions. The ATIPP processes launched by the Applicant over the years have consumed a great deal of GN staff time, and it appears they will consume a great deal more before they are finished. I have no doubt that ATIPP staff approach the file with trepidation bordering on dread.

[23] Nevertheless, HR needs to follow the law. If HR believes the Applicant's request places an unreasonable burden on it, there are mechanisms within the ATIPPA to deal with that. For example, a time extension can be claimed under section 11(1)(b), provided there is evidence of unreasonable interference with HR's operations. Or HR can apply under section 53 for authorization to disregard all or a portion of the request. HR has not used either of these mechanisms.

[24] Rather than following the law, HR has created its own processing rule for this file: they will get to it when they get to it. And as I have written before, that is not an acceptable choice: *Department of Human Resources (Re)*, 2022 NUIPC 13 (CanLII) at paragraph 23.

[25] I acknowledge that HR has not just been sitting on the file. Nevertheless, the work is proceeding too slowly. There are bursts of activity, but the file is set aside, sometimes for long periods, when other work needs to be done. The Applicant is left to periodically prod HR for a completion date, and the answers are vague. That is not the way the ATIPP system is supposed to work. Long delays defeat the statutory purpose of the ATIPPA.

ATIPP and employee-relations files

[26] The Applicant raises the fact that a manager in the Employee Relations division of HR told the Applicant "...you are not entitled to see your ER file". I have seen a copy of the manager's email, so I can verify this was said. That concerns me.

[27] As noted in the Law section above, the ATIPPA applies to all records "in the custody or under the control" of a public body. If records are going to be withheld, they must fit within one of the exemptions in Division B of the ATIPPA.

[28] There is no blanket exemption for ER files. To the extent that the manager suggests otherwise, the manager is wrong. ER files may be wholly or partly exempt, for example under section 23 or section 25.1. But ER files must, like any other files, go through the ATIPP process.

[29] In reviewing the internal correspondence on the Applicant's request, I note that both HR's ATIPP Coordinator and the Territorial ATIPP Manager understand that there is no blanket exemption for ER files. I am hopeful that will lay the Applicant's concern to rest.

Conclusion

[30] There is no legal justification for the Department of Human Resources' delay in responding to the Applicant's request for records.

Recommendations

[31] I recommend that the Department of Human Resources take one of the following actions no later than 25 business days after the date of this Review Report:

- a. Provide a final response to the Applicant's request for records.
- b. Provide to the Applicant a time-extension letter under section 11(1)(b) of the ATIPPA, including evidence of how meeting the time limit would unreasonably interfere with HR's operations. If this option is chosen, HR should take no more than one extension.
- c. Apply under section 53 of the ATIPPA for authorization to disregard all or a portion of the Applicant's request for records.

Graham Steele

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