

Issue

[4] The only issue in this review is whether EDT performed a diligent search for responsive records.

Facts

[5] On September 5, 2023, the Applicant sent a request for records to the Department of Economic Development and Transportation (EDT) and the Department of Finance:

- a. The request to EDT was for “All records concerning the provision of security services at the Iqaluit Deep Sea Port” from July 1, 2023, to the date of the application.
- b. The request to Finance was for “All records concerning a RFP/Contracts as well as all invoices/bills/receipts paid by the Government of Nunavut for security services at the Iqaluit Deep Sea Port” from July 1, 2023, to the date of the application.

[6] Finance quickly concluded that it had no responsive records, so it transferred its portion of the request to EDT. Finance has had no further involvement with the file.

[7] EDT began the process of searching for and compiling responsive records. They focused on searching the e-mail archives of the two EDT employees who had played central roles in the port security contract. The result, when compiled in PDF format, was a disclosure package of 196 pages. EDT redacted some of this information but did not yet send it to the Applicant.

[8] On December 12, EDT notified a third party that the draft disclosure package contained information that might affect its interests under section 23 (personal information) and section 24 (business information). This notification was required under section 26(1) of the ATIPPA. Unfortunately, EDT overlooked the requirement in section 26(4) to inform the Applicant that the third-party procedure had been invoked.

[9] There was then some back-and-forth between EDT and the third party about what should be redacted. On December 15, EDT wrote to the third party to say that it had made its final decision about redactions. In its e-mail, EDT attached the final disclosure package. Unfortunately, EDT overlooked the requirement in section 27(2) to inform the Applicant that a third-party decision had been made.

[10] On December 18, the Applicant wrote to EDT to ask about the status of the file. EDT replied that disclosure was imminent. The next day, EDT corrected itself, saying that the third-party procedure had been invoked, which would delay disclosure. This appears to be the first time the Applicant was informed that a third party had been notified.

[11] On January 4, 2024, the third party wrote a letter jointly to EDT and to my office. The letter purported to make further arguments to EDT for redaction, while also requesting a review under section 28(2) of the ATIPPA.

[12] The file, at this point, was in a procedural tangle. To unravel the tangle while respecting the ATIPP rights of the Applicant and the third party, I suggested to EDT that it redact the disclosure package in accordance with the third party's wishes, and then send the redacted disclosure package to the Applicant.

[13] (To be clear, this method of proceeding was intended only to get the file moving in the right direction. It does not necessarily mean that I agree with the redactions requested by the third party. That question remains undecided.)

[14] EDT accepted my suggestion. On January 17, EDT sent the redacted disclosure package to the Applicant.

[15] On February 15, the Applicant requested that I review EDT's search for records. The Applicant did not request review of the redactions. The third party was notified of the review, but did not participate. The third party reserved its right to participate if the redactions became an issue.

Law

[16] A public body has a duty to undertake a “diligent search” for responsive records: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraphs 12 to 15; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraphs 24 to 27; *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII).

[17] In Ontario, the search required of a public body is described this way: “A reasonable search is one in 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”: *Municipality of Chatham-Kent (Re)*, 2019 CanLII 108986 (ON IPC) at paragraph 15; *Health Professions Appeal and Review Board (Re)*, 2018 CanLII 74224 (ON IPC) at paragraph 11.

[18] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner in *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). The adjudicator in *University of Lethbridge* quotes from an earlier Order listing the kinds of evidence that a public body should put forward to show it made reasonable efforts in its search:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[19] I adopt this explanation of the ATIPPA search requirement, along with the stipulation from the Ontario cases that the search should be conducted by “an experienced employee knowledgeable in the subject matter of the request”.

[20] There is a threshold question in every “diligent search” case, and that is whether there is some basis for believing that undisclosed records exist at all: *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII) at paragraph 64; *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner; *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

[21] The purpose of the “some basis” test is “to prevent the public body expending time and effort on searches based only on an applicant’s subjective belief that a document must exist or should exist or might exist”: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

Analysis

[22] EDT did a reasonably good job of responding to the Applicant’s request. There were, however, errors regarding the third-party procedure. As a result, the Applicant had to wait longer than they should have for disclosure. The Applicant filed their request for records in early September 2023, and it was not until late January 2024, after an intervention from this office, that the Applicant received the disclosure package.

[23] The Applicant has not asked me to review the redactions in the disclosure package. The Applicant has asked me to review whether EDT’s search for records was a “diligent search”. In simple language: did EDT miss anything?

[24] In the Law section above, I wrote that there is threshold question in every “diligent search” case, and that is whether there is some basis for believing that undisclosed records exist at all. In this case, the Applicant showed me some of their own e-mails to EDT that should have been in the disclosure package, but were not. If these e-mails were missed, perhaps (argues the Applicant) other responsive records were missed. In my view, these missing e-mails satisfy the “some basis” test.

[25] EDT says they did a diligent search. To support that claim, EDT provided me with the following:

- a. All internal correspondence about the search for records.
- b. All correspondence between EDT and the Applicant.
- c. All correspondence between EDT and the third party.
- d. Completed and signed “search declarations” from the two EDT employees most likely to have responsive records.

[26] EDT does not appear to have used the “Diligent Search Tracker” template developed by the Territorial ATIPP Office at the Department of Executive and Intergovernmental Affairs. It is essentially a running log of the search for records. It is a useful tool, and saves time on review. I recommend that EDT use it in future.

[27] With the information provided to me by EDT, I was able to piece together how EDT’s search was done. The focus was on the e-mails of the two EDT employees who played central roles in the port security contract. This was, of course, the most logical place to look. All the records in the 196-page disclosure package are from these two employees’ e-mail archives.

[28] The “missing e-mails” sent to me by the Applicant (see paragraph 24 above) showed that it was reasonable for EDT to expand its search beyond the records of the two key employees. The missing e-mails were responsive records, but they were neither to nor from the two key employees.

[29] I therefore suggested to EDT, during this review, that it search the records of two additional employees, plus an e-mail account associated with the Iqaluit port but not connected to a specific employee. That additional search did turn up a handful of new responsive records, which were forwarded to the Applicant on March 21. None of these new records involved the third party. All of them were e-mails to or from the Applicant, so presumably the Applicant was already aware of them.

[30] I also suggested that EDT check whether there were any responsive records on its “Y-drive” (the GN networked drive where digital records are stored) and whether there was any paper file containing records on port security. Finally, I met with EDT’s two key employees on the port security file to probe whether there might be responsive records in any place that had not yet been searched. These inquiries did not produce any new responsive records.

[31] Finally, I carefully reviewed the 196-page unredacted disclosure package to see if there was any internal evidence of missing records. The records in the package tell a story that is intelligible and complete, starting from when the idea of a port security contract for 2023 was first broached, to development of a Request for Proposals, to the use of sole-sourcing instead of an RFP, to entering a contract with a vendor, to invoicing and payment. I do not see any internal evidence of missing records. At one point there appears to be a gap in the records of roughly three weeks, but that gap was satisfactorily explained to me by the EDT employees who were involved in the port security file.

[32] As a result of these efforts and discussions, I am satisfied that EDT has met the test for a “diligent search” (see paragraphs 17 to 19 above).

Conclusion

[33] EDT has performed a diligent search for responsive records.

Recommendations

[34] Given my conclusion, I have no formal recommendations.

[35] EDT did make some errors in processing the Applicant’s request (see paragraphs 8 and 9 above). I suggest EDT review the third-party procedure in sections 26 and 27 of the ATIPPA to ensure it is correctly followed in future cases. I also suggest that, for future access requests, EDT use the “Diligent Search Tracker” template developed by EIA (see paragraph 26 above).

Graham Steele

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