



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-023

October 14, 2016

City of Corner Brook

Summary:

The Applicants made four requests to the City of Corner Brook for information relating to an ongoing contract between [named company] and the City. The City provided some of the responsive records, but declined to provide others, citing section 30 (legal advice), 33(2) (information from a workplace investigation), and 40(4) (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. With respect to section 40(4), the Commissioner found that the City had properly relied on this exception in its redactions. With regard to its application of section 33(2), the City did not provide responsive records for review and further acknowledged that no workplace investigation had been undertaken. Therefore the Commissioner recommended release of all records withheld under this section. With respect to section 30, the Commissioner found that the City had applied the exception correctly to a number of records, but incorrectly to others. As a result, the Commissioner recommended partial release of the records withheld under this section. The Commissioner also recommended that the City review section 13 (duty to assist applicant), along with resources from the Access to Information and Protection of Privacy Office relating to the duty to assist. The Commissioner further recommended that the City review the sections of the *ATIPPA, 2015* relating to an investigation from this Office so that the City is aware of the timelines and requirements of a public body during an investigation.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015,
S.N.L. 2015, c. A-1.2, ss. 13(1), 30, 33(2), 37(1)(a), and 40(4).

Authorities Relied On: *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, 2015 NLTD (G) 183.

OIPC Reports [A-2013-15](#), [A-2013-16](#), [A-2016-009](#), [A-2014-004](#), [A-2015-10](#), [2007-007](#) at <http://www.oipc.nl.ca>.

Other: Report of the 2014 ATIPPA Statutory Review Committee, 2015, at www.atipp.gov.nl.ca, Volume I: Executive Summary. The OIPC's *Public Body Guidelines for Preparing for an Access Complaint*.



I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicants, acting together, submitted four access to information requests to the City of Corner Brook (the “City”). The subject of the requests relates to a contractual disagreement between the City and [named Company], owned by one of the Applicants and employing the other.
- [2] Requests 1 through 3 sought to obtain e-mail and other correspondence from a number of named City employees relating to the contract and specific contract issues, costs associated with specific contract services, foreman shift records, hired equipment services records, a report of inspection completed by [named individual] for [named company] related to contract procedures during a specific time period, all e-mails and written correspondence within the City that included the Applicants or [named Company], and any information under the City’s Respectful Workplace Policy that makes reference to the Applicants and/or [named Company].
- [3] The fourth request sought detailed records regarding both “water leak repairs” from April 1st to December 31st, 2015 and “house abatement” from January 1st to April 1st, 2016. It also requested e-mail and correspondence from a number of named employees of the City regarding both these issues, as well as the duties of departmental employees of the City “when starting and overseeing contracts.”
- [4] The City informed the Applicant that it had decided to disclose some requested records, with redactions pursuant to section 40(4). These included e-mail and other correspondence from a number of named City employees relating to the contract and specific contract issues between November 1st, 2014 and February 3rd, 2016, the report of inspection completed by [named individual] for [named company] related to contract procedures during a specific time period, and most of the responsive records pertaining to the Applicant’s fourth request. The City also informed the Applicants that a copy of its Respectful Workplace Policy could be viewed on the City’s website.

- [5] Additionally the City narrowed the request for all e-mails and written correspondence within the City that included the Applicants or [named company] to “staff members that would have such information.” The narrowed request included the following City employees: the Supervisor of Human Resources, the Assistant Director of Infrastructure and Public Works, the Engineering Technician for Work Planning, and the Director of Finance and Administration. After reviewing the responsive records of the narrowed request, the City refused disclosure in accordance with section 33(2).
- [6] Finally, the City denied access to all e-mail and other correspondence from a number of named City employees related to the contract and specific contract issues from February 3rd, 2016 to the date of the request, costs associated with specific contract services, foreman shift records, and hired equipment services records, pursuant to section 30 of the *ATIPPA, 2015*.
- [7] The Applicants filed complaints with this Office in relation to all four access requests, requesting that the Commissioner review the decision of the City to withhold records.
- [8] Attempts to resolve these Complaints by informal resolution were not successful, and the complaints were referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II APPLICANTS' POSITION

- [9] The Applicants made several arguments in support of their position against the City's decision.

Section 40(4): Disclosure harmful to personal privacy

- [10] With respect to the responsive records the City redacted pursuant to 40(4), the Applicants only had concerns with the redactions made under the fourth request, noting that the City had stated in its response to them that “attached is a table outlining the records requested and our decision with respect to disclosure of the requested records,” however no

table was attached to the response. The Applicants are seeking a copy of the table in question and requested a review of the City's response "on the basis that this is absent from review."

Section 33(2): Information from a workplace investigation

[11] With respect to the responsive records over which section 33(2) was claimed, the Applicants argued that the search should not have been narrowed to incorporate only a few City staff, a decision made unilaterally by the City. The Applicants noted that they had discussed narrowing the request with the City and had agreed to narrow it to the timeframe of "the inclusive dates September 1st, 2014 to present," the latter of which was May 26th, 2016. The Applicants therefore requested the City provide the requested information in its entirety (subject to the narrowed timeframe) as they believed the City "has its own server" and "a search on this server by the IT department would quickly produce the results from all staff." Additionally, the Applicants argued that all responsive records in this request could not possibly fall under section 33(2) given the constraints of the section and the City's own parameters for carrying out a workplace investigation under its Policy Statement (which they included in their submissions), requiring several steps that were not carried out by the City.

Section 30: Legal advice

[12] With respect to the responsive records over which section 30 was claimed, the Applicants noted that no active litigation had begun before, on, or after February 3rd, 2016 between either of themselves or [named company] and the City. Additionally, they believed that section 30 was being abused by the City to deny access to records that included costs explaining the use of public dollars as well as the City's decision-making processes that involve public services, and expressed concern that this action was allowing the City to "become less accountable to its stakeholders." Furthermore they argued that the City was simply "cc'ing all correspondence among City staff to the City solicitor" in an effort to claim solicitor and client privilege, believing this to be a "manipulative tactic" to deny access.

Section 13(1): Duty to assist

[13] Finally, the Applicants claimed the City had been negligent in its duty to assist under section 13(1). They based this claim on what they feel are refusals of access “without merit,” requests that were “narrowed beyond reason,” and documentation that was “incomplete.” Additionally they believe the City initially misrepresented the access process by suggesting it could complete their requests without a formal ATIPP request, leaving the Applicants without a complaint process when they felt the City did not respond appropriately. The Applicants then had to spend additional time re-making the same requests formally when the informal ones did not result in what they were looking for.

III PUBLIC BODY’S POSITION

Section 40(4): Disclosure harmful to personal privacy

[14] The City acknowledged its oversight in not providing the Applicants a copy of the table “outlining the records requested and our decision with respect to disclosure of the requested records,” noted in its response to the Applicants. It agreed to send the table to the Applicants as initially intended.

[15] At the informal review stage, the City made no specific representations as to why it applied section 40(4) to some of the responsive records. However, at the formal investigation stage it did make representations noting that the section was used in the Applicants’ fourth request to protect third party personal information “related to the medical history of some employees listed on the foreman’s shift reports.” No specific representations were made as to why the City employed the section in other responsive records, namely, e-mail and other correspondence from a number of named City employees related to the contract and specific contract issues between November 1st, 2014 and February 3rd, 2016, and the report of inspection completed by [named individual] for [named company] related to contract procedures during a specific time period.

