January 12, 2009 **A-2009-001**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2009-001

Executive Council

Summary: The Applicant applied to Executive Council under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to the subject lines for all e-mails to and from seven people in the Premier's Office for a one month period and the subject lines for all emails exchanged between two other individuals for the period 1 January 2005 to 31 December 2005. Executive Council refused the Applicant's request in accordance with sections 8(2) and 10(1)(b) of the *ATIPPA*. The Commissioner found that while section 8(2) did not apply, section 10(1)(b) did apply. The number of the e-mails encompassed by the request was initially estimated to be about 70,000. However, when Executive Council was asked to substantiate this estimate and had the Office of the Chief Information Officer track the volume of e-mails received by the individuals named in the request (or alternatively, the volume of e-mails of the person now occupying the position of a named individual where the named individual no longer worked in Executive Council) the number of e-mails encompassed by the request was over 119,000. At a rate of 500 e-mails per day, it would take about 8 months to process the request. The Commissioner found that this was an unreasonable interference with the operations of Executive Council.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 8(2), 10(1)(b), 50, 60.

Authorities Cited: Newfoundland and Labrador OIPC Report 2006-015; *Crocker v. British Columbia (Information and Privacy Commissioner)* 155 D.L.R. (4th) 220, 10 Admin. L.R. (3d) 308.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 23 April 2008 to the Office of the Premier, Executive Council (the "Department"). The request, received by the Department on 24 April 2008, sought disclosure of records as follows:

> *….I would like to have copies of the subject lines for all emails to and from each of the following individuals in the Premier's Office for the period March 1, 2007 to April 30, 2007:*
> [list of seven names]
> *Additionally, I would like copies of the subject lines for all emails exchanged between* [name] *and Communications director* [name] *for the period January 1, 2005 to December 31, 2005.*

[2] The Department responded by correspondence dated 12 May 2008 and informed the Applicant that his request was being refused in accordance with sections 8(2) and 10(1)(b) of the *ATIPPA.*

[3] The Applicant, in a Request for Review dated 15 May 2008 and received in this Office on 16 May 2008, asked for a review of the Department's decision to deny access to the information requested.

[4] The Department was advised of the Request for Review by this Office and informal resolution efforts began. However, these efforts were unsuccessful and the parties were notified by this Office on 12 August 2008 that the matter had proceeded to the formal investigation stage. Both parties were invited to make submissions to this Office outlining their positions in accordance with section 47 of the *ATIPPA*. The Applicant declined to make a submission and the Department provided a short letter in support of their position.

II PUBLIC BODY'S SUBMISSION

[5] While the Department initially provided a short submission, it later submitted a detailed estimate with respect to the volume of e-mails the request would likely encompass. The Department initially estimated the volume of e-mails to be in the vicinity of 70,000. At a rate of 500 e-mails per day, the Department estimated that it would take 140 days to complete the review and this would interfere unreasonably with the operations of their office. The Department also pointed out, in its submission, that it advised the Applicant that should he wish to narrow the scope of the request, it would then consider and review the request, as narrowing the scope would presumably reduce the amount of records involved.

[6] In response to a request from this Office for the Department to substantiate its estimate, it asked the Office of the Chief Information Officer ("OCIO") to track e-mails sent and received by the individuals named in the request or where the named individuals no longer work in the Department, the individuals who now occupy the positions previously held by the individuals named in the request. This was done over a period of seven days. This exercise showed that in a specific seven day period, these individuals sent or received a total of 6,816 e-mails. Of course, the number of e-mails sent and received in any given week will vary, however, these numbers will serve as a useful guide for the purpose of this Report. The first part of the access request encompasses the e-mails of seven people over a period of 61 days. According to the information gathered by OCIO, this part of the request would encompass 36,867 e-mails. This number does not include the volume of e-mails that would be sent or received by the Premier. Therefore, it is reasonable to assume that the actual figure would be much higher if these e-mails were taken into account.

[7] The second part of the request encompasses all e-mails between two specific individuals over the course of a year. According to the information gathered by OCIO, these individuals sent or received a total of 1,981 e-mails over a seven day period. Extrapolated over a one year period, this gives a total of 83,086 (not including the 61 days worth of e-mails for one individual that is counted in the above number). Granted, this is not the number of e-mails exchanged solely between these two individuals, but this volume of e-mails would have to be searched to find those that were exchanged solely between these two individuals.

[8] This means that approximately 119,953 e-mails are included in the scope of this request. The Department estimates that at the rate of 500 e-mails per day, it would take one person 240 days (about 8 months) to review the records.

III DISCUSSION

[9] As indicated, the Department is relying on sections 8(2) and 10(1)(b) to refuse access to the information requested. Section 8(2) states as follows:

> *8(2) A request shall be in the form set by the minister responsible for this Act and shall provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify the record containing the information.*

[10] The Applicant requested the subject lines of all e-mails to and from several people in the Premier's Office for two separate specified time periods. The request was specific enough so that an "employee familiar with the records of a public body can identify the record…" Identifying the relevant records was merely a matter of searching the e-mails of the specified people for the specified periods. Therefore, it is my opinion that section 8(2) is not applicable.

[11] Section 10(1)(b) states as follows:

> *10. (1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where*
>
> *(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and*
>
> *(b) producing it would not interfere unreasonably with the operations of the public body.*

[12] As noted above, according to the information gathered by OCIO, the initial part of the request would encompass 36,867 e-mails (not including e-mails sent to or by the Premier), while the second part would encompass 83,086 e-mails for a total of 119,953. That number might at

first appear to be extremely high, however, these are senior officials in the Premier's Office, including the Chief of Staff; Director of Communications; Principal Assistant to the Premier; Deputy Chief of Staff, Director of Operations, Press Secretary, Director of Strategic Communications, Planning and Priorities (Executive Council) and the Premier himself. Given the nature of the roles these people play in government, it is not unreasonable to assume they would receive a significant number of e-mails per day.

[13] While it is only necessary to review the subject line and not the e-mail itself (in most cases reference to the body of the e-mail will not be necessary, however, in some circumstances the context of the whole e-mail may have to be considered in order to determine if the information in the subject line contains any information to which exceptions apply), this is still a formidable task. During this period, the person or persons charged with reviewing and redacting the record would not be able to attend to other ATIPP requests or other work they may be tasked with. Other Applicants would therefore be disadvantaged. Access to information is a right guaranteed by section 7 of the *ATIPPA* and this right is guaranteed to everyone equally. It is also important to note that this time estimate does not include the time it would take to search for, locate and retrieve the actual e-mails.

[14] The Department indicated several times during the informal resolution process that it was more than willing to process the request if the Applicant could narrow the scope of information requested. It is also my understanding that the Department communicated this to the Applicant directly prior to the Request for Review reaching this Office.

[15] Meaningful participation in the access to information process by both parties is essential if the process is to work properly. In the present case, the Department did not simply state that they would not provide the information. It offered to process the request if the Applicant could narrow the scope of his request, perhaps by subject matter, or time frame. The Applicant declined to do so. Even breaking the Applicant's request down into several smaller requests would have made it significantly more manageable because smaller requests submitted at delayed or staggered intervals would enable the Department to respond to each request within the legislated timeline. While there is nothing in the *ATIPPA* that requires this staggering of requests, this is my suggestion to the Applicant in the interests of fairness and reasonableness. In fact, had the

Applicant done this when first suggested by the Department, he would likely have begun to receive the information shortly thereafter and might even have it all by the time of this Report. However, the request, as it stands, involves a considerable volume of material, and according to the estimation provided, there is no way the Department could possibly respond to the request within the legislated timelines, even allowing for the allotment of extra staff and the 30 day extension of time permitted by section 16 of the *ATIPPA*.

[16] I would like to emphasize the fact that each request for information must be assessed separately and on its own merits with respect to section 10. One applicant may have 10 access requests for a particular public body or 10 applicants may have one request each. A public body is only permitted to claim section 10 where an individual access request would interfere unreasonably with the daily operations of the public body. To purport to apply section 10 where the aggregate number of access requests interferes unreasonably with the operations of the public body would defeat the purpose of the legislation. If a public body were to find that it was unable to adequately respond to and process the volume of access requests received, then it would be appropriate to allocate additional resources to the processing of access to information requests. Claiming section 10 would not be appropriate in these circumstances, as this section only contemplates the burden each individual access request places on a public body.

[17] In Report 2006-015, my predecessor quoted with approval the following passage from *Crocker v. British Columbia (Information and Privacy Commissioner)* 155 D.L.R. (4th) 220, 10 Admin. L.R. (3d) 308:

> *[46]BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operation. The evidence demonstrated that a significant portion of the company's Information and Privacy resources were being expended responding to the Petitioner's requests and that their demands were also affecting the Customer Service department's ability to perform its other duties and responsibilities. The determination of what constitutes an unreasonable interference in the operations of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. However, it is the Commissioner, with his specialized knowledge, who is best able to make an objective assessment of what is an unreasonable interference. In this instance, the Commissioner had sufficient*

> *evidence to make an informed assessment of the negative impact of the Petitioner's requests on B.C. Transit.*

[18] In Report 2006-015, the Applicant applied to the public body for all records comprised of communications to or from six individuals employed by the public body containing references to the Applicant's name within a specified time period. After some initial searching, it became apparent that this would involve a search of over 15,000 records in order to determine which ones referenced the Applicant. It was determined that of these, over 6,000 were responsive to the Applicant's request. These records would then have to be reviewed and appropriately redacted prior to being released to the Applicant. However, prior to the review there was a process involved in producing a working copy of the records that had to be performed by the public body's IT staff. The public body estimated that in all, responding to this request would consume six weeks of dedicated staff time. My predecessor found that this was "excessive and beyond reasonable for a single request."

[19] While I am hesitant to allow a public body to rely on section 10 to refuse to respond to a request, I must conclude that the time involved in responding to this request is also "excessive and beyond reasonable for a single request." In this case, the Department offered several times to respond to a revised or narrowed access request. During the informal resolution process, the Departmental ATIPP Coordinator asked me to stress to the Applicant that they were willing to respond, but that the request, as worded, encompassed such a large volume of records that to do so was just not feasible.

[20] Further, by making this finding, I am not leaving the Applicant without recourse. He can still amend, narrow or break up his request into a number of smaller requests and then submit these requests at reasonably spaced intervals to the Department for response. This finding is based solely on the current form of the request and the volume of material it encompasses. Further, my finding does not excuse the Department from responding to a revised request or requests from the Applicant for the same information. I have only found that the request encompasses such a large volume of records that responding to it, in its current form, would interfere unreasonably with the operations of the Department.

[21] Finally, while it has no bearing on my findings in this Report, I would like to comment on the length of time it took the Department to respond to this Office's request for information to substantiate the Department's estimate of the volume of e-mail involved in this access request. An Investigator from this Office initially asked for this information by e-mail dated 14 October 2008. Several follow-up communications were made to the Departmental Coordinator, asking when and if the information was forthcoming. The Coordinator could offer no response to these inquiries; she was not aware when the information would be provided to this Office or what the reason was for the delay. The requested information was finally received by this Office on 17 December 2008.

[22] This delay is unacceptable and put this Office in a difficult position. It was impossible to make an informed and fair decision without this information. The Department had provided an estimate that led me to believe that reliance on section 10 may be warranted, however, I was reluctant to make this finding in the absence of concrete evidence concerning the volume of e-mail involved. In future, Executive Council should endeavor to effect more timely and active cooperation with this Office if it wishes to operate within the spirit and intent of the *ATIPPA*.

V CONCLUSION

[23] I have found that the Applicant's request was sufficiently clear to enable an "employee familiar with the records of the public body" to "identify the record containing the information." Therefore, the Department is not entitled to rely on section 8 of the *ATIPPA*.

[24] I have found that in this case, responding to the request would constitute an "unreasonable interference" with the daily operations of the Department. Therefore, I accept the Department's reliance on section 10 in support of its refusal to provide access to the requested records, but I should note, that such decisions are very much case specific. The very nature of an access to information request may be to interfere somewhat with "normal" daily activities in an organization, however, the right of access to information is an important one and should not be lightly curtailed.

[25] I am also mindful that the Department attempted to assist the Applicant to revise or narrow his request, and did not simply refuse to provide access on the basis of section 10. Therefore, I see no reason why, should the Applicant submit a revised request (or requests), that the Department would not be willing to respond appropriately.

[26] Having found that the Department acted appropriately, it is not necessary for me to make a recommendation; however, I would like to state that the Department must make greater efforts to respond to inquiries from this Office in a timely manner.

[27] Under authority of section 50 of the *ATIPPA*, I direct the head of the Department to write to this Office and to the Applicant within 15 days after receiving this Commissioner's Report to indicate the Department's final decision with respect to this Report.

[28] I hereby notify the Applicant that he has a right to appeal the decision of the Department to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60. The Applicant must file this appeal within 30 days after receiving a decision of the head of the Department.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of January, 2009.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador