



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2011-001

January 26, 2011

Department of Environment & Conservation

Summary:

The Applicant applied to the Department of Environment and Conservation (the “Department”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to information relating to a specific application for Crown land and the relevant Crown land. The Department granted access to the records in part, severing portions of the records pursuant to section 30(1) (disclosure of personal information) of the *ATIPPA*. During the informal resolution process the Department provided additional information to the Applicant. The Commissioner determined that the Department provided all responsive records to the Applicant; however, certain information which was severed pursuant to section 30(1) is publicly available at the Registry of Crown Titles (the “Registry”). Therefore, this information should not have been severed and the Applicant should have been informed of the Registry procedure for obtaining access to this publicly available information. Consequently, the Commissioner recommended that the Department release this information to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 2(o), 5(2)(a), 30(1) & 30(2)(d), (k), 43(1) & (3); *Lands Act*, S.N.L. 1991, c. 36, s.37.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2007-016, A-2010-010.

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*” or the “*Act*”) the Applicant submitted an access to information request to the Department of Environment and Conservation (the “Department”) on July 14, 2010, in which he requested the disclosure of records as follows:

Access to Record's/Information concerning Application Number [Application Number] in Brigus Junction, Newfoundland. [named individual's] property in Brigus Junction the road that Canadian National Railway had to give up to [named individual] and attach map to the contract agreement in the Year 1962 and month November and day 6th and his son [named individual] got the Property in 1988 but refuse to accept the Contract Agreement or sign the deal but still [named government employee] gave [named individual] Legal Receipt for Grant over \$2,000.00 which I got Legal opinion on. Do the Road belong to [named individuals] go back to Crown Land since 1962 or what contract was not Legal or belong to [named individuals] attach map.

- [2] The Department responded to this request on July 27, 2010 indicating that access was being granted except for some personal information which was severed pursuant to section 30(1) of the *ATTIPA*.
- [3] In a Request for Review dated and received in this Office on August 11, 2010, the Applicant asked for a review of the decision made by the Department. Specifically, the Applicant wanted: additional information regarding the ownership of certain Crown land; additional information related to the specific Crown land application requested; and a review of the severing done by the Department.
- [4] During the informal resolution process, following discussions with this Office, the Department released additional information to the Applicant. This information was not initially released to the Applicant as it had been previously provided to the Applicant by the Department in another matter. An Investigator from this Office suggested to the Department that it would be reasonable, given that this matter was unrelated to the previous disclosure, that the request itself was not repetitious and that the document was not lengthy, to re-release this information to the Applicant despite section 13 of the *ATIPPA* in order to try and resolve the matter informally.

- [5] It should be noted that a portion of the responsive records appeared, at first glance, to belong to a category of records which are normally considered to be publicly available. During the informal resolution process an Investigator from this Office inquired about the availability of this information because the Department had severed information from these records. In fact, to be certain, the Investigator requested that the Coordinator check the availability of all the responsive records. The Investigator was advised that the records were not publicly available for reasons which will be discussed later in this Report.
- [6] Additionally, following discussions with this Office, the Department agreed to provide a further explanation of the records to the Applicant in the hope that this would clarify why no additional responsive records were found.
- [7] In my opinion, by providing this additional explanation the Department met the obligations imposed on it by the *ATIPPA* in respect of the provision of records.
- [8] Nevertheless, despite this explanation, the Applicant remained dissatisfied and further efforts by an Investigator from this Office to facilitate an informal resolution were fruitless. By letters dated October 8, 2010, the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.
- [9] Neither the Department nor the Applicant filed a formal submission, however, the Applicant did file a lengthy letter with this Office just prior to the commencement of the formal investigation; however, no new arguments were put forward. Consequently, this Office has proceeded on the information provided to it by both parties during the informal resolution process.

II DISCUSSION

[10] The issues to be decided are as follows:

1. Do additional records or information exist which are responsive to the Applicant's access request but which have not yet been provided to the Applicant?
2. Was the severed information properly withheld under section 30(1) of the *ATIPPA*?

1. Do additional records or information exist which are responsive to the Applicant's access request but which have not yet been provided to the Applicant?

[11] The Applicant requested information regarding the ownership of certain Crown land. The Department provided the Applicant with various records which explain the ownership of this land, including a specific Crown land application form and information related thereto, and other records which, while related to the relevant land, was not related to the Crown land application. The Department severed certain information within these records pursuant to section 30(1).

[12] In respect of the Applicant's request for additional information relating to the application by a certain individual for Crown land, the Department has provided an adequate explanation for why this information does not exist.

[13] As I discussed most recently in Report 2010-010, where a public body has conducted a reasonable search by knowledgeable staff and an applicant continues to suggest that records are being withheld, the onus is then placed on the applicant to provide a "reasonable basis" for that position. In this matter, the Applicant has provided no evidence that additional records should exist in response to this portion of his access request. In my opinion, the Department has provided all responsive records.

[14] The Applicant is seeking, in particular, the response to a two-part question contained on the Crown land application form which he requested. According to the form if the answer to the first part of the question is "YES", then the second part of the question must also be answered. On the Crown land application form which the Applicant received, the second part of the question was not answered, despite a "YES" answer being provided to the first question. The Department has

explained that ordinarily the Department would follow-up in order to obtain an answer to the second part of the question. However, in this instance, the Department recognized that this Crown land application would not be approved and, therefore, did not consider it necessary to obtain this information. Consequently, the second part of the question was never answered. This has been explained to the Applicant, however, the Applicant believes that because the Crown land application form states that a "...completed application" must be submitted, the second part of the question must have been answered at some point.

[15] The Applicant's position on this aspect of the matter is somewhat unreasonable. The Department has provided an adequate, and indeed reasonable, explanation for why the second part of the question was not answered. It is clear that the application form is required to be completed in its entirety in order to be processed; however, where this processing does not occur, the requirement for completion is redundant. As a result, it makes sense that no copy of the Crown land application form on which the second part of this question is answered would exist. The Department has, therefore, provided all responsive records in this regard.

2. *Was the severed information properly withheld under section 30(1) of the ATIPPA?*

[16] Section 30(1) of the *ATIPPA* states:

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

[17] Section 2(o) of the *ATIPPA* defines "personal information" as:

[...] *recorded information about an identifiable individual, including*

- (i) the individual's name, address or telephone number,*
- (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
- (iii) the individual's age, sex, sexual orientation, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (v) the individual's fingerprints, blood type or inheritable characteristics,*
- (vi) information about the individual's health care status or history, including a physical or mental disability,*
- (vii) information about the individual's educational, financial, criminal or employment status or history,*

- (viii) the opinions of a person about the individual, and*
- (ix) the individual's personal views or opinions*

[18] The responsive records in this matter are of two categories: 1) records relating to a refused Crown land application and 2) records relating to a granted Crown grant.

[19] The information which has been severed by the Department from both categories of records includes names and contact information and, therefore, constitutes “personal information” within the meaning of section 2(o).

First Category of Records

[20] I must now turn my attention to section 30(2) to determine if there is an exemption to the exception from disclosure contained in section 30(1) (i.e. a provision which provides for the disclosure of this information). The relevant paragraphs of 30(2) state:

(2) Subsection (1) does not apply where

[...]

(d) an Act or regulation of the province or Canada authorizes the disclosure;

[...]

(k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or

[21] Section 37 of the *Lands Act*, S.N.L. 1991, c. 36 states:

37. (1) All applications and duplicates of all grants, leases, licences or easements and copies of surveys shall be kept and recorded in the division and all those records shall be open to the inspection of the public for a prescribed fee during normal business hours.

(2) A person may obtain a copy of a grant, lease, licence, easement or application kept in the division upon the payment of a prescribed fee.

[22] According to the Department’s interpretation of section 37 of the *Lands Act*, the records relating to applications for Crown land grants which are refused or denied are not part of the Registry of

Crown Titles (the “Registry”) because no grant was actually given. However, a copy of the records relating to the relevant refused Crown land application has been provided to the Applicant with information severed pursuant to section 30(1). Given that the Department does not place refused Crown land applications in the Registry, section 30(2)(d) would not apply to the records relating to the refused Crown land application and the severing of personal information from this category of records is appropriate.

[23] Section 30(2)(k) is also inapplicable to the records relating to the refused Crown land application as it requires “a [...]benefit **granted** to a third party by a public body”. No grant relating to the relevant application exists.

[24] No other provisions of section 30(2) appear to have application in this matter and, consequently, the Department has properly severed all information from the portion of the responsive records relating to the refused Crown land application.

Second Category of Records

[25] Section 5(2)(a) of the *ATIPPA* states:

5. [...]

(2) *This Act*

(a) is in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees;

[26] As mentioned above, the Department confirmed during informal resolution attempts that none of the responsive records, inclusive of those relating to the granted Crown grant, were publicly available. During the formal investigation process, an Investigator from this Office also requested that the Department again confirm, in writing, whether any of the severed records were available to the public at the Registry. The Department’s response was as follows:

All the files are in the Registry vault are available for public viewing with the exception of [records relating to the refused Crown land application], mapping and referrals from the Eastern Regional file, [File Number] which would not be available to the public.

[27] This response is vague at best. The Registry is a public registry and, therefore, it is moot to say that all files in the Registry are available to the public. If the Department's response is read as confirming that some of the responsive records are publicly available, it does not go so far as to indicate precisely which records they are. Additionally, if the Department's response is to be read as confirming that some of the responsive records are publicly available it does not address why information in those records is severed. This response is especially confusing given that the File Number referred to in the Department's response is referenced on both categories of responsive records.

[28] Due to the seemingly public nature of the second category of records and the vague response of the Department an Investigator from this Office attended at the Registry to confirm that the records relating to the granted Crown grant were not publicly available. The Investigator learned that these records **were** publicly available and, in fact, obtained an unsevered copy of those records upon payment of the required fees. On a related note, the Investigator was also unable to locate any records from the first category of records (i.e. those relating to the refused Crown land application) in the Registry, confirming that those records are not publicly available in accordance with the Department's interpretation of *Lands Act*.

[29] The Department was asked on **two** occasions whether the severed information was publicly available. These inquiries should have aroused the attention of the Department and alerted it to thoroughly search the Registry. The registry and the search process are simple and locating the records should not have proved difficult for the Department.

[30] As my predecessor stated in Report 2007-016 at paragraph 23:

[...] the requirement to respond in an open, accurate and complete manner would place an onus on any public body to do a thorough search for responsive records.

[31] It is for the Department to interpret and apply its own governing legislation; however, where interpretations are given to legislative provisions, those interpretations should be disseminated throughout the Department to ensure all those employed by the Department are aware of and abide by those interpretations.

[32] In respect of the second category of records I believe the interpretation given by the Department to section 37 of the *Lands Act* was either improperly applied or miscommunicated, resulting in an inadequate search for the responsive records. Had the Department more carefully reviewed its search and better understood what was captured by the Department's interpretation of section 37 of the *Lands Act*, the Department would have recognized that the second category of records were records located in the Registry and, pursuant to section 5(2)(a) there is a procedure for accessing these records outside the *ATIPPA*. The Department could have then simply referred the Applicant to this procedure. This would have simplified this matter and, in fact, resulted in no review by this Office in regards to this aspect of this matter.

[33] Given the lack of a formal submission from the Department I am left to speculate as to why the Department did not realize that the second category of records was publicly available. All responsive records relate to one File Number, for reasons unknown to this Office, and it may be that this is where the confusion arose. By simply using this File Number to do the search, may have resulted in all responsive records being considered as part of the first category of records (i.e. those relating to the refused Crown land application). As part of the duty to assist under section 9 of the Act, the Department should have ensured that parameters used in searching for the records were broad enough to ensure that all records in all locations were searched for.

[34] Whether intentional or not, the Department failed to properly search for the records and failed to meet its duty to assist under section 9 of the *Act*. The Department also failed to recognize that the second category of records fell under section 5(2)(a) of the *ATIPPA* and, thereby, did not inform the Applicant of the Registry procedure for obtaining access to this publicly available information.

[35] The Applicant in this matter is a frequent user of access to information and is already suspicious, rightly or wrongly, of the activities and behavior of some public bodies, including the Department. Failing to direct the Applicant to the publicly available information in the Registry, and failing to check when questioned by this Office will likely result in a heightened sensitivity in this Applicant. This may also result in an increased unwillingness on the part of the Applicant to accept other explanations offered by public bodies as well as attempts at informal resolution in the future.

III CONCLUSION

[36] I have found that there are no additional records which are responsive to the Applicant's request which have not already been provided to the Applicant.

[37] I have, however, found that some of the information in the records which was withheld from the Applicant under s. 30(1) is publicly available and should be released to the Applicant.

[38] Typically I would expect that if a public body were to receive an access request for a record that is normally found in the Registry, the applicant would simply be referred to the Registry, as the procedure to access records from the Registry would fall under s. 5(2)(a) of the *ATIPPA* as an existing procedure to access records normally available to the public. In this case, given the time that has elapsed and my findings in relation to this Review, I believe the most straightforward approach would be for the Department to simply release to the Applicant an unsevered copy of the record which was previously supplied to the Applicant in severed form. For clarity, the information to be released is highlighted in yellow on a copy of the records provided to the Department with this Report.

IV RECOMMENDATIONS

[39] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department release to the Applicant the information highlighted in yellow on a copy of the record that is enclosed with this Report.

[40] Under the 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 Report to indicate the final decision of the Department with respect to this Report.

[41] Please note that within 30 days of receiving the decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of January, 2011.

E. P. Ring
Information and Privacy Commissioner

