



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2018-020

August 28, 2018

Premier's Office

Summary:

The Complainant made a request to the Office of the Premier for access to all Blackberry messages (BBM or PINs) sent or received by senior staff during a five-day period. The Office of the Premier determined there were no responsive records, indicating that such messages are transitory in nature and subject to deletion. The Complainant made a complaint to the Office of the Information and Privacy Commissioner to review whether a full search was completed by the Office of the Premier and whether the use of BBM messages is in compliance with the *Access to Information and Protection of Privacy Act, 2015* (the "ATIPPA, 2015"). The Commissioner concluded that the Premier's Office failed to fulfil its duty to assist, as imposed by section 13 of the *ATIPPA, 2015*. The Commissioner recommended improvements to the access to information process when responding to access requests involving BBM messages, PINs, or other forms of electronic text communications.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, section 13; [Management of Information Act](#), SNL 2005, c M-1.01, section 2(h).

Authorities Relied On:

OIPC Report [A-2009-011](#).

Other Resources:

[OCIO Directive on Instant Messaging](#); [OCIO FYI on Instant Messaging](#); OIPC [Practice Bulletin Reasonable Search](#)

I BACKGROUND

- [1] The Office of the Premier received a request under the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) on April 25, 2018 for “a copy of all blackberry messages (including BBM, or PINs) sent or received by senior staff (including chief of staff, policy advisers and communications director) from April 21st to present.”
- [2] On April 27, 2018 senior staff of the Premier’s Office were notified that they were required to search their Blackberry devices to determine whether there were any BBMs or PINs. In its final response to the Applicant, the Office of the Premier noted it had “no records responsive to your request.” The Applicant followed up indicating he knew certain matters were discussed over BBM and wondered why those messages did not show up in the Premier’s Office’s search. Again, he was advised that a search had been completed and there were no responsive records, with a reference to the directive of the Office of the Chief Information Officer (the “OCIO”) on Instant Messaging that states instant messages “are considered transitory records.”
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] The Office of the Premier took the position in its submissions to this Office that, in accordance with OCIO’s directive, the type of records requested were transitory, thereby explaining why they were not retained. Given that no BBMs or PINs were retained during the relevant timeframe, no records were available in response to the Applicant’s request.

III COMPLAINANT’S POSITION

- [5] The Complainant submitted that the Premier’s Office frequently uses BBM as a way of communicating amongst employees. He acknowledged that while the Office of the Premier

treats all BBMs and PINs as “transitory” and therefore regularly deletes these forms of communication, he believed there were responsive records on senior staff’s electronic devices when he submitted the request, particularly given the narrow timeframe identified.

- [6] Additionally, the Complainant requested the Commissioner investigate whether a full search was done and whether this use of BBMs and PINs messages is in compliance with the *ATIPPA, 2015*.

IV DECISION

- [7] Section 13 of the *ATIPPA, 2015* imposes a duty to assist on public bodies and requires that they 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:

13.(1) 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.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

- [8] It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:

[80] ...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.

The standard for assessing a public body’s efforts is reasonableness, not perfection.

- [9] This Complaint deals with the latter two aspects of the duty to assist: the completeness of the search conducted by the Premier’s Office and its communications with the Applicant.

- [10] The Complainant alleges that there should have been some records responsive to his request. With regard to searching records, our Practice Bulletin on “Reasonable Search”

directs that knowledgeable staff search in locations where relevant records are likely to be located. The Premier's Office submitted that it received the Applicant's request on April 25, 2018 and notification was provided to senior staff on April 27, 2018 indicating they were required to search their Blackberry devices to determine whether there were any BBMs or PINs. The Public Body submitted that the required individuals searched all relevant devices and discovered no records.

[11] The Premier's Office went on to cite OCIO's Instant Messaging directive, noting compliance is mandatory for all government employees and, among other things, this policy notes that instant messages:

1. are not to be used to conduct government business activity,
2. are defined as "transitory records" under section 2(h) of the *Management of Information Act*, and,
3. are not required to be retained and should be deleted on a regular basis.

[12] Additionally, it noted the directive instructs that where an instant message or series of instant messages "evolves to include content reflective of government business," employees are directed to transfer these messages to an appropriate format to be managed as a government record. The Office of the Premier's position is that the parameters of this directive and compliance with it explain why it found no records responsive to the Applicant's access request.

[13] In follow-up discussions with the Premier's Office, we pursued several points, including:

1. whether senior staff were initially informed they should halt any deletion or programmed deletion activities related to their BBMs or PINs until a response was provided to the Applicant;
2. whether there was any reason for, or follow-up on the time delay between the ATIPP Coordinator requesting staff check their mobile devices on April 27, 2018 and the final two senior staff responses that weren't received by the Coordinator until May 18, 2018;
3. whether the Public Body could provide any specific protocol or schedule senior staff followed surrounding the regular deletion of BBMs or PINs; and

4. whether there had been any BBMs or PINs sent or received during the relevant timeframe that evolved to reflect government business and transferred to a different format to be managed as a government record.

[14] The Premier's Office responded providing further detail, indicating it gave no specific direction to staff to halt deletion activity involving BBMs or PINs, but that "staff are aware to halt any deletion activities from their devices (eg. E-mails, BBM messages, files) once an ATIPP request is received. This is per ATIPPA requirements and the IM directive."

[15] The Public Body failed to provide an explanation for why senior staff took as much as 15 business days to respond to the Coordinator's request that they search their mobile devices. The ATIPP Coordinator noted there was "regular follow-up with staff requesting they review their phones to determine if there were any BBM's or PINS" and the overall access request response "was provided to the applicant within the required legislative time frame."

[16] The Premier's Office indicated that, "it does not have a specific [destruction] protocol in place, rather staff manage their mobile devices in accordance with the Directive." And finally, confirmed:

There were no BBMs or PINs transferred to another medium during this period. For clarity, if a BBM message or PIN had been transferred to another medium, it would have been considered a responsive record to this request and it would have been provided to the applicant. As noted in the final response to the applicant, there were no responsive records to this request.

[17] The very nature of Instant Messaging requires immediacy of action when they comprise part of an access request, particularly in light of the OCIO's current directive.

[18] Once an access request for records is made to a public body, that request should trigger the preservation of all records, whether viewed as transitory or otherwise, until a response to the Complainant is completed and timelines for legislated avenues of appeal are exhausted. Triggering preservation of records is particularly critical where they involve BBMs, PINs or similar forms of electronic text communication.

[19] In this instance, the duty to assist required more than just passive reliance that staff involved will halt deletion of messages, and instead requires the ATIPP Coordinator on receipt of the request to take initial immediate steps to ensure records are preserved. This would include informing all staff of the access request and ensuring the halting of any manual or automatic destruction measures until the responsive records had been gathered. As more time passes between actively informing staff that destruction must be halted, and obtaining a response to whether any records exist, the likelihood increases of the deletion of responsive records, either inadvertently or intentionally.

[20] The Premier's Office reported that no BBMs or PINs had evolved into government business requiring transfer to an appropriate format for managing. However, it did not clearly communicate this to the Applicant in its response to his request. Further communication to the Applicant beyond simply stating "no responsive records", including information about the approach made to review and respond to his request given the type of record sought, would have been beneficial.

[21] As for the OCIO Directive on Instant Messaging, I note that the wording of that document is presently such that it is open to an interpretation, by those in public bodies who might view instant messaging as a way of avoiding accountability and transparency, as an ideal means to accomplish that goal.

[22] The Directive as presently worded, does not sufficiently convey that instant messages are no different from any records to the extent that a record's content, and context, determine whether it is a transitory record, not the record's form or the medium of communication. We consulted with the OCIO as part of our investigation. Commendably, the OCIO agreed additional clarity would assist and they are issuing a revised Directive.

V CONCLUSION

[23] The duty to assist required more timely action by the Office of the Premier to preserve the records sought.

VI RECOMMENDATIONS

- [24] Pursuant to section 47(d), I recommend that the Office of the Premier review its policies and practices as they relate to instant messages and its obligations under the *ATIPPA, 2015*.
- [25] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Office the Premier 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
- [26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 28th day of August 2018.

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