Section 33(2): Information from a workplace investigation

- [16] The City asserted that the scope of the Applicants' request for responsive records over which it eventually applied the section 33(2) exception was "quite broad." It made the unilateral determination to narrow the scope to search a specific group of individuals. It provided no evidence as to why the request would "unreasonably interfere with the operations of the City", stating only that it made a "reasonable assumption of the staff that would be in custody of such correspondence related to the application."
- [17] Having narrowed the search, the City went on to hold that the responsive records were subject to the section 33(2) exception covering information from a workplace investigation. The City failed to provide to this Office for review either the responsive records or representations as to why section 33(2) should be applied to those records as required under sections 43(1) and 97(4) of the Act. Instead, the City acknowledged that no "official workplace investigation" was conducted. It stated that notes were taken by its Human Resources Officer following an incident, and the Director of Finance and Administration reached out to the Applicants via e-mail to discuss the City's concerns, but there was no response from the Applicants and the City did not move forward in starting an investigation.
- [18] At the formal investigation stage the City argued that releasing the requested documentation to the Applicants would have the potential to "cause harm to employees of the City." It claimed that, upon further review of its earlier submission to this Office, section 37(1)(a) (disclosure harmful to individual or public safety) "may have been a more appropriate section to cite." The City noted in its formal investigation submission that "with the new changes to the Act along with the excessive administrative burden associated with responding to four concurrent requests," it might "have erred in choosing the appropriate section."

Section 30: Legal advice

[19] The City claimed section 30 exempted from disclosure all records concerning the contract dispute from February 3rd, 2016 to the time of the access requests on May 25th, 2016. It made this determination based on a letter it received on February 3rd, 2016 from a lawyer representing the Applicants and [named company] in relation to a contract dispute between them and the City. It noted that because the letter raised the possibility of legal action, it determined, as of that date, to refer the matter to its own in house legal counsel. The City further argued that any records that came into existence after February 3rd, 2016 and concerning the contract dispute matter were either solicitor and client privileged or subject to litigation privilege. Additionally, it noted during the formal investigation stage that it believed the February 3rd, 2016 letter “clearly demonstrates that there was reasonable contemplation of litigation” by the Applicants.

IV DECISION

Discussion of Section 40(4): Disclosure harmful to personal privacy

[20] The relevant portion of section 40(4) reads as follows:

40 (4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;*
- (c) the personal information relates to employment or educational history;*
- (g) the personal information consists of the third party's name where*
 - (i) it appears with other personal information about the third party, or*
 - (ii) the disclosure of the name itself would reveal personal information about the third party; or*

[21] The City provided the responsive records to the Applicants over which it claimed section 40(4). Although the City noted it planned to provide the Applicants with a copy of the tables

referred to by the Applicants in their arguments related to this section and their fourth request, I have not received confirmation that this has occurred. Upon review of the tables, the City has provided full disclosure (subject only to section 40(4)) for almost everything in the Applicants' fourth request, noting four instances where there were no responsive records found and providing the additional information that the City does not maintain records for those requested items.

[22] Upon review of the responsive records and the redactions made pursuant to section 40(4), the City's representations regarding some of its use of the section to redact "employee names and their reasons for not attending work (i.e. sick, doctor's appointments, etc.)" in the foreman shift reports, as well as its other uses of the section in e-mails and other correspondence and an inspection report, I find the redactions to have been made appropriately.

Discussion of Section 33(2): Information from a workplace investigation

(i) Review of submissions

[23] Section 33(2) sets out the following:

33 (2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

[24] The City did not provide to this Office the responsive records over which it claimed section 33(2) despite repeated requests to do so. It is impossible to consider or investigate whether this exception applies without reviewing the records. Therefore, the City has failed to meet its burden of proof under sections 43(1) and 97(4) of the Act. Where this burden is not met, I find that a Public Body cannot use the exception to deny access to the responsive records. As noted in Reports A-2013-15 and A-2013-16, the legislation places the burden of proving that an exception applies to requested records "squarely on the public body," and where no evidence is put forth by the public body to support its position, it is clear that it has not met its burden of proof. The fact that the City has acknowledged that no workplace

investigation occurred certainly undercuts the legitimacy of this particular claim even if the City had made some attempt to support it.

[25] At the formal investigation stage the City attempted to introduce the claim that an additional discretionary section, 37(1)(a) (disclosure harmful to individual or public safety), might be the more appropriate section to protect disclosure of these records. As noted in our *Public Body Guidelines for Preparing for an Access Complaint*, a copy of which was provided to the City in a letter dated July 18th, 2016, sent by this Office notifying of the access complaints filed by the Applicants:

“all exceptions claimed should be claimed at the time a response to the access request is provided to the Applicant. Should a Public Body wish to invoke any additional discretionary exceptions under the ATIPPA, 2015, it must inform the Applicant and this Office of its intention to do so within 10 business days of receipt of correspondence from this Office notifying the Public Body that the Applicant has filed a Complaint. Any discretionary exceptions claimed after this period will not be considered by this Office.”

[26] It is, however, worth noting that the City again presented this new argument without any representations justifying its position that release of these responsive records could, pursuant to section 37(1)(a), “reasonably be expected to threaten the safety or mental or physical health of a person other than the Applicants.” As the primary focus of the request is personal information about the Applicants and [named company], and without specific evidence from the City, even if I was willing to ignore the requirements of procedural fairness to the Applicants, I cannot reasonably conclude that release of these responsive records would meet the requirements to be exempt from disclosure pursuant to this section.

(ii) Narrowing of Scope of Request by the City

[27] Finally, the City represented in a letter to this office that the initial request for these records would have “unreasonably interfered with the operations of the City” as explanation for why it narrowed the scope of its search to only a select number of City employees. The

City also stated that the Applicants had “refused to narrow or define the search,” but provided a letter from the Applicants addressed to the City’s ATIPP Head where they did just that, providing a limited timeframe of “the inclusive dates September 1st, 2014 to present,” the latter of which was May 26th, 2016.

[28] As noted, the City did indeed contact the Applicants with a request the narrow or define the search, and the Applicants agreed to do so in respect of the time frame for the request. Upon review of the matter, it is clear that the Applicants intended the search to be much broader than the one conducted by the City. The duty to assist set out in section 13 requires public bodies to assist applicants in making a request. This would include working with the applicant to clearly define the parameters of the request. It would have been helpful in this instance had the City indicated to the Applicants the specific search it intended to conduct, in terms of narrowing it to a small number of individuals. The Applicants did not learn until the final letter of response from the City that the City had approached the request with this narrow interpretation. Furthermore, the fact that a much larger number of individuals were specifically named in the Applicants other three requests should have served as an indication that a request without specific names was intended to be broader, rather than narrower than the one undertaken by the City.

[29] It is my conclusion that the City did not conduct an adequate search, based on the fact that the Applicants clearly intended that it be a broad search rather than a narrow one, and furthermore that the City failed in its duty to assist by not clearly communicating to the Applicant the narrow parameters that it had placed around the request and ensuring that it would capture the responsive records intended by the Applicants.

[30] The remedies open to the City if it concluded that the request might unreasonably interfere with its operations are to either apply to this Office for a time extension in accordance with section 23, or apply for approval to disregard a request under section 21. Otherwise, working with applicants to narrow the scope of a request can only be done in accordance with the duty to assist and with the cooperation of the Applicants. The City did in

fact make and receive a time extension in relation to all four requests; however, its application to disregard was rejected.

Discussion of Section 30: Legal advice

[31] The City withheld approximately 600 pages of records based on section 30 of the *ATIPPA, 2015*, which states as follows:

30 (1) The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

[32] Solicitor and client privilege, including litigation privilege, is discussed in previous reports (most recently Report A-2016-009). The decision of Justice Orsborn in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, 2015 NLTD(G) 183, quoted in A-2016-009, provides an in-depth overview of solicitor and client privilege in the context of the *ATIPPA, 2015*, including litigation privilege at paragraphs 24 and 25.

[33] The Court's additional comments at paragraphs 37-39 regarding records it found not to meet the requirements for claiming solicitor and client or litigation privilege are especially worthy of repeating in this matter:

[37] However, I did not assume that the purpose of a communication was to seek or give legal advice simply because a communication was to or from counsel. I considered the legal advice component of the privilege to be less likely to be established if a communication was simply copied to counsel.

[38] Further, unless the content and context – insofar as they could be gleaned – clearly established otherwise, I have not found to be privileged internally-generated documents – including e-mail attachments.

[39] I have not considered as privileged:

i. communications which, although sent or copied to or from counsel, involve operational or logistical issues such as security for staff, meeting attendance or dealing with the media;

ii. communications between counsel and the police;

iii. generally, communications concerning a request for information by the Citizens Representative;

iv. communications with Crown counsel;

v. generally, communications forwarding ‘operational’ documents originally created by hospital staff for transmission to other non-counsel hospital staff, and

vi. communication of otherwise public documents such as court pleadings.

[34] After reviewing the letter to the City from the lawyer representing the Applicants dated February 3rd, 2016, I am in agreement that litigation was reasonably contemplated based upon its contents. The responsive records that the City claims as exempt pursuant to section 30 can be divided into three groups – electronic records (the bulk of which are e-mails involving the City’s solicitor) as set out in Part A of the attached Schedule A, and two separate packages of paper records as set out in Parts B and C of Schedule A.

[35] All three groups of the responsive records over which the section 30 exception was claimed have been reviewed and I have concluded that there are indeed a number of records that have been appropriately redacted pursuant to this section and in consideration of the above case law setting out solicitor and client and/or litigation privilege. I have concluded that all the electronic records forming Part A of Schedule A were properly withheld using this exception, as well as some of the responsive records making up Parts B and C of

Schedule A. However, I have also determined that a number of responsive records were improperly withheld pursuant to section 30 and recommend release of these records as outlined in Parts B and C of the attached Schedule A.

Discussion of section 13(1): Duty to assist applicant

[36] Section 13(1) sets out the following:

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

[37] In the *Report of the 2014 ATIPPA Statutory Review Committee, 2015, Volume I: Executive Summary*, it was noted that the law sets out three principles under this section:

“The public body must make a reasonable effort to assist the applicant, the response must be made in a timely manner, and the search must be thorough, so as to return as complete a set of records as possible.”

[38] Based on the representations of both the Applicants and the City, I find that the public body did fail in meeting each of these requirements under this section. As noted in Report A-2014-004, the public body’s duty to assist requires assisting the applicant in the early stages of making a request, conducting a reasonable search for the requested records and responding to the applicant in an open, accurate and complete manner.

[39] By not properly assessing the Applicants’ initial request and directing them to make formal access requests from the start, the City neglected its duties of assisting the Applicants at the early stages of making a request and hindered the timeliness of response. As noted in Report 2007-007, the City was required to provide a complete and accurate explanation to the Applicants that included indicating to them that by not proceeding with a formal access request, any response would be outside the scope of the *ATIPPA, 2015*, leaving the Applicants without the ability to seek a review of the City’s informal decision by this Office unless a formal request was made, incurring additional time and effort.

[40] Further, I find the City failed to conduct a reasonable search for the requested records discussed under the section 33(2) exception. The Applicants' request may have initially been quite broad, but they agreed to a reasonable narrowing of the timeframe. The City appears to have been less than fully candid with this Office about the Applicants' willingness to narrow the scope of their request and ultimately the City unilaterally narrowed the request to a search involving a limited number of City staff. Given that the Applicants did indeed agree to narrow by timeframe, but that they intended the request to cover a broader scope of City staff, I agree with the argument put forth by the Applicants that this request was "narrowed beyond reason." I do not find the City's actions to be reasonable and their original search was less than thorough, potentially returning an incomplete set of responsive records. As referenced above, I consider this to be a failure of the duty to assist as well as an inadequate search.

[41] I also agree with the Applicants that some of the City's refusals to access were "without merit" – particularly as discussed above with respect to its claim of section 33(2). The City made the claim to exempt from disclosure responsive records it claimed met the description of section 33(2), "all relevant information created or gathered for the purpose of a workplace investigation," yet it knew that no workplace investigation had been undertaken. It cannot be said then that this response was open, accurate or complete and again questions the *bona fides* of the City in dealing with these Applicants.

[42] Additionally, when a complaint is filed with my Office, we must attempt to resolve the complaint informally, and where that is not possible, to proceed to a Report. The City's effort and lack of cooperation fell far short of the usual responsiveness and efforts of other public bodies in dealing with complaints. If the City does not provide the records and representation required of it in a timely fashion, this Office is hindered in its review of the matter. The shortened timelines of the *ATIPPA, 2015* do not allow waiting for a public body to decide to provide a response and requested information at its leisure. Failure of a public body to provide the records and representations requested at the outset of a file and after repeated requests indicates either ignorance of or a lack of concern from a public body for this process.

[43] I find that the City did not appropriately discharge its duty to assist the Applicants and that it did not fully cooperate with this Office during the investigation. I further find that the City failed to comply with section 97(4) in relation to the records which were subject to a claim of section 33(2) by failing to provide them to this Office for review.

VI RECOMMENDATIONS

[44] Under the authority of section 47 of the *ATIPPA, 2015*, it is my recommendation that the City disclose the following responsive records to the Applicants:

1. The table referred to in the City's response to the Applicants' fourth request that outlines the records requested and the City's decision with respect to disclosure of those requested records;
2. All e-mails and other correspondence with the City that include the "Applicants' names or [named company]" for the inclusive dates September 1st, 2014 to May 26th, 2016, without any additional narrowing of the request (i.e. to only specific City staff), including the records which were subject to a claim of section 33(2); and
3. All records as outlined in Parts B and C of the attached Schedule A.

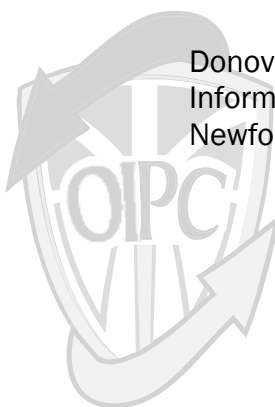
[45] Additionally, I recommend that the City review section 13 (duty to assist applicant) of the *ATIPPA, 2015*; the Duty to Assist section in the *Access to Information: Policy and Procedures Manual November 2015* from the Access to Information and Protection of Privacy Office; and the *Duty to Assist Handout* from the Access to Information and Protection of Privacy Office. I further recommend that the Department review the sections of the *ATIPPA, 2015* relating to an investigation from this Office as well as the *Public Body Guidelines for Preparing for an Access Complaint* which this Office provides to each public body at the beginning of a complaint investigation.

[46] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the City must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[47] Please note that within 10 business days of receiving the decision of the City under section 49, the Applicants may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[48] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of October 2016.

Donovan Molloy
Information and Privacy Commissioner
Newfoundland and Labrador



Schedule "A"

The following outlines the records for which section 30 (legal advice) was claimed.

PART A

These records consist of 83 documents in electronic format.

These records are protected by solicitor and client privilege and/or litigation privilege and are not to be disclosed.

PART B

This set of records consists of 438 pages.

A portion of this set of records is excepted from disclosure by solicitor and client privilege and/or litigation privilege and are not to be disclosed.

There are records which are not excepted from disclosure contained on the following pages and these are recommended for disclosure:

Pages 27, 42, 57-59, 66-68, 71-73, 76-78, 84-106, 109-121, 174-176, 179-182, 184-188, 224-262, 279, 285-288, 302-303, 312, 322-329, 331-339, 355, 369-371, and 392-411.

PART C

This set of records consists of 139 pages.

A portion of this set of records is excepted from disclosure by solicitor and client privilege and/or litigation privilege and are not to be disclosed.

There are records which are not excepted from disclosure contained on the following pages and these are recommended for disclosure:

Pages 26, 28-41, 43, 44-49, 52-55, 58-59, and 69-128.