



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2018-003

January 25, 2018

City of St. John's

### Summary:

The City of St. John's (the "City") received an access request seeking disclosure of information related to Kenmount Crossing. The City provided some records but withheld others based on sections 28(1)(c) (local public body confidences), 30(1) (legal advice), 35(1)(d) (disclosure harmful to the financial or economic interests of a public body), 39 (disclosure harmful to business interests of a third party) and 40(1) (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. The Applicant was not satisfied and filed a complaint with this Office. While the Commissioner determined that the City had conducted a reasonable search for records, the City failed in its duty to assist the Applicant by its significant oversight in not providing all records to the Applicant initially. The Commissioner recommended that the City review the duty to assist section under the *ATIPPA, 2015* and its procedures to avoid future misplacement of responsive records. The Commissioner determined that the City properly applied section 35(1)(d) to the records and as the public interest override did not apply, recommended the City continue to withhold the records.

### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2](#), sections 35(1)(d) and 39; [Freedom of Information and Protection of Privacy Act \[RSBC 1996\] Chapter 165](#), section 17.

### Authorities Relied On:

OIPC NL Report [A-2017-023](#).

### Other Resources:

OIPC Practice Bulletin: [Reasonable Search](#), March 2017; OIPC Guidelines for [Public Interest Override](#), June 2015.

## I BACKGROUND

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

- *Historic and current Agenda and Meeting Minutes for any Public Consultations that were held for Kenmount Crossing.*
- *Historic and current Memorandums with respect to development at Kenmount Crossing.*
- *Historic and current proposed Resolutions or Amendments to the St. John’s Development Regulations in relation to development above the 190m contour, specially Kenmount Crossing.*
- *Historic and current staff engineering reports and recommendations with respect to development above the 190m contour, specifically Kenmount Crossing.*
- *Historic and current development applications for development at Kenmount Crossing.*
- *Historic and current development permits for development at Kenmount Crossing.*
- *Historic and current City of St. John’s zoning applications for development at Kenmount Crossing.*
- *Historic and current internal communication in the form of memo, email, letter, meeting minutes, etc regarding development at Kenmount Crossing.*
- *Historic and current external communication in the form of memo, email, letter, meeting minutes, etc regarding development at Kenmount Crossing.*
- *Historic and current City Council meeting minutes regarding development at Kenmount Crossing.*
- *Historic and current studies including but not limited to traffic services, infrastructure, environmental, utilities, etc. for development at Kenmount Crossing.*
- *Confirmation of who installed, paid for, and owns the infrastructure necessary to service the Kenmount Crossing area including road network, sanitary sewer systems, storm water systems, and potable water related infrastructure including any pump stations, lift stations, and chlorination stations.*

[2] The City responded to the Applicant on October 11, 2017 providing records (approximately 1543 pages) with redactions based on sections 30(1) (legal advice) and 40(1) (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. The Applicant questioned if the City provided all responsive records as there were no records dated later than October 2016. The City erroneously advised the Applicant it provided all responsive records post October 2016, other than those not yet approved by Council.

[3] The Applicant was not satisfied with the City's response and filed a complaint with this Office on October 23, 2017.

[4] The City released further records to the Applicant on October 30, 2017, explaining:

*Quite recently, we were made aware of additional information, including information post October 2016 which we did not disclose to you previously. It is hereby attached. We sincerely apologize for this error. We understood that what we had provided to you previously was the extent of information that was available to be provided as per the Access to Information and Protection of Privacy Act.*

This significant oversight led to the Applicant's concerns regarding the adequacy of the City's search for records. The records subsequently disclosed were redacted by the City based on sections 28(1)(c) (local public body confidences), 35(1)(d) (disclosure harmful to the financial or economic interests of a public body), 39 (disclosure harmful to business interest of a third party) and 40(1) (disclosure harmful to personal privacy) of the *ATIPPA, 2015*.

[5] During the informal resolution process the City released information it redacted based on sections 28 and 40. The City continued to withhold records based on sections 30, 35 and 39.

[6] When informal resolution efforts concluded without resolving all of the outstanding issues, the matter proceeded to formal investigation pursuant to section 44(4), at which time the Applicant requested that the Commissioner review redactions under section 35 and 39 and assess the adequacy of the search conducted by the City. The Applicant chose not to ask the Commissioner to review records where there had been a claim of section 30 (legal advice), section 28(1)(c) (local public body confidences), and section 40 (disclosure harmful to personal privacy).

## II PUBLIC BODY'S POSITION

[7] In terms of search adequacy, the City explained that an employee placed numerous files in an electronic folder for the purpose of disclosure to the Applicant. A communication error

resulted in the failure to inform the City's ATIPP Coordinator of the existence of those files. When the Applicant questioned whether the City provided all the records, he was misinformed as to the status of the missing records. Once the City received the notice of complaint, they investigated further, discovered the files, and provided the Applicant with those records (subject to the above-noted redactions).

[8] The City's position regarding records withheld based on sections 35 and 39 is that their release would:

- result in the premature disclosure of a project;
- reveal technical information supplied by a third party that was supplied in confidence and the disclosure of which would harm significantly the competitive position of the third party; or,
- result in similar information no longer being supplied to the City when it is in the public interest that such information be supplied.

### III APPLICANT'S POSITION

[9] As the City did not provide the Applicant with all responsive records initially, the Applicant questioned the adequacy of the City's search for records.

[10] The Applicant believes that the City's initial response, advising that it would be premature to release information not yet approved by Council, was not "a lawful reason to withhold the remaining information". The Applicant states that this reason is also contrary to the City's explanation, during the informal resolution process, that it did not provide 1050 pages of records due to oversight. The Applicant maintains that the City provided incomplete information in response to previous access requests and this is once again an issue with this access request.

[11] The Applicant also questions the City's reliance on sections 35(1)(d) and 39, as the Applicant believes the City may be withholding records the release of which are in the public interest pursuant to section 9(1) of the *ATIPPA, 2015*.

#### IV DECISION

- [12] The first issue is whether the City conducted a reasonable search for records. We have addressed the issue of reasonable search in many previous reports issued by this Office, including Report A-2017-023. Guidance is available in our practice bulletin “*Reasonable Search*”, including the requirement that searches must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.
- [13] The City answered questions similar to those outlined in the Practice Bulletin in its response to this complaint. Upon review of the City’s answers, I conclude that the City conducted a reasonable search despite not providing all of the responsive records in its initial response to the Applicant. I accept that the City *located* all responsive records during its search, but an error in communication resulted in the omission of a portion of those records from its first response to the Applicant. That error was compounded by misinformation in response to the Applicant’s query submitted prior to complaining to this Office.
- [14] I am concerned that the City was not aware that such a large volume of records was omitted from its response to the Applicant, particularly when, after receiving the initial response, the Applicant questioned why there were no records dated after October 2016. The Coordinator failed to recognize that the Applicant was alerting the City to what turned out to be an error in disclosure of the records, instead assuming that the Applicant was asking again for records to which the City had denied access. Because of this apparent misunderstanding, the City advised the Applicant that records after October 2016 were not included as it would be premature to release information not yet approved by Council.
- [15] This was a significant oversight by the City and a failure of its duty to assist the Applicant. The City eventually provided the missing records, but only after the Applicant filed a complaint with this Office. It is the City’s responsibility to ensure that it responds to Applicants in a timely manner, and in an open, accurate and complete fashion. In this case, the City failed to meet its obligations under section 13 of the *ATIPPA, 2015*.

[16] Sections 35(1)(d) and 39 of *ATIPPA, 2015* were relied upon by the City to redact portions of the responsive records:

35(1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

...

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

39(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

- (i) trade secrets of a third party,
- (ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
- (iii) result in undue financial loss or gain to any person, or
- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[17] The information being withheld under section 35(1)(d) and section 39 relates to information provided by a developer to the City for the City to provide comments, assess compliance with policies and regulations and ultimately to consider whether to approve the development in any form. The City advised that this information relates to a development project or construction project still in the planning stages awaiting evaluation by Council at the time of the request.

[18] The British Columbia *Freedom of Information and Protection of Privacy Act* has a similar section to section 35 of the *ATIPPA, 2015*:

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which **could reasonably be expected to harm** the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; [emphasis added]

[19] The harms requirement applies to all elements of section 17 of British Columbia's *Act*. In contrast, the harms test applies only to some elements of section 35.

[20] Section 35(1)(d) does not have a harms test incorporated into the exception. It is categorical in nature, meaning that if the information is of the kind described in that provision it may be withheld without any need to prove that harm will result from disclosure.

[21] The information at issue discusses a private construction proposal or project that is in the planning stage and has not yet been approved. With aspects of the construction proposal or project not being finalized, or evaluated for potential approval, I conclude that the information fits within "a premature disclosure of a proposal or project" and therefore can be withheld under section 35(1)(d) of the *ATIPPA, 2015*. As the records may be withheld under section 35, it is not necessary for me to consider the applicability of section 39.

[22] The Applicant maintains that the public interest override applies to this information. The City indicated that it considered the application of section 9 to the information at issue and determined that the public interest did not require disclosure. It stated that disclosure of records subject to change would lead to confusion and misinterpretation by the public and would also lead to a misunderstanding of the City's regulatory requirements, and affect compliance with the regulatory regime in the future.

[23] The potential that information may be misunderstood or misinterpreted is not a relevant factor in assessing the public interest, as discussed in our *Guidelines for Public Interest Override*. After considering all of the relevant factors in our *Guidelines*, I conclude that it is not clearly demonstrated that the public interest in disclosure outweighs the reason for the exception. As such, the public interest override does not require disclosure.

## V RECOMMENDATIONS

[24] Under the authority of section 47(d) of the *ATIPPA, 2015*, I recommend that the City review the requirements under section 13 for its duty to assist an applicant. Further I recommend the City conduct a review of its procedures for responding to access to information requests to ensure that once all material has been gathered there is a reporting structure in place so that responsive records are not misplaced. Pursuant to section 47(a) I recommend that the City continue to withhold the records that were initially withheld based on section 35(1)(d) of the *ATIPPA, 2015*.

[25] 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 this recommendation to the Commissioner and to any person who was sent a copy of this Report (in this case the Applicant) within 10 business days of receiving this Report.

[26] Please note that within 10 business days of receiving the decision of the City 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*.

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of January, 2018.

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