

Commissioner’s Final Report

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Summary

[1] The Applicant requested certain records related to their employment with the Department of Education. The request for records contained two incorrect dates, but these errors were not noticed until later. After a long delay, Education told the Applicant there were no responsive records. Only then did the Applicant become aware of the date errors. The Applicant informed Education. Education told the Applicant the search would be re-done with the correct dates. After another long delay, Education told the Applicant there were no responsive records but it would keep looking. The Commissioner finds Education did not conduct a diligent search, and that the delays in providing a response were not reasonable. The Commissioner recommends a new search be conducted by someone else.

Nature of Review and Jurisdiction

[2] This is a review of the Department of Education’s response to an application for access to records. The review request was filed under section 28(1) of the *Access to information and Protection of Privacy Act (ATIPPA)*. I conducted my review under section 31(1).

[3] I have jurisdiction over the Department of Education: ATIPPA, section 2, definition of “public body”.

Issues

[4] The issues in this review are:

- a. Did Education conduct a diligent search for the requested records?
- b. Were the time extensions taken by Education reasonable?

Facts

[5] The Applicant was employed within the Nunavut education system. The Applicant complained to management about certain workplace conditions which the Applicant found intolerable.

[6] On November 26, 2020, the Applicant spoke for approximately three hours by telephone with two senior managers. The managers promised a workplace investigation, but said that it would probably not be possible to start the investigation until January 2021.

[7] Before the investigation started, the Applicant left their employment and the community in which they were working. They received no further information from the GN about the results of the promised investigation.

[8] In May 2022, the Applicant submitted an ATIPP request for records relating to the promised investigation. The request had two parts: (a) records showing the details and results of the investigation, and (b) the senior managers’ notes of the telephone meeting on November 26, 2020.

[9] There were two date errors in the ATIPP request:

- a. The date of the telephone conversation is stated twice. The first time, the date is correctly given as November 26, 2020. The second time, the date is incorrectly given as November 26, 2022.
- b. The date the workplace investigation started is incorrectly given as February 22, 2022, instead of February 22, 2021.

[10] The Applicant consulted the Territorial ATIPP Manager because the Applicant was uncertain whether the request should go to the Department of Human Resources or the Department of Education. The Territorial ATIPP Manager, who performs a coordinating function but does not themselves process ATIPP requests, forwarded the request to both HR and Education.

[11] On July 6, 2022, HR wrote to the Applicant to say that they (HR) needed more time. On August 2, HR wrote to say that they had been unable to locate any responsive records.

[12] Meanwhile, the extension letter from HR had prompted the Applicant to write to the Territorial ATIPP Manager to say that there had still been no response, not even an acknowledgement letter, from Education. The Territorial ATIPP Manager contacted Education on July 25. Education sent an acknowledgement letter to the Applicant on July 27.

[13] Education admits it received the Territorial ATIPP Manager's email with the ATIPP request in late May, but "overlooked" it. After being nudged by the Territorial ATIPP Manager on July 25, Education started working on the file.

[14] In accordance with the request, Education was looking for records from four people within the education system. Education learned that two of the four had left the GN, and a third was on long-term leave.

[15] Education therefore started their search by sending a request for electronic data files (EDFs) to the Department of Community and Government Services, which manages the GN's computer network. The EDF requests were for e-mails only. On August 5, Education received the requested EDFs.

[16] On November 4, 2022, Education sent a letter to the Applicant stating that no responsive records had been found. The letter adds "Our division has experienced a staffing shortage and we sincerely apologize for the delay in providing you with a response".

[17] The Applicant then contacted this office about a review. When the Applicant was sorting through their papers in preparation for the review, they

noticed, for the first time, the two date errors in the original application. They contacted Education about the date errors. Education agreed to re-do the search, using the correct dates. Since Education was re-opening their search, the Applicant and I agreed that the review would be put on hold.

[18] By February 1, 2023, the Applicant had received no disclosure from Education, and there was no indication from Education when disclosure might be forthcoming. The Applicant and I agreed that I should resume my review.

[19] On February 2, 2023, I wrote to Education asking for their written submission and background documents. I received that material on February 16. The written submission was in the form of a letter from the deputy minister (in the Analysis section below, I will have more to say about the deputy minister's letter). The letter said that Education had set March 10 as a target date for a response to the Applicant.

[20] On March 10, 2023, while this review was nearing completion, Education wrote to the Applicant to say that the revised search had produced no responsive records. The letter said that the search would continue: "...we will be expanding our search for records beyond the names you provided in an effort to fulfill your request to the best of our abilities". There is no indication what search strategy Education might now follow, or when the Applicant might expect a response.

Law

Diligent search

[21] 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).

[22] 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.

[23] 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 the Lethbridge case 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

[24] 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”.

Deadlines and time extensions

[25] 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).

[26] 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.

[27] 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”.

[28] 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 *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.

Analysis

[29] The Applicant had a distressing experience in their GN workplace, which eventually led to their leaving the workplace and the community. In November 2020, they were promised an investigation by senior managers. The Applicant

heard nothing further. They filed an ATIPP request in May 2022 for records of the investigation. Ten months later, they still have nothing from Education. That delay is not acceptable, notwithstanding the fact that some of the delay (but not much) is attributable to the date errors in the Applicant's request for records.

[30] This case can be analyzed either as a “diligent search” case or a “time extension” case. Both lead to the same conclusion: Education has handled the file poorly.

Diligent search

[31] In the Law section above, I outlined the requirements for a “diligent search”. A diligent 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.

[32] In this case, the search was too narrow. The electronic data file (EDF) requests asked only for emails. In my view, the records requested by the Applicant (i.e. an investigation report, and notes of a meeting) are not by their nature records one would expect to find in email. They might be attached to an email, but they are more likely to be found elsewhere, such as in a notebook, on a laptop, on the managers' personal network drive (in GN jargon, the “U-drive”), or on the departmental network drive (the “Y-drive”).

[33] Furthermore, Education seems to have taken it as a given that the three absent employees (i.e. two who had left the GN, and a third who was on leave) could not be contacted. This group included the two senior managers who had promised the Applicant an investigation. They are, or should have been, the key to the search for responsive records.

[34] The fact that someone has left the GN does not mean they cannot or should not be contacted as part of a diligent search: see, for example, *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 33. If the departed employee has taken the records with them (e.g. a notebook with handwritten meeting notes) those records still belong to the GN. If the departed employee has left the records behind – as one would expect – then they can

provide guidance about where to look. Since the GN does not, to put it gently, always follow good records-management practices, this kind of informal guidance from a former employee can be invaluable to zero in quickly on where records will be found.

[35] I have also seen no indication that Education contacted the people who succeeded the departed employees. When a GN employee leaves their position, one would expect their successor to take up their active files. It is possible that this investigation was accidentally dropped when the two senior managers left the GN. The only way for Education to explore this possibility is to talk to the successors, record the answers in the “diligent search” tracker, and inform the Applicant.

[36] I conclude that Education did not perform a diligent search for the requested records.

Delays in responding

[37] Education’s failure to look in the right places was exacerbated by how long the search took.

[38] As noted in the Law section above, the statutory standard for an ATIPP response is 25 business days (a “business day” excludes weekends and holidays). The time may be extended, but only if one of the conditions in section 11 is met. Even then, the time extension has to be “for a reasonable period”. An extension of another 25 business days is, except in very unusual circumstances, “the outer limits of reasonableness”.

[39] In this case, the original request was overlooked in the ATIPP Coordinator’s email inbox for two months. By the time Education even realized an application had been filed, the statutory deadline had been exceeded.

[40] When Education started looking for responsive records, they asked CGS to produce an electronic data file (EDF) of the relevant employees’ emails. Education received the EDFs on August 5, 2022. In the material provided to me by Education, there is no indication of what happened between August 5 and

November 4, when Education wrote to the Applicant to say that no responsive records were found. That is another three months.

[41] The same thing happened when Education re-started the search in November 2022 with the corrected dates. New EDFs were obtained. New searches were done. Another three months went by before Education informed the Applicant that no responsive records had been found.

[42] 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.

[43] Nevertheless, it should not have taken Education three months to complete the task each time (from early August to early November, then again from late November to early March). As we will see later in this decision, there is another reason why Education took so long to go through the EDFs.

[44] The cumulative time taken by Education on this file has far exceeded the statutory deadlines. The delays do not fit within any of the circumstances of section 11, nor has Education tried to argue that they do. Indeed, Education did not even bother to send time-extension letters for most of the delays.

Role of the date errors

[45] In explaining its processing delays, Education points to the date errors in the Applicant's request for records.

[46] It is true that the Applicant's request contained two date errors. But one was insignificant and could not reasonably have led Education astray. The other was more substantial. Still, it should not have held Education back by more than one month.

[47] The first date error concerned the date of the long telephone conversation between the Applicant and two senior managers. The first time the date is

mentioned in the ATIPP request, the date is stated correctly (November 20, 2020). The second time, the date is stated incorrectly (November 20, 2022). But this error could and should have been noticed right away, and probably was. It made no sense for the Applicant to be asking for records of a meeting on a future date.

[48] The second date error concerned the date on which the managers' investigation started. The Applicant wrote that it started (as far as they knew) in February 2022. They meant to say February 2021. This situation was happening during the COVID-19 pandemic, so it would not necessarily have been surprising for an investigation to be postponed for a full year, especially if it involved, as this one did, having staff fly into one of Nunavut's hamlets.

[49] The Territorial ATIPP Manager, who had been communicating with the Applicant, wrote to Education to say that the search could be restricted to the period November 2021 to March 2022. Education then took these dates as hard boundaries for its search. The correct dates were November 2020 (i.e. from the time of the telephone call) to March 2021 (i.e. the Applicant's best guess as to when the investigation would have been completed, assuming it started in February 2021).

[50] I have seen the emails flowing between the Applicant, Education, and the Territorial ATIPP Manager. I can see the date error creeping into the correspondence, and then getting solidified as a hard boundary for Education's search. I have the benefit of hindsight, but I am still puzzled why nobody, including the Applicant, noticed the error. In the context of the Applicant's story, the date range that was being searched (November 2021 to March 2022) did not make much sense. Nevertheless, nobody did catch the error until the Applicant noticed it in November 2022.

[51] The net result was that, from August to November 2022, Education was searching within a date range that (unsurprisingly) produced no responsive records. (And as discussed in the "diligent search" section above, Education was searching only in emails, where the records were unlikely to be found anyway.)

[52] I am sympathetic to Education. No doubt there was some consternation when they heard about the date error. It meant the work they had done between August and November 2022 was wasted. But I have to point out that if they had been working within the normal statutory deadlines, they would have learned of the date error earlier, and they would not, in my view, have been held back by more than one month.

Deputy minister's letter

[53] On February 16, 2023, I received a letter from the deputy minister of Education. The letter was Education's written submission on this review. The letter is frank about Education's limitations with respect to ATIPP files. In the circumstances, it is useful to quote at some length from the letter.

[54] The first portion of the letter deals with the EDFs and the date error:

As you will note in the Activity Log attached, [the Applicant's] ATIPP request required a request for electronic transfer of files, as certain individuals included in [the Applicant's] request are no longer employees of the department. Our current method for searching through archived files received through electronic file transfer must be done manually. Significant effort is required with this method due to software and hardware strain. Each search must be done manually and can fail for a number of reasons. It is our understanding that the [Territorial ATIPP Manager] is working with the Department of Community and Government Services to address the issue.

The issues above are multiplied when multiple file caches need to be searched. Each individual will have a cache but where the files are too large, the caches are provided in split pieces that need to be searched separately. The time and effort needed to complete searches increases and due to the time range error, we were not looking for records in all the right caches.

Because there was a strong basis for the records to exist, we did assume the error was on our end. My department did troubleshoot and exhaust its options which took significant time, but had not found the expected responsive records. A letter indicating this was sent to the applicant on November 4, 2022.

The applicant then reached out to our department by phone to indicate that [their] initial request for information had the incorrect dates. As you can

imagine, this was disconcerting for our under-capacity team, who had already dedicated significant time to this file and would need to repeat the effort.

The file was reopened, and a new request for an electronic data transfer was made on November 21, 2022.

[55] The deputy then addresses a different reason for the processing delays:

Between November 21, 2022 and February 2023, the department continued to work on the applicant's revised request, while at the same time dealing with a number of other lengthy ATIPP requests. The ATIPP resources within the department are limited and we must prioritize work on each file within our capabilities.

We are sympathetic to the context of the request, but each applicant has equal rights to records requested and we have done our best to remain transparent with everyone under our duty to assist.

[56] These latter comments are similar to those I received from the Department of Human Resources in *Department of Human Resources (Re)*, 2022 NUIPC 12 (CanLII) and *Department of Human Resources (Re)*, 2022 NUIPC 13 (CanLII). The gist of the argument is that when processing resources are limited, files are handled in chronological order and each applicant must wait their turn.

[57] “Each applicant must wait their turn” is a fair principle for many bureaucratic processes, but it does not apply to ATIPP requests. Why? Because the ATIPPA sets hard deadlines. There is no statutory deadline for the issuance of a driver’s license or a passport or a tax refund, but there is a statutory deadline for responding to an ATIPP request.

[58] As I wrote in *Department of Human Resources (Re)*, 2022 NUIPC 13 (CanLII) at paragraph 23:

The ATIPPA is the law of Nunavut. It gives applicants a right to receive records from public bodies. It also sets deadlines for how long a public body can take to respond. A public body cannot lawfully ignore those deadlines and make up its own processing rules. When it does, the public body defeats the statutory objectives of the ATIPPA.

In this case, like in the HR cases, Education is making up its own processing rules. Education is defeating the statutory objectives of the ATIPPA.

[59] I have no doubt that Education staff are making an effort within the resources they have been given. They are short-staffed for dealing with the volume of ATIPP files. They have had trouble filling the ATIPP Coordinator role. There has been significant staff turnover in the policy unit that covers ATIPP processing. Searching through EDFs is, because of hardware and software constraints, frustrating and time-consuming. Maybe there has not been enough training or the right kind of training.

[60] None of that, however, is justification for making this Applicant wait as long as they have. To be blunt, Education's internal issues are not the Applicant's problem. They are Education's problem. Responsibility for fixing the problems with ATIPP processing within a department lie squarely with the minister and with the department's management: see, for example, *Department of Human Resources (Re)*, 2022 NUIPC 12 (CanLII) at paragraph 42.

[61] Recent decisions from this office show disarray within the Department of Education's ATIPP function: *Department of Education (Re)*, 2022 NUIPC 11 (CanLII); *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Department of Education (Re)*, 2021 NUIPC 21 (CanLII). The present case can, unfortunately, be added to the list.

A final comment

[62] My conclusions are clear, but I struggle with what to recommend. In response to a reasonably straightforward request for records, Education has been looking in the wrong places, and taking far too long to do it. The file is still technically open, according to Education's most recent correspondence, but Education has not explained its current search strategy or when the Applicant can expect an answer.

[63] Taking the whole history of the file into account, I believe it is more likely that Education will bring this file to a successful and timely conclusion if somebody different takes charge of it. The file needs a fresh look.

Conclusion

[64] Education did not conduct a diligent search for the requested records.

[65] The time extensions taken by Education to respond to the Applicant's request are not justified under section 11 and are, in any event, not for a reasonable period.

Recommendations

[66] **I recommend** that Education plan and execute a new search for the requested records, following the guidance provided in this decision.

[67] **I recommend** that Education, in consultation with the Territorial ATIPP Manager, assign the file to someone who has not been previously involved in the file but who has the experience and knowledge needed to bring the file to a successful and timely conclusion. That may be, for example, a senior staff person in Education, an ATIPP Coordinator from a different public body, the Territorial ATIPP Manager, or an outside contractor.

[68] **I recommend** that Education provide a final response to the Applicant no later than 25 business days after the date of this Review Report. For greater certainty, that is April 19, 2023.

Graham Steele

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