



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-030

December 14, 2022

Department of Industry, Energy and Technology

Summary:

The Complainant made an access to information request to the Department of Industry, Energy and Technology for records related to a proposed wind turbine farm, and ammonia and hydrogen plant project. The Department provided responsive records, but withheld some information. The Complainant filed a complaint with this Office requesting a review of some of the information withheld by the Department pursuant to sections 29(1)(a) (policy advice or recommendations); 35(1)(d), 35(1)(f), and 35(1)(g) (disclosure harmful to the financial or economic interests of a public body); and 39(1)(a)(ii), 39(1)(b), and 39(1)(c)(i) (disclosure harmful to business interests of a third party). The Complainant also raised concerns with the completeness of the Department's search for records, identifying various records which he believed should exist and should have been provided. For much of the information withheld by the Department, the Department did not provide sufficient evidence to support its application of exceptions to access and the Commissioner recommended release of this information. The Department also did not satisfy this Office that a reasonable search had been conducted. The Commissioner concluded that the Department should conduct a secondary search for records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 29, 31, 35, and 39.

Authorities Relied On:

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

BACKGROUND

- [1] The Complainant made an access to information request to the Department of Industry, Energy and Technology (the “Department” or “IET”) under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). The Complainant requested:

All records regarding the proposed wind turbine farms and ammonia/hydrogen plant being proposed by World Energy GH2 for the west coast of Newfoundland and Labrador.

- [2] IET provided the Complainant with a response and records, withholding some information pursuant to various exceptions to access under *ATIPPA, 2015*. Dissatisfied with the response from the Department, the Complainant filed a complaint with this Office requesting a review of some of the applications of sections 29(1)(a) (policy advice or recommendations); 35(1)(d), 35(1)(f), and 35(1)(g) (disclosure harmful to the financial or economic interests of a public body); and 39(1)(a)(ii), 39(1)(b), and 39(1)(c)(i) (disclosure harmful to business interests of a third party). The Complainant also expressed concern about the completeness of the search for records and noted the absence of certain documents, such as project applications and meeting minutes.
- [3] Informal resolution of this complaint was unsuccessful, and the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [4] The Department’s position is that the search for records conducted by the Department was reasonable and the redactions were appropriate.
- [5] Although the Department believes that there are no additional records related to the request, the Department does acknowledge that “lack of records are a concern”. The Department notes an overall issue regarding record-keeping, including that, “[i]n some cases it was a matter of information correctly assessed as a transitory record with the final version

placed in the appropriate recordkeeping system but in other areas such as meeting minutes there is opportunity for improvement.”

- [6] To address what it perceives as deficiencies in its record-keeping system, the Department states that “[a]dditional communications on the importance of records creation, specifically related to meeting minutes, and filing in the approved recordkeeping system is underway within the department.”

COMPLAINANT’S POSITION

- [7] The Complainant’s position is that, due to the substantial financial, environmental, and personal impacts of the project, full disclosure of the records is required to ensure transparency. The Complainant asserts that there appears to be significant gaps in records and specifically mentions there are “no records of meeting minutes or notes kept by [Department] personnel.” The Complainant also voiced his concern that the only records were from the Department’s email system.

DECISION

- [8] The Complainant sought a review of the decision of the Department to withhold information pursuant to sections 29(1)(a); 35(1)(d), 35(1)(f), and 35(1)(g); and 39(1)(a)(ii), 39(1)(b), and 39(1)(c)(i). In its response to our investigation, the Department provided brief comments on the applicability of these exceptions, such as assertions that the withheld information contains “business proposal information” and that its release would harm a third party or harm relations, or that the information consists of analysis by Department staff. While the Department provided responsive records for our review, it did not elaborate on these assertions in its initial submissions or in response to our follow-up questions in the course of our investigation.
- [9] Pursuant to section 43, the burden of proof is on the public body to prove that an exception to access applies and that an applicant does not have a right to access to information. Aside from some passages which clearly, on their face, meet the exceptions to access applied by

the Department, the Department has not met the burden of proof necessary to continue to withhold the information requested by the Complainant.

[10] As noted above, the Complainant submitted that additional records should have been located and provided. Records which the Complainant believes the Department has failed to provide include an application by the proponents of the wind farm project, and minutes of meetings between the project proponents and representatives of the Department.

[11] Section 13 of *ATIPPA, 2015* (duty to assist) requires a public body to conduct a reasonable search for responsive records. Our initial letter notifying the Department of this complaint sought written submissions from the Department to explain the extent of the search conducted, the locations searched, and which subject-matter experts were consulted during the process. In its response to this Complainant, other than the above-quoted comments about the apparent absence of certain records, the Department did not answer our queries about its search.

