



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-053

December 29, 2023

Department of Finance

Summary:

The Complainant made an access request to the Department of Finance for records relating to the planning for the release of the Office of the Auditor General's report on Memorial University. The Department responded that it had no responsive records other than those that had been provided and published in response to an earlier request. The Complainant filed a complaint, arguing that the Department had not conducted a reasonable search under section 13 (duty to assist the applicant) and that the redactions made to the previously published records were inappropriate. On review the Commissioner found that the Department had conducted a reasonable search for records, and that the exceptions were properly applied. The Commissioner recommended that the Department need not conduct a further search, and that it continue to withhold the information.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, SNL 2015, c. A-1.2, sections 7, and 13.

Auditor General Act, 2021, SNL 2021, c. A 22.1, section 30.

BACKGROUND

- [1] The Department of Finance (“Department”) received an access request from the Complainant under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or “the Act”) for:

All records pertaining to the scheduling of the preparation, tabling and release of the Office of the Auditor General Report on Special Assignment into Executive & Management Compensation, Operating Expenses and Oversight at Memorial University of Newfoundland (OC2022-088), which includes, but is not limited to, records containing the planned tabling and/or release date. On 4 April 2022 the Honourable Siobhan Coady, Deputy Premier and Minister of Finance, announced that the Provincial Government has formally requested a full and comprehensive review of operations and spending at Memorial University by the Office of the Auditor General. Format requested: the format in which a record was made, sent or received or in a format that does not materially change the electronic information that was originally created, sent or received.

- [2] The Department responded that it had no records responsive to the request apart from those records that had been provided to an earlier applicant, in response to a previous access request (FIN/35/2022) and which were publicly available on the “completed access requests” page on the ATIPP Office website.
- [3] The Complainant filed a complaint with this Office, arguing that there must be more responsive records, that the Department had therefore not met its duty to assist under section 13, and that the records disclosed in response to the previous request were improperly redacted. As informal resolution was unsuccessful the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

ISSUES

- [4] The issues to be addressed in this Report are whether the Department met its duty to assist the applicant under section 13 of the *Act* by conducting a reasonable search for records and whether the Department has properly withheld some information under section 7 and Schedule A of the *Act* relating to section 30(2) of the *Auditor General Act*.

DECISION

- [5] On the first issue, the Department has provided a detailed description of the search conducted, including a list of the staff who were asked to provide records, the Departmental record repositories in the Department's records management system that were searched by the Coordinator, and the numerous search terms that were used. It is clear from the description that the Department specifically designed the search to address the wording of the present request, that it was broad enough to capture all relevant records, and that it was reasonably thorough.
- [6] A small number of records were located in that search and it turned out that all of those records had previously been provided to an applicant in response to an earlier request. Those records had subsequently been posted publicly on the searchable website maintained by the ATIPP Office under the heading of "Completed Access Requests."
- [7] The Complainant asserted that there would likely have been other records generated in the period between the two searches. While this, on its face, may appear to be a plausible argument, the fact remains that a properly conducted search did not find any such records in the custody or control of the Department. It is of course possible that such records may have been generated by, and might be in the custody or control of the Auditor General or another public body. However, that is outside the scope of this access request, which was specifically addressed to the Department of Finance.
- [8] The Complainant points out that the disclosed records include an Order in Council, but do not include any record pertaining to the application for and receipt of that Order in Council. However, the Complainant here misunderstands the nature of the Order in Council process. Orders in Council are issued by Cabinet Secretariat, and the Order in question here, on its face, is stated to relate to the Department of Education. The Complainant's access request, however, was made to the Department of Finance.
- [9] The Complainant argues that the Department has not explained why it does not have custody of separate correspondence, addressed to the Lieutenant Governor, requesting

signature of the Order in Council. Again, the Complainant misunderstands the nature of the Order in Council process. The Complainant seems to be under the impression that the Lieutenant Governor is an active participant in these governmental processes. This is not the case. The Lieutenant Governor has only a ceremonial role.

[10] It is true that the Lieutenant Governor, as the representative of the Crown, signs Orders in Council. This is formally required to make them legally effective, but there would be no “separate correspondence” relating to that, from ministers or from the Departments affected. There is simply a routine process, in which Orders are drafted at the Cabinet Secretariat and approved by Cabinet. They are then transported to the Lieutenant Governor’s office for signing (often in batches – there were 298 such Orders in 2022). They are then brought back to Cabinet Secretariat for publishing and filing. If the Complainant seeks further details of that process, Cabinet Secretariat would be the public body to ask.

[11] Our conclusion on the first issue is that the Department conducted a reasonable search for records, and has met its duty to assist the applicant under section 13 of the Act.

[12] On the second issue, we have received and reviewed unredacted copies of those records to which the Department had applied section 7(2) of the Act, which reads:

(2) *Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule A, that provision shall prevail over this Act or a regulation made under it.*

[13] Schedule A lists provisions of other statutes that prevail over ATIPPA, 2015, including Section 30(2) of the Auditor General Act. That subsection provides that ATIPPA, 2015 does not apply to the disclosure of “audit working papers.”

[14] The latter expression is defined in the Auditor General Act as follows:

(e) *“audit working papers” include draft reports and all other documents which record the planning of, execution of and the evidence obtained during an audit;*

[15] The redacted record in question is one page that was completely withheld from the previous, published access request and the present request. On review, our conclusion is that it falls into the category of “audit working papers.” As it is a record-level exception, the entire record must be withheld. The title of the record, in the email to which the record was attached, contains information about the content of the record. Therefore it must also be withheld.

RECOMMENDATIONS

[16] Under the authority of section 47 of *ATIPPA, 2015* I recommend that the Department of Finance continue to withhold the records originally withheld from the Complainant.

[17] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Finance 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.

[18] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 29th day of December 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador