



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-009

February 18, 2021

Town of Happy Valley-Goose Bay

Summary:

The Complainant made an access to information request to the Town of Happy Valley – Goose Bay (the “Town”) for the body-worn camera and vehicle camera footage of a Municipal Enforcement Officer detaining an individual on a certain date pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). The Town refused access on the basis of exceptions 31 (disclosure harmful to law enforcement), 33 (information from a workplace investigation), 37 (disclosure harmful to individual or public safety) and 40 (disclosure harmful to personal privacy). The Complainant requested a review. The Commissioner found that the Town had inappropriately applied certain of the exceptions to access but had properly applied section 40 with respect to the personal information of various third parties. The Commissioner therefore recommended that the Town continue to withhold the record.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 31(1)(a), 33, 37 and 40.

Authorities Relied On:

NL OIPC Report [A-2021-003](#)

I BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015*, (“*ATIPPA, 2015*” or the “*Act*”) to the Town of Happy Valley – Goose Bay (the “*Town*”) as follows:

Requesting to obtain or view a copy of the municipal enforcement officer’s ([named individual]) body cam and vehicle camera footage pertaining to the detainment of [named individual] in the Town of Happy Valley-Goose Bay on October 16, 2020.

- [2] The Town refused to provide the Complainant with the requested records, initially citing section 33 (information from a workplace investigation) and later citing sections 31(1)(a) (disclosure harmful to law enforcement), 37 (disclosure harmful to individual or public safety) and 40 (disclosure harmful to personal privacy) of the *Act*.
- [3] The Complainant filed a complaint with our Office. 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 Town provided our Office with a submission describing its rationale for the application of the various exceptions under *ATIPPA, 2015* it used to withhold the record from the Complainant. We will refer to them where necessary later in this Report.

III COMPLAINANT’S POSITION

- [5] The Complainant wanted the Office of the Information and Privacy Commissioner to review the Town’s decision to deny the access to information request.

IV ISSUES

- [6] The issues to be dealt with in this Report are:
1. Does section 31(1)(a) of *ATIPPA, 2015* apply to the record?
 2. Does section 33 of *ATIPPA, 2015* apply to the record?
 3. Does section 37 of *ATIPPA, 2015* apply to the record?
 4. Does section 40 of the *ATIPPA, 2015* apply to the record?

V DECISION

Section 31(1)(a) (disclosure harmful to law enforcement)

- [7] Section 31(1)(a) of *ATIPPA, 2015* states:

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

(a) interfere with or harm a law enforcement matter;

- [8] Law enforcement is defined in *ATIPPA, 2015* under section 2(n) as follows:

"law enforcement" means

(i) policing, including criminal intelligence operations, or

(ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;

- [9] The Town's position with respect to section 31(1)(a) is that the video was collected during a law enforcement investigation. The Town explained that the Municipal Enforcement Officer was called for a public intoxication or nuisance complaint, over which he has policing and enforcement powers and obligations. He arrived to investigate, met with the subjects of the complaint, and eventually arrested one of them and called for the Royal Canadian Mounted Police to come for further handling of the subject.

[10] The Town advised that the investigation in question under this section was initiated on October 16, 2020 and that to the best of the Town's knowledge, the investigation has been concluded.

[11] This exception can only apply to ongoing law enforcement matters. As it appears that the investigation is concluded, then there is no interference or harm to the investigation. The second part of this exception fails and, therefore, this section cannot be applied to withhold the record.

Section 33 (information from a workplace investigation)

[12] Section 33 of *ATIPPA, 2015* states:

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.

[13] Section 33 is a mandatory exception to access unless the access to information applicant is a party to the workplace investigation – a “party” is defined as a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation. If section 33 applied to the record, the Complainant would not be entitled to it.

[14] The Town’s position is that there has been a workplace investigation into the conduct of the Municipal Enforcement Officer. The Town's position is also that the original creation of this video was not only for law enforcement and security, but also for workplace investigation purposes. According to the Town, many police forces acknowledge that one of the primary incentives for and benefits of body-worn camera programs is in preventing or resolving allegations of officer misconduct during duty.

[15] The Town stated that the recording of officer-public interactions, particularly in interactions that are more sensitive or where conflict might arise, is one of the only ways to objectively evaluate the validity of allegations of misconduct.

[16] The Town advised that the formal workplace investigation started on or around October 26, 2020 and was concluded in mid-December 2020. After reviewing the report, the Town decided the return the Municipal Enforcement Officer who was the subject of the investigation to his full duties. The Town made a public announcement to this effect.

[17] However, while the recording may have been used as part of the workplace investigation, it is difficult to accept that a public body can have a record, then decide that it will be considered during a workplace investigation, and because of this, the record is permanently shielded from disclosure.

[18] “For the purpose” under section 33(2) is an important part of the section. In this case, the record was not created or gathered “for the purpose” of the workplace investigation, but for some other purpose. It may have been used in workplace investigation but that was not the primary purpose for its initial creation.

Section 37 (disclosure harmful to individual or public safety)

[19] Section 37 of *ATIPPA, 2015* 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.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[20] It is the Town’s position that the disclosure of the record could reasonably be expected to affect the safety and mental health of the parties involved. The Town references comments on social and news media networks but did not provide any evidence that disclosure would specifically threaten the safety or mental or physical health of any person, as required by the exception.

[21] The Town first claimed this exception late in the investigation, well after the ten business days in which the Town had to provide representations to the Commissioner. Under the *Public Body Guidelines for Preparing for an Access Complaint* provided to the Town from this Office at the beginning of the access complaint investigation, the Town was advised to invoke any additional discretionary exceptions within 10 business days of receipt of the notification letter from this Office and to inform the Applicant. The Town did this with section 31(1)(a) but failed to do this with section 37. This section of the *Public Body Guidelines for Preparing for an Access Complaint* is as follows:

Normally, all exceptions claimed should be claimed at the time a response to the access request is provided to the Applicant. Should a Public Body wish to invoke any additional discretionary exceptions under the ATIPPA, 2015, it must inform the Applicant and this Office of its intention to do so within 10 business days of receipt of correspondence from this Office notifying the Public Body that the Applicant has filed a Complaint. Any discretionary exceptions claimed after this period will not be considered by this Office.

[22] The purpose of this policy is grounded in procedural fairness. Public bodies are required by the statute to indicate in a final response to the applicant the reasons for the refusal and the exceptions claimed. Applicants are then in a position to file a complaint to the OIPC equipped with the knowledge of the public body's position, and thereby to put forward arguments or evidence to help support their complaint. If exceptions are claimed without the applicant's knowledge, or at too late a point in the process, they no longer have a fair opportunity to address or comment on such exceptions. As such, this Office will not be considering the argument put forward by the Town regarding this exception to disclosure. This is not a decision taken lightly, given that this exception speaks to threats to the safety and well-being of individuals. However, as noted above, the Town provided little evidence to substantiate the application of this exception and, for reasons to follow, our final recommendations do not rely on the decision to not accept these late-raised arguments.

Section 40 (disclosure harmful to personal privacy)

[23] The Town has relied on the general provision on unreasonable invasion of an individual's privacy in subsection 40(1), as well as, but not limited to, some or all of the following subsections: 40(4)(a), 40(4)(b), 40(5)(e), 40(5)(g), and 40(5)(h).

[24] These sections of *ATIPPA, 2015* are as follows:

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.

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;

40 (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*

(e) the third party will be exposed unfairly to financial or other harm;

(g) the personal information is likely to be inaccurate or unreliable;

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

[25] The Town argues that in this case, disclosing the video would disclose personal information about the Municipal Enforcement Officer, the citizen who was detained, and the people he was present with when the Officer answered the call on October 16, 2020. The Town believes that disclosure would be an unreasonable invasion of all of these individuals' privacy.

[26] The video contains personal information as defined under section 2(u) of *ATIPPA, 2015*. The video contains images captured by the Municipal Enforcement Officer including the individual who was detained and other people who were present. The video contains the Municipal Enforcement Officer's voice and captures other individuals' voices. Clearly the video has captured recorded information about an identifiable individuals. In this case a number of individuals have had their personal information captured on video.

[27] While the Municipal Enforcement Officer's voice and actions are captured on the video, this would not be considered an unreasonable invasion of privacy if released, as section 40(2)(f) of *ATIPPA, 2015* would apply allowing disclosure of information about a third party's position, functions or remuneration as an officer, employee or member of a public body.

[28] It is relevant to note that a second video of the incident in question, filmed by a bystander, has already been released to the public. Given the availability of this other video, I accept that in this instance, even if the identities of the individual detained as well as the other individuals were blurred out, that the video would still reveal information about these individuals and would constitute an unreasonable invasion of privacy as these individuals could be re-identified with reference to the second video.

[29] In this access to information request, the applicant was not one of the individuals captured on the video. If that had been the case, there would have been a right of access by that person to their personal information under section 40(2)(a) of *ATIPPA, 2015*, subject to other individuals' personal information being protected.

[30] Due to the unreasonable invasion of privacy of an individual subject to a law enforcement investigation, as well as third parties, and the likelihood of their re-identification even if personal information were removed from the video, my Office will be recommending that the Town continue to withhold the video. However, this does not mean that we would not recommend disclosure under different circumstances.

[31] One of the purposes of using body-worn cameras is generally understood to be to promote greater transparency in the exercise of law enforcement. There could be situations in which, as with the present situation, it was impossible to shield personal information from disclosure but in which disclosure could be considered to be a reasonable invasion of personal privacy if it is desirable for the purpose of subjecting the activities of a public body to scrutiny under section 40(5)(a). In the present situation, however, there is another video which is already in the public domain. The video which is the subject of this complaint, in our view, does not provide additional value in subjecting the Town to scrutiny that would justify the disclosure of personal information about the individuals involved.

VI RECOMMENDATIONS

- [32] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Town continue to refuse access to the record based on section 40 of *ATIPPA, 2015*.
- [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 18th day of February 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador