Access to Information and Protection of Privacy Act
5-Year Review

City of Mount Pearl Submission

November 27, 2020

Item 1: Section 16. Time Limit for Final Response

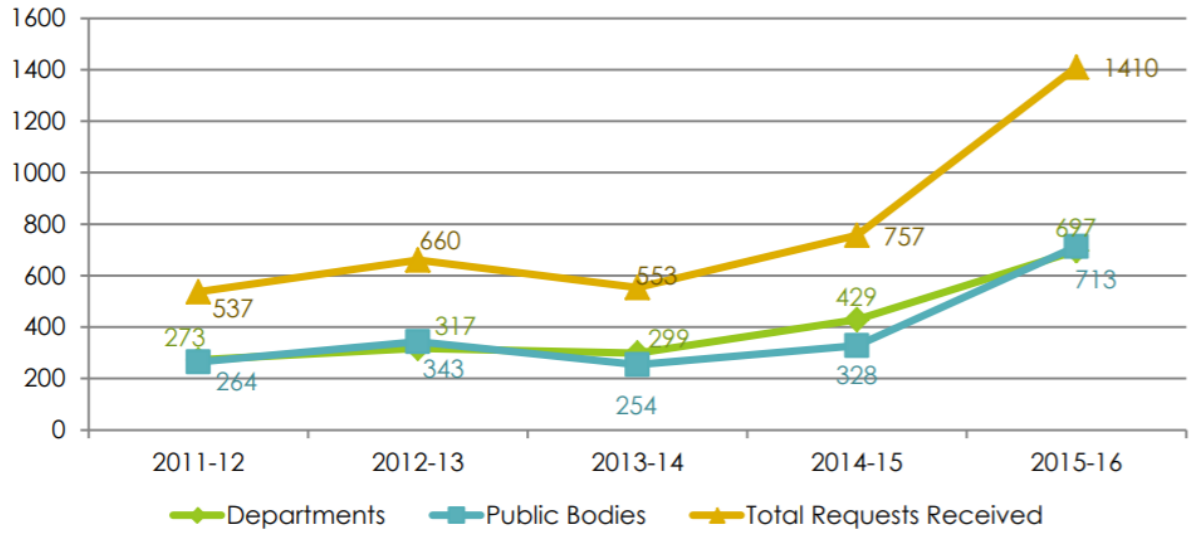
Current Legislation:

> ***Time limit for final response***
>
> ***16.*** *(1) The head of a public body shall respond to a request in accordance with section 17 or 18, without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23.*
>
> *(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.*

Commentary:

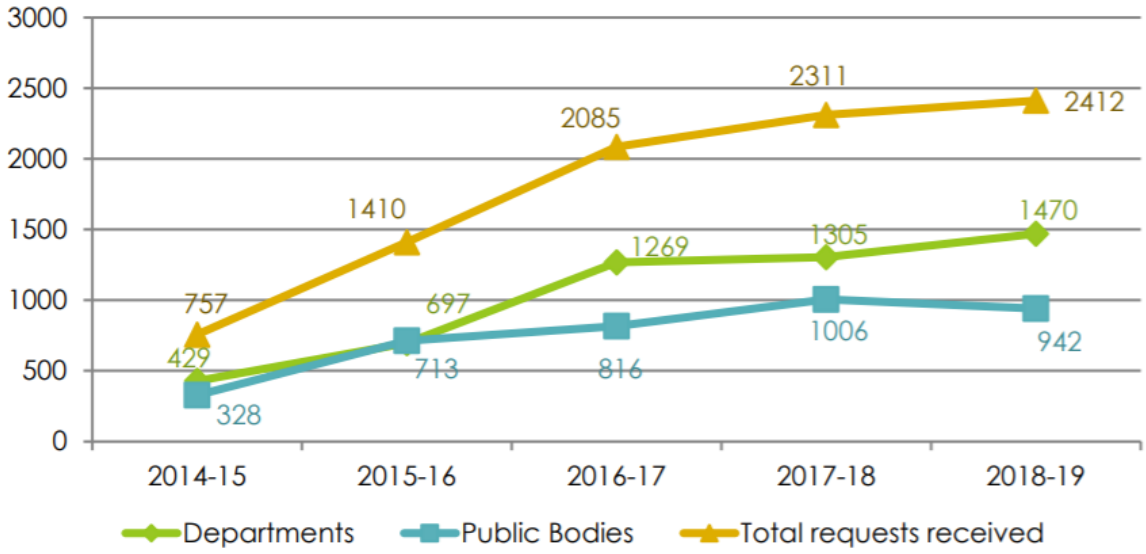
Overall, timelines can be difficult to meet as not all public bodies have/are able to have the role of Coordinator as a dedicated position itself, but rather it is a role that has shared duties and other responsibilities. As such, Coordinators often have many other obligations to their employer that require time/attention. While the option to request an extension from the OIPC exists, it is subjective how much of an, if any, extension will be approved by the OIPC. Further, extensions would not factor in any of the other duties of the Coordinator's position. This is not to imply that the OIPC extension system is flawed/requires changing, but rather that an overall increased time limit is justified. This is further supported by the large increase seen in ATIPP requests since 2012 (see Figures below), which demonstrates a greater burden on Coordinators than when ATIPPA was first enacted.

