



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-022

October 4, 2016

Department of Natural Resources

Summary:

The Applicant requested e-mails dealing with government business from the Minister's personal e-mail account for a specified period. The Department provided records, but the Applicant complained to this Office, stating that he believed he had not been provided with all records and that the Minister's personal e-mail account had not been searched. The Commissioner found that the Department had conducted a reasonable search, which included the Minister's personal e-mail account. The Commissioner reiterated concerns about the practice of using personal e-mail accounts to conduct business, urged the government to produce legislation imposing the duty to document on all public bodies, and recommended that the Minister establish a policy prohibiting the use of personal e-mail to conduct government business.

Statutes Cited:

Access to Information and Privacy Act, 2015, SNL 2015, c. A-1.2, ss.5, 13.

Authorities Relied On:

Canada (Information Commissioner) v. Canada (Minister of Defence), 2011 SCC 25.

Access to Information Policy and Procedures Manual, November 2015. ATIPP Office, Department of Justice and Public Safety, at www.atipp.gov.nl.ca.

Use of Personal E-mail Accounts for Public Business, OIPC Guideline at www.oipc.nl.ca.

OIPC Reports [A-2016-005](http://www.oipc.nl.ca), [A-2014-012](http://www.oipc.nl.ca), at www.oipc.nl.ca;

Report of the 2014 ATIPPA Statutory Review Committee, 2015, at www.atipp.gov.nl.ca, Volume II: Full Report.

I BACKGROUND

- [1] The Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) to the Department of Natural Resources (“the Department”) for the following records:

All emails containing any sort of government business sent or received by [the Minister] Siobhan Coady between December 14, 2015 and June 1, 2015 from her gmail account.

- [2] The Department responded to the Applicant, providing him with a number of e-mail messages and attachments, with some information severed on the basis of either section 40 (disclosure harmful to personal privacy) or section 30 (legal advice.) That severing was not raised as an issue by the Applicant.
- [3] The Applicant filed a complaint with this Office, stating that he believed he had not been provided with all of the records responsive to his request, as he had reason to believe that the Minister’s personal e-mail account had not been searched.
- [4] The Complaint could not be resolved informally, and was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Written submissions in support of their positions were received from both the Department and the Applicant.

II THE APPLICANT’S POSITION

- [5] The Applicant argues that, on principle, the business of government conducted by public sector workers and elected officials, paid for by public funds, is a matter of public ownership. If records are created in the course of that business, those are public records. The *ATIPPA, 2015* applies to all records “in the custody of or under the control of a public body” and it should apply equally to all e-mail correspondence, regardless of whether that correspondence was created on a personal e-mail account.

[6] The Applicant also argues that, if it is established that, by using personal e-mail addresses, top-level public officials have effectively shielded themselves from scrutiny under *ATIPPA, 2015*, then it will create a dangerous precedent and an incentive for further use of non-governmental systems for correspondence.

III THE DEPARTMENT'S POSITION

[7] The Department took the position that the Minister's personal e-mail account had been searched twice, with the same result, and that the Applicant had been given all of the records from that search responsive to his request.

IV DECISION

[8] The only issue to be dealt with in this Report is whether the Applicant has received all of the records responsive to his request. In the language of access to information, the issue becomes whether the Department has fulfilled its duty, under section 13 of the Act, to assist the Applicant, by conducting a reasonable search for records responsive to the request.

[9] This issue was recently discussed in Report A-2016-021 from this Office. A reasonable search, as defined in Canadian access to information jurisprudence, and in the Access to Information Policy Manual from the ATIPP Office, is a search "undertaken by knowledgeable staff in locations where the records in question might reasonably be located".

[10] There is no doubt that e-mails sent to or from the Minister's personal account would be subject to the *ATIPPA, 2015*. As this Office has stated in a guideline issued in June 2016, posted on the OIPC website, and as recently confirmed in Report A-2016-021, the *ATIPPA, 2015* applies to any records, created or received by officers and employees of public bodies in the course of their duties, which relate to the business of the public body, including those created or received on personal email accounts.

[11] Whether a reasonable search in response to the Applicant's access request should have produced e-mails from the Minister's personal account depends on whether the Department has custody or control of the e-mails in question.

[12] The concepts of custody and control were discussed by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of Defence)*, 2011 SCC 25, in which it stated that where a record is not in the physical possession of a government institution, it will still be under its control if two questions are answered in the affirmative:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[13] Unlike the situation described in Report A-2016-021, where the individuals whose e-mails were sought no longer had a direct relationship with the public body, in the present case the Minister whose e-mails are the subject of this request is still the Minister. It was our view that the Access and Privacy Coordinator conducting the search for records could reasonably expect to obtain copies of any such e-mails from the Minister upon request.

[14] We therefore asked that the Minister search her personal e-mail accounts for any records responsive to the request, and provide them to us. We asked that the records provided to us be accompanied by an affidavit from the Minister attesting to the completeness of the search.

[15] We received from the Department an affidavit, sworn by the Minister, confirming that she had searched her personal e-mail account twice. The first search was conducted in response to the initial access request, and the second search followed the request from this Office. In both cases the searches were witnessed by other senior staff of the Department.

[16] The affidavit also stated that all responsive records were sent to the Applicant in response to the initial access request, with the exception of one April 20, 2016 e-mail message which had previously been released to the media by government and was not

included in the package sent to the Applicant. The affidavit further stated that the second search did not uncover any responsive records that had not already been provided to the Applicant.

[17] It is the general practice of this Office to accept, in the absence of evidence to the contrary, that searches conducted by public bodies in response to access requests are reasonable and complete. In the present case, given the unusual circumstances and the public prominence of the matter, we took the additional step of requesting an affidavit covering the search. The response from the Department supports the conclusion that the Department has been entirely cooperative. I have therefore concluded that the Department has conducted a reasonable search, and has provided all responsive records to the Applicant.

[18] The Minister's affidavit also advised that the Minister has added a notice to her personal e-mail account asking senders to re-direct e-mails pertaining to government business to her government e-mail account. This is a positive step, and commendable, but falls short of an adequate measure to ensure that public body records are preserved and not exposed to a heightened risk of a privacy breach.

[19] I wish to reiterate what I have stated in Report A-2016-021, that public officials should not be able to shield public records from scrutiny by using personal e-mail addresses. Government information management policies make no distinction between personal and official e-mail records. However, there is, so far, no government policy prohibiting the use of personal e-mail accounts for the conduct of government business. This is a policy issue best dealt with as an aspect of a comprehensive implementation of the recommendations of the ATIPPA Statutory Review Committee, which urged the government to take steps to establish a duty to document.

[20] On page 315 of its Report, which was released in March 2015, the Statutory Review Committee set out the need for a duty to document, and made recommendations to ensure that this duty is imposed. It stated:

As of January 2015, the ATIPPA has been in place for a decade. Most of the public focus has been on the provisions of the Act that provides or restricts access, and on the practices around its administration. However, it must be realized that the ultimate success of the ATIPP system rests on its ability to manage and protect information. Senior officials must ensure that appropriate resources are allocated to do the job completely, and that all public bodies understand the essential role that information management plays in ATIPP.

Recommendations

The Committee recommends that

79. The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the Management of Information Act, not the ATIPPA.

80. Implementation and operation of this new section of the Management of Information Act be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.

81. Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems.

[21] In April 2016, in Report A-2016-005, which involved an access request to the Office of the Premier, my predecessor referred to the above passage from the Review Committee's Report, and observed that the current government needed to advance policy development and legislative amendments as soon as feasible.

[22] Report A-2016-005 recommended that the Premier's Office implement a duty to document as recommended by the ATIPPA Review Committee. At that time it was the response of the government to the recommendation that the government was committed to the duty to document, that careful policy work and consultation work was required before implementing a legislated duty to document and that this work had started. However, I am not aware of any further progress toward this important goal.

[23] It is now eighteen months since the recommendations of the ATIPPA Statutory Review Committee were issued. Therefore I wish to take this opportunity to reiterate my comments about the practice of using personal e-mail accounts to conduct the business of public

bodies, and more broadly to urge the government to conclude its efforts to produce legislation imposing the duty to document on all public bodies covered by the *Management of Information Act*. For public bodies covered by the *ATIPPA, 2015* but outside of the *Management of Information Act*, such as municipalities, this issue will have to be addressed through other means. This can be addressed once the first and most urgent step is completed, namely an amendment to the *Management of Information Act*.

[24] I would therefore urge the Minister inquire into the status of the policy and consultation work that the government has begun toward implementing a legislated duty to document, and report back to this Office on the progress that has been made on that project so far, and its anticipated completion date.

[25] However, I would also observe that, in practice, it should not require legislation for government to create and implement a policy that neither ministers nor government employees are permitted to use personal e-mail accounts to conduct government business.

[26] True commitment to accountability and transparency dictates the implementation of record keeping practices and policies that preclude use of personal e-mail accounts or other means that either avoid creating records or make records inaccessible. Premiers, ministers, chairs, directors and other executives who use personal e-mail to conduct the business of a public body set a tone throughout the body that this is acceptable, and perhaps preferred. Citizens of the Province are entitled not to have their access to information subverted by the use of personal e-mail. The public also must be satisfied that communications surrounding a public body's decisions and its actual decisions are documented so that there are records to access. Privacy breaches become more likely as well when government records are stored outside of government networks.

V RECOMMENDATIONS

[27] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Minister create and implement a policy prohibiting the use of personal e-mail accounts to conduct government business by all personnel in her Department.

[28] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Natural Resources 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.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of October, 2016.



Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador