



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2017-002

January 17, 2017

City of St. John's

### Summary:

The Applicant requested from the City of St. John's a list of properties with arrears of municipal taxes, water taxes and/or interest exceeding \$10,000. The City withheld the information on the basis that it would disclose information gathered for the purpose of collecting a tax as set out in sections 39(2) and 40(4)(d) of the *Access to Information and Protection of Privacy Act, 2015*. With respect to section 39(2), the Commissioner found that section 39(2) applied to part of the record and recommended that the name and address fields continue to be withheld. The Commissioner recommended that the amount of tax arrears and tax years for the amounts owing be disclosed.

### Statutes Cited:

*Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, s. 8 and 39(2); *Assessment Act, 2006*, SNL 2006, c A-18.1; *City of St. John's Act*, R.S.N.L. 1990 c. C-17; *City of St. John's Municipal Taxation Act*, S.N.L. 2006 c. C-17.1

### Authorities Relied On:

Ontario OIPC Order M-800, Interim Order MO-2511-1, and Interim Order MO-2552-I; British Columbia OIPC Order F-15-19 and Order F05-29.

### Other Resources:

City of St. John's Council Meeting Minutes from January 7, 2008.

## I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”) the Applicant submitted an access to information request to the City of St. John’s (the “City”) seeking disclosure of the following:

*A list of properties whose owners have failed to remit payment of municipal taxes, water taxes and/or interest and who owe more than \$10,000. Request includes property address, name of real property owner, amount owing (broken down by type of payment owing), and tax years for which the amount(s) is/are owing.*

- [2] The City refused access citing sections 22(1), 30, 40(1), 40(4)(d) and 40(4)(e) of the *ATIPPA, 2015*.
- [3] The Applicant subsequently filed a complaint with this Office. During the informal resolution process, the City raised additional exceptions, but ultimately relinquished arguments based on all exceptions other than sections 39(2), 40(1) and 40(4)(d). As attempts to resolve the complaint by informal resolution were not successful it was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

## II PUBLIC BODY’S POSITION

- [4] The City submits that it is required by the *Assessment Act, 2006* and the *City of St. John’s Act* to assess all property within the City, send notices of assessment to property owners and annually set a property tax rate. It asserts that information on property ownership compiled pursuant to this authority is collected for the sole purpose of collecting a tax.
- [5] The City’s submission quotes sections (2)(a)(b)(c), 2(3) and 3(1) of the *Assessment Act, 2006*. These sections require assessment of real property, establish three categories for assessment (commercial, residential or partly residential) and allow for assessment of buildings separate from land in certain circumstances. The City notes, “The Assessment Act

regulates the assessment of properties, not the taxation of them which is the municipality's responsibility.”

[6] The City's submission also quotes sections 3 and 4(1)(2)(3)(4)(5) and (6) of the *City of St. John's Municipal Taxation Act*. This Act establishes the Council's authority to impose a real property tax on owners of real property within the City, that the tax shall be fixed as a percentage of the property value as established in the assessment roll, and that there may be both a residential and commercial rate of tax. The City states, “Information is collected for the provision of municipal services made possible by the collection of municipal taxes. There would be no other reason for the collection of such data.”

[7] The City also raised concerns regarding notification pursuant to section 19, commenting:

*If the OIPC were to determine that the information is required to be released, the City would be required to provide third party notification to all those affected as per section 19. This would involve notification to potentially thousands of property owners.*

[8] Initially the City advised that, “records on outstanding tax accounts have not been gathered as it is not possible to produce a spreadsheet showing all accounts over \$10,000. Each account has to be reviewed individually.” It later provided to this Office computer print-outs of properties with tax arrears, noting that, “The list provides the total owing rather than the statement of account provided in the sampling. The taxes on the residential property is inclusive of both water and property tax.” The information provided is contained in the Govern Software System. The City explains, “The information gathered in Govern is strictly for the provision of municipal services that would not be possible without the collection of municipal taxes. The two activities are inherently and inextricably linked.”

[9] The City also claims section 39(2), stating:

*We further assert that the information gathered was done so for the purpose of collecting taxes and as such, section 39(2) applies. The City's sole purpose for collecting individual's names and contact information is for taxation purposes.*

[10] Finally, the City claims section 40 and states:

*Section 2(u)(i) and (vii) clearly defines personal information. It is our opinion that the information is “financial” and such personal information is excluded from being released. We further assert that the personal information gathered was done so for the purpose of collecting taxes and as such, section 40(4)(d) applies. The City’s sole purpose for collecting individual’s names and contact information is for taxation purposes...*

*As per section 40(5)(e) and (h), there is a potential for financial harm to those persons/businesses whose tax arrears being made public could damage their reputation. This is particularly true where there are personal issues which have led to the arrears (i.e. divorce) and where arrears are rectified in the period between preparation of the requested information and subsequent release to the applicant.*

### III APPLICANT’S POSITION

[11] The Applicant provided two detailed submissions, one during the informal resolution process and another after the file was referred to formal resolution. The Applicant cites the purpose of the *ATIPPA, 2015* as set out in section 3:

3. (1) *The purpose of this Act is to facilitate democracy through*
- (a) ensuring that citizens have the information required to participate meaningfully in the democratic process;*
  - (b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and*
  - (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.*

[12] The Applicant also notes that section 43(1) of the *ATIPPA, 2015* places the onus on the public body to prove that the information should not be made public. Further, he states that he contacted the City to inquire whether it would release some portions of the information, citing several sections of the *ATIPPA, 2015* that supported the release, and even inquired about the release of aggregate (non-identifying) information. His submission states, “Throughout the process, I have been open to changing aspects of my request to informally resolve this matter. I have not heard from the city since filing my complaint.”

[13] The Applicant's position regarding section 39(2) of the *ATIPPA, 2015* is that the responsive records do not involve tax returns or royalty returns. With regard to information "gathered for the purpose of determining tax liability or collecting a tax", he notes that much of this information is already in the public domain. His submission states:

*By law, municipal assessment rolls are public documents. Any citizen can search the assessment rolls for any property, to find the address, assessed value, type of property, number of water units and ownership. Municipal tax rates are also public information. Simple math allows anyone to determine the amount of tax payable on any property in the assessment rolls.*

[14] The Applicant points out that the City initially claimed section 22(1) (published material). He states, "It is unclear to me how the City can argue that the information I am seeking is already published, but is also exempt from being released to the public." The Applicant asserts that there is precedent for the release of the names of businesses in conjunction with municipal tax arrears, citing an Order issued by the Office of the Information and Privacy Commissioner of Ontario. In Order M-800, the City of Ottawa received a request for access, "...to a list of all properties whose municipal taxes are in arrears, as well as the amounts owing, the term, the property owner, and any other information about arrears that would be recorded on title." The Ontario Commissioner's Order states in part:

...

*2. I order the City to disclose the registered owners and property addresses of all non-individually-owned properties which appear on the various print-outs, including properties owned by sole proprietorships, partnerships, unincorporated associations or corporations.*

*3. I order the City to disclose the following categories of information contained on the various print-outs for all properties:*

- *Balance - actual arrears as of Nov.30, 1995*
- *CY - current year*
- *Prin/pen - Principal Penalty*
- *Figures for current year minus 1, minus 2 and prior to 1993*
- *Accounts receivable charges*

...

[15] With regard to section 40(1) and 40(4)(d), the Applicant notes that a business does not have personal privacy rights under the *ATIPPA, 2015* as it is not an “identifiable individual” as defined in section 2(u). He asserts that this section of the *ATIPPA, 2015* should therefore only apply to people and not businesses. He requests that, if this Office determines that some of the information in question falls under the personal privacy exception, as much information as possible be released. To support this request, he quotes section 8(2) of the *ATIPPA, 2015*:

*The right of access to a record does not extend to information excepted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*

[16] He asserts that personal information of individuals, such as name and address, could be redacted. He also quotes from Interim Order MO-2552-I, issued by the Office of the Information and Privacy Commissioner of Ontario. In that Order, the City of Toronto received a request for, “[a]ll individuals who are in arrears of their property taxes in excess of \$500,000, including property address and outstanding amount.” That Order states, in part:

*Interim Order MO-2511-I set out a balanced way of severing the record that would provide the public with basic information about the relevant property and the City’s efforts to collect the outstanding tax arrears, but would simultaneously protect the privacy of the individual who owes these arrears. Unfortunately, after re-exercising its discretion under section 6(1)(b), the City has opted not to disclose any information from this record.*

*The City’s position that there is “no advantage to the democratic process” in disclosing any information from this record, including non-personal information, is debatable. In my view, many Toronto taxpayers would strongly disagree with the City’s position, particularly given the current public debate about the best way to manage the City’s finances. As I stated in Interim Order MO-2511-I, the majority of the City’s individual property owners pay their taxes in full and on time and have a right to expect some transparency from the City with respect to properties owned by other individuals for which significant tax arrears are owing.*

[17] The Applicant argues that there is a clear case for information to be released in the public interest. He further asserts that the City of St. John’s has disclosed information about its success in collecting taxes, providing the example of Council Meeting Minutes from

January 7, 2008 where an audit report was discussed. The audit report stressed the importance of proper tax collection efforts. It notes that “the dollar value is still quite significant” when it comes to compliance with tax collection. The Applicant asserts that “it is in the public interest to examine the current state of non-compliance with tax collection efforts, and what the city is, or is not, doing to address the issue.” As such, the Applicant requests that section 40(5)(a) of the *ATIPPA, 2015* be considered, which states, “the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny.”

#### IV DECISION

##### *Preliminary Issues*

[18] A number of issues arose with respect to the City’s understanding of the complaint process and its obligations pursuant to the *ATIPPA, 2015*. A notification letter was sent by this Office pursuant to section 97(4) of the *ATIPPA, 2015*, requesting that a complete copy of records responsive to the application be sent to the Commissioner within 10 business days. A sample of responsive records did not arrive until November 17<sup>th</sup>, 20 business days later. The records required were not provided until November 25<sup>th</sup>, 26 business days after receipt of the notification letter. This Office is unable to determine whether or not a public body has appropriately applied exceptions in the absence of responsive records. Failure of a Public Body to meet this statutory deadline is unacceptable.

[19] Another issue relating to the City’s response to this Office must also be addressed. The City’s initial submission to this Office stated, “the records on outstanding tax accounts have not been gathered as it is not possible to produce a spreadsheet showing all accounts over \$10,000. Each account has to be reviewed individually.” Days before the end of the informal resolution process, a number of print-outs were provided. The City describes them as:

*...a report developed by the City’s Information Services Division in which Revenue Accounting staff were able to select all properties owing more than \$10,000 in taxes. The list provides the total owing rather than the statement*

*of account provided in the sampling. The taxes on the residential property is inclusive of both water and property tax.*

Public Bodies are expected to gather responsive records when the access request is made. Further, it is clear that the City's initial statements that a manual search of over 40,000 files was required to identify records responsive to this request was premature and inaccurate.

[20] During informal resolution, the City raised additional exceptions to disclosure and was reminded that doing so required them to inform the Applicant. The City did not inform the Applicant of the additional exceptions being claimed. This omission fails to respect procedural fairness and contravenes sections 13(1) and 17(1)(c) of *ATIPPA, 2015*. In the end only section 39(2), a mandatory exception, was accepted for consideration. This Office informed the Applicant of the additional exception being claimed in the letter notifying him that the file had moved to formal resolution. The Applicant subsequently addressed the City's additional claim in his submission to this Office.

[21] Many of the City's initial submissions did not contain the level of detail requested, requiring this Office to pose many additional follow-up questions seeking information that should have already been provided. This process was frustrating for all parties. In addition, although initial notification letters instruct public bodies to include any correspondence to or from the Applicant regarding the request, the Applicant in this case provided copies of correspondence that were not included in the City's submission to this Office. Public bodies must provide complete and robust submissions, addressing all the information requested in correspondence with this Office.

*Are the records excepted from disclosure?*

[22] The record at issue is a series of computer print-outs, which identify by name the owners of particular properties on which tax arrears in excess of \$10,000 are owing. In some cases, the property is clearly owned by an individual or individuals; in other instances the owner is a business, corporation or other organization. The print-out also includes addresses, total amount owing and columns for interest for the years 2010-2016. There are approximately 800 properties on the list provided to this Office.



[23] The City argues that the information requested was gathered for the purpose of collecting a tax as set out in section 39(2) and that section 40(4)(d) also applies to the information requested. Section 40(4)(d) states that, “A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where... (d) the personal information was collected on a tax return or gathered for the purpose of collecting a tax.” Section 39(2) states:

*39 (2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.*

[24] There is no suggestion or evidence that the information at issue was collected or obtained on a tax return or is royalty information. This leaves me to determine if the information was “gathered for the purpose of collecting a tax” or “gathered for the purpose of determining a tax liability or collecting a tax.”

[25] The Applicant cites Ontario OIPC Order M-800. That decision is not helpful in addressing the applicability of section 39(2) as there was no equivalent section in the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56. Further, in terms of personal privacy, the Order did not address whether in that instance the records were “gathered for the purpose of collecting a tax”.

[26] The Applicant also cites Ontario OIPC Interim Order MO-2552-I. Again, there was no equivalent to section 39(2) under consideration. That Interim Order cites with approval Interim Order MO-2511-I. In terms of records comparable to those sought by the Applicant from the City, Interim Order MO-2511-I states that:

*In my view, the personal information in Attachment 2 was clearly gathered for the purpose of collecting municipal property taxes and therefore falls within the section 14(3)(e) presumption. In addition, some of the information describes the affected party's “finances” and “liabilities” and therefore falls within the section 14(3)(f) presumption. There is nothing in the wording of sections 14(3)(e) and (f) to suggest that these presumptions can be disregarded if the amount in outstanding property taxes reaches a “reasonable threshold.” Consequently, I find that disclosing this personal*

*information is presumed to constitute an unjustified invasion of the affected party's personal privacy.*

[27] The Office of the Information and Privacy Commissioner of British Columbia has on several occasions examined issues similar to those in this matter. Order F-15-19 dealt with a provision of British Columbia's *Freedom of Information and Protection of Privacy Act (FIPPA)* similar to our section 39(2). In that case, information pertaining to tax liabilities was ordered to be disclosed. In that instance however the records sought involved aggregate information generated by the public body in relation to five properties, not information of individual property owners. Had individual records been sought, it is fair to conclude from the following that the records would have been excepted from disclosure as records gathered for the purpose of determining tax liability or collecting a tax. While the word "confidentiality" is more apt than "privacy" in respect of corporate information, I agree with the substance of the analysis in Order F-15-19:

*While the intent of FIPPA is to make public bodies more open and accountable through disclosure of information, it also recognizes that exceptions to disclosure are desirable and necessary in certain circumstances. The tension between these dual purposes in FIPPA is plainly evident in this case. A public body's ability to disclose information like the aggregate tax information in this case encourages public accountability, while the exceptions in ss. 21(2) and 22(3)(e) recognize that taxpayers, whether individual or corporate, are entitled to privacy with respect to their tax information. Such privacy fosters the voluntary and fulsome disclosure of information necessary for governments to determine tax liability and collect tax. If individual tax payers fear disclosure of their tax information, it may result in a reluctance to share such information with the public body collecting that information for tax purposes. Based on the facts of this case, I am satisfied that the information in dispute neither directly nor indirectly discloses the tax information of the individual Insurers, and disclosure would not undermine the balance between public accountability and the protection of taxpayer privacy.*

[28] In Order F05-29, former British Columbia Commissioner Loukidelis addressed the purpose of section 21(2) in ordering disclosure of general information generated by the assessment authority to assess market rent, vacancy allowance, expense allowance and capitalization rates:

*In my view, the purpose of s. 21(2) is to protect information that a public body obtains from a taxpayer (on the taxpayer's tax return) or otherwise gathers relating to the taxpayer for the purpose of determining a tax liability or collecting a tax. The policy of this disclosure exception is to protect information obtained or gathered relating to the taxpayer for the purpose of determining tax liability or collecting a tax, without, unlike s. 21(1), requiring the establishment of confidentiality of the information or a reasonable expectation of harm to the taxpayer from its disclosure.*

[29] The individual taxpayer information sought was required to be withheld:

*No one argued in this inquiry that property tax is not a tax under s. 21(2). I agree that personal and corporate income tax falls within the meaning of a tax in s. 21(2) but not to the exclusion of property tax, which in my view also meets that description. Order No. 217-1998 and Investigation Report P98-11 confirm that Commissioner Flaherty also considered property tax to be a tax within the meaning of s. 21(2).*

[30] That Order supports the inclusion of information identifying both corporate and personal property owners under section 39(2), provided of course that the information fits fully within the description of information which may be withheld by the exception. Order F05-29 also addresses the term "gathered", noting:

*A public body may gather information relating to the taxpayer from a variety of sources--including sources other than tax returns and sources other than the taxpayer--and then record that information. Such information, in the state in which it was gathered or as compiled in the public body's records or files, will be information that has been "gathered" within the meaning of s. 21(2)...*

*...the word 'gathered' does not cover information that is generated, or created, by a public body by applying skills, techniques and professional judgment to information that it has gathered even where underlying information that is analyzed to create the disputed information has been gathered directly from a taxpayer.*

[31] There is nothing to distinguish some of the information sought by the Applicant here from that assessed as falling within British Columbia's counterpart to section 39(2). As such, I find that names and addresses of individual and 'corporate' taxpayers were gathered for the purpose of collecting a tax and are excepted from disclosure under section 39(2). However,

the amounts of tax arrears and tax years for which the amounts are owing are not excepted from disclosure pursuant to section 39(2). These figures were not gathered but generated as a result of an accounting process by the City. Pursuant to section 8 of the *ATIPPA, 2015*, the Applicant should be provided with that portion of the record.

[32] As I have found that section 39(2) encompasses the names and addresses of both personal and corporate taxpayers, it is not necessary for me to consider the application of section 40. In any event, my conclusion would likely be that the names and addresses of property owners who are natural persons should also be withheld pursuant to this section.

[33] In the absence of the name and/or address of the owner of the property in tax arrears, it could be argued that more context is needed for the information being released. As there are different tax rates and tax relief programs available to commercial and residential properties, this Office recommends that the City respect any request made by the Applicant to identify properties as commercial or residential on the printout.

[34] The City's submission indicates, it "...is not able to differentiate between residential and commercial properties using our current software. Each file would need to be accessed individually to make that determination." Given its initial denial of the ability to electronically generate responsive records, I am skeptical of this claim, especially as there are two different tax rates in the City, one for residential and the other for commercial purposes. If the City is able to determine which tax rate to apply to a property, it should be able to employ the same process to determine which properties are owned by individuals and those owned by sole proprietorships, partnerships, unincorporated associations or corporations. If not, the burden should not be onerous given there are approximately 800 properties on the arrears list.

## V RECOMMENDATIONS

[35] I recommend that the City redact the owners' names and addresses, as well as any other identifying information which may be in the record, and release the remaining information,

including the amount of tax owing on each property and the tax years for which the amount is owing.

- [36] I further recommend that the City take steps to:
- i. review its policies and procedures for responding to access requests in accordance with the duty to assist as set out in section 13(1);
  - ii. make a greater effort to communicate its full position and response to this Office within statutory time limits; and,
  - iii. review its policies and procedures for handling and responding to complaints filed with this Office.

[37] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the City of St. John's 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 (in this case, the Applicant) within 10 business days of receiving this Report.

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

[39] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17<sup>th</sup> day of January 2017.

Donovan Molloy, Q.C.  
Information and Privacy Commissioner  
Newfoundland and Labrador