Figure 1 – Number of Access Requests by Fiscal Year



[1] *Annual ATIPPA Report 2015-2016*

Figure 1 – Number of Access Requests by Fiscal Year



[2] *Annual ATIPPA Report 2018-2019*

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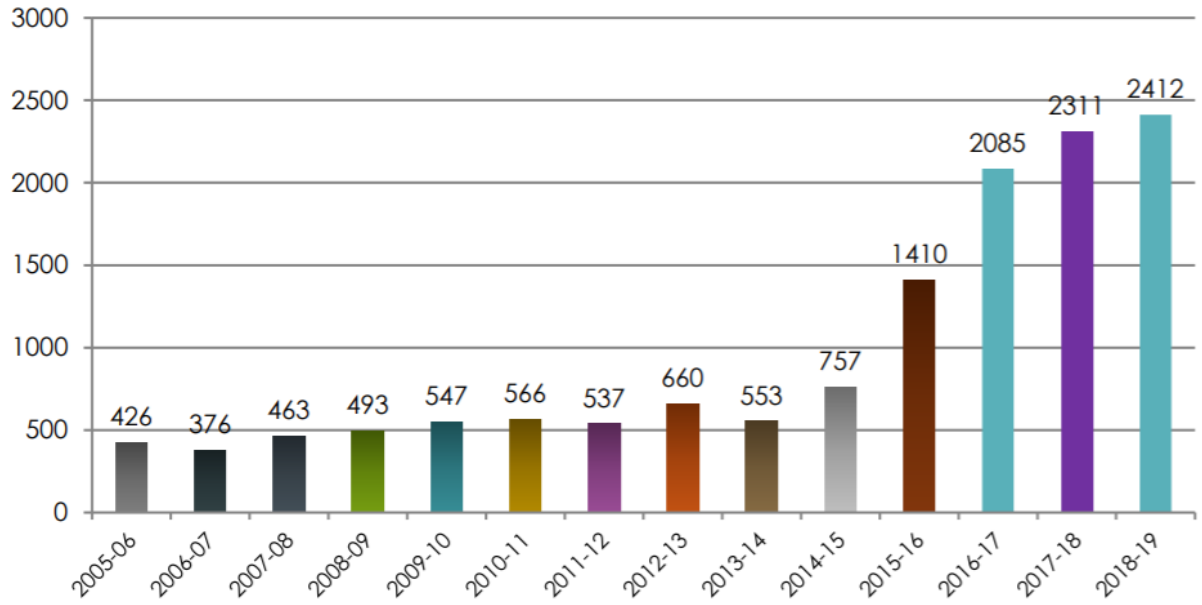
[1] Department of Justice and Public Safety, *2015-2016 Annual Report on the Administration of the Access to Information and Protection of Privacy Act, 2015*, 2017, p.9, https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2015-16.pdf, Accessed November 19, 2020.

[2] Department of Justice and Public Safety, *2018-2019 Annual Report on the Administration of the Access to Information and Protection of Privacy Act, 2015*, 2020, https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2018-19.pdf, p.8, Accessed November 19, 2020.

Figure 2 – Number of Access Requests Over 14-Year Period



[3] *Annual ATIPPA Report 2018-2019*

While it could be argued that Public Bodies should hire a position for a full time Coordinator or provide backup Coordinators, Public Bodies are continually required to 'do more with less.' Decreased municipal revenues make it financially challenging to hire dedicated bodies to fulfill a fluctuating workload projection. Therefore, it is not necessarily fiscally possible for Public Bodies to hire additional and/or full-time Coordinator roles. Extending the Time Limit for Final Response could alleviate stressors on overburdened Coordinators.

[3] Department of Justice and Public Safety, *2018-2019 Annual Report on the Administration of the Access to Information and Protection of Privacy Act, 2015*, 2020, https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2018-19.pdf, p.10, Accessed November 19, 2020.

Item 2: Section 21. Disregarding a request

Current Legislation:

Disregarding a request

21. *(1) The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request where the head is of the opinion that*

(a) the request would unreasonably interfere with the operations of the public body;

(b) the request is for information already provided to the applicant; or

(c) the request would amount to an abuse of the right to make a request because it is

(i) trivial, frivolous or vexatious,

(ii) unduly repetitive or systematic,

(iii) excessively broad or incomprehensible, or

(iv) otherwise made in bad faith.

(2) The commissioner shall, without delay and in any event not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(3) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16 (1).

(4) Where the commissioner does not approve the application, the head of the public body shall respond to the request in the manner required by this Act.

(5) Where the commissioner approves the application, the head of a public body who refuses to give access to a record or correct personal information under this section shall notify the person who made the request.

(6) The notice shall contain the following information:

(a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal;

(b) that the commissioner has approved the decision of the head of a public body to disregard the request; and

(c) that the person who made the request may appeal the decision of the head of the public body to the Trial Division under subsection 52 (1).

Commentary:

Timelines:
In relation to Section 21, Disregarding a Request, the five-day time limit for a public body to apply to the Commissioner for approval to disregard is too short. It can be difficult to have the full context and understanding of a request for a Public Body to determine if a disregard may be applicable within the five-day timeline. Extending the five-day time limit to seven or ten business days will allow the Public Body a greater opportunity to understand all aspects of the request to determine if they wish to seek a disregard.

In addition to this, it is also recommended that the requested timeline be extended by the same number of days it takes the Commissioner's office to provide a response to the request for disregard. This would prevent the Public Body from expending time and resources on a request that could potentially be disregarded. The Commissioner's office provides responses to requests in a very timely manner and the extension would have minimal impact on overall request timelines. The Public Body could provide notification of a submission for disregard to the Applicant in the Advisory response letter to keep the Applicant informed of the progress of their request.

Disregard Multiple Requests as a Group:

When an individual, or group of individuals, submit the same or similar requests that a public body wishes to apply to the Commissioner for a disregard, instead of requiring each disregard request be submitted and evaluated individually, it would be more efficient if the Public Body could draft one submission. The Commissioner could evaluate the disregard requests that meet such criteria rather than individually.

Vexatious Applicant:

If an Applicant has a history of repeatedly submitting vexatious requests, it is recommended that the Commissioner label said Applicant as a *Vexatious Applicant*. This would prevent the Public Body and Commissioner's Office from needing to continually address requests from Applicants who regularly abuse the right to make a request. Below are some links that illustrate this type of situation from other jurisdictions. Further, it could be limited to a specific period of time as to ensure the Applicant is held accountable but also has the opportunity to access the right to information in the future.

