



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2025-006

February 25, 2025

Department of Education

Summary:

The Complainant made two access to information requests to the Department of Education. The first access request sought records related to the resignation of the former Chair of Memorial's Board of Regents, as well as the appointment of their successor. The second request sought records of consultations by the Department of Education with any other public body in processing the first access request. The Department provided some records for both access requests but withheld most of the records as cabinet confidences (section 27). The Complainant disagreed and filed a complaint with this Office for both access requests. The Complainant also alleged the Department failed in its duty to assist as required by section 13. After review of submissions from both parties and considering the burden of proof borne by the Department, the Commissioner agreed with the application of section 27 to the records. The Commissioner also found the Department met its duty to assist.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 17, 27, and 29.

Authorities Relied On: NL OIPC Reports [A-2024-006](#)

BACKGROUND

[1] The Complainant made an access to information request under the **Access to Information and Protection of Privacy Act, 2015** (the “Act”) to the Department of Education requesting the following information:

All records, including emails, handwritten notes, and call logs, pertaining to

- (i) Communications with [named individual] regarding his resignation as Chair of MUN’s Board of Regents on 15 August 2024, including the letter of resignation.
- (ii) Communications with [second named individual] regarding his appointment as Chair of MUN’s Board of Regents on 21 August 2024 and
- (iii) Preparation of [second named individual] biographical information for public release

Period covered: 25 July 2024 to date.

[2] After receiving the final response for the first access request, the Complainant submitted a second access to information request with the Department seeking records about the Department’s consultations with public bodies in processing the first access request.

[3] The Department located 33 pages of responsive records for the first access request. In the final response the Department noted the first 13 pages were being withheld pursuant to section 27 (cabinet confidences) as they were records created during the process of developing or preparing a submission for Cabinet (section 27(1)(h)) or a memorandum, created to present proposals or recommendations to Cabinet (section 27(1)(c)). Of the 20 pages that were disclosed, the Department applied redactions pursuant to sections 29 (policy advice or recommendations) and 40 (disclosure harmful to personal privacy). In its final response, the Department advised the Complainant that Cabinet Secretariat was consulted while processing the access request because the request contained Cabinet records.

[4] In response to the second access request, the Department located 20 pages of records but withheld 15 pages pursuant to sections 29 and 27 of the Act. Except for one page, all the records withheld as cabinet records were the same records withheld in the first access

request. The Department identified an additional page as a cabinet record pursuant to section 27(1)(i) as it contains information about the contents of a cabinet record.

- [5] The Complainant filed a complaint with this Office in relation to both access requests, seeking a review of the redactions and alleging the Department failed in its duty to assist pursuant to section 13 of the Act.
- [6] The Department agreed to release some additional information in the first set of responsive records during the course of the investigation. The Department also advised the Complainant that there were no records located responsive to the second and third items in the first access request. This question was previously posed by the Complainant but had not been answered. The Complainant maintained that the Department failed in its duty to assist and questioned whether the exceptions pursuant to sections 27 and 29 were applied appropriately in each set of records.
- [7] As informal resolution was unsuccessful and both complaints proceeded together to formal investigation in accordance with section 44(4) of the Act. This report covers the complaints for both the first and second access to information requests.

PUBLIC BODY'S POSITION

- [8] The Department states the records at issue are cabinet records and records that contain advice for a public body and thus were properly withheld pursuant to sections 27 and 29 of the Act.
- [9] The Department states that the search completed for both requests were performed with the correct parameters. Additionally, the records withheld by the Department in their entirety were described as cabinet records and included the provision under the Act that classified the records withheld as cabinet records.

COMPLAINANT'S POSITION

[10] The Complainant submits the Department may have improperly applied exceptions and argues the cabinet records withheld should be carefully reviewed, especially considering the public interest override set out in section 27(3) of the Act.

[11] The Complainant also alleges the Department failed its duty to assist by failing to conduct a reasonable search for the records; failing to respond to the Complainant in an open, accurate and complete manner; and failing to respond to the first access request without delay.

ISSUES

[12] The issues to be addressed are whether the Department properly applied sections 27 and 29 of the Act, and whether the Department fulfilled its duty to assist as required by section 13.

DECISION

Section 27 (Cabinet Confidences)

[13] The relevant provisions of the Act are as follows:

27.(1) in this section “cabinet record” means

...

(c) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;

...

(h) a record created during the process of developing or preparing a submission for the Cabinet;

(i) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).

...

(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record;

...

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in disclosure of the information outweighs the reason for the exception.

[14] Section 27(2) is a mandatory exception to access for cabinet records, as defined by section 27(1). However, section 27(3) gives the Clerk of the Executive Council discretion to release records where the public interest in the disclosure of the information outweighs the reason for the exception.

[15] The first issue to determine is whether the responsive records at issue are cabinet records as defined under sections 27(1)(c), 27(1)(h), or 27(1)(i). After reviewing the records responsive to the first request, page one is appropriately classified as a record created during the process of developing or preparing a submission for Cabinet, as set out in section 27(1)(h). The remaining 12 pages are a memorandum to Executive Council and these include recommendations. These are appropriately classified as a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet, as set out in section 27(1)(c).

[16] The records responsive to the second request include the same cabinet records in the first set, except for one additional page, which is withheld pursuant to section 27(1)(i). That page provides a description of the documents withheld under section 27(1)(h) and 27(1)(c) and therefore was appropriately withheld.

[17] The Complainant also raises concerns that the Executive Council approved the suggested redactions indiscriminately, in a wholesale manner. This is based on an email released as part of the second access request that states the Executive Council is satisfied the records should not be disclosed. The Complainant claims there is no mention of the public interest override in this response. On the contrary, the email states that the Executive Council carefully examined all the information withheld in accordance with section 27 and is satisfied that it does not meet the test for disclosure in accordance with subsection 27(3). It is clear that the Clerk concluded that there was no public interest in disclosure and that it would not be appropriate to release the records.

[18] For all the above reasons, the Department properly withheld the records pursuant to section 27(2)(a).

Section 29(1)(a)

[19] The relevant provisions of the Act are as follows:

29.(1) The head of a public body may refuse to disclose to an applicant information that would reveal

- (a) advice, proposals, recommendations, analyses, or policy options developed by or for a public body or minister,

[20] This section was applied to withhold an email attachment titled “Section 27 Checklist” amongst the records responsive to the second request. The Complainant surmises that these records do not contain “advice” based on the name of the attachment. The attachment titled “Section 27 Checklist” consists of two pages (one withheld under section 27(1)(i) above). The checklist contains advice to the Clerk of the Executive Council with respect to the application of section 27 to the responsive records and hence was appropriately withheld pursuant to section 29(1)(a).

Section 13 (Duty to Assist)

[21] Section 13(1) of the Act states as follows:

13(1) The head of a public body shall make every reasonable effort to assist the applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

[22] In [Report A-2009-11](#), the Commissioner held the duty to assist may be understood as having three separate components.

- First, the public body must assist an applicant in the early stages of making a request.
- Second, it must conduct a reasonable search for the requested records.
- Third, it must respond to the applicant in an open, accurate and complete manner.

[23] The Complainant's allegations that the Department failed in its duty to assist on both access requests are multifarious and will be addressed separately.

Failure to Conduct a Reasonable Search for Responsive Records

[24] The Complainant asserts additional responsive records must exist for both access requests and therefore the Department did not conduct a reasonable search. The Act does not require the public body to prove with absolute certainty that records do not exist. The public body must provide evidence to show that it has made a reasonable effort to locate records responsive to the request. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. The standard is not perfection, but one of reasonableness. The efforts undertaken by the public body must be documented so that a public body can show it has fulfilled its obligations under the Act.

[25] The Department provided our Office with the specific steps taken to search for responsive records for both access requests. For the first request the Department's search included:

- A search of the Department’s information management system using appropriate search terms,
- A search for emails of Department heads and other staff, including the Director of Communications, was performed on their accounts using appropriate search terms,
- Consultation with Department heads and other staff, including the Director of Communications, requesting they conduct a search for responsive records.

[26] The Complainant asserts the Chair of the Board of Regents could not be appointed without the Department consulting the appointee about their biographical information and for this reason, additional records must exist with the Department. The Complainant also relies on records from the Department of Justice and Public Safety pertaining to the preparation of the biographical information for Queens Counsel appointments and suggests that if the Act is “administered even-handedly”, the same type of records should be released by the Department for the appointment of the Chair of the Board of Regents. However, the Complainant postulates that the process for these appointments is the same. The Chair of the Board of Regents is appointed by the Independent Appointments Commission, not the Department of Education, providing a plausible explanation as to why the Department did not locate these records.

[27] After review of the above steps, correspondence between the Complainant and the Department, and reasons the Department provided to explain why it believes no further records exist, this Office is satisfied that the Department conducted a reasonable search for records responsive to the first request.

[28] For the second access request, the Department again provided the steps it took to search for responsive records. The records sought were created and sent by the ATIPP Coordinator for the Department and the ATIPP Coordinator for Cabinet Secretariat. The ATIPP Coordinator for the Department searched for the records they created, used, and stored. As the creator of the records and their position as the Department’s ATIPP Coordinator, they are very knowledgeable with respect to the records used during the consultation process. The Coordinator identified and located the responsive records through their own email and in the

ATIPP Case File for the access request the second access request stems from. The Department also confirmed that all records related to the consult between the Coordinator and the Cabinet Secretariat would only be found in those locations due to the confidential nature of cabinet records and the information management protocols of the Department.

[29] The Complainant contends that an email in the responsive records that references “advice” from the Department is evidence there are records missing because the responsive records do not contain any “advice”. The Complainant is basing this off the names given to attached documents sent to the Cabinet Secretariat during the consultation process. One of those was the “Section 27 checklist” and as noted above in our analysis of section 29(1)(a), this record contains advice. The name given a record as an email attachment does not establish that the record itself does not contain advice.

[30] After review of the above steps, correspondence between the Complainant and the Department, and reasons the Department provided to explain why it believes no further records exist, this Office is satisfied that the Department conducted a reasonable search for the second set of responsive records.

Failure to Respond in an Open, Accurate and Complete Manner

[31] The Complainant also asserts the Department failed in its duty to assist by failing to respond to the Complainant in an open, accurate and complete manner. The Complainant argues the Department was expected to identify the location of records responsive to items two and three within the first set of records upon the Complainant’s request. This was one of several questions the Complainant put to the Department after receiving the final response. Although the Department initially failed to clarify with the Complainant that there were no records responsive to those two items of the request, upon receiving the complaint, the Department advised this question was overlooked in error and provided this information to the Complainant. At the time the Complainant received the Department’s final response, the Department had also attempted to phone the Complainant, without success, and emailed the Complainant to state they can reach out if further discussion was necessary.

[32] Another issue raised by the Complainant is that the Department expected him to conduct his own investigation. On the contrary, the Department provided contact information to the Complainant to address a question the Complainant posed that was outside the scope of the access request, specifically the Complainant's question as to why the records appear to contradict a public statement made by Memorial University.

[33] The Complainant also takes issue with Department withholding responsive records in their entirety without providing, as the Complainant proposes, a description in "neutral language (sender, receiver, date, subject)." In its final response to the Complainant, the Department set out in writing that the records withheld in their entirety were withheld as Cabinet Records pursuant to section 27(2)(a). Additionally, the Department provided the subsection that defined each page withheld as a Cabinet Record. Section 27(1)(c) is a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet. Section 27(1)(h) is a record created during the process of developing or preparing a submission for the Cabinet. There is no requirement that a public body provide to an applicant information such as date, sender, subject, receiver, or similar information about a withheld record. In this case, the definition of Cabinet Record relied upon by the Department, and communicated to the Complainant, provided a sufficient description of the exempted information and we do not find the Department failed in its duty to assist. Nonetheless, the Department should be mindful of its obligations under section 17 of the Act. Section 17(a)(c)(i) explicitly sets out that where access to a record or part of a record is refused in a final response to an access request, the public body shall not only set out the provision of the Act on which the refusal is based, but also inform the applicant in writing of the reasons for the refusal.

[34] For all the reasons outlined above, we do not find the Department failed in its duty to assist by failing to respond to the Complainant in an open, accurate and complete manner.

Failing to respond to the first access request without delay

[35] The Complainant alleges the Department failed to respond to the first access request without delay. This Office approved an extension of time for responding to the first request, and the Department complied with the new October 21, 2024, deadline. For that reason, it is

clear the Department did not fail to respond to the access request without delay. In these circumstances, there is typically nothing further to be addressed, yet the Complainant persisted in his complaint.

[36] The Complainant argues that a reasonable and informed observer would conclude that the Department's request for an extension from this Office was simply "buying time" and unnecessarily delaying the response. To support this argument the Complainant states that the deadline was extended to October 21, 2024, by this Office because the Department needed time to consult other public bodies, but the consultation did not take place until October 11, 2024. The Complainant does not acknowledge that the basis for extending the deadline was also necessary due to the volume of requests being processed by the Department at the time. This information is clearly outlined in a letter to the Complainant from the Department on September 18, 2024. Notwithstanding this, upon receiving the second set of records, the Complainant requested the Department explain why the response to the first request required an extension if the consultation took place October 11, 2024. The Department informed the Complainant, again, on November 22, 2024, that the deadline extension was necessary for the two reasons previously provided to him in September. The Department also provided the following details,

At the time of your request, the Department was also processing 18 other active requests (11 of which were received before your request). Our request for extension to the OIPC stated that we had completed the search for your records but had not yet started to review them. While the review had not started, during the search, it was discovered that there were cabinet records included. Due to this, we knew there would be need to consult with Cabinet Secretariat prior to reviewing and redacting your records. Once the records were reviewed and redacted appropriately, they were prepared and sent for consult on October 11.

[37] Despite the Department being quite clear to the Complainant on at least 2 occasions the reason for the delay and the fact that the Department properly sought and had approved a time extension by the OIPC, the Complainant could not be satisfied to resolve this issue, which is unfortunate as it consumes time and resources for both the Department and this office.

RECOMMENDATIONS

- [38] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Department of Education maintain its position and continue to withhold the records pursuant to sections 27 and 29.
- [39] As set out in section 49(1)(b) of the **Access to Information and Protection of Privacy Act, 2015**, the head of the Department of Education must give written notice of his or her decision with respect to these recommendation to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.
- [40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of February 2025.



Kerry Hatfield
Information and Privacy Commissioner
Newfoundland and Labrador