



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-015

August 5, 2022

City of St. John's

Summary:

The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* to the City of St. John's for records regarding the review and approval of a City Project. The City provided records to the Complainant, but withheld some information claiming 28(1)(c) (Local public body confidences), 29(1)(a) (Policy advice or recommendations), 30(1)(a) (Legal advice), 35(1)(d) (Disclosure harmful to the financial or economic interests of a third party), and 40(1) (Disclosure harmful to personal privacy). During the complaint investigation, the City agreed to and released some additional information. The Commissioner recommended the City continue to withhold the remaining redacted information.

Statutes Cited:

[*Access to Information and Protection of Privacy Act, 2015*](#), S.N.L. 2015, c. A-1.2, sections 9, 28(1)(c), 29(1)(a), 30(1)(a), 35(1)(d) and 40(1).

BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) to the City of St. John’s (the “City”) for any and all information regarding the review and approval of [City Project] from August 2019 to present.
- [2] The original search located a high volume of records and the City sought and was given an extension of 15 business days by this Office to complete its response to the access request. The Complainant agreed to omit records already in its possession and a final response from the City was provided to the Complainant. The City redacted information under sections 28 (local public body confidences), 29 (policy, advice or recommendations), 30 (legal advice), 35 (disclosure harmful to the financial or economic interests of a public body) and 40 (disclosure harmful to personal privacy).
- [3] The Complainant filed a complaint to this Office seeking a review of the volume of redactions in the final response from the City and whether any omissions in responsive records had occurred with regards to two named former employees.
- [4] During informal resolution efforts, on this Office’s recommendation, the City agreed to release some additional information that it had previously redacted pursuant to section 30, together with five additional pages of records it found during the complaint process as a result of the Complainant naming two additional former employees for it to include as part of the access request and search for records.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

- [6] The City provided submissions to this Office responding to both the Complainant's allegations: that the redactions were not properly applied as well as concerns regarding omissions of records.
- [7] With respect to alleged omissions of records and the Complainant's concerns regarding records involving two named former employees, the City noted that the Complainant had only highlighted these two employee accounts in its complaint to this Office but they were not explicitly included in the original request for information. The City conducted an additional search of the email backups while compiling its response to this Office and was able to locate some additional records. Of those records, only five pages were not previously provided to the Complainant as part of the final response from the City.
- [8] With respect to the application of redactions, the City noted that it had arrived at the redactions after consultations with key staff members and conducting a line-by-line review of the full responsive records. Most of the exceptions relied on to redact records are discretionary, and the City submitted that it reviewed the material and applied sections 28, 29, 30, 35 and 40 as applicable. The City indicated sections 28-30 and 40 were applied as follows:
- As the *City of St. John's Act* allows for the withholding of records of privileged meetings of Council, one set of Special Meeting Minutes were redacted pursuant to section 28(1)(c);
 - Communications in which staff were weighing options or providing advice were withheld pursuant to section 29(1)(a);
 - Communications that are solicitor/client privileged were withheld pursuant to section 30(1)(a); and
 - Personal contact information and vacation times were withheld pursuant to section 40(1).

[9] The City noted that most of the redactions were applied in accordance with section 35(1)(d) as, “disclosure at this time could negatively impact the economic or financial position of a third party (the Third Party).” The City submitted that the Project is “very much in limbo given the apparent disagreement between the two parties.” It noted that staff had made several attempts to reach the parties involved in the Project in an attempt to obtain applications, plans, and/or general status of the project. Given the Project is “in a state of uncertainty, the plans have not been approved by the City, and the Complainant was not included in these communications.” It went on to note that;

...while the overall Project is known at this time, the disclosure of the actual plans, technical drawings and considerations relating to the same would be premature to disclose at this time and given that this is a significant development project, it is reasonable to conclude that the premature disclosure of the same would be harmful to the financial position of the third parties involved.

COMPLAINANT’S POSITION

[10] The Complainant submitted that it is an interested party of the Project, as it is a corporation jointly involved and financially responsible with a Third Party; and it indicated it had reason to believe the City had communicated with the Third Party on the project in the period of time noted in the request for information. The Complainant submitted it had sought copies of these communications from the City and had proceeded to file an access request when it did not receive a response.

[11] The Complainant argued that, “it is a natural conclusion, that with few exceptions, any discussion of the Project should be available to [Complainant].” In further submissions to this Office, the Complainant noted,

...that both parties are jointly involved and we strongly believe that it is in the public interest that information concerning the Project be provided to both, and not just one party. The [Complainant] has indicated in writing that it has already solely incurred significant expenditures of several millions of dollars. It contends that any decision by the City affecting the Project affects the overall cost and ultimately the cost sharing agreement and joint financial responsibility of [Third Party] and the [Complainant]. Consequently, any information related to the Project should be provided to the [Complainant].

[12] In addition, the Complainant raised section 9, the public interest override, arguing;

Section 9 of the Access to Information and Protection of Privacy Act, 2015 provides a public interest override which negates the exceptions claimed here by the City other than section 40(1). Public Bodies must balance the reason why the information must be protected against the public interest in preserving democratic and political values, the upholding of justice, and good governance, including transparency and accountability. Random reduction and exclusion of information from interested parties on a particular subject is not in the public interest, which outweighs the reason for a particular exemption.

ISSUES

[13] Did the City appropriately apply sections 28, 29, 30, 35 and 40 and does the section 9 public interest override apply?

DECISION

[14] The City withheld information pursuant to sections 28(1)(c), 29(1)(a), 30(1)(a), 35(1)(d) and 40(1) which state:

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

(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

30.(1) The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

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

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

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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.

[15] Upon review of the records, this Office found the City had mostly correctly applied the above-noted sections in redacting portions of the responsive records. The sections were applied in accordance with the legislation and in each case the material withheld was in keeping with the description set out in the respective provision. The section 40(1) material is required by the legislation to be redacted as disclosure would be harmful to personal privacy, but the remaining sections are applicable at the discretion of the City once information involved meets the description of the respective section being used. In this case the information in question falls within the scope of what can be redacted according to each of sections 28(1)(c), 29(1)(a), 30(1)(a) and 35(1)(d) and in discussions with the Complainant it acknowledged the broad language of the exceptions, that the information likely fell within this description and that these are within the City's discretion to use.

[16] There was one page of email correspondence where this Office found section 30 had been applied excessively. The redaction in question is quite minimal, amounting to a couple preliminary lines inquiring about the Project and setting up a discussion. The remainder of the chain of emails was properly redacted under section 30 as it did involve legal advice. However, it was excessive for the City to include the initial couple of lines of back and forth as well. On the recommendation of this Office, the City agreed to and did provide the Complainant with this information previously redacted on its original final response.

[17] Additionally, as noted above, the City indicated in its submission to this Office that two email accounts were specified as part of the complaint that were not included in the original request for information and in responding to the complaint it searched these finding five additional pages of records not previously provided to the Complainant. On the recommendation of this Office, the City agreed to and did provide the Complainant with these five additional pages of records.

[18] In its submission to this Office, the Complainant focused its arguments on the section 9 public interest override, which states:

9. (1) *Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.*

(2) Subsection (1) applies to the following sections:

(a) *section 28 (local public body confidences);*

(b) *section 29 (policy advice or recommendations);*

(c) *subsection 30(1) (legal advice);*

(d) *section 32 (confidential evaluations);*

(f) *section 35 (disclosure harmful to the financial or economic interests of a public body);*

[19] Section 3 of *ATIPPA, 2015* states that first and foremost the Act's purpose is to "facilitate democracy," listing three means to achieve this goal: ensuring that citizens have the information required to participate meaningfully in the democratic process; increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies. The Act is intended to favour disclosure of information by public bodies, with a limited number of exceptions. While some exceptions are mandatory, most are discretionary, permitting a public body to decide, after considering all relevant factors, that it is appropriate to disclose the requested information even though an exception could be applied. This discretion was enhanced by the inclusion of section 9.

[20] Section 9 directs that discretionary exceptions "shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception." It therefore requires each time a discretionary exception is considered to which the public interest override might apply, that a public body must assess its application. In the case of this complaint, a review of the records finds that the information fits within the exceptions claimed and that the harms the exceptions are meant to protect against are

present: to prevent the harm that is presumed to occur if the substance of deliberations of a privileged meeting is disclosed (section 28); to protect the full and frank discussion of policy alternatives within a public body (section 29); to protect communications between the public body and its solicitor (section 30); and to prevent the premature disclosure of a proposal or project or significant loss or gain to a third party (section 35).

[21] Section 9 is meant to be applied to override redactions made where it is clearly demonstrated to be in the public's interest for the material in question to be disclosed; and that the public interest outweighs the reason(s) for the exceptions being applied to redact portions of the records. In this case this Office finds that the interests at play are private in nature, and therefore this section is not applicable.

[22] The Complainant clearly articulated in its submissions to this Office the private commercial interests at play. Private interests do not trigger the public interest override: a public body can release information involving private interests of the applicant simply by exercising its discretion. But the public interest override would not be part of that assessment.

[23] The Complainant argued that it has a special interest in the requested records. It is not for us to judge whether or not that is the case, because *ATIPPA, 2015* provides for a broad, public right of access. For the most part, it does not focus on whether a requester may have a special interest in the records. The Complainant therefore has no greater or lesser right of access to the records, within the context of a request under *ATIPPA, 2015*, than any member of the public. Rather, the circumstances of this matter appear to be a dispute between contractual parties, which may be best addressed in another forum, where other considerations may determine the degree of access to records enjoyed by each party.

RECOMMENDATIONS

- [24] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the City continue to withhold the remaining redactions under the sections claimed.
- [25] As set out in section 49(1)(b) of *ATIPPA, 2015*, 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 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 5th day of August 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador