



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-043

October 15, 2021

Town of Grand Falls-Windsor

Summary:

The Complainant submitted a request to the Town under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) seeking access to records relating to the cost of hiring a consultant for the Town’s collective bargaining. The Town located a limited number of records but denied access to the records, citing section 38 (labour relations interests of public body as employer). The Commissioner concluded that the Town did not appropriately apply section 38 of *ATIPPA, 2015*, nor did the Town demonstrate that it had conducted a reasonable search for records. The Commissioner also found that the Town failed in its duty to assist the Complainant. The Commissioner recommended the disclosure of the responsive records and that the Town conduct a further search for records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, and 38.

Authorities Relied On:

NL OIPC [Report A-2017-024](#)

OIPC Practice Bulletin – [Reasonable Search](#)

I BACKGROUND

- [1] The Complainant made an access to information request to the Town of Grand Falls-Windsor (the “Town”), seeking information about the costs of hiring a human resources consultant, including invoices, contracts, and obligations.
- [2] The Town did not respond to the Applicant within the 20 business days required by section 16 of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). When the Town did respond, it advised the Complainant that it had located some records; but denied access to the records pursuant to section 38(1)(b)(i) of *ATIPPA, 2015* on the grounds that the information was labour relations information. The Town is presently in the midst of a labour dispute, having locked out unionized employees in mid-July. In its response to the Complainant, the Town advised that due to the ongoing negotiations with the labour union, the release of the information would “serve as a distraction to the real issues at hand during the negotiations.”
- [3] The Complainant was not satisfied with the Town’s response and filed a complaint with this Office.
- [4] 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

- [5] The Town’s position is that the release of the responsive records would interfere with the negotiation process, as it would serve as a distraction to the ongoing negotiations with the union. The Town notes that information in the records related to the consultant might be used to harm the Town’s bargaining position. However, the Town further stated that the use of the consultant has nothing to do with the issues at hand in bargaining.
- [6] The Town advised that the access request is being used as a distraction to the bargaining process and they intend to release the information after the process has concluded.

III COMPLAINANT'S POSITION

[7] The Complainant's position is that the Town inappropriately applied section 38 of *ATIPPA, 2015* as the request was not for information related to collective bargaining. The Complainant also noted that the Town did not respond to the request within the legislated time period and did not provide a response until the Town was reminded to do so.

IV ISSUES

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

- i) whether the responsive records were appropriately withheld under section 38;
- ii) whether the Town fulfilled its duty to assist under section 13, and
- iii) whether the Town provided an appropriate response to and cooperated with OIPC's investigation.

V DECISION

Section 38

[9] Section 38 of *ATIPPA, 2015* states:

Disclosure harmful to labour relations interests of public body as employer

38. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

- (a) *labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or*
- (b) *labour relations information the disclosure of which could reasonably be expected to*
 - (i) *harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,*

- (ii) result in significant financial loss or gain to the public body as an employer, or
- (iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

[10] The responsive records located by the Town consisted of two documents related to the hiring of a human resources consultant: a copy of an invoice submitted to the Town by the consultant for his services, and an email discussing the consultant's rates.

[11] As noted in Report A-2017-024 of this Office, *ATIPPA, 2015* is unique in the exception relating to labour relations information:

[38] The Town argued that section 38 applies to exclude the payment information. The fact that the information at issue is payment information does not automatically make it labour relations information. While no other jurisdiction has an exception similar to section 38 of the ATIPPA, 2015, a definition of labour relations from Ontario Order P-653 is helpful in interpreting the meaning of labour relations as being: "... information concerning the collective relationship between an employer and its employees." In BC Order 04-04 that definition is used in interpreting the term "labour relations" in that province's freedom of information legislation. The adjudicator determined that since all records involved an individual teacher's case and did not contain information related to the collective bargaining process or other general labour relations matters, the information was not "labour relations" information. An individual employee's payment information does not fall within the exception in section 38 and therefore it does not apply in this situation to withhold the payment information.

[12] As in the above-noted Report, payment information does not fall within the exception in section 38. In the present matter, the situation is perhaps even clearer: the records sought by the Complainant concern the payment of an outside consultant, not a unionized employee of the Town. Records relating to an individual consultant's recruitment or pay are not "labour relations information" because they do not reveal anything about the collective relationship between the employer and its employees.

[13] The Town's justification for applying section 38 even notes that the contracting of the consultant has nothing to do with the issues at hand in bargaining, thus undermining the application of the exception in the first place.

[14] The Town's application of the exception indicates a fundamental misunderstanding of the exception – the reasoning that release of the records would be a distraction from the “real issues” in collective bargaining, or that the records may be used against the Town in negotiations, is not an appropriate application of the section. As such, the records should be released to the Complainant.

Duty to Assist Applicant

[15] The second issue is whether the Town met its duty to assist the Complainant under section 13 of *ATIPPA, 2015*, which states,

13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

[16] As previously outlined in Report A-2009-011, the duty to assist has three components:

[80] ...First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

[17] With regard to whether the Town conducted a reasonable search for records, as noted above, the Town produced only two records related to the request: an internal email with the consultant's rates and a single invoice from the consultant. Additionally, there appeared to be a discrepancy in the dates regarding the two records, as the consultant's invoice pre-dates the email discussing his rates (which appears to contemplate retaining the consultant) by several months.

[18] As part of the formal investigation, OIPC asked several questions of the Town to determine whether a reasonable search for responsive records had been conducted as described in our *Reasonable Search* practice bulletin. The Town was unable to explain the discrepancy in the records; and, furthermore, the answers to the questions posed regarding its search were

insufficient to determine that a reasonable search for records was conducted. Therefore, the only determination OIPC is able to make is that a reasonable search for records was not performed and that a new search for records ought to be conducted.

[19] The duty to assist also requires the public body to assist the applicant in making the request and in responding to the applicant in “an open, accurate and complete manner.” The Town was late in providing a response to the Complainant in response to the request and responded beyond the 20 business days set by section 16. The Complainant contends that the Town only responded once the Complainant reminded the Town of the request.

[20] The Town’s response to the Complainant also noted that releasing the records would distract from the “real” issues ongoing within the Town. Under *ATIPPA, 2015*, an applicant does not require a reason to make a request for information. The notion that making such a request for information is inconvenient, a distraction, or would interfere with other obligations or issues of the Town goes against the purpose of the *Act* to encourage transparency and to facilitate democracy.

[21] As a result, this Office can only determine that the Town has failed on all three components in relation to the duty to assist under section 13.

Cooperation with OIPC’s Investigation

[22] The Town did not fully cooperate with our investigation. It failed to provide submissions and records within the statutory time period and failed to sufficiently answer questions regarding the reasonableness of the search conducted. OIPC recognizes that the Town is currently understaffed due to the labour lockout and acknowledges that, given the circumstances, it would be difficult to fully cooperate with this type of investigation. Therefore, this Report has focused on the Town’s application of *ATIPPA, 2015* to the records and its attempts to assist the Complainant during the access process.

[23] The Town’s failure to properly fulfil its obligations under *ATIPPA, 2015* pre-dated the labour lockout, so while the Town struggled to cooperate with this investigation, it cannot rely on this

excuse to justify its failure to process the Complainant's access request within the required time period.

VI RECOMMENDATIONS.

[24] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town of Grand Falls-Windsor:

- (a) release the records already located to the Complainant immediately;
- (b) conduct a new search for records and provide its final response to the Complainant's access to information request within 10 business days of its receipt of this Report;
- (c) review its access to information policies and procedures in detail, and implement measures to ensure legislative compliance in future;
- (d) comply in future with the statutory duties imposed upon it by section 13 of the Act, to respond to an applicant in an open, accurate and complete manner, without delay; and
- (e) commit to full and open communication with this Office on future investigations including timely responses to notification letters and requests for records within the legislated time periods.

[25] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Grand Falls-Windsor 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.

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



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador