

November 27, 2020

The Honourable David Orsborn
Committee Chair
Access to Information and Protection of Privacy
Review Committee
3rd Floor, Beothuk Building
20 Crosbie Place
St. John's NL A1B 3Y8
Email: admin@nlatippareview.ca

Dear Justice Orsborn:

I write in response to your letter of September 29, 2020 inviting the Department of Tourism, Culture, Arts and Recreation to submit input into the **Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015) Statutory Review 2020**. We welcome this opportunity to provide some thoughts on the intersection between facilitating information access while also examining the department's experience in administering the Act.

We strongly support the Act's objective of greater openness and transparency and work hard as a Department to meet the requirements of the Act and in exercising our duty to assist applicants. Our experiences in working with other Government entities and applicants offers us some insight into not only legislative provisions, but practical matters involving ATIPP coordinators and processes that could lead to a more efficient operation of the Act. The execution of access to information requests are both time-consuming and expensive undertakings to the normal operations of departments. I will separate our response into two areas: suggested changes to the processing of access to information requests to provide more efficient and direct processing; and, suggested improvements to the ATIPPA (2015) legislation to enable a more balanced recognition of the rights of the public, the government and third parties in discharging the duties of the Act.

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Administering the ATIPPA (2015)

Currently, there is no classification of duties or salary scale for ATIPP coordinators. Across government departments, some coordinators are employed in roles with other duties and the function of ATIPP Coordinators is assumed by one or more staff as required. This causes a variety of differing skill sets and compensation levels. In the 2014 review of the ATIPPA, it was noted that ATIPP coordinators should be in a senior role to comfortably advocate on behalf of applicants to senior management and the executives of public bodies. This may contribute to the high turnover of ATIPP coordinators in government departments which in turn causes a loss of expertise and knowledge of the ATIPPA, 2015.

The processing of ATIPP requests is both a time consuming and expensive process. For some applicants, there is a belief that a request is fulfilled easily, with minimal effort. The reality is the searching and examination of files is only a small part of the ATIPP procedure; consulting with subject matter experts, legal counsel and seeking permission to disclose information by senior executive of public bodies each adds to the cost to the taxpayer to process and release information. This department strongly advocates the implementation of a minimal fee to reduce frivolous and vexatious requests. Other jurisdictions, including the Government of Canada, do charge fees for ATIPP requests and a minimal fee (e.g., \$10.00) would assist in streamlining the workload related to the ATIPPA, 2015. Additionally, we recommend that each completed request should contain a sentence indicating to the applicant the estimated cost to the taxpayer/treasury of processing that particular request. This can be done by recording the number of hours spent on processing the request, time of subject matter experts, legal counsel and Executive branch review for disclosure. Requests for personal information of an individual would be excluded from such an application fee.

Both the ATIPP coordinator and the applicant have a duty to reach a mutual understanding of the ATIPP request. Often clarification is required by the applicant to make the request reasonable and understood by the department. As an example, "Give me everything you have on moose" is not manageable, given the potential variety and volume of responsive records; however the 20 day response clock begins when the ATIPP request is received. Some applicants never respond to coordinator's requests to seek clarification, or respond late in the process. This reduces the time period to get the work done. The process regulations should be amended to reflect the 20 day period for response does not commence until final clarification has been mutually agreed upon between the coordinator and the applicant. Additionally, all Provincial Government holidays and work interruption days (e.g., snow storms, electrical failure) should be recognized as exempt from the 20 day response period. Finally, the five day period to disregard an ATIPP request is too short. Our experience shows that in many cases, clarifications sought from applicants or the searching for responsive records that are in offsite storage precludes coordinators from enough time to file disregard requests to the Office of the Information and Privacy Commissioner (OIPC). The department submits the ability to disregard a request should be a minimum of 10 business days and the ATIPP processing clock be halted until resolution with the OIPC.

On occasion and in accordance with the ATIPPA, 2015, responses to applicants are challenged and investigated by the OIPC. The majority of this department's interactions with the OIPC have been cordial and professional so the following observations are meant to help with the workload associated with the ATIPP process. Once, a complaint is filed with the OIPC, the department has 10 business days to respond. This, however, does not take into account the ongoing workload of the department. More time for response to the OIPC should be a consideration if the department is to undertake OIPC challenges and investigations while conducting normal departmental ATIPP responsibilities. In addition, in cases where the OIPC may be aware of records that were not provided to an applicant, it is incumbent upon the OIPC to share those records with the public body so that public body can determine why a particular record may no longer be in custody.

Legislative Review

Section 21 – Disregarding a request – As mentioned above, five business days is not adequate time to resolve clarification issues with applicants or receive adequate information on the scope and complexity of some requests. The department proposes the ability to file a disregard request with the OIPC be 10 business days, with the ATIPP process clock being stopped until a response from OIPC is received.

Section 25 – Costs - Currently, public bodies cannot charge a fee to access information. As stated previously, this should be changed to a minimal fee of \$10.00 to dissuade vexatious and frivolous applications. Some applicants (e.g., media and political parties) have the resources to pay such a fee. Applicants who are requesting access to their personal information would not be charged an application fee. Other jurisdictions in Canada and the federal government charge minimal fees for ATIPP applications.

Section 39 – Disclosure harmful to business interests of a third party – This section has been a source of contention for our ATIPP coordinators, both from the perspective of the difficulty of meeting the requirements of its three-part test, and, is one of the sections routinely challenged by the OIPC during the complaints process. Currently, the section does not adequately protect the interests of third parties to the point where coordinators hesitate to utilize this section or prefer to apply other multiple sections of the ATIPPA, 2015 to try and protect the interests of our clients. Consideration could be given to requiring any two elements of the three-part test be met in order for the exemption to be applied.

Section 44 – Investigation – As mentioned above, the 10 business days for a public body to make representation to the Commissioner can be limiting, considering other normal departmental ATIPP responsibilities.

Increased transparency remains an important pillar for the public trust. In concert with this is the need for an open dialogue with the taxpaying public on the financial cost to public bodies in discharging the requirements of the ATIPPA, 2015. These issues are critical when considering the reform of the ATIPPA, 2015 and I thank you for the opportunity to provide my input into this important process.

Sincerely,

A handwritten signature in blue ink, appearing to be "Bernard Davis", with a long horizontal line extending to the right.

HON. BERNARD DAVIS, MHA
District of Virginia Waters - Pleasantville
Minister