



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-045

November 3, 2021

Town of Gander

Summary:

The Complainant submitted an access request to the Town of Gander under the *Access to Information and Protection of Privacy Act, 2015* for records that are related to the Town, but held by third parties. The Town misunderstood the request, did not provide the Complainant with an advisory response, and did not determine whether it or another public body has control over the records. The Commissioner found that the Town failed its duty to assist the Complainant, its duty to provide an advisory response to the Complainant. It also failed to consider whether it should transfer the request to another public body. The Commissioner recommended that the Town request the records from the third parties in question, determine which public body has control of the records, and provide a new final response to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 5, 8, 13, 14, 15, 16, 44, 47, and 49.

Authorities Relied On:

NL OIPC Reports [A-2014-012](#), [A-2017-021](#), [A-2020-013](#), and [A-2021-008](#).

[Canada \(Information Commissioner\) v Canada \(Minister of National Defence\)](#), 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

Ontario IPC [Order MO-2750](#).

I BACKGROUND

- [1] The Complainant filed an access request for all information and records relating to the Town of Gander's (the "Town") wastewater treatment system that are in the possession of certain third parties, which formed part of the Town's steering committee (the "Third Parties"). The Complainant requested the Third Parties' meeting minutes, all records related to the steering committee's discussions, and minutes of the evaluation of each proposal including all comments and notes from each evaluator.
- [2] The Town did not provide the Complainant with an advisory response within ten business days of receiving the request, contrary to section 15 of *Access to Information and Protection of Privacy Act, 2015* ("ATIPPA, 2015"). The Town did mail its final response to the Complainant within 20 business days, per section 16 of *ATIPPA, 2015*. However, the final response did not tell the Complainant whether the Town had asked the Third Parties for the requested records; it only advised the Complainant that, "*the Town has no records responsive to your request. You have been sent the file in it's [sic] entirety in response to your previous ATIPP request*".
- [3] The Complainant was not satisfied with the Town's final response and filed a Complaint with this Office.
- [4] 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

- [5] The Town's initial position was that it does not have any additional records other than what it already provided to the Complainant through previous access to information requests. Upon understanding that this was a misinterpretation of the access request, as the Complainant did not request records that the Town had on hand but had specifically requested records that were in the possession of the Third Parties, the Town advised that it was unsure whether it had control of the records in question.

[6] The Town suggested that one or more Provincial Government Departments may actually have custody or control of the requested records, but could not say for sure which, if any, public body has any control over the responsive records in the custody of the Third Parties.

[7] Through ongoing discussions with this Office, the Town has confirmed that it will request the records from the Third Parties.

III COMPLAINANT'S POSITION

[8] The Complainant's position is that the Town must have, or must be entitled to obtain, the records from the Third Parties .

[9] The Complainant has further advised this Office of previous access to information requests he had made to Provincial Government Departments for the requested records. In these instances, those public bodies referred the Complainant back to the Town.

IV ISSUES

[10] This Report will address the following issues:

- (i) whether the records are under the control of the Town per section 5(1) and 8(1);
- (ii) whether the Town met its duty to provide an advisory response to the Complainant within 10 business days subject to section 15, and
- (iii) if the records are not under the control of the Town, but are under the control of another public body, whether the Town ought to have transferred the request subject to section 14(1).

V DECISION

Control of Records

[11] Sections 5(1) and 8(1) of *ATIPPA, 2015* address the issue of custody and control as follows:

5(1) This Act applies to all records in the custody of or under the control of a public body

...

8(1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body...

[12] In other words, access rights may still apply to records that are not necessarily in a public body's immediate custody. If the records are in a public body's *control*, then *ATIPPA, 2015* applies.

[13] This Office has previously considered the issue of control in Reports A-2014-012, A-2017-021, A-2020-013, and A-2021-008. We have considered a two-part test from the Supreme Court of Canada decision, *Canada (Information Commissioner) v Canada (Minister of National Defence)*:

(1) Do the contents of the documents relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?" [paragraph 50].

[14] Additionally, this Office has frequently applied a non-exhaustive list of factors to consider from the Information and Privacy Commissioner of Ontario's Order MO-2750:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a "core", "central" or "basic" function of the institution?*
- *Does the content of the record relate to the institution's mandate and functions?*
- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*

- *If the institution does have possession of the record, is it more than “bare possession”?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*
- *Does the institution have the authority to regulate the record’s content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[15] Through communications with this Office, the Town has attempted to address the factors above. The Town confirmed that it does not currently have physical possession of the records. The Third Parties created the records for the purpose of evaluating proposals, and then made recommendations based on those evaluations. The Town further confirmed that the “activity in question” was for a “Core Municipal Function”, and that it did rely on the results of the records for awarding a contract. However, the Town stated that it was unsure about a number of factors, such as *“If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?”*, *“Does the institution have the authority to regulate the record’s content, use and disposal?”*, and *“What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?”*. Further, the Town did not provide a conclusive answer to *“Does the institution have a right to possession of the record?”*. Accordingly, we cannot determine which public body, if any, has control of the records in question.

[16] We would, however, remind the Town of its duty to assist an applicant per section 13(1) of *ATIPPA, 2015*:

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”.

It would seem in this instance, the Town failed its duty to assist the Complainant, which leads us to the next two issues.

Advisory Response

[17] The Complainant did not receive any communications from the Town until he received its final response in the mail. The Town did not address this or provide any evidence to the contrary.

[18] Section 15(1) of *ATIPPA, 2015* sets out public bodies' obligation to provide an advisory response: "*The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing...*".

[19] Further to its failure to properly assist the Complainant, the Town also failed to provide an advisory response to the Complainant. If the Town had adhered to this duty, it may have cleared up its misunderstanding of the Complainant's request at an earlier stage.

Transfer of Request

[20] The Complainant believes that the Town is the appropriate public body to obtain these records from the Third Parties. The Town has not provided a conclusive position on whether it or another public body has control of the records. Since the Town initially misunderstood the access request, it is logical to presume it would not have had the foresight to determine which public body may have control of these records, and therefore transfer the request accordingly.

[21] However, we would once again remind the Town of its duty to assist an applicant under section 13(1). If it had met its duty, particularly its duty to respond without delay, and determined that another public body had actual control over the records, it would have been able to at least consider whether to transfer the request to the appropriate public body per section 14(1):

14(1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that

(a) the record was produced by or for the other public body; or

(b) the record or personal information is in the custody of or under the control of the other public body”.

VI RECOMMENDATIONS

[22] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town of Gander:

- (i) review what rights the Town has to the records and request the records from the Third Parties within five business days of receiving this Report, and require that the Third Parties respond within ten business days;
- (ii) provide a final response to the Complainant within five business days of receiving the Third Parties’ responses to the Town’s request for the records. The response is to outline which entity or entities have control of the requested records;
- (iii) if the Town determines that any other public body or public bodies have control of the records, the Town is to transfer the Complainant’s access request to the appropriate public body or public bodies within five business days of providing its final response to the Complainant;
- (iv) if the Third Parties provide the records to the Town, upon receipt of the records, the Town is to review them and provide a final response to the Complainant’s access request within 10 business days of its receipt of the records;
- (v) review its access to information policies and procedures in detail, and implement measures to ensure legislative compliance in the future; and
- (vi) in the future, comply with all of its statutory duties imposed on it by *ATIPPA, 2015*, particularly sections 13 and 15.

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

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of November 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador