



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-007

May 29, 2020

Department of Tourism, Culture, Industry and Innovation

Summary:

The Department of Tourism, Culture, Industry and Innovation (the “Department”) received an access request for all records relating to the creation of a position for the Rooms and the decision to fill it with a specific individual. The Department provided records to the Complainant, however the Complainant indicated that they have reason to believe additional responsive records exist. The Commissioner found that the Department failed in its duty to assist under section 13 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* by a combination of: by failing to advise the Complainant that the records likely to be of most interest would be in the custody of to the Rooms; narrowly interpreting the scope of the request; and by deleting a potentially responsive non-transitory record.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 13; [Rooms Act](#), S.N.L 2005, c. R-15.1; [Management of Information Act](#), S.N.L. 2005 c. M-1.01

Authorities Relied On:

NL OIPC Reports [A-2018-020](#) and [A-2019-32](#).

Other Resources:

[Commission of Inquiry Respecting the Muskrat Falls Project](#)

I BACKGROUND

- [1] The Complainant made an access to information request to the Department of Tourism, Culture, Industry and Innovation (the “Department”) as follows:

All records related to the creation of the position of Executive Director of Marketing and Development for the Rooms, including but not limited to the decision to fill it with [named individual].

- [2] The access request was received by the Department on October 29, 2018. In response to this request the Complainant received records consisting of a human resources form and copies of emails received from the public to the Department expressing opinions regarding the decision to hire a particular individual for the position. As a result of details about the matter that have since come to light with the publication of the Mitchelmore Report on November 13, 2019 by the Commissioner for Legislative Standards, the Complainant now believes that more records may have existed at the time of the access request that were not provided.

- [3] In particular, the Complainant became aware of email correspondence related to the decision to rescind a contract with a person who had been hired for a similar role, the Director of Marketing and Development position with the Rooms. The email was sent on June 15, 2018 from the Deputy Minister (DM) of the Department to the CEO of the Rooms. The Mitchelmore Report included an attachment to that email – a draft letter from the CEO to the person from whom the contract was to be rescinded – but not the email itself. It also relates that the DM deleted that email himself and asked (directed or suggested), via his Administrative Assistant, that the Rooms delete the email. The Complainant believes that any records pertaining to the decision to rescind that contract were related to the creation of the Executive Director of Marketing and Development position and the decision to fill it with the individual named in the ATIPPA request. Therefore, the Complainant believes that records about rescinding the contract were responsive to the access request.

- [4] Some information in this Report has been obtained directly from the Rooms through a request for records by the OIPC to the Rooms under section 97(4) of ATIPPA, 2015 as well as

information that has been published in the Mitchelmore Report. Additional information was provided to the OIPC by the Clerk of the Executive Council in the form of a report authored by the Office of Citizens' Representative (OCR) into the role of the then Deputy Minister of Tourism, Culture, Industry and Innovation in this matter (OCR DM Report) as well as the email referenced in paragraph 3. That email had indeed been deleted by the Department but Executive Council managed to obtain it. It was later also obtained from the Rooms, which had not deleted it, along with other records referenced above.

[5] The Complainant made a complaint to this Office and the Commissioner used his discretion under section 42(5) of *ATIPPA, 2015* to accept the complaint outside of the legislated timeframe for filing a complaint with this Office.

[6] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[7] The Department's position is that it conducted a reasonable search for records and that there is no reason to believe any additional responsive records exist. The Department stated that the search was very fair and that the request was very narrow and specific.

[8] The Department advised that upon receipt of the request the Departmental ATIPP Coordinator notified staff members of the request who would likely have responsive records. This email included the wording of the request and a request to search their records. The staff members included the DM of the Department, the Administrative Assistants to the Minister and DM of the Department, the Assistant Deputy Ministers (ADM's), the Minister's Executive Assistant as well as the Director of Communications and the Director of Corporate Services and Manager of Information Management.

[9] The Department stated that all relevant staff records had been searched and all relevant records were located within the Department. The ATIPP Coordinator completed a search of the electronic records management system. The Department stated that the DM, the ADMs

as well as the other individuals conducted the searches themselves as they would have been familiar with their own records.

[10] The Department advised that since the request was not large or complex the individual searches were not reviewed by the ATIPP Coordinator (other than the electronic records management system). The Department stated that the ATIPP Coordinator, the ADM who worked closely with the Rooms and the DM reviewed the final records package.

[11] It was the Department's assessment that there was no basis to extend the scope of the search, as the request was specific to the Executive Director of Marketing and Development position and that the position was created upon entering into the employment contract with the employee on October 1, 2018.

[12] It is the Department's position that the search for records related to the creation of the position of Executive Director of Marketing and Development would not have captured records related to the earlier engagement of another individual:

However, a reasonable search for records (described above) based on the applicant's request specific to "the creation of the position of Executive Director of Marketing and Development for the Rooms, including but not limited to the decision to fill it with [named individual A]" would not have captured records related to the engagement of [named individual B]. Furthermore, even in applying the duty to assist, there was no basis for the head of the public body to extend the search or to link the engagement of [named individual B] with a different position that was created for [named individual A] months later.

[13] The Department pointed out that the contract that was signed by the CEO of the Rooms with the other individual was in the spring of 2018 whereas the individual who ultimately filled the Executive Director of Marketing and Development position was engaged on September 26, 2018 with a start date of October 1, 2018 at the Rooms.

[14] Furthermore, the Department referenced the fact that the Department and the Rooms do not have a close relationship, stating:

...the Department of TCII would not typically have involvement in day to day decisions or actions of the CEO at the Rooms. The Assistant Deputy Minister

has a seat on the Board of the Rooms per the legislation. Practically, the Rooms and the Department share a Minister and occasionally the Deputy Minister may be asked to communicate with the Rooms as a matter of convenience.

- [15] The Department further advised that it did not transfer the request to the Rooms given that after a preliminary search the Department had records responsive to the access request.
- [16] The Department undertook a second search at the request of this Office with a broader scope of time beginning in February 1, 2018 up to and including October 29, 2018 for any records related to the Executive Director of Marketing and Development position and the Director of Marketing and Development position as well as records of any communication between the Rooms and the Department relating to the two positions.
- [17] The Department explained that the scope of the second search, in terms of personnel involved, was the same as the original search. Specifically, it included the Minister, Executive Assistant, Deputy Minister, Assistant Deputy Minister's, their respective Administrative Assistants and the Director of Communications. The second search consisted of a multi-mailbox search of the former Deputy Minister and former Director of Communications' records, a personal search by all remaining Executive team members and their assistants, and a comprehensive search of the electronic database. The former Minister and Executive Assistant had left the Department, however their departmental records remain with the Department and they would have been captured by the electronic database search.
- [18] The Department advised that the second search did not yield any additional records. The Department stated that it has exhausted all means of searching and is confident that no additional records exist in the Department's custody.

III COMPLAINANT'S POSITION

- [19] The Complainant received two types of records in response to the access request: a staffing form and comments from the public. The Mitchelmore Report referenced an email between the Department and the Rooms. The Complainant did not receive this email in response to the access request. The Complainant's position is that the Mitchelmore Report

also documents months of conversations about moving the named individual into the position. It is the Complainant's position that the Department should have had more records responsive to the access request than were provided.

[20] The Complainant raised a concern that the Department did not create records relating to decisions about the position and commented on the fact that there were no meeting notes, letters, email or other communications about the position and the decision to fill it with the named individual. The Complainant questioned whether officials conducted themselves in a way to ensure that nothing was ever written down, i.e. communication in person or phone conversations.

[21] The Complainant raised an even more serious concern, raising the possibility that those records existed but were deleted, perhaps improperly.

[22] The Complainant also questioned the Department's understanding of transitory records and believes that there should have been records relating to this position, its creation, and the decision to fill it with a particular individual. The Complainant states that any decisions concerning this position are part of the conduct of government business and therefore there should be supporting records.

[23] The Complainant believes that the government should institute a duty to document to ensure that records exist to show the process and rationale for key government decisions.

IV DECISION

[24] Section 13 of *ATIPPA, 2015* states:

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.

[25] This Office has considered a public body's duty to assist previously in numerous reports, including most recently in Reports A-2019-032 and A-2020-002.

[26] Report A-2018-020 states the position of this Office with regard to the duty to assist:

[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

[27] The Department explained the limited scope of the initial search by stating that the creation of the Executive Director of Marketing and Development occurred when the employment contract was signed with the employee on October 1, 2018. However, typically a position is created at some time previous to the date of the employment contract and discussions about the decision to create the position and consideration of candidates usually occur in advance of signing the contract.

[28] The Department however claimed that the creation of the position and the filling of it were done contemporaneously. The Complainant indicated that the Mitchelmore Report documents months of conversations about moving the named individual into the position and the Complainant questioned why there were no records of these conversations. When asked by this Office to address this question, as noted above, the Department responded that it would not typically have involvement in day to day decisions or actions of the CEO at the Rooms, though occasionally the DM may be asked to communicate with the Rooms on the Minister's behalf as a matter of convenience.

[29] The staff members conducting the search were also the ones determining the scope. Additionally the ATIPP Coordinator did not review the individual searches and may not have been aware that other records could or should have existed. According to the Mitchelmore Report, the specific email the Complainant referenced would already have been deleted by

the time this search occurred, therefore staff would not have found it. Even if it had not been deleted, the Department limited the search to the period following when the Executive Director position was created as well as limiting the scope to include only those records related to the filling of the Executive Director position. This means that it would not have been deemed responsive by the Department in any case.

[30] The Department advised that it did not transfer the access request as it possessed responsive records. However, as stated above the Department also advised it is not responsible for the Rooms and only shares a Minister. With a shared Minister, the Department is clearly linked to the Rooms and further communication with the Complainant may have resulted in the Complainant making an additional request to the Rooms. The Department should have communicated more openly with the Complainant as part of its duty to assist. Clearly, the topic of the request involves the Rooms, and all access to information applicants would not necessarily know that the Rooms is a separate public body with its own distinct records. Given the topic of the access request, the Department should have aided the Complainant by discussing a transfer of his request or suggesting an additional request to the Rooms for records.

[31] The Department is of the view that the Director of Marketing and Development position is not related to the Executive Director of Marketing and Development position in the context of the Complainant's access request. However, the submission from the Executive Council in an appendix of the Mitchelmore Report states that the budget allocation for the vacant permanent position at the Rooms was being used to fund the two contractual position which included the position of Executive Director of Marketing and Development. The submission also notes that there was no position description appended to or included in the contract for the named individual for the position of the Executive Director of Marketing and Development as a description of the key responsibilities was provided verbally. The Department has therefore not convincingly established that these two positions are not, for all intents and purposes, the same position. The Department adopted a deliberately narrow interpretation of the request by de-linking the two positions in the course of determining which records would be responsive to the access request.

[32] The records from the Rooms indicate that the Minister may have had a candidate in mind for the position of Director of Marketing and Development as early as March 2018. There are emails from the CEO of the Rooms to the DM of the Department asking for updates on the candidate and moving forward with filling the position at the Rooms. With no written record of a response from the Department, the Rooms CEO went ahead with filling the position.

[33] It was only when the CEO forwarded the contract to the DM of the Department that the direction to rescind the contract occurred. This all happened on the same day, June 15, 2018, within a couple of hours of the initial email to the DM with the contract attached. The explanation provided by the Department was that the human resources form (the Request for Staffing Action) had to be completed therefore the contract was not valid and the offer had to be rescinded. In order to assess where records are likely to be found it is also important to understand the processes under which they are created. Whether the completion of this Departmental form was even necessary given the CEO's role under the *Rooms Act* muddies the waters in this regard:

10. (1) The Lieutenant-Governor in Council shall appoint, after consultation with the board, a chief executive officer of the corporation who shall hold office on the terms and conditions established by the Lieutenant-Governor in Council.

(2) The chief executive officer

(a) is responsible for the human resources, general direction, supervision and control of the finances and other business of the corporation and of the divisions of the corporation;

Even accepting that the CEO may have felt an obligation to seek approval from the Department, a simple and logical solution would be to complete the Request for Staffing Action and re-offer the position to the person who had just signed the contract. This did not happen.

[34] It is in the public domain through the Mitchelmore Report that the Department deleted at least one email record pertaining to the rescinding of the contract related to the Director of Marketing and Development position and also asked the Rooms to delete that same email. In the course of this investigation, this Office obtained that email from the Rooms and from the Clerk. The Department maintains that this email was out of scope of the original access

request. The DM has stated that he believed it to be transitory and, because of its transitory nature, the deletion of the record reflected appropriate records management practices.

[35] While the Department's narrow interpretation of the access request is perhaps plausible though unfortunate, it is much more difficult to accept its argument that this email, which involved the DM sending the CEO of the Rooms a letter for him to sign, was not for all intents and purposes direction from either him, or him on behalf of the Minister, to rescind the contract. A record of this nature establishes accountability for a hiring decision, and in this particular case it was one that was connected to another person's contract being rescinded. This cannot be said to be a minor transaction, and therefore it cannot be said that this record was transitory in nature. Transitory record is a defined term in the *Management of Information Act*:

2. *In this Act*

(h) "transitory record" means a government record of temporary usefulness in any format or medium having no ongoing value beyond an immediate and minor transaction or the preparation of a subsequent record.

[36] This email and its attachment, sent on June 15, 2018, are at the crux of the Complaint and this Report and therefore deserve special attention. The letter attached to the email, which was reproduced in the Mitchelmore Report, is a draft letter – it was unsigned, and indeed was not even on proper letterhead of the Rooms. There is little question that the letter itself could be interpreted to be a transitory document, particularly if there was a final signed letter retained for the file. However, this draft letter was attached to an email from the DM to the CEO that simply said “As discussed”. With knowledge of the circumstances of this interaction between the DM and the CEO as described in the Mitchelmore Report and the OCR DM Report, it is clear to this Office that this email was direction, whether from the DM himself or from the DM on behalf of the Minister, to rescind the contract. Even though the *Rooms Act* provides authority for the CEO to make human resources decisions such as this autonomously, the requirement for the Minister to sign Requests for Staffing Action is indication that, in practice if not in law, the Minister exercises decision-making over such matters and in this case, this authority was expressed in the form of this email.

[37] The allegations made by the whistleblower against the DM and against the Minister that led to the two OCR reports allege, respectively, that each of them “directed staff of the Rooms to delete e-mails in contradiction of best practices for document storage and contrary to law”. While the Citizens Representative conducted his analysis under the *Public Interest Disclosure and Whistleblower Protection Act* and sought to determine whether there were acts of gross mismanagement, a somewhat different concern is triggered for the OIPC. Subsection 115(2)(d) of *ATIPPA, 2015* establishes that a person who “destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records” is guilty of an offence.

[38] The Citizens Representative found that the Minister did not have involvement in this matter and therefore disregarded this allegation against him. I similarly have no reason to believe that the Minister may have contravened subsection 115(2)(d). As for the DM, the versions reported in the Mitchelmore Report and in the OCR DM report vary somewhat, but for my purposes the evidence is clear that the DM deleted the email from his own records and either instructed or suggested that the email be deleted from the Rooms records.

[39] The evidence available to me indicates that the DM knew the decision conveyed in the email and attached letter might be controversial and subject to an access request, however he has asserted that the belief that the record was transitory was genuine and the deletion was in accordance with that belief.

[40] It is possible that the DM’s intention, in deleting the Department’s copy of the email and attempting to have the Rooms to do the same, was to shield from a potential future access request the fact that the rescinding of the contract by the CEO was at the direction of the DM or the DM on behalf of the Minister rather than a decision that the CEO took on his own under the authority of the *Rooms Act*. However, it is also possible that the DM, considering that the attachment was a draft letter, that the email itself simply said “As discussed”, and in the ambiguous context of the appropriate authorities of the Minister, the CEO and the DM with respect to human resources at the Rooms, did actually believe that the email was transitory. This is what the DM has maintained and I do not have sufficient evidence to find otherwise.

[41] However, it is without question that the rescinding of the contract was at the direction of the DM or the Minister and there is no other record, whether in the custody or control of the Department or of the Rooms, of the Minister's direction to the CEO to rescind the contract. Therefore, while I do not believe there is sufficient evidence to determine that the DM's direction to delete the email crosses the threshold of the commission of an offence per subsection 115(2)(d), it is clear that the DM's direction to do so did involve the deletion of a non-transitory record and was an error.

[42] If other records were not created in the first place, this raises concerns of proper record keeping. The lack of responsive records means that no official records of these decisions were created. This is not a reasonable approach to good governance. While there is not yet a legislated duty to document, principles of sound public administration dictate that records of significant decisions be created and retained, otherwise the right of access to information is devalued. Without the requirement to create and retain records of significant decisions, it is not possible to effectively use *ATIPPA, 2015* to assess these decisions and hold public bodies accountable.

[43] Commissioner Richard LeBlanc addressed the failure to document government decisions in the recently issued report of the Commission of Inquiry Respecting the Muskrat Falls Project, He was unequivocal about the need for legislated a duty to document, and on page 43 of Volume Four he stated the following:

I conclude that there is a need for a change in culture within GNL to promote the requirement to document and create records. The direction for this cultural change must come from the Premier and from members of Cabinet, and I recommend that legislation in this province be amended to incorporate a duty to document. Since this has been under consideration within GNL for some time now, it should be done within six months of the submission of this Report.

[44] In sum, as it relates to this access request, the Department: chose to interpret the request narrowly; failed in its communication by not directing the Applicant to the Rooms; and interpreted the definition of transitory records under the *Management of Information Act* unduly broadly, thereby deleting records that represented direction from the Minister or Department to the Rooms and which would have potentially been responsive to this access

request. These three problems, in combination, amount to deficiencies in the Department's duty to assist the Applicant.

[45] Though not a formal recommendation under *ATIPPA, 2015*, future access requests to the Department would benefit from: adherence to the *Management of Information Act* and, to that end, review by all appropriate staff of the Office of the Chief Information Officer's resource documents on records management, in particular the maintenance of documents recording decisions and the management of transitory documents.

[46] It was also apparent during this investigation that there is confusion in the roles and responsibilities between the Department and the Rooms. While the Department has maintained that it does not have day to day involvement in the Rooms, records received from the Rooms provide evidence of regular involvement in the business of that public body by the DM. Moreover, while the *Rooms Act* provides the CEO with authority for "human resources, general direction, supervision and control of the finances and other business of the corporation and of the divisions of the corporation", it is clear that the practice is that the Minister and the DM are involved in such matters, in particular but not limited to the requirement for the Minister's signature on all staffing forms at the Rooms. While the roles and responsibilities of Departments and related agencies, boards and committees are outside of the mandate of this Office, it is important for information management and thus access to information and democratic accountability, that these roles and responsibilities be clear to the public bodies in question and to the public.

[47] In this case, the applicant was clearly looking for records related to how the Executive Director position was created and filled and was under the impression that these records would be best found at the Department. The Department did not correct this impression. Moreover, the Department has maintained that it did not have a role to play in human resources decisions at the Rooms, when clearly the Government, the Minister and the DM were involved. This is important because a lack of clarity on roles and responsibilities created the circumstances in which the DM could determine that an email which clearly involved direction to the CEO to rescind a contract was transitory and order its deletion, not just from Departmental records but also from the Rooms. Therefore, while similarly not a formal

recommendation under *ATIPPA, 2015*, it would be beneficial for future access requests if the Department examined its roles and responsibilities with the agencies, boards and commissions with which it interacts, with a particular attention to ensuring that information management practices align with the accountability structures mandated by the relevant statutes.

V RECOMMENDATIONS

[48] Under the authority of section 47 of *ATIPPA, 2015*, I find that the Department has not fulfilled its duty to assist under section 13 of the *ATIPPA, 2015*.

[49] I recommend that the Department communicate with applicants in the early stages of an access request if the Department believes that another public body could more fully respond to the access request and either transfer it or recommend that the applicant consider submitting a separate access request to that entity.

[50] I recommend that the Department revise its internal access to information process so that the ATIPP Coordinator is not excluded from the determination of scope or the collection of records, providing a check against actual or perceived biases that executive and program officials may face in this regard.

[51] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department 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.

[52] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of May 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador