



ATIPPA Review 2020

Department of Industry, Energy and Technology

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1. About the Department

The Department of Industry, Energy and Technology (IET) is the lead for innovation, economic development, and diversification in Newfoundland and Labrador. The department focuses on creating a competitive environment to support private sector investment and business growth; and supporting industries in Newfoundland and Labrador such as mining, energy, and technology. Working closely with key stakeholders, the department also develops and monitors supporting regulatory and benefits activities.

1.1 Volume of Requests

Public bodies that receive significant numbers of requests need to maximize all potential efficiencies. The former Department of Natural Resources (NR) has received record breaking ATIPP requests since 2018. In 2018, 261 requests were received; in 2019, 264 requests were received; and as of November 26, 2020, 318 requests were received between the former NR and the newly formed IET in August. These have consecutively been the highest amount of requests for any public body within government.

1.2 Types of Requests and Applicant Stats

IET almost exclusively receives access requests for general information, rather than personal information, produced by the department or in control of the department. The department has regular reoccurring requests, for example, monthly briefing notes and general one-time only requests that can arise from a new project or funding initiatives the department may be involved in.

The applicants who make requests to the department are mostly categorized as "individuals" meaning non-media, non-political. In addition, the department frequently receives requests from the same applicants, meaning these individuals make request for information on a regular basis, often several times per month. These individuals make up about 70 percent of our total requests. This makes it easier for the department to build relationships with the applicants, creating trust and understanding from both parties.

2. Administration of *Access to Information and Protection of Privacy Act, 2015*

While the department embraces transparency, there are many challenges faced by the ATIPP team in regards to the administration of the legislation and the processing of requests. The following section will highlight these challenges and propose potential solutions that, we believe, would be options for mitigation.

2.1 Challenge 1: Administrative Workload

It is widely known there is a substantial amount of administrative work that goes along with each ATIPP request. The administrative work on a single file can be upwards of two hours or more. For a department that receives 300 requests in a year this is 600 hours, or 17 weeks, worth of administrative work. Simply averaging one request per day (approximately 250 per year) means two hours every day spent on administrative work for ATIPP. Thus, IET has examined the processing of ATIPP requests and identified areas we believe could become more efficient and streamlined through automation or requirements that can be eliminated. The department recommends the consideration of legislative authority to reduce administrative burden where possible.

Proposed Resolution 1a: Implement an automatic acknowledgement email for requests

Currently, ATIPP coordinators prepare individual letters for each request to inform the applicant their request has been received. Implementing an electronic automatic response to the applicant would decrease the administrative burden and lower the chance of human error and privacy breaches. The department envisions this automatic response will be sent through email once the ATIPP Coordinator confirms receipt of the request in their Outlook inbox. The acknowledgement should include the current message from the template acknowledgement letters prepared by the ATIPP Office, the due date of the request, and contact information for the coordinator.

Proposed Resolution 1b: Merge the ATIPP HPRM/TRIM and the ATIPP Time Tracker databases.

There are multiple mediums where ATIPP Coordinators must enter data. IET is recommending the information captured in ATIPP HPRM/TRIM be moved to the online ATIPP Time Tracker. The platform used to track time can be expanded to gather the information HPRM/TRIM does. Response time details (including extensions) and a list of the sections of the Act used would need to be features added to the time tracker.

Proposed Resolution 1c: Eliminate the 10 day update

Through practice, it has been determined that this requirement does not appear to provide any value to the applicant. The 10-day update simply informs the applicant that the department is processing their request and does not give them any other information. This, for the most part, appears to be repetitive of the acknowledgement email. As coordinators are in contact with the applicant if there is any clarification needed or if a time extension is required on the request, the 10 day update is viewed as unnecessary.

These small changes would not impact the applicants or delay access to information, but would decrease the administrative workload on coordinators. It is estimated these eliminations would save coordinators 45 minutes per file, nearly half the amount of time spent on administrative tasks. For IET, this could equate to 6 weeks worth of work.

2.2 Challenge 2: Responsibility of Applicants to Assist Coordinators

Currently, there are no regulations or requirements for applicants to assist coordinators when processing a request. There are common instances where applicants may make a request that is overly vague or unclear to the point the coordinator is unsure what information is being requested. A disregard may not be appropriate because the applicant is genuinely looking for information, yet when contacted for clarification, they do not respond or respond slowly, often many days later, impacting the processing time.

Proposed Resolution 2: Implement a Duty to Cooperate

IET is proposing the development of a legislative requirement stating the applicants “duty to cooperate”. This could mirror the ATIPP Coordinator’s duty to assist in Section 13 of *ATIPPA, 2015*. A duty to cooperate clause should include provisions for situations where an applicant does not respond to a clarification request; for example, the coordinator may have authority to put the file, and response timeframe, “on hold” until clarification is received. The duty to cooperate should also include guidelines on how to proceed if an applicant is non-responsive for narrowing the scope of an overly broad request or if the applicant is acting ill-mannered towards the coordinator.

2.3 Challenge 3: Holidays (Section 2b)

Business days under *ATIPPA, 2015* do not align with the standard Government of Newfoundland and Labrador holidays. Currently, St. Patrick’s Day, St. George’s Days, Discovery Day, and Orangeman’s Day are not holidays as per the *Interpretation Act*, yet they are considered holidays for governmental departments. Furthermore, holidays that fall on a day of the week other than Sunday and are observed on another day of the week are not considered a holiday under the *Interpretation Act*. For example, Boxing Day 2020 falls on a Saturday and is observed on a Monday. As such, the Monday is considered a business day for ATIPP but not for other public bodies. Therefore, coordinators lose a day of processing time or they are working outside their set work hours during these days. This topic has been extensively discussed amongst ATIPP administrators and is commonly highlighted as a concern.

Furthermore, when government offices are closed due to adverse weather or other unforeseen event the ATIPP calendar is unaffected. This means that if a snowstorm were to occur in January and government offices are close for 4 days an ATIPP Coordinator would lose 20 percent of their processing time.

Proposed Resolution 3: Align ATIPP holidays with the public body holidays and reflect unforeseen events which result in closing of offices

2.4 Challenge 4: Disregards (Section 21)

Currently under, *ATIPPA, 2015* requests for disregards must be submitted to the OIPC no later than day five. IET rarely uses disregards because it is often unknown if this route may be required before day five. With multiple requests being processed simultaneously, a coordinator is typically unable to identify record sets, conduct searches and complete a responsive record review prior to the 5 day timeline.

Proposed Resolution 4: Eliminate/Extend the time period for disregards to be granted

The department genuinely makes every effort to work with applicants and assist them in finding the information they are seeking. Although requests could seem trivial or frivolous on the surface, the ATIPP Coordinator will contact the applicant to clarify or narrow their request to something comprehensible. If clarification is required by an applicant, it is probable they may not respond before day 5, thus making a disregard impossible.

2.5 Challenge 5: Time Extensions (Section 23)

Similar to disregards, time extension requests are to be submitted to the OIPC no later than day 15. Again IET does not avail of many time extensions, however when it is necessary this time restriction can be very challenging. Below are a number of options to help alleviate the challenges with the current time extension issue.

Proposed Resolution 5a: Eliminate/Extend the time period extensions can be granted

Coordinators are often not aware by day 15 if they will need a time extension. A very relevant example of this for the department is when a subject matter expert's review is required. This is the case for a majority of files at IET. On large files it is often hard to determine how much time it will take for subject matter experts to review and provide their recommendations. Once reviewed, there is additional time required to make redactions and have the material reviewed/approved at the executive level. If the subject matter expert is still in possession of the files on day 15 and it is unknown how long the review will take, the ATIPP team must apply for an extension. This process of filing a time extension request can take over an hour and may not end up being required. The subject matter expert may have the file reviewed by day 17 and then the coordinator will be able to complete the access request on time. Time spent completing an unnecessary extension request could have been better spent processing the request.

Proposed Resolution 5b: Grant coordinators the ability to approve a one time, per request, 5-10 day time extension

IET believes a more effective method would be to eliminate the formal request to the OIPC for the first time extension. When a coordinator identifies the need for an extension, they could be given authority to grant themselves a short time extension (such as 5 or 10 days) with permission from the head of the public body and with a written notice to the OIPC. Any request beyond this would require approval from the OIPC.

Proposed Resolution 5c: Bank requests when a set threshold is met for active requests

Similar to the OIPC's banking policy, the ATIPP Coordinator may be given authority to "park" requests when a certain threshold of active requests is reached. This threshold may be different for each public body depending on their level of normal activity and internal resources. This would ensure request volumes are at a more manageable level for coordinators and avoid late responses. The coordinators will be better able to focus on their active files and have them completed before moving onto another set of files. This parking would be used at coordinator's discretion and does not limit incoming requests.

2.6 Challenge 6: OIPC Policies and Guidance

There are policies that have been implemented by the OIPC which have a significant impact on the administration and application of the Act. The department recommends the addition of legislative authority to review/require change to the following policy areas:

Proposed Resolution 6a: Revise the OIPC time extension policies

Filing a time extension request with the OIPC is cumbersome and can take over an hour. This is a significant amount of administrative work for a coordinator when the time could be spent processing the request. Additionally, the OIPC does not provide reasoning to the department in the approval or denial of an extension request, and there appears to be variability in the way that extensions are granted. For example, a coordinator that requests 20 days may received 10 without explanation, or may not be granted the extension at all. Being required to provide less detailed information for an extension request, and receiving explanation from the OIPC, would assist coordinators in working through this process.

Proposed Resolution 6b: Change OIPC policy on responsive information within a record

Currently, the OIPC guidelines say if there is responsive information within a record, the entire record is responsive. This policy often creates an extensive amount of work for the department. It is common for the ATIPP team to encounter records, such a briefing notes, which may be multiple pages of highly sensitive information, with a single sentence or paragraph in the record that is actually responsive to the request. Another common occurrence of this is an email with multiple attachments but not all are responsive. According to OIPC guidance, coordinators are "free to use their discretion" for redacting

non-responsive information. This means careful review of the material and the application of exemption codes is required for all parts of the record, despite the fact that the bulk of the record may have nothing to do with the information requested by the applicant. In the past the OIPC has overruled coordinators when they use non-responsive to redact parts of a record. IET recommends the ability to redact any non-responsive information, using “non-responsive” as the explanation with the support from the OIPC. This would reduce the time the coordinator and subject matter experts are required to take to review all the non-responsive information for redactions. On the surface this may not seem like a great deal of work, however the department deals frequently with multi-faceted documents that fall into this category. Understandably, it is frustrating for departmental staff to spend significant amounts of time determining and applying redactions to information that is not related to the request. Having the approval and support from the OIPC to flag information as non-responsive would eliminate processing time for the department.

Proposed Resolution 6c: Change the definitions accepted by the OIPC for terminology in the Act

Section 39 of ATIPPA, 2015 uses the term “supplied”. In practice, the OIPC has determined that supplied means something that was voluntary given, not requested or required. This interpretation of “supplied” often makes the three part test of Section 39 impossible to use in order to protect third party business information (Section 39 will be discussed further in Section 3 of this report). For example, commercially sensitive documents provided by a company as required under a contract are not voluntarily provided and thus are not covered under this terminology. This effectively eliminates the department’s ability to use Section 39 for its intended purpose. This leaves the department looking to other discretionary exemptions to protect information that should be protected by the mandatory Section 39 exemption. It is also noted that the use of a discretionary exemption makes the information subject to public interest override which is not the case for mandatory exemptions. Clarification is required to ensure standard interpretation and application of this provision. This is noted with the assumption that subsection 39 (b) will remain in the Act.

Proposed Resolution 6d: Lessen the administrative work required by the OIPC to grant a disregard

In addition to the short time period required for disregards, the administrative work associated with requesting one is burdensome. It can take over an hour to complete a request for a disregard and the entire search for records and an assessment of their responsiveness must be conducted by the department to inform the disregard request. This is an area where, the request, based on its merits should be assessed for the disregard, as the reasonableness of the request it is generally known by the actual wording of the request – i.e., the records search is not required to determine this.

3. Access to Information and Protection of Privacy Act, 2015 Exemptions to Disclosure

This section of the submission will highlight the exemptions of *ATIPPA, 2015*, and the department's recommendations, if any. IET does not use every section, however the department believes it is valuable to state the reason there may be no recommendation on a section. For example as outlined below, there are various exemptions in the Act the department uses frequently and have no issues with.

Exemption Section	Comments
Section 27	IET uses this exception rarely. There are no recommendations at this time.
Section 28	IET does not use this section frequently enough to provide input.
Section 29	IET uses this exception very frequently. Our department is economic, policy, and legislation/regulation centred, thus policy advice and recommendations are common aspect of our records. The department has no concerns.
Section 30	IET uses this exception occasionally. The department has no concerns.
Section 31	IET does not use this section frequently enough to provide input.
Section 32	IET does not use this section frequently enough to provide input.
Section 33	IET does not use this section frequently enough to provide input.
Section 34	IET uses this exception occasionally. We recommended subsection (1)(a)(v) be amended to included all Indigenous/Aboriginal self governing bodies. Our department has frequent dealings with Indigenous communities and believes this addition is necessary.
Section 35	IET uses this exception very frequently. Specifically, our department regularly engages with many third party organizations (subsection (1)(d)), conducts research (subsection (1)(e)), and participates in negotiations (subsection (1)(f)). Overall the department agrees with this section however, we do note that negotiations have often been interpreted by the OIPC to be something that occurs only at the beginning of a project/contract. This assumption is not correct for many projects/contracts in our sectors where negotiations are often ongoing throughout the life of a project. It is recommended that this be recognized by the Act.
Section 36	IET does not use this section frequently enough to provide input.
Section 37	IET uses this exception rarely. There are no recommendations at this time.
Section 38	IET does not use this section frequently enough to provide input.
Section 39 (1)	While the bulk of IET requests relate to this exemption, the department is unable to use this section often due to its limited application. Our department deals substantively with third party business information

which would be harmful to disclose. The department, based on the definitions of terms used in this section, is often unable to meet the three part test. This has caused strained relationships with our stakeholders as organizations no longer want to provide information for fear of disclosure under ATIPP.

This is also a concern as it relates to Non-Disclosure Agreements (NDAs) as companies will often not share information unless and NDA is in place. Companies expect that an NDA provides full protection for all information included (as it does in the corporate world), however government is only able to apply exemptions and not protect the information in full. This issue is evolving - frustrations are increasing as companies will not share information unless there is an NDA while government cannot provide the assurance that an NDA will protect the information.

With respect to companies there are other concerns. The first is that government will not receive the full information necessary to do due diligence assessments which could end up causing financial harm to the province – i.e. funding programs where funds are provided without full information being provided – government is then forced to provide funds without full information or not provide funds – both of which could have a negative financial impact on the province. Companies may also choose not to come to NL because of ATIPP expectations – i.e. go to another province. Finally, there are companies who will not engage in government programs – e.g. business growth programs because they are unwilling to accept potential financial exposure as a result of ATIPP.

In addition, it is recommended that the legislation define “trade secrets” as outlined in 39(1)(a)(i). IET would recommend that the definition cover all components covered by the Canadian Intellectual Property Office (CIPO) such as Intellectual property, copyright, trademarks, etc. This will remove any ambiguity for coordinators, third party businesses and the OIPC.

Our department is proposing information that meets two of the three parts 39 (1)(a),(b), or (c) be exempt for disclosure under Section 39 – assuming the definition of “supplied” is changed as previously referenced.

As part of using Section 39, Section 19 of the Act must also be considered. As it currently stands, Section 19 can only be used when a public body is

	<p>intending to use Section 39, however the public body is typically unable to determine whether section 39 actually applies (particularly 39(1)(c)(iii) - release would cause significant harm to the public body). This is problematic because neither ATIPP Coordinators nor the head of the public body are able to (or should be required to) decide on behalf of the third party what they think may be harmful to the third party and therefore exempt under Section 39. As stated by Justice Marshall in <i>Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador</i>, 2019 "there is a significant responsibility placed upon the head of a public body to determine who should be informed of the intention to grant access to information". It is not possible to undertake this decision without properly consulting the third party before deciding to release the information.</p>
Section 39 (2)	IET uses this exception frequently. There are no concerns. This subsection is critical to the operations of our Royalties and Benefits division.
Section 40	IET uses this exception very frequently. The department has no concerns.
Section 41	Not applicable to IET

4. Conclusion

This submission has outlined the challenges our department has identified with the *ATIPPA, 2015* and its administration. The proposed resolutions outlined throughout this report could mitigate these issues and assist all ATIPP coordinators throughout government. IET is committed to efficiently and effectively providing the public with the access to information and we believe these adjustments will make ATIPP a more streamlined process. Thank you for the opportunity to provide our departmental concerns and offer our recommendations.

Appendix A

As part of completing the ATIPPA Review submission, IET consulted with the ADMs and Directors in the department. Below are a list of questions posed to these staff members. Their responses have been incorporated into the report.

1. Does your division have any operational challenges that arise from being involved with ATIPP requests?
2. Are you satisfied with the way the ATIPP Coordinator requests information from you/your division? How could the process of requesting information be improved?
3. Aside from time constraints, what is your biggest challenge when providing information for ATIPP?
4. Does your division handle or process information you believe should be exempt under ATIPP? Please explain and be specific.
5. Are there any other exemptions that you feel should be added to ATIPPA 2020? Please explain and be specific.
6. Within the scope of our current resources, do you have any ideas or suggestions on how to improve ATIPP processes in the department?
7. Any other comments or suggestions?