



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2022-005

May 19, 2022

City of St. John's

Summary:

The Complainant submitted an access request to the City of St. John's under the *Access to Information and Protection of Privacy Act, 2015* for information relating to the job titles of and remuneration that the City paid to former employees of St. John's Sports and Entertainment Ltd. The circumstances of these employees' departure from their positions are related to alleged incidents of workplace harassment, for which there are ongoing negotiations. The City provided the job titles, but has refused to provide the remuneration paid, relying on settlement privilege and subsections 35(1)(f) and (g) (disclosure harmful to the financial or economic interests of a public body). The Commissioner found that, in the current circumstances, the City could continue to withhold the information under section 35(1)(g), but that the situation was fluid and that the City may not be entitled to withhold the information indefinitely.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 2(z), 35(1)(f), 35(1)(g), 39, 40(2), 43(1), and 44.

Authorities Relied On:

[Canada \(Office of the Information Commissioner\) v Calian Ltd, 2017 FCA 135](#).

[Newfoundland and Labrador v Newfoundland and Labrador Teachers' Association, 2018 NLCA 54](#).

NL OIPC Reports [A-2016-032](#), [A-2017-003](#), [A-2017-015](#), [A-2017-024](#), [A-2018-021](#), [A-2018-022](#), [A-2019-002](#), [A-2019-017](#), and [A-2020-020](#).

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”) with the City of St. John’s (the “City”) for:

Records related to remuneration for any employee who has left the employ of St. John’s Sports and Entertainment since October 1, 2021. Request includes remuneration as defined in section 2 (z) of ATIPPA, including severance. As per OIPC report A-2017-024 (at paragraph 16), this includes termination allowances and associated payments: “what an employee is entitled to receive in severance as well as what has actually been received should both be disclosed.” Request includes the total of any amounts due to be paid related to severance and termination that may not have been paid yet.

- [2] Following discussions between the Complainant and the City, the Complainant agreed to narrow the request to, “the names/job titles of those employees who left after October 1, 2021, and a breakdown of what they are entitled to (severance and/or settlements/salary continuance)”. The Complainant specifically requested a breakdown of these amounts. The City explained, “for example, salary continuance should specify the salary amount and the number of years rather than just the total amount”.
- [3] There are particular circumstances surrounding any potential settlements in this regard: there was a previous workplace investigation involving St. John’s Sports and Entertainment Ltd. (“SJSEL”) and there is an ongoing workplace investigation involving SJSEL. These arise from alleged incidents of workplace harassment that span from 2018 to 2021.
- [4] The City provided the Complainant with a list of the positions that employees had vacated since October 1, 2021, but withheld the dollar amounts that the City has paid to any of those individuals since they left their positions. In the City’s final response it relied on section 35(1)(f) of *ATIPPA, 2015* for withholding this information.
- [5] Upon receipt of this complaint, however, the City advised that it had intended to rely on section 35(1)(g) and erroneously referenced the incorrect subsection. The City notified both

this Office and the Complainant of this discrepancy shortly after receiving notice of the complaint, and further addressed this in its initial submissions, which it provided within the 10 business days in accordance with sections 44 and 96 of *ATIPPA, 2015*. The City maintained that both subsections (f) and (g) were appropriate exceptions to withhold the requested information. The relevant parts of section 35 are as follows:

35. (1) *The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*

...

(f) *positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;*

(g) *information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body;*

...

[6] Because the City advised this Office and the Complainant of its reliance on a new subsection of an exception at an early stage of the investigation, it is reasonable to consider subsection 35(1)(g) in this matter as we have discussed in our Guidelines and Report A-2020-020.

[7] 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

[8] Per section 35(1)(g), the City believes that there is a reasonable expectation of harm in disclosing the withheld information. It emphasizes the difference in the language in *ATIPPA, 2015* between section 35(1)(g)'s "*reasonably be expected to prejudice the financial or economic interest of ... a public body*" and section 39's "*reasonably be expected to harm significantly*" (*emphasis added*). The City references Report A-2018-021, which accepted that a degree of informed speculation and forecasting may meet the test of a reasonable expectation of harm under section 35(1)(g).

- [9] The City states that section 35(1)(f) simply requires that negotiations or related negotiations be ongoing or that future related negotiations are anticipated, and references Reports A-2017-003 and A-2016-032. As explained below, the City demonstrates that negotiations are ongoing and it asserts that “to divulge the requested records at this time would disclose information that directly relates to those negotiations and SJSEL’s position in the same”.
- [10] The City further asserts that settlement privilege protects the information in question, though it acknowledges that our Office’s position is that *ATIPPA, 2015* does not speak to settlement privilege.
- [11] The City advises that six employees have vacated their positions with SJSEL since October 1, 2021. Some have reached settlement agreements, while others have not as of yet. The City further advises that while some negotiations are still in progress and at least one individual has expressed that they intend to pursue a legal claim in court. The City asserts that the situation remains fluid and that there are further considerations at play, which we have decided not to include in this Report.
- [12] The City explains that that the two-year limitation period for the commencement of legal action relating to the alleged workplace harassment has not yet expired. The City believes that there is a reasonable expectation that litigation in court may ensue.
- [13] While the City acknowledges that there is not yet an ongoing court matter in the case at hand, it does point out that there is ongoing related arbitration. The City further asserts that while no party has yet filed a statement of claim with the Supreme Court of Newfoundland and Labrador, it is aware that some employees have retained counsel.
- [14] Because of the ongoing negotiations and the City’s belief that there will likely be litigation on this matter, it believes that sections 35(1)(f) and (g) of *ATIPPA, 2015* allow it to withhold some of the requested information – specifically the amounts that have been paid to or are owing to employees who have left their positions since October of 2021. The City is concerned

that revealing the settlement amounts it has already paid will compromise its ability to continue with remaining negotiations and possible litigation.

[15] The City believes that Reports A-2018-021, A-2019-002, and A-2017-015 are analogous to the situation at hand and that the Reports support its decision to withhold the information in question.

[16] The City acknowledges that it has previously disclosed remuneration paid in relation to other departing employees in unrelated matters. It says that such circumstances were significantly different:

The information requested is distinguishable ... ; the current situation involves workplace investigations, allegations of personal harassment, allegations of reputational damage by employees, and the involvement of legal counsel in negotiations on behalf of some of the employees.

[17] The City further states that while the exiting employees in the matter at hand all held different positions, which would presumably lead to differences in remuneration, we should not consider simply the wages that the employees earned but also the additional damages or entitlements that they may now be claiming from similar or the same events:

... the amounts ... sought were not solely related to traditional factors associated with a retirement, lay-off, or termination without cause. This situation is separate; there is the provided workplace investigation and another ongoing one dealing with similar allegations ... An employee citing the same experiences and being in the same situations, upon being made aware of payments received by a departed employee, would consider such payments to '...provide a baseline by which to pursue their own settlement negotiations.'

[18] Based on above, the City believes that it has met its burden to establish that releasing the withheld information would lead to a reasonable expectation of financial or economic harm (per section 35(1)(g)) and that releasing the information in question would not be appropriate as some negotiations are ongoing (per section 35(1)(f)).

III COMPLAINANT'S POSITION

[19] The Complainant is not satisfied that the City has discharged its burden of proof, per section 43 of *ATIPPA, 2015*, for withholding the information in question. The relevant portion of section 43 reads as follows:

43. (1) On an investigation of a complaint from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.

[20] The Complainant argues that the information in question is, “related to remuneration of those employed by a public body”, which he claims, “is settled law that this information is public”. The Complainant references the Newfoundland and Labrador Court of Appeal’s decision *Newfoundland and Labrador v Newfoundland and Labrador Teachers' Association*, 2018 NLCA 54 and Report A-2017-024.

[21] Section 2(z) of *ATIPPA, 2015* defines remuneration as follows:

2(z) "remuneration" includes salary, wages, overtime pay, bonuses, allowances, honorariums, severance pay, and the aggregate of the contributions of a public body to pension, insurance, health and other benefit plans;

...

[22] Further to the definition of remuneration in section 2(z), the Complainant references section 40(2), which states that the disclosure of someone’s “position, functions or remuneration as an officer, employee or member of a public body” is not an unreasonable invasion of their privacy.

[23] The Complainant understands that one individual has threatened litigation against the City in this matter, but does not believe that this is sufficient to discharge the City’s burden of proof. He refers to Report A-2018-021 wherein there was active litigation at the time of that complaint, and states that, “In the present case, there is not – simply a claim by the City that one employee has indicated that they intend to take that step. That is a significant difference in assessing potential harm”.

[24] In response to the City's concerns regarding releasing the information, the Complainant has addressed that he is not asking for details relating to the City's negotiation strategies: "I am simply asking for remuneration paid (or due) to public body employees, not any records detailing a negotiating strategy".

[25] The Complainant also refers to information that the City has previously released relating to amounts of severance and other remuneration paid to departing civil servants (https://stjohns.ca/sites/default/files/CSJ_FileUpload/CorporateServices/Retirement%20Incentive%20by%20Position_2016.pdf) and says that, "There is no evidence I am aware of that these disclosures ... somehow harmed the financial or economic interests of the city. And the burden is on the city to show that to be the case". He has confirmed that he is requesting a similar format for the breakdown of remuneration in question.

[26] The Complainant has further addressed the variety of roles and compensation likely owing to each, separate individual:

... the employees at issue held very different positions. It is incumbent on the city to prove that revealing details of remuneration paid to a CEO, for example, would somehow prejudice its interests when dealing with other affected positions: event logistics manager, box office supervisor, marketing and communications co-ordinator, facilities co-ordinator, chief financial officer. Presumably, the circumstances in each – length of service, baseline salary, and other benefits– would be very different as well. In simple terms, knowing how much apples cost does not give you an unfair advantage in buying oranges.

If I had asked for remuneration of any of these positions before the employees departed, presumably that request would have been granted. But to take the city's arguments a step further, could they have contended that releasing the information then would have been injurious to future negotiations related to those positions? I submit the answer is no. As it should be in the current case.

[27] The Complainant believes that the information he is requesting is public information, which the City ought to disclose. He does not agree that the findings in Report A-2018-021 are applicable to the matter at hand or that the City has met its burden of proof in applying section 35(1)(f) or (g) to the records.

IV ISSUE

[28] This Report addresses the issue of whether the City properly withheld information under section 35(1)(f) or 35(1)(g) of *ATIPPA, 2015*.

V DECISION

[29] While I generally agree with the Complainant that the information in question (specifically remuneration) is, generally, subject to disclosure under *ATIPPA, 2015*, the City may withhold the information for the time being. Our Office has recommended the release of similar information in Reports in the past (such as Reports A-2017-024 and A-2018-022); however, I do find, however, that Report A-2018-021 is currently more relevant to the matter at hand.

[30] In Report A-2018-021, this Office cited the Federal Court of Appeal's decision of *Canada (Office of the Information Commissioner) v Calian Ltd*, 2017 FCA 135, which spoke to the level of specific harm that one must establish:

... there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as the prediction is grounded in ascertainable facts, credible inferences and relevant experience, it is unassailable.

[31] The City has provided sufficient details to show that some negotiations are ongoing, specifically in relation to employees leaving their positions because of the alleged workplace harassment.

[32] I further accept that the settlement amounts paid to departing employees are not solely related to objective factors such as their job titles, salaries, or years of service, but may also be related to other monetary compensation resulting from the alleged workplace harassment events. It is reasonable to conclude that an employee may be inclined to pursue a similar claim against the City if they learn of a settlement payment relating to a workplace incident in which they were also involved.

[33] The City has highlighted that the two-year limitation period to commence litigation in court has not yet passed. I find this a relevant consideration, particularly while some negotiations are ongoing.

[34] Paragraphs 29-30 of Report A-2018-021 address the foregoing considerations:

One of the considerations in taking a decision to terminate a contract is, of course, the likelihood of resulting court action. A related consideration is the anticipated likelihood of settling such litigation through negotiation. The District maintains that a current or future claimant could view the settlement details of the present case as a 'baseline' by which to pursue its own settlement negotiations. This, it states, would prejudice the District's ability to defend individual claims, or to negotiate reasonable settlements, and thereby put the public purse at risk. The District is of the view that this meets the standard of 'reasonable expectation of probable harm'.

I agree with this reasoning. As the Court in Calian observed, while there is an element of forecasting and speculation involved, the District 'grounded its prediction in ascertainable facts' and has therefore met the requirements of section 35(1)(g). I am satisfied that disclosing the details of the present settlement could reasonably be expected to result in prejudice to the financial or economic interests of the District.

[35] The Complainant has emphasized that he is not seeking access to the City's negotiating strategies or to the entire contents of the settlement agreements; he is simply seeking a breakdown of the numbers paid or owing to each exiting employee. This may negate the City's ability to withhold the information under section 35(1)(f) as he is not seeking information that would divulge the City's "positions, plans, procedures, criteria or instructions"; However, I believe that even the breakdown of these amounts may potentially expose the City to financial harm with regard to its remaining negotiations and employees. For this reason, the City is able to withhold the information under section 35(1)(g).

[36] Notwithstanding the foregoing, in the event that the City settles all negotiations in this matter or the two-year limitation period passes without proceeding to court, the City would have a much more difficult job of meeting its burden of proof in withholding this information under *ATIPPA, 2015*. If the Complainant were to submit a new access request at that time, either the City's response or the outcome of an investigation by our Office may be different.

[37] Our Office has previously found that settlement privilege is not an exception to access within *ATIPPA, 2015* (see, for example, Reports A-2018-022 and A-2019-017), but that section 35(1)(g) can serve the same purpose and protect against disclosure that could harm a public body. Given our past statements on settlement privilege, and having found that section 35(1)(g) applies to the information, it is not necessary to address settlement privilege any further in this Report.

VI RECOMMENDATIONS

[38] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that, for now, the City of St. John's continue to withhold the information it redacted in accordance with section 35(1)(g) of *ATIPPA, 2015*.

[39] As section 49(1)(b) of *ATIPPA, 2015* sets out, the head of the City of St. John's must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who received a copy of this Report within 10 business days of receiving this Report.

[40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of May 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador