OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2022-007

June 14, 2022

Office of the Premier

Summary: The Office of the Premier received several requests under the *Access to Information and Protection of Privacy Act, 2015* for records relating to a dispute between the Complainant, a municipality, and Crown Lands. The Office of the Premier responded that it had no responsive records. During our investigation, the Office of the Premier advised that it had located records but considered them to be not responsive to the requests. The Commissioner concluded that the Office of the Premier had been mistaken in its characterization of the records and had not conducted a reasonable search. The Commissioner recommended that the Office of the Premier conduct a more thorough search, and provide any additional records to the Complainant.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 13, 14, 16, 17, 42, 97, and 98.

Authorities Relied On: NL OIPC Practice Bulletin: *Reasonable Search*.

File #s: 0005-092-22-020 and -0005-092-22-021

I BACKGROUND

[1] The Complainant made three different requests under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015"* or the "*Act*") to the Office of the Premier ("Premier's Office") for records relating to his ongoing dispute with a municipality and with the Crown Lands Branch of the Department of Fisheries, Forestry and Agriculture ("FFA") over property that he asserted belongs to his family. The Premier's Office responded to the first request by suggesting the Complainant make a request to FFA, and to the second and third requests by transferring them to FFA.

[2] The Complainant, however, had already made similar requests to FFA. He had made these requests to the Premier's Office intentionally, since he had written frequently and at length to Crown Lands staff and to the minister, and had copied the Premier's Office on much of that correspondence. The Complainant believed that there had been communication between the Premier's Office and FFA and that therefore there should be records. Unsatisfied with the response from the Premier's Office, the Complainant filed complaints with this Office.

[3] During the course of informal resolution efforts, it was discovered that the Premier's Office had in fact conducted one search, and had found records of the correspondence with the Complainant, but had taken the position that the term "responsive records" does not include correspondence to or from the applicant. Therefore the Premier's Office initially did not acknowledge that it had those records or provide them to the Complainant.

[4] Our Office advised the Premier's Office that narrowing the definition of responsive records in this way was an error, and suggested that it provide the Complainant with the records it had located. The Premier's Office provided the Complainant with several hundred pages of records, mostly email threads from and to the Complainant himself but also some communications to other parties, such as FFA, regarding the issues that had been raised by the Complainant.

[5] 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

[6] The Premier's Office takes the position that the records released to the Complainant were not responsive to the Complainant's access request, but were provided only in the interest of resolution of the complaint.

[7] The Premier's Office also states that it had never in fact sent the Complainant a "Final Response" to his access requests, but simply transferred his requests and sent him a notification that it had done so. The Premier's Office takes the position that therefore the complaint is solely about the transfer decision.

III COMPLAINANT'S POSITION

[8] The Complainant states that he no longer has faith that the Premier's Office has conducted a complete and thorough search. Despite the Premier's Office providing several hundred pages of records, the Complainant argues that it is likely that there are still more records to be found by a proper search and that a new independent search should be conducted.

IV ISSUES

[9] The issues to be determined in this Report are:

1. whether the Premier's Office appropriately transferred the Complainant's requests;
2. whether the Premier's Office provided the Complainant with a Final Response that could be the basis for a complaint;
3. whether the Premier's Office has conducted a reasonable search for responsive records; and
4. whether an independent search should be conducted.

V DECISION

1. The Transfer Issue

[10] Section 14 of *ATIPPA, 2025* states:

> *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.*
>
> *(2) The head of the public body to which a request is transferred shall respond to the request, and the provisions of this Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date it was transferred to that public body.*

[11] The three successive access requests are all different, but for information relating in one way or another to the ownership and disposition of several parcels of land in a municipality, including information about a Crown Lands application, and information about a sale by the town under the *Municipalities Act*. It is obvious to anyone familiar with the structure of the provincial government that much, or even most, of the information responsive to these requests would logically be in the custody and control of FFA and its Crown Lands division, or of the Town itself. It would therefore have been reasonable and appropriate for the Premier's Office to consider exercising its discretion under section 14(1) to transfer those requests to FFA.

[12] It would also have been reasonable for the Premier's Office to do the transfer promptly. The Complainant states that, to him, it is suspicious that his requests were transferred so quickly. However, section 14 requires a transfer to be done within 5 business days of receiving the access request. It therefore would not appear to be a failure of the duty to assist the applicant, under section 13 of the *Act,* to promptly transfer the requests.

[13] However, section 14 does not state that a public body, in considering whether to transfer a request, is absolved from the duty to assist an applicant. There may be situations where it

is so obvious that the request ought to have been made to a different public body that a conversation with the applicant before making the transfer under section 14 may not be necessary. However, in most cases, when a public body is contemplating transferring a request under section 14, it should first contact the applicant to advise that the request may be transferred and to discuss the basis for doing so. A public body may also need to conduct a search of its own records to verify that it does not have responsive records, or has very few responsive records, and to advise the applicant of this fact.

[14] In at least some circumstances, therefore, it will not be enough for even an experienced ATIPP coordinator to conclude, from examining the request, that the public body "would not" have responsive records. Rather, in such circumstances, an effort must be made to engage with the applicant to understand their purpose in making the request to the public body, and also to determine whether the public body does or does not in fact have responsive records. That is what would reasonably have been required of the Premier's Office in the present case.

2. The Final Response Issue

[15] Section 16 of the *Act* sets out the time limit by which a public body must provide a final response to an applicant, and section 17 sets out what that final response must contain. Contrary to the argument made by the Premier's Office, the *Act* does not require a "final response" to form the basis of a complaint. Under section 42 an applicant may file a complaint with the Commissioner respecting any "decision, act or failure to act of the head of the public body that relates to the request."

[16] The Premier's Office has argued that it "… did not send the applicant a final response advising that it had no responsive records." However, in its response to the first of the three requests (PRE-29-2022), the Premier's Office told the Complainant that:

> *… based on the current wording, we are unable to process this request. The Premier's Office would not have answers to the questions noted.*

There is no practical difference between that response and a response stating explicitly that the public body has no responsive records. In fact, the Premier's Office did not even transfer that request, but merely advised the Complainant to make an access request to FFA. Any

applicant receiving such a reply would reasonably conclude that the public body is saying that it has no responsive records. Knowing that he had previously sent numerous emails to that public body on that subject, an applicant would reasonably suspect that no search had actually been conducted. If so, that would of course constitute a "failure to act" within the meaning of section 42, which is quite enough to form the basis for a complaint.

3. The Reasonable Search Issue

[17] Section 13 of *ATIPPA, 2015,* dealing with the duty of a public body in responding to an access request, 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.*

[18] Much has been written about the content of the duty to assist. Among other things, it requires a public body to make a reasonable effort to communicate with an applicant in order to ensure that it is clear what information the applicant is seeking. It also requires, at a minimum, as stated in our Practice Bulletin entitled *Reasonable Search,* that a public body "…must show that it has made a reasonable effort to identify and locate records responsive to the request." What will constitute a reasonable effort will generally depend on the circumstances.

[19] As noted above, the Premier's Office did not conduct any search for records at the time of the first access request, nor did it transfer the request. At the time, it may have been genuinely believed that the Premier's Office "would not" have responsive records.

[20] In response to the second and third access requests, the Premier's Office did transfer the requests to FFA within the 5 business days required, and notified the Complainant that it had done so. During that time, however, the Premier's Office did conduct a search for records, using the Crown Lands application number cited by the Complainant as a keyword. That search covered the Office's email accounts and its records management system. However, the Premier's Office erroneously deemed the resulting several hundred pages of records to be "not responsive".

[21] Consequently, in response to the Complainant's second request, the Premier's Office stated:

> *As noted in file PRE/29/2022, the information you are requesting is in the custody and control of Fisheries, Forestry and Agriculture (FFA). Your request, therefore, was transferred to FFA.*

[22] In the response to the Complainant's third request, notifying him of the transfer, the Premier's Office similarly stated:

> *As noted in file PRE/29/2022 and PRE/30/2022, the information you are requesting is in the custody and control of Fisheries, Forestry and Agriculture (FFA). Your request, therefore, was transferred to FFA.*

[23] There are several shortcomings with this approach. First, the Premier's Office did not communicate with the Complainant to clarify his requests or to propose the transfer. If it had done that, it would have discovered that he had already made a similar request to FFA, and had made the request to the Premier's Office intentionally, to find out what records it held, in view of the fact that he had written to that Office and wanted to know what action, if any, it had taken. Had the Premier's Office inquired and learned those details, it might have concluded that the transfer of the requests was not actually necessary.

[24] The Premier's Office might also have concluded that a search for records in its own holdings was both appropriate and necessary. It is not at all obvious from a review of these access requests that the Premier's Office "would not have any records" and such assumptions are often wrong, as proved to be the case here. Given the speed and ease with which electronic searches can be conducted, the Premier's Office could have done a preliminary search, and still have transferred the request to FFA within 5 business days if it was appropriate to do so.

[25] It is not clear what prompted the Premier's Office to conduct the one search that it did. When that search located hundreds of pages of records, it should have been apparent that the original assumption, that there would not be any records, was wrong. Instead, the mistake was compounded by the erroneous proposition that responsive records do not include communications to or from an applicant.

[26] A responsive record is one that is reasonably related to the subject-matter of the applicant's access request. In numerous cases over the years, this Office has confirmed that every record relating to the subject of a request must be considered responsive and provided to the applicant, even though the public body believes the applicant already has it, or even though it may have been written by the applicant, provided to the public body by the applicant, or already provided to the applicant by the public body on some other occasion. A public body cannot simply assume that the applicant does not want copies of such records. The only exception to this general rule is where the public body discusses the request with the applicant, and the applicant agrees to exclude certain classes of records from the scope of the request.

[27] In addition, there may have been a problem with the scope of the actual search that was conducted by the Premier's Office. Using only the Crown Lands application number as a search term, without more, might not have been enough in the present case to constitute a reasonable search. While one of the Complainant's access requests contained that 6 digit number, the other two did not, as those two requests were not about the Crown Lands application, but about the tax sale and the title dispute. If any of the Complainant's correspondence with the Premier's Office, or any correspondence between, for example, the Premier's Office and FFA or the municipality, did not happen to include that 6 digit number, then those records would not show up in the results. Given the subject matter of the requests, the Premier's Office should have done a more thorough search using, for example, the Complainant's name, the name of the town, or other useful search terms related to the actual subject matter of the requests.

[28] The standard by which a search for records is measured is not perfection, but reasonableness, and it is of course possible that a more thorough search might not locate any additional records. However, a more thorough search would have enabled the Premier's Office to report to the applicant with confidence that no more responsive records exist. Conducting a more thorough search in the first place, and explaining to the applicant how it was conducted, might have taken a little more time. However, that might well have satisfied the Complainant's concerns and might therefore have avoided this far more time-consuming complaint investigation process in which we have been engaged.

[29] We therefore recommend that, to satisfy the requirements of the *Act,* the Premier's Office should conduct an additional search as suggested above. Given that it is an electronic search, it should not be unduly burdensome.

4. The Independent Search Issue

[30] This Office has the jurisdiction, under sections 97 and 98 of *ATIPPA, 2015,* to conduct an independent search for records. However, the circumstances of the present case fall short of requiring such a measure. Every public body is responsible for ensuring its own compliance with the *Act,* and the head of the public body, in conjunction with its ATIPP Coordinator, is usually in the best position to make sure that a search for records is conducted with reasonable competence, thoroughness and skill. If there have been shortcomings, or if mistakes have been made, the head of the public body and the Coordinator are in the best position to correct them.

[31] In our Practice Bulletin, we have cautioned that where there is a history of conflict between the applicant and an employee of the public body, it might be better if someone other than the employee is present to oversee the search. However, the circumstances of the present case do not justify such a recommendation.

VI RECOMMENDATIONS

[32] Under the authority of section 47 of *ATIPPA, 2015* I recommend:

(1) that the Office of the Premier conduct a more thorough search of its holdings, using appropriate methods, as outlined in the Practice Bulletin and in this Report, and report the methods, locations and results of that search to the Complainant and to this Office; and

(2) that the Office of the Premier provide to the Complainant any additional records located, subject to any applicable exceptions.

[33] 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.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of June, 2022.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador