



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-023

May 29, 2024

Executive Council

Summary:

The Complainant made an access request to Executive Council seeking records related to four Orders in Council. Executive Council interpreted the access request as referring to solely information related to the actual issuance of the Order in Council and not the entire Order in Council process. As a result of the narrow interpretation, Executive Council relied on the opinion of a staff member with expertise on Orders in Council to determine that there were no responsive records. The Complainant asserted that Executive Council did not meet its duty to assist pursuant to section 13(1) of the **Access to Information and Protection of Privacy Act, 2015**. The Commissioner agreed with the Complainant. Executive Council should have consulted with the Complainant as to the exact meaning of their access request. Executive Council should have also conducted a search to determine whether responsive records existed. The Commissioner recommended that Executive Council communicate with the Complainant on the scope of the access request and to conduct a formal search for responsive records.

Statutes Cited:

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

Authorities Relied On:

OIPC Reports [A-2016-009](#); and [A-2023-025](#).

BACKGROUND

- [1] The Complainant made a request under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015), initially to the Department of Education, for:

All records pertaining to the preparation, drafting, and signing of the following Orders in Council: OC2002-088 dated 2022-04-07, OC2023-155 dated 2023-06-16, OC2023-162 dated 2023-06-22, and OC2023-175 dated 2023-07-05.

- [2] Upon review of the request, the Department of Education transferred it to the Executive Council, pursuant to section 14 of ATIPPA, 2015 on the basis that Executive Council would have custody over Orders in Council. Upon receipt of the transferred request, Executive Council consulted with a cabinet officer with expertise in the cabinet process. The cabinet officer advised there would be no responsive records for the request. Executive Council provided this conclusion to the Complainant in its final response letter in which it indicated that there were no responsive records. The Complainant asserts that Executive Council did not meet its section 13(1) duty to assist the applicant, as the public body did not perform a proper search or seek clarification as to the specifics of their access request.
- [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 Executive Council that it conducted a reasonable search for requested records and fulfilled its duty to assist the Complainant. Executive Council notes that the standard for an appropriate search for responsive records is that a reasonable effort be made, and that consulting with the subject matter expert in this instance and relying upon their opinion constituted a reasonable effort.

COMPLAINANT'S POSITION

- [5] The Complainant submits that Executive Council did not meet the duty to assist in that it did not communicate with the Complainant and that Executive Council should have conducted

a formal search for responsive records, as the Complainant believes that some records do exist.

DECISION

[6] At issue in this complaint is the duty to assist under section 13 of ATIPPA, 2015:

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] The duty to assist is composed of several elements and persists throughout the access to information process. This is clear from the language in section 13(1) of ATIPPA, 2015, which does not reference the search for documents, but instead note a “reasonable effort to assist,” and responding “without delay to an applicant in an open, accurate, and complete manner.”

[8] A key component of the duty to assist is ensuring that both the Applicant and the Public Body agree and understand exactly what the Applicant is requesting. Clarity as to what is being requested by the Applicant was addressed by this Office in Report [A-2023-025](#), at paragraph 9:

The duty to assist an applicant with their access request is of critical importance to the access to information process. Navigating government is difficult. Knowing how to frame a request, where it should be directed, and establishing its scope is a challenge and support guides to assist cannot account for every situation. As such, the access to information process depends on regular communication between the ATIPP Coordinator and the Applicant to minimize confusion and ensure that the request can be properly addressed.

[9] In this instance, neither Executive Council nor the Department of Education reached out to the Complainant and sought clarification as to the scope of their request. Executive Council noted that it found the request to be straightforward; however, a plain reading of the request does show some ambiguity that could have benefitted from a discussion with the Complainant. Executive Council limited its interpretation to the period just before an Order in Council is ordered to just after the Order is signed and published. However, the Complainant requested information on the “preparation” of the Order in Council with no indication of how far back in the process the request was intended to cover. That the Complainant had a

different perspective on the scope of the access request was clear once Executive Council sent its final response to the Complainant. In response to being advised that there were no responsive records, the Complainant inquired as to the paper trail leading up to the issuance of the Order in Council; such a paper trail does exist if the Complainant's access request is interpreted more broadly than it was.

[10] The process for the issuance of an Order in Council is straightforward. It starts with a submission to cabinet by a department that is seeking cabinet approval on a particular matter. A minute of council is created and then, if the matter under consideration requires the consent of the Lieutenant Governor of Newfoundland and Labrador, an Order in Council setting out the decision is prepared for the Lieutenant Governor to sign. In its submission, Executive Council referred to the process between cabinet and the issuance of the Order in Council as "automatic." To a degree this is true, as cabinet approval triggers the requirement to establish an Order in Council. But there is still the "minute of council" that exists as its own record. Moreover, there is also the submission to cabinet, which is a record that has to exist to commence the entire process.

[11] The process of establishing an Order in Council is well-defined: it starts with the submission to cabinet and ends with the Order in Council. It is likely that this is what the Complainant had in mind when they filed their access request. If there was any doubt as to what the request meant, Executive Council should have contacted the Complainant and sought clarity. In its submissions, Executive Council acknowledged that "it would appear, through the applicant's own response, that [they do] not understand the process related to the issuance of an [Order in Council]." It is very well possible that an access to information applicant may not understand a particular process within a public body. If that is apparent, a public body should engage with the applicant in order to meet its duty to assist. One trigger for Executive Council here was that, based on its interpretation, the Complainant was requesting records that did not and would not exist because of this automatic process. This was a circumstance where reaching out to the Complainant during the request process would have been appropriate and would have helped enormously. As Executive Council did not contact the Complainant, it did not meet its duty to assist pursuant to section 13(1) of ATIPPA, 2015.

[12] The duty to assist also includes the duty to conduct a reasonable search for responsive records. The standard for a reasonable search has been stated in previous reports, such as Report [A-2016-009](#), 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 expends a reasonable effort to locate records which are reasonably related to the request.

[13] As noted above, Executive Council concluded that the “automatic” generation of an Order in Council following approval of a cabinet submission request meant that there were no records that could exist in between cabinet submission and the issuance of the Order. Based on this, from Executive Council’s perspective, there could not be any responsive records. Executive Council cited the reasonableness standard in its submission to this Office and asserted that its consultation with the cabinet officer and the response provided from them constituted a reasonable search.

[14] There are instances when a public body may reasonably conclude that it does not have responsive records and therefore a formal search may not be required, but this case is not such an instance. Of particular relevance to this complaint are the minutes of council that should exist for each Order in Council in the Complainant’s request. As noted above, based on the submissions this Office received from Executive Council, a minute of council records cabinet’s decision on a question submitted by a department in a cabinet submission. The information in the minute then informs the content of the Order in Council. In the past, various departments and the executive have claimed that a minute of cabinet is a cabinet record and can be withheld pursuant to section 27 of ATIPPA, 2015. While this may be true, it does not negate the fact that the cabinet minutes exist, and would be responsive records. In this instance, Executive Council should acknowledge that these records exist but that they are required to be withheld as cabinet records. If, in the end, Executive Council conducts a formal search and cannot locate the relevant minutes of council, there will at least be a documented

effort of how such a search was conducted. A search would also verify whether, for whatever reason, additional records related to the four Orders in Council exist.

RECOMMENDATIONS

[15] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act 2015** (ATIPPA, 2015), I recommend that Executive Council:

1. Contact the Complainant within 10 days of the release of this Report to clarify the Complainant's access request;
2. Within 15 days of the release of this Report to conduct a reasonable search for responsive records based on the Complainant's clarified access request; and
3. Within 20 days of the release of this Report, provide to the Complainant copies of any responsive records and/or reasons for why some or all of these records are being withheld.

[16] As set out in in section 49(1)(b) of ATIPPA, 2015, the head of the Executive Council 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.

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of May 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador