



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-025

November 22, 2016

Central Health

Summary:

The Applicant made a two-part request to Central Health seeking: 1) all records relating to her recruitment, hiring and subsequent contract with Central Health from May 1st, 2014 – July 1st, 2015; and 2) all written records to or from [named individual] and the Applicant from May 1, 2014 – July 19th, 2016. Central Health released a number of responsive records with some redactions under section 40(1) of the *ATIPPA, 2015* (disclosure harmful to personal privacy). The Applicant filed a Complaint with this Office regarding the reasonableness and adequacy of Central Health's search, noting an e-mail in the Applicant's possession that should have been responsive to the Applicant's request, had not been included in the responsive records released by Central Health, thereby calling into question the completeness of the responsive records provided. The Commissioner found that even though Central Health did not provide the e-mail in question to the Applicant as part of the responsive records, it had discovered this e-mail during its initial search and that overall Central Health did perform a reasonable search. However, the Commissioner cautioned Central Health that the e-mail in question should have been provided with the initial responsive records. The Commissioner accepted that this was a good faith error but reminded Central Health that it is a very serious matter if a public body were to knowingly fail to provide a responsive record to an Applicant without relying on one of the exceptions in the *ATIPPA, 2015*. The Commissioner also noted the potential for a future own motion investigation.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2.

Authorities Relied On:

OIPC Reports [A-2016-009](#), [A-2016-022](#), [A-2016-021](#), [A-2016-010](#) at <http://www.oipc.nl.ca>.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”), the Applicant submitted an access to information request to Central Health seeking disclosure of records as follows:

“...[the Applicant] therefore asks to be provided with all materials (e-mails, letters, handwritten or typed notes, anything reduced to writing) written by or, in the possession of, any management personnel or other employees of Central Health in relation to her recruitment, hiring and subsequent contract from May 1, 2014 – July 1, 2015.

More specifically, in relation to [named individual], Chief of Staff during the relevant time frame, [the Applicant] asks to be provided with all e-mails, letters, internal memos, handwritten notes, typed materials or anything reduced to writing to, or from, [named individual] from May 1, 2014 to the present relating to [the Applicant] in any way.”

- [2] Following receipt of the request, Central Health informed the Applicant that it had decided to provide partial access to the records, withholding some information based on section 40(1) (disclosure harmful to personal privacy). This included personal e-mail addresses, individuals’ names and other financial information. Central Health also informed the Applicant that no contract existed between itself and the Applicant as outlined in the first part of the request.
- [3] The Applicant was not satisfied with Central Health’s response and filed a complaint with this Office. The Applicant was in possession of an e-mail that she believed should have formed part of the records responsive to her request, but that had not been disclosed by Central Health. As a result, the Applicant believed Central Health had provided an incomplete set of responsive records and questioned the reasonableness and adequacy of its search and its response to her request. Through the informal resolution process Central Health admitted that it had discovered the e-mail in question during its search for responsive records, although it did not provide it to the Applicant at the time of the request. Central Health provided a copy to the Applicant with appropriate redactions under section 40(1) as soon as the issue was brought to its attention by this Office.

- [4] Attempts to resolve this complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [5] Central Health's position is that a reasonable and adequate search was conducted, all responsive records were found and all redactions properly applied in accordance with the *ATIPPA, 2015*. Central Health did acknowledge it had erred in not providing the e-mail in question despite discovering it as part of its initial search efforts. It stated that the e-mail was not provided to the Applicant at the time of the initial response, "as it was felt that this document was written to provide rationale for the actions of a staff member (third party) in support of a human resource matter." Central Health, following discussions with this Office on the matter, appropriately redacted information in the e-mail and provided the remainder to the Applicant during the informal resolution period.
- [6] Additionally, Central Health performed a second search after the Applicant questioned the completeness of the initial search, believing more records should have been located. Central Health located no further records in this second search.

III APPLICANT'S POSITION

- [7] The Applicant expressed concern that the records disclosed by Central Health were incomplete. The Applicant believed that more responsive records possibly existed because of the e-mail in her possession that was responsive yet not provided to her by Central Health as part of its response to her request. As a result, the Applicant questioned the reasonableness and adequacy of Central Health's search.

IV DECISION

- [8] The Applicant raised the issue of the search performed by Central Health believing that additional records possibly existed that were not located. Therefore, the issue to be determined is whether Central Health conducted a reasonable search.
- [9] Report [A-2016-009](#) notes that while the *ATIPPA, 2015* does not speak directly to the issue of reasonable search, it has been determined that a reasonable search does not require the public body to prove with absolute certainty that further records do not exist. The public body must simply provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.
- [10] The Applicant believed further records existed based on the e-mail in her possession that was responsive to her request yet not provided by Central Health during initial disclosure. Central Health addressed this issue in two ways. First, it acknowledged that the e-mail in question had in fact been found during its initial search, which supports the reasonableness and adequacy of its original search efforts. Additionally, Central Health performed a second search that located no further records other than what had initially been provided to the Applicant as well as the e-mail in question.
- [11] Central Health therefore did locate all responsive records on the first search. I find that the search was conducted by experienced employees, who were knowledgeable in the subject matter of the request, and who expended a reasonable effort to locate records. Taking this into account as well as the fact that Central Health found the e-mail in question during its first search, I find that Central Health made a reasonable effort to identify and locate responsive records. The test is one of reasonableness, not perfection, and overall Central Health conducted a reasonable search for records. However, while I have determined its search efforts were reasonable and adequate, the fact that Central Health deemed a record (the e-mail in question) to be part of the responsive records, yet did not disclose this to the Applicant is problematic. Central Health must be cognizant of the fact

that all responsive records must be disclosed to the Applicant subject to any applicable exceptions claimed. If whole records cannot be provided, partial access, or as much access as is possible is required under the *ATIPPA, 2015*. Further, I note that the rationale behind the creation of a record does not affect or impact its responsiveness to an access request, and therefore cannot be used to withhold release unless the record or a part thereof falls within a legislative exception. Only an exception in the *ATIPPA, 2015* can be used to refuse access to a responsive record. In this case I accept that the failure to provide access to the e-mail in question was a good faith error.

[12] I must point out the importance of timely access and that the manner in which access is provided must be free from any appearance of obstruction. If Central Health had not discovered the record in question when it first compiled the responsive records, then one would generally assume there was a fault in the original search.

[13] Where, as in this case, the record in question was part of the initial package of responsive records, but not provided to the applicant in any form, it could lead to a suspicion that a conscious decision was made to conceal its existence for an inappropriate purpose. The Applicant here certainly believes that had she not already been in possession of the record in question, she never would have received it via her access request.

[14] Given a previous recent instance of an applicant self-identifying the omission of responsive records ([Report A-2016-009](#)) provided by Central Health, it must ensure that all responsive records are provided to all applicants in their first response. Future omissions of clearly responsive records by Central Health may require that this Office conduct an own motion investigation regarding its processes and procedures.

VI RECOMMENDATIONS

[15] I recommend that in responding to future access requests, Central Health ensure adherence to its obligation to release all responsive records not excepted from disclosure. As the Applicant was subsequently provided the outstanding responsive record during the

informal review process and I have determined Central Health's search to be reasonable and adequate I make no further recommendations at this time.

[16] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Central Health 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 (in this case a copy of the Report was sent to the Applicant).

[17] Please note that within 10 business days of receiving the decision of the Central Health under section 49, the Applicants may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of November 2016.



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