

ᓄᓇᓂᓴᑦ ᑕᓴᑲᓯᓄᓯᑦ ᑭᓪ ᓅᓄᓯᓄᓯᑦ ᑭᓪ ᓅᓄᓯᓄᓯᑦ
Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauuyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Final Report

Report Number:	23-235-RR
CanLII Citation:	Nunavut Liquor and Cannabis Commission (Re), 2023 NUIPC 2
NUIPC File Number:	23-103
GN File Number:	1029-20-NULC03172
Date:	February 9, 2023

Summary

[1] The Applicant submitted a request for records to the Nunavut Liquor and Cannabis Commission, and paid the required fee. The request covered a large number of records covering a five-year period. The NULC gave itself a series of time extensions. The first disclosure was delivered 267 days after fee payment, with no firm date for disclosure of the remainder. The Commissioner finds the totality of the time extensions is unreasonable and recommends faster disclosure.

Nature of Review and Jurisdiction

[2] This is a review of a series of time extensions taken by the Nunavut Liquor and Cannabis Commission (NULC) under section 11(1) of the *Access to Information and Protection of Privacy Act* (the ATIPPA). The request for review was filed under section 28(1) of the ATIPPA. I conducted my review under section 31(1).

[3] I have jurisdiction over the NULC: ATIPPA, section 2, paragraph (b) of the definition of "public body"; ATIPP regulations, Schedule A, item 4.

[4] Although the NULC is legally a stand-alone entity, most of the back-office corporate functions of the NULC, including ATIPP processing, are performed by staff in the Department of Finance. I also have jurisdiction over Finance: ATIPPA, section 2, paragraph (a) of the definition of “public body”. In this decision, “NULC” and “Finance” can be read almost interchangeably.

Issues

[5] The issues in this review are:

- a. When the NULC took a series of time extensions, did the circumstances meet the two conditions in section 11(1)(b)?
- b. If so, is the time extension taken by the NULC “for a reasonable period”?

Facts

[6] In November 2021, the Applicant submitted two ATIPP requests to the NULC, concerning the NULC’s alcohol pricing policy. Discussion between the Applicant and the NULC ensued, which resulted in a re-worded request being submitted in February 2022.

[7] The NULC provided a fee estimate of slightly more than \$30,000. The Applicant was unwilling to pay that much. Further discussion ensued, which resulted in a re-worded request being submitted on March 23, 2023. That is the request that is at issue in this case.

[8] The NULC provided a revised fee estimate of slightly less than \$5,000. The Applicant paid half the estimated fee, in accordance with the *ATIPP Regulations*, on May 12, 2022. That is when the clock started ticking for the NULC’s response. The first deadline was June 17, 2022, which was 25 business days from the date of fee payment.

[9] Since then, the NULC has issued six extensions, each for 25 more business days.

[10] On February 3, 2023 – i.e. while this review was underway – the NULC sent the first disclosure package to the Applicant and also to me. The NULC

acknowledges this is partial disclosure. There is more to come. The NULC cannot say with any precision when the remaining responsive records will be disclosed. It may not be for some months.

Law

[11] 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).

[12] 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.

[13] 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”.

[14] 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 most recently in *Department of Human Resources (Re)*, 2022

NUIPC 13 (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.

Analysis

[15] This case is, on one level, simple. Some 175 business days (267 calendar days) after paying the required fee, the Applicant received partial disclosure. The Applicant does not know, and the NULC is not able to say, when the rest of the disclosure package will be ready. It is obvious that the NULC has far exceeded what the former Commissioner and I have laid down as “the outer limit of reasonableness” for responding to the Applicant’s request. There are no “very unusual” circumstances that would justify NULC blowing past the outer limit to the extent that it has.

[16] Below the surface, though, this case illustrates one of the more fundamental problems with the ATIPPA system in Nunavut. The NULC did not have the resources necessary to respond to the request within the ATIPPA’s time limits, so it chose to respond outside the time limits. There are no consequences for making this choice.

[17] Regrettably, I have no enforcement authority. As I wrote in *Department of Education (Re)*, 2022 NUIPC 11 (CanLII) at paragraph 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.

[18] I can find that the NULC has exceeded the allowable time, but the NULC already knows that. I can recommend that NULC complete its disclosure as soon as possible, but the NULC does not have to accept that recommendation. The

NULC says it is doing what it can, within the limits of its resources. Meanwhile the Applicant waits, and waits, and waits.

Scope of the request

[19] The Applicant asked for records covering a period of slightly more than five years, and described as follows:

- a. “Records ... regarding the [NULC] Pricing Schedule”.
- b. “Records ... related to the pricing of domestic Beer”.
- c. “Records ... related to the pricing of local Beer”.

That is a broad request. It was already narrowed from the Applicant’s original request, but it is still broad.

[20] In its written submission, the Applicant says that it wants to understand the factual basis and rationale for the NULC’s pricing policies. The Applicant says it has tried over an extended period, both inside and outside the ATIPP system, to get that information, but has not been satisfied with the answers it has received. That is why it is resorting to another ATIPP request. It is, of course, entirely within its rights to do so.

[21] The NULC says there were thousands of potentially responsive records, which had to be found, formatted, examined, and where appropriate, redacted. The first disclosure package alone consists of over 1,000 pages of records. Another disclosure package, not yet released, is said to consist of another 4,229 pages. This is not the largest number of responsive records this office has seen on a review file, but it is at the upper end of the scale.

Limiting broad requests

[22] The first and best method to limit the scope of a broad request is for a public body and an applicant to discuss how best to shape the request. That is part of the public body’s “duty to assist”: ATIPPA, section 7(1); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 25 (CanLII); *Applicant (Re)*, 2020 NUIPC 15 (CanLII).

[23] In this case, the NULC and the Applicant did discuss how to revise the request so that it was more focussed for the NULC and more meaningful and affordable for the Applicant. As a result of those discussions, the Applicant did twice re-frame their request. So that option has been exhausted.

[24] There are other mechanisms within the ATIPPA to deal with unreasonable applications or unreasonable applicant behaviour: see, for example, sections 7(2)(b), 10(2)(b), 11(1)(a) and especially section 53. None of these mechanisms apply in the present case.

[25] The NULC says in its written submission that it might have liked to invoke section 53, which allows a public body to disregard an ATIPP request in certain circumstances. Without going into the details of how section 53 works, I will say that the bar for its application is high; that it has been applied only once since Nunavut was created; and that the present case does not, at least based on the information I have, come anywhere close to meeting the requirements of section 53. And of course NULC did not actually make a section 53 application.

[26] Another mechanism for limiting overbroad requests is the charging of fees, as permitted by section 50. The prescribed fees are in the *ATIPP Regulations*, sections 9 to 14 and Schedule B. As I wrote *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraph 57, “fees do serve the function, albeit bluntly, of sharing the cost of the ATIPP system and of regulating applicant behaviour”.

[27] In the present case, the NULC provided a fee estimate, and the Applicant paid half prior to processing, all of which was in accordance with the Act and regulations.

[28] The NULC appears now to regret its fee estimate. It says, and I accept, that by the time final disclosure occurs, NULC staff will have devoted far more time to this request than estimated. It acknowledges that section 13(3) of the *ATIPP Regulations* does not permit upwards revision of a fee estimate, once the first half has been paid.

[29] So that leaves the NULC where it began: with a valid request, for which the required fees have been paid, and which must be processed according to law.

Reasons for the delay

[30] The NULC says that this ATIPP request “is extremely large and was always to going to require a very long processing time”. There are, it says, four exacerbating factors:

- a. Limited human-resources capacity.
- b. No previous experience with a request of this magnitude.
- c. Technical issues.
- d. Communication problems.

[31] On capacity, the NULC says “we face a critical staffing shortage... There is no doubt that our limited capacity impacts our ability to provide the access to information service”. In these circumstances, the NULC must make choices about where to allocate its resources. It has to set priorities, and working on a given ATIPP file will not always be at the top of the priority list.

[32] On experience, the NULC says “None of our ATIPP coordinators have worked on an access to information request of this magnitude before... There is no substitute for experience in navigating complex files like this”. In these circumstances, inexperienced staff take longer to accomplish tasks, and “Small delays are magnified when repeated across thousands of records”.

[33] On technical issues, the NULC says it has run into an “array” of technical problems. I will not go into the details of these technical issues, other than to say that at least some of them were connected to the large number of records. For example, says the NULC, “the size of the raw files we are working with on this request has strained our computer hardware and software”.

[34] On communication, the NULC says that, in hindsight, it might have been better to provide a possible timeframe to the Applicant to help set expectations.

[35] In the Law section above, I quoted section 11(1). That is the exhaustive list of circumstances in which a time extension is allowed. The only one that is possibly applicable in this case is section 11(1)(b):

11. (1) The head of a public body may extend the time for responding to a request for a reasonable period where

....

(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;

....

[36] For section 11(1)(b) to support a time extension, three conditions must be met:

- a. The number of records requested, or that must be searched to identify the requested record, is “large”.
- b. Meeting the time limit would unreasonably interfere with the operations of the public body.
- c. The time extension must be “for a reasonable period”.

First condition: Large number of records

[37] The first condition in section 11(1)(b) is met. As I have noted above, this file is not the largest file my office has seen, but it is on the upper end of the scale. The number of records is “large”.

Second condition: Unreasonable interference with operations

[38] I am not as easily convinced that the second condition in section 11(1)(b) is met.

[39] Certainly I accept that the NULC – or to be precise, the Department of Finance, whose staff do the ATIPP work for the NULC – was short-staffed, and had no prior experience with a request for which there were so many potentially responsive records. But that is not enough.

[40] The second condition of section 11(1)(b) has an implicit premise: that the ATIPP function has been adequately resourced so that the public body can, in normal circumstances, meet its legal obligations. Adequate resources means enough people, with enough experience, and adequate tools, to process ATIPP

requests according to law. If we do not read this premise into section 11(1)(b), then the right of access in the ATIPPA is illusory.

[41] The NULC has been admirably frank about why it has taken so long to respond to the Applicant. But it is the Applicant's perspective that matters. To the Applicant, it does not matter that the NULC is short-staffed, or is inexperienced with a request of this size, or has slightly creaky hardware and software. The Applicant has a legal right of access government records. That right is being frustrated by the NULC's slow response.

[42] The NULC, once it realized how long it was going to take to process the Applicant's request, had some options. An unusually large request required stepping outside the usual processing system. There are freelance ATIPP consultants who could have been hired to deal with this one request. Perhaps there were ATIPP coordinators at other public bodies who were available to assist. Certainly the Territorial ATIPP Manager was available for advice and assistance, for example on some of the technical issues. Perhaps these options were explored, but there is no indication of it in the NULC's written submission.

[43] I have every sympathy for the NULC and Finance. I am certain they are doing the best they can with the resources they have. But the essence of this decision is that when a public body's ATIPP function is inadequately resourced, the resulting delay is unlikely to satisfy the second condition of section 11(1)(b).

Third condition: Reasonable period

[44] In the end, I do not have to decide if the second condition in section 11(1)(b) is met, because the third condition is definitely not met.

[45] No matter how one looks at the situation, a response time of some 175 business days, or 267 calendar days, and counting is not a reasonable period. The first extension was certainly justified. The second extension may have been justified, given the relatively large number of records. But six extensions with no end in sight? No.

A few final comments

[46] This case does not demonstrate the kind of complete breakdown in the ATIPP function that we saw in *Department of Education (Re)*, 2022 NUIPC 11 (CanLII). Nevertheless, my concluding comments in that decision are broadly applicable in this case too.

[47] 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.

[48] The GN is small. Each public body under the GN umbrella is smaller. The vacancy rate is high. The turnover rate is high. The ATIPP function across the GN is not immune to these problems. These problems are chronic.

[49] Perhaps the time has come to revisit the notion that each public body is capable of doing its own ATIPP processing. The GN needs to give serious consideration to re-organizing its ATIPP function, perhaps with a central processing unit, with all the necessary resources and tools. Otherwise the ATIPPA is making promises that the GN cannot keep.

Conclusion

[50] When the NULC took a series of time extensions, the circumstances met the first condition in section 11(1)(b) and might have met the second condition, at least for the first two extensions.

[51] In any event, the totality of the time extension taken by the NULC is unreasonable. The delay in responding to the Applicant is not in accordance with the ATTIPA.

Recommendations

[52] **I recommend** that the NULC complete its disclosure of responsive records on or before April 9, 2023, which is two months from the date of this decision.

[53] If the NULC believes that its internal resources are insufficient to complete its disclosure on or before April 9, 2023, **I recommend** that it find or contract the additional resources, including resources external to the GN, that are necessary to meet that deadline.

Graham Steele

ᑲᑦᑦᑲ / Commissioner / Kamisina / Commissaire