OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-013

August 25, 2020

City of Mount Pearl

Summary: The City of Mount Pearl received an access to information request for the complaints and witness statements collected in a workplace investigation of a named individual. The City provided the complaints but refused access to the witness statements, asserting that the records were not in the custody or under the control of the City. A complaint was filed with this Office asking the Commissioner to review the refusal. In the event that the witness statements are found to be in the custody or under the control of the City, the City's position is that the relevancy of records and information gathered for the purpose of the workplace investigation cannot be determined until the investigation is complete, therefore the right of access provided under section 33 (information from a workplace investigation) of the *Access to Information and Protection of Privacy Act* (*ATIPPA, 2015*) did not apply. The Commissioner determined that the witness statements are within the control of the City and that section 33(3) applies regardless of whether or not the workplace investigation is complete. The Commissioner recommended that the City obtain the witness statements from the Investigator and disclose the relevant information to the access to information Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 5 and 33; *City of Mount Pearl Act*, R.S.N.L. 1990, c. C-16

Authorities Relied On: NL OIPC Reports A-2014-012; BC OIPC Order 04-19; BC OIPC Order F06-01

File#: 0025-114-20-011

	Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25; *Archean Resources Ltd. v. Newfoundland (Minister of Finance),* 2002 NFCA 43.
Other Sources:	OIPC Guidance, *Section 33 – Information from a Workplace Investigation*; City of Mount Pearl, *Respectful Workplace Policy and Procedure* and *Protected Disclosure (Whistleblower) Policy and Procedure*.

I BACKGROUND

[1] The Complainant made an access to information request to the City of Mount Pearl (the "City") as follows:

> *All information created or gathered for the purpose of a workplace investigation concerning [named individual] as the respondent.*

[2] The request was then modified as follows:

> *Specifically, we requested copies of the two complaints made* against [named individual]*, as well as copies of any witness statements taken in the course of the workplace investigation thus far.*

[3] The City provided access to the two complaints but refused access to the witness statements, advising that the records were not in the custody or under the control of the City within the meaning of subsection 5(1) of *ATIPPA, 2015*.

[4] The Complainant was not satisfied with the City's response and filed a complaint with this Office.

[5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

[6] On July 31, 2020 this Office issued Report P-2020-001 addressing privacy complaints relating to records associated with the same matter which is the subject of this Report. While there is overlap between these two Reports in the sense that some of the same records are involved, this Report deals with an access to information request rather than a privacy complaint, and therefore different statutory provisions apply. In particular, Report P-2020-001 concluded that the release of the complaint letters to the Complainant, prior to the receipt of the access request considered in this Report, was a privacy breach because the City did not have proper legal authority to disclose the information in the absence of an access request. This Report considers the different legal context after an access request had been received.

II PUBLIC BODY'S POSITION

Custody and Control

[7] The City has argued that the witness statements are not within its custody nor under its control and therefore they cannot be provided to the Complainant.

[8] In assessing custody and control the City used the factors listed in Report A-2014-012 at paragraph 37 as follows:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a "core", "central" or "basic" function of the institution?*
- *Does the content of the record relate to the institution's mandate and functions?*
- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*
- *If the institution does have possession of the record, is it more than "bare possession"?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*
- *Does the institution have the authority to regulate the record's content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[9] Regarding the above factors the City advised as follows:

- *that the external investigator was retained under a contract to provide services to the City in the form of an external independent workplace investigation;*

- *that the external investigator intended to use the records for evaluating the evidence relating to the allegations and in rendering an investigation report;*
- *that the City has a common law duty as an employer to investigate workplace complaints where allegations contained in a complaint, if proven, would constitute a breach of policy or law;*
- *that commencing workplace investigations is not a "core", "central" or "basic" function of the City;*
- *that the content of the records does not relate to the City's mandate and functions;*
- *that the City does not have physical possession of the records and is not entitled to possess the records either by statute or contract and that it was never the external investigator's intentions to provide their notes to the City upon the completion of the investigation;*
- *that the City does not have the authority to assert control over the records because it is the work product of an external independent investigator and that any control the City sought over the investigator's work-in–progress would nullify the independence of the investigation;*
- *that the City has not relied on the records and that the records have not been integrated with any other records held by the City; and*
- *that the City has only commenced one prior workplace investigation and it was done internally and carried out by a consultant to the City who occupied an office at the City and performed other human resources functions for the City.*

[10] The City argued that under the two-part test for control outlined in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* that the responsive records do not relate to a departmental matter. Instead the City asserts that the responsive records relate to a matter that is collateral to the normal business of the City. The two-part test is as follows:

> *… (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?*
>
> *…*
>
> *…all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder… The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.*

[11] It is the City's position that the two-part test outlined above does not include human resources matters *per se*, but instead that the determination is focused on whether the "record" relates to the mandate and/or function of the public body. The City states that it does not exist for the purpose of employing individuals and the fact that the City employs individuals to complete the mandate and functions of the City, which is the delivery and administration of services to the residents of the municipality, is collateral to its 'reason for being'.

[12] The City further asserts that it could not reasonably be expected to obtain a copy of the records upon request. No representation was made by the external investigator that work-in-progress would be provided to the City and there was no expectation on the part of the City that they would receive it.

[13] Furthermore, the City states that the workplace investigation is to be conducted independently and at arm's length from the City and the City does not have a right to possess notes detailing the investigator's conversation with complainants and/or witnesses.

[14] The City had a *Respectful Workplace Policy and Procedure* (2018) as well as a *Protected Disclosure (Whistleblower) Policy and Procedure* (2018). Both were in effect when the complaints were made to the City. Both allow for an investigation to be conducted internally or by an external party, however, the *Protected Disclosure (Whistleblower) Procedure* specifically states that if there is a Disclosure against the Chief Administrator Officer, Mayor or Members of Council then any appointed investigator shall be external to the City.

[15] The City has stated that the complaints may be characterized as falling within both the City's *Respectful Workplace Policy* and its *Protected Disclosure (Whistleblower) Policy*, however, by their nature they align more as whistleblower complaints.

[16] However, the City advised that the Whistleblower Policy is not specifically referenced in either signed complaint and that neither complainant self-identifies as a "Discloser" under the *Protected Disclosure (Whistleblower) Policy* or asserts whistleblower protections. The City also states that in one complaint the complainant references the City's *Respectful Workplace Policy*.

[17] In this case the City was required to seek an external investigator. The City entered into an agreement with a third party to conduct an independent workplace investigation. It was agreed that the investigator would provide an independent workplace investigation regarding the complaints, provide a written report to the City upon completion of the investigation and bill the City for services. The investigator would not provide a legal opinion and would not act as an advocate or provide advice to the City with respect to what actions, if any, should be taken as a result of the investigation.

[18] The Formal Resolution clause under the *Respectful Workplace Guidelines and Procedure* states:

> *4.2 Formal Resolution*
> *…*
> *The formal resolution process is initiated once a written complaint is received. Once a formal written complaint of disrespectful behaviour is made, Human Resources will commence an investigation if appropriate and may recommend the engagement of others including, an external party, in the investigation process.*
>
> *An investigation may be carried out by the Manager of Human Resources or designate directly, assigned to management in the area involved, assigned to an investigative team, assigned to an independent third-party or re-directed to a more appropriate existing process dependent upon the specific circumstances and seriousness of the allegation.*
>
> *Formal resolution investigations cannot be carried out anonymously. The identity of the complainant and the allegations contained in the complaint will be made known to the individual(s) alleged to have engaged in disrespectful behavior and they shall have an opportunity to respond to the allegations.*
>
> *Upon completion of the investigation, the investigator will document their findings and any recommendations for the resolution of the disrespectful behavior.*
>
> …

[19] The Procedure for Investigation of Alleged Wrongdoing under the *Protected Disclosure (Whistleblower) Procedure* states:

> *…*
> *8.12 Upon completing an investigation, the investigator shall prepare a report containing their findings and any recommendations about the Disclosure and*

> *the wrongdoing, and submit that report to the Manager of Human Resources or the Director of Corporate Services.*
> *…*

[20] The City's position is that the wording in the engagement letter to the external investigator "unless otherwise directed I will provide a written report to the City upon completion of the investigation" does not give the City any control of the investigator's work product. Further, the City states that there are no witness statements in existence. The only documents in existence are the external investigator's hand-written notes that are used to render the report, hence their work-product.

[21] The City argues that the meaning of "unless otherwise directed" is that there are only two options: one in which a report is delivered to the City, or alternatively the City could have indicated it did not want a written report. However, as outlined above under both procedures the investigator is required to document their findings or prepare a report containing those findings.

[22] The City states that it will not ask the external investigator to provide the requested records to the Complainant as it is the view of the City that the Complainant is not entitled to that level of disclosure, particularly at an interim stage of the investigation, and that the Complainant can make full answer and defence to the claims without access to the external investigator's handwritten notes.

Section 33 (Information from a workplace investigation) *ATIPPA, 2015*

[23] As explained above, the City is of the view that the responsive records are not in the control or custody of the City. Alternatively, the City asserts that even if the records are in the control or custody of the City, disclosure in accordance with section 33 would not be appropriate. The City argues that under section 33 of *ATIPPA, 2015*, the parties have a right to all relevant information pertaining to the workplace investigation. As the investigation is still ongoing, the City argues that the relevance of information gathered is still an issue under determination by the external investigator and can only be ascertained once the interviews are completed.

Furthermore, there is a risk of irrelevant information being disclosed prior to the completion of the investigation.

[24] The City also believes that mid-investigation disclosure would be harmful to the complainants and other employees who have been interviewed by the external investigator as the information was provided with an expectation of some confidentiality. The external investigator met with each complainant and witness cautioning them about the confidentiality of the investigation and assured them that the information provided would be disclosed only to the extent necessary to provide the Complainant with the ability to know the case against them and make full response as required for procedural fairness.

[25] The City states that as the complaints fall within the *Protected Disclosure (Whistleblower) Policy* that disclosing the information mid-way through an investigation defeats the purpose of that policy and the protection it affords to complainants.

[26] The City states that mid-investigation disclosure would have an impact on the evaluation of the relevance of the information, making it significantly more challenging and speculative than if the review and evaluation occurred post-investigation. Additionally, an interim disclosure has the potential to thwart the timeliness and integrity of the investigation.

III COMPLAINANT'S POSITION

Custody and Control

[27] The Complainant's position is that the witness statements are within the City's control and access should be granted.

[28] It is the Complainant's position that the City's Human Resources department has power over the information collected during an investigation. The Complainant believes that the Human Resources department has the power and responsibility whether the investigation is carried out by a City employee or an external investigator. The Complainant relies on part of

section 4.2 and section 4.6 of the City's *Respectful Workplace Guidelines and Procedures* as follows:

> *4.2 Formal Resolution*
> *…*
>
> *An investigation may be carried out by the Manager of Human Resources or designate directly, assigned to management in the area involved, assigned to an investigative team, assigned to an independent third-party or re-directed to a more appropriate existing process dependent upon the specific circumstances and seriousness of the allegation.*
> *…*
>
> *4.6 Confidentiality*
>
> *Information collected and retained during an investigation is treated as confidential. During the investigation process, Human Resources will limit disclosure of investigation-related information to that which is necessary to resolve the complaint.*
>
> *Information collected and retained by Human Resources may be required to be released by law including release required in court proceedings, arbitration or other legal proceedings.*

[29] The City has claimed the *Protected Disclosure (Whistleblower) Procedure* applies to the allegations contained in the complaints. The Complainant argues that the City's Director of Corporate Services does not cease to be the "official guardian" of the records simply because the City appoints an external investigation. The Complainant relies on section 5.2 of this procedure which states:

> *5.2 The Director of Corporate Services shall be the official custodian of records created as a result of the filing of a Protected Disclosure and shall manage those records in accordance with the City's Information Management policy and procedures.*

[30] The Complainant cites *Canada (Information Commissioner) v. Canada (Minister of National Defence* as the authority for the test to determine control of records.

> *[55] Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers*

> *of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.*
>
> *[56] Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonable expect to obtain a copy upon request. These factors include the substantive content of the records, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the records holder, or on practices intended to avoid the application of the Access to Information Act (A.F., at para 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the records must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.*

[31] It is the Complainant's position that a workplace investigation is a human resources matter and that human resources matters are clearly within the City's responsibilities as an employer. The Complainant argues that part one of the test for control is met.

[32] Regarding part two of the test, the Complainant argues that the City has formal policies in place that empower it to commence an investigation. The City did institute the investigation which gave rise to the creation of the records. Based on the assumption that "the substantive content of the record is expected to largely consist of statements made by complainants and witnesses concerning the alleged conduct of [named individual] in the workplace setting", the City as the employer should reasonably expect to obtain such information on request from the investigator, whom the City hired.

[33] Furthermore, it is the Complainant's position that designating an external investigator does not give the City any less control over the records created in the investigation than it would have if the investigation was done internally.

[34] The Complainant also relies on section 8.16 of the *Protected Disclosure (Whistleblower) Procedure* to support the City having the responsibility to keep the records from the investigation once it is completed. This section states:

> *On completion of the investigation, the investigator shall deposit all records with the overseer who shall be the official custodian of such records charged with preserving their confidentiality. All records pertaining to a Disclosure's report and the Investigator's report shall be securely disposed of in accordance with the City's Retention and Disposal Schedule.*

[35] It is the Complainant's position that the City has the authority to regulate the records' use and disposal which is one of the factors pointing to the City having control of the records.

[36] The Complainant argues that the City's interpretation of custody and control is narrow and technical as opposed to broad and liberal.

Section 33 (Information from a workplace investigation) *ATIPPA, 2015*

[37] Regarding section 33 of *ATIPPA, 2015*, the Complainant states that if the City's position prevailed, parties to a workplace investigation instituted under the City's policies would have their rights of disclosure under *ATIPPA, 2015* depend on whether the investigation was carried out in-house or by an external investigator.

[38] The Complainant argues that as a party to the investigation, section 33 of *ATIPPA, 2015* requires disclosure of all relevant information created or gathered for the purpose of a workplace investigation. The Complainant relies on the use of "shall" in section 33 as mandating the head of the public body to provide disclosure.

[39] Regarding the use of the term "relevant" in section 33(2) of *ATIPPA, 2015*, it is the Complainant's position that a witness statement of conduct or alleged conduct by the Complainant in the workplace would be relevant to the investigation. The Complainant relies on a guidance piece from this Office, "Section 33 – Information from a Workplace Investigation" as follows:

> *When releasing information under this section, it is imperative that careful consideration be given to the word "relevant". In the course of workplace investigations, a lot of information may be created or gathered that is ultimately not relevant to the investigation. Examples of such information might include medical diagnoses unrelated to the issue or specifics of medical treatment. While a general diagnosis or description of a medical condition may be relevant in some situations, sometimes detailed treatment notes or plans are not relevant.*
>
> *Similarly, detailed personal histories may be collected as part of a workplace investigation. Significant portions of the personal history may not be relevant to the investigation. Information that is not relevant to the investigation which is also an unreasonable invasion of personal privacy is still protected and should not be disclosed.*
>
> *Decisions with respect to relevance are case specific, and as a result certain types of information may be disclosed in one case but not another. The relevance of the information is a decision that must be made by the public body given the specific circumstances of each file, and release of information in one instance should not be seen as a "precedent setting."*

[40] The Complainant states that *ATIPPA, 2015* does not limit an applicant's right to receive relevant information created or gathered for the purpose of a workplace investigation to a particular period of time, and that it would be improper that a party can only make use of the right once the investigation has been concluded. The Complainant asserts that access delayed is access denied.

[41] Furthermore, the Complainant believes that the investigator can ascertain relevancy as each witness statement has been taken. As the investigation is looking at conduct in the workplace, the Complainant feels there should be minimal non-relevant information provided such as medical information.

[42] In conclusion the Complainant states that the City has the onus to prove that the Complainant has no right of access to the records or part of the records requested.

IV ISSUES

[43] The issues to be decided in this Report are as follows:

1. Are the responsive records in the City's custody or under its control?
2. If yes, does the term "relevant" within section 33 of *ATIPPA, 2015* limit the timing of disclosure of the witness statements to when the investigation is complete?

V DECISION

Custody or Control

[44] Section 5 of *ATIPPA, 2015* outlines the issue of custody and control as follows:

> *5(1) This Act applies to all records in the custody of or under the control of a public body…*

[45] The issue of custody or control has been reviewed in depth in Report A-2014-012. As stated in paragraphs 30-32 of that Report, section 5 of *ATIPPA, 2015* sets out an important threshold question and the terms custody and control, while not defined, have been given a broad and liberal interpretation:

> *[30] Section 5(1) sets out an important threshold question. In order for the ATIPPA to apply to records, the records must either be in the custody of or under the control of a public body. A record will only be subject to the ATIPPA if it is in the custody **OR** under the control of a public body; it need not be both.*
>
> *[31] Determining that a record is in the custody of or under the control of a public body does not necessarily mean that an applicant will be given access to it. A record within a public body's custody or control may be withheld from an applicant under a mandatory or discretionary exception.*
>
> *[32] The terms "custody" and "control" are not defined in the ATIPPA. Commissioners and courts in other jurisdictions have given these terms a broad and liberal interpretation in keeping with the intent of access to information legislation. The purposes of the ATIPPA, as set out in section 3, are to make public bodies more accountable to the public and to protect personal privacy. Section 3 of the ATIPPA reads as follows:*
>
> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

> *(a) giving the public a right of access to records;*
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
> *(c) specifying limited exceptions to the right of access;*
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(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.*

[46] The issue in this complaint is whether the records are under the control of the City as the records are currently in the custody of the external investigation. In order to be subject to *ATIPPA, 2015*, the records need only be in either the control or custody of a public body.

[47] As outlined at paragraph 37 in Report A-2014-012 there are a number of factors that must be considered when assessing custody and control. This list of factors is not exhaustive and is as follows:

> *[37] A non-exhaustive list of factors has been developed and used in other jurisdictions is assessing custody and control. Some of the factors may not apply in a specific case, while other unlisted factors may apply. Order MO-2750 from the Information and Privacy Commissioner of Ontario sets out the factors at paragraph 21, as follows:*
>
> - *Was the record created by an officer or employee of the institution?*
> - *What use did the creator intend to make of the record?*
> - *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
> - *Is the activity in question a "core", "central" or "basic" function of the institution?*
> - *Does the content of the record relate to the institution's mandate and functions?*
> - *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*
> - *If the institution does have possession of the record, is it more than "bare possession"?*
> - *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
> - *Does the institution have a right to possession of the record?*

- *Does the institution have the authority to regulate the record's content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[48] The test for control has been covered in detail in Report A-2014-012. As the main issue in this Report is that of control, it is worth repeating here:

> *[39] In addition to the above factors the Supreme Court of Canada has commented on the issue of control of documents in Canada (Information Commissioner) v. Canada (Minister of National Defence) ("Minister of National Defence"). The Court stated at paragraph 48 as follows:*
>
> > *As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The Canadian Oxford Dictionary defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307) … The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91-95).*
>
> *[40] The Court went on at paragraph 50 to support a two-part test for whether a document was under the control of an institution. This test is as follows*:
>
> > *… in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a*

> *departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?*
>
> *[41] At paragraph 55 of Minister of National Defence the Court explained that step one of the test acts as a useful screening device. Step one asks whether the record relates to a departmental matter and if the answer to that question is no then the inquiry is ended. The Court continued at paragraph 56 by commenting on the second question as follows:*
>
> > *…all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder… The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.*

[49] The City provided arguments for each of the factors listed above. The factors weighing against the City having custody or control are the fact that the records are not in the physical possession of the City, that the City has not relied on the records, that the records have not been integrated with any other records held by the City, and that the records are for the use of the external investigator in evaluating evidence.

[50] The City has argued that it is not entitled to possess the records either by statute or contract and that it was never the external investigator's intention to provide their notes to the City upon the completion of the investigation. The City further argued that it does not have the authority to assert control over the records because it is the work product of an external independent investigator. The City asserted that any control the City sought over the investigator's work-in–progress would nullify the independence of the investigation.

[51] The factors weighing in favour of the records being in the City's control are the fact that the external investigator would be considered an employee of the City as defined under section 2 of *ATIPPA, 2015*, that the City as an employer has a duty to carry out investigations in workplace complaints, that the City under the *Protected Disclosure (Whistleblower)*

Procedure seems to have the ability to regulate the record's disposal under section 8.16 "… All records pertaining to a Discloser's report and the investigator's report shall be securely disposed of in accordance with the City's Retention and Disposal Schedule."

[52] The *City of Mount Pearl Act* establishes a statutory role for the City Manager in carrying out various functions, including being the head of the administrative branch, and conducting the affairs of the City in accordance with its policies. The City's policies are supported by statutory authority. Section 58. (1) of the *City of Mount Pearl Act* states:

> *58. (1) The city manager is the chief executive and administrative officer of the council and head of its administrative branch and is responsible to it for the proper planning, execution, conduct and the proper administration of the affairs of the council in accordance with the policies determined by the council.*

[53] Section 62 of the *City of Mount Pearl Act* states:

> *62. The city manager may use the services of the heads of departments and of all other employees of the council for the purpose of carrying out his or her duties.*

[54] The *City of Mount Pearl Act* contains all of the necessary authority for carrying out the City's core mandate, including the administrative affairs of the City and management of employees.

[55] While the City argues that human resources matters are collateral to its "reason for being", they are pursued per the *City of Mount Pearl Act* via policies developed, and therefore we do not agree with the assessment that commencing a workplace investigation is not a "core", "central" or "basic" function of the City.

[56] Based on the *Respectful Workplace Policy and Procedure* and the *Protected Disclosure (Whistleblower) Policy and Procedure*, the City has the responsibility to investigate complaints. The fact that an external investigator was engaged, as required by the *Protected Disclosure (Whistleblower) Procedure* in this case, does not relieve the City of its responsibilities under the *City of Mount Peart Act* or its Policies and Procedures. Furthermore, the engagement of an external investigator does not relieve the City of its responsibilities under *ATIPPA, 2015*.

[57] Order 04-19 from the Office of the Information and Privacy Commissioner for British Columbia dealt with an access request for a contract investigator's notes of the investigation into a harassment complaint. Similar to this case, the main issue in Order 04-19 is whether the notes, though not in the physical possession of the School District, were under its control.

[58] The School District argued that its statutory mandate was to provide educational programs, not to conduct harassment investigations, and that the notes did not come under its control through any term in the contract with the investigator. Furthermore, the notes were the property of the investigator, that it was not the normal practice of the School District to request an investigator's interview notes, and while the harassment investigation report is kept, the notes of the investigator do not form part of the investigator's report and were not integrated with the School District records.

[59] Order 04-19 commented at paragraph 47 as follows:

> *[47] A statutory provision that imposes express obligations on a public body with respect to a particular record or type of record is obviously relevant to determining control under the* Act*. However, in addition to or in the absence of explicit statutory provisions for information gathering and management, control may be established by reference to express or implied functions of a public body that necessarily entail obtaining or compiling records.*

[60] The Adjudicator went on to reference an example of a similar case at paragraph 49 as follows:

> *[49] In Criminal Review Board, above, the Board had a statutory obligation to maintain a record of its proceedings yet the court reporter who created and physically possessed the backup tapes of those proceedings was an independent contractor and the contract for services did not address control of backup tapes. Referring to Neilson and acknowledging that it concerned records kept by an employee as opposed to an independent contractor, the Ontario Court of Appeal found the Board's obligation to maintain a record of its proceedings related to all forms of records and transcripts, including backup tapes that might have to be referred to in the event of a dispute over the accuracy of a record or transcript. The Board's duty to maintain a record of its proceedings and provide access to records under its control was not, and could not be, avoided by contracting out court reporting services, however silent or deficient the contractual terms respecting control of backup tapes might be. Styling the role of the court reporter as an "independent" one was meaningless when the function the court reporter fulfilled was part of the public body's functions:*

> *[35] The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does, it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfill its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.*

[61] The Adjudicator stated at paragraph 50 "in short, contractual provisions may be relevant to control, but the School District cannot contract out of the Act directly." The Adjudicator commented on the relationship of the investigation to the School District which is relevant to the issues in this Report. The Adjudicator stated:

> *[54]... I am also unable to accept that, as the School District contends, the harassment complaint investigation was outside the mandate and functions of the School District. An operation or activity can be part of a public body's mandate or functions without being a stand-alone purpose for its existence or without being specifically mandated by law. The education of children is no doubt the purpose of the School Act and the School District. That objective is accomplished, however, by the School District operating schools, employing and managing staff and entering into collective bargaining relationships in that regard. These functions are provided for by statute and they call for the School District to address applicable educational and workplace laws, standards and practices, as it did for workplace harassment in School District Policy 5530 and the Teachers' Collective Agreement.*
>
> *[55] Considering the provisions of the School Act, Public Education Labour Relations Act and Labour Relations Code affecting the School District, its harassment policy, the workplace harassment provisions in the collective agreement and the School District's letter of engagement to the investigator, which required him to follow the procedures in the harassment policy and collective agreement, I conclude that harassment complaint investigations are clearly part of the School District's mandate and functions.*

> *[56] Nothing in the statutes, harassment policy or collective agreement suggests that the use of an employee or a contractor as investigator has bearing on the School District's responsibility for harassment complaint investigations. On the contrary, the School District has legislated responsibility for operating and managing schools in its area and, under the harassment policy and collective agreement, it is the School District that maintains responsibility and control over harassment complaint investigations, regardless of the investigator's status as an employee or contractor.*

[62] Ultimately the Adjudicator found that there was "no meaningful difference between School District control under the Act of records created by an employee who is assigned to conduct a harassment complaint investigation and records created by an external investigator who is contracted to perform that task."

[63] The Adjudicator also reviewed the relationship of the notes to the investigation and determined:

> *I am also not persuaded that there is a principled reason to differentiate between control of the report, a record the investigator was explicitly required to create, and control of records of interviews or other investigative work that the investigator was implicitly required, or at the very least authorized, to create in conducting the investigation. The collection, compilation and analysis of information is, after all, the essence of investigation and these records all relate to, and flow from, the investigation that the investigator was engaged to do for the School District as part of its functions.*

[64] The Adjudicator ordered that the School District obtain the notes from the investigator, determine whether to apply one of more exceptions to the notes and provide a response to the applicant.

[65] As the fact situation in Order 04-19 is very similar to the present case, many of the Adjudicator's findings apply here as well. It was determined that there is no difference between control of a report that was requested and control over the records of interviews or other investigative work that the investigator was implicitly required or authorized to create in conducting the investigation. It was also found that investigating a complaint was not outside the mandate and functions of the public body and that a public body maintains responsibility

and control over the investigation regardless of the investigator's status as an employee or contractor.

[66] Order F-06-01 from the Office of the Information and Privacy Commissioner for British Columbia dealt with an access request for records relating to a public report on offshore gas exploration prepared for the Minister of Energy and Mines by a panel of three scientific experts.

[67] In that case there was an agreement between the Ministry and the parties but it was argued that the agreement did not accurately reflect the understanding of what was to be provided to the Ministry. As well, it was clear that the panel's assignment to provide advice to the Minister on whether offshore oil and gas activity can be undertaken in a scientifically sound and environmentally responsible manner was clearly within the Ministry's mandate and function.

[68] The Adjudicator found that a public body cannot contract out of its obligations and stated as follows:

> *[84] I conclude that a public body cannot contract out of its obligations under the Act, or immunize records from its control under the Act, by contracting out a function and labelling it "independent" or failing to enter into adequate contractual arrangements to ensure compliance with the Act.*

[69] Furthermore at paragraph 122, the Adjudicator stated:

> *[122] The Ministry does not see how public access to records that it has not seen could make it more accountable. I do not agree that the Act's purpose of public body accountability to the public through access to records is negated by inadvertent or intended avoidance of actual knowledge of the contents of records. I also do not agree that it is consonant with the purposes of the Act for a public body's control of records, and thus accountability under the Act, to be negated by the device of using contract consultants or other service providers to create and control records and keep them out of the possession and actual knowledge of the public body. In my view, it would be inimical to the objects of the Act for records to be immunized from the Act's application and protections because a public body contracts for services and fails––by design or neglect, before or after the fact––to provide for any or adequate contractual control of records that the contractor receives or produces in performing the contract services for the public body.*

[70] Ultimately the City is in the same position by hiring an external investigator as the above public bodies and cannot contract out of *ATIPPA, 2015* by having the work done by an external party.

[71] Based on the review of the orders above along with the factors for assessing custody and control, and the two-part control test, it is determined that the requested records are under the control of the City. While the investigator gave assurances of confidentiality, as the City has control of the records, section 33 of the *Act* must be considered.

Section 33 (Information from a workplace investigation) of *ATIPPA, 2015*

[72] Since it was found that the City has control of the requested records, we now must determine if section 33 of *ATIPPA, 2015* applies.

[73] Section 33 is listed under the exceptions to disclosure, however, unlike the other exceptions it also functions as a mandatory disclosure provision in certain circumstances and for certain individuals when a request for access to information has been filed with a public body. Section 33 is as follows:

> *33.(1) For the purpose of this section*
>
> *(a) harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;*
>
> *(b) party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and*
>
> *(c) "workplace investigation" means an investigation related to*
>
> *(i) the conduct of an employee in the workplace,*
>
> *(ii) harassment, or*
>
> *(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public which may give rise to progressive discipline or corrective action by the public body employer.*

> *(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.*
>
> *(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).*
>
> *(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.*

[74] The Complainant is a party to a workplace investigation as defined in section 33(1), therefore under section 33(2) and section 33(3) the Complainant is entitled to "all relevant information created or gathered for the purpose of a workplace investigation." The word relevant is not defined in section 33 or in *ATIPPA, 2015*, however, the plain meaning of relevant is "closely connected or appropriate to what is being done or considered."

[75] When considering the interpretation of a word in a statue, the Court in *Archean Resources Ltd. v. Newfoundland (Minister of Finance), 2002 NFCA 43 at para. 82:*

> *In my view, the law is clear that, faced with the task of interpreting words or expressions in a statute, the court or judge must, before coming to a conclusion as to what these specific words or expressions means, consider them in "their entire context, harmoniously with the scheme of the statute ... its purpose and the intention of the legislature". Further, the statute must be considered in the light of s. 16 of the Interpretation Act (assuming the court is dealing with a Newfoundland statute), which requires that the Act and every provision thereof be considered remedial and shall receive the liberal construction and interpretation that best assures the attainment of the objects of the Act and provisions, according to its true meaning.*

[76] The City has argued that as the investigation is still ongoing the relevance of the information gathered is still an issue under determination by the external investigator and can only be ascertained once the interviews are completed.

[77] While not all relevant information may be known during a given phase of the investigation process, it is clear that a large portion of information about a workplace incident or allegations against the Complainant would be relevant. That information would be closely connected to the purpose of the investigation.

[78] As outlined in this Office's guidance piece *Section 33 – Information from a Workplace Investigation*, noted previously, there still must be a careful consideration when determining relevancy of information. In the course of the investigation there could be information created or gathered that is ultimately not relevant, such as specific medical diagnoses or detailed personal histories. Information that is not relevant to the investigation which is also an unreasonable invasion of personal privacy is still protected and should not be disclosed.

[79] This Office has taken the position that decisions with respect to relevance are case specific and must be made by the public body.

VI RECOMMENDATIONS

[80] Under the authority of section 47(a) of *ATIPPA, 2015*, I recommend that the City:

1. obtain the requested records from the investigator;
2. review the records and make a determination of "relevancy" under section 33 of *ATIPPA, 2015*; and
3. provide the relevant records to the Complainant with any appropriate redactions for non-relevant material. Non-relevant information can only be withheld if disclosure would be an unreasonable invasion of privacy, or if another exception applies.

[81] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the City of Mount Pearl 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.

[82] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of August 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador