



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-022

August 27, 2019

Department of Health and Community Services

Summary:

The Department of Health and Community Services (the “Department”) received two access requests for information relating to Tamper Resistant Prescription Pads. The Department provided records with minimal redactions based on section 30 (Legal Advice) of the *Access to Information and Protection of Privacy Act, 2015*. The Complainant was not satisfied with the Department’s response as he believed that not all information had been provided. The Director of Research and Quality Assurance determined that the Department had conducted a reasonable search and had fulfilled its duty to assist the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 13.

Authorities Relied On:

Newfoundland and Labrador OIPC Report [A-2019-014](#) and Report [A-2019-018](#).

Other Resources:

OIPC NL [Practice Bulletin Reasonable Search](#), March 2017.

I BACKGROUND

- [1] The Department of Health and Community Services (the “Department”) received two access requests on the same day from the same individual pursuant to the Access to Information and Protection of Privacy Act, 2015 (the “ATIPPA, 2015”). The Department dealt with them as one request. The requests sought the following records:

Request 1

All information pertaining to my request for Tamper Resistant Prescription Pads (TRPPs). Please supply all records and correspondence that is available in electronic and handwritten form. This should include, but not be limited to, all internal notes, emails, and records of telephone conversations and meetings.

Request 2

Firstly, all policies and meeting minutes pertaining to the Tamper Resistant Prescription Pad (TRPP) program. In particular, I am looking for information that relates to the policy for handling requests for TRPPs from out-of-province physicians, including the definition of an “out-of-province” physician, and appeals or complaints procedures in the event that a physician is refused TRPPs.

Secondly, the number of out-of-province physicians that have applied for TRPPs in the last 3 years. With this data, please provide a breakdown according to: the province that the physicians normally practice in (given that they are out-of-province), drugs prescribed by these physicians (specific drug names and/or categories), provinces in which the physician’s practice licence is held (specifically, do they hold a licence to practice in Newfoundland and Labrador), indication as to how many physicians were denied TRPPs (include reasons from their rejection), and ethnicity of the physicians (including breakdown of those who applied for TRPPs and those who were declined them).

The number of out-of-province physicians that currently are issued with TRPPs. With this data, please provide a breakdown according to: the province that the physicians normally practice in (given that they are out-of-province), drugs prescribed by these physicians (specific drug names and/or categories), provinces in which the physician’s practice licence is held (specifically, do they hold a licence to practice in Newfoundland and Labrador), and ethnicity of the physicians.

- [2] The Department provided partial disclosure of records to the Applicant and withheld minimal information based on section 30 (Legal Advice) of the ATIPPA, 2015. The Applicant was not satisfied with the Department’s response and filed a complaint with this Office. In his

complaint, the Applicant stated that the Department had not provided a substantial proportion of the information he had requested. He did not complain about the Department's reliance on section 30 to redact a small portion of information from the responsive records. The Department, however, provided to this Office a copy of the information redacted under section 30 for review. Upon review, it was clear that this information was withheld appropriately, and because it was not addressed by the Complainant in his complaint, it will not be discussed further below.

[3] As an informal resolution could not be reached, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

[4] The Information and Privacy Commissioner, Michael Harvey, delegated authority for this matter to me, as Director of Research and Quality Assurance, pursuant to section 103 of the *ATIPPA, 2015*. The decision to delegate this matter was made because the Commissioner was recently the former Assistant Deputy Minister in the Department of Health and Community Services. The Commissioner asserts that there is no actual conflict of interest but chose to delegate this matter in order to avoid any potential for a perceived conflict of interest.

II PUBLIC BODY'S POSITION

[5] The Department's position is that it conducted a complete and thorough search of all responsive records and provided the Complainant with as much information as it could.

[6] The Complainant outlined in his complaint areas where he felt the provision of information was lacking. He questioned the Department's failure to produce a letter he had sent to a named individual in the Department dated March 8, 2018, as well as a lack of correspondence prior to February 1, 2018, and his own application for TRPPs. The Department located these items during our investigation and disclosed further records, including the ones itemized above, to the Complainant.

- [7] The Department explained that it initially thought the letter dated March 8, 2018 had been destroyed as it could not be located. As well, the Department had not interpreted the access request to include a copy of the Complainant's own application for TRPPs.
- [8] The Department explained that all responsive records in relation to the policy for the TRPP program have now been provided. The Department noted that in the package of records provided to the Complainant that the records reference the fact that there is a limited amount of written policy on the program and that the provision of TRPPs is at the discretion of the Minister.
- [9] The Department also advised that there were no responsive records for the statistical information the Complainant had requested. The Department indicated that the ATIPP Coordinator had contacted the Complainant to advise that there were no responsive records for this portion of his access request, and suggested that he contact the College of Physicians and Surgeons as it may have such information. The Department's final response letter to the Complainant directed him to the Pharmaceutical Services Division of the Department regarding questions on the Department's policy and information about out-of-province physicians.
- [10] Through our investigation, the Department has since advised that it is willing to answer the Complainant's statistical questions, however, the Department does not possess records "as the applicant originally requested." The Department explained that in order to provide a response it would have to extract data/information from a variety of sources, including the original applications, which would require the creation of a new record. The Department advised that its interpretation of the *ATIPPA, 2015* is to facilitate the provision of existing records, not the creation of new ones. The Department stated that the ATIPP Coordinator had explained to the Complainant that the statistical portions of his request could not be provided through the *ATIPPA, 2015* and that is why he was directed to the Pharmaceutical Services Division.
- [11] The Department advised that the Director of the Pharmaceutical Services Division would provide answers to the Complainant's questions but the Complainant would have to contact

the Division directly. The Department further advised that it does not have information pertaining to certain aspects of his request such as ethnicity.

III COMPLAINANT'S POSITION

[12] The Complainant's position is that the Department did not conduct a reasonable search for records and has not fully responded to his access request.

[13] The Complainant believes that the statistical information he has requested is already in the custody or control of the Department and can be captured from a search, and that there should be at least partial responsive records regarding that aspect of his request.

[14] The Complainant also stated that he believes that because the Department's ATIPP coordinator contacted him early in the access to information process to advise that the statistical information could not be provided, that there was a predetermined decision on this part of the access request and he therefore has concerns regarding the search.

[15] The Complainant has provided some background information regarding previous requests to the Pharmaceutical Services Division (not through the ATIPP process) regarding TRPPs. The Complainant asserts that the Pharmaceutical Services Division has been unwilling to answer his questions and that he is being ignored.

[16] The Complainant also pointed out that the Pharmaceutical Services Division had directed him to make an access request and now that he has made an access request, the Department is redirecting him to the Pharmaceuticals Services Division. The Complainant believes he is being sent in circles.

[17] The Complainant accepts that some of the policy information he requested was not provided because the information does not exist. He advised that he received some information on policies regarding the granting of the TRPPs but no information regarding his request for a definition of an out-of-province physician. This is acceptable to the Complainant as it is conceivable that there is no record of the definition of an out-of-province physician.

[18] The Complainant has expressed frustration with the response provided by the Department and says that it did not address all parts of his access request, and that further records should exist. The Complainant believes that the Department has not conducted a reasonable search for records.

IV DECISION

[19] Section 13 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.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

[20] This Office has considered the issue of a public body's duty to assist in many previous reports, including most recently in Report A-2019-014 and Report A-2019-018. Our Practice Bulletin on Reasonable Search outlines that a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located.

[21] As our practice bulletin states, the *ATIPPA, 2015* does not require a public body to prove with absolute certainty that records do not exist. The standard for assessing a public body's efforts is reasonableness, not perfection

[22] During our investigation the Department provided this Office with an explanation of the search conducted, by whom, and in which locations. We have reviewed this submission and found it to have generally met the test set out in this Office's Practice Bulletin, as noted above.

[23] The Department has provided some further records though our investigation, and the Complainant has accepted that some of the information requested may not be available. However, the outstanding issue is the provision of the statistical information requested. The Complainant believes that the Department has this information in a record and it should be provided. The Department has explained that while the information exists, it is not available in a record as requested by the Complainant and that is why the Department advised our

Office through the investigation process that there were no responsive records for this part of the access request.

[24] The statistical information the Complainant has requested involves the number of out-of-province physicians that have applied for TRPPs, the number of out-of-province physicians that currently are issued TRPPs, the province where the physician's practice licence is held, the ethnicity of the physician etc. Some of this information is contained within the applications for TRPPs. The Department advised that the specific information the Complainant wants would need to be extracted from a variety of sources or applications which would require the Department to create a new record.

[25] Section 20(5) of the *ATIPPA, 2015* speaks to the creation of a record:

20. (5) Where a record exists, but not in the form requested by the applicant, the head of the public body may, in consultation with the applicant, create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

[26] The *ATIPPA, 2015* applies to all records in the custody of or under the control of a public body. However, as section 20(5) states, there is no requirement that a public body create a record in the form requested. The statistical information the Complainant has requested does not currently exist in a record format that can easily be provided.

[27] The Department has advised that it and its Pharmaceutical Services Division remain willing to work with the Complainant to address his questions.

[28] The Complainant had previously contacted the Pharmaceutical Services Division to request records and ask questions and he was directed by the Division to make an access to information request to the Department. The final response letter from the Department to the Complainant in this access request directed him back to the Pharmaceutical Services Division.

[29] The Pharmaceutical Services Division is a branch of the Department, so it is therefore not surprising that the Complainant is frustrated by this response. On the other hand, the Department's access Coordinator cannot be held accountable for communications which may

have occurred between the Pharmaceutical Services Division and the Complainant prior to the access request being filed. He can only address matters going forward from the receipt of a request. In light of this particular request, and as a result of discussions between the Coordinator and officials of the Pharmaceutical Services Division, the Coordinator was advised that the Division would be able to provide further information to the Applicant regarding his request for statistical information. The Coordinator was fulfilling his duty to assist by passing this information on to the Complainant. Whether the Division should have provided this information during its previous interaction with the Complainant, prior to the Complainant filing his access request, is a matter which was not within the scope of this investigation.

[30] As noted earlier, the Department failed to find one particular record, and it also misinterpreted the Complainant's request to some degree, such that the Complainant received additional documents as a result of this investigation. Despite those mistakes, I reiterate that the necessary standard is one of reasonableness, and I have concluded based on guidelines published by this Office, that the Department conducted a reasonable search. In future it is suggested that the Department communicate with applicants before they become complainants and clarify the scope of the request before assuming that certain records are not responsive. Finally, there is no requirement to create a record of the statistical information that remains at issue for the Complainant. The Complainant now has the option of taking up the Department's offer to work with officials of the Pharmaceutical Services Division, given that the Department has provided assurances that he can obtain additional information through such a process. It is also open to the Complainant, should he wish to do so, to file a new request for the actual TRPP applications by province, and depending on any redactions applied by the Department, he may be able to use the information obtained to develop the statistical analysis he seeks.

V RECOMMENDATIONS

[31] Under the authority of section 47 of the *ATIPPA, 2015*, I find that the Department has conducted a reasonable search for records and that there is no requirement for the

Department to create a new record in this case. Therefore, I recommend that the Department maintain its position regarding this matter.

[32] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this Report to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of August 2019.



Sean Murray
Director of Research and Quality Assurance
Newfoundland and Labrador