

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT 2006-007

Department of Government Services

Summary:

The Applicant applied to the Department of Government Services (the “Department”) for access to electrical permits and related information regarding a cabin and shed owned by another individual. The Department provided access to some, but not all of the information requested. Efforts to resolve this matter informally were not successful, and the Applicant requested that the Commissioner review this matter. The Applicant was of the opinion that the information must be in the custody of the Department. The Commissioner observed that the Department had conducted a reasonable search, and accepted the Department’s position that the records containing the remainder of the information could not be found. The Commissioner also noted that if the Applicant has issues in relation to the validity or correctness of certain electrical permits, this is a matter for enforcement by the Department or other agencies as appropriate, not a matter to be pursued under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”). The Commissioner issued two recommendations. The first is in relation to the Department’s failure to respond to the Applicant within the 30 day time limit as prescribed by section 11 of the ATIPPA, and its corresponding deficiency in exercising the duty to assist under section 9. The second recommendation calls for the Department to update its records management practices, including the development of a schedule within appropriate legislative and regulatory guidelines for the retention and disposal of records.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as am, ss. 3, 9, 11, 12, 49(1), 50 and 60.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-003, 2006-006; Ontario OIPC Order M-909.

Other Resources Cited:

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at

<http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf>

I BACKGROUND

- [1] On 29 August 2005 the Applicant submitted the following request under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) to the Department of Government Services (the “Department”):

[Individual’s] electrical permit for his cabin you gave me month, year, and now I want to know who issued the permit, and who approved it, and I also like a copy of the permit for my record as evidence in a court of law under subsection 37(1) and (2), and subsection 38 Crown Lands Act. I want the name of the person who done electrical wiring in [Individual’s] shed when it was built as evidence for the court [sic].

- [2] In a letter dated 4 October 2005, the Department acknowledged receipt of a number of access requests from the Applicant, although this particular request was not referenced. The Department then issued a further letter dated 14 November 2005 in which it responds to the Applicant’s request. In this letter, the Department refers to previous correspondence sent to the Applicant, taking the position that the Applicant’s request has already been addressed in that series of correspondence.

- [3] The Applicant then forwarded a Request for Review to this Office, received on 17 January 2006. In it, the Applicant further elaborated on his original access request as follows:

[Individual’s] cabin in [community] “electrical permit” who was the person who issued the permit for cabin, and who approved it. The name of the person who done the electrical wiring in cabin and shed in the early 1990’s was it the same person done the cabin also done the shed because I was there, and now I want the person name for the court [sic].

The Applicant included with his Request for Review some additional comments expressing his opinion about the process for issuing an electrical permit and proposing certain consequences for any officials who may have had anything to do with allegedly issuing an electrical permit improperly. The Applicant also indicated in his Request for Review that he wanted me to review an alleged failure of the Department’s duty to assist applicants.

- [4] Attempts to resolve this Request for Review by informal means were not successful. On 6 February 2006 the Applicant and the Department were notified that the file had been referred to the formal investigation process. It should be noted that this Office is issuing three Reports simultaneously in relation to similar types of requests from the same Applicant (see Reports 2006-008 and 2006-009).

II PUBLIC BODY'S SUBMISSION

- [5] The Department provided a formal submission dated 10 February 2006 in which it briefly addresses this matter as well as two other Requests for Review relating to similar requests for information from the same Applicant. The Department advises in its submission that the Applicant was not denied access to any information he requested, but that this information was simply not available. The Department also forwarded to this Office copies of correspondence which further details the process followed in responding to the Applicant's request.
- [6] In a letter to the Applicant dated 4 October 2005, the Department acknowledged receipt of a number of different access requests received from the Applicant during the same period, although this particular request is not referenced. The Department says that this and one other request by the Applicant were overlooked when the letter was issued. The Department advised the Applicant that it intended to extend the 30 day time period for a response to those requests as per section 16(1)(a), and that it would respond by 17 November 2005. The Department stated in the letter that "the reason for this extension of time is to allow us to obtain additional information in order to properly identify the records you are requesting." The Department then issued a further letter dated 14 November 2005 in which it responds to 18 different requests from this particular Applicant, including the request which is the focus of this Report. In this letter, the Department refers to previous correspondence sent to the Applicant, taking the position that the Applicant's request has already been addressed in that series of correspondence.
- [7] The Department's letter groups together this request and two other similar ones relating to electrical permits, and advises the Applicant that "these requests were previously acknowledged

in responses to you dated May 13 and July 8, respectively. Also attached is a copy of a letter from [Deputy Minister] dated January 20, 2005.” The two letters from May and July were signed by an Electrical Inspector, employed by the Department, in response to “allegations” and a “complaint” by the Applicant, as opposed to a request under the *ATIPPA*. The letter dated 8 July 2005 advises that “the undersigned has responsibility only for electrical matters,” and the Applicant’s allegations of violations under various pieces of legislation “has been forwarded to the Province’s Department of Justice for its review and opinion.” The letter dated 13 May 2005 states that:

We have initiated an investigation of your complaint dated April 18, 2005 regarding the electrical wiring at [individual]’s cabin and shed in [location]. Our inspection records indicate that an electrical permit was issued for the cabin in June 1990 and the connection authorization was approved July 1990. The shed wiring investigation is still ongoing. We will advise you of any results when the investigation is completed.

The letter from the Deputy Minister of the Department to the Applicant dated 20 January 2005 is not relevant to this particular matter, but instead relates to a different request by the Applicant.

- [8] On 30 January 2006 the Department issued a letter to the Applicant in which it indicated in reference to the Applicant’s request that:

The electrical permit for the cabin was issued in St. John’s on June [date], 1990. We do not have a record of the person who issued the permit. The connection was authorized by [named official] on July [date], 1990. A copy of this permit has already been supplied to you.

We do not have a record of the name of the person who did the electrical wiring in the shed when it was originally built. The only record we have regarding this shed is a copy of a permit granted in May 2005, a copy of which has already been forwarded to you.

- [9] On 25 April 2006 the Department issued a further letter to this Office on the specific measures undertaken to assist the Applicant and to locate the requested records. With regard to the aforementioned letter of 4 October 2005, the Department acknowledges that this and one other request by the Applicant were overlooked, and were not referenced in that correspondence. The Department says that:

The appellant submitted 11 requests from August 29, 2005 up to and including September 13, 2005. These requests often contained several requests relative to one or more departments. The coordinator for ATIPPA was new to the role and had some difficulty interpreting the exact nature of the requests.

- [10] Subsequent to the Department issuing the letter of 4 October 2005, the Department initiated a meeting with the Applicant to discuss his various requests for information. The Department says in relation to that meeting that:

On October 19, 2005 the coordinator met with the appellant for about two hours to try and determine what the exact nature of his requests were and to offer him some verbal responses on the information that had been collected to date. It was quickly apparent that this session did not meet the expectations of the appellant.

- [11] The Department, in its letter to this Office of 25 April 2006, says that “to investigate these requests, telephone calls and faxes were made and sent to GSC Managers of Operations, [name], St. John’s, and [name], Harbour Grace.” The Department further states that this particular request was determined to be repetitive, the matter having been addressed in previous correspondence to the Applicant.

- [12] As noted above in its response of 30 January 2006, the Department acknowledges being unable to find records in relation to some aspects of the Applicant’s request for information. In addition to the searches conducted by Department personnel, the Department also notes that records management is a factor in terms of older records:

Electrical Inspections responsibility was transferred from the Department of Environment and Labour to the Department of Government Services and Lands in 1995. All existing records prior to 1995 were also transferred. The paper records in question (what is known to exist) are stored at the Harbour Grace office. It is possible that information was lost as a result of this transfer. [...] There is no retention and disposal schedule in place for electrical permits. The department acknowledges that this is an area requiring attention.

III APPLICANT'S SUBMISSION

[13] On 16 February 2006 the Applicant forwarded a submission to this Office in which he outlined his position regarding the requested material. He indicated that he does not believe that the Department is correct in stating that it does not have records containing all the information he requested. He states that the particular location of the buildings referenced in his request dictates that any electrical permit issued would have most likely come from the Bay Roberts Government Service Centre as opposed to the St. John's location as indicated in the Department's response.

[14] The Applicant further indicated that the inability of the Department to locate some of the requested information is a concern to him, because it calls into question whether the process of granting the permits for the buildings in question was done correctly and legally. He says that the information he is requesting is important in order to determine whether the correct procedure was followed with regard to these buildings.

[15] The Applicant then concludes his submission by going into a significant amount of detail about his particular concerns regarding the connection of electrical service to those buildings and his belief that this connection may have been done improperly. The Applicant quotes other legislation in order to support his position, and he proposes that various individuals should be charged with an offence under section 72 of the *ATIPPA*, as well as being charged under the regulations of another act.

[16] A further submission from the Applicant dated 22 March 2006 was also received by this Office, in which he repeats similar arguments, stating that "no electrical should be put into that shed hooked up to his cabin."

IV DISCUSSION

[17] In discussing this particular matter, it is important to reflect on the purpose of the *ATIPPA* as outlined in section 3(1):

3.(1) *The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

(a) giving the public a right of access to records;

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;

(c) specifying limited exceptions to the right of access;

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

(e) providing for an independent review of decisions made by public bodies under this Act.

[18] In his correspondence to the Department and to this Office, this Applicant has continually confused the concept of access to information as described in section 3(1)(a) with other issues. I must make it clear that the Applicant's arguments about whether an individual has or has not contravened some electrical regulations are completely irrelevant to this Report. These are not issues which can be dealt with by this Office or by using the provisions of the *ATIPPA*.

[19] In this case, the Department is asserting that all available records have been provided to the Applicant, while acknowledging that no records can be found which respond to certain parts of his request. It is important to note that when an Applicant, in a Request for Review, takes the position that a public body is either intentionally withholding a record or has not undertaken an adequate search for a record, there is some onus on the Applicant to present a reasonable basis for that position. As I noted in my Reports 2005-003 and 2006-006, adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. 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.

In my opinion, the Applicant has not provided a reasonable basis to conclude that records relating to this electrical permit exist.

[20] I noted in my Report 2005-006 that “the Inquiry Officer in Order M-909 also states that records searches ‘must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.’” I accept that such was the case in this instance.

[21] In addition to the main thrust of his Request for Review, the Applicant also requested me to determine whether the Department had failed in its duty to assist applicants. The duty to assist is set out in section 9 of the *ATIPPA* 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.

[22] Despite the difficulty of keeping track of a large number of requests from the same Applicant, I believe there are some issues in the way the Department carried out its duty to assist the Applicant in this matter. The Department failed to forward an acknowledgement to the Applicant that it had received this request within the 30 day time period prescribed by section 11 of the *ATIPPA*. The Department states in its submission that it simply overlooked this particular request when it forwarded its letter of 4 October 2005 to the Applicant acknowledging receipt of a number of his requests for information. This meant that the Applicant was not properly notified that an extension of time to respond was being applied by the Department in relation to this request. I accept that the Department simply overlooked this request when it sent out the October letter to the Applicant, but even the date of that letter shows that the Department took 36 days to issue its initial response to the Applicant. Section 11 of the *ATIPPA* requires that a public body must respond to an Applicant within 30 days. Despite the many requests received from the Applicant in a short period of time, 36 days is not an acceptable time frame

[23] While the Department’s October response to the Applicant neglected to reference this particular request, the letter issued to the Applicant in November was somewhat vague in its response to this request. This response, as noted above in the Department’s submission, simply referred the Applicant to previous correspondence, which was presumed to suffice as a response

to this access request. More care should have been taken, however, to compare the contents of the letters referenced to the details of the Applicant's actual request. It is clear that these letters did not contain information answering all of his specific questions, such as who issued the permit for electrical wiring in the cabin, who approved the permit, as well as the name of the person who did the electrical wiring in the shed. The Department was required to indicate whether or not this information was available to the Applicant in its November correspondence, and to state the reasons why or why not, with specific reference to the *ATIPPA*.

[24] Only in its correspondence of 30 January 2006 did the Department specifically address these questions. This letter was not written until after the Applicant had filed his Request for Review with this Office. I do not accept the Department's position, therefore, that this request by the Applicant was entirely repetitive, even though some aspects of it were so. In its 30 January 2006 correspondence, the Department provided the name of the person who approved (or authorized) the connection. The Department also states that it does not have a record of the person who issued the permit, nor does it have a record of the person's name who did the electrical wiring in the shed. The Department's failure to adequately address each part of the Applicant's request prior to this letter detracts from its other efforts to fulfill the duty to assist, including its meeting with the Applicant to try to determine the needs of the Applicant in filing his many requests. It appears that some records were provided to the Applicant, such as a copy of the electrical permit for the cabin issued in 1990 and a copy of the electrical permit for the shed issued in 2005 (although it appears the Applicant was seeking an older permit). Unfortunately, the Department does not seem to have noted in its November correspondence to the Applicant any indication of what records relating to this particular request were being provided to the Applicant.

[25] Section 12 of the *ATIPPA* sets out the basic requirements for a response issued by the Department:

12. *(1) In a response under section 11, the head of a public body shall inform the applicant*
 - (a) whether access to the record or part of the record is granted or refused;*

(b) if access to the record or part of the record is granted, where, when and how access will be given; and

(c) if access to the record or part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.

[26] The Department must take greater care to ensure that its responses to Applicants address each part of the Applicant's request, as per section 12. In addition to section 12, the *ATIPPA Policy and Procedures Manual*, (produced by the Department of Justice Access to Information and Protection of Privacy Coordinating Office), contains very specific guidelines and instructions, as well as a form letter to assist any public body in preparing a response. This will ensure that all elements of a response are in place, which will assist both the Applicant and the public body should the matter come before me for Review.

[27] Another factor which comes to light as a result of this Review is that of records management within the Department. The Department states in its 25 April 2006 submission to this Office that "there is no retention and disposal schedule in place for electrical permits. The Department acknowledges that this is an area requiring attention." This is not a subject on which I am prepared to go into great detail, other than to recommend that such a schedule be established under the appropriate legislation and regulations. Some of the questions posed by the Applicant might involve records which may have been destroyed as part of an ad hoc records disposition, or which may have simply been lost when responsibility for electrical regulations moved from one department to another, as suggested by the Department. Whatever the reason, the Department needs to develop a set of procedures to deal with its records in order to be in the best position to comply with the requirements of the *ATIPPA*.

[28] It appears that the Department may also be experiencing some difficulty in handling a large amount of requests, many of them coming from this particular Applicant. In order to ensure that these requests are handled in the most appropriate way, in full compliance with the *ATIPPA*, it may also be useful for the Department to develop a system which carefully tracks all requests, also ensuring that correspondence issued to applicants is consistent with the *ATIPPA Policy and Procedures Manual* so that no requests “fall through the cracks” and receive an inadequate or late response.

V CONCLUSION

[29] In this Review, we have seen the difficult situation of an Applicant who does not appear to fully understand the purposes to which the *ATIPPA* can apply and a public body which appears to be having difficulty coping with many requests for information from this particular Applicant. It is clear that the Department has made efforts to meet with the Applicant and to understand the Applicant’s needs. It is equally clear, even by the Department’s own admission, that it was unable to satisfy the Applicant. Part of this may be due to the fact that the Applicant is not only requesting records, but also appears to see the *ATIPPA* as a way of spurring some other type of enforcement activity in relation to electrical regulations. Another part of the problem has been the Department’s failure to respond in a complete and timely manner to the Applicant’s requests.

[30] This Review involved records of a relatively routine nature. There is certainly no indication that the Department has intentionally deceived the Applicant in any way, and I accept that the Department has simply lost track of these fifteen-plus year old records. The Department acknowledges that it needs to improve its records management system, as well as to develop an appropriate retention and disposal schedule. Clearly, some adjustments are warranted in how the Department goes about processing access requests. Despite this, I do not believe that a further search for the information/records sought by the Applicant is likely to yield a different result.

VI RECOMMENDATIONS

[31] I find that the case of the Applicant is not well founded with respect to the records described above and I therefore issue no recommendation with respect to the requested records. With respect to the Department's delay in responding to the Applicant's request, and to the Department's failure to thoroughly address all aspects of the request, I hereby recommend under authority of Section 49(1) of the *ATIPPA*:

1. That the Department review its procedures for responding to access requests in order to ensure that it can fully comply with its obligations under sections 9 and 11 of the *ATIPPA*;
2. That the Department further develop its records management procedures, including clear guidelines for the retention and destruction of records in its control and custody.

[32] Under authority of section 50 I direct the head of the Department of Government Services to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

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

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of May, 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador