



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-025

October 25, 2022

Independent Appointments Commission

Summary:

The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* to the Independent Appointments Commission for records relating to the review of applicants for a Vice-Chairperson position on the Labour Relations Board. The Complainant was seeking information as to why a second Vice-Chairperson was not appointed. The Independent Appointments Commission responded to the Complainant, providing records but withholding some information pursuant to sections 27 (cabinet confidences), 32 (confidential evaluation) and 40 (disclosure harmful to personal privacy). This Report finds that the Independent Appointments Commission had conducted a reasonable search for records and that the exceptions were applied appropriately.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 27, 32 and 40.

Authorities Relied On:

NL OIPC Report A-2022-024.

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

BACKGROUND

- [1] The Complainant made an access to information request to the Independent Appointments Commission (“IAC”) under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”). The Complainant requested records pertaining to the review of applicants for a Vice-Chairperson position on the Labour Relations Board which had not been filled on March 9, 2022. The Complainant is seeking information that would explain why one new Vice-Chairperson was appointed but a second was not.
- [2] The IAC responded to the Complainant and provided records with some information withheld under sections 27 (cabinet confidences), 32 (confidential evaluation) and 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*. The Complainant made a complaint to this Office disputing the IAC’s decision to withhold certain records under section 27. The Complainant also indicated that he was not satisfied with the search conducted by the IAC. What is specifically at issue is whether the IAC’s search had located a final correspondence addressed to the office of the Minister Responsible for Labour with the names of three recommended applicants and, if so, whether that record should be released.
- [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 IAC’s position is that it conducted a reasonable search for responsive records and that it had properly applied the above exceptions to access.
- [5] The Access to Information and Protection of Privacy (ATIPP) Coordinator for the IAC advised this Office that the IAC searched its own records as well as those of the Public Service Commission (“PSC”). The PSC was not the public body to which the access request was

submitted; however, in an effort to respond diligently to the request, the ATIPP Coordinator also searched the PSC for responsive records.

[6] The ATIPP Coordinator advised that the search included staff of the IAC and PSC who were instructed to search their email, other correspondence, shared drive, HPRM (the records management system), and any paper files. The ATIPP Coordinator also consulted with two employees who are considered Independent Appointments Commission subject matter experts with respect to the records responsive to this request. The ATIPP Coordinator reviewed the search conducted by staff and the responsive records which were provided, as well as conducted an additional search of the shared drive and HPRM to confirm that all responsive records for this request had been located.

[7] The IAC confirmed that the final correspondence addressed to the Minister's office with the names of three recommended applicants does exist and was withheld from the Complainant based on sections 27 (cabinet confidences), 32 (confidential evaluation) and 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*.

[8] The IAC indicated that decisions related to the application of section 27 to any record or any part of a record must be made in consultation with Cabinet Secretariat. In this case, the Clerk of Executive Council examined all information withheld in accordance with section 27 of *ATIPPA, 2015*, approved the use of section 27, and in considering the public interest provision in section 27(3), was satisfied in this instance that the public interest did not outweigh the purpose for the exception.

[9] The IAC states that the record was located which indicates the search was reasonable and, as it is a cabinet record, section 27 was properly applied to withhold it.

COMPLAINANT'S POSITION

[10] The Complainant's position is that the IAC failed in its duty to assist by not conducting a reasonable search as a record of a final correspondence addressed to the Minister with the names of three recommended applicants was not located or released.

[11] During the informal resolution stage of this file, the Complainant was advised by this Office that in response to his complaint the IAC confirmed that the record he is seeking exists and was withheld based on exceptions to access under *ATIPPA, 2015*.

[12] The Complainant then requested the metadata of the record in question and asked for a neutral description of the record. The Complainant stated that a neutral description of the record is needed in order to assess the reasonableness of the search conducted. The Complainant also wanted to know if there is any record that was withheld in its entirety by the IAC that was sent to the Minister on certain dates.

DECISION

[13] 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.

[14] This Office has commented on the requirements of a reasonable search in many previous reports, and just recently in Report A-2022-024. 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.

[15] Based on the description of the search conducted and the fact that the correspondence does exist and was located, I conclude that the IAC conducted a reasonable search for records.

[16] After reviewing the responsive record, it is clear that it is a cabinet record and that section 27 was properly applied by the IAC to withhold it. The relevant provisions of section 27 are 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

[17] The Complainant's complaint to this Office requested a review of the search conducted by the IAC, and for it to locate and release a record of a final correspondence addressed to the Minister with the names of three recommended applicants. The Complainant was advised that the record was located and was properly withheld pursuant to section 27 of *ATIPPA, 2015*. Later in our investigation of this complaint, the Complainant submitted that he should receive a description of the withheld records as well as metadata related to them. Section 17 (content of final response for access) does require a public body to provide reasons for a refusal of access. However, that does not extend so far as to require a public body to describe the information or records that it has withheld. Section 27 is a mandatory and record-level exception, meaning that a public body must withhold the entire record, including any metadata. In any event, the Complainant's interest in metadata was only raised relatively late in the complaint investigation process and was not part of the original access request, therefore it is not a matter that is properly part of my review of the IAC's decision relating to this request for access.

[18] Sections 32 and 40 were also applied by the IAC to the same records withheld pursuant to section 27. As section 27 is a record-level exception to access, and I have accepted its application, it is not necessary to review the application of sections 32 and 40 to specific information within the record.

RECOMMENDATIONS

[19] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Independent Appointments Commission continue to withhold the record in question pursuant to section 27 of *ATIPPA, 2015* and, whereas the IAC conducted a reasonable search for responsive records,

I recommend it take no further action regarding its search efforts for the requested information.

[20] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Independent Appointments Commission 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.

[21] 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