



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

A-2010-004

April 22, 2010

Department of Justice

**Summary:**

The Applicant applied under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to records held by the Department of Justice (the “Department”) relating to a 1985 criminal trial. The Department advised the Applicant that the records in question (most of which had been provided to the Applicant in response to a previous informal request) were now missing. Upon review the Commissioner determined that the only issue was whether the Department had fulfilled its duty to assist the Applicant, under section 9 of the *ATIPPA*, by conducting an adequate search for the missing records. The Commissioner concluded that the Department had done everything that could be reasonably expected of it to locate the missing records and therefore had fulfilled its duty to assist the Applicant. Accordingly no recommendation was made.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as amended, ss. 3(2), 5(2), 9, 56.

**Authorities Cited:**

Newfoundland and Labrador OIPC Report 2005-006.

## I BACKGROUND

- [1] On October 29, 2008 the Applicant filed an access to information request with the Department of Justice (the “Department”) as follows:

*I wish/need to attain any and all records regarding Her Majesty the Queen v. [a named individual]. I am especially interested in obtaining the RCMP report and the crown prosecutors report stored at the Department of Justice. I am interested in attaining all information pertaining to this matter and explanation of the information already received to date.*

Typically, my Report would begin with the access request. In the present case, however, it is necessary to summarize a series of events that began long before the access request was filed.

- [2] The matter referenced by the Applicant in the access request was a criminal trial that took place in the summer and fall of 1985 in Provincial Court in a rural Newfoundland community. The accused, after a preliminary hearing, pleaded guilty to a lesser offence and was sentenced to a lengthy term of imprisonment. The accused subsequently appealed against the sentence, but it was upheld by the Court of Appeal.
- [3] Almost twenty years later, on April 15, 2005, the Applicant contacted the Department of Justice in St. John’s requesting information relating to the case. A Department official made inquiries and determined that there were two such files belonging to the Department, a trial file and an appeal file, in off-site storage. The files were retrieved from storage and on May 4, 2005 the Applicant was provided with copies of the information, the judgment and the trial transcript. The files were then returned to the Department’s Records Centre in St. John’s.
- [4] Some months later, not being satisfied that she had been provided with everything in the files, the Applicant contacted the Department again. The same official who had handled the initial request agreed to have another look in the files, and requested that they be retrieved from the Records Centre. It was at that time that the Records Centre advised that the files could not be located.
- [5] The Department in turn advised the Applicant that the files were missing. In December 2005 the Applicant retained a lawyer who made a further request for the information. The Department similarly advised the lawyer that the files could not be located.

[6] In September 2008 the Applicant re-opened the inquiry with phone calls and letters to various Department employees and an e-mail to the Minister. This was followed up by an Assistant Deputy Minister, who ordered a further search within the Department, and who also contacted the RCMP to ascertain whether that body might have retained any relevant records. Unfortunately, the response from the RCMP was that any information previously held in storage on the 1985 criminal matter had since been destroyed. The Department, however, provided the Applicant with contact information for the Provincial Court, and also suggested that the Applicant file a formal access to information request with the Department.

[7] The formal access request was filed on October 29, 2008. The response to the Applicant from the Department's ATIPP Coordinator on November 25, 2008 was that after a thorough search, the records could not be located. Following a number of further communications with the Department by telephone and e-mail the Applicant filed a Request for Review with this Office on December 24, 2008.

### **Informal Investigation**

[8] During the course of the review, an investigator from our Office had conversations and meetings with a number of individuals at the Department, including the very experienced individuals in charge of records management in the Department, and a number of individuals who had been involved in responding to the Applicant's initial requests.

[9] The two individuals who had handled the files in 2005 stated independently that, in their recollection, there was relatively little documentation in them. The appeal file contained only a few pieces of paper, and the trial file contained very little apart from the information, transcript and judgment already sent to the Applicant. Neither of those two individuals recollected any police report, prosecutor's notes, exhibits or case authorities.

[10] In an effort to determine whether it would be possible to reconstruct the contents of the missing files from other sources, the investigator from my Office contacted officials at the Provincial Court and Court of Appeal. My Office was advised by the Provincial Court Director of Court Services that the Court trial file, which until recently had been in St. John's, had been returned to the Grand Falls office for return to storage. Consequently my Office did not see the contents of that file during the

investigation. However, an investigator from my Office was able to view the 1986 appeal court file at the Court of Appeal office in St. John's.

[11] The appeal file contained the judgment on appeal (upholding the sentence), the Notice of Appeal, a letter from a doctor, the transcript of the trial, including the judge's sentencing reasons, and a number of original exhibits, including hand-written statements of the accused, colour photos and plans, and the original information. There were also a number of copies of case authorities. All of that material had been put before the Court during the appeal hearing. The file also contained an August 2006 letter from the Applicant's lawyer to the Court, requesting documents and the Court's reply. It appears from discussions with the Applicant that the Applicant already has copies of all of the documents from this file. Since the exhibits in the appeal file were original documents that had been transferred from the trial file and had not been returned, it is probable that the trial file would contain very little that the Applicant has not already been provided.

[12] Efforts to resolve this matter informally were not successful, and by letters dated March 9, 2009 the Applicant and the Department were advised that the matter had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process both parties were given an opportunity to provide written submissions to this Office pursuant to section 47. Written submissions were received from the Applicant on April 7, 2009 and from the Department on April 14, 2009.

## II SUBMISSION OF THE DEPARTMENT OF JUSTICE

[13] The Department's submission recounted in great detail the background events leading up to the formal access request and the Department's response to that request. That background has been summarized above. The Department also recounted the steps taken and the efforts made to locate the missing files. Those efforts will be summarized below.

[14] The Department's conclusions are as follows:

*[G]iven the extensive search for the missing records over the years and cooperation with the investigation of the OIPC, it is our view that there are no reasonable options available for Justice to pursue in granting the applicant's request and thus we have discharged our duty to assist the applicant pursuant to section 9 of the ATIPP Act.*

### III SUBMISSION OF THE APPLICANT

[15] The Applicant submits that in 2005, the *ATIPPA* was in force, but that no one in the Department referred her to the *Act*, and states that whether anyone considered the legislation in responding to her request is a mystery.

[16] The informal investigation, according to the Applicant, has not explained what exactly happened to the files in the custody and control of the Department. The Applicant states that the excuse of “missing files” is too vague.

[17] The Applicant expresses the concern that the conclusions reached by our Office in the informal investigation are the result of conversations with people in various departments, but there is nothing in writing, and that if our Office did have letters from the parties involved, the Applicant would not be able to gain access to them.

[18] The Applicant further states that:

*Your office, to add insult to injury, stated that you had no jurisdiction with regard to the Courts and could not help me with access to Court records. Yet, your investigator went to the Court and did gain access to the files for his “need to know.” The actions of that investigator show that my right to know is not as important as your investigator’s right to know. What was in that Court file was top secret....*

### IV DISCUSSION

[19] Section 9 of the *ATIPPA* reads 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.*

[20] Our Office interprets this requirement as including the duty to complete a reasonably thorough search for records, by an experienced person who is familiar with the records system and storage practices. Only then can a public body respond that the requested records do not exist. (See, for example, the discussion in Report 2005-006.) In the present case, this duty is all the more important in view of the fact that the responsive records apparently did exist as recently as April 2005.

[21] I have concluded that the missing records probably still exist but have been misplaced. The way in which this situation appears to have come about is summarized in the following paragraphs.

[22] The search by Department officials in response to the Applicant's April 2005 informal request found that after the court cases had concluded the files had been sent to off-site storage at a private company, Storall, in St. John's. They were retrieved from storage by the Department's Records Centre office and delivered to the Department employee who responded to the informal request. Some documents were copied and sent to the Applicant, after which the files were returned to the Department's Records Centre. These file movements were tracked in the Department's file management system which, since 2001, takes the form of an electronic record.

[23] It is important to note that the request made on April 15, 2005 by the Applicant (who resides in another province) was not a formal access to information request under the *ATIPPA*, which had only just come into force on January 17, 2005, and it was not treated as an access request by the Department. Rather, it appears to have been treated as a routine request for information and, following the usual practice of the Department up to that time (which was somewhat informal) copies of the documents were simply sent to the Applicant. No attempt was made to decide whether any of the records ought to be withheld or partially severed in accordance with any of the exceptions to access contained in the *ATIPPA*, and the documents that were sent were disclosed in their entirety.

[24] The Applicant in her submission finds fault with the way in which her 2005 request was handled. However, the *ATIPPA* is quite clear that it does not replace other procedures for access to information (subsection 3(2)) and that it is *in addition to* existing procedures for access to records (subsection 5(2)). It is not uncommon for some public bodies to have procedures for providing access to information that pre-date the coming into force of the *ATIPPA*. In fact, in some cases more information can be routinely obtained under those alternate procedures than under a formal access to information request. In the present case it is possible that, had the Department strictly applied the *ATIPPA* to the Applicant's original request, some of the records that she received might have been withheld, in whole or in part. I cannot conclude that there was anything wrong with the Department's handling of the 2005 request.

[25] In August 2005 a large number of files that had accumulated in the on-site storage room of the Department's Records Centre, including the two files in question, were designated to be returned to off-site storage. This sort of transfer to storage apparently takes place several times each year, due to limitations of space in the Department. Every Justice Department file has a unique record number. When it is placed in a box for transfer, the date, the file number and the box number are recorded. The box numbers are recorded when the boxes are transferred to Storall, and when each box is placed on a shelf in the warehouse a location number is assigned so that each file can be tracked to its physical location. All of this information is initially recorded on paper, and later entered into the electronic system.

[26] When the Department Records Centre staff attempted to respond to the Applicant's 2008 *ATIPPA* request, they discovered that the files in question were no longer in the Records Centre storeroom. However, there was no electronic record of their having been sent to Storall. A systematic search of likely locations within the Justice Department, such as the offices of the individuals who had handled the files in April 2005, did not turn them up.

[27] A search of the electronic record revealed that altogether there were five other files (unrelated to the Applicant's request) missing from the Justice Department's custody during the same period. The Records Management staff have concluded that what most likely happened was that in August 2005, when the boxes of files to be transferred to storage were loaded onto the Storall delivery truck, there was one box, containing all of the now-missing files, which had not yet been assigned a proper box number. The theory is that that box was prematurely included in the shipment. If that were the case, then it went to Storall with the others.

[28] Upon arrival that box must have been checked in somehow, because Storall has no record of an unlabelled box. This could conceivably have happened if, as is sometimes the case, it was a re-used box, still bearing an old label from one of the many other government departments that use this storage company. If so, there is no way of knowing where in the warehouse it might be, since each customer has a separate secure storage area.

[29] In an effort to locate the missing files the Department has taken a number of actions. All of the boxes that were actually recorded as having been sent from the Department to Storall in August

2005 (and also the boxes that had been sent in similar transfers in October and November 2005) were systematically located, opened and searched in case the two missing files had been placed in the wrong box by mistake. That did not prove to be the case. The government also operates its own records storage location (the “White Hills” site) and all boxes of files sent there from the Department during the relevant time period were identified and searched as well, without result.

[30] The Department has taken a number of other steps to complete this process of elimination. It has checked the records of files sent for destruction, but there were no similar numbers. It has asked Storall to print a list of all file numbers listed as received from all customers in 2005, in order to see whether any of them resemble Justice Department file numbers. It has physically pulled and examined files bearing numbers similar to the missing numbers, in case some digits had been accidentally transposed when they were being recorded. In the end the Department has concluded that all of the files sent to storage from the Department in 2005 have been accounted for, except for the missing files noted above.

[31] I have concluded that all of the other logical possibilities have been exhausted, that the Department’s theory is most likely the correct one, and that the two missing files are probably in the Storall warehouse, but in an unlabelled or improperly labelled box in an unknown location. Without any way of further narrowing the search, it would be an enormous task to search among the thousands of file boxes for these missing files. Indeed, such a search, to be complete, could involve getting permission from every other customer of Storall to look in every one of their boxes as well (including boxes that may have been taken out of the warehouse by other customers since August 2005). Under these circumstances, I have concluded that the Department has gone as far as it can reasonably be expected to go in trying to locate and retrieve the missing files.

[32] The Applicant complains that the informal investigation has not explained what exactly happened to the missing files and that the excuse of “missing files” is too vague. The problem is, of course, that if it were possible to ascertain *exactly* what became of the missing files, we would be able to locate them and retrieve them. I must reiterate that although the files were in the custody and control of the Department, and although this is a serious responsibility, the standard of care imposed by the *ATIPPA* on the Department both for safeguarding the files to begin with and for attempting to locate and recover them is not perfection, but reasonableness. On the evidence



uncovered by our investigation I cannot conclude that the officials of the Department responsible for records management were negligent in losing track of the missing files. No matter what file management practices are put into effect, errors or accidents will sometimes happen. Similarly, the Department has put a considerable effort into attempting to locate the missing files, as recounted above. Having eliminated all of the other possibilities, the Department has arrived at a conclusion about what likely happened to those files. In my view that conclusion is a reasonable one, and a more precise one is not possible in the circumstances.

[33] The Applicant is generally correct in saying that if our Office did have letters from the parties involved, the Applicant could not gain access to them. Section 56 of the *ATIPPA* provides that our Office may not, in most circumstances, disclose information obtained in performing duties or exercising powers under the *Act*. In the course of our investigations, it is necessary that the parties are able to provide us with information and to candidly discuss the issues in confidence. This applies equally to applicants and to public bodies. The Applicant has been provided with all of the results of our investigation but was not, however, satisfied to accept the results and did not agree to resolve this matter informally.

[34] Finally, I wish to address what appears to be a misunderstanding by the Applicant regarding access to court files. During the course of the investigation, our Office went to considerable lengths to ascertain what may have been contained in the missing files, in order to determine whether such records could be provided from other sources. Because file administration and records management practices have evolved over the years it is impossible for us to definitively say what sort of documents a file like this would usually contain, or to speculate about whether an Applicant would be entitled to have access to certain documents if they were found to exist. However, it seemed possible that the files relating to the trial and the appeal in the custody of the court offices might contain records that would be of some use to the Applicant.

[35] The statutory jurisdiction of our Office does not extend to court files, because the courts are not included in the definition of “public body” under the *ATIPPA*. As a result, I have no authority to *demand* to see court files or, for example, to request that the Provincial Court trial file be sent back to St. John’s. My right of access to court files is no greater than that of the Applicant or any other citizen, and any such right of access to court files is governed by the records management policies of

the different courts, not by the *ATIPPA*. As it turned out, the Court of Appeal office was agreeable to giving our investigator access to its file, and as explained above, it was found to contain a large number of records. Far from being considered “top secret,” most or all of the records in that file had already been provided by the Court to the Applicant in response to her earlier request.

[36] I have already explained that I have no authority to require the Provincial Court to provide me with court records for my review, nor any authority to recommend that the Court provide them to the Applicant. I understand from the Applicant, however, that the Provincial Court office has advised that it will send the Applicant certain documents from the trial file. I hope that whatever the Provincial Court sends is of some use to the Applicant. However, given that our Office has no jurisdiction with respect to court records, I cannot usefully offer any comment on the Provincial Court’s policy on public access to records, or on specific decisions the Court may have made in response to a request.

## V CONCLUSION

[37] The Department has taken a number of additional steps in response to, and as a follow-up to, this investigation. The Department has flagged these files in its system and in notices sent to Storall, so that if the requested records ever do surface they will be delivered to the Records Centre, and my Office will be notified. In addition, further administrative measures have been put in place at the Department Records Centre as a result of this incident. When files are to be sent back to storage, they are manually checked to ensure that they are filed in the proper boxes and the locations are accurately recorded. As well, additional rules are in place to ensure that only boxes that are properly logged and labelled are actually removed for shipment to storage.

[38] I understand the frustration and disappointment experienced by the Applicant as a result of these files being misplaced. Unfortunately the administrative systems we devise are not perfect, and human error cannot always be eliminated completely. The file management, tracking and storage systems that have been developed by the Department appear to be reasonably adequate for their purposes.

[39] Therefore it is my conclusion that the Department has conducted a reasonable search for the records responsive to this request, and therefore has fulfilled its duty to assist the Applicant pursuant to section 9 of the *ATIPPA*.

## VI RECOMMENDATIONS

[40] Given the conclusions I have reached it is not necessary for me to make any recommendation.

[41] Although I have not made a recommendation in this Report, under authority of section 50 of the *ATIPPA* I direct the head of the Department of Justice to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Department of Justice with respect to this Report.

[42] Please note that within 30 days of receiving a decision of the Department of Justice 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*.

[43] Dated at St. John's in the Province of Newfoundland and Labrador this 22<sup>nd</sup> day of April, 2010.

E. P. Ring  
Information and Privacy Commissioner