Vaughan (City) (Re), 2009 CanLII 73272 (ON IPC)
University of Ottawa (Re), 2013 CanLII 21359 (ON IPC)

Item 3: Section 28. Local public body confidences

Current Legislation:

Local public body confidences

28. *(1) The head of a local public body may refuse to disclose to an applicant information that would reveal*

(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;

(b) a draft of a private Bill; or

(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

(2) Subsection (1) does not apply where

(a) the draft of a resolution, by-law or other legal instrument, a private Bill or the subject matter of deliberations has been considered, other than incidentally, in a meeting open to the public; or

(b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.

Commentary:

Section 28. (1)(c) identifies that deliberations of a committee of a Public Body's elected officials could be withheld as Local Public Body Confidences. Clarification as to whether Committee meetings of the Public Body, which may consist of elected officials are considered as part of the Local Public Body Confidences provision in relation to the Act is needed.

Item 4: Section 33. Information from a workplace investigation

Current Legislation:

Information from a workplace investigation

33. *(1) For the purpose of this section*

(a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;

(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and

(c) "workplace investigation" means an investigation related to

(i) the conduct of an employee in the workplace,

(ii) harassment, or

(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.

Commentary:

This section of the Act effectively removes any Protected Disclosure/Respectful Workplace Policy protection in an organization/Public Body. A recent report by the OIPC, A-2020-013, found that witness statements in a workplace investigation surrounding the CAO of the public body should be provided to the Applicant. This removes any safeguard from potential retribution against staff at the Public Body for being part of an investigation.

Further, as a municipality that has experienced the outcomes from rulings in relation to the Act, it is important we share the impact of such a ruling on the staff body. Upon hearing that the investigator's notes would be released, staff could be seen openly crying and afraid of what the retribution may be sought; recommending the release of these type of records will effectively ensure that employees will not speak up in the future. While the Act does indicate how these types of records should be viewed, this section of the Act can cause great harm to individuals and potentially make them afraid to speak out

against a superior within an organization. The Commissioner's report A-2020-024, indicated that there should be some greater consideration to how both S.33 and S.37 of the Act may relate to each other:

> *It is conceivable, however, that a circumstance could arise in the future where there is clear and convincing evidence that section 37 applies to certain records, yet section 33 may apply to require disclosure. The legislature may wish to consider the interplay between sections 33 and 37 of the Act in order to ensure that the serious harm contemplated by section 37 will not result from a good faith effort to comply with the disclosure requirements of section 33.*

The above-described situation within the City of Mount Pearl most definitely negatively impacted mental, and by extension physical, health of numerous employees within the City.

It is our recommendation that this section of the Act be removed entirely. For comparison, neither Nova Scotia's nor PEI's equivalent Acts have provisions for similar documentation. If this section of the Act must remain, it should at least be amended to something like what is in the New Brunswick Right to Information and Protection of Privacy Act:

> ***Information from a harassment, personnel or university investigation***
>
> *20(2) The head of a public body **may*** [emphasis added] *disclose to the applicant who is a party to the harassment investigation or personnel investigation the information referred to in paragraphs (1)(b) and (c) by allowing the applicant to examine the records, but the head may refuse to provide the applicant copies of the record.*

Further, outlining that the investigator's notes fall outside of the section, while the investigator's findings would fall within, could protect Complainants/Witnesses, while also allowing the Subject to respond appropriately. This would allow the Public Body to protect its employees from backlash/retribution based on workplace investigations. It is reasonable for the Subject of a complaint to know what they are accused of. It is detrimental to the health and safety of Complainants and Witnesses to enable retribution against those who speak up.

Item 5: Section 49. Response of public body

Current Legislation:

Response of public body

49. *(1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,*

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

(3) The written notice shall include notice of the right

(a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in subsection 51 (1).

Commentary:

Sections 49. (1) and 49. (2) are contradictory to each other in how they are written and could have negative impact on S.54. Section 49(1) indicates that a Public Body must give written response within a certain timeline, but 49(2) indicates that no response within said timeline is considered acceptance. Therefore, a non-response by a Public Body is considered acceptance of the Commissioner's recommendation, the Public Body would not need to notify the Commissioner or an Applicant/Third Party of its decision to accept the Commissioner's recommendations. This could lead to confusion when S. 54 Appeal of public body decision after receipt of commissioner's recommendation is relevant.