



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-024

October 25, 2022

Legal Appointments Board

Summary:

The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* to the Legal Appointments Board for information relating to consultations and the recommendation of four named individuals who were appointed to the Queen's Counsel on January 21, 2022. The Legal Appointments Board responded to the Complainant providing records with some information withheld based on sections 27 (cabinet confidences) and 40 (disclosure harmful to personal privacy). This Report finds that the exceptions were properly applied; however, there was insufficient evidence available to conclude that the Legal Appointments Board conducted a reasonable search for records. It was therefore recommended that the Board conduct a new search by requesting from the former Chair's law firm all responsive records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 27 and 40.

Authorities Relied On:

NL OIPC Reports [A-2016-022](#), [A-2021-020](#) and [A-2022-014](#).

OIPC Practice Bulletin – [Reasonable Search](#).

BACKGROUND

- [1] The Complainant made an access to information request to the Legal Appointments Board (the “Board”) under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “Act”) seeking records pertaining to consultations and recommendations in relation to January 21, 2022 Queen’s Counsel appointments.
- [2] Initially, this request was mistakenly processed by the Department of Justice and Public Safety (“JPS”) which did provide the Complainant with a response and records from JPS. Once the mistake was identified, the access request was then processed by the Board and a response and further records were provided by the Board to the Complainant. While the Board provided responsive records, the majority of the information was withheld based on sections 27 (cabinet confidences) and 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*. The Information and Privacy Commissioner, Michael Harvey, delegated authority for this matter to me, as Director of Research and Quality Assurance, pursuant to section 103 of the *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [4] The Board’s position is that its search was reasonable and that it had properly applied sections 27 and 40 to withhold information.
- [5] The Board was chaired by a member of the legal profession in private practice. The Access to Information and Protection of Privacy (ATIPP) Coordinator for the Board indicated that they contacted the Chair of the Board and requested that he search for and provide any records responsive to the access to information request.
- [6] The Chair of the Board conducted the search and provided records to the ATIPP Coordinator. The ATIPP Coordinator explained that they were in communication with the Chair

during the search and felt that the Chair was aware of the scope of the request, relevant search terms, and the legislation.

[7] The ATIPP Coordinator reviewed the records provided by the Chair but did not review the details of the search that the Chair had conducted. The ATIPP Coordinator advised this Office that the Chair had met with Board members before providing the final set of records and that based on communications with the Chair, the ATIPP Coordinator believed that a thorough search was completed and all responsive records had been provided.

[8] Following the Board's final response to the Complainant, but prior to the Complainant filing his complaint with this Office, the Chair of the Board passed away. Therefore, during the course of our investigation, the ATIPP Coordinator was unable to provide an exact account of the steps taken by the Chair of the Board to search for and locate responsive records. As the Chair of the Board had been a lawyer in private practice, and Board business was conducted largely through his business email account, the ATIPP Coordinator did not have access to locations where responsive records may have been found.

[9] The ATIPP coordinator advised that they did do an additional search of the email accounts belonging to the Minister of Justice and Public Safety and the Minister's secretary even though the request was for the Board, but found no further records responsive to this request.

COMPLAINANT'S POSITION

[10] The Complainant's position is that the search conducted was not reasonable and that the exceptions to access were not properly applied. Specifically, the Complainant states that "nomination packages" for the four individuals who received Queen's Counsel appointments were not located.

[11] As the basis for concluding that the search was not reasonable, the Complainant relies on the fact that a record provided by the Board was not also provided originally by JPS when JPS originally, and mistakenly, processed the access request. The record in question was addressed to the Board's Chair and copied to the Minister of Justice and Public Safety.

[12] The Complainant submits:

Since the email was copied on JPS, this department had its custody and control when providing an initial response to the ATIPP request. It must have been located and released by May 5, in the other words. This material finding prompts two conclusions:

- 1. The search conducted by JPS in April-May was not reasonable,*
- 2. The additional search conducted by the Legal Appointments Board was not reasonable either: it failed to produce a single record that would not be in the custody and control of JPS.*

[13] The Complainant states that the responsive records are not cabinet records since they were not created during the process of developing or preparing a submission for Cabinet. The Complainant states that nomination packages were prepared for the Board as opposed to being prepared by the Board for submission to JPS, as the covering letter was addressed to the Chair of the Board.

ISSUES

[14] The issues to be addressed are whether the Board conducted a reasonable search for records responsive to the access request and whether, for those records which were located and provided, the Board properly applied the exceptions to access at section 27 and 40 of *ATIPPA, 2015*.

DECISION

Reasonable Search

[15] A public body's duty to conduct a reasonable search for records responsive to an access request is found in section 13 of *ATIPPA, 2015*, the relevant portion of which reads as follows:

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.

[16] This Office has commented on the requirements of a reasonable search in many previous reports. Further, this Office also has a Practice Bulletin on Reasonable Search that states that

a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located. The standard for assessing a public body's efforts is reasonableness, not perfection.

[17] As noted above, the Chair of the Board was using an email account belonging to his law firm while conducting Board business. As such, the ATIPP Coordinator relied on the Chair of the Board to locate and provide records responsive to the access request and could not confirm the steps taken by the Chair in searching for records. Unfortunately, we are unable to solicit information about this search from the Chair of the Board who has since passed away. While acknowledging that an experienced ATIPP Coordinator supported the Chair of the Board in his search for responsive records, without knowing precisely how the search was conducted, I am unable to conclude that the Board has satisfied my Office that it conducted a reasonable search.

[18] The challenges of assessing the reasonableness of the Board's search are compounded by the fact that the Board's business was conducted through the Chair's business email account. The Board does not dispute that it has custody or control of all records related to the conduct of the Board's business, but as those records are in the possession of the Chair's former law firm, this poses an obvious obstacle to confirming the adequacy of a search. Both reports A-2016-022 and A-2021-020 discuss the use of personal email addresses for public body business and encourage public bodies to ensure that their business is conducted through an email account controlled by the public body.

Exceptions to Access

[19] The Board is a five-member board appointed under the authority of the *Queen's Counsel Act*. Its duties are to consult with the Minister of Justice and Public Safety regarding (since Her Majesty's passing) King's Counsel appointments; to recommend, at the request of the Minister of Justice and Public Safety, the names of suitable persons for consideration for King's Counsel appointment; and to make recommendations respecting other appointments to legal offices in the province that may be referred to the Board by Cabinet.

[20] The Board withheld the majority of the responsive records based on sections 27(1)(h) and 27(2)(a) of *ATIPPA, 2015* which reads as follows:

27.(1) In this section, "cabinet record" means

.....

(h) a record created during the process of developing or preparing a submission for the Cabinet: and

...

27.(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record; or

[21] If a record is found to fall within the category described in section 27(1)(h) it must be withheld in its entirety pursuant to section 27(2)(a) of *ATIPPA, 2015*.

[22] The Board advised that the *Queen's Counsel Act* outlines the process for appointment. Subsection of that Act 3(1) states:

3. (1) On the recommendation of the Minister of Justice after consultation with the board, the Lieutenant-Governor in Council may, by letters patent under the Great Seal, appoint during pleasure from among the members of the Bar of this province persons that he or she considers right to be provincial officers under the style of "Her Majesty's Counsel learned in the law".

[23] The Board stated that the process for appointment requires that the Minister consult with the Board, and the dialogue between the Minister and Board informs the recommendations and forms part of the Cabinet process.

[24] The Board advised that when considering the application of section 27 to a record, it is common to consult with Cabinet Secretariat. In the present case, the Clerk of the Executive Council reviewed the records, indicated agreement about the applicability of section 27 and that in this instance the public interest in disclosure did not outweigh the purpose of the exception.

[25] Report A-2022-014 provides a recent review of the application of section 27, and in the present matter, a review of the records supports the conclusion that they are cabinet records and that the exception was properly applied to withhold them from the Complainant.

[26] Section 40 was also applied by the Board to withhold personal information. Based on a review of the records, that exception was also properly applied.

RECOMMENDATIONS

[27] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Legal Appointments Board:

1. Request all records responsive to the request from the former Board Chair's law firm within 5 business days of receiving this Report; provide appropriate guidance to assist the law firm in identifying responsive records; and request that the law firm respond within 10 business days;
2. Provide a new final response, with additional records (if any), received from the law firm to the Complainant within 10 business days of receiving the law firm's response to the Board's request for the records, less any applicable exceptions; and
3. Provide members of the Legal Appointments Board with Government of Newfoundland and Labrador email accounts for conducting Legal Appointments Board business, or implement another measure that ensures the Legal Appointments Board has possession of emails and other records created while conducting its business.

[28] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Legal Appointments Board must give written notice of his or her decision with respect to these recommendations to the Office of the Information and Privacy Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of October 2022.



Sean Murray
Director of Research and Quality Assurance