



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-022

May 21, 2024

Department of Environment and Climate Change

Summary:

The Complainant made a request under the **Access to Information and Protection of Privacy Act, 2015** to the Department of Environment and Climate Change for records about a public survey on behalf of the Department by the Public Engagement and Planning Division. Responsive records were identified by the Department, though the survey responses were still being processed by Public Engagement and Planning. The Department provided a final response to the Complainant that did not include the survey responses and further failed to address why the survey results were not included. Subsequently, the Department advised the Complainant to make a new access request for the survey responses. This Office determined that the Department did not comply with section 13 of the Act (duty to assist applicant) by not providing a clear and definitive response as to why the survey results were not part of the Department's final response.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, section 13(1).

BACKGROUND

- [1] The Complainant made an access to information request under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015) to the Department of Environment and Climate Change seeking:

All submissions and questionnaire results for the Climate Change Action Plans Engagement and Consultations.

- [2] The Department conducted a search which produced responsive records that were disclosed to the Complainant. However, the Complainant did not receive the individual responses from the survey. At the time of the request, the Public Engagement and Planning Division, located within Executive Council, was reviewing the survey responses. As the deadline to provide a final response to the Complainant approached, the Department determined that it would not receive the questionnaires from Public Engagement and Planning in time and proceeded to release to the Complainant the other records that were ready to be disclosed.

- [3] In the Department's final response to the access request, the Complainant was not provided with reasons as to why the survey responses were not provided. No exceptions were claimed, it did not dispute that the records were under its control, it did not deny the existence of the records, and it did not apply to the Commissioner for an extension of time to respond. The Department did eventually provide the Complainant with a reason, though the Complainant had to seek out this response on their own initiative. The Department then advised the Complainant to submit a new access request for the survey responses. The Complainant asserts that the Department did not take the appropriate steps to ensure that the records were disclosed within the statutory timeline or to properly communicate why they were not disclosed. The Complainant also questions the Department's solution to their issue, namely, to suggest that they make a new access request.

- [4] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015.

PUBLIC BODY'S POSITION

- [5] It is the position of the Department that it did conduct a proper search and it did identify all responsive records and provided everything that it could to the Complainant within the statutory deadline of 20 business days. Further, it encouraged the Complainant to file an additional access request immediately after the previous request was concluded so that the Complainant could receive the additional records they did not receive in the first request. The Department asserts that it was clear and forthcoming to the Complainant and that it worked diligently on the matter. While not all the records were disclosed in the first request, the subsequent request rectified this deficiency.

COMPLAINANT'S POSITION

- [6] The Complainant's position is that the Department could have done more to provide the questionnaire responses on time and that the progress and challenges encountered by the Department in addressing the request should have been better communicated. As it was not, the Complainant believes the Department failed to meet its duty to assist.

DECISION

- [7] The provisions of ATIPPA, 2015 relevant to this matter are as follows:

13.(1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate, and complete manner.

The Context of the Access Request

- [8] The context surrounding the Complainant's access request is important because it presents a particular set of challenges. In 2023, the Department collaborated with the Public Engagement and Planning Division to conduct a survey of residents on environmental issues. The survey was developed by the Department with assistance from Public Engagement and Planning and was delivered and managed by the Division through its "engage NL" website. Individuals and groups could also make written submissions directly to the Department. Those

submissions did not involve Public Engagement and Planning and often consisted of longer documents with detailed analysis and recommendations

[9] The online survey was launched in the fall of 2023 and closed on January 7, 2024. Once the survey closed, Public Engagement and Planning started to collect and organize the responses in a manner that reflected the responses of participants. Public Engagement and Planning have a particular expertise for this task. The survey received a significant number of responses.

[10] When the Complainant made their access request on February 13, 2024, the survey responses were still being processed by Public Engagement and Planning. The Division advised the Department of this fact when the Department was conducting its search for responsive records. Public Engagement and Planning further advised the Department in early March that the responses were still being processed and that it could not commit to a precise date as to when the material would be properly organized. As a result of this response, the Department issued a final response to the Complainant that included the submissions sent directly to the Department but not the survey responses. In the final response letter sent to the Complainant, the Department remained silent on the issue of the survey responses.

Duty to Assist

[11] As this Office has stated on many occasions, the duty to assist a complainant in the access to information process starts the moment the access request is submitted and continues until a final response is delivered. The duty to assist is more than just conducting a reasonable search, it involves clear communication and, in the case when records are not provided, a clear explanation as to why this is the case.

[12] The legislative framework for access requests requires definitive responses from a public body. Applicants need to know why a decision is made so that they can properly exercise their rights to appeal a decision, whether to this Office or to the Supreme Court of Newfoundland and Labrador. Even when the facts are complex, as in this case, the Public Body must state a clear reason pursuant to ATIPPA 2015 as to why a decision was made. In this instance, the Department provided no reasons; it was instead silent as to why certain responsive records,

which all parties knew existed, were not provided. Instead, the Department subsequently suggested that the Complainant submit a new access request seeking the same records as in the initial access request, but which had not been provided. The suggestion to submit a new response is not a remedy under ATIPPA, 2015 and cannot be used to substitute for the legislative exceptions to access.

[13] The Department should have communicated a definitive response to the Complainant regarding the survey results in its final response. A public body in such circumstances has a number of options to consider in deciding on its response. For example, if a public body determined that the records were not in its custody or control, it should say so. Under such circumstances, a public body may transfer a request, or at least direct the applicant to the appropriate public body. If a public body concluded that it had control but not custody, it needed to obtain the records and either provide access or refuse access in accordance with the Act. If it was not possible to obtain the records within the statutory time frame for a response, a public body could seek approval from the Commissioner for an extension of time to respond. Even if a public body is not able to obtain a precise estimate of when the records would be obtained in order to respond to the request, a rough estimate would at least facilitate an application for a time extension to this Office. If a public body's Coordinator could not elicit such an estimate, departmental executive could be engaged to inquire. Under other circumstances, if the requested records do not exist or cannot be found, a public body must advise the applicant. Failing to provide requested records is a refusal of access, and failure to explain the reason in a final response is a failure of the duty to assist.

[14] To be clear, there is no evidence of bad faith or negligence on the part of the Department in its response to this request. Clearly, the Department struggled with how to handle this particular request and we acknowledge that it is not something that would arise frequently. Not only were the records in the possession of another public body, they were actively being worked on by that public body, such that it would have been difficult for the Department to obtain them sooner. Under such circumstances, a request to this Office for approval of an extension of time would seem to have been the best approach. We do not accept that it was simply impossible to get any kind of rough estimate from Public Engagement and Planning as to when the records would be provided to the Department. Coordinators should avail of

support from their executive to inquire further, in such circumstances. Despite the irregularity of the Department's response, it is this Office's understanding that the Complainant did proceed to make the recommended second access request and the Department provided a final response in compliance with ATIPPA, 2015.

RECOMMENDATIONS

- [15] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Department of Environment and Climate Change maintain its position with respect to this matter, given that a response has already been provided further to the Complainant's second request.
- [16] As set out in in section 49(1)(b) of ATIPPA, 2015, the head of the Department of Environment and Climate Change must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.
- [17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of May 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador