



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-035

July 18, 2023

Office of the Chief Information Officer

Summary:

The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* to the Office of the Chief Information Officer (OCIO) seeking records related to restrictions placed on .EML files. OCIO conducted a search pursuant to the application, which returned a small number of responsive records. The Complainant expected a specific record that was not produced. As such, the Complainant submitted a complaint to this Office asserting that OCIO did not meet its duty to assist pursuant to section 13(1) of *ATIPPA, 2015*. Upon review of the particulars of the search conducted by OCIO, the Commissioner found that it was reasonable and OCIO had met its duty to assist the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, section 13(1).

Authorities Relied On:

NL OIPC Report [A-2022-30](#).

[F.H. v. McDougall 2008 SCC 53](#).

BACKGROUND

- [1] The Complainant made the following access request to the Office of the Chief Information Officer (“OCIO”):

Records pertaining to setting attachment restrictions with respect to .EML files on servers in the custody and control of the Office of the Chief Information Officer. As it stands, .EML files cannot be sent or received as attachments to email passing through servers in the custody and control of the Office of the Chief Information Officer. EML is a file extension for an email message saved to a file for an email message saved to a file in the Internet Message Format protocol for electronic mail messages.

- [2] The search conducted by OCIO produced a small number of responsive records that were released to the Complainant. There was one short redaction claimed under section 31(1)(l) of *ATIPPA, 2015* that was not an issue between the parties.
- [3] The sole issue raised by the Complainant in their application to this Office is whether OCIO conducted a reasonable search for records pursuant to section 13(1) of *ATIPPA, 2015*. The Complainant proposed that, on a balance of probabilities, OCIO did not conduct a reasonable search.
- [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] OCIO submits that it conducted an organized and thorough search for responsive records based on the request provided by the Complainant. It also notes that it did provide further assistance to the Complainant after the responsive records were released to address specific questions raised by the Complainant.

COMPLAINANT'S POSITION

- [6] The Complainant's position that a reasonable search was not conducted is based largely on their argument that OCIO did not produce any record documenting a change in its treatment of .EML files.

DECISION

- [7] The section of *ATIPPA, 2015* relevant to this matter is 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.

- [8] This Office has established in numerous reports that the standard a public body must meet when conducting a search for records is reasonableness, not perfection. A reasonable search is one that is organized and conducted using appropriate search terms, carried out by individuals who would be in the best position to know if records exist, and supervised by the ATIPP coordinator.

- [9] In Report A-2022-030, this Office also established that an effective approach to proving it has conducted a reasonable search is for the public body to properly document its search efforts so that this information can be provided to the Complainant or this Office if challenged.

- [10] In its response to this Office, OCIO set out in detail the efforts it made to search for responsive records. These efforts included:

- Consulting with subject matter experts in the program area responsible for managing GNL email;
- Contacting individuals likely to have records or knowledge of records;
- Having employees search their own mailboxes for responsive information, with the ATIPP coordinator conducting a search of inactive accounts of employees no longer with OCIO;
- Having OCIO's electronic records management system searched, and

- Using “.EML” as the search term.

Our assessment is that this was a thorough, organized, and well-managed search, which meets the standard of reasonableness required by *ATIPPA, 2015*.

[11] This Office subsequently contacted OCIO to ask if there was any kind of policy related to .EML files. We were informed that OCIO follows industry standards and that when a certain file extension is identified as possibly harmful, it is acted upon immediately. Given the constant flow of information through emails, webpages, etc., it is not practical from a timeliness perspective to develop a policy on every possible threat and have it approved by the OCIO executive. OCIO addressed .EML files in the same way it addresses other potentially harmful files.

[12] With respect to the Complainant’s position that a particular document should have been provided as part of OCIO’s response, *ATIPPA, 2015* is focused on providing a process by which the public can seek access to information in the control or custody of public bodies subject to the *Act*. The *Act*, however, does not provide a guarantee that a public body has created or otherwise holds a specific document that an applicant is seeking, nor is there any guarantee that the document sought even exists.

[13] The success of the access to information process cannot be judged by whether the documents that are disclosed answer every question that an applicant may have. In some cases, the apparent absence of a record or information may itself provide an answer to a question. In reviewing a public body’s conduct under *ATIPPA, 2015* this Office is assessing whether the public body has adhered to its various responsibilities under the *Act*. In this case, OCIO met its responsibility under section 13(1) of the *Act*, while also meeting the *Act*’s deadlines and responding appropriately to the Complainant.

[14] The Complainant asserts that on the balance of probabilities the document specifying the date that .EML files were restricted must exist. According to the Complainant, that is the logical conclusion to draw and that restrictions on .EML files must be noted somewhere in a document within OCIO, which would be uncovered by a new and better search.

[15] The balance of probabilities standard of proof is commonly understood to be the “more likely than not” rule. It is the standard of proof applied in civil litigation and it is the standard applied by this Office when comparing arguments for two competing claims. Regardless, the balance of probabilities is an evidentiary standard and evidence needs to be presented to support one probability over another.

[16] In *F.H. v. McDougall*, the Supreme Court of Canada considered how the balance of probabilities should be applied. Writing for the Court, Justice Rothstein noted at paragraph

[46] If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing, and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[17] Evidence must be considered from both sides when determining a matter on the balance of probabilities. In this instance, as noted above, OCIO conducted a reasonable search that did produce records responsive to the Complainant’s request. As for the Complainant, they have offered no evidence that OCIO is in possession of the document they seek. The only evidence offered by them is that they were once subjected to the restrictions imposed upon .EML email messages. Outside of this experience, the Complainant’s position is based solely on suspicion, which in the face of the explanation provided and search completed by OCIO, does not suffice.

[18] Considering the evidence produced by both sides, this Office does not believe that on the balance of probabilities OCIO is withholding or failed to adequately search for the responsive record sought by the Complainant.

RECOMMENDATIONS

[19] Under the authority of section 47 of *ATIPPA, 2015*, I find the Office of the Chief Information Officer conducted a reasonable search for responsive records and responded to the Complainant appropriately under section 13 of *ATIPPA, 2015*. Therefore, I recommend that the Office of the Chief Information Officer maintain its position regarding these matters.

[20] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Office of the Chief Information Officer 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.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of July 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador