



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-031

July 6th, 2021

Office of the Premier

Summary:

The Office of the Premier (the “Premier’s Office”) received an access to information request that included a request for correspondence between the Premier’s Office and the Chief Electoral Officer for a specified period of time. The Premier’s Office provided some information but withheld the correspondence, citing section 5(1)(d) of the *Access to Information and Protection of Privacy Act, 2015* (records of a registered political party or caucus). The Commissioner concluded that the Premier’s Office properly withheld portions of the responsive records under section 5(1)(d) and this information should continue to be withheld from disclosure. However, the Commissioner also found that the Premier’s Office failed to respond within the statutory deadline (section 16) and failed to uphold section 13 (duty to assist) by failing to respond to the Complainant without delay and in an open, accurate and complete manner.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 5(1)(d), 13 and 16; [House of Assembly Accountability, Integrity and Administration Act](#), S.N.L. 2007, c. H-10.1, section 2(d) and (o).

Authorities Relied On:

NL OIPC Reports [A-2021-027](#); [A-2018-009](#).

I BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”) to the Office of the Premier (the “Premier’s Office”) for several records, including:

...all records including emails, texts, etc to/from the Premier's office to [the Chief Electoral Officer], from December 1, 2020 to February 15, 2021.

- [2] The Complainant was eventually provided with some records deemed responsive by the Premier’s Office, but portions were withheld on the basis of *ATIPPA, 2015* section 5(1)(d). Additionally, the public body did not issue its final response to the Complainant within the legislated timeframe of 20 business days, taking an additional 15 business days before providing its final response.
- [3] 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

- [4] The Premier’s Office submitted that the responsive records in question are records of a political party or caucus as defined in the *House of Assembly Accountability, Integrity and Responsibility Act* (the “Act”). It noted these records include copies of emails from the Chief Electoral Officer to the Premier and/or members of the Liberal party in relation to the election. Some emails were sent to all party leaders in relation to specific election issues such as extension of timelines for voting and special ballots. Additionally, there are two emails that are specifically related to actions of candidates running in the election.
- [5] The Premier’s Office noted that, “many of the records were clearly sent to the Premier as Liberal Leader - the attachments have the title Liberal Leader in them vs "Premier".” Additionally, many were also sent to all party leaders, referring to them as party leaders in the text. The only reason the Premier’s Office was able to locate them within its custody and control is that the same email account is used for government business as well.

[6] In responding to why its response was late, the Premier's Office referred to its request to this Office on March 1st, 2021 seeking an extension of time related to this access request. In that extension request, it noted the reason for the request was "limited access to required staff due to the level 5 lockdown." It offered no further specifics to justify approval of a time extension at the time and was therefore denied its request on March 3rd, 2021. In its submission to this Office in response to this complaint, the Premier's Office offered the additional comment that the request for the extension was due to:

the fact that the level 5 lockdown was causing limited access to staff, with staff working primarily from home. Given the request specifically asks for all communications, including texts, I requested the extension to avoid any potential issues with delays as I did not have the same direct access to all staff as I would normally have if all were working in the office.

III COMPLAINANT'S POSITION

[7] The Complainant sought this Office's review to determine whether the responsive records were appropriately withheld or not. Additionally, the Complainant believed that given the subject matter of the request, the failure of the Premier's Office to provide a timely response in accordance with the provisions of *ATIPPA, 2015*, "had significant implications. I am concerned the final response may have been withheld, in contravention of the *Act*, for political reasons."

[8] The Complainant believed the response was, "deliberately and maliciously withheld so as to interfere with the election outcome, i.e., that the election would be over before this material was released as required." The Complainant submitted that, "the volume of material and other considerations did not warrant a blatant disregard for a timely response required under the legislation."

IV ISSUES

[9] This complaint raised two issues to be addressed:

- 1) Whether the withheld records were appropriately withheld pursuant to section 5(1)(d);
- 2) The failure of the public body to provide a timely response in accordance with *ATIPPA, 2015*

V DECISION

Section 5(1)(d) Application

[10] Section 5(1)(d) of *ATIPPA, 2015*, sets out:

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to

(d) records of a registered political party or caucus as defined in the House of Assembly Accountability, Integrity and Administration Act;

[11] The relevant portion of the *House of Assembly Accountability, Integrity and Administration Act* states as follows:

2. In this Act

(d) "caucus" means a group of 2 or more members who belong to the same registered political party;

(o) "registered political party" means an organization formed for the purpose of contesting an election of members to the House of Assembly and which is registered in the register of political parties under section 278 of the Elections Act, 1991;

[12] Approximately 26 pages of records were withheld from disclosure pursuant to section 5(1)(d) of *ATIPPA, 2015*. This Office has reviewed these records in detail and determined they fall within the description of 5(1)(d) as set out above. We are satisfied that the Premier's Office properly applied this section in withholding these records from disclosure. It is clear that they are records in relation to a registered political party; predominantly correspondence sent to all political party leaders (not simply the Premier as leader of his party) on aspects of the election process, as well as some correspondence sent to the Premier as leader of his political

party in relation to specific party candidate's actions. It should also be noted, however, that section 5 is not a mandatory exception to the right of access. Rather, when records are subject to section 5 it means that the records are excluded from the scope of the *Act*, and as a result there is no obligation on the part of a public body to either withhold them or disclose them. The Premier's Office is entirely within its right therefore to deny access to records that are not subject to the *Act*.

Failure to Provide Timely Response

[13] While this Office has determined the Premier's Office acted in accordance with the legislation in withholding the records in question from disclosure, a review of the timeline of events has determined that it failed to provide a full and final response in accordance with the statutory deadlines set out in *ATIPPA, 2015*.

[14] Section 16 of *ATIPPA, 2015* sets out the deadline for responding to an access request:

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18, without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23.

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

[15] The Complainant's request was submitted to the Premier's Office on February 15th, 2021, and therefore a response should have been provided by March 15th, 2021. However, the Premier's Office did not provide a final response to this request until April 6th, 2021.

[16] While the Premier's Office did seek an extension from this Office on March 1st, 2021, that request was denied on March 3rd, 2021 based on a failure to provide sufficient justification. In declining the request for a 10 business day extension, this Office noted that all staff of the Premier's Office were working remotely from home and:

While this is likely less convenient than being able to interact with staff face-to-face, your application does not indicate any substantial obstacles to completing these

access to information requests, such as staff being unable to work remotely or access electronic records, or the processing of this request requiring access to physical records.

Given that an insufficient rationale for a time extension was provided to this Office at the time, and considering all of the circumstances, this Office concluded a 10 business day extension to account for COVID-19-related disruptions would not be appropriate for this access request. For additional context, it is worth noting that during the period of February 15th to March 26th when there was a COVID spike and many public bodies switched to remote work, this Office announced a special process for public body time extension requests. That process was meant to reflect the fact that public bodies had had sufficient time to adapt to remote working, but also to accommodate the fact that there would sometimes be additional workload or other challenges during that period. In announcing this special temporary process, we communicated the following to public bodies:

Public bodies seeking an extension for COVID-related reasons may forego the usual application form and process and apply for multiple extensions by providing this Office with the public body number for the request, the wording of the request, the date of the request and its due date, and specific reasons for requiring a request ... Examples of reasons which will be considered include responsive records in physical format that are not accessible to the ATIPP Coordinator, or processing an access to information request requiring the assistance of public body staff who are not working remotely.

[Emphasis in original]

During this period, we received 48 COVID-related extension requests. Only two were rejected in their entirety. Both were from the Premier's Office, and the request that led to this complaint was one of those two.

[17] After being denied approval for an extension of time to respond to the request, the public body then informed the Complainant on March 3rd, 2021 that it would provide a final response within the legislated timeframe, however it did not fulfil that commitment, nor did it provide any further communications or explanation to the Complainant. In its response to the complaint to this Office the Premier's Office reiterated its reasons for seeking an extension,

suggesting that it tried but was simply unable to complete its response within the appropriate timeframe. Ultimately the response was issued even later than the extended date sought by the Premier's Office in its time extension request, having been provided to the Complainant 15 business days beyond the March 15th, 2021 deadline on April 6th, 2021.

[18] In addition to the statutory deadline to respond to a request, the duty to assist at section 13 of the *ATIPPA, 2015* is also relevant here:

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.

[19] The public body's actions were not in keeping with the requirements of the legislation as set out above. It had a duty to assist the Complainant, which included responding to requests in a timely fashion "without delay." Its failure to communicate openly and accurately about the delay in its response is also a failure of the duty to assist.

[20] As this Office has noted in the past, "access delayed is access denied," a concern that the Complainant raised given the subject matter of the request and the circumstances of the provincial election. While the Complainant has suggested motives for the delay, this Office has found no evidence of any specific motivation or reason behind the delay other than the suggestion from the Premier's Office that it simply could not complete the request and response in the time required.

VI CONCLUSION

[21] This Office finds that the Premier's Office properly determined the records in question fell under section 5(1)(d) and were therefore not subject to the *ATIPPA, 2015*. The Premier's Office was therefore authorized to refuse access.

[22] However, this Office also finds that the Premier's Office failed in its duty to assist, namely in responding in a timely fashion and in communicating accurately and completely with the Complainant.

VII RECOMMENDATIONS

[23] Under the authority of section 47(a) of *ATIPPA, 2015*, I recommend the Office of the Premier continue to withhold the redacted information in accordance with section 5(1)(d).

[24] Under the authority of section 47(d) of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Office of the Premier:

- 1) Review its access to information policies and procedures to determine the cause of the delay, and implement measures to reduce or eliminate similar circumstances from occurring in future;
- 2) Comply in future with the statutory duties imposed upon it by section 13 of the *ATIPPA, 2015*, to respond to an applicant in an open, accurate and complete manner, without delay, and in any event within the statutory deadlines, including keeping the applicant informed, and maintaining open communication throughout the process.

[25] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Office of 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 6th day of July 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador