



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-025

May 23, 2023

Executive Council

Summary:

The Complainant made an access to information request to Executive Council seeking information about communications between the Lieutenant Governor, employees of Government House, a member of the public, and a private company. In response, Executive Council asserted that Government House was not a public body pursuant to section 2(x) of *ATIPPA, 2015*. The Commissioner determined that Government House is within the jurisdiction of *ATIPPA, 2015* and recommended that Executive Council perform the search for records as submitted by the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 2(x), 4, 8(1), 11(1), 13(1), and 43(1).

[Management of Information Act](#), SNL 2005, M-1.01 section 4.

Authorities Relied On:

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25.

BACKGROUND

- [1] The Complainant made the following access request to the Executive Council of the Government of Newfoundland and Labrador under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”):

Any and all records between [named individual] and/or [named business] and Lieutenant Governor Judy Foote for the past five years. This should include staff at Government House.

Executive Council’s response to the Complainant was as follows:

For your information, Government House does not meet the definition of a public body as defined by section 2(x) of the Access to Information and Protection of Privacy Act (the Act). Some records of the Lieutenant Governor are the responsibility of the Government of Canada. To file an access to information request, please refer to the following link (link provided)

- [2] The Complainant did not agree with Executive Council’s decision regarding the request and filed a complaint with this Office.
- [3] In this Office’s notification of complaint sent to Executive Council, there was a request for copies of any correspondence between Executive Council and the Complainant. Nothing was provided by Executive Council except the above response to the Complainant stating that Government House was not a public body and therefore not subject to *ATIPPA, 2015*.
- [4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [5] Executive Council’s position is that Government House is not a public body and not subject to *ATIPPA, 2015*. In support of this position, Executive Council asserts:
- a. Government House does not meet the definition of a public body as stated in *ATIPPA, 2015*, particularly section 2(x)(i);

- b. The Lieutenant Governor of the province is a representative of the Crown, appointed by the Governor General of Canada, is not a member of the Executive Council and not a member of the Government of Newfoundland and Labrador;
- c. Government House and the land it is situated on is an asset of the provincial government but the Lieutenant Governor and her staff are not part of the provincial government;
- d. Executive Council provides limited financial support to Government House;
- e. As a result of the above-noted factors, Executive Council does not have custody or control of Government House records, and
- f. The position of the Government of Newfoundland and Labrador towards Government House is similar to how other provinces view their respective government houses.

COMPLAINANT'S POSITION

[6] The Complainant disagrees with Executive Council's interpretation of *ATIPPA, 2015* and its application to Government House. Specifically, the Complainant suggests that Government House, being the residence and office of the Lieutenant Governor, is part of the executive branch of government and is included in *ATIPPA, 2015*.

ISSUES

- [7] There are three issues to address:
1. Did Executive Council meet its duty under section 13(1) of *ATIPPA, 2015* to assist the Complainant?
 2. Does *ATIPPA, 2015* apply to Government House?
 3. Does Executive Council have custody or control over the records requested in the Complainant's search?

DECISION

[8] This decision addresses the following sections of *ATIPPA, 2015*:

- 2.(x) “public body” means
- (i) a department created under the Executive Council Act, or a branch of the executive government of the province,
- ...
4. When the House of Assembly is not in session, the Lieutenant Governor in Council, on the recommendation of the House of Assembly Management Commission, may by order amend Schedule B, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.
- ...
- 8.(1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.
- ...
- 11.(1) A person may access a record or seek a correction of personal information by making a request to the public body that the person believes has custody or control of the record or personal information.
- ...
- 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.
- ...
- 43.(1) On an investigation of a complaint from a decision to refuse access to a record or part of a record, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

The Duty to Assist

[9] The duty to assist an applicant with their access request is of critical importance to the access to information process. Navigating government is difficult. Knowing how to frame a request, where it should be directed, and establishing its scope is a challenge and support guides to assist cannot account for every situation. As such, the access to information process depends on regular communication between the ATIPP Coordinator and the applicant to minimize confusion and ensure that the request can be properly addressed.

[10] The request submitted by the Complainant in this case is somewhat ambiguous and could have been clearer. In this case, the ATIPP Coordinator should have contacted the Complainant and sought clarification. For example, the request refers generically to “employees” of

Government House. The ATIPP Coordinator should have sought clarification about what classification of employee was of interest, or whether the Complainant knew the names of the employees.

[11] As section 11(1) makes clear, there is a broad right for an applicant to make a request pursuant to *ATIPPA, 2015* for records in the custody or control of a public body. A public body cannot disregard a request from a Complainant without the approval of this office. In this case, the Complainant made their request to Executive Council under the belief that Executive Council would have the information that they were seeking. Executive Council did not conduct a search to determine if it had any records responsive to the Complainant's request. Instead, it confined its response to simply stating that Government House is not a public body under *ATIPPA, 2015*. The Complainant sought records from Executive Council and no effort was made to see if these records existed or could be disclosed.

[12] Section 13(1) states that a response to a request should be open, accurate, and complete. This was not done in this case. The response given to the Complainant was one paragraph that did not provide an analysis or explanation of the perspective of Executive Council. It did not inform the Complainant that Executive Council had not conducted a search respecting their request. As section 43(1), reproduced above, makes clear, the burden of proof when documents are denied rests with Executive Council. That burden was not discharged in the response given to the Complainant.

[13] Executive Council did not meet its section 13(1) duty to assist the Complainant.

Government House and *ATIPPA, 2015*

[14] In our view, Government House is clearly covered by *ATIPPA, 2015*. Section 2(x)(i) refers to "a branch of the executive government of this province." In its response to this office regarding the complaint, Executive Council argued that Government House was not part of Executive Council. This interpretation confuses the Executive Council for the executive branch. Executive Council is the department of the executive branch, but it is just part of the executive branch. It is not *the* executive branch.

[15] Following the Westminster model of parliamentary government, the executive level of the federal and provincial governments in Canada consist of the Prime Minister or Premier, Cabinet, and the representative of the Crown, whether that be the Governor General of Canada or the various Lieutenant Governors of the provinces. The Lieutenant Governor is the apex of the executive government of Newfoundland and Labrador. Further, Government House is no different than Confederation Building in that the work performed therein is part of the provincial government. The primary difference is that employees work directly for Government House.

[16] Executive Council asserted that its position that *ATIPPA, 2015* does not apply to Government House is in keeping with how other provinces interpret their own access to information legislation's application to their own equivalents of Government House. When this Office asked for clarity on this statement and examples that it could review, Executive Council provided nothing further on the matter. This response did not meet the section 43 burden of proof responsibility that Executive Council held in this case.

[17] Contrary to the Executive Council position, representatives of the Crown in other jurisdictions are considered to be subject to access to information legislation. For example, the Governor General's office has its own Access to Information and Privacy coordinator to handle requests under the federal *Access to Information Act*.

[18] It is the position of this Office that *ATIPPA, 2015* is a complete code. That means that it applies to a public body, or part thereof, unless expressly stated otherwise. There are limited instances where *ATIPPA, 2015* does not apply to a public body; such as, for example, the Court of Appeal, but these are explicitly mentioned in either *ATIPPA, 2015* or other acts referenced by *ATIPPA, 2015*.

[19] The legislature also retains significant ongoing authority to exclude public bodies from *ATIPPA, 2015*. This authority is given under section 4 of the *Act*, which allows the legislature to add public bodies to Schedule "B" of the *Act* where excluded public bodies are listed. The legislature does not take such action often, but it has as recently as 2021. Government House is not listed as an excluded public body in Schedule "B".

Custody or Control of Information

[20] Executive Council asserts that it does not have custody or control over the records requested by the Complainant. This is for two reasons. First, as addressed above, Executive Council's position that Government House is not a public body. Second, the request is for records that may involve a private company and a private individual and Executive Council would not retain that information. Custody or control is not as cut and dry as Executive Council argues nor could it state that it was not in possession of any records with the company or private individual's name without having conducted a search to determine that was the case.

[21] Government House is a relatively small operation with few staff when compared to Executive Council. In assessing how Executive Council and Government House interact, it appears that Executive Council provides significant administrative and financial support to Government House. Contrary to what Executive Council asserted, the bulk of Government House's funding is provided through Executive Council. In the "Estimates of the Program Expenditure and Revenue of the Consolidated Revenue Fund," which is created by the Department of Finance for the purposes of passing the budget, funding for Government House is listed under Executive Council. In fiscal year 2023-24, it appears that Government House will be fully funded by the Government of Newfoundland and Labrador through the Executive Council budget in the amount of \$657,300. In fiscal year 2022-23, the Executive Council was responsible for more than \$700,000 provided to fund Government House. The federal government contributed just \$20,000. Further, in the "Estimates" document prepared by the Department of Finance, the page that provides a breakdown of Government House's budget contains the following statement:

Appropriations provide for the salary cost of the staff working within the Lieutenant-Governor's Establishment and the operating cost of the official residence.

Employees at Government House are employees of the Government of Newfoundland and Labrador – they are paid out of provincial funds and are subject to collective agreements between the Government of Newfoundland and Labrador and various labour organizations. There is also nothing to suggest, either in the provincial budget information or in federal

information on the costs of the Lieutenant Governor, that the federal government covers the costs of Government House employees.

- [22] The senior permanent public servant at Government House is the Lieutenant Governor's Private Secretary. The current incumbent was appointed by provincial Order in Council OC2021-142 which states, in part:

Under the authority of section 9 of the Executive Council Act and the Prerogative of the Crown, the Lieutenant-Governor in Council is pleased to appoint [incumbent] as Private Secretary to the Lieutenant Governor in the Office of the Executive Council, effective May 26, 2021, at his current salary and pay scale, with normal step progressions and general salary increases applicable to Executive to apply.

- [23] Since Government House employees are provincial employees, then the provincial government would have to retain custody and control over all documents created or received by these employees. This is stated explicitly in section 4 of the province's *Management of Information Act*, which states:

4 (1) All records created by or received by a public body in the conduct of its affairs are the property of the Crown.

(2) Records referred to in subsection (1) shall not be destroyed or removed from the ownership or control of the Crown unless the destruction or removal is authorized under this Act.

- [24] Pursuant to the *Management of Information Act*, the Government of Newfoundland and Labrador does have custody and control of all documents created and received by the employees of Government House. Logically, given the connections between Government House and Executive Council, the ATIPP Coordinator for Executive Council should be able to conduct the appropriate search and retrieve any responsive records. Alternatively, if Executive Council does not have custody or control of these records, it should advise the Complainant of which public body, be it Government House or otherwise, would have custody and control of the information being requested. The Complainant would then be able to issue a new access request to the correct public body.

- [25] With respect to information relating to the private company and private individual, Executive Council still needs to perform a search within its information management system

for those names. Any responsive records would then have to be assessed against the limitations on disclosure set forth in *ATIPPA, 2015*.

[26] There is also more to control or custody for a public body than just actual possession of a document. The Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 set out the full scope of how custody and control should be interpreted for a Public Body. At paragraph 50, the Court stated:

... In the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[27] The first part of this test is difficult to assess since the purpose of the Complainant's search is not known. However, this Office has addressed situations similar to this in the past and, in general, if a document relates to expenditures by a public body, the provision of a service to a public body, or contracts with a public body then the document would relate to a departmental matter.

[28] The second part of the test queries whether the public body could expect to receive a copy of the document upon request. Certain types of documents will most likely be provided to a public body upon request. Any agreement, contract, price quote, record of payment, application for permits, sub-contract, and similar documents that may be in possession of a third party should be provided to a public body upon request, particularly since these documents often address a financial commitment with obligations on both sides.

[29] It is not necessary for this Office to determine at this time whether Government House is its own public body and is separate from other parts of the Executive Council of the Government of Newfoundland and Labrador. Such a finding is not necessary to address the complaint. Government House is either its own public body or part of another government department. What we feel is clear, however, is that Government House is not excluded from *ATIPPA, 2015*. Even though the Lieutenant Governor herself is appointed by the Governor General and her salary provided by the federal government, Government House employees

are provincial government employees and its funding is predominantly provided by the provincial government. Government House may well be a public body, with the Lieutenant Governor's Private Secretary functioning as the head of that public body. Alternatively, it could be considered some component of the executive government of the province in some other way. In any case, there is nothing in *ATIPPA, 2015*'s complete code to exclude it and no reason why it should be excluded. There is no reason that it should exist in a void of accountability between federal and provincial access to information legislation. Its records must be accessible somehow and Executive Council owes a duty to assist the applicant in determining how.

RECOMMENDATIONS

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

1. that Executive Council communicate with the Complainant to clarify any issues surrounding the access request;
2. (a) if Executive Council maintains its position that Government House is not a public body, then within 20 days of its decision regarding this report, it should perform a search for responsive records in its own custody as well as those within its control by arranging for a search to be done of the records of Government House and provide those records to the Complainant subject to any exclusions or exceptions that may apply; or, in the alternative;

(b) If, in light of this report, Executive Council is of the view that Government House is a separate public body, with custody and control of its own records, then it should advise the Complainant that they should file an ATIPP request with Government House, or the name of public body that would have custody or control, so that the Complainant can make a new request at their convenience.

[31] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Executive Council 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 23rd day of May 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador