OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2012-001

January 16, 2012

City of Corner Brook

Summary: The Applicant applied to the City of Corner Brook (the "City") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to the minutes from Council "in-committee" meetings conducted during a specific timeframe. The City responded by issuing a fee estimate. The City also indicated that if the estimate was paid and records were released, information would, nevertheless, be severed from those records pursuant to section 19(1)(c) (local public body confidences) and on the basis that the information was "of a land, legal or labour nature". At a later date, the City also claimed sections 26 (disclosure harmful to individual or public safety), 27 (disclosure harmful to business interests of a third party), and 30 (disclosure of personal information) of the *ATIPPA*. The Applicant filed both a Fee Complaint and Request for Review with this Office. The Commissioner found that the City had improperly applied sections 19(1)(c), 26, 27 and, in certain instances, section 30. The Commissioner found that some applications of section 30 were correct; however, he determined that all other information in the records should be released. The Commissioner also indicated that the City should reduce the fee estimate to reflect the time spent severing the information recommended to be withheld and the actual costs of copying. Furthermore, the City should only charge this fee if the Applicant wishes to have to a copy of the responsive records. The Commissioner also recommended that the City's practices of recording, tabling and adopting Council minutes be reviewed and revised, both for privileged and public meetings, as they are not in accordance with the recommended practices of the Department of Municipal Affairs.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, ss. 3(2) and 5(2) as amended; *City of Corner Brook Act,* R.S.N.L. 1990, c. C-15, s. 46.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated August 23, 2010 to the City of Corner Brook (the "City"). The request sought disclosure of records as follows:

> *Copies of all the minutes for Council in committee meetings from January 1, 2003 to August 17, 2010.*

[2] On September 19, 2010 the City sent the Applicant a letter enclosing a fee estimate related to his access request. The City advised that any records which would be provided upon payment of the fee estimate would be severed pursuant to section 19(1)(c) of the *ATIPPA* and, as well, any information "of a land, legal or labour nature" would also be redacted. On September 28, 2010 this Office received a Request for Review from the Applicant asking the Commissioner to review the decision of the City. Following a discussion with this Office, on November 23, 2010, the Applicant also filed a Fee Complaint related to the Request for Review.

[3] On February 28, 2011, the City responded to a request from this Office to further define what was meant by information "of a land, legal or labour nature". An analyst from this Office explained to the City that only information severed in accordance with *ATIPPA* could be withheld. Information withheld on any other basis would be recommended for release. Consequently, the City added sections 26, 27 and 30 to its claims of severing, but certain information in the records still remained severed solely on the basis of it being "of a land, legal or labour nature".

[4] Attempts to resolve this Request for Review by informal means were not successful and by letters dated March 30, 2011 the Applicant and the City were advised that the Request for Review and accompanying Fee Complaint had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. Ordinarily, a Fee Complaint would not be resolved via formal investigation and a Commissioner's Report; however, in this instance the fee estimate is so intertwined with the facts and issues arising in the Request for Review that I have decided to deal with it in this manner. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47. Formal submissions were received from the Applicant and the City.

[5] Additionally, given the applicability of the *City of Corner Brook Act,* R.S.N.L. 1990, c. C-15 ("*CCBA*") and its interaction with the *ATIPPA* in this matter, an invitation was extended to the Department of Municipal Affairs (the "Department") to provide a submission. This Office requested input and information from the Department in respect of how municipal councils, in general, should conduct public and private meetings and the procedure for recording, tabling and adopting/approving council minutes. The Department provided a submission on this issue.

[6] On May 4, 2011, the OIPC advised the City of its obligation, given that this matter had been referred for formal investigation and a claim of section 27 had been made, to notify all Third Parties in order to allow them an opportunity to make representations or consent to the release of the relevant withheld information. This Office required the City to identify and, in accordance with section 28 of the *ATIPPA*, notify all relevant Third Parties and to forward this information and correspondence to the OIPC.

[7] On June 29, 2011, the City advised this Office that it had contacted all Third Parties whose interests might be affected pursuant to section 27. Eight Third Parties were identified:

- three Third Parties consented to the release of their information;
- in respect of information related to three Third Parties, the City changed its claimed exemption from section 27 to section 19;
- in respect of information related to one Third Party, the City removed its claim of section 27 and agreed to the release of this information; and
- one Third Party requested that their information be withheld.

[8] On July 12, 2011 the OIPC wrote to the Third Party who requested that their information be withheld and requested that they provide a written submission in support of their position. It was explained to the Third Party that in order for section 27 to be applicable, evidence and arguments specifying and identifying the harm likely to result from the disclosure would be necessary. The Third Party did not respond to this letter.

II PUBLIC BODY'S SUBMISSION

[9] With respect to the procedures used by the City to ratify minutes, the City indicates that it ratifies complete sets of minutes from "in-committee" meetings at public Council meetings in order to validate any decisions made. The City acknowledges, in hindsight, that procedurally it should have only ratified the decisions made rather than the complete set of minutes.

[10] The City recognizes that section 46(1) of the *CCBA* requires that all documents tabled or adopted at a public meeting of Council be made available to the public. Section 46(1) of the *CCBA* states:

> *46. (1) The following documents shall be made available by the council for public inspection during the normal business hours of the council:*
>
> *(a) adopted minutes of the council;*
>
> *(b) assessment rolls;*
>
> *(c) regulations;*
>
> *(d) municipal plans;*
>
> *(e) opened public tenders;*
>
> *(f) financial statements;*
>
> *(g) auditor's reports;*
>
> *(h) adopted budgets;*
>
> *(i) contracts;*
>
> *(j) orders;*
>
> *(k) permits;*
>
> *(l) councillor disclosure statements filed under section 26; and*
>
> *(m) all other documents tabled or adopted by council at a public meeting.*

However, the City submits that regardless of the necessity for public viewing, the City is entitled to sever deliberations from those records pursuant to the *ATIPPA*.

[11] To this end, the City takes the position that issues of a "land, legal and labour" nature should be severed from disclosure and submits that:

> *This has been the long standing practice followed by the Council of the City of Corner Brook and a position which was ratified in a Council Meeting of Nov 19, 2003 wherein Council approved Rules of Procedure for Council Meetings. It is important to note that Section 41 of the City of Corner Brook Act provides authority for Council to hold "in camera" meetings but does not establish criteria for what may be considered a privileged meeting. In Minute CC03-203 Council adopted Rules of Procedure. These procedures outlined criteria to be considered at in-camera meetings and how these decisions are to be ratified. The Rules closely parallel legislation adopted by other municipal councils.*

[12] The City further explained its rationale for withholding certain information:

> *The rationale for not releasing resolutions of a privileged nature was to protect third party interests, particularly in cases where an individual was requesting relief due to financial hardship; or to maintain a confidence with respect to a development which was not at a stage to be finalized publically* [sic].

[13] It should be noted that the City's use of the word "privilege" here refers to information of a land, legal or labor nature which was discussed at an "in-committee" meeting. The City has also confirmed that there have been occasions where "non-privileged" matters were dealt with at "in-committee" meetings. The City has no objection to producing the resolutions from those "non-privileged" matters.

[14] To bring its severing claims within the parameters of the *ATIPPA*, the City categorized the majority of the claims it was making on the basis of "land, legal and labour" matters into exceptions under sections 19, 26, 27 and 30 of the *ATIPPA*. Nevertheless, in at least five instances within the responsive records, information remains severed without any reference to an exception in the *ATIPPA*.

[15] Section 19 has been claimed by the City to protect any matters arising in an "in-committee" meeting where the matters have not been finalized by Council publicly (i.e. where no resolution has been passed).

[16] The City made little argument in respect of its claim of section 26, except to state that certain information, if released, could endanger the health of certain individuals.

[17] In relation to information severed pursuant to section 27, the City submits that it used this provision to withhold information which, if released, it believes could:

> *…jeopardize a firm withdrawing or withholding their interest in investigating a business opportunity in the City in fear that their business opportunity could potentially or prematurely be disclosed publically* [sic].

[18] In respect of its claim of section 30, the City states that taxpayer identification numbers should be severed from the records to avoid publicly embarrassing the relevant individual. However, the City submits that the use of taxpayer numbers in place of names may provide adequate protection of the personal information of the individual. The City has also invoked section 30 to sever additional information, some of which, by the City's own admission, is available publicly through other mechanisms.

[19] Finally, in its formal submission, the City did acknowledge that some of the information which it had previously proposed for severing could, upon additional review, be released to the Applicant.

III APPLICANT'S SUBMISSION

[20] The Applicant's submission directs the OIPC to previous correspondence provided by the Applicant in support of his position; however, one further point is raised. The Applicant notes that the minutes in question have already been ratified and adopted publicly and to "omit, change or sever any part of a publicly ratified/adopted minute" would be unconstitutional and a breach of the Applicant's statutory rights. The Applicant states:

> *If council are negligent in the way they structure publicly adopted minutes then your formal report will be a bases* [sic] *on which they can self correct for the future, however any consequences of past negligence should be theirs alone to bear and not undergirded by leniency from the OIPC.*

[21] In earlier correspondence with this Office the Applicant submitted that all ratified minutes, regardless of whether they relate to public Council meetings or "in-committee" meetings, should be available to the public. The Applicant states that:

> *If the City are allowed to publically* [sic] *ratify minutes to in committee meetings without saying what it is they are ratifying and then conceal those minutes, this means that there is no transparency, which means that there is no accountability, which means that they are allowed to rule with absolute power.*

[22] In relation to the fee estimate the Applicant submitted that any fee must be based on the records which are to be provided and, consequently, it is possible that the fee estimate may need to be greatly reduced or even eliminated if the records are to be made publicly available.

[23] Finally, the Applicant also refers this Office to subsection 46(1) of the *CCBA* (referenced earlier in this Report) in support of the notion that the records described therein should be made publicly available, and therefore not subject to a fee.

IV DEPARTMENT'S SUBMISSION

[24] In response to a request from this Office, the Department of Municipal Affairs provided a submission outlining, in general, the recommended conduct of municipal council meetings - both public and private - and the procedure for recording, tabling and adopting or approving Council minutes.

[25] The Department explained that:

> […] *privileged meetings should be held for discussion of matters where the holding of a discussion in a public meeting may be detrimental to the public interest or unduly prejudicial to a private interest (such as personnel matters). This must, however, be balanced with the overriding principles of openness and transparency which guide municipal operations. Those principles are recognized by the requirement to ratify at a public meeting any decision of council that was made at a privileged*

> *meeting. While the essential substance of the decision must be disclosed when ratifying a motion at a public meeting, the extent of disclosure of the subject matter will vary according to the circumstances.*

[26] The Department goes on to set out the "recommended protocol for the holding of privileged meetings" which includes the following:

> *3. Any decision taken at a privileged meeting is not valid until it is adopted at a public meeting of council. A council need not engage in debate at the public meeting but must adopt a decision by way of a motion at a public meeting. The motion should be sufficient in detail so that a third party can suitably understand the subject of the motion, without disclosing information intended to be the subject of privilege.*

[27] In relation to the severing of information from Council records and meetings, the Department has indicated:

> *Generally, personal information is not severed from documents presented at a council meeting. Should a council wish to consider a document which contains sensitive personal information about an identifiable individual, it may be cause for consideration at a privileged meeting.*

V DISCUSSION

[28] In this Review, the Applicant has asked this Office to examine whether the City is entitled to withhold any of the information which it has proposed to sever and whether the fee estimate is reasonable.

a) Is the City entitled to sever information from the requested records?

[29] I must first point out that any information which the City has proposed to sever on the basis of it being of a "land, legal and labour" nature alone should be released. This severing has no basis in either the *ATIPPA* or the *CCBA*.

[30] All parties (including the Department) have agreed that both the *CCBA* and the *ATIPPA* have application in this matter. Section 46 of the *CCBA,* clearly mandates that "all […] documents tabled or adopted by council at a public meeting" must "be made available for public inspection."

[31] The Applicant is seeking copies of minutes from Council "in-committee" meetings held during a specific timeframe and the City has admitted that it has ratified the complete set of minutes from each of those "in-committee" meetings at public Council meetings in order to validate the decisions which were made.

[32] Two comments must be made in light of this practice by the City. First, in accordance with the recommended practices of the Department, the City should only ratify the decisions made at "in-committee" meetings, not the entire set of minutes from those meetings. I will discuss this in more detail below in paragraph 41.

[33] Second, in order to ratify the minutes from the "in-committee" meetings, the City must have first tabled those minutes such that they were before the Council for review prior to their ratification. Consequently, the City has brought the Council "in-committee" meeting minutes within the purview of section 46 of the *CCBA*. Therefore, the information should be available for public viewing.

[34] The City has claimed that the *ATIPPA* should apply to the requested information regardless of section 46 of the *CCBA*. However, subsection 5(2) of the *ATIPPA* states:

> *5.* […]
>
> *(2) This Act*
>
> > *(a) is in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees;*
>
> […]

[35] In other words; the *ATIPPA* must be read along side of the *CCBA* and act as an additional mechanism for access to and disclosure of information. However, section 3(2) of the *ATIPPA* states:

> *3.* […]
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that* ***is not personal information*** *and is available to the public.*
>
> [Emphasis added]

[36] Reading subsections 5(2) and 3(2) of the *ATIPPA* together, I conclude that where other procedures for access to records or information normally available to the public exist, the application of the *ATIPPA* is limited to the protection of personal information in accordance with section 30. In other words, if another Act requires a public body to make information available, you cannot use the *ATIPPA* to deny access to that information, unless it is personal information.

[37] This is not to say that the City's application of section 30 was entirely correct; the City has claimed section 30 in respect of information which does not meet the definition of "personal information" as set out in subparagraph 2(o) of the *ATIPPA*. This information should be released to the Applicant. I have indicated to the City on a copy of the records provided with this Report, the information which should be severed in accordance with section 30.

[38] In respect of all other claims made by the City (i.e. sections 19, 26 and 27) I must consider subsections 3(2) and 5(2) of the *ATIPPA* together with section 46 of the *CCBA* and recommend the release of all information proposed for severing under these sections.

[39] Although I find that the City cannot rely on section 27, I wish to point out that in the course of this matter the relevant Third Parties were notified in accordance with section 28 of the *ATIPPA*. All but one Third Party consented to the release of their information and, therefore, in accordance with section 28(3) of the *ATIPPA* this information should be released.

[40] The Third Party which refused its consent failed to provide this Office with any evidence supporting its desire to withhold the information. Consequently, even if I had not found that section 46 of the *CCBA* mandates the release of this information, it is likely that I would have found that the three-part test required for a claim of section 27 (recently discussed in my Report 2011-007) was not met. As a result, I would likely still have come to the conclusion that this information should be released to the Applicant because no evidence was presented by either the City of the Third Party to prove that the information should be withheld under that exception.

[41] I would also like to further comment on the City's current practice of tabling and ratifying complete sets of minutes from "in-committee" meetings. In the future, the City should keep in mind

the position expressed by the Department that it should not engage in debate at public meetings regarding the matters discussed at "in-committee" meetings. Rather, Council should simply ratify only the decisions made at "in-committee" meetings by way of a motion which is sufficient in detail for any individual to understand the subject of the motion, without disclosing information intended to be the subject of privilege. By proceeding in this manner, the complete set of minutes of the privileged meetings need not be tabled or ratified at the subsequent public Council meeting.

[42] I would also like to emphasize that while the *ATIPPA* does recognize the co-existence of other procedures for access to information, in accordance with section 3(2) those other procedures cannot be in conflict with the protection of personal information required by the *ATIPPA*. For example, while the *CCBA* provides an alternative mechanism for accessing information, that does not mean that the access provided through the *CCBA* can ignore the protection of personal information. In so far as personal information is involved, the *ATIPPA* takes precedence.

[43] Beyond instances of access to information, I feel it is both reasonable and proper to provide my comments in respect of the disclosure of information as it relates to the current practice of the City. Recently in Report P-2011-001 I provided guidance in a similar matter which it would be useful to reiterate in this matter:

> *Any disclosure of personal information by a municipality at a public meeting of Council must be done in accordance with the provisions of section 39(1) of the ATIPPA, and even if such a disclosure is authorized by section 39(1), adherence to section 39(2) will ensure that only the minimum amount of personal information necessary for the purpose will be disclosed. When disclosing personal information, I urge public bodies to be cognizant of the reason for doing so. If the particular goal or purpose can be achieved without the disclosure of personal information, then public bodies should refrain from making the disclosure. This will hopefully clarify the issue and help to minimize any debate concerning how much personal information should be released.*

[44] Currently, even where other access mechanisms exist, the *ATIPPA* continues to offer protection to personal information. All other types of information must be disclosed in accordance with the alternative mechanism for access. Consequently, unless the *CCBA* is amended to come further in line with the *ATIPPA*, such that information beyond personal information is offered protection, I believe it is good practice for all public bodies to conduct themselves in a manner which is consistent with the spirit and intent of the *ATIPPA*.

[45] Consequently, the City should be careful and cautious when presenting, tabling and adopting information containing personal information or other information protected by mandatory exceptions under the *ATIPPA* and do so only where it is absolutely necessary. Furthermore, even where it is necessary and disclosure is required, Council should limit the disclosure of such information to only the minimum amount necessary to achieve the purpose. In this manner, the City would bring itself in line with the disclosure requirements set out in section 39 of the *ATIPPA* and could be seen as conducting its business in a manner which is mindful of **both** the *CCBA* and the *ATIPPA*.

b) Are the fees being charged by the City appropriate?

[46] Subsection 46(2) of the *CCBA* states

> *46.* […]
>
> *(2) A person making an inspection under subsection (1)*
>
> > *(a) shall not remove the document from the place where it is located or interfere with an employee of the council in the performance of his or her duties; and*
> >
> > *(b) may make extracts from the documents, and may, where the council has copying equipment, have a copy made of the documents upon payment of a fee equal to the actual cost of providing that copy.*

[47] As a result, the City is only entitled to charge a fee equal to the actual cost of providing a copy. On its face the *CCBA* does not appear to allow the City to charge for the time it spends searching for, retrieving, redacting and organizing the information set out in subsection 46(1). The *ATIPPA* does permit a public body to charge for the time it spends on these tasks. I believe it is a relevant consideration that severing would not be necessary in respect of the responsive records except that the City's practices are not in line with the recommended practices of the Department and also are not in compliance with the *ATIPPA*. Had the City only ratified the decisions made, as is suggested by the Department, it is likely that no information would need to be severed. Nevertheless, as I have indicated the *ATIPPA* and the *CCBA* must be read along side each other and where personal information is recommended for severing, the City may charge for this task. However, I am not convinced that the minutes from "in-committee" council meetings would take anything other than

minimal time and effort to locate and organize and, therefore, no fees should be charged for these activities.

[48] Finally, it is not fair to the Applicant to allow the City to charge for copying, when according to the *CCBA* the Applicant should simply be allowed to **view** the records. As mentioned above, the City itself through its own decisions regarding the conduct of meetings, has made copying and severing prior to the viewing a necessary action in order to sever personal information. Should the Applicant desire to have a copy of the responsive records, a fee can be charged per page of copying along with any time in excess of two hours required to make the copies in accordance with the *ATIPPA* Fee Schedule.

VI CONCLUSION

[49] Given the foregoing, I find that the provisions for access to records of the *CCBA,* must take precedence over the exceptions to disclosure contained in the *ATIPPA* save for section 30. While information contained in the minutes may potentially fall squarely within an enumerated exemption of the *ATIPPA*, section 3(2) of the *ATIPPA* only mandates the protection of personal information; all other information must be released in accordance with the *CCBA* which clearly is "an existing procedure" for access to information.

[50] Furthermore, the City may only charge for the time spent severing the information I have suggested be withheld and the actual costs of copying, if the Applicant desires to have to a copy of the responsive records. However, should the Applicant be satisfied to simply view the redacted responsive records within City offices, no fee should be charged.

VII RECOMMENDATIONS

[51] Having found that the City has improperly applied all claimed sections of the *ATIPPA* with the exception of certain applications of section 30, under the authority of section 49(1) of the *ATIPPA*, I recommend that the City:

i. release to the Applicant all responsive records in their entirety with the exception of the information highlighted in pink on a copy of the record that is enclosed with this Report;

ii. reduce its fees to reflect only the time spent severing the information I have suggested be withheld and the actual costs of copying, and that the City only charge this fee if the Applicant desires to have a copy of the responsive records. Should the Applicant be satisfied to simply view the redacted responsive records within City offices, then I recommend that no fee be charged; and

iii. review and revise its practices of recording, tabling and adopting council minutes, both for privileged and public meetings, in consultation with the Department.

[52] Under authority of section 50(1) I direct the head of the City to write to this Office and to the Applicant and to the Third Party within 15 days after receiving this Report to indicate the final decision of the City with respect to this Report.

[53] Please note that within 30 days of receiving a decision of the City under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*. **Consequently, no record can be disclosed to the Applicant by the City until the expiration of the 30-day appeal period.**

[54] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of January, 2012.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador