



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-021

May 3, 2024

Department of Industry, Energy, and Technology

Summary:

The Complainant made an access to information request to the Department of Industry, Energy, and Technology seeking access to records listed as appendices in an Environmental Indemnity Agreement from 2002. The Department conducted a search but could not locate the records. The Complainant asserted the documents existed and that the Department did not meet its duty to assist, pursuant to section 13(1) of the **Access to Information and Protection of Privacy Act, 2015**. This Office found that the Department did meet its duty to assist the Complainant. While the Complainant did meet the standard needed to assert that the documents likely existed, the Department's search was appropriate and thorough and its determination that the documents could not be found and may not exist was reasonable.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, section 13(1).

Authorities Relied On:

NL OIPC Reports [A-2016-009](#); [A-2022-030](#); and [A-2023-026](#)

Other Resources:

[OIPC Practice Bulletin: Reasonable Search](#)

BACKGROUND

- [1] The Complainant made the following access to information request under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015) to the Department of Industry, Energy, and Technology:

...

Please send me: (i) a copy of the aforementioned "Work Plan" [Appendix "A"]; and (ii) a copy of the aforementioned report of the Baseline Environmental Investigation of the Shipyard (i.e. the "Baseline Investigation Report") [Appendix "B"]

- [2] The Department conducted a search for the requested records but could not locate them. The Complainant asserts that these records exist as they are mentioned in another document, an Environmental Indemnity Agreement from 2002, that the Complainant received from a previous access request. The Complainant states that there has not been a reasonable search for the requested records and therefore the Department did not meet its duty to assist the Complainant pursuant to section 13(1) of ATIPPA, 2015.
- [3] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015.

PUBLIC BODY'S POSITION

- [4] It is the position of the Department that it conducted a reasonable search for the requested records and fulfilled its duty to assist the Complainant. The Department notes that it performed a comprehensive search and that it cannot determine whether the requested records had ever even been created.

COMPLAINANT'S POSITION

- [5] The Complainant states that it is "nonsensical" that the Department cannot locate a copy of these records. The Complainant's assertion is based on the mention of the documents in

an Environmental Indemnity Agreement from 2002 and from a letter from a consultant working on the matter in 2002 that suggests that the two documents would be created.

DECISION

[6] At issue in this complaint is section 13 of ATIPPA, 2015, which 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.

[7] A key component of the duty to assist is that a public body conduct a reasonable search in response to a complainant's access request. The standard for a reasonable search is set forth in Report [A-2016-009](#), which states at paragraph 8:

While the ATIPPA, 2015 does not speak directly to the issue of reasonable search, it has been determined that a reasonable search does not require the public body to prove with absolute certainty that further records do not exist. The public body must simply provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records. A reasonable search is one which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.

[8] From this Office's review of the Department's search for the requested records, it appears that the Department did make a reasonable effort. The Complainant is seeking two specific documents, which helps focus the search. The Department's ATIPP coordinator, working with the staff of the Department's Information Management Division and its Business Analysis Section, managed the search. A search of the Department's digital file management system was conducted using the terms "Marystown Shipyard," "Work Plan," and "Baseline Environmental Investigation Report." A search was also conducted of shared drives within the Department. Both searches failed to return the requested records.

[9] As the Environmental Indemnity Agreement, which references both records, was created in 2002, the Department determined that it was possible that only hard copies of the requested documents exist. Therefore, the Director of Information Management for the Department conducted a search for physical documents at two locations where older

government documents are filed and organized. The search at both of these locations also failed to produce the two documents sought by the Complainant. After conducting these searches, the Department concluded that it does not know whether the documents were ever created. They can find no proof that they were.

- [10] Given the approach and attention by which the Department conducted the search for responsive records, it did meet the standard of reasonableness against which the duty to assist is assessed.

The Complainant's Assertion that Additional Records Exist and Were not Disclosed

- [11] In our Practice Bulletin on Reasonable Search, as well as Reports [A-2022-030](#) and [A-2023-026](#), this Office has determined that a complainant must provide more than a mere assertion or belief that additional records exist. The Practice Bulletin states:

[The] Complainant must establish the existence of a reasonable suspicion that a public body is withholding a record. Sometimes, this takes the form of having possession of or having previously seen a document that was not included with other responsive records or media reports regarding the documents.

- [12] The Complainant's position that the Department must have copies of these two records is reasonable and is based on two documents already in their possession. The first is the Environmental Indemnity Agreement that references a "Work Plan" being attached to the Agreement as "Appendix A" and a "Baseline Environmental Investigation Report" that the Agreement references as "Appendix B". Given the specific mention of these documents within the Agreement, it is logical to assume that they existed. Second, the Complainant is in possession of correspondence involving a consulting company tasked to work on the Marystown Shipyard and a representative of the Department of Industry Trade and Rural Development, which formerly had responsibility for the shipyard. In this letter, the consultant references being approached by the Province to conduct work that appears to be related to the documents that are referenced as appendices to the Environmental Indemnity Agreement.

- [13] However, none of the records cited by the Complainant actually confirm that the Work Plan and Baseline Environmental Investigation Report were created. In Article 1.01 of the Environmental Indemnity Agreement, "Work Plan" is defined as:

...shall mean the description and character of the effort to be made and the activities to be carried out on behalf of Her Majesty in the conduct of the Baseline Environmental Investigation, same to be added hereto as Appendix "A" when completed.

- [14] The phrases "... the effort to be made and the activities to be carried out ..." and "...to be added hereto as Appendix "A" when completed" strongly suggests that the Work Plan did not exist at the time the Environmental Indemnity Agreement was created and that it would be added later once a plan was developed for the Baseline Environmental Investigation.
- [15] As for the Baseline Environmental Investigation, the Environmental Indemnity Agreement clearly notes that this has not yet been conducted. The Agreement states the investigation "shall, when completed and identified by Parties hereto, be added to this Environmental Indemnity Agreement as Appendix 'B.'" With respect to both the Work Plan and the Baseline Environmental Investigation, the Agreement envisions that these would form part of the overall agreement once complete, however, there is no proof that such documents were ever completed. It is entirely possible that they never were.
- [16] The assertion that the requested records exist must be weighed against the quality of the search conducted by the Department. This search was thorough and appropriate. It covered the Department's electronic and physical records. The Department's conclusion as to the uncertainty of whether the Work Plan and Baseline Environmental Investigation exist is reasonable.
- [17] We would note however that this is an instance where the Department should consider whether it can provide the Complainant with some clarity regarding the Environmental Indemnity Agreement and the appendices. Why is it likely the appendices were not created? Were other documents established instead that could assist the Complainant? These conversations between Public Bodies and Complainants are important and go a long way to facilitate transparency and promote democracy, which are two of the purposes of *ATIPPA, 2015*. Not everything is captured in a physical record. Institutional memory can be an important source of information for the public, particularly when the matter under consideration is more than 20 years old.

RECOMMENDATIONS

- [18] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Department of Industry, Energy, and Technology maintain its position on this matter.
- [19] As set out in in section 49(1)(b) of ATIPPA, 2015, the head of the Department of Industry, Energy, and Technology 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.
- [20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of May 2024.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador