



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-036

August 7, 2023

Department of Tourism, Culture, Arts and Recreation

Summary:

The Complainant sought access to information from the Department of Tourism, Culture, Arts, and Recreation (TCAR) regarding the \$1 million of funding for the *Come From Away* production being held in Gander. The search for responsive records produced some records, all of which were withheld pursuant to section 27 of *ATIPPA, 2015*. However, due to a lack of consultation with the Complainant on the part of TCAR as to the scope of the Complainant's request, it was unclear whether all responsive records were produced. The Commissioner agreed with TCAR that the responsive records should be withheld pursuant to section 27. However, the Commissioner found that TCAR did not meet its duty to assist as it took a narrow interpretation of the request that was not reasonable and that may have contributed to the lack of responsive records produced. As a result, the Commissioner recommended that a new search for responsive records be conducted, prior to which TCAR should consult with the Complainant in order to confirm the scope of the request.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 2(y), 3(1), 13(1), 27(1), and 27(2).

BACKGROUND

- [1] The Complainant submitted the following request to the Department of Tourism, Culture, Arts and Recreation (“TCAR”):

I am requesting any and all records concerning the \$1 million budget announcement for the Come From Away production in Gander this summer. Search should include emails, letters, funding application, cost/benefit analysis, business case review, etc. Timeframe is one year back from today [April 4, 2023].

- [2] The search conducted by TCAR produced 26 pages of documents all of which were withheld pursuant to section 27 of *ATIPPA, 2015*.

- [3] The Complainant requested that this Office review the withheld documents to ensure that section 27 was properly applied and to assess whether TCAR met its duty to assist pursuant to section 13(1) of *ATIPPA, 2015*.

- [4] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

COMPLAINANT’S POSITION

- [5] Having not seen the records being withheld, the Complainant is uncertain as to whether section 27 is being applied correctly by TCAR and therefore seeks the opinion of this Office on TCAR’s decision to withhold them. The Complainant also asserts that, given that the funding for *Come From Away* was part of the provincial budget, that additional documents should exist. The Complainant states that the budgetary process has never been completely subsumed in cabinet confidences and therefore a further search should be conducted for responsive records.

- [6] There are different types of Cabinet documents and the Complainant asserts that one of the documents being withheld may fall within the definition of section 27(1)(d) of *ATIPPA, 2015*. Within those types of cabinet documents, facts and background material are supposed to be disclosed by a public body.

[7] Regarding the duty to assist, the Complainant submitted the following:

It is also not believable that there would be no written material leading up to [the] process of making a cabinet submission. Was there really no letter, email, text message or handwritten note documenting the request that funding be provided? Was there no funding application, stating the details of the production and the intended uses of public funding? Were there no documents justifying this particular use of public funding, outlining the potential direct and indirect benefits of such an investment - the jobs, the supplier contracts, the spinoffs for the accommodations and food services sectors in the region, and so forth? Was there no overview of the similar requests the department received, approved and denied? It is inconceivable that there is no paper trail or electronic trail. The public service does not function like this when preparing to request significant funding from cabinet via Treasury Board. Officials following best practices must do their due diligence, and written records must be produced along the way.

POSITION OF THE PUBLIC BODY

[8] It is the position of TCAR that the documents withheld are cabinet records as defined by sections 27(1)(c) and (e) and must not be released pursuant to section 27(2)(a) of *ATIPPA, 2015*. TCAR further asserts that it met its duty to assist the Complainant by carrying out a reasonable search for responsive records pursuant to section 13(1) of the Act.

[9] TCAR states that the withheld records fall under sections 27(c) and (e) and, as a result, they must be withheld in their entirety pursuant to section 27(2)(a) of *ATIPPA, 2015*. Some of the records withheld were clearly developed for and presented to Cabinet, while others were responses from Executive Council approving that which was requested in the cabinet records.

[10] With respect to the section 13(1) duty to assist, TCAR asserts that a proper search was conducted involving knowledgeable staff in locations where the records in question might reasonably be located. The Department also noted that “any records related to the allocation of funding for the *Come From Away* funding being approved by Cabinet, which is outside the search timeframe specified by the Complainant in their access request” were not deemed responsive.

DECISION

[11] The sections of *ATIPPA, 2015* relevant to this matter are as follows:

2. In this Act:

(y) “record” means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded, or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

3.(1) The purpose of this Act is to facilitate democracy through:

- (a) ensuring that citizens have the information required to participate meaningfully in the democratic process;
- (b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and
- (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

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.

27.(1) In this section “cabinet record” means:

- (c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;
- (d) a discussion paper, policy analysis, proposal, advice, or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;
- (e) an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;

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

- (a) a cabinet record.

The Section 27 Exception

[12] Section 27(2)(a) makes it clear that a cabinet record “shall” not be disclosed, which is a record-level exception and not subject to the line-by-line analysis applied to most records responsive to an ATIPP request. The only variance from this record-level exception is set forth in section 27(1)(d), which removes from the scope of the exception factual or background material

presented in discussion papers, policy analysis, proposals, or briefing materials prepared for Cabinet. Background or factual material in cabinet records described in section 27(1)(a) to (c) and (e) to (i) is, however, not to be disclosed. Clearly, the legislature concluded that background and factual materials in certain cabinet records should be treated differently than in others.

[13] With respect to the records over which TCAR is claiming section 27, there is one document that is labelled a “Memorandum to Executive Council.” This is clearly a cabinet record covered under section 27(1)(c) and it must be withheld in its entirety.

[14] Another record withheld is labeled a briefing note. It is a specific type of briefing note used for the budget process, which is a Cabinet process, and therefore this is also a cabinet record under section 27(1)(c) and must be withheld in its entirety.

[15] The final record being withheld contains minutes of meetings at the Cabinet level. This qualifies as a cabinet record under section 27(1)(e) and must be withheld in its entirety.

[16] After a review of the documents being withheld, it is clear that none of them meet the class of document set forth in section 27(1)(d) of *ATIPPA, 2015* where some factual and background material could be released. This Office agrees with TCAR’s decision not to release these cabinet records to the Complainant.

The Duty to Assist

[17] While I have found that the records located by TCAR were properly withheld as cabinet records, the question remains whether these 26 pages of records are the only records that document the funding decision that is the subject of the Complainant’s access request.

[18] As an initial matter, there appears to be confusion regarding what the Complainant is seeking. TCAR on several occasions has stated that the request for documents was regarding the “\$1 million dollar announcement” of funding for *Come From Away*. From correspondence with TCAR, they noted that “the scope of the request was narrow.” However, the bookends of this narrow scope were not clearly defined by TCAR in its submissions to this Office. From the perspective of this Office, and confirmed by the Complainant, the request goes beyond the actual announcement of the \$1 million allocation; rather, it seeks records going back one year prior to the date of the

request relating to the process by which the idea and justification for providing such funding was developed – the who, want, when, and how this decision was arrived at. The Applicant made this clear by including in the request that the “search should include emails, letters, funding application, cost/benefit analysis, business case review, etc. Timeframe is one year back from today.” The applicant was very clearly looking for all information relating to the development of the policy decision to provide the funding.

[19] TCAR did not meet its duty to assist the Complainant. The failure to do so occurred early in the process and affected subsequent parts of the access request. In one of its submissions to this Office, TCAR said that the request by the Complainant was narrow in scope, limited to the “\$1 million budget announcement.” Given this determination, TCAR asserted that there was no ambiguity as to the request and therefore did not need to consult with the Complainant. Clearly this is not the case. The Complainant’s understanding of the request differs considerably from TCAR’s, since they intended the access request to cover the funding for *Come From Away* from a broad perspective. The Complainant made this intention clear in the second sentence of the access request. This Office does not support TCAR’s interpretation of the search request, which I do not think is reasonable upon a plain reading. The scope of the request is determined by the Complainant and if there is possible confusion, TCAR should have consulted with the Complainant. The Complainant advises that they were not contacted by TCAR to clarify the access request.

[20] With the request interpreted unduly narrowly, TCAR proceeded to conduct its search for responsive records. TCAR decided to focus its search efforts on the work of the Assistant Deputy Minister (ADM) who worked with the Minister in developing the cabinet records previously discussed in this Report. According to TCAR, the cabinet records were developed exclusively as a result of verbal conversations between the Minister and the ADM.

[21] The Complainant’s expectations, as expressed in paragraph 8 above, are reasonable, and at the outset they were similar to what this Office expected to be identified as responsive records; however, upon careful examination of the Department’s submissions and information about the musical production in the public domain, the likely source of confusion emerged. The Complainant was under the assumption that the funding was in the form of a grant to a production company which would produce the musical at the Arts and Culture Centre. Hence they expected, among other things: some form of funding application or at least a written request for funding;

establishment of terms and conditions, including identification of eligible costs and other means for ensuring that public funds were spent in a prudent fashion; and other correspondence between TCAR and the production company, and potentially other stakeholders. These were reasonable expectations. While OIPC has no data on such things, casual observation suggests that performances at the province's Arts and Culture Centres are commonly run by independent production companies. However, as it happens, *Come From Away* in Gander is not being produced by a production company but instead by the Arts and Culture Centre itself. While the musical's original production company has been engaged, it has been for the purpose of licencing the musical for the local production. It does not seem that a grant has been provided to the company. At the time of the request, which was immediately after the budget announcement was made with no detail about the funding included, there was no way for the Complainant to know the form of the funding.

[22] The Arts and Culture Centre is part of TCAR and not a separate entity. Therefore, the additional funding was simply added to its budget and spent directly from its budget to stand up the production. The terms and conditions that apply to government spending would apply to this spending as well, as would mechanisms to ensure accountability and the appropriate expenditure of public funds. Therefore, unlike if the production had been stood up by a third party, there would be no need for formal correspondence. In short, many of the records that the Complainant reasonably expected to be present, would not have been.

[23] Aside from formal correspondence with third parties, the Complainant was clearly interested in the policy decision to allocate \$1 million to *Come From Away* and surprised that additional records did not exist. One potential explanation is that it appears from TCAR's submissions that the policy decision for the Arts and Culture Centre to produce *Come From Away* in Gander in 2023 had been made prior to April 2022. In one submission, TCAR stated that the Budget 2023 allocation "is more accurately referred to as new funding for the continuation of the previously approved project." The Complainant had set the timeframe for the request between April 2022 and April 2023. TCAR made it clear to OIPC during the course of the investigation that it limited its search to that timeframe.

[24] For these reasons, while this Office was initially as surprised as the Complainant about the lack of records, it became apparent upon closer examination that there are plausible reasons for the paucity of certain types of records. This said, it remains difficult to understand how there were

literally no other records identified as being associated with this matter: the development of Cabinet submissions and budget notes involve intradepartmental and interdepartmental consultation, and normally would involve emails between the author of the submissions and their superiors and subordinates. Many of these records, had they been identified, would likely also have been subject to the mandatory section 27 exception, but they would have nevertheless been responsive and should have been identified if they existed.

[25] While the lack of responsive records can be mostly explained, a significant issue remains. This Office is of the view that the applicant's original request was clear: they were interested in the policy decision that led to the allocation of \$1 million to *Come From Away*. Because of the way in which they phrased the request (the announcement of the financial allocation in Budget 2023) and the timeframe that was put on it (April 2022 – 2023) they likely missed the target on capturing the records that were intended. This Office is of the view that the duty to assist created a responsibility on TCAR to contact the Applicant and discuss the fact that the specifics of the request did not match their evident intention, and either broaden the search in a manner that would capture such records, or advise the Applicant to submit a new search. The Department did not contact the Applicant at all and instead took an unduly narrow approach to the search.

[26] Access to information should not need to rely on applicant's ability to guess the existence and characteristics of records. If it is evident, as it was in this matter, what the applicant's intentions and interests are, and the specifics of their request do not match that, then a public body has a responsibility to consult them and, within reason, assist them with the parameters of their search.

RECOMMENDATIONS

[27] Under the authority of section 47 of *ATIPPA, 2015*:

- a. I find that the records currently being withheld by the Department of Tourism, Culture, Arts and Recreation pursuant to section 27 of *ATIPPA, 2015* do meet the definition of cabinet records. As a result, I recommend that the Department continue to withhold them.
- b. I find that the Department of Tourism, Culture, Arts and Recreation did not meet its duty to assist the Complainant pursuant to section 13(1) of *ATIPPA, 2015* and recommend that the Department consult with the Complainant about the scope of their access request and, on the basis of that consultation, either conduct a new search or advise the Complainant

to submit a revised access request. Contact with the Complainant should be made within 10 business days, unless they are not available, and records identified in a broadened or new search should be provided to the Complainant, subject to any exceptions, within a further 20 business days.

[28] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Tourism, Culture, Arts and Recreation 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.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of August 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador