



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-010

July 31, 2020

Department of Transportation and Works

Summary:

The Complainant requested records from the Department of Transportation and Works relating to a Request for Proposal. The Department withheld some records pursuant to section 29, section 31, section 35, section 37, and section 40. The Complainant filed a complaint with this Office, alleging that the Department had inappropriately applied some of the exceptions to disclosure and also failed to produce all the records responsive to the request. During informal resolution efforts, the Department provided all records previously withheld under section 35 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* to the Complainant. The issue of section 40 was also resolved informally. The Commissioner found that the Department had appropriately applied sections 29 and 37, that it was not necessary to assess the application of section 31, and that the Department had conducted a reasonable search for records in accordance with section 13 of *ATIPPA, 2015*. The Commissioner recommended that the Department continue to withhold the records.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, section 13, 29, 31 and 37.

Authorities Relied On: NL OIPC Report [A-2019-022](#); OIPC NL [Practice Bulletin Reasonable Search](#), March 2017.

I BACKGROUND

- [1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) to the Department of Transportation and Works (“the Department” or “TW”) for information related to a specific Request for Proposal.
- [2] A summarized list of records requested included:
- all bid submissions in digital and physical copy (including copies of envelopes and evidence of their submissions to the Department);
 - all additional correspondences or exchanges related to the bid by [Third Party] to August 25, 2018;
 - all correspondence involving any civil servants and/or politicians related to the [Third Party] bid and proposal and the awarding of this contract;
 - all “staff accounts” and “records of Tendering and Contracts” referred to in a departmental letter dated February 15, 2019;
 - all correspondence exchanged between TW staff related to the Tender and all bid submissions;
 - all evaluation documentation of all proposals including documentation of the evaluation committee;
 - all contract documentation associated with and including the award of contract to [Third Party];
 - all contract documentation and all correspondence related to public announcements regarding the awarding of the contract on August 23, 2018 and August 25, 2018;
 - all documentation associated with the change and extension of the mandatory performance date of from April 1, 2019 to July 2019; and,
 - all other correspondence relating to the procurement process under the Tender.
- [3] The Complainant was clear in his request that “documentation” or “correspondence” should be construed to include emails, notes, and documents.
- [4] The Department of Transportation and Works responded to the access request granting the request in part, withholding access to some records pursuant to sections 29 (policy advice or recommendations), 31 (disclosure harmful to law enforcement), 35 (disclosure harmful to the financial or economic interests of a public body), 37 (disclosure harmful to individual or public safety), and 40 (disclosure harmful to personal privacy). The Complainant was not satisfied with the response and filed a complaint with this Office. The Complainant stated that any information withheld should be released. The Complainant also alleged that the Department had not conducted an adequate search.

[5] During the informal resolution period, records previously withheld under section 35(1)(d) were released to the Complainant. The issue of section 40(1) was also resolved.

[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] It is position of the Department that the exceptions to access under sections 29, 31, and 37 were appropriately applied. It is also the position of the Department that “any records deemed missing do not exist.”

III COMPLAINANT'S POSITION

[8] The Complainant states that the Department inappropriately withheld information pursuant to sections 29(1)(a), 31(1)(a) and 37(1)(b).

[9] The Complainant states he has reason to believe the Department has not provided all records which are responsive. In his submissions, the Complainant advises that records ought to, but do not, include:

“[...] notes, memos, correspondence, emails, and exchange of emails in the possession of the Government of NL and/or its employees as it relates to RFP Tender [#], its processes, receipt of submissions up to April 16/18, actions of staff members from 12:00 p.m. up to 3:00 p.m. on April 16/18, the subsequent actions of government employees related to the posting on the government's website of information relating to RFP Tender[#], the evaluation of the proposals, its review, various discussions and meetings between senior staff members and/or politicians as it relates to RFP Tender[#], its evaluation and review, the awarding of the contract to [Third Party] and the signing of the contract with [Third Party] and various meetings and discussions and notes taken as a result of such meetings and discussions from April 16, 2018, up to present as it relates to any of the above-noted matters concerning RFP Tender [#], and as noted above which have not been disclosed and should be disclosed involving the following individuals.”

The Complainant included a list of 20 individuals, as well as “various representatives of the [Third Parties]”.

[10] It is the Complainant's position that the undisclosed information should be provided to him. The Complainant asserts that "[t]he disclosure of the information is desirable for the purpose of subjecting the activities of the Department of Transportation and Works (TW), Service Newfoundland and Labrador (Service NL), the Public Procurement Agency, the Chief Procurement Officer, the Deputy Ministers of TW and Service NL, and various involved employees of the Government of Newfoundland and Labrador (GNL), to public scrutiny."

IV DECISION

Section 29

[11] Section 29(1)(a) states:

29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

[12] Upon review of the information withheld as advice, recommendations, analyses or policy options per section 29(1)(a) of *ATIPPA, 2015* it is our conclusion that the information does meet the definition of that exception. These records include policy options and recommendations developed by the Department. As such, the Department's application of the exception to access is appropriate.

Section 37

[13] Section 37 states:

37. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to

(a) threaten the safety or mental or physical health of a person other than the applicant; or

(b) interfere with public safety.

[14] This Office reviewed the records which included redactions under section 37(1)(b). The information withheld consists of information which could reasonably be expected to interfere with public safety. The records include information about a government facility that, if

disclosed, could potentially expose the public body to a security risk. The Department's application of section 37 is appropriate.

[15] The Department applied section 31(1)(a) to the same information withheld pursuant to section 37(1)(b). As this Office agrees that the Department appropriately withheld the information under section 37, there is no need to review Section 31.

Duty to Assist

[16] The Complainant alleges that the Department has not disclosed numerous records which were requested. Section 13 of *ATIPPA, 2015* provides:

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.

[17] Although the Complainant states that the Department has not provided him with all responsive records, he does not offer any explanation to substantiate this statement. The onus is on the Complainant to raise a reasonable suspicion that a Public Body has not provided all responsive records. Per the OIPC's practice bulletin on *Reasonable Search*:

Complainants must establish the existence of a reasonable suspicion that a public body is withholding a record, or has not undertaken an adequate search for a record. Sometimes this takes the form of having possession of or having previously seen a document that was not included with other responsive records, or media reports regarding the record. The Complainant is expected to provide something more than a mere assertion that a document should exist.

[18] In his submissions, the Complainant included a list of individuals who may have been involved in the tender process and who may be in possession of responsive records. The Department conducted searches of records in relation to these individuals and others, including email accounts, notebooks, paper records, electronic documents, and record management systems. The Department also used broad search terms to ensure all records related to the RFP were captured.

[19] As this Office has often expressed, including recently in Report A-2019-022, the standard for searches for records in response to access to information requests is reasonableness:

[21] As our practice bulletin states, the ATIPPA, 2015 does not require a public body to prove with absolute certainty that records do not exist. The standard for assessing a public body's efforts is reasonableness, not perfection

[20] The Complainant's request was quite broad in scope and produced approximately 1100 records which were provided to him. The Complainant's submissions to this Office states that amongst the information he believes has not been disclosed were "notes, memos, correspondence, emails, and exchanges of emails in the possession of the Government of NL and/or its employees". He also advises that disclosure would subject the Department of Transportation and Works, Service NL, and the Public Procurement Agency to public scrutiny.

[21] It must therefore be noted that the Complainant's request was to the Department of Transportation and Works, not to other departments. The Department is accountable for records within its custody and control. It is possible that the records sought by the Complainant may exist outside of this Department. However, it is the Complainant who must make a request for records to other public bodies.

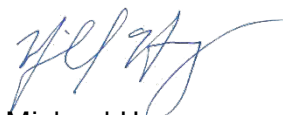
[22] Based on the evidence and response provided by the Department, we are satisfied that the search for records was conducted by a knowledgeable person who consulted subject matter experts and searched locations where records were likely to be found. Therefore, this Office finds that the Department's search for records was reasonable.

V RECOMMENDATIONS

[23] Under the authority of section 47(a) of *ATIPPA, 2015*, I recommend that the Department continue to withhold the redacted information pursuant to sections 29(1)(a) and 37(1)(b).

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

[25] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31st day of July 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador