



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Report A-2022-004

March 18, 2022

Town of Witless Bay

**Summary:**

The Complainant submitted an access request to the Town of Witless Bay under the *Access to Information and Protection of Privacy Act, 2015* for records relating to rescinding motions that the new Town's Council addressed at its first two meetings. The Town provided the records it had to the Complainant, but the Complainant believed that there were more records and filed a complaint with this Office. The Commissioner concluded that there was no evidence that additional records exist.

**Statutes Cited:**

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

**Authorities Relied On:**

NL OIPC Report [A-2016-022](#).

Practice Bulletin: [Use of Personal Email Accounts for Public Body Business](#).

[Bill 37, An Act Respecting the Conduct of Municipal Officials, 1st Sess, 50th Leg, Newfoundland and Labrador, 2021](#).

## I BACKGROUND

- [1] The Complainant made an access to information request to the Town of Witless Bay (the “Town”) for:

*...all emails, phone records, texts, and any forms of communications, both on private forms of communication that were used for official town business and official forms of communication, prior to and after the swearing in of officials, between all members of the Witless Bay town council, including the mayor and deputy mayor, and between all members of the Witless Bay council and any employee or former employee, and between the Witless Bay town council and any private citizen, regarding the motions that were rescinded in the first and second called town meetings by the new council.*

- [2] The Town had had a municipal election near the end of September, 2021 in which the municipality’s voters elected an entirely new town council. The new council held its first two meetings on October 8, 2021 and October 19, 2021.

- [3] Upon receipt of the above request, the Town’s Acting ATIPP Coordinator conducted a search of all records sent to the Town’s main office and email account, and asked each councillor and employee to conduct a search for records responsive to the request in both their Town and personal accounts, devices, and records.

- [4] The number of responsive records that turned up were limited. The responsive records were provided to the Complainant without severing any information. The Town further provided the Complainant with a number of statements from councillors advising that they did not have any records responsive to the access request.

- [5] The Complainant took issue with the Town’s response and said,

*With all due respect, it is unreasonable to assert that not one phone call took place, no texts or emails, no social media messages happened in the wake of such a furry [sic] happening over 3 days, especially during a pandemic. I fear that information I requested is being deliberately withheld.*

- [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] The Town explained the steps that it took in responding to the access request. It explained how it conducted its search, including who was involved in the search. The Acting Coordinator asked the councillors and employees to search their personal accounts and devices as well as their Town-assigned email accounts.
- [8] The Town's acting ATIPP Coordinator confirmed that she has received training through the ATIPP Office some years ago and that she provided the Town Council members and employees with instructions on how to conduct a search for records.
- [9] Upon receipt of this access complaint, the Town conducted another search for records, but advised that it did not locate any additional responsive records.
- [10] Further, the Town confirmed that staff and councillors use their Town-provided "@townofwitlessbay.ca" email accounts to conduct Town business, and that it is not their practice to use personal accounts or devices to conduct Town business.
- [11] Notwithstanding the above, the Town acknowledged that there was a brief period in early October, 2021 when newly-elected councillors did use their personal email accounts to coordinate logistics for their first meeting. They used their personal emails for this because they did not yet have Town-provided email accounts. The Acting Coordinator asked for all emails that the Council Members exchanged through their personal email accounts responsive to the ATIPP request and reviewed what the Council Members provided. None of the information in those emails related to the rescinding motions referenced in the Complainant's access request and were therefore not responsive. The Coordinator had no reason to believe that they withheld records.
- [12] The Town offered some explanation as to why the responsive records were somewhat limited. For one, the Town Office was closed from June 11, 2021 to October 11, 2021 and the Town explained that, during this time, the Office was not staffed, and that councilors were

not sending correspondence to, or receiving correspondence from, the Town. As mentioned, the current Town council was not elected until the end of September, 2021.

[13] Further, and specifically in relation to the rescinding motions, various councillors advised the acting ATIPP Coordinator that they had verbal discussions on the rescinding motions as they gathered prior to their first formal meeting. These discussions did not form part of a formal or privileged meeting wherein anyone took notes.

[14] The Town provided our Office with a copy of its “Computer, Email and Internet Use Policy and Procedures” for review. The Policy and Procedures in question do require users to, “use only the browser software and e-mail programs installed by the Town”.

### III COMPLAINANT’S POSITION

[15] The Complainant described all of the events that she believed occurred leading up to the new council’s swearing-in ceremony, its first meeting, and the council’s attendance at Town hall to vote on discussed matters. She stated that:

*...it is unreasonable to assert that so much activity took place prior to, during, and after the election, days of planning in which the new council engaged in an effort to arrange an early swearing in, and a hastily arranged emergency meeting that by their own words was designed to rescind motions made by the previous council, all without any technological communications between council members and those private citizens who were involved. Add to the fact that we are in the throes of a pandemic where everyone was isolating, and it is clear that this flurry of activity was not, under any reasonable circumstances, all done in person.*

[16] The Complainant believes that, “The council elect got together and discussed these [rescinding motions] prior to the meeting” and that, “their main goal was to rescind those motions”.

[17] The Complainant referenced a specific document that she believes exists and stated that she would like to receive a copy of same. However, the document in question relates to a

Town meeting that occurred on November 9, 2021, which is outside the scope of the present access request.

[18] The Complainant has requested for, “the council to be compelled to make public their private discussions in any form about the issues in the original request”.

#### IV ISSUE

[19] This Report will address the issue of whether the Town met its duty to assist under section 13 of *ATIPPA, 2015*.

#### V DECISION

[20] Based on the wording of the ATIPP request, a reasonable search for records would produce records (if any exist) relating to the motions to rescind that the Town’s new council dealt with at its first two meetings (on October 8, 2021 and October 19, 2021), and not additional matters, such as other agenda items, matters relating to subsequent meetings, or documents related to general planning for meetings.

[21] The standard is a *reasonable* search, not perfection. The Town provided the Complainant with a final response and retrieved records within the statutory deadline, and conducted a subsequent search following its receipt of the complaint. The Town offered an explanation as to why additional records do not exist, and allowed our Office to review emails that Council members exchanged. The Town demonstrated reasonable efforts to assist the Complainant as section 13(1) of *ATIPPA, 2015* sets out:

*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.*

[22] There has been no evidence to support the Complainant’s claim that responsive records were “being deliberately withheld”.

[23] The Complainant took issue with the fact that the Town did not provide her with any records relating to the new council's swearing-in ceremony or general planning leading up to the meetings in question. However, any such records fall outside of the scope of the Complainant's access request. The request was limited to records responsive to rescinding motions that the new councillors discussed at their first two meetings. If the Complainant wishes to obtain records beyond this scope, she must file a new access request with the Town.

[24] Part of the responsive records that the Town provided to the Complainant included the agendas for the Town meeting of October 8, 2021, and the minutes for the October 19, 2021 meeting. Contrary to the Complainant's suggestions, these meetings did not seem to focus on rescinding motions. Rather, the agenda for the October 8, 2021 meeting included one reference to a rescinding motion, among a number of other agenda items.

[25] The minutes for the October 19, 2021 meeting show a brief reference to the rescinding motion wherein the Council made an edit to the wording of a previous rescinding motion from September 13, 2021 (prior to the swearing-in of the new council). There is no evidence to substantiate the claim that, "their main goal was to rescind those motions" in relation to the two meetings.

[26] It is possible that the Complainant mistakenly thought that the November 9, 2021 meeting would fall within the parameters of the access request. If the Complainant would like access to records relating to this, or any earlier or later meeting of the new Town Council, she must file a new access request with the Town.

[27] Overall, I am satisfied that the Town conducted a reasonable search and met its duty to assist under section 13. I find that there is no evidence to suggest that additional responsive records exist.

[28] Our Office has previously addressed the issue of public body employees or representatives using their personal email accounts to conduct official business (see, for example, Report A-2016-022 and our Practice Bulletin: *Use of Personal Email Accounts for Public Body Business*). We stand by our position that it is inappropriate to use personal email accounts to

conduct public body business. In the case at hand, it is reassuring that the Town has policy and procedures against such personal email use.

[29] Bill 37 will enact the new *Municipal Conduct Act* (the “new Act”) within the coming months. Part III of the new Act will require municipalities to implement a Code of Conduct that will apply to councillors. Section 12(3)(a) requires the Code to include provisions to address standards of professional behaviour and confidentiality:

*12 (1) Within 6 months of the coming into force of this Act, a council shall establish a code of conduct that applies to all councillors.*

...

*(3) A code of conduct referred to in subsection (1) shall*

*(a) include provisions relating to*

- (i) standards of professional behaviour,*
- (ii) use of influence,*
- (iii) confidentiality,*
- (iv) harassment and bullying, and*
- (v) any other matter prescribed in the regulations;*

...

[30] Section 15 of the new Act sets out a number of potential consequences for those who breach the Code:

*15.(1) Where a council determines that a councillor has contravened the code of conduct or failed to comply with a penalty imposed under this section, the council may, by resolution, do one or more of the following:*

- (a) reprimand the councillor;*
- (b) require the councillor to attend training as determined by the council;*
- (c) suspend the councillor from council committees or other additional activities or duties for a period of no more than 3 months;*
- (d) suspend the councillor from council, without remuneration, for a period of no more than 3 months; and*
- (e) where one or more of the following apply, make an application to court seeking that the councillor vacate the councillor's seat on council and that the councillor not be eligible to be nominated as a candidate until the nomination period for the next general election:*
  - (i) the contravention of the code of conduct resulted in loss of public trust,*
  - (ii) the contravention of the code of conduct consisted of violence or the credible threat of violence, and*

- (iii) *the councillor has contravened the code of conduct more than once and has refused to comply with the penalties imposed.*
- (2) *Where the council determines that a former councillor has contravened the code of conduct, the council may, by resolution, do one or both of the following:*
  - (a) *reprimand the former councillor; and*
  - (b) *where one or more of the following apply, declare that the former councillor is not eligible to be nominated as a candidate until the nomination period for the next general election:*
    - (i) *the contravention of the code of conduct resulted in loss of public trust,*
    - (ii) *the contravention of the code of conduct consisted of violence or the credible threat of violence, and*
    - (iii) *the former councillor has contravened the code of conduct more than once and has refused to comply with penalties imposed.*

[31] It would serve the Town well to implement its Computer, Email and Internet Use Policy and Procedures as part of its Code of Conduct once the Legislature enacts the new Act.

## VI RECOMMENDATIONS

[32] Because we found no evidence that there are any additional responsive records, we have nothing to recommend to the Town regarding the further release of records related to this access complaint,

[33] Under the authority of section 47(d) of *ATIPPA, 2015*, I recommend, however, that the Town of Witless Bay:

- (i) Consider implementing, as appropriate, its Computer, Email and Internet Use Policy and Procedures, specifically as it relates to prohibiting personal email use for Town Business, as part of its Code of Conduct once the Legislature enacts the *Municipal Conduct Act* in the Province of Newfoundland and Labrador.



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

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18<sup>th</sup> day of March, 2022.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador