



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-008

February 15, 2021

Town of Conception Bay South

Summary:

The Complainant made an access to information request to the Town of Conception Bay South (the “Town”) for Board minutes of the Long Pond Harbour Authority pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). The Town initially withheld the records based on section 39 (disclosure harmful to business interests of a third party). The Complainant asserted that the Town had not met all three parts of the test under section 39 of *ATIPPA, 2015* and asked the Commissioner to review the Town’s refusal. During the investigation, submissions were received from the Long Pond Harbour Authority arguing that the Town did not have custody or control of the records, therefore the records could not be disclosed under *ATIPPA, 2015*. The Town agreed with this position. The Commissioner determined that the records were not in the custody or under the control of the Town and that *ATIPPA, 2015* did not apply to the records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, section 5.

Authorities Relied On: NL OIPC Reports [A-2014-012](#), [A-2017-021](#), [A-2020-013](#); [Ontario IPC Order MO-2750](#); [Canada \(Information Commissioner\) v. Canada \(Minister of Defence\)](#) [2011] 2 S.C.R. 306.

I BACKGROUND

- [1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to the Town of Conception Bay South (the “*Town*”) for:

Copies of Board minutes of the Long Pond Harbour Authority for the period December 2015 to September 2020 received by CBS officials who are by virtue of their positions with the Town of Conception Bay South, members fo [sic] the Long Pond Harbour Authority as per the Articles of Association filed with the Registry of Companies.

- [2] The Town initially withheld all responsive records pursuant to section 39 (disclosure harmful to business interests of a third party) of *ATIPPA, 2015*. The Complainant was not satisfied with the Town’s response and filed a complaint with this Office.
- [3] During the investigation, this Office received a submission from the Long Pond Harbour Authority (the “*LPHA*”) which was accepted under section 96(1) of *ATIPPA, 2015*. The LPHA is a private corporation without share capital, incorporated pursuant to the Newfoundland and Labrador *Corporations Act*. In 2013, the LPHA was provided ownership of the Port of Long Pond infrastructure and seabed as part of the Canadian Port Divestiture Program.
- [4] The LPHA argued that the records were not in the Town’s custody or control for the purposes of the *Act* and that if the records were found to be in the Town’s custody or control then section 39 of *ATIPPA, 2015* applied to withhold the records.
- [5] Following receipt of the LPHA’s submissions, the Town agreed with the LPHA’s position regarding custody and control and submitted to this Office that the Town did not have custody or control.
- [6] 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

- [7] In its final response to the Complainant, and in its submissions to this Office, the Town initially withheld the records pursuant to section 39 of *ATIPPA, 2015*. However, upon receipt of a letter from the LPHA, the Town agreed with the position that the records were not within its custody or under its control for the purposes of *ATIPPA, 2015* and that the access to information procedure under the *Act* could not require their disclosure. As the Town has agreed with the position initially put forward by the LPHA, the LPHA's arguments constitute the Town's position on custody or control.
- [8] The LPHA stated that it is not a public body as defined by section 2(x) of *ATIPPA, 2015* and therefore not subject to the *Act*. Furthermore, the LPHA does not consider itself subject to the federal *Access to Information Act* as it believes that LPHA does not meet the definition of a government institution under that *Act*.
- [9] LPHA stated that it has two member groups: the Town of Conception Bay South, a municipal corporation, and the Port Users Group, which is comprised of the industrial and commercial users of the Port of Long Pond who have applied to be members of the Port Users Group and who have met the specified financial contributions in the by-laws of the LPHA.
- [10] While the LPHA acknowledges that the Town is a public body and subject to the *Act*, its position is that the records are not in the Town's custody or control for the purposes of *ATIPPA, 2015*. It is LPHA's position that the Town only has bare possession of the records.
- [11] The LPHA provided our Office with a detailed submission describing its rationale for claiming that the records are not in the custody or under the control of the Town as well as the application of section 39 of *ATIPPA, 2015* if the records are found to be in the custody or under the control of the Town. We will refer to the LPHA's position and arguments where necessary later in this Report.

III COMPLAINANT'S POSITION

[12] The Complainant's position was that all three parts of the test under section 39 were not met and therefore the Town could not rely on that exception to withhold the records.

[13] The Complainant did not provide a position on the issue of custody or control as that was not the Town's initial position.

IV ISSUES

[14] The issues to be dealt with in this Report are:

1. whether the records are in the custody of or under the control of the Town for the purposes of *ATIPPA, 2015*? and
2. if the records are in the custody or under the control of the Town, does section 39 apply to the records?

V DECISION

[15] While section 39 of *ATIPPA, 2015* was originally claimed by the Town we must address the LPHA's claim that the Town does not have custody or control of the records as this must be determined before this Office can determine whether or not it has the authority to embark on any further steps.

[16] Section 5 of *ATIPPA, 2015* addresses 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...

[17] The issue of custody and control has been reviewed in previous reports such as Report A-2014-012, Report A-2017-021 and recently in Report A-2020-013.

[18] As stated in the above-noted reports, section 5(1) establishes an important threshold. In order for *ATIPPA, 2015* to apply to records, the records must either be in the custody of or under the control of a public body, it need not be both.

[19] The terms “custody” and “control” are not defined in *ATIPPA, 2015*. However, these terms have been given a broad and liberal interpretation in keeping with the purposes of access to information legislation. One of the purposes of *ATIPPA, 2015* is to facilitate democracy through ensuring that citizens have the information required to participate meaningfully in the democratic process, increased transparency in government and public bodies and protecting the privacy of individuals.

[20] It has generally been established that while physical possession of a record is the best evidence of custody, simple possession is not determinative.

[21] There is a two-part test set out in *Canada (Information Commissioner) v. Canada (Minister of Defence)* to determine the question of control:

- (i) whether the contents of the document relate to a departmental matter; and
- (ii) whether the relevant government institution could reasonably expect to obtain a copy of the document upon request.

[22] In addition to the two-part test, a non-exhaustive list of factors in Ontario IPC Order MO-2750 for custody or control has been accepted in other jurisdictions. The unique circumstances of each case determines the relevance, if any, of these factors:

- 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?

[23] In considering the factors listed above, as well as others, the LPHA answered many of the questions in the negative. The LPHA argued that the records do not relate to a Town matter. While the Port of Long Pond lands are located within the boundaries of the Town and the Town receives benefits from the Port, the Port is not owned or operated by the Town as it is a privately-owned asset of LPHA.

[24] In accordance with the LPHA By-laws, the Town has appointed two of its employees to the LPHA board of directors. The Town has possession of the records as the records were sent to these directors at their Town email addresses. However, it is the LPHA's position that the Town does not have a right or an obligation to possess or hold the minutes sufficient to establish custody. According to LPHA, the employees of the Town who are also directors of LPHA are not permitted to provide the minutes to the Town council, to other Town employees, or to anyone else, and they are prohibited from permitting the Town council and Town employees to inspect or have access to the minutes, without first obtaining authorization to do so from LPHA.

[25] The directors of the LPHA must make and sign an oath of office before they are permitted to act as directors. This requirement is found in the LPHA's By-laws, section 7(i) and the oath says in part:

I...solemnly swear or affirm that I will faithfully, truly and to the best of my judgment, skill, knowledge and ability execute and perform the duties required as a Director..... I further solemnly swear that I will not communicate or allow to be communicated to any person not legally entitled thereto any and all information related to the business of the Corporation, nor will I, without due authority, allow any such person to inspect

or have access to any books or documents belonging to or in possession of the Corporation and relating to the business of the Corporation.

[26] The LPHA further explained that all LPHA directors are required to enter into, and each director has entered into, a confidentiality agreement with the LPHA by which each director agrees to keep all information pertaining to the corporation in the strictest confidence, and further agrees not to disclose any such information to third parties without the consent of the corporation. Also, each director is required to comply with a Code of Conduct, and to sign an acknowledgement that he or she has read and understands the Code of Conduct and that observation of the Code of Conduct is a condition of the individual's appointment as a director. The Code of Conduct states in s. 6.2 as follows:

Subject to section 6.3, no director or officer shall disclose any information concerning the business or affairs or proposed business or affairs of the Corporation acquired in connection with his or her position with the Corporation ("Confidential Information") which has not been disclosed to the public or has been made available to the public without the prior written consent of the Board.

[27] The LPHA's position is that the directors of LPHA owe a fiduciary duty to LPHA to act honestly and in good faith in the best interests of the organization. This fiduciary duty requires that the directors not disclose or use the organization's confidential information, such as, but not limited to, information discussed at board meetings, the minutes, the organization's financial information, or information about employees of the organization. Although the directors are accountable to the members of LPHA, such as the Town, they do not owe the members a fiduciary duty. The directors' fiduciary duty is only owed to the corporation.

[28] The LPHA further argued that although the Town is a member of the LPHA, in its capacity as a member, the Town does not have the right to inspect, examine or possess the minutes. While the Town employees who are directors of LPHA have been appointed to those roles by the Town, these directors owe a fiduciary duty to LPHA to maintain the confidentiality of the minutes. These directors have, in accordance with the By-laws of LPHA and the oath of office each director must take, agreed not to disclose the minutes, or the contents thereof, to anyone, including the Town.

[29] After reviewing the arguments by the parties and the factors listed above, I have determined that the records the Complainant has requested are not in the custody or under the control of the Town. This determination relies on a numbers of facts and circumstances specific to this file and the relationship between the Town and LPHA.

[30] When a public body does not have custody or control of a responsive record, it may, under section 14 of *ATIPPA, 2015*, transfer an access to information request to a public body which does have custody or control of the records in question. As noted above, LPHA submitted to this Office that it is not a public body under either *ATIPPA, 2015* or the federal access to information legislation. Having reviewed LPHA's submissions; its articles of incorporation and by-laws; and the definition of "public body" at section 2 of *ATIPPA, 2015*, it is our view that the LPHA is not a public body under *ATIPPA, 2015* and it would not have been possible for the Town to transfer the request to the LPHA.

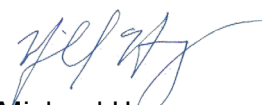
[31] Even though the Town is a public body under *ATIPPA, 2015*, it has been determined that the Town does not have custody or control of the records for the purposes of *ATIPPA, 2015*., Based on this there is no need to examine the arguments put forward under section 39 of *ATIPPA, 2015* as the Act does not apply to the records.

VI RECOMMENDATIONS

[32] Under the authority of section 47 of *ATIPPA, 2015* I recommend that the Town may continue to refuse access to the responsive record.

[33] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town 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.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of February 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador