



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2013-002

January 30, 2013

### Department of Justice

**Summary:**

The Applicant requested from the Department of Justice information pertaining to a wildlife investigation that took place in Labrador in September 2009. The Department provided partial access to the records requested, severing certain information under the exceptions to disclosure set out in sections 21 (legal advice), and 30 (personal information) of the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”). The Applicant accepted the severing but felt that additional records should exist. The Commissioner found that the Department had conducted an adequate search for the records as required by section 9 (duty to assist) of the *ATIPPA*.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, section 9.

**Authorities Cited:**

Newfoundland and Labrador OIPC Report A-2009-011; Ontario OIPC Order M-909.

## I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request dated March 15, 2012 to the Department of Environment and Conservation. The request sought disclosure of records as follows:

*ANY and ALL information as contained in the records of the NL Government which pertain to a Department of Wildlife investigation that took place in a Labrador location known as ‘Crystal Lake’, on or about September 1, 2009. Information to include, but shall not be limited to, all internal e-mails, faxes and correspondence of any nature/ all expense and travel reports including aircraft usage and related costs/ all information, excluding personal identities of the accused, relating to the indictment of [Third Party] and/ or any [Third Party] hunting/fishing guests and/ or any [Third Party] staff, at the Crystal Lake location. Information to also include, but shall not be limited to, all costs incurred in relation to the air transportation of the accused to Happy Valley-Goose Bay, and the subsequent incarceration of the accused. In addition, specific details are requested with regards to the nature of the charges which were laid under the NL Wildlife Act during the course of that investigation, and what the outcome of each of the said charges (offences) was, in relation to fines, penalties etc., following the court bearing(s). Any details of what precipitated this action, if any, also to be included.*

- [2] The request was transferred to the Department of Justice (the “Department”) on March 26, 2012 because in 2011, when the Division of Fish and Wildlife Enforcement was created under the Department of Justice, all files from the Department of Natural Resources (which handled fish and wildlife enforcement previously) were transferred to the Department of Justice. The Department extended the time for responding to the request pursuant to section 16 of the *ATIPPA* and responded to the request on April 19, 2012 by granting partial access and severing certain information under sections 21 (legal advice), and 30 (personal information) of the *ATIPPA*.

- [3] In a Request for Review dated June 19, 2012 and received in this Office on that date, the Applicant asked for a review of the decisions made by the Department. During the informal resolution process the Applicant made it clear to an Analyst from this Office that she was dissatisfied with the Department’s response and felt that additional responsive records should exist. In particular, she was looking for documentation with respect to the aircraft used to transport the hunters and wildlife officials, documentation about the handling and disposition of the weapons that were confiscated from the hunters, records with respect to the ultimate disposition of this case, the amount of the fine(s) ultimately paid by the third party, records regarding any tip or complaint that

led to the investigation and records regarding any charges that may have been originally laid against the individuals involved.

- [4] The Department agreed to undertake an additional search and ultimately did provide more information with respect to some of the above noted issues to the Applicant and this Office, but no additional records were discovered. The Department also provided to this Office a detailed list outlining the search that was undertaken in response to the Applicant's request. However, the Applicant still believed that additional records containing the information she sought should exist. Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated November 5, 2012 the parties were advised that the Request for Review had been referred for formal investigation under section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

## II PUBLIC BODY'S SUBMISSION

- [5] The Department's submission is set out in correspondence dated November 20, 2012. The Department submits that it has met its duty to assist under section 9 of the *ATIPPA*, as the Department conducted a thorough search for the requested records to ensure that all records were provided to the Applicant. The Department outlined their search in a table as follows:

#	Date	Steps Taken	Outcome
1.	Mar.27/12	Contacted Dept. of Justice (Fish & Wildlife Enforcement Division) to see if they had any records relating to request.	There were no records to provide.
2.	Mar.28/12	Contacted Dept. of Justice (Public Prosecutions Division) to see if they had any records relating to request.	They had records, which were provided to applicant on April 19, 2012.
3.	Apr. 10/ 12 - Apr. 13/12	- This request related to records from 2009. At that time, Wildlife Enforcement was part of the Dept. of Natural Resources. - Spoke with ATIPP Coordinator for Natural Resources to see if they had any records relating to this request.	The Dept. of Natural Resources had no records to provide.

		<ul style="list-style-type: none"> <li>- ATIPP Coordinator checked with his Dept. and we were informed that when Fish and Wildlife Enforcement moved to the Dept. of Justice the records were transferred with them.</li> </ul>	
4.	Apr.12/12 – Apr. 19/12	<ul style="list-style-type: none"> <li>- Contacted Fish and Wildlife Division for a second time to confirm they had no records relating to [Third Party]. We were told to contact Fish and Wildlife Officers in the Labrador region for confirmation.</li> <li>- We spoke with an individual from the Labrador Region. He spoke with the case officer who told him that any records they had were in the prosecution file which had already been received.</li> </ul>	There were no additional records to provide.
5.	May 16/12 – June 21/12	<ul style="list-style-type: none"> <li>- The Applicant phoned wondering if there were any records indicating the costs incurred by the province as a result of the arrest (air travel, etc.),</li> <li>- We emailed the officer in Labrador Region to see if there were any records relating to the costs incurred by the province. He informed us that he had no records but that we should contact the Dept. of Natural Resources, Goose Bay region.</li> <li>- Dept. of Natural Resources was contacted and they indicated that the only cost associated with this case was the lease of a twin otter to transport the 5 arrested individuals and their gear. Provincial Airlines provided the cost to lease the twin otter - \$5649 + HST.</li> <li>- This information was provided to the applicant.</li> </ul>	Found additional information which was provided to applicant on June 21, 2012.
6.	June 21/12	<ul style="list-style-type: none"> <li>- The applicant emailed suggesting that there should be additional information including flight logs, reports, etc.</li> <li>- We spoke with the Dept. of Natural Resources, Goose Bay Region, and confirmed there were no other records or information relating to this request.</li> </ul>	Informed the applicant there were no additional records or information to provide.
7.	Aug.29/12 - Oct.2/12	<ul style="list-style-type: none"> <li>- OIPC asked if there was any information about the firearms seized. We explained that multiple searches were conducted and there were no additional records to provide.</li> <li>- OIPC asked if there was any general information about the procedures relating to the seizure of firearms.</li> </ul>	Provided OIPC with general information about procedures relating to the seizure of Firearms currently practiced in the Dept. of Justice on October 2, 2012.

8.	<i>Aug.29/12 - Oct.24/12</i>	<ul style="list-style-type: none"> <li>- <i>OIPC asked if we could find out if there was any way we could confirm if the fines associated with this case were paid.</i></li> <li>- <i>We contacted the Dept. of Justice, Fines Administration Division to see if they could confirm if the fines were paid. They suggested we contact the Provincial Court.</i></li> <li>- <i>We contacted the Provincial Court who confirmed that 5 \$1000.00 fines (\$5000.00 in total) in fines were paid by [the Third Party].</i></li> </ul>	<i>Provided confirmation of payment to OIPC on October 24, 2012.</i>
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### III APPLICANT'S SUBMISSION

[6] Before summarizing the Applicant's argument, I feel it is necessary to describe the documents that were provided to the Applicant, as she makes reference to them in her submission and uses them as a basis upon which to infer the existence of further documents. The Applicant received records from the Crown Attorney's Office in Happy Valley-Goose Bay which included a letter sent to the Court by the Third Party, letters and e-mails from the Crown Attorney to the Department of Natural Resources discussing the case, a letter to the Third Party's lawyer from the Crown, one Summons to a Person Charged With an Offence and five Informations (the document that describes the offence with which one is charged), a draft Agreed Statement of Facts, an Exhibit Ledger, correspondence to the Court from the Crown Attorney's Office enclosing a Forfeiture Order, and a Forfeiture Order signed by a judge.

[7] The Applicant's submission is set out in correspondence dated November 19, 2012. In her submission, the Applicant again requests the information she believes is missing from the Department's response. In particular, she notes that she requested any and all information in relation to a specific incident, including information about costs related to aircraft usage, the nature and outcome of any charges that were laid and what precipitated the incident (whether it was the result of routine patrol or whether conservation officers had received a complaint). The Applicant also notes that among the records she did receive, there are references to video-recorded statements and seizure of weapons, yet no records related to this were located or provided to her. As she requested "any and all information", the Applicant questions why this was not provided to her, and believes

the records must exist. The Applicant also specifically requests ‘jailhouse’ information, notes and records and records with respect to the outcome of the charges laid (i.e. fine amounts), as the documents she received only reveal a “suggested” fine amount and do not include confirmation of the actual fine.

- [8] The Applicant also asks several questions related to her request for documents, such as what precipitated the incident (given its remote location from the nearest Wildlife Office), why a particular weapon was struck from the Exhibit Ledger and why firearms were not returned to the hunters in accordance with correspondence from the Crown Attorney. She also questions whether (and if so, when) the hunters were “read Caution and Charter rights.”

#### IV DISCUSSION

- [9] The Applicant accepted the Analyst’s opinion that the severing of the record was done in accordance with the *ATIPPA*, so the only issue to be discussed in this Report is whether the Department of Justice complied with section 9 of the *ATIPPA* (duty to assist applicant). Section 9 states as follows:

*9. 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.*

- [10] To paraphrase my comments in Report A-2009-011, the duty to assist has three separate components: the public body must first assist an applicant in the early stages of making a request; it must then conduct a reasonable search for the requested records; and finally, it must respond to the applicant in an open, accurate and complete manner. It has been widely accepted by this Office and other Commissioners across the country that the standard against which the duty to assist is measured is reasonableness, not perfection, and the public body bears the burden of proving that the duty to assist has been fulfilled. However, it may be the case that on any specific issue, the burden of proof of a particular proposition may rest with the party that is asserting it. In Ontario Order M-909, the Inquiry Officer commented that:

*Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.*

[11] A reasonable search, as also defined in Ontario Order M-909 and accepted in past Reports from this Office, is one conducted “by knowledgeable staff in locations where the records might reasonably be located.” Based on the wording of the request and the steps taken by the Departmental Coordinator to locate the record as indicated above, it appears to me that a reasonable search was undertaken. The Coordinator contacted people in all the departments where responsive records might reasonably be located, and in some cases, contact was made more than once, as additional search efforts were undertaken during the informal resolution process.

[12] The records that were provided to the Applicant do provide some evidence to suggest that there should be other records, such as the video recorded statements, and records related to the handling of the seized weapons. I agree with the Applicant that it is disconcerting that there are no actual records to show, for example, what the costs were in relation to this incident (i.e. actual invoices from airline companies) or what happened to the confiscated weapons. However, in this case, this appears to be a separate records management issue, and does not relate to the adequacy of the search (and thus the duty to assist owed to the Applicant) by the Department. After contacting Provincial Airlines, the Department did provide the actual cost of leasing the Twin Otter aircraft, but there was no official invoice provided. With respect to the handling of the seized weapons, the Department provided an Analyst from this Office with a detailed explanation of how such are handled in the present by the Department of Justice. However, the Department was not certain if these same procedures were in place with the Department of Natural Resources (which was the department responsible for fish and wildlife enforcement in 2009 when the incident occurred). Additional questions about this process and how long such records are usually retained posed by an Analyst during the informal investigation stage were not responded to by the Department.

[13] The Department was also able to get verbal confirmation from the Court in Happy Valley-Goose Bay that a total of \$5000.00 in fines was paid by the Third Party (five \$1000.00 fines). Again, no record was received. However, it should be noted that courts are not public bodies under the *ATIPPA*, and as such are not subject to the *ATIPPA*, and therefore under no obligation to provide records in response to a request.

## V CONCLUSION

[14] Despite the Applicant's concern that additional records in response to her access to information request exist, it is my finding that the Department has conducted a reasonable search for all records, and has fulfilled its duty to assist under section 9 of the *ATIPPA*. I agree with the Applicant that it seems only logical that additional records should exist, and I can only speculate as to whether such additional records existed at some point and if so, why they no longer exist/cannot be found. As noted, the Department responsible for wildlife and fish enforcement changed from the Department of Natural Resources to the Department of Justice, and there was no response from the Department when questioned about a records retention policy.

[15] The Department of Justice is the public body which responded to the Applicant's request for access to information, and it inherited many of the responsive records from the Department of Environment and Conservation. The one thing which causes me concern resulting from this Review is the fact that important records seem to be missing. Whether they were never created in the first place, whether they were lost, whether they were destroyed or misplaced during the transition from one Department to the other, we may never know. The important thing is that in the future, records of this sort are retained or destroyed only in keeping with an approved records management policy. There is no indication in my investigation that the policies and procedures for records management are lacking at the Department of Justice, however, based on their non-response to our question about their records retention policy, I will suggest that the Department ensure that those policies and procedures are in place and are being followed. Given that it was not the Department responsible for the records during the time frame covered by this request, I do not believe that a formal recommendation in this regard is warranted.

## VI RECOMMENDATIONS

[16] Given my findings above, I have no recommendation to make. Nevertheless, under the authority of section 50 of the *ATIPPA*, I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[17] Please note that within 30 days of receiving the decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30<sup>th</sup> day of January, 2013.

E. P. Ring  
Information and Privacy Commissioner  
Newfoundland and Labrador

