



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-005

April 13, 2016

Premier's Office

Summary:

The Complainant requested from the Premier's Office a report regarding fisheries enforcement. The Premier's Office responded to the Complainant and indicated that there were no records responsive to the request. The Commissioner recommended that the Premier's Office obtain a copy of the Report from the author, review it in accordance with the *ATIPPA, 2015*, apply any applicable exceptions and grant the Complainant access to the remainder of the Report. The Commissioner also recommended that the Premier's Office take immediate steps to implement a duty to document for all government departments, agencies, and employees.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, ss.5, 13(1)

Authorities Relied On:

Hansard (June 17, 2010. House of Assembly Proceedings. Vol. XLVI No. 40),

<http://www.assembly.nl.ca/business/hansard/ga46session3/10-06-17.htm#2010>;

Hansard (May 17, 2011. House of Assembly Proceedings. Vol XLVI No. 26),

<http://www.assembly.nl.ca/business/hansard/ga46session4/11-05-17.htm#1290>;

Access to Information: Policy and Procedures Manual, November 2015. Government of Newfoundland and Labrador, ATIPP Office, Office of Public Engagement,

http://www.atipp.gov.nl.ca/info/pdf/Access_to_Information_Manual.pdf;

Newfoundland and Labrador OIPC Reports A-2014-012;

Report of the 2014 Statutory Committee; Access to Information and Protection of Privacy Act, Newfoundland and Labrador, Volume II: Full Report,

http://www.opec.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol2.pdf

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Complainant submitted an access to information request to the Premier’s Office for a copy of a report regarding Inland Fisheries Enforcement prepared by retired judge, William W. Marshall entitled “Building on Successes by Unravelling Mistakes of the Past” (the “Report”).
- [2] It should be noted that the Report is related to another record, a preliminary report on the same topic and by the same author, which this Office previously reviewed in Report A-2009-003, recommending that a significant portion of it be released.
- [3] The Premier’s Office advised the Complainant that it had no records responsive to the access request.
- [4] Attempts to resolve this Complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*. The Complainant presented evidence during the informal resolution stage which will be relied upon in this Report. The Premier’s Office was invited to provide an additional submission as this Office raised various concerns that it felt the Premier’s Office may wish to address.

II PUBLIC BODY’S SUBMISSION

- [5] The Premier’s Office has indicated that its policy dictates that Executive Council-Cabinet Secretariat maintain all records, both electronic and paper, except transitory records. On this basis, any records provided to Cabinet Secretariat would form part of Cabinet Secretariat’s records; however, Cabinet Secretariat has no record of the Report being received or considered. The Premier’s Office advised that a similar policy exists at the Department of Justice and Public Safety, which it directed to conduct a search for the Report, but no responsive records were located at that Department, nor is there any record of the Report being received. The Premier’s Office also advised that it contacted the Department of Natural Resources to facilitate a search of its records. The Department advised that it had previously been requested to do a search for the

Report and it advised that it would not have any responsive records as the Inland Fisheries Enforcement Program had been transferred to the Department of Justice in 2006.

[6] The Premier's Office pointed out that former Premier's Offices would be responsible for managing their own records.

[7] The Premier's Office confirmed that it contacted the author of the Report and the author advised that a copy of the Report was hand delivered to former Premier Williams' secretary on August 30, 2010. No electronic copies were provided.

[8] The Premier's Office also stated that the author was not under contract for the preparation of the Report, but rather he created the Report at no charge.

[9] The Premier's Office advised that based on the information provided by the author further searches were conducted; however no responsive records were located. During the informal process, the Premier's Office provided details of the searches which it conducted, along with the searches which it coordinated with other public bodies.

[10] Evidence presented in Hansard transcripts, which were provided by the Complainant and will be discussed further below, confirms that the Report was received by the Government at the time. The Premier's Office does not dispute this evidence; however, it has pointed out that the searches which have been conducted did not result in the identification of the Report.

[11] The Premier's Office did not provide the Complainant with a copy of the preliminary report as it was confident that this was not the record the Complainant was seeking, nor did it contact the Complainant to determine if the Complainant desired a copy of the preliminary report in the absence of the Report. However, it has agreed to do so should the Complainant wish to receive it.

[12] The Premier's Office also advised that it was aware that the author of the Report intended to release a copy of the Report if it was not provided to the Complainant by the Premier's Office. The Premier's Office advised that section 2(b.1) of the *Management of Information Act* defines a "government record" as a "record created by or received by a public body in the conduct of its

affairs and includes a cabinet record, transitory record and an abandoned record.” On this basis the Premier’s Office indicated that any copy of the Report released by the author would not be considered a “government record” as the Premier’s Office is unable to verify receipt of the Report.

III COMPLAINANT’S SUBMISSION

[13] The Complainant provided two transcripts from House of Assembly proceedings (i.e. Hansard transcripts). The first transcript is dated June 17, 2010 and involves a debate between Kelvin Parsons, then Opposition House Leader, and Felix Collins, then Minister of Justice and the Attorney General, about a preliminary version of the Report. The transcript clearly indicates that this version of the Report was received by Government and a severed copy was provided to the Opposition.

[14] The second transcript, dated May 17, 2011, again involves a debate between Kelvin Parsons and Felix Collins. During this debate the transcript clearly indicates that the Report responsive to this request was received by Government in the fall of 2010.

IV DECISION

Reasonable and Adequate Search

[15] Section 5 of the *ATIPPA, 2015* states that the Act is applicable to all records in the custody or under the control of a public body.

[16] The issue of custody and control has been considered by this Office on many occasions. A lengthy discussion is contained in Report A-2014-012.

[17] As discussed in that decision, many factors must be considered when determining if a public body has custody of or control over a record. In this instance I believe the following factors indicate that the Premier’s Office has control over the Report. The Report was commissioned by government; government has a right to obtain a copy of the Report if it is not in its immediate

possession – the author of the Report has indicated that he previously provided the Report to government and would provide further copies if requested; the recommendations contained in the Report relate to a departmental issue; and even if the Report is currently only in the possession of the author, government has authority to act upon the recommendations contained in the Report.

[18] Based on the foregoing it is my opinion that the Report, as held by the author, is under the control of the Premier’s Office to the extent that the Premier’s Office should be able to obtain a copy.

[19] Furthermore, section 13(1) of the *ATIPPA, 2015* states:

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. [...]

[20] The *Access to Information: Policy and Procedures Manual November 2015* from the Access to Information and Protection of Privacy Office of the Office of Public Engagement provides a detailed overview of the duty to assist, specifically in respect of adequacy of search. Its states:

3.2.3 Adequate Search

The head of a public body must conduct an adequate search for records that are responsive to a request from an applicant. An adequate search is one which is undertaken by “[...] knowledgeable staff in locations where the records in question might reasonably be located.”

Specifically, the public body must satisfy itself that a reasonable search has taken place and be able to demonstrate that it has done such a search. This may include searching off-site locations where responsive records may reside.

An adequate search would include contacting any individuals who are likely to have responsive records or knowledge of responsive records. *ATIPP Coordinators should document their search efforts to demonstrate the searches conducted in the event of a review by the Information and Privacy Commissioner. [...]*

[21] I accept that the internal searches conducted or facilitated by the Premier’s Office were reasonable. However, in responding openly, accurately and completely, as part of its duty to assist the Premier’s Office should have contacted any individual who it was aware would likely have responsive records. The Premier’s Office only did so after being encouraged by this Office. However, the Premier’s Office is unwilling to obtain a copy of the Report from the author to

facilitate a transfer to the Complainant. It is the position of the Premier's Office that it is unable to verify that the report was received and therefore cannot confirm that the Report is a "government record."

[22] The receipt of the Report is clearly acknowledged in the Hansard transcripts and the Premier's Office accepts the content of those transcripts. The author of the Report is a well-respected, well-known, former lawyer, judge, elected member of the House of Assembly and Cabinet Minister. I see no reasonable rationale not to accept that a copy of the Report was delivered to the Premier's Office as described by the author and, therefore, no rationale for not obtaining a replacement copy from the author.

[23] By declining to obtain a copy of the record from the author, I believe the Premier's Office failed to discharge its duty to assist the Complainant.

Retention/Destruction of Records and the Duty to Document

[24] The Premier's Office has indicated that while it has a policy regarding the retention of records and documentation of the receipt of records, it cannot comment on the information management policies of previous administrations nor any decisions made by those administrations.

[25] While I appreciate that the Premier's Office may have its hands tied by any actions taken by previous administrations in relation to the Report, I am disappointed in the lack of continuity in policies and the lack of information from previous administrations in this regard. It is difficult, if not impossible, for there to be any continuity between administrations if the incoming government is unable to locate any documentation indicating how records were managed previously. I respect that some records may not be transferred between administrations; however, there should be some clear indication of what has become of those records and on what basis those decisions were made.

[26] My comments above go to the heart of the duty to document which was discussed by the 2014 Statutory Review Committee on the *Access to Information and Protection of Privacy Act*.

[27] On page 310 of the Report of the Committee, the Committee quotes from an OCIO directive which states:

[...]Government records may not be destroyed without the authorization of the Government Records Committee, as outlined in the Management of Information Act.

And then the Committee goes on to state:

The OCIO's policy framework outlines the responsibility "employees and contractors" have in maintaining an effective information management system. It states employees are responsible for managing and protecting records that they have created or collected; it outlines the necessity of employing physical and technical means to protect records from unauthorized access; and it states that employees who willfully breach confidentiality of personal information are open to consequences "up to and including dismissal."

[28] On page 315, the Committee sets out the need for a duty to document and makes recommendations to ensure that this duty is imposed. It states:

As of January 2015, the ATIPPA has been in place for a decade. Most of the public focus has been on the provisions of the Act that provides or restricts access, and on the practices around its administration. However, it must be realized that the ultimate success of the ATIPP system rests on its ability to manage and protect information. Senior officials must ensure that appropriate resources are allocated to do the job completely, and that all public bodies understand the essential role that information management plays in ATIPP.

Recommendations

The Committee recommends that

79. The Government take the necessary steps to impose a duty to document, and that the proper legislation to express that duty would be the Management of Information Act, not the ATIPPA.

80. Implementation and operation of this new section of the Management of Information Act be subject to such monitoring or audit and report to the House of Assembly by the OIPC as the Commissioner considers appropriate.

81. Adequate resources be provided to public bodies served by the Office of the Chief Information Officer, so that there is consistency in the performance of information management systems.

[29] I believe the current situation is illustrative of the importance and significance of the duty to document and the need for the current government to make strides toward much needed policy development and legislative amendments as soon as feasible.

V RECOMMENDATIONS

[30] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that:

- a. the Premier's Office obtain a copy of the Report from the author. Once the Premier's Office has obtained the record it must review it in accordance with the *ATIPPA, 2015* and determine if any exceptions apply. Once this review has been completed, and subject to any exceptions that may apply, I recommend that the Premier's Office grant access to the Record to the Complainant; and
- b. the Premier's Office implement a duty to document as recommended by the *ATIPPA* Review Committee.

[31] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Premier's Office must give written notice of his or her decision with respect to this recommendation to the Commissioner within 10 business days of receiving this Report.

[32] Please note that within 10 business days of receiving the decision of Premier's Office under section 49, the Complainant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 13th day of April 2016.

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