



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2022-001

January 5, 2022

Department of Education

Summary:

The Complainant submitted an access to information request to the Department of Education under the *Access to Information and Protection of Privacy Act, 2015* seeking access to records regarding the Minister's emails within a specified period of time. The Department sought to narrow the request then completed its search. In its response, the Department provided the Complainant with responsive records, but severed some information pursuant to sections 29 (policy, advice or recommendations), 35(1)(c), (d), (g) (disclosure harmful to the financial or economic interests of a public body), 39 (disclosure harmful to business interests of a third party), and 40 (disclosure harmful to personal privacy). The Complainant argued that the Department had not properly handled the request, requested confirmation the exceptions to access had been properly applied, and raised concerns about the reasonableness of the search. The Commissioner concluded that the Department had met its obligations in handling the request, including the duty to assist, and that the exceptions had been properly applied. However, the Commissioner noted that the Department ought to have expanded its search for records to incorporate email responses of the Minister sent via his Secretary's email.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 15, 16, 17, 29, 35, 39, and 40.

Authorities Relied On:

NL OIPC Reports [A-2017-015](#), [A-2019-002](#), [A-2021-025](#), [A-2021-034](#), and [A-2021-035](#).

I BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or the “Act”) to the Department of Education (the “Department”) for the following records:

All email correspondence for the Minister of Education (i.e. to, from, copied and deleted) during the week ended July 31, 2021

- [2] The Department sought to narrow the scope of the request, and following correspondence with the Complainant, the parties settled on the following wording:

All email correspondence for the Minister of Education (i.e. to, from, copied and deleted) during the week ended July 31, 2021, excluding matters related to: early childhood development and regulated child care (except the \$25 per day child care proposal between the federal and provincial governments), public libraries, constituency records, and press releases.

- [3] The Department responded to the request by providing access to responsive records, but denying access to some information pursuant to sections 29, 35(1)(c), (d) and (g), 39 and 40(1) of the Act. The Complainant made a complaint to this Office regarding the handling of the request, specifically in relation to the Department’s efforts to narrow the scope of his request as it was initially worded, and also sought confirmation that the exceptions applied were warranted. During the course of informal resolution the Complainant additionally raised the issue of the reasonableness of the Department’s search.

- [4] Some additional records were provided to the Complainant during the informal resolution process, but the matter was not resolved informally, therefore the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] The Department acknowledged that, upon receipt of the Complainant’s request for records, it had determined the request was too broad given the volume of projects and subject matter for which it “provides leadership and direction”. The Department sought the guidance

of the ATIPP Office in determining whether it was reasonable for it to seek to narrow the request, highlighting the “Clarifying the Request” section (3.2.2) of that Office’s *Access to Information: Policy and Procedures Model*, which outlines:

The duty to assist includes assisting an applicant in the formulation and clarification of their request. Broad requests are often the result of applicants’ lack of knowledge of the public body’s activities and/or how to frame their question to fully capture the records they are seeking. Clarification of the request may involve assisting the applicant in defining the subject of the request, the specific kinds of records of interest, and the time period for which records are being requested. Where a request is clarified, ATIPP Coordinators should include the clarification of the request in the advisory response and in the final response letter.

- [6] The Department submitted that it corresponded with the Complainant via email to reach a narrowed scope acceptable to the Complainant before it proceeded to search for responsive records. It noted the majority of the responsive records were provided to the Complainant. However, redactions were made in accordance with specific exceptions to access. Section 29 was applied to sever portions of the records, the disclosure of which would reveal advice, proposals, and analysis or policy options. Section 35(1)(c) was applied to withhold records related to potential measures by the Conseil scolaire francophone provincial de Terre-Neuve-et-Labrador (“CSFP”) to identify budget cost efficiencies that have yet not been implemented or made public. Section 35(1)(d) and (g) were applied to redact portions of a draft funding application form that was not completed nor submitted on behalf of the Department, as well as portions of a feasibility study in relation to a new school and community center development that remains in the preliminary development and planning stages. The Department argued that due to the sensitive nature of the financial information, the release of these records could have the potential for economic harm to the government. Section 39 was applied to redact records containing sensitive economic information, and a proposal for the acquisition of land, the release of which the Department believed could significantly harm the competitive position or interfere with the negotiating position of the third party involved for future bids or the purchase of the land identified. Finally, section 40 was applied to withhold information throughout the responsive records to ensure the protection of personal information of third parties.

[7] The Department also addressed the Complainant's comments regarding its handling of the request for information, noting it:

...takes its responsibility under the ATIPPA, 2015 very seriously and at no time was it the Department's intent to restrict access to the Applicant. Every effort was made to be respectful to the Applicant, to provide the best customer service, and to fulfil the duty to assist.

III COMPLAINANT'S POSITION

[8] In the complaint to this Office, the Complainant expressed disappointment with the Department's communications and final response. This Office was asked to examine whether the Department had, "respected my rights under applicable legislation in processing my request."

[9] In particular, the Complainant was concerned with the Department's efforts to narrow the request, and specifically that it "did not check to determine if the number of records was too much to handle prior to asserting that the request was too broad at the time."

[10] The Complainant argued that they had submitted "almost an identical request (only the name of the official was different) to another organization," and that the other organization was processing that request, which reportedly involved 2,000-3,000 records, "with an extension granted by [this] Office." The Complainant noted that the other organization had not sought to narrow the request.

[11] Additionally, the Complainant noted that the final response from the Department contained 221 pages, arguing that the number of records involved did not justify the narrowing of the request and suggesting it "did not care to check if the work involved was manageable or not." The Complainant went on to state,

...the conduct of the [Department] is careless. Not only do I question if they have been fair to me in their attempts to limit my request, I also doubt that the information withheld is justified. As part of your assessment of this file, please review whether withholding any information is warranted.

[12] During the course of informal resolution, the Complainant additionally raised concerns about the reasonableness of the Department's search. A partial reply from another public body regarding a similar request made at the same time as that made to the Department produced records that appeared responsive to the within request. However, the Department did not include these records in its response. The Complainant noted, "... it is evident ... that the [Department] did not conduct a thorough search ... or that records were ignored/deleted that should have been kept, found and provided to me."

IV ISSUES

- [13] The issues to be addressed are:
- (i) the handling of the access request;
 - (ii) the application of redactions, and
 - (iii) the reasonableness of the search.

V DECISION

Handling of the Access Request

[14] The primary concern raised by the Complainant was the handling of the access request by the Department, its responses to the Complainant, and whether the Department had acted improperly in its efforts to focus the scope of the request. In exercising our oversight, this Office must examine whether the Department has complied with its obligations under the legislation. Sections 15 through 17 of *ATIPPA, 2015* set out the following:

15. (1) The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing to.

(a) advise the applicant as to what will be the final response where

- (i) the record is available and the public body is neither authorized nor required to refuse access to the record under this Act, or*
- (ii) the request for correction of personal information is justified and can be readily made; or*

(b) in other circumstances, advise the applicant of the status of the request.

- (2) *An advisory response under paragraph (1)(b) shall inform the applicant about one or more of the following matters, then known:*
- (a) *a circumstance that may result in the request being refused in full or in part;*
 - (b) *a cause or other factor that may result in a delay beyond the time period of 20 business days and an estimated length of that delay, for which the head of the public body may seek approval from the commissioner under section 23 to extend the time limit for responding;*
 - (c) *costs that may be estimated under section 26 to respond to the request;*
 - (d) *a third party interest in the request; and*
 - (e) *possible revisions to the request that may facilitate its earlier and less costly response.*
- (3) *The head of the public body shall, where it is reasonable to do so, provide an applicant with a further advisory response at a later time where an additional circumstance, cause or other factor, costs or a third party interest that may delay receipt of a final response, becomes known.*
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.*
17. (1) *In a final response to a request for access to a record, the head of a public body shall inform the applicant in writing*
- (a) *whether access to the record or part of the record is granted or refused;*
 - (b) *if access to the record or part of the record is granted, where, when and how access will be given; and*
 - (c) *if access to the record or part of the record is refused,*

- (i) the reasons for the refusal and the provision of this Act on which the refusal is based, and*
- (ii) that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52, and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.*

(2) Notwithstanding paragraph (1)(c), the head of a public body may in a final response refuse to confirm or deny the existence of

- (a) a record containing information described in section 31 ;*
- (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy under section 40 ; or*
- (c) a record that could threaten the health and safety of an individual.*

[15] A review of the correspondence between the Department and Complainant confirms the Department responded to the Complainant's access request with both advisory and final responses which complied with sections 15 through 17, above. There is therefore nothing about these responses that is contrary to the Act.

[16] The Complainant's concerns stem from how the Department reacted and responded to the request for information as compared to how another public body reacted and responded to a similar request. It is worth noting that *ATIPPA, 2015* provides considerable flexibility to public bodies when responding to access to information requests, and public bodies may differ in their efforts to assist an applicant or in their exercise of discretion. Accordingly, an Applicant may experience different responses depending on the public bodies involved and information requested. This does not mean one response is correct and the other not, or that one response is in keeping with the legislation and the other not. In this case, the difference comes from the Department seeking to narrow the request while another public body opted instead to seek an extension from this Office while handling a similar request.

[17] The legislation does not provide direction that one of these methods is correct and the other not. Either or both are options open to a public body in handling and responding to requests for information. In reviewing the Department's choice in handling this particular

access to information request, this Office looks to a public body's obligations under section 13, which 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.

[18] The standard under the Act is whether the Department's actions are "reasonable" and whether it has communicated openly, accurately, completely, and without delay. The decision to seek a narrowed request is reasonable given the volume of subjects and projects the Minister is involved with, and would be sending and receiving email communications on, at any given time. It is also in keeping with the spirit of the Act – where concerns exist that a request may be overly broad, a first course of action should be to seek to clarify and possibly narrow the scope of the request prior to seeking an extension of time from this Office, providing that the Applicant is in agreement to alter their request in that way.

[19] Additionally, from a review of the communications between the Complainant and the Department from the start of the request, the Department reached out immediately, and these communications were open, clear, accurate and complete. The Department worked with the Complainant in good faith to develop request language that narrowed the scope in a way that met the Complainant's approval. The final text of the request was wording that was suggested by the Complainant.

[20] Narrowing a request, via discussion between an applicant and a public body can achieve a more targeted and relevant response. Taking this approach is not inconsistent with the duty to assist, and may in fact yield results of greater value to an applicant, provided that the applicant agrees with this approach and consents to the new language in the amended request.

Applications of Exceptions

[21] The Department applied sections 29, 35, 39, and 40 to withhold some information from the Complainant:

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;*

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35. (1) *The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*

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(c) *plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*

(d) *information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;*

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(g) *information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or*

—

39. (1) *The head of a public body shall refuse to disclose to an applicant information*

(a) *that would reveal*

(ii) *commercial, financial, labour relations, scientific or technical information of a third party;*

(b) *that is supplied, implicitly or explicitly, in confidence; and*

(c) *the disclosure of which could reasonably be expected to*

(i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

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40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

[22] Along with questions about the Department's conduct, the Complainant sought to have our Office review whether the redactions were done in accordance with the legislation. A review of the records finds them falling within the scope of the sections noted. Personal emails and names of third parties were redacted according to section 40(1). This information is clearly captured by section 40(1), would be an unreasonable invasion of privacy if disclosed, and does not fall within any of the scenarios which are deemed under section 40(2) to not be an unreasonable invasion of personal privacy. Section 35(1)(c) was employed to redact a single page of a letter from CSFP to the Department outlining potential areas for cutting costs that have not yet been implemented. This material directly falls within the description of the exception and is therefore at the Department's discretion to withhold.

[23] Sections 29(1)(a), 35(1)(d), (g) and 39 were used to redact communications involving proposals, recommendations and information about a project that is still in the planning stage. Some information pertains to a potential third party who was in discussions to participate in the project. The redactions all fall within the above listed descriptions. The first two sections, 29 and 35, have broad application so long as the material in question falls within the description each sets out. The material redacted pursuant to section 29(1)(a), would reveal advice, proposals, recommendations, analyses, or policy options and was therefore in the Department's discretion to withhold.

[24] Some of the section 35 redactions were resolved during the informal process. For the remaining section 35 redactions, the Department has applied both sections 35(1)(d) and (g). Given the text of section 35(1)(d), so long as the records involved meet the first part ("information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project"), the Department need not prove anything further, however the word "premature" does imply a kind of harm assessment, in terms of considering the unfolding of events and the passage of time, such that there is potentially a point at which disclosure could no longer be considered premature. In this case, however, it is clear that the

disclosure of this information would indeed be premature, and it is within the Department's discretion to withhold it. The material in question all relates to ongoing discussions, planning and proposals surrounding a project that has not yet been implemented. Previous reports of this Office have noted that where the information in question is about an ongoing project or matter, the early release of such information could reasonably be expected to result in the premature disclosure of a proposal or project and we find the same here (see, for example, A-2021-035, A-2019-002, and A-2017-015).

[25] Additionally, there has not been presented a convincing section 9 public interest override argument to outweigh the application of sections 29 or 35 to require disclosure: this project is still in the very early stages and the information involved is quite tentative in nature which raises concerns that release now could actually be more harmful to the public than withholding it.

[26] Section 39 has been applied to redact a letter between a third party and the Department outlining proposals and negotiations that constitute commercial, financial, labour relations, scientific or technical information of the third party supplied, implicitly or explicitly, in confidence; and, if disclosed, could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party, and result in undue financial loss or gain to any person, as set out in the description of this section. The Department properly applied this mandatory exception to redact this information from disclosure.

Reasonableness of the Search

[27] During the course of the informal resolution process, the Complainant raised additional concerns in relation to the adequacy and completeness of the Department's search. In support of this position, the Complainant provided records received under a separate request to a different public body which appeared responsive to this request. This Office then inquired into the Department's search for responsive records, when assessing the reasonableness of a search, the standard is reasonableness not perfection. Upon review of those records and the particulars of the Department's search, it was determined that the records in question

were from the email of the Department's Ministerial Secretary, who had sent and received some emails on behalf of the Minister during time frame of the Complainant's request.

[28] Given the specific wording of the Complainant's request, this Office acknowledges how the Department initially overlooked additionally searching the Secretary's email and therefore finding these additional records. However, this Office determined these were records the Department ought to have searched for, found and disclosed as well. Given that the Ministerial Secretary does send emails on behalf of the Minister, a request for the "Minister's emails" cannot be limited to just a search of the Minister's email account, but must also be expanded to include the Secretary to ensure any emails sent by or on behalf of the Minister are captured as well. The Department agreed, conducted an additional search for records, and provided those retrieved to the Complainant. The Department also took note of this Office's position in relation to the request wording and that it should have included the Secretary's emails as part of its initial request, changing its policy on a go-forward basis to ensure any future similar requests would be dealt with in this manner.

[29] The Complainant then raised additional questions saying they had, "been told" the Minister has two email accounts and seeking whether all accounts had been searched. This Office confirmed the Minister has one professional government account which is the one that was searched in regards to the request. Finally, the Complainant sought whether the Minister's assistant's emails formed part of the Department's search. This Office confirmed the emails of these political staff (one is an Executive Assistant and the other a Liaison to the Minister) were not searched. Correspondence to the Minister of Education on departmental issues is not handled by political staff and so it was not reasonable for the Department to have included them as part of their search parameters for this request for information.

VI RECOMMENDATIONS

[30] Having found that the Department handled the Complainant's request in accordance with the *Act*, including in its application of redactions, we recommend the Department maintain its position with regards to these matters. While we determined its initial search was not sufficient, the Department has since rectified this, completing our additional recommendation

to search the Secretary's emails and providing those records to the Complainant, as well as updating its policy and procedure for future requests. Given that, we have no further recommendations to make.

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

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of January 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador