

Review Report 18-05 Department of Health and Wellness
September 17, 2018
Response to the Review Report's Findings

Dear Ms. Tully:

Re: Response to the Review Report 18-05 – Department of Health and Wellness

We are writing in response to your Report of September 17, 2018. This letter is our response to the six (6) recommendations contained at the end of your Report. We also outline key aspects of the processing of the requests by or on behalf of the Department of Health & Wellness that we wish to highlight for the public record.

As you are aware, the processing of the requests that gave rise to this Review involved the Department of Health and Wellness (“DHW” or the “Department”) and the Department of Internal Services (“ISD”) through the shared services protocol. For this reason, this response is provided on behalf of both DHW and ISD. Minister Glavine is also no longer the Minister of Health. These facts should be kept in mind when receiving this response.

I. Introduction

In its Background section at para [4], the Review states that the applicant filed two access to information requests in July 2017 to look into “the extent of the use of personal email accounts” by Minister Glavine over a fourteen-month period while he was the Minister of Health and Wellness. This had the result of making the Minister’s practice of using personal email to conduct government business the subject of the Review.

Throughout the process, the DHW, with the advice and assistance of ISD, has actively participated in meaningful efforts to fulfill the substance of the initial requests. Significantly, it facilitated the fulfillment of a third request that arose as a result of efforts to assist the applicant during the Informal Resolution stage. There was also no attempt to obscure the fact that the Minister had used personal email on some occasions; personal responsibility was taken and corrective actions were implemented. Our position in this process has, from beginning to end, sought to comply with the substance of the initial requests within the frame of reasonableness and the *Freedom of Information and Protection of Privacy Act* (Act).

Your Report has continued the conversation on this very important topic for government. The speed and pervasiveness of modern technology continues to shape and inform how government deals with the incredible volume of material Ministers and other public servants deal with on a daily basis. The Departments appreciate the opportunity to clarify the efforts taken in this case and, through the response to the recommendations, demonstrate its continued commitment to transparency.

II. Corrective Actions Taken to Date

It is important to clarify the steps taken before the filing of your most recent Report in relation to the issues raised in the initial requests. In the summer of 2017, Minister Glavine acknowledged the error of using personal email and pledged to discontinue the practice. Concurrently, government took steps, more broadly, to ensure that only government email is used for government business. These steps included presentations in 2017 to deliver the message to all of Cabinet, Caucus, Executive Council Office, and deputy ministers. Government has also been working on a set of Guidelines to govern the use of personal email, which it plans to implement immediately [See below, Response to Recommendation #6 – Information Access and Privacy Services (“IAP”) Practice Bulletin – Use of Personal Email for Government Business].

These steps were taken as part of IAP Services’ ongoing mandate since its formation in 2015 to undertake training and share best practices with all government employees to promote access to information and transparency in government.

III. Clarification: Review Report 18-05

The Departments offer the following clarification. The Report acknowledges at para [70] that, during the lengthy Informal Review stage which occurred before the Formal Review, IAP Services explained to your investigators that all Ministers are provided training and guidance on their responsibilities with regard to government record keeping. Your Report notes this at para [70]:

[70] *“... The best practices that are followed include instructions on transferring records to the government record-keeping system and then deleting the government record(s) created on personal account(s) or system(s) outside the government servers.”*

Shortly after, at para [72], your Report states the contrary:

[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.”*

Earlier, at para [60], the Report also acknowledges the complementary activities underway with staff to inform them of government requirements to preserve records in government systems:

[60] *“In the course of 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. Clearly then, the Department has attempted to assert some control over employees and their personal email accounts by requiring employees move emails from those accounts into the government system.”*

At para [9], the Report further acknowledges that, in July of 2017, Minister Glavine described his email practices to the applicant in this Review:

[9] *"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

The Report goes on at para [9] to state that ISD told the applicant that:

[9] *"... All ministers have been reminded of their record-keeping responsibility, including the importance of using their government email addresses when doing government business."*

We emphasize that efforts were made to address the issue raised by the request, and that there was a demonstrated commitment to training and education on the requirement to move emails onto the government system, and an immediate response to correct any errors.

IV. Response to Findings at para [82]

With respect to the Findings, the Department provides the following comments.

[82] 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 or control of the Departments.*

The Departments agree with this finding.

Departments retain within their custody or control, according to the *Government Records Act*, personal emails about government business, and routinely release these types of emails to applicants. In the current case, this is how the applicant came to know that the emails forming the context of this Review existed.

Proof of this practice can be found in para [8] of your Report, which explains that, in response to a prior FOIPOP request that the DHW received from the applicant in this Review in April of 2017, the Department provided personal emails of Minister Glavine that were found on government servers. It was because the applicant located the Minister's personal emails on government servers through this first FOIPOP in early 2017 that the applicant filed the two subsequent applications in the summer of 2017 – the requests that led to the current Review.

[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. ..."* (emphasis added)

Additional proof of the practice is found at para [11] of your Report:

[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.”*

As a result of the January 2018 application, the applicant received an 81-page response from the DHW, including personal emails about government business.

In the current Review, DHW stated in its decision letter that it is personal email accounts that are not under its custody or control. It did not say that personal emails located on government servers are not in its custody or control.

The main point of contention in the current Review, therefore, was the *method* advanced to locate this type of record – a search of the Minister’s personal email account for the requested records, or a search for the same type of records *within* the records under the custody and control of DHW.

This point of contention remained, despite a lengthy period of give-and-take at the informal investigation stage between ISD and your Office / the applicant to find a compromise acceptable to the applicant.

[82] 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.*

DHW does not have control or ownership of external systems and the documents they may contain. Searching external systems for government records as a matter of practice is not a position the Departments can support. Absent some evidentiary basis for such a search, a request to simply search a private email system is neither legally nor practically prudent.

Notwithstanding this position, Minister Glavine will be asked to conduct a search as indicated under the Response set out below to Recommendation #1. We understand that Minister Glavine has publicly acknowledged that there is some evidence to show that personal email was used. While efforts taken to date have addressed the substance of the initial requests, we will support a search related to Minister Glavine’s emails.

[82] 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.***

The Departments strongly disagree with these findings. They do not acknowledge the months-long period of activity on the part of ISD to find an informal resolution to the Review before it went to the Formal Review stage. This occurred in the fall and winter of 2017.

By November 29th of that year, in an effort to assist, the applicant was provided an offer to conduct a targeted search over a shorter period of time, but the applicant declined the offer. Two weeks later, in December of 2017, the applicant filed “a similarly worded request” as the one previously rejected and received 81 pages of responsive records from the Department, as noted above [para 32].

It is also significant that, during the informal resolution stage, IAP Services staff, on behalf of the Department, worked with investigators from your Office on the practicalities of searching alternate accounts and methods of getting the records to the applicant. In fact, the Report suggests these efforts had little intrinsic value:

[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. ...”

The 81-page response to the new request that resulted from the above offer illustrates that the Department retains personal emails about government business within its custody or control, pursuant to the *Government Records Act*, and routinely makes them available for disclosure in response to FOIPOP requests.

During the investigation stage, no evidence was ever offered by Review Office staff or the applicant that there were records that should have existed in the government systems that actually did not. There was no evidence presented of wrongdoing on the part of the Minister. Rather, all evidence suggests the Minister’s records – regardless of medium of creation – were being located inside the government system, and in the absence of custody or control of private email accounts, the Departments were attempting to find ways satisfactory to the applicant to search for the same records inside the government system, over which it did exercise custody or control.

V. Response to Recommendations at para [83]

In response to the recommendations found at para 83 of the Report, we respond as follows:

RECOMMENDATION #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 the access to information requests. Minister Glavine should then ensure that all original emails in the personal email accounts are securely deleted.

RESPONSE: The intent of this recommendation is to capture government business that may have been diverted to Minister Glavine’s personal emails, to ensure they are stored in the government email system. To that end, and despite the efforts already undertaken, Minister Glavine will review his personal email accounts for the time period identified for messages received into those accounts from a “novascotia.ca” address. He will then determine if they relate to government business. These emails will then be moved into the government email system.

RECOMMENDATION #2: Minister Glavine confirm in writing the scope of his email search and that this confirmation be provided to my office.

RESPONSE: Minister Glavine will employ the search strategy described above and will confirm it in writing once the task is completed.

RECOMMENDATION #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.

RESPONSE: This recommendation is not tenable. Ministers and Members of the House of Assembly receive countless emails from constituents and members of the public, based on email addresses found on numerous sites and various documents. Constituents and members of the public would have difficulty discerning whether the matter they are advancing is “departmental business” or a personal matter requiring advocacy or explanation from the Minister or Member. An automated response would hinder effective communication with members of the public. Vigilance regarding proper record-keeping of government business on the government’s email system will instead be maintained.

RECOMMENDATION #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.

RESPONSE: The response to recommendation #1 satisfies this recommendation. An email coming *from* a personal account into the government system is a government record. It would also be operationally disruptive to search every Department employee’s emails to determine what was received from a personal email account used by the Minister, especially when the receipt of such an email would place the matter in the government system in any case. A limited search of communications received from the personal email of the Minister to his Deputy Minister, Assistant Deputy Minister, Executive Assistant, and Director of Communications would be feasible, as these are the officials with whom he communicated most frequently. This search would also be constrained to “government business” as described above.

RECOMMENDATION #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.

RESPONSE: The Department will provide any documents retrieved, subject only to the exemptions available pursuant to the legislation.

RECOMMENDATION #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.

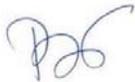
RESPONSE: IAP, working in conjunction with Executive Council Office, has created the attached Practice Bulletin on this issue, and plans to implement it immediately [IAP Services Practice Bulletin – Use of Personal Email for Government Business]. This is in addition to the efforts already taken to ensure only government email is used for government business. This includes presentations to Cabinet, Caucus, Executive Council Office, and deputy ministers in the summer and fall of 2017, when the Minister originally acknowledge the error and steps were taken to address the issue across government.

VI. Conclusion

The Departments remain committed to the principles of transparency and openness, as well as to the requirements of the *Freedom of Information and Protection of Privacy Act*. They have participated meaningfully in the resolution processes relating to these requests and have taken responsibility and corrective action appropriately, as early as the summer of 2017.

The Applicant has the right to appeal this decision to the Supreme Court within 30 days of the date of this letter.

Yours truly,



Denise Perret
Deputy Minister, Health and Wellness



Jeff Conrad
Deputy Minister, Internal Services

Attachment

cc: Maria Lasheras, Chief Information Access and Privacy Officer, IAP Services