[12] Our Office acknowledges that many public bodies are experiencing significant challenges regarding staffing and resourcing, and the Department is no exception. However, fulfilling access to information requests is a legislated part of each public body's responsibilities. Efforts must be made to ensure transparency and accountability is not compromised while dealing with other departmental concerns. To this effect, the Department has advised that it is in the process of formalizing communications and other processes, specifically concerning meeting minutes and transitory records.

[13] Because we were not provided with sufficient information during the course of the investigation to determine whether a reasonable search was conducted by the Department, we are therefore unable to conclude that a reasonable search was conducted. The Department must therefore conduct a new search for records in which it can demonstrably show that it has searched for records such as the proponent's initial proposal, and that it can provide details of a search showing that appropriate staff have searched in places where records responsive to this request might reasonably be located.

[14] Our Office has frequently commented in published reports on what constitutes a reasonable search under *ATIPPA, 2015*. Our guidance document on reasonable search outlines the questions this Office seeks answers to when conducting a review during an investigation. These questions include, but are not limited, to:

- steps that were taken to identify and locate records;
- where (paper files, databases, emails, off-site storage locations) you searched;
- types of searches conducted (i.e. keyword search of email or database, manual search of paper files, etc.);
- when the search took place;
- who conducted searches; and
- why the public body believes no records exist.

[15] Locations of potential records include offices containing written records, including paper files, handwritten notes and “black books” of elected officials and departmental staff; working folders and files; emails (searched by individuals and through multi-mailbox searches); electronic networks; smartphones, for texts and other instant messages; and shared network folders. Unless there is reason to believe no records exist offline and a legitimate explanation can be provided, a search of only emails and online networks cannot be considered reasonable. In this circumstance, where it is known that meetings about the subject took place, but were not minuted and did not have agendas, and no records exist in formal databases about them, it is particularly important to search all locations – including the offices and smartphones of officials that participated in the meetings to identify offline electronic or paper working files or black books. It should also be noted that all officials, whether senior or junior, are subject to these requirements.

[16] In this particular situation, this Office was not adequately advised on the parameters of the search – by whom it was conducted, which locations were (or were not) searched, or how the scope of search was devised.

[17] The Department also raised the notion of transitory records during the investigation. Certain records may be considered transitory under some legislation (such as the *Management of Information Act (MOIA)*). However, under *ATIPPA, 2015*, in the context of an access request, there is nothing to distinguish a transitory record from other responsive

records. If a record exists during a search per an access to information request, it is deemed to be responsive – the transitory nature is not relevant. The record must be released unless it or information within it is subject to one of the exceptions to access in *ATIPPA, 2015*. If a record existed prior to receipt of the access request, but was deemed transitory in nature and was destroyed per a record retention schedule, this must be adequately explained.

[18] This is particularly relevant to handwritten notes, working folders, and other offline records, referenced above. Officials commonly understand that these records are transitory, and they may indeed be transitory per *MOIA*, particularly if final documents such as meeting minutes exist. We suspect that for this reason such records are not often prioritized in searches. To reiterate: there is no such thing as a transitory record under *ATIPPA, 2015*. Even if transitory records, per *MOIA*, may be destroyed per a records retention and destruction schedule, per *ATIPPA, 2015*, any records that exist – transitory or otherwise – that are responsive must be retained for processing and cannot be destroyed. In situations such as these where no formal agenda, notes or minutes of meetings exist, it is all the more important to ensure that the search include these kinds of records.

[19] We should note that the Complainant identified the lack of a project application among the records that he expected to see. While we agree with the Complainant (and indeed the Department) that certain other records such as meeting agendas, minutes and notes should have existed, but don't, in this case there was indeed a project application among the responsive records. The application was withheld in its entirety under subsections 39 and 35 and so the Complainant would not have been aware of its existence. While we do not believe the Department has provided sufficient evidence and analysis to support its burden of proof under section 39, we do believe that the material fits the exception under section 35 and should continue to be withheld in its entirety. We mention this here so as to not leave the impression that the Department did not possess such an application or fail to identify it as responsive.

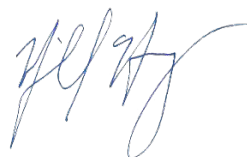
RECOMMENDATIONS

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

1. The disclosure of the information our Office has identified on the schedule attached to the Department of Industry, Energy and Technology's copy of this Report;
2. The Department conduct an additional search for records, as described above, within 10 business days of providing its response to this Report and provide this Office with: a detailed description of the search undertaken; evidence that it has done so; an inventory of the records that have been located; and an estimate of the time required to process such records. Following a discussion with the OIPC about next steps, the Department is to provide an update to the complainant;
3. The Department undertake additional ATIPP training; and
4. As the Department has assessed its current information management policies and procedures to require improvement to better implement the access to information function, per section 47(d), I recommend that the Department continue to, as a priority, develop, disseminate, and train on its records management policies.

[21] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Industry, Energy, and Technology 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.

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



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador