Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 18-05

September 17, 2018

Department of Health and Wellness

Summary: The use of personal email accounts to conduct government business has the potential to subvert the right of access under Nova Scotia's right to information laws. When public bodies receive an access to information request they must make every reasonable effort to assist applicants openly, accurately and completely. In this case, an applicant requested copies of all emails in relation to the former Minister of Health and Wellness' mandate that were sent or received using the Minister's personal email accounts for a specified time period. The Commissioner determines that the Department failed to satisfy its duty to assist in a number of significant ways. The Department failed to make any effort, let alone every reasonable effort, to search for responsive records. It failed to communicate to the applicant any concerns it had with the clarity of the request and its response letters were neither open, accurate nor complete. The Commissioner recommends that the Department undertake six steps to ensure that it conducts an adequate search for records so that the use of personal email accounts for departmental purposes does not result in making government records inaccessible to the public.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 4, 6, 7, 45; *Freedom of Information and Protection of Privacy Regulations*, NS Reg 105/94, s. 3(2).

Authorities Considered: Newfoundland and Labrador: Report A-2016-022; **Nova Scotia:** Review Report 16-05 Nova Scotia (Department of Justice) (Re), 2016 NSOIPC 5 (CanLII), **Saskatchewan:** Investigation Report 101-2017; **United Kingdom:** Freedom of Information Act 2000 (FOIA) Decision Note 01 March 2012, Reference FS50422276;

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25 (CanLII); *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII); *Competitive Enterprise Institute v. Office of Science and Technology Policy,* No. 15-5128 (DC Cir. 2016); *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII).

Other Sources Considered: Concise Oxford English Dictionary, (12th ed) (New York: Oxford University Press, 2011).

INTRODUCTION:

[1] The use of personal email accounts by government officials, particularly ministers, is cause for concern. The concern, of course, is that using personal email accounts to conduct departmental business may effectively circumvent the public's right to know if emails sent and received using personal email accounts are shielded from searches for government records. A true commitment to transparency and accountability under Nova Scotia's access law requires active efforts to assist applicants in a manner that is open, accurate and complete.

[2] In this case, when the applicant requested that the Department provide her with all emails sent to or from the former Minister of Health and Wellness' personal email accounts, the response from the Department of Health and Wellness (Department) was to deny access to the information entirely. It conducted no search for the records inside or outside the government email system. It provided a variety of rationales for its decision.

ISSUES:

[3] The Department's response raises three issues:

1. Does the Department have custody or control of the requested records?
2. Were the August 24, 2017 decision letters open, accurate and complete as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*)?
3. Did the Department meet its duty to assist the applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?

DISCUSSION:

Background

[4] The applicant sought information about the extent of the use of personal email accounts by the former Minister of Health and Wellness, the Honourable Leo Glavine (Minister). To do so, she filed two related access to information requests on July 26, 2017, seeking "all emails sent or received by then Health Minister Leo Glavine on his personal email account that are related to his mandate as a member of the executive council and/or as health minister."[1] The applicant provided a specific Gmail account address and also requested that the search include "any other personal or private email accounts that he uses." The time period specified by the two requests was the 14-month period from March 1, 2016 to May 31, 2017 inclusive.

[1] Only the Department of Health and Wellness responded to these requests. There was no response from the Executive Council Office, a separate public body for the purposes of *FOIPOP*. The applicant only appealed the responses from the Department of Health and Wellness and so this report deals only with that aspect of the original requests.

[5] The Department did not provide any responsive records to these requests. The Department provided three different rationales for its decision:

1. The *Freedom of Information and Protection of Privacy Act* applies to records that are in the custody or under the control of a public body. This does not include personal email accounts. As such, the Department cannot respond to the request.[2]
2. The breadth of what has been asked for – anything related to the Minister's mandate as Minister of Health and Wellness for a full year (June 1, 2016 to May 31, 2017) – would make a search unreasonably difficult for a public body to satisfy from the perspective of topic as well as timeframe.[3]
3. The Department could not assess whether the requested records were in its custody or control because the applicant's request did not include sufficient parameters to permit the Department to objectively assess custody or control. On that basis, the Department was authorized to determine that it did not have custody or control.[4]

[6] The only rationale communicated to the applicant and the decision under review today is the first – that personal email accounts are not under the custody or control of a public body.

[7] In Nova Scotia, access to information requests made to government departments are processed by a program within the Department of Internal Services known as Information Access and Privacy Services (IAP). Therefore, when the applicant filed two requests for review with this office on October 17, 2017, IAP officials responded on behalf of the Department.

[8] In support of her position that Minister Glavine was using personal email accounts for government business, the applicant provided this office with a copy of a record she received from the Department in response to an unrelated access to information request. The record was an email dated April 2017 sent to a variety of Department officials at "novascotia.ca" email addresses and to Minister Glavine at a Gmail address. Following receipt of this document, the applicant had an email exchange with communications officials with the Department in the summer of 2017.

[9] The applicant provided this office with a copy of the email exchange that occurred in late July 2017. At that time, the applicant, a journalist, asked questions about the Minister's use of personal email accounts and the Department's position on the use of personal email accounts. The following is the response the applicant received on July 27, 2017:

> I have a number of statements for you – from different departments, and Minister Glavine.
>
> See below.

[2] Original decision letters dated August 24, 2017.
[3] Letter dated November 29, 2017 from Information Access and Privacy Services on behalf of the Department to the Office of the Information and Privacy Commissioner.
[4] Department's submission dated July 6, 2018.

> I am not a regular user of email and my standard practice in my time as Minister of Health and Wellness was for the department to email information and items for approval to my Executive Assistant, who would then bring it to my attention. My EA used his provincial government email address for this work. The email in question was a public news release that my staff wanted me to see before it went out and they needed to reach me quickly. I've taken steps to ensure this doesn't happen again, regardless of the deadline." – **Minister Leo Glavine**
>
> **Department of Health statement regarding privacy:**
> The Department of Health and Wellness is very careful about the transmission of sensitive information and patient confidentiality in all of our communications and correspondence. We are taking this opportunity to remind all staff about using government email addresses for government business.
>
> **Department of Internal Services statement regarding email policy and record retention:**
> Ministers receive a high volume of email and other correspondence from a wide variety of stakeholders and staff, including their constituents. Therefore, it's not surprising that sometimes MLA email addresses get used mistakenly. All ministers have been reminded of their record-keeping responsibility, including the importance of using their government email addresses when doing government business.

[10] In addition, a communications official with the Department stated that the Gmail address is not a personal email account, it is an email account the Minister uses as an MLA. She also stated that, "In light of the amount of correspondence received in both roles, he relied on his secretary and executive assistant to filter through the department email he had to deal with directly."

[11] On January 15, 2018, the applicant filed a new request. She asked for all emails sent to a Gmail and Blackberry address by the Minister's executive assistant (EA) and the director of communications, and all emails sent from a Gmail and Blackberry address to the same two individuals for a three-month period.

[12] In response, the Department provided 81 pages of email records. The applicant provided a copy of the response to this office. The emails further supported the applicant's position that the Minister used personal email accounts to conduct departmental business during the 14-month period covered by the two access to information requests. The accounts included the Gmail and Blackberry addresses originally identified by the applicant and a kingswest.ca account that appears to be associated with the Minister's MLA activities.

Burden of Proof

[13] The Department bears the burden of proving that the applicant has no right of access to the records.[5]

[5] *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 45(1)

Does the Department have custody or control of the requested records?

[14] The Department's response to these requests was to state unequivocally that, "The *Freedom of Information and Protection of Privacy Act* applies to records that are in the custody or under the control of a public body. This does not include personal email accounts."

[15] However, in correspondence from an IAP official to the Office of the Information and Privacy Commissioner (OIPC), the official stated, "In short, the Department determined that personal e-mail accounts were not under their control." But the official goes on to concede that, "We do agree, however, that the records related to government business are under the control of the Department regardless of the account used." (emphasis added).

[16] It appears that the objection is to having to potentially search a personal email account of a minister if it is determined that the account contains records related to government business that cannot be located in the government records retention system. Based on the Department's submission, it also appears that the Department objects to the possibility of having to search the government email system for emails sent to or from a personal email account.

[17] The minister responsible for IAP also commented on this topic in the House of Assembly on April 5, 2018. The Hansard transcripts quotes Minister Arab as stating, "Mr. Speaker, I would like to reiterate that the medium that is used to conduct government business is not an issue, it is the content. So anything, any government content, whether it's an email, or a conversation, anything that is about government business is subject to FOIPOP. So, whether it's done from a private email or a public email, it makes no difference whatsoever."[6]

[18] Despite IAP's agreement that records related to government business are under the control of the Department, the Department refused to change its decision. It continues to rely on the initial decision that the requested records are not in its custody or control. In its submission, the Department argues that emails residing on government servers that originate from personal email accounts are also not necessarily in its custody or control.

[19] The Department points to cases in Ontario[7] and Alberta[8] where emails stored on public body servers were found not to be in the custody or control of the public body because they were private communications of employees unrelated to government business or to the public body's mandate.[9]

[20] In the Ontario case, a city solicitor used the municipal email system to send emails related to his volunteer work with the Children's Aid Society. The Court determined that those emails were not within the custody or control of the city. The Court's analysis in the Ontario decision included considerations of the fact that the documents were never intended to be used by the public body for its own purposes, the employee voluntarily used the public body email server for his own purposes, possession of the record was entirely unrelated to public body business, the

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[6] Nova Scotia Legislative Assembly, *Debates (Hansard),* Assembly 63, Session 1, (April 5, 2018) at p. 3642.
[7] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII) (*City of Ottawa*).
[8] *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (CanLII) (*University of Alberta*).
[9] *City of Ottawa* at para 28, *University of Alberta* at para 98.

emails had no bearing whatsoever on the processes of the government and the emails would not provide any information to citizens about the functioning of government.[10]

[21] In the Alberta decision, an applicant sought copies of emails created by a professor at the direction of a federal research institution. The Court determined that these records were not in the custody or control of the university for a variety of reasons including that the records were created at the direction of the federal institution, not within the context of his employment. Other reasons included that the employee intended that the documents remain confidential and be used and provided to the federal institution, and that the records were intimately connected to the mandate and function of a federal body subject to federal access law.[11]

[22] The Department submits that emails originating from the Minister's personal email accounts and residing on government servers do not automatically qualify as being in the custody or control of the public body. The Department must undertake an analysis of custody or control. But, according to the Department, such an analysis is impossible in this case.

[23] The applicant's requests were for emails sent or received on personal email accounts "that are related to his mandate as a …health minister…." The Department's position is that a minister's mandate does not necessarily pertain to a 'Departmental matter'. The examples the Department gives are an email sent to constituents to solicit fundraising, which provides a link to the Department's annual business plan, or a private communication between an individual constituent and the Minister discussing a hospital from which a constituent's family member is receiving care. Such emails, says the Department, arguably relate to the Minister of Health and Wellness' 'mandate' yet fall outside the scope of departmental business or function.

Meaning of "mandate"

[24] The submission provided by the Department notes that s. 4(1) of *FOIPOP* provides that the Act applies to all records in the custody or under the control of a public body. The converse, says the Department, is that the Act does not apply to any records not in the custody or under the control of the public body. "In other words, if an applicant submits a request for records that do not meet this threshold, then denial of the applicant's request by a public body is permissible since the Act does not apply to such a request."

[25] The submission then goes on to assert that it was not possible for the Department to assess whether the emails requested were under the custody or control of the Department. This was because the applicant's requests did not include sufficient parameters that permitted the Department to undertake an objective assessment of "custody" or "control" under the established legal test.

[26] This argument conflates two provisions of *FOIPOP* and places a burden on applicants that simply does not exist in law. To say nothing of the fact that it is a non-sequitur to say a public body does not have enough information to assess custody or control, therefore the public body does not have custody or control.

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[10] *City of Ottawa* at para 30.

[11] *University of Alberta* para 104-110.

[27] The applicant's requests were for emails sent or received on personal email accounts "that are related to his mandate as a …health minister…." What was the former Minister of Health and Wellness' mandate between March 1, 2016 and May 31, 2017? According to The Concise Oxford English Dictionary "mandate" means an official order or commission to do something and the authority.[12] Ministerial mandate letters would fit that definition.

[28] Ministerial mandate letters are signed by the Premier and set out the work individual ministers are expected to undertake on behalf of Nova Scotians. Former Health and Wellness Minister Glavine was provided with a letter of mandate dated December 18, 2015.[13] A careful review of the ministerial mandate letter reveals that there is no reference to constituency work of any kind. The letter is focused on work to be done by the Minister and his department. Minister Glavine was directed to do such things as to actively work to further shared priorities of departments in eliminating barriers to growth, achieving fiscal sustainability and conducting continuous review of programs. Minister Glavine was directed to strengthen the new health authority model, ensure the focus of the Department was on the core activities of planning, funding and monitoring publicly funded health services, and proactively work with the Nova Scotia Health Authority and the IWK to ensure that citizens have access to quality public health care.

[29] The applicant confirmed to this office that she used the word "mandate" to communicate that she wanted emails relating to departmental business. She had been previously advised by IAP officials that she could not access constituency-related materials and so she used the word "mandate" to specify that she only required records relating to departmental business. She also confirmed that the Department never indicated any confusion over the use of the word "mandate" and never asked her to explain the term.

[30] Does the evidence support the Department's position that the meaning of the word "mandate" was unclear?

[31] The Department makes much of the fact that three months after denying it had custody or control of the requested records, it made an offer to search for the following:

> DHW is prepared to ask its Deputy Minister, Assistant Deputy Minister and Director of Communications to search their emails for a three-month period (January 2017 to March 2017), put the results through the redaction process and provide the responsive records to the applicant with a copy to your office.
>
> This search will be limited to email to/from the email address [****@gmail.com]. Given the distinction between the administrative and legislative branches of Government that must be preserved, it is not possible for DHW to know what "other email accounts" are or were used by MLA Glavine or his MLA office.

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[12] Concise Oxford English Dictionary (12th Edition) p. 868.

[13] Ministerial mandate letters are publicly available at: https://novascotia.ca/exec_council/letters.html and Minister Glavine's 2015 mandate letter is available at: https://novascotia.ca/exec_council/pdf/letters/2015-HEALTH-SENIORS.pdf

[32] Clearly then, the Department could identify records in its custody or control based solely on a Gmail address and the name of a government official during a three month period. As noted above, while the applicant rejected the Department's offer because it was "not what I asked for", she did eventually file a similarly worded access to information request in January 2017. She received 81 pages of responsive records. The search would have involved using the Gmail address as the search parameter in each official's email account. The Department would have had to review each responsive email to assess whether it related to departmental business or not.

[33] This, in my view, was exactly the vetting the Department would have to undertake if it had conducted the search in response to the applicant's original requests. Use the Gmail and Blackberry email addresses as the initial search parameter for the time period in question and then review each responsive email to see if it related to departmental business or not. In other words, even if the word "mandate" might have been unclear, the Department was never going to disclose records relating to constituency work and so it would have vetted the response so that records released only related to departmental business. There was nothing stopping it from proceeding on that basis.

[34] I am satisfied that the use of the word "mandate" by the applicant sufficiently communicated the fact that she was looking for emails that related to departmental business or functions. It is a term commonly used by government and specifically used in letters of mandate. Further, if the Department truly did not understand the meaning of the word "mandate" as used by the applicant, it could and should have contacted the applicant for clarification. Instead, it simply refused access 29 days after receiving the access to information requests. I will discuss this aspect of the Department's response below with respect to issues 2 and 3.

[35] The evidence does not support the Department's assertion that the Department did not understand that when the applicant sought records related to the Minister's mandate, she was seeking records relating to departmental business.

The test for custody or control

[36] Can it then be said that the Department had custody or control over the requested records? The leading case for determining "control" under access to information legislation is a decision of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.[14] It is important to note that in that case, the records sought were not in the physical control of an institution subject to the federal access to information law. The Court notes, "While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control."[15] The Court says that the test it sets out applies, "Where the documents requested are not in the physical possession of the government institution…."[16] The test for control in these circumstances is:

1. Does the record relate to a departmental matter? If it does not, that ends the inquiry.

[14] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25 (CanLII) (*National Defence*).
[15] *National Defence* at para 54.
[16] *National Defence* at para 54.

2. If it does relate to a departmental matter, then all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request.

Personal email on government servers

[37] As noted above, the cases cited by the Department in support of assertions that not all emails on government servers are within a public body's custody or control both found that the emails in question did not relate to the mandate of the public body at issue.[17] In other words, they did not pass the first part of the Supreme Court of Canada's test for control.[18] As a result, no further inquiry would be needed under the Supreme Court of Canada test because the record would not be in the public body's control.

[38] The same cannot be said for the requests in this case. The applicant clearly sought access to records related to the Minister's departmental mandate. That satisfies the requirements of the first part of the test. The second question asks, could the government institution reasonably expect to obtain a copy upon request? In the case of emails on a government server, no request was necessary, it had possession of the emails. As the Supreme Court of Canada notes, physical control over a document will obviously play a leading role in any case.

[39] Considerations in applying the second part of the test also include the substantive content of the record, the circumstances in which it was created and the legal relationship between the government institution and the record holder.[19]

[40] The substantive content sought by this applicant was records related to the former Minister of Health and Wellness' mandate. Mandate could reasonably be understood to be departmental business or departmental matters. *FOIPOP*'s purpose is to ensure public bodies are fully accountable to the public. Records in relation to departmental business or departmental matters are the exact records *FOIPOP* is intended to cover.

[41] The circumstances in which the records were created would vary depending on the topic. But in both requests, the applicant sought records created or received by the Minister in the course of his duties as the head of a public body.[20] Clearly then, the circumstances of creation of the records sought placed the records within the control of the public body.

[42] With respect to the legal relationship between the government institution and the record holder, the record holder was a minister and the head of the government institution for the purposes of *FOIPOP*. Again, this factor strongly supports a finding that the requested records are within the control of the public body.

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[17] Discussed at paras 19 and 20 above.

[18] In *City of Ottawa,* the Court referenced the Federal Court of Appeal decision in *Minister of National Defence*. The FCA cited the same two-part test approved by the SCC. At para 48 the Ontario S.C.J says, "the contents do not relate to a City matter" and so, as noted according to the SCC articulation of the test, that ends the inquiry. In the *University of Alberta* case, the Court determines that while, in a very general sense, the content of the record relates to the public body's mandate and function, it is much more intimately connected to the mandate and function of a federal body (para 106).

[19] *National Defence* at para 56.

[20] Section 3(1)(c) of *FOIPOP* defines "head" in relation to a department as the minister who presides over it.

[43] I find that the emails of the Minister that related to his mandate as Minister of Health and Wellness sent to or from personal email accounts and that reside on government servers are within the custody and control of the Department.

Control of emails not on government servers

[44] Because the Department never conducted a search for records responsive to these requests, it is unclear what it would have found on government servers. Based on the applicant's third request filed in January 2017 that covered a subset of the records she originally requested, it is clear that there are at least 81 pages of responsive records on government servers. What is not clear is whether it may also be necessary for the Minister to conduct a search of his personal email accounts to ensure that all responsive records are produced in response to these access to information requests. This leads to the question, does the Department have control over emails that relate to departmental business but are only located in personal email accounts of a minister?

[45] The purpose of *FOIPOP* is to ensure that public bodies are fully accountable to the public by giving the public a right of access to records. Any interpretation of control must take into account this fundamental purpose.

[46] This issue of ministers using personal email accounts to conduct government business has recently arisen in Saskatchewan and Newfoundland. In both provinces, information and privacy commissioners found that there was a positive duty on ministers to search their personal email accounts and produce responsive records.

[47] In Saskatchewan, the information and privacy commissioner recommended that "the Minister or his staff follow best practice and review all emails on his "saskparty.com" and "sasktel.net" email accounts and ensure that all records created or held that relate to government business be moved into government controlled management systems with the original deleted from his "saskparty.com" and "sasktel.net" email accounts."[21]

[48] In Newfoundland, an applicant sought emails dealing with government business from a minister's personal email account for a specified time period. In response, the minister conducted two searches of her personal email accounts in the presence of a public servant and then swore an affidavit attesting to the scope of her search.[22] Commissioner Molloy stated, "There is no doubt that email sent to or from the Minister's personal account would be subject to the ATIPPA, 2015…ATIPPA 2015 applies to any records, created or received by officers and employees of public bodies in the course of their duties, which relate to the business of the public body, including those created or received on personal email accounts."[23]

[49] Commissioner Molloy recommended that the minister create and implement a policy prohibiting the use of personal email accounts to conduct government business by all personnel in her Department. In making that recommendation Commissioner Molloy states,

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[21] Investigation Report 101-2017 at para 43.
[22] Report A-2016-022 .
[23] Report A-2016-022 at para 10.

> True commitment to accountability and transparency dictates the implementation of record keeping practices and policies that preclude use of personal e-mail accounts or other means that either avoid creating records or make records inaccessible. Premiers, ministers, chairs, directors and other executives who use personal e-mail to conduct the business of a public body set a tone throughout the body that this is acceptable, and perhaps preferred. Citizens of the Province are entitled not to have their access to information subverted by the use of personal e-mail. The public also must be satisfied that communications surrounding a public body's decisions and its actual decisions are documented so that there are records to access. Privacy breaches become more likely as well when government records are stored outside of government networks.[24]

[50] The U.S. Court of Appeals for the D.C. Circuit recently agreed that messages contained in a personal email account can be considered government records subject to *Freedom of Information Act* requests, noting that:

> If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control….A current official's mere possession of assumed agency records in a (physical or virtual) location beyond the agency's ordinary domain, in and of itself does not mean that the agency lacks the control necessary for a withholding"[25]

[51] I agree with the U.S. Court of Appeals' comment with respect to the suggestion that a department head in particular can hold responsive emails while the department itself claims a lack of control over those emails:

> If the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced. The agency's claim before us simply makes little sense.[26]

[52] Likewise, the U.K. Information Commissioner's Office determined that government departments may need to search personal email accounts. Where a public authority has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search his or her personal email account for any relevant information.[27]

[53] As noted earlier, the Minister of Internal Services has acknowledged that it is the content not the medium that is at issue. Anything that is about government business is subject to

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[24] Report A-2016-022 at para 26.
[25] *Competitive Enterprise Institute v. Office of Science and Technology Policy,* No. 15-5128 (DC Cir. 2016) (*Competitive Enterprise*).
[26] *Competitive Enterprise* at p. 8.
[27] *Freedom of Information Act* 2000 (FOIA) Decision Note 01 March 2012, Reference FS50422276.

FOIPOP. I agree with Minister Arab. The Department has acknowledged that records related to government business are under the control of the Department regardless of the account used. If the Department accepts that emails related to government business are under the control of the Department and anything about government business is subject to *FOIPOP*, then why has the Department not simply requested the Minister search his personal email accounts and produce the responsive records?

[54] The Department asserts that it does not have "control" over personal email accounts in the context of these two access to information requests for records relating to the mandate of the Minister. As a practical matter, if true, this means that using personal email accounts for government business is an effective strategy for subverting the right to access information. Is the Department's position correct in law?

[55] Applying the Supreme Court of Canada's two-step process for assessing control:

1. Does the record relate to a departmental matter? If it does not, that ends the inquiry.
2. If it does relate to a departmental matter, then all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request.

[56] It seems all parties acknowledge that emails relating to departmental business are departmental matters. I have found above that this includes the applicant's requests for emails relating to the Minister's mandate. This satisfies the first part of the Supreme Court of Canada test.

[57] What are other relevant factors? The substantive content of the requested records are those records that relate to the mandate as Minister of Health and Wellness. This is a departmental matter and supports a finding that the records, even on personal email accounts, are under the control of the Department.

[58] The legal relationship between the government institution and the record holder is that the record holder in this case was the Minister and the head of the relevant public body at the time the records were created. This supports a finding of control.

[59] The email accounts are not physically in the possession of the Department. They are the electronic equivalent of a rented unit. The Minister holds the key (a password) but the email accounts themselves reside on servers owned by third parties. There is no evidence however, that such a relationship would interfere with the Minister's ability to search for and produce copies of records that fall within the scope of these requests.

[60] In the course of the discussions relating to these requests, the Department asserted that employees understand through training, practice and information notes that any emails they send or receive for work purposes on their personal email accounts must make their way into the government system.[28] Clearly then, the Department has attempted to assert some control over

[28] As stated by IAP personnel in a meeting with OIPC investigators on January 17, 2018.

employees and their personal email accounts by requiring employees move emails from those accounts into the government system.

[61] I find that there are sufficient indicia of control to require that, at the very least, the Department request that the Minister conduct a search of his personal email accounts for records responsive to these requests.

Were the August 24, 2017 decision letters open, accurate and complete as required by s. 7(1)(a) of *FOIPOP*?

Did the Department meet its duty to assist the applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?

[62] The final two issues both relate to the Department's duty to assist. The duty to assist is set out in s. 7(1)(a) of *FOIPOP* and provides that where a request is made pursuant to *FOIPOP*, the public body shall make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.[29] Applicants have an obligation to make their requests in writing and to specify the subject-matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record.[30] If they fail to do this, the Regulations to *FOIPOP* place a clear obligation on public bodies:

> 3 (2) If an individual familiar with the subject matter is unable to identify a record for which an application is made, the head of the public body shall so advise the applicant and permit the applicant to amend the application to provide additional particulars.[31]

[63] In Review Report 16-05 I made the following comment regarding the processing of access to information requests:

> [40] Best practices for public bodies when receiving and interpreting access to information requests are:
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> - Interpret access to information requests in a fair, reasonable, open and flexible manner.
> - Before deciding whether sufficient particulars are required, consult with an individual familiar with the subject-matter and ensure that he or she is taking into account the public body's duty to make every reasonable effort to assist the applicant.
> - If further particulars are required:
>   - Immediately (within a day or two of receipt of the request) advise the applicant of the need for further particulars.
>   - Ask specific questions and make specific suggestions to illicit the needed information.

[29] *FOIPOP* s. 7.
[30] *FOIPOP* s. 6.
[31] *Freedom of Information and Protection of Privacy Regulations* NS Reg 105/94, s. 3(2).

- Advise the applicant that he or she has the right to request a review of the public body's decision to place the request on hold.
- Permit the applicant to amend the application to provide additional details. o Respond promptly to the applicant's communications and questions.
- Conclude the on hold time as quickly as possible, generally within a few days.
- Restart the 30 day timeline immediately upon receipt of the needed information.

[64] The Department's evidence was that it made no effort to communicate with the applicant upon receipt of the requests. It did not tell her it did not understand the meaning of "mandate" and it did not seek clarification. Instead, 29 days after receipt of the requests, the Department advised the applicant that it did not have custody or control of the requested records. This response was certainly not "without delay" as required under s. 7(1)(a) and did not follow the best practices outlined in Review Report 16-05.

[65] The applicant confirms she was not advised that the Department was confused by her use of the word "mandate". The applicant's position was that, in fact, the Department did clearly know that she was focused on the use of personal email accounts for departmental business because she published media articles on the topic at the time of her access to information requests and because the Department had previously advised her that she could not access constituency-related material under *FOIPOP*.

[66] *FOIPOP* places a positive duty on public bodies to actively assist applicants. The Regulations go further, making it mandatory that where a public body is unable to identify a record, the public body shall so advise the applicant. This did not occur in this case. In fact, the Department made no effort to assist the applicant in any way until it made its offer to conduct a limited search in a communication to this office dated November 29, 2017 – four months after the original access to information requests and three months after access was denied.

[67] The Department concedes that it never conducted a search for records in response to these requests. Its stated view from the outset was that if the requests were interpreted as requests to search personal email accounts, it did not have "custody or control" over those records. If the request was to search government email accounts, IAP communicated that, "All records related to his mandate as a member of the executive council…is far from being a clear subject matter. One could argue that all records in the inbox of the Minister during the period of time indicated could be related to his mandate. Wording access to information requests in this fashion is, in my view, an abuse of process."[32]

[68] What this response clearly misses is that the applicant was only seeking records relating to the Minister's mandate sent to or from personal email accounts. Presumably, this would not have resulted in producing every record in his government email account's inbox but only those emails sent to or from personal email accounts. In truth, if it did result in producing every record in his inbox, this is an important piece of information for the public to have. As a practical

[32] Email dated March 13, 2018 from IAP Services.

matter, if the search had resulted in the identification of thousands of responsive records, the Department could have issued a fee estimate. It did not.

[69] On January 11, 2018, OIPC investigators asked IAP officials to confirm that Minister Glavine had been advised of the access to information requests and asked to preserve any potentially responsive records pending the outcome of this review. IAP officials refused this request.

[70] When asked by OIPC investigators whether Minister Glavine was aware of the government practice to require emails that are sent or received on personal email accounts be sent into the government system, IAP officials declined to answer in relation to Minister Glavine's knowledge or practice. Instead they stated, "All Ministers are provided training and guidance on their responsibilities with regard to government record keeping…The best practices that are followed include instructions on transferring records to the government record-keeping system and then deleting the government records(s) created on personal account(s) or system(s) ioutside (sic) the government servers."[33] There is no evidence before me that such instruction was ever provided to Minister Glavine or, if it was, that it occurred before the time period covered by these two access to information requests.

[71] When asked by OIPC investigators what Minister Glavine's normal practice was for getting emails that were sent from non-government email accounts into the government system, IAP officials declined to answer the question. Instead they stated, "As noted, Ministers are aware of their obligations and there are different methods that are provided for filing records in the appropriate repository depending on the circumstances…There is no requirement for a single method or practice to be followed."

[72] The evidence establishes that there is no government standard practice or requirement for how government records found in personal email accounts are transferred into the government system. There is no evidence that Minister Glavine was made aware of these access to information requests. Further, despite the OIPC's specific request, the Department provided no evidence that the Minister was asked about his knowledge of the government practice of filing government records within the government system during the relevant time period (March 2016 – May 2017) and provided no evidence that Minister Glavine was asked about his own personal practice for ensuring this occurred during the time period in question, assuming he was aware of the requirement. No explanation was offered for why IAP, on behalf of the Department, declined to provide this information.

[73] The evidence before me then, is that there is a general practice that government officials are expected to follow. We requested documentation of the practice but none was provided. The evidence is that government officials are not told how to properly manage their records to ensure they make their way into the government system so that the only way to know how a particular official has complied with the practice is to ask him or her. Yet, in this case, IAP officials declined to ask the relevant official what his practice was. This is a "don't tell, don't ask" records management philosophy. In effect, in response to these requests, the Department relies on the Department's failure to set clear standards for records management and then refuses to

[33] Email from IAP Services dated Feb. 8, 2018.

take the reasonable alternative approach of determining what the relevant individual's approach was.

[74] Interestingly, the Minister himself has been more forthcoming. It was the applicant in this case who provided an email exchange she had with a communication's official with the Department in July 2017 that revealed the following information about the Minister's knowledge with respect to the use of personal email accounts:

> I am not a regular user of email and my standard practice in my time as Minister of Health and Wellness was for the department to email information and items for approval to my Executive Assistant, who would then bring it to my attention. My EA used his provincial government email address for this work. The email in question was a public news release that my staff wanted me to see before it went out and they needed to reach me quickly. I've taken steps to ensure this doesn't happen again, regardless of the deadline." – **Minister Leo Glavine**

[75] As a result, it appears that the Minister's former executive assistant would be an appropriate individual to provide evidence as to the Minister's email filing habits between March 2016 and May 2017. However, when the Department was asked by the OIPC to produce the former executive assistant as a witness, the Deputy Minister to the Premier responded on August 9, 2018 indicating that the executive assistant would not be made available for an interview by this office.

[76] It is one of the many weaknesses of Nova Scotia's outdated right to information law that this office does not have the power to summons witnesses. The statutory power to summons witnesses is common to numerous other information and privacy commissioners.[34] In any event, I have no evidence before me provided directly by the Department as to the Minister's email practices during the relevant time period.

[77] In its response letters to the applicant the Department said only that:

> The *Freedom of Information and Protection of Privacy Act* applies to records that are in the custody or under the control of a public body. This does not include personal email accounts. As such, we cannot respond to your request.

[78] This was an inaccurate response. The decision says the Department did not have custody or control of the records but the Department's submission is that the Department did not have enough information to make such a decision and a third document suggests that it was really the broad scope of the requests that was the problem. The Department's response to the applicant's January 2017 request proves that the Department in fact did have enough information to conduct a search for emails sent to or from a personal email account.

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[34] See for example *Access to Information and Protection of Privacy Act, 2015* (Newfoundland) s. 97(2), *Freedom of Information and Protection of Privacy Act* (PEI) s. 53, *Freedom of Information and Protection of Privacy Act* (Ontario) s. 52(8), *Freedom of Information and Protection of Privacy Act* (Manitoba) s. 50(1), *Freedom of Information and Protection of Privacy Act* (British Columbia) s. 44.

[79] I have determined above that there was no uncertainty as to the meaning of "mandate" such that the Department could not conduct a search for records. What did *FOIPOP* require that it do in the circumstances? *FOIPOP* requires that public bodies make "every reasonable effort" to search for records. In this case, given the uncertainty about the Minister's email practices at the time, a reasonable approach would have been to ask the Minister about his practices. If he could confidently say that every email that related to a departmental matter had been filed into the government system, then the Department could then obtain information about how the Minister accomplished that outcome and design its search based on that information. If the Minister could not confidently say that every email that related to a departmental matter had been filed into the government system, then the Department should have asked the Minister to conduct a search of his personal email accounts and ensure that all of the records were forwarded into the government system.

[80] The Department conducted no search for records either inside or outside of the government system. The Department did not contact the Minister regarding his records management practices and did not request that the Minister conduct a search of his personal email accounts.

[81] I find that the Department failed to meet its duty to assist in four significant ways:

i. The Department failed to make any effort, let alone every reasonable effort, to search for responsive records.
ii. The Department failed to advise the applicant that it could not identify responsive records based on the use of the word "mandate".
iii. The Department failed to give the applicant an opportunity to amend the application to provide additional particulars as required under *FOIPOP*.
iv. The Department's response letter was not open, accurate or complete in that it failed to communicate the Department's decision that the word "mandate" lacked sufficient clarity to allow it to process the applicant's request.

FINDINGS & RECOMMENDATIONS:

[82] In summary, I find:

1. The emails of the Minister that related to his mandate as Minister of Health and Wellness sent to or from personal email accounts and that reside on government servers are within the custody and control of the Department.
2. There are sufficient indicia of control to require that, at the very least, the Department request that the Minister conduct a search of his personal email accounts for records responsive to these requests.
3. The Department failed to meet its duty to assist in four significant ways:
    i. The Department failed to make any effort, let alone every reasonable effort, to search for responsive records.
    ii. The Department failed to advise the applicant that it could not identify responsive records based on the use of the word "mandate".

iii. The Department failed to give the applicant an opportunity to amend the application to provide additional particulars as required under *FOIPOP*.

iv. The Department's response letter was not open, accurate or complete in that it failed to communicate the Department's decision that the word "mandate" lacked sufficient clarity to allow it to process the applicant's request.

[83] I recommend:

1. Minister Glavine review all personal email accounts used between March 1, 2016 and May 31, 2017, including his Gmail, Blackberry and kingswest.ca accounts, identify all emails that relate to government business and move those records into government system. A complete copy of those emails should also be provided to IAP for the purposes of processing these access to information requests. Minister Glavine should then ensure that all original emails in the personal email accounts are securely deleted.
2. Minister Glavine confirm in writing the scope of his email search and that this confirmation be provided to my office.
3. Minister Glavine add a message to his personal email accounts directing correspondents to address any departmental business to his 'novascotia.ca' (government) email account.
4. The Department gather information on Minister Glavine's email practices between March 1, 2016 and May 31, 2017 and then conduct a search of the government email system for records responsive to the applicant's requests based on the information gathered.
5. The Department provide all responsive records (subject only to limited and specific exemptions which may apply) to the applicant within 60 days of receipt of these recommendations.
6. The Department develop and implement a policy prohibiting the use of personal email accounts to conduct government business. Include in the policy clear directions on how to file records relating to government business into the government system and on how to securely delete the original emails.

[84] Because of the importance of the use of personal email accounts to conduct government business and its potential to circumvent the public's right to know, I will publish the Department's response to these recommendations upon receipt.

September 17, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC Files 17-00266 and 17-00268