



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-019

May 4, 2021

City of Mount Pearl

Summary:

The City of Mount Pearl (the “City”) received an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) for records relating to a workplace investigation. That request was the subject of Report A-2020-013, in which the Commissioner recommended that the City obtain the records from the investigator and release all relevant records to the Applicant. Having now obtained the records, the City provided section 19 (third party notifications) notices to individuals whose personal information was included in the records. A number of those individuals filed complaints with this Office, requesting that their personal information not be released. The Commissioner concluded that due to the application of section 33, only personal information that was not relevant to the workplace investigation could be withheld. None of the third party complainants have met the burden of proof required to show that their information falls under section 40 and is not relevant to the investigation. Therefore the Commissioner recommended release of all of the information covered under the section 19 notices.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 19, 33, 37, and 40.

Authorities Relied On:

NL OIPC Reports [A-2020-013](#), [A-2020-024](#); [OIPC Guidance Section 33 – Information from a Workplace Investigation. *Oleynik v. Memorial University of Newfoundland and Labrador*, 2021 NLSC 51](#)

I BACKGROUND

- [1] The City of Mount Pearl (the “City”) received an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”). The request sought the disclosure of the complaints and witness statements in relation to a workplace investigation, and was made by a party to the investigation (the “Applicant”).
- [2] The City provided the Applicant with the complaints but withheld the witness statements. This led to a complaint being made to this Office, and ultimately resulted in Report A-2020-013 in which the Commissioner recommended that the City obtain the requested records from the investigator, review the records for relevancy, and provide all relevant records, with redactions only for irrelevant information where another exception applied. The City accepted the recommendations of the Commissioner.
- [3] The City has now obtained the records from the investigator. Following a review of the records, the City felt it was necessary, in accordance with section 19 of *ATIPPA, 2015*, to notify a number of third parties of its decision to release the requested records that contained personal information of the Third Parties. Several of these Third Parties filed complaints with this Office opposing the City’s decision to release their personal information.
- [4] As informal resolution was unsuccessful, the complaints have proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] Due to a potential conflict of interest, the City requested and obtained the assistance of the Department of Justice and Public Safety’s Access to Information and Protection of Privacy Office (“ATIPP Office”) to review the records and provide an opinion regarding redactions. Based on the recommendations of the ATIPP Office, the City provided section 19 notices to a number of Third Parties whose personal information was contained in the records subject to disclosure.

III THIRD PARTIES' POSITIONS

- [6] This report combines the complaints of four third parties (the “Third Parties”). In general, the position of the Third Parties is that they believe that the information contained in the records is their personal information and should be withheld under section 40 of *ATIPPA, 2015*.
- [7] The Third Parties have also raised section 37 (disclosure harmful to individual or public safety). Some indicated that they feared potential retaliation should their witness statements be released. They also noted that given the position and power of the Applicant, they feared that their reputation or economic stability could be harmed.

IV ISSUES

- [8] Can any of the information that is subject to the various section 19 notices be withheld?
- a. Have any of the Third Parties met the burden of proof to show that the information is not relevant under section 33?
 - b. If so, does section 40 apply to any of the information that is not relevant to the investigation?

V DECISION

- [9] Section 19(1) specifically provides that notices are only to be given to third parties when the head of the public body has reason to believe that the records they intend to release contain information that might be excepted from disclosure under sections 39 or 40. In these cases, only section 40 is at issue.
- [10] Given the limited scope of an investigation in response to a complaint regarding notification given under section 19, this Office is unable to comment on the application of section 37 for the purposes of this investigation and report.

[11] Further limiting the scope and considerations in this matter, is that fact that the initial request falls under section 33, which 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.

[12] In addition to the previous Report A-2020-013 concerning this matter, Report A-2020-024 was also decided on the basis of section 33. In that report, this Office confirmed that where section 33 applies, and the applicant is a party to the investigation, no other exceptions can be applied to relevant information, even if those exceptions would apply if the records were not being disclosed under section 33. This limitation, particularly with respect to section 37, has been identified by the Commissioner as an area of concern to the ATIPPA Statutory Review

Committee 2020. To date, the only qualification to the direction in section 33(3) that a public body “shall disclose” “all relevant information” to an applicant is the recent decision of the Supreme Court of Newfoundland and Labrador in *Oleynik v. Memorial University of Newfoundland and Labrador*, 2021 NLSC 51. In that decision, the Court determined, based on decisions of the Supreme Court of Canada, that solicitor-client privilege is a substantive right which can only be abrogated through specific statutory language, and that the language in section 33 is insufficiently clear to override section 30 and the protection of solicitor-client privilege.

[13] The Applicant is a party to the investigation and, therefore, section 33(3) requires that all relevant information be released to that individual. The only information that can potentially be withheld is information that was not relevant to the workplace investigation. Even if the responsive records contain information that is not considered relevant to the workplace investigation, if it is responsive to the access request, then it can only be withheld if one of the other exceptions to disclosure in *ATIPPA, 2015* is applicable. This is also in accordance with the Commissioner’s recommendations in Report A-2020-13, which were accepted by the City.

[14] As this workplace investigation has not been concluded, and is wide-ranging, all, or virtually all, of the information contained in the responsive records is relevant to the investigation. Despite having been provided with an explanation of the operation of section 33 and the opportunity to make submissions on the relevancy of their personal information to the investigation, none of the third parties have met the burden to show that the information contained in their witness statements is not relevant to the workplace investigation and subject to section 40.

VI RECOMMENDATIONS

[15] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the City of Mount Pearl release the information related to the section 19 notices.

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

[17] Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party Complainants file notices of appeal and provide the City with a copy of their notices of appeal prior to that time.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of May 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador