



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2011-002

March 22, 2011

Executive Council

Summary:

The Applicant applied to Executive Council under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) for access to “[t]he personal file on me in the premier’s office.” Executive Council responded to the Applicant’s request by stating that there were no records responsive to the request. The Commissioner determined that there was a misunderstanding between the Applicant and Executive Council as to the interpretation of the wording of the Applicant’s access request. The Commissioner concluded that Executive Council, by not contacting the Applicant to seek clarification of the request, had failed to meet the duty to assist imposed on it by section 9. The Commissioner recommended that in future access requests Executive Council should attempt to develop an effective working relationship with applicants in order to facilitate the access to information process.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as amended, ss. 2(o), 9 and 64; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 10; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 6.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2007-007, 2007-015, A-2008-004 and A-2009-011; Alberta OIPC Order F2005-020 and Alberta OIPC Order F2010-001.; British Columbia OIPC Order No. 328-1999; Ontario OIPC Order P-880.

Other Resources Cited:

Access to Information and Protection of Privacy Office, *Access to Information Policy and Procedures Manual* (St. John’s: Department of Justice, 2008), (http://www.justice.gov.nl.ca/just/info/access_policy_and_procedures_manual.pdf.)

Merriam-Webster Online: Available at:
<http://www.merriam-webster.com/dictionary/personal>

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request dated January 10, 2008 and received by Executive Council on January 15, 2008, seeking disclosure of records as follows:

The personal file on me in the premier’s office; it is my understanding that these files are referred to as “purple files”.

- [2] Executive Council responded to the Applicant’s access request in correspondence dated January 17, 2008 by stating:

I would like to advise that Executive Council does not have any responsive records with regard to this request. I am returning the cheque for the amount you submitted for the processing of your request.

- [3] In a Request for Review dated January 31, 2008 the Applicant asked for a review of the decision of Executive Council with respect to the access request.
- [4] Attempts to resolve this Request for Review by informal means were not successful and by letters dated September 25, 2008 both the Applicant and Executive Council were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II PUBLIC BODY’S SUBMISSION

- [5] Executive Council indicated in an e-mail dated October 3, 2008 that it had no additional information to provide related to the investigation and that it maintained the position it had submitted during the informal resolution stage. In a letter dated February 19, 2008, Executive Council expressed its position to this Office as follows:

This letter is in response to an appeal before your office on access to information contained in “Purple Files”. Cabinet Secretariat had advised [the Applicant] that we were unable to fulfil his request, as the Premier’s Office had no records responsive. The personal information the applicant is looking for does not exist and has never existed. The files are temporary in nature and created to prepare the Premier for scheduled upcoming interviews. However, they do not contain personal information as was requested.

- [6] In that same letter, Executive Council responded to the request from this Office asking for a complete copy of the records responsive to the access request by stating that “as previously indicated we have no records responsive.”

III APPLICANT’S SUBMISSION

- [7] In a written submission received in our Office on October 9, 2008, the Applicant stated:

On Dec. 10, 2007, I was in contact with officials in the premier’s office attempting to arrange a “year-end” interview with the premier.

That morning, I received an e-mail from [Name], director of communications for the premier. The e-mail was apparently intended for . . . a communications specialist in the premier’s office. It was inadvertently sent to me; I informed [the Premier’s Director of Communications] of this error. . . .

The e-mail referred to both my “purple file” and that of another reporter.

On Dec. 20, 2007, I conducted my interview with the premier, in his eighth-floor Confederation Building office. During this interview, I noticed there was an empty purple folder placed on a nearby table. The purple folder had a tab on it, with the name [Applicant’s name] on the tab.

On Jan. 10, 2008, I filed an ATIPPA request seeking access to the contents of my personal “purple file.” . . .

On Jan. 17, 2008, [Name], deputy clerk, Executive Council, wrote informing me that Executive Council “does not have any responsive records with regard to this request.”

On Jan. 20, 2008 . . . a Telegram reporter who acts as the newspaper’s access to information co-ordinator . . . contacted . . . the ATIPPA co-ordinator with Executive Council.

[The Telegram’s access to information co-ordinator] inquired as to why the request came back non-responsive. [Executive Council’s ATIPP Co-ordinator] told him that she had been informed there were no such records, and suggested he contact [the Premier’s Director of Communications] for further clarification. He did not do so at this point.

Regardless, *within an hour*, [the Premier's Director of Communications] e-mailed [The Telegram's access to information co-ordinator] *about this matter*.

...

[The Premier's Director of Communications] *indicated there are no personal files kept on reporters, only general briefing files on specific interview requests, which are referred to as "purple files."*

She subsequently specifically acknowledged that "purple files do exist" and are labeled with the names of reporters, but do not contain personal information.

If purple files exist, and carry the names of individual reporters, the "non-responsive" reply from Executive Council was incorrect.

The purple files contents should be released under ATIPPA, subject to mandatory exemptions under the act.

It is my understanding that Executive Council is hung up on the word "personal," contending there is no personal information in the files.

With regards to [a] definition of what is and is not "personal" information, let's look at Merriam-Webster's online dictionary (<http://www.merriam-webster.com/dictionary/personal>). The first definition of "personal" is: "of or relating to, or affecting a particular person."

The facts are clear in this case:

- *there is a "purple file" referenced in relation to my December 2007 interview with the premier.*
- *I saw a purple file, with my name on it, in the premier's office during the interview.*

My request was not for "personal information." It was for my "personal file."

Any file with my name on it is "of, relating to, or affecting a particular person." In this case, the person is me. The contents of that file are "of, relating to, or affecting a particular person." Again, that person is me.

It is nonsensical for Executive Council to insist that the contents of a file bearing my name are not "of, relating to, or affecting" me.

I have a right under ATIPPA to the contents of that file, subject to the exemptions outlined in the legislation.

I would like to highlight the role that Section 30(2) would play in the exemption process, barring exemptions where "the applicant is the individual to whom the information relates."

IV DISCUSSION

[8] Having reviewed the positions of the parties, it is clear to me that there has been a miscommunication and misunderstanding with regard to the meaning of the Applicant's access request. In light of this I will discuss in detail the correspondence and communications between the Applicant and Executive Council.

[9] The Applicant contacted the Premier's Director of Communications by e-mail at 9:26 a.m. on December 10, 2007 requesting an interview with the Premier. The Director of Communications replied by e-mail at 11:21 a.m. This is the e-mail which the Applicant indicates was inadvertently sent to him, having been intended for a communications specialist in the Premier's Office. This e-mail reads:

Call [the Applicant] to discuss. If this is a year-end type piece set it up. Also, find 125 minutes for [Another Reporter] somewhere. Will need purple files on both.

[10] On December 20, 2007, the Applicant conducted his interview with the Premier in the Premier's Office and while in the office he noticed an empty purple file folder labeled with the Applicant's name.

[11] On January 15, 2008, Executive Council received the Applicant's access request and on January 17, 2008 Executive Council responded by advising the Applicant that there were no records responsive to his request.

[12] On January 28, 2008 the Premier's Director of Communications sent an e-mail to *The Telegram's* access to information co-ordinator stating:

Hi [Telegram's Co-ordinator]. I understand that you and several others at the Telegram were inquiring about the purple folders containing personal information in the Premier's Office. The ATIPPA people came asking us for that information. I assume this is in relation to an email I inadvertently sent to [the Applicant] when he requested a year-end interview with the Premier. I can assure you that we do not have files with personal information about any reporters. I'm not sure why or how you would ever have taken that from the email I sent to [the Applicant]. When the Premier has a major interview request – such as a year ender – we sometimes compile a folder that

includes notes on what we think may arise in the course of the interview for his review. That would be the purple file reference. . . .

- [13] The access to information co-ordinator for *The Telegram* responded to the e-mail from the Premier's Director of Communication in an e-mail dated January 29, 2008 by stating:

. . . Re: the request, the language of the e-mail seemed pretty clear to me. Referencing [the Applicant] and [Name of the other Reporter] you wrote to [a Communications Specialist in the Premier's Office]: "Will need purple files on both." When [the Applicant] interviewed the premier, there was an actual purple folder sitting on a nearby table with a tab that read: "[Applicant's name]." That appears to indicate the folder does indeed exist – at least on [the Applicant]. We have no idea what is in the folder, but the fact that it had his name on it appears to signify that it is personally linked to him. So I'm not sure how the request can come back non-responsive.

- [14] In reply, the Director of Communications sent an e-mail dated January 29, 2008:

. . . Purple files do exist, as I said before. They contain info to brief the premier in preparation for an interview and we do label them with the name of the reporter – we have literally hundreds of files floating around our office so obviously labels are needed. Again, absolutely no personal information are [sic] contained in these files so the answer to your ATIPPA request was entirely appropriate. The actual purple file process helps me stay organized in the office in terms of interview requests. . . .

- [15] It is clear from this e-mail exchange and other correspondence between the Applicant and Executive Council that there was a disagreement as to the information the Applicant was seeking. Executive Council interpreted the Applicant's access request for "[t]he personal file on me in the premier's office" as a request for the Applicant's personal information. The Applicant, on the other hand, stated in his submission that "[m]y request was not for 'personal information.' It was for my 'personal file.'" I presume this to be a reference to the folder the Applicant saw with his name on it. The contents of this file being the records responsive to the Applicant's access request.

- [16] The term "personal information" is defined in section 2(o) of the *ATIPPA* as follows:

2. (o) "*personal information*" means recorded information about an identifiable individual, including
 - (i) *the individual's name, address or telephone number,*
 - (ii) *the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*

- (iii) *the individual's age, sex, sexual orientation, marital status or family status,*
- (iv) *an identifying number, symbol or other particular assigned to the individual,*
- (v) *the individual's fingerprints, blood type or inheritable characteristics,*
- (vi) *information about the individual's health care status or history, including a physical or mental disability,*
- (vii) *information about the individual's educational, financial, criminal or employment status or history,*
- (viii) *the opinions of a person about the individual, and*
- (ix) *the individual's personal views or opinions;*

[17] It appears then that the Applicant's access request was open to two different interpretations. What should a public body such as Executive Council do when confronted with an access request that may be subject to conflicting interpretations? The answer to that question is provided in the *Access to Information Policy and Procedures Manual* produced by the Access to Information and Protection of Privacy Coordinating Office of the Department of Justice (the "*Manual*"). The *Manual* provides as follows on page 3-7 under the heading "Receiving a Request":

On the day an access request is received, the Access and Privacy Coordinator, or whichever employee first receives the application, must date stamp the application.

...

On the same day, or as soon after as possible, the Coordinator should review the request to determine

- *whether the application is understandable and complete,*

...

< If the request is unclear, provides insufficient information, or is overly broad, the Access and Privacy Coordinator should contact the applicant as quickly as possible (preferably by telephone, fax or e-mail) to clarify his or her information needs. Vague or overly general applications are generally the result of a lack of understanding of the functions of the public body, its records or how to best articulate the request. If, despite the Access and Privacy Coordinator's best efforts to clarify the request with the applicant, there is still some confusion, subsection 16(1) of the Act enables the head of the public body to extend the time for responding to a request for up to an additional 30 days if the applicant does not give enough details to enable the public body to identify a requested record. [Emphasis added]

[18] In my view, the obligation placed on a public body to clarify with an applicant the nature of the information being requested is part of the duty to assist imposed on public bodies by section 9 of the *ATIPPA*, which provides 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.

[19] I outlined the three components of the duty to assist in Report A-2009-011 at paragraph 80:

[80] The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner. . . .

[20] My predecessor discussed the duty placed on a public body by section 9 in Report 2007-007 at paragraphs 9 to 10:

[9] The ATIPPA Policy and Procedures Manual, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice (the "Manual") provides a useful summary of section 9. At section 3.3 the Manual states in part that

The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.

[10] In considering the duty to assist, I am guided by the clear language of the ATIPPA and the corresponding language of the Manual. I am also guided by a number of Orders of the Office of the Information and Privacy Commissioner of Alberta. In his Order F2005-020 the Alberta Commissioner summarized as follows:

[para 16] Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is "reasonable". . . .

[Emphasis added]

[21] My predecessor also commented on the importance of section 9 in Report 2007-015 at paragraph 51:

[51] I consider the statutory duty of a public body to assist an applicant to be a significant obligation and to be a key element in the administration of the ATIPPA. This duty is fundamental to the purposes of the legislation as set out in section 3. As with the Alberta Commissioner, I recognize that the ATIPPA has established a standard of reasonableness with respect to section 9 and it is this standard by which I am guided.

[22] Who bears the burden of proving that a public body has met its duty to assist as set out in section 9? Section 64(1) of the *ATIPPA* provides that in a request for review the burden is on the public body to prove that an applicant has no right of access to a record. However, section 64(1) does not deal with who has the onus of proof in relation to section 9. In Order F2005-020, the Alberta Information and Privacy Commissioner dealt with the burden of proof for section 10 of the *Alberta Freedom of Information and Protection of Privacy Act*, which in all material aspects is equivalent to section 9 of the *ATIPPA*, by stating a paragraph 14:

[para 14] Section 71 of the Act is silent regarding who has the burden of proof regarding the applicability of section 10. However, as this section sets out a general duty for public bodies to assist applicants, the Public Body would appear best placed to meet the burden of proof. Accordingly, the Public Body will bear the burden to establish that it fulfilled its duties under that section.

Likewise, I am of the view that in this Request for Review Executive Council bears the burden of proving that it has fulfilled its duty to assist the Applicant in accordance with section 9 of the *ATIPPA*.

[23] In Order No. 328-1999, the British Columbia Information and Privacy Commissioner discussed the importance of clarifying exactly what information is being asked for in an access request at paragraph 3.2:

3.2 How Applicants Can Assist the Process - Although it is not necessary to do so for the purposes of this case, I would like to make a few comments about how applicants make requests. It should be made clear that the following discussion is a general one and does not arise on the facts of this case. The request made by the applicant in this case posed no difficulty for the public body. The following discussion, therefore, does not reflect on the applicant's behavior in this case. It is intended to offer some observations as to how applicants, generally, can improve the processing of requests for all involved.

Public bodies are under a legal duty, under s. 6(1) of the Act, to

... make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

The Act does not impose a corresponding legal duty on applicants. As a general matter, however, applicants should assist public bodies, wherever it is reasonably possible to do so, by formulating specific and clear requests for records. A vaguely formulated or scattergun request will almost always delay a public body's response and will cost the public body more to process. . . .

Specific and precise access requests enable public bodies to respond much more quickly and cost-effectively. This avoids the delay often entailed when all-encompassing or imprecise access requests are made. Applicants therefore have an incentive, in my view, to cooperate with public bodies by, whenever it is reasonably possible to do so, making clear, specific and not unnecessarily broad access requests. They also have an incentive to cooperate, when reasonably asked to do so, by clarifying requests and, in some cases, by narrowing requests. To be clear, the Act does not impose any legal duty on applicants to cooperate in the ways I have just described. But a responsible applicant will recognize that his or her request will be handled more quickly and cheaply if some effort is made to cooperate with a public body. A responsible applicant will also recognize that cooperation with the public body will reduce the overall costs, in times of restraint, of complying with the Act generally.

For their part, public bodies should, where practicable, contact applicants whose requests are vague or apparently too broad and attempt to clarify or narrow the request. This is, in my view, one way in which public bodies should comply with their s. 6(1) duty to assist applicants. Such a practice also can reduce the costs of processing access requests considerably.

[Emphasis added]

- [24] In Report A-2008-004 at paragraph 33, I commented on another situation where there was misunderstanding and miscommunication between an applicant and a public body:

[33] This is not a case where one party is entirely correct and another party is entirely wrong. It is not that the Applicant's point of view does not have some merit, because it does. This is a case where there appears to have been a misunderstanding of the Applicant's request, coupled with a lack of communication. As I have said, if CNA failed here in any way, it was that there was no effort to clarify the Applicant's request. CNA has argued, however, that it simply interpreted the request in good faith, but unfortunately it did not interpret the request as we now know the Applicant meant it. CNA's position also has merit. I see my role in a situation such as this as not simply agreeing or disagreeing with one party or another, but to point to the most efficient and effective means of seeing that applicants gain access to the information to which they are entitled under the ATIPPA.

- [25] In my view, when Executive Council received the Applicant's request on January 15, 2008 it interpreted the Applicant's use of the phrase "[t]he personal file on me in the premier's office" as a request by the Applicant for his personal information. However, Executive Council appears not to have noted the Applicant's use in his request of the phrase "it is my understanding that these files

are referred to as ‘purple files.’” In my opinion, Executive Council should have identified the contradiction in its interpretation of the access request by a careful reading of the request which would have noted the reference to “purple files” (the existence of these files now having been acknowledged by Executive Council). Once this contradiction had been observed, Executive Council should have contacted the Applicant for clarification as to exactly what information he was seeking before it made its all too prompt reply on January 17, 2008 (having received the request on January 15, 2008), which advised the Applicant that there were no records responsive to the request.

[26] In failing to contact the Applicant to seek clarification, Executive Council failed in its duty to assist the Applicant. If Executive Council had, in fulfilling its duty to assist, taken the time and effort to contact the Applicant, then it is likely that the ensuing misunderstanding and miscommunication could have been avoided. Any attempt by Executive Council to clarify did not take place until after Executive Council had given its response on January 17, 2008. By this time, the parties were well entrenched in their opposing positions as to the meaning of the words in the access request and there was no likelihood of the Applicant and Executive Council developing the “working relationship” necessary for the access to information process to operate as it should.

[27] I wish to comment on Executive Council’s position that there were no records responsive to the Applicant’s access request. Executive Council advised the Applicant in correspondence dated January 17, 2008 that it did not have any responsive records with regard to his request. The Executive Council in correspondence dated February 19, 2008 notified this Office that “[t]he personal information the applicant is looking for does not exist and has never existed. The files are temporary in nature and created to prepare the Premier for scheduled upcoming interviews.” The Executive Council then continued by stating that as a result it had no records responsive to the request.

[28] In Order P-880, the Ontario Information and Privacy Commissioner discussed when a record is responsive to a request at pages 10 to 11:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of

freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

. . . the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. . . .

[29] The Alberta Information and Privacy Commissioner also discussed the concept of responsiveness in Order F2010-001 at paragraph 27:

[para 27] "Responsiveness" is a term coined to describe records falling within the parameters of an applicant's access request. There is no duty for a Public Body to search for or grant access to information . . . if an applicant has not first made a request for access to that information. A Public Body is not required to provide a response in relation to all information in its custody or under its control to an Applicant; only information that reasonably relates to the access request. Essentially, a Public Body's duties in relation to responding to an access request are not engaged until an applicant asks for the information.

[30] In the present case, Executive Council promptly determined that there were no records responsive to the Applicant's access request and provided neither the Applicant nor this Office with any records. I note that the Applicant stated in his submission that during his interview of the Premier he "noticed there was an empty purple folder placed on a nearby table." It may very well be that there were no records in the file folder and it was being used simply as an aid to the Director of Communications to help her, as she stated: "stay organized in the office in terms of interview requests". Also, I note that Executive Council has said that the files were temporary and it may be that between the date of the interview on December 20, 2007 and the filing of the access request on January 10, 2008, the file was destroyed.

[31] Consequently, this office is now in the position that it cannot determine whether there were any records responsive to the Applicant's access request. Again, the Executive Council has failed to comply with section 9 which imposes on a public body as part of its duty to assist an obligation to assist the Applicant in the early stages of making an access request. Executive Council was required to give a liberal interpretation to the wording of the request and to consider any records "reasonably

related to the request” to be responsive. If Executive Council had any doubts about its interpretation of the request, then it should have consulted with the Applicant and perhaps the request could have been clarified or reformulated.

V CONCLUSION

[32] My conclusion in this matter is that there was an avoidable misunderstanding and miscommunication between the Applicant and Executive Council.

[33] I further conclude that Executive Council by not contacting the Applicant to clarify the meaning of his access request has failed to carry out its duty to assist imposed by section 9 of the *ATIPPA*.

[34] I am unable to recommend release of any records to the Applicant because Executive Council has stated that the records were of a temporary nature and no records were reviewed by this Office.

VI RECOMMENDATIONS

[35] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that Executive Council in future access requests attempt to develop an effective working relationship with applicants in order to facilitate the access to information process and, in particular, to gain an understanding of the nature of the information being sought by applicants.

[36] Under the authority of section 50 of the *ATIPPA* I direct the head of Executive Council to write to this Office and the Applicant within 15 days after receiving this Report to indicate the final decision of Executive Council with respect to this Report.

[37] Please note that within 30 days of receiving the decision of Executive Council 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*.

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this day of 22nd March 2011.

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

