



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2020-012

August 20, 2020

City of St. John's

### Summary:

The Complainant requested the name of a City of St. John's ("the City") employee, operating a specified vehicle at a specified location and time. The City withheld the employee's name pursuant to sections 40(1) and 40(4)(c) (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015* (ATIPPA, 2015). The Complainant filed a complaint with this Office alleging the City had not properly considered sections 40(5)(a) and (c) and seeking disclosure of the employee's name. During informal resolution efforts, new information regarding an incident between the Complainant and employee came to light and the City additionally sought to withhold the employee's name pursuant to section 37(1)(a) (disclosure harmful to individual or public safety). The Commissioner found that the City had incorrectly applied section 40(4)(a) to withhold the employee's name, and that section 40(2)(f) is applicable in finding that there is no unreasonable invasion of the third party's personal privacy in releasing the employee's name. Additionally, the Commissioner found that the City had not discharged its burden of proof under section 37(1)(a) and therefore that section is not applicable to the information in question. The Commissioner recommended that the City disclose the employee's name to the Complainant.

### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 37(1)(a), 40(1), 40(2)(f), 40(4)(c), 40(5)(a) and (c).

### Authorities Relied On:

NL OIPC Reports [A-2015-003](#), and [A-2016-011](#).

## I BACKGROUND

- [1] The Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “*the Act*”) to the City of St. John’s (“the City”) for, “the name of the person operating the heavy equipment with the license plate number [license plate number] at 7:00am on January 7, 2020.”
- [2] The City withheld the name of the heavy equipment operator (“the employee”) pursuant to sections 40(1) and 40(4)(c) of *ATIPPA, 2015* (disclosure harmful to personal privacy). The Complainant was not satisfied with the response and filed a complaint with this Office.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## II PUBLIC BODY’S POSITION

- [4] The City submitted that upon initial receipt of the Complainant’s request, efforts were made to direct the Complainant to the City’s legal department (for a claims-related matter), or the Citizen Service Centre (311) for service issues. The Complainant was not satisfied by these referrals, so the access request proceeded. The City withheld the employee’s name pursuant to sections 40(1) and 40(4)(c) of *ATIPPA, 2015*, arguing the information in question relates to the employee’s employment history with the City as it is connected to a specific date, time and location of employment revealing, “where a particular employee was at a specific time during the course of their work.”
- [5] During informal resolution, the Complainant wrote an email to the City’s Mayor and Council including the statement, “I had cause to take issue with the conduct of a City of St. John’s (City) employee.” Prior to this email, the Deputy City Manager of Public Works (the “DCMPW”) had been unaware of any incident involving the parties. After receipt of this email, the DCMPW spoke with the employee and inquired if he recalled any incident during the shift referenced in the Complainant’s request. The employee informed that he had been involved in an incident with a resident (the Complainant) where the resident approached him, “swearing and yelling,

and stood in front of the vehicle.” The employee additionally recalled being, “concerned the resident would try and climb into or onto the vehicle.”

[6] The City went on to state that:

*Considering the alleged actions already exhibited by the Complainant, it is not unreasonable to assume that similar actions would be taken in future once he learns the identity of the operator. It is reasonable to expect a threat to the operator’s safety and mental health considering the fear the operator says he would have for himself and his family as a result of disclosing his name to this particular individual. It is the City’s position that releasing the name of the operator in this case, would result in a reasonable expectation of harm to our employee. At the very least, this harm would be the undue stress and fear brought upon the operator by releasing his name without his consent to an individual by which he has felt threatened in the past.*

[7] The City concluded that this additional information made it necessary to consider section 37(1)(a) (disclosure harmful to personal or public safety) of *ATIPPA, 2015* in determining whether to disclose the information requested. It found that it should continue to deny access to the employee’s name on the basis of concern for the employee’s safety. In addition to the details of the incident as recalled above, the employee expressed that he had not felt comfortable disclosing his name to the Complainant during the incident (directing him instead to call 311), and had felt threatened, explicitly stating he does not want his name disclosed as, “doing so would cause him to fear for his safety and his family’s safety.”

[8] Additionally the City submitted that the Newfoundland and Labrador Occupational Health and Safety Regulations carry a liability to employers who fail to comply in protecting workers from harassment and violence in the workplace. As part of its compliance with these regulations, the City adopted a Respectful Workplace Policy and believes the Complainant’s behavior during the incident with the employee meets the definitions of “disrespectful behavior” and “harassment” as defined in the City of St. John’s Respectful Workplace Policy, and may meet the definition of “violence” as well, all 3 of which are not to be tolerated in the workplace. The City argued that the employee had already experienced disrespectful behavior, harassment, “and at least a perceived threat of violence from the [Complainant],” and disclosing the employee’s name to the Complainant would, “likely facilitate a continued

harassment of the operator,” and therefore, “result in a failure on the part of the City in its commitment to maintain a safe and respectful workplace.”

[9] The City acknowledged in its response to this complaint that, “the Applicant did not explicitly threaten or indicate overt ill will while filing his request,” but stated that its concern for the employee’s safety is based on the Complainant’s wish to have the employee, “held accountable and to prevent a repeat in the future - leaving [the City] to wonder what mechanism the Applicant wishes to employ.”

### III APPLICANT’S POSITION

[10] The Complainant submitted that, while the City had initially relied on sections 40(1) and 40(4)(c) to withhold the name of the employee, he believed that it had not properly weighed sections 40(5)(a) and (c) in arriving at that determination. Additionally, the Complainant noted that he required the employee’s name, “for reference to ensure the entity is holding an individual accountable for their conduct at a particular time and place and to prevent a repeat in the future. Attempts at redress through 311 have been ignored.”

[11] Regarding the incident with the employee, the Complainant acknowledged that he was upset at the time but denied he was threatening toward the employee. He stated that the employee used abusive language toward him and did not appear to be intimidated by the Complainant.

[12] Additionally, the Complainant submitted that the City’s assertion that there are grounds to withhold the employee’s name based on section 37(1)(a) lacks credibility. He noted that his conduct with respect to this matter had been “level headed and assertive,” and that, “at no time did [he] do anything that would be reasonably expected to threaten the safety or mental or physical health of anyone, in particular the [employee].” The Complainant went on to note that he had gone to the Royal Newfoundland Constabulary (RNC) headquarters to inquire, “whether anyone had filed a complaint about an incident involving [him],” and had been assured that, “if there was a report concerning conduct that could reasonably be expected to threaten the safety or mental or physical health of a person, [the RNC] would have contacted

[him].” Given this, the Complainant submitted that, “if the [employee] felt that my interaction was consistent with section 37(1)(a), he would have approached the RNC.” The Complainant also noted that, “allegations of my conduct only surfaced after the [employee] was informed that the City would have to release his name to me. If my conduct was truly serious the matter would have been brought to the attention of the appropriate authority prior to the City replying to my initial request for information and their response would have cited section 37 not section 40.”

#### IV ISSUES

[13] The issues to be addressed are whether the City properly withheld the name of the employee pursuant to sections 40(1) and 40(4)(c), and 37(1)(a) of *ATIPPA, 2015*.

#### V DECISION

##### Section 40

[14] Sections 40, 40(2)(f), 40(4)(c), 40(5)(a) and (c) state the following:

*40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

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*(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where*

*(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*

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

*(c) the personal information relates to employment or educational history;*

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*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*

- (a) *the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
- (c) *the personal information is relevant to a fair determination of the applicant's rights;*

[15] Sections 40(1) and 40(4)(c) provide that information should be withheld where disclosure would be an unreasonable invasion of a third party's personal privacy and deem it presumptively an unreasonable invasion where that personal information relates to employment or educational history. The Complainant argued that the City had not properly considered section 40(5) and the desirability for disclosure of the information in order to subject the activities of the City to public scrutiny and his belief that the personal information is relevant to a fair determination of his rights. However, the release of the information in question is presumptively not an unreasonable invasion of privacy under sections 40(1) and 40(4)(c) because of the applicability of section 40(2)(f), as it relates to the employee's position and functions as an employee of the City. The issue of the release of public bodies' employees' names was previously considered in OIPC Report A-2016-011, at paragraph 21. An employee's name is not considered a part of their employment history under section 40(4)(c) as this would be irreconcilable with section 40(2)(f) – that is release of an employee's name cannot be both a presumptively reasonable and unreasonable invasion of privacy.

[16] This Office finds that the information requested by the Complainant contains personal information of the employee. However this personal information is covered by section 40(2)(f) in that, "the information is about a third party's position, functions or remuneration as an employee" of the City. Therefore this Office finds that disclosure of the requested information would not constitute an unreasonable invasion of privacy of the employee because it is deemed not to be so by section 40(2)(f).

[17] Based on the determination that the employee's name is presumptively releasable under section 40(2)(f), it is unnecessary to perform the section 40(5) analysis.

## Section 37

[18] Section 37(1)(a) states:

*37. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to*

- (a) threaten the safety or mental or physical health of a person other than the applicant; or*
- (b) interfere with public safety.*

[19] The City of St. John's relied upon paragraph 37(1)(a) to additionally withhold the employee's name on the basis of concerns for his "safety or mental or physical health". This Office has consistently interpreted "reasonably be expected to" as requiring a Public Body to apply a harms test to determine if information should be withheld. This harms test is described in Report A-2015-003:

*[10] As with other harms tests under the ATIPPA, 2015, public bodies cannot rely on speculation that harm might take place but must establish a reasonable expectation that harm would result from the disclosure of the specific records or information at issue and not from unrelated factors. Report 2007-001 from former Commissioner Wall examined the former section 37(1) of the ATIPPA, 2015 (section 26) and stated that "a public body wishing to use section 26(1) must present evidence of a reasonable expectation of such a threat to result if the records are released.*

[20] In its submissions, the City states "it is not unreasonable to assume". While the City's response uses the language of "reasonable expectation of harm", it does not provide sufficient support. "Not unreasonable to assume" is far from meeting the standard of a reasonable expectation of harm. As the above noted report states, public bodies cannot rely on speculation. The harm which may befall the employee is entirely speculative.

[21] A bare statement by the Complainant that he wished to hold the City's employee accountable and prevent recurrences is not, on its own, evidence of an intent to cause harm, particularly in the absence of threats or "overt ill will." Subsection 3(b) of *ATIPPA, 2015*, lists as one of the purposes of the Act "increasing transparency in government and public bodies so that elected officials, officers **and employees** remain **accountable**" (emphasis added). The invocation of one of the purposes of the Act, on its own and in the absence of threats or "overt

ill will,” does not support the argument that the applicant “could reasonably be expected to... threaten the safety or mental or physical health of a person other than the Applicant.” It would be anathema to the purposes of the *Act* if employees of public bodies could prevent the release of their names through a vaguely-defined and poorly-supported expression of fear.

[22] Additionally, it is worth noting that, despite the employee’s expressed fear for his safety, the Deputy Manager of Public Works was unaware of the incident until contacted by the City’s ATIPP coordinator in response to this complaint. The degree to which the employee is concerned for his safety is therefore questionable given the lack of action taken to address this incident prior to both the request and subsequent complaint to this Office. The employee expressed concern for his and his family’s safety, but there is no indication any threats were made and no reasonable argument is provided to support the proposition that harm of any sort would come to the employee as a result of the release of his name. The Complainant’s own expressed intention in obtaining the name is to hold the City and the employee accountable. There is nothing to suggest that he intends to hold anyone accountable through anything other than appropriate legal means.

[23] The City of St. John’s referred to sections of its Respectful Workplace Policy, specifically the definitions of “disrespectful behavior”, “harassment”, and “violence,” suggesting that the behavior of the Complainant could fall within these definitions and the City would thereby be in breach of its own policies were it not to take steps such as withholding the employee’s name to protect its staff. The City did not, however, indicate the relevance of its policy to the harms test but merely referred to the definitions within. Additionally, it seems speculation at best for the City to try and classify the actions of the Complainant as potentially “violent” when it itself acknowledges there was no physical or threatened actions made by the Complainant towards the employee.

[24] The City also suggested that release of the employee’s name could result in his “continued harassment.” To date, there has been no evidence of any harassment of the employee subsequent to the inciting incident. By definition harassment has to be ongoing for it to be “continued.” No description of the form of harassment the employee may be subject to has been provided by the City. In the absence of any threats or overt ill will, and without an



explanation of how the release of the employee's name could endanger him beyond speculation and "not unreasonable" assumptions, the City has not discharged its onus under paragraph 37(1)(a).

## VI CONCLUSIONS

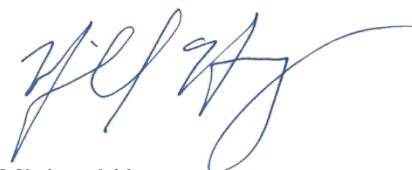
[25] Given the preceding, the employee's name should be disclosed to the Complainant as it is presumptively "not an unreasonable invasion of privacy" under s. 40(2)(f) and the City has not provided evidence to support withholding this information under s. 37(1)(a).

## VII RECOMMENDATIONS

[26] Under the authority of section 47 of *ATIPPA 2015*, I recommend that the City disclose the name of the employee to the Complainant.

[27] As set out in section 49(1)(b) of *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.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20<sup>th</sup> day of August 2020.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador