

Issues

- [4]** The issues in this review are:
- a. Were the time extensions taken by the Department of Education justified under section 11(1)?
 - b. If the time extensions were justified, were they “for a reasonable period”?
 - c. Did the Department of Education conduct a diligent search for records?

Facts

[5] On September 19, 2023, the Applicant filed with the Department of Education a request for certain records. The request was connected to the “made in Nunavut” curriculum, a project on which the Department of Education was working in the 2000s.

[6] In this first request, the Applicant was especially interested in documents passing between two specific Education employees. I will refer to them as “EMP1” and “EMP2”. The date range was 2003 to 2010.

[7] On September 25, Education acknowledged receipt of the request. The request was given the file number EDU1688, which is how I will refer to it in this decision.

[8] On September 27, the Applicant filed a second, related request. The topic was still the made-in-Nunavut curriculum.

[9] In this second request, the Applicant was especially interested in documents passing between EMP2 and a third Education employee (“EMP3”), and between EMP2 and a fourth Education employee (“EMP4”). The date range for the first pair was 2003 to 2010, and for the second pair it was 2006 to 2010.

[10] On October 12, Education acknowledged receipt of the request. This request was given the file number EDU1996, which is how I will refer to it in this decision.

[11] Although there were technically two different requests, Education approached them as, essentially, a single request with several parts. I will do the same in this decision.

EDU1688: What the Applicant received

[12] Education's original deadline for EDU1688 was October 27. There were then a series of extensions, as follows:

- a. On October 27, Education extended the deadline to December 4. The reason given was "The office in Arviat, Nunavut, is currently under renovations and staff have no access to physical files".
- b. On December 4, Education extended the deadline to January 17. The same reason was given.
- c. Also on December 4, Education contacted the Applicant to ask if a call could be scheduled "just to narrow some of the requests down a bit, there are thousands and thousands of correspondence regarding some of the things you are requesting".
- d. On December 7, the Applicant spoke with two representatives from Education. Agreement was reached on a narrower request.
- e. On January 17, Education sent a partial release consisting of 67 pages. For the remainder, the deadline was extended to February 19. No specific reason for the extension is given, other than a rote reference to section 11(1)(b) of the ATIPPA.
- f. On February 28, Education wrote a final letter to the Applicant about EDU1688. The substantive part of the letter reads as follows:

The department has exhausted our search for records relating to the above request. We would also like to give you an option for a refund of \$25.00 as your two requests can really be one. Please let me know if you would like a refund.

[13] In summary for EDU1688: a total of 67 pages of records were disclosed on January 17, 2024. That was four months after the request for records was filed. There was no other disclosure.

Second request: What the Applicant received

[14] Education's original deadline for EDU1996 was October 31. There were then a series of extensions, as follows:

- a. On November 3, Education extended the deadline to December 4. The reason given was the same as for EDU1688: the office renovations in Arviat.
- b. On December 4, Education extended the deadline to January 17. The same reason was given.
- c. On January 17, Education extended the deadline to February 19. The reason given was "We are currently going through a large number of emails and records and are required to be reviewed before final release."
- d. On February 2, Education sent a partial release consisting of 150 pages. A further release was promised on or before February 19.
- e. On February 21, Education extended the deadline to February 28. The reason given was "We are currently waiting on Information Management to send [EMP2 and EMP3] emails". (I note in passing that, at this point, Education had EMP2's e-mails for over a month, and had not yet submitted a request for EMP3's e-mails.)
- f. On February 28, Education sent a partial release consisting of 331 pages. A further release was promised on or before March 6. The letter added "The Department is consulting with the Department of Community and Government Services to receive [EMP3's] archived emails". (I note in passing that Education did not submit a request for EMP3's e-mails until March 4. They were received the same day.)

- g. On March 6, Education sent a partial release consisting of 29 pages. A further release was promised on or before March 13. The letter added “We are expanding our search and requested any made-in-Nunavut curriculum from 2003-2010 from our curriculum division.”
- h. On March 13, Education sent a partial release consisting of 79 pages. Their letter said:

These records come from a search that was beyond the scope of your original request. Please review the attached release and let the department know if this information aligns with what you may be looking for. If so, we can continue to search for similar records. Once we receive confirmation from you, we can set a new release date.

[15] In summary for EDU1996, a total of 589 pages of records (Education says 592) were disclosed between February 2 to March 6. That was 4-5 months after the request for records was filed. Education acknowledges that not all these records are within the scope of the request.

Education’s search for records

[16] As we have seen, the Applicant submitted EDU1688 on September 19, and submitted EDU1996 on September 27. Receipt was acknowledged on September 25 and October 12, respectively.

[17] Education’s search for records went as follows:

- a. On October 12, an “ATIPP memo” for EDU1688 was sent to the Curriculum Development Division in Arviat. The memo described the records being sought and gave a deadline for response.
- b. On November 21, Education requested electronic data files (EDFs, which are essentially a compilation of archived e-mails) for EMP1 and EMP4. The EDFs were received on December 4. That was the same day Education contacted the Applicant about the possibility of narrowing the scope of the request.

- c. On December 7, Education spoke with the Applicant. According to the Applicant, Education said the delay was due in part to “third-party approvals and reviews”. (I note in passing that there is no evidence, in the material provided to me by Education, of any third-party consultation.) During the call, agreement was reached on how to narrow the request.
- d. On January 15, Education requested the EDF for EMP2. The EDF was received the same day.
- e. On March 4, Education requested the EDF for EMP3. The EDF was received the same day.
- f. On March 6, an “ATIPP memo” for EDU1996 was sent to the Curriculum Development Division in Arviat to expand the search in EDU1996.

[18] As of the date of this Review Report, it is not clear if Education is still searching for records for EDU1996. If they are, the records are not likely to be responsive to the Applicant’s narrowed request.

Law

[19] Education’s approach to this file raises three legal issues: whether the extensions of time taken by Education are reasonable, and if so, whether the time extensions are reasonable; and whether Education conducted a “diligent search” for records.

Time extensions

[20] 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).

[21] 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.

[22] 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”.

[23] 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; and *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 “the outer limit of reasonableness” and should not be exceeded except in very unusual circumstances.

Diligent search

[24] A public body has a duty to undertake a “diligent search” for responsive records: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraphs 12 to 15; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraphs 24 to 27; *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII).

[25] In Ontario, the search required of a public body is described this way: “A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request”: *Municipality of Chatham-Kent (Re)*, 2019 CanLII 108986 (ON IPC) at paragraph 15; *Health Professions Appeal and Review Board (Re)*, 2018 CanLII 74224 (ON IPC) at paragraph 11.

[26] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner in *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). The adjudicator in *University of Lethbridge* quotes from an earlier Order listing the kinds of evidence that a public body should put forward to show it made reasonable efforts in its search:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[27] I adopt this explanation of the ATIPPA search requirement, along with the stipulation from the Ontario cases that the search should be conducted by “an experienced employee knowledgeable in the subject matter of the request”.

[28] There is a threshold question in every “diligent search” case, and that is whether there is some basis for believing that undisclosed records exist at all: *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII) at paragraph 64; *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner; *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

[29] The purpose of the “some basis” test is “to prevent the public body expending time and effort on searches based only on an applicant’s subjective belief that a document must exist or should exist or might exist”: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

Analysis

[30] Education has not handled these requests well.

[31] By the end of September, Education had two requests for records relating to curriculum development. The requests were broadly worded, but the core of them was clear enough: the Applicant was interested in records of communications between three pairs of Education employees:

- a. EMP1 and EMP2 (EDU1688)
- b. EMP2 and EMP3 (EDU1996)
- c. EMP2 and EMP4 (EDU1996)

[32] After the December 7 call with the Applicant, the focus of the request should have been even clearer. The Applicant wanted records of communications between those pairs of employees on the specific topic of a made-in-Nunavut curriculum. Other possible topics of conversation were left aside.

[33] But instead of focusing on what the Applicant really wanted, Education took a slow, piecemeal approach to compiling responsive records.

Extensions of time

[34] As noted in paragraph 23 above, the “outer limit of reasonableness” for responding to an ATIPP request is 50 business days (the 25 business days provided for in section 8(1), plus one extension of another 25 business days) except in very unusual circumstances. The present case was never going to be easy, but it is not “very unusual”.

[35] Although the requests were filed on September 19 and 27, respectively, Education does not appear to have started working on them until October 12. No explanation is given for that initial delay.

[36] Once work started, it was done in piecemeal fashion. As we have seen, the Applicant named four specific Education employees. Education requested electronic data files (EDFs) for the four employees as follows:

- a. EMP1 and EMP4: Requested November 21, received December 4.
- b. EMP2: Requested January 15, received same day.
- c. EMP 3: Requested March 4, received same day.

No explanation is given why the requests for EDFs were not submitted right away and all together. By the time the first request was submitted, the statutory deadline of 25 business days had already expired. Since EMP2 was the person in common to all three “pairs” in the Applicant’s request, priority should have been given to that employee’s EDF. Instead, the request for EMP2’s EDF was not submitted until January 15.

[37] The request sent to the Curriculum Development Division in Arviat on October 12 was certainly reasonable. But the first two extension letters on both files said, “The office in Arviat, Nunavut, is currently under renovations and staff have no access to physical files”.

[38] As noted in the Law section above, the list in section 11(1) of acceptable reasons for extending a deadline is an exhaustive list. If a reason cannot be found in that list, then an extension is not allowed. “Office renovations” is not in the list. As I wrote in *Department of Education (Re)*, 2023 NUIPC 4 (CanLII) at paragraph 60, “Education’s internal issues are not the Applicant’s problem”.

[39] Education and the Applicant spoke on December 7 to try to narrow the scope of the request. The Applicant did narrow their request. There was, in my view, an implicit *quid pro quo* expected from Education: in exchange for the Applicant narrowing the request, Education would speed up processing. That did not happen.

[40] For all these reasons, I find that the extensions of time taken by Education were not justified under section 11(1), and even if they were, the cumulative extensions were not reasonable. It should, in my view, have been possible with normal effort to provide the Applicant with a final response no later than mid-December.

Diligent search

[41] As noted in the Law section above, the first step in the diligent-search analysis is to ask if there is “some basis” for believing there are undisclosed records at all.

[42] The Applicant is looking primarily for internal conversations, among the most senior people in Education, about a made-in-Nunavut curriculum. The made-in-Nunavut curriculum was an important public policy issue in the early years of Nunavut’s existence. The Applicant says, in their written submission for this review, that they were expecting 1750-2000 pages of internal conversations.

[43] Instead, the Applicant has received disclosure of internal e-mails numbering “fewer than 15”. The Applicant finds it hard to believe that such an important topic generated so little discussion among education leaders over a seven-year period. I agree. The “some basis” test is met.

[44] The next step in the diligent-search analysis is to ask whether the criteria for a diligent search, as outlined in paragraphs 25 to 27 above, have been met. I find they have not.

[45] The key records in this case are the electronic data files (EDFs) for the four Education employees named by the Applicant. Apart from the unexplained delay in requesting the EDFs (see paragraph 36 above), Education has not provided any explanation of what exactly it requested, what exactly it received, or how exactly it sifted through the EDFs to find responsive records.

[46] Public bodies in Nunavut have difficulty searching EDFs. In *Department of Education (Re)*, 2023 NUIPC 4 (CanLII) at paragraph 42, I wrote:

I am aware that the process of searching through an EDF of emails, at least the way it is done in Nunavut, can be frustrating and time-consuming. The GN's typical hardware and software configuration is not well-suited to the task. A large file must be broken into pieces, which interferes with the proper functioning of the software, and then each piece has to be searched separately. It is not Education's fault that EDFs are so hard to search.

[47] On December 4, Education received the first EDFs from the Department of Community and Government Services. The EDFs were for EMP1 and EMP4. On the same day, Education contacted the Applicant to say there were “thousands and thousands” of records, and requested a call to try to narrow the request. I surmise the two events – receiving the EDFs and making the call – were connected.

[48] What remains unexplained is how the supposed “thousands and thousands” of records ended up producing disclosure packages containing only a handful of responsive e-mails.

[49] In a cover letter dated March 15, 2024, the deputy minister of Education wrote “...there were very few emails in [EMP1's] archived account. The reason for this is unknown, but it may be that she rarely used her government email, or that some emails were deleted or lost”. That is, of course, speculation. To be satisfied that a diligent search was conducted, I need better evidence of why the e-mail archives for EMP1 produced almost no records. EMP1 was the GN's key employee on the made-in-Nunavut curriculum.

[50] There is a reference in Education's internal correspondence to curriculum records from Arviat having been boxed in the summer of 2023 for archival purposes and maybe sent to Iqaluit. There is no indication that Education followed up on this hint from Education staff in Arviat about where responsive records might be found.

[51] In the later stages of EDU1996, Education appears to have expanded its search beyond what the Applicant requested. That was not a good idea. The Applicant was never told, for EDU1996, whether the original, in-scope search was finished. Expanding the search to cover non-responsive records only left the

Applicant and I confused about the status of the file. It may also be leading Education staff in Arviat to continue looking for records that the Applicant did not ask for and perhaps does not want.

[52] I note that Education followed a similar strategy in a previous case: see *Department of Education (Re)*, 2023 NUIPC 4 (CanLII) at paragraph 20. Education needs to re-think its approach. A deficient search cannot be fixed by starting a fresh but vague search for non-responsive records.

[53] For all these reasons, I find that Education did not conduct a diligent search for responsive records.

A few final comments

[54] Over the past several years, Education has struggled to meet its ATIPP obligations: *Department of Education (Re)*, 2024 NUIPC 2 (CanLII); *Department of Education (Re)*, 2023 NUIPC 4 (CanLII); *Department of Education (Re)*, 2022 NUIPC 11 (CanLII); *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Department of Education (Re)*, 2021 NUIPC 21 (CanLII).

[55] Education is making efforts to improve, and I acknowledge those efforts. But progress is slower than it needs to be. The errors made in this case are too like the errors in *Department of Education (Re)*, 2023 NUIPC 4 (CanLII), which was published a year ago. To err is human, but I would like to see more evidence that Education is learning from its previous errors. This Applicant did not receive the good service they have a right to expect under the law.

[56] Education also needs to improve the documentation of its ATIPP files. I had trouble piecing together Education's search and its thought process. I should be able to read an ATIPP file and know what has been done, and when, and why. The "Diligent Search Tracker" tool is meant to be a running log, rather than something that is created after-the-fact for purposes of review.

[57] Education also needs to take the statutory deadlines more seriously. The deadlines in the ATIPPA are not a suggestion. They are the law. There are too many unexplained gaps in this file when nothing much appears to have been

happening. Education has far exceeded a reasonable timeframe for responding to the Applicant's requests.

[58] Finally, I note that all of Education's time-extension letters in this case quote part of section 11(1)(b) – "a large number of records is requested or must be searched" – even though that was not the true reason for the time extensions. It appears that the reference to section 11(1)(b) is now just part of Education's template for time-extension letters. That is not a good practice. It should stop.

Conclusion

[59] The time extensions taken by Education were not justified under section 11(1).

[60] The time extensions taken by Education were cumulatively not for a reasonable period.

[61] Education did not conduct a diligent search for records.

Recommendations

[62] **I recommend** that Education consult with the Director of ATIPP at the Department of Executive and Intergovernmental Affairs for assistance in understanding this decision and in implementing the recommendations.

[63] **I recommend** that Education review and, if appropriate, revise its requests to the Department of Community and Government Services for the electronic data files (EDFs) pertaining to the four employees named by the Applicant.

[64] If an EDF request comes back with fewer records than reasonably expected (especially for EMP1), **I recommend** that Education consult with CGS about technical explanations for the missing records and whether there are alternative methods of retrieving the employee's e-mail archives. **I recommend** that Education document this process and provide the documentation to the Applicant.

[65] I **recommend** that Education redo its search for responsive records within the EDFs. I **recommend** that Education document this process and provide the documentation to the Applicant.

[66] I **recommend** that Education consult the Applicant on whether responsive records are likely to be found in the boxes of curriculum records archived in Arviat in the summer of 2023, and if so, locate and search the boxes.

[67] If the minister accepts my recommendations, I **recommend** that Education complete its disclosure to the Applicant within one month from the date of the minister's decision.

Graham Steele

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