



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-001

January 25, 2023

Town of Musgrave Harbour

Summary:

The Complainant made an access to information request to the Town of Musgrave Harbour, seeking a copy of an investigation report. The Town responded that it did not have the report and the Complainant filed a complaint with our Office. The Commissioner found that the report's author had provided the report to legal counsel for the Town and the report was therefore under the control of the Town. The Commissioner recommended that the Town obtain the report from its counsel and provide it to the Complainant, less any applicable exceptions.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 5, 8, and 13.

Authorities Relied On:

NL OIPC Report [A-2021-028](#); ON OIPC [Interim Order MO-2150-I](#).

BACKGROUND

- [1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) to the Town of Musgrave Harbour (the “*Town*”) on September 18, 2022, seeking a copy of an investigation report. The Town responded that it did not have the report. The Complainant filed a complaint with our Office.
- [2] The Town responded to the complaint stating that it had not received the report, but that it believed that the Complainant was entitled to a copy and that it would be provided to him when it was received.
- [3] The Complainant, on December 14, 2022, provided our Office with evidence that the investigator who had authored the report had already provided the report to the Town’s legal counsel. The Town did not respond further to inquiries from our Office.
- [4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

DECISION

- [5] Section 8(1) of the *Act* provides that “A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body . . .” The only issue for determination in this Report is whether the Town has custody or control of the responsive record. If it does, *ATIPPA, 2015* is clear that it must be provided to the Complainant, subject to any exceptions to access that might apply.
- [6] The Town has stated repeatedly, but without further elaboration, that it does not have the report in question. It does not dispute that an investigator did in fact, under a contract, conduct the investigation on behalf of the Town.

- [7] The Town also does not dispute that the Complainant is entitled to the report, as the Town has conceded that the report is responsive to the access request and has stated that the Complainant “will receive a copy once we have it in our possession.”
- [8] It may be the case that the Town did not yet have the investigation report at the time that the Complainant made his access request. Therefore, the response of the Town to the Complainant at that time may have been accurate, and legitimate.
- [9] However, during the course of our investigation, the Complainant provided our Office with a copy of an email to him, dated November 26, 2022, from the investigator who had produced the report, stating that the report had been provided to legal counsel for the Town.
- [10] The issue then becomes whether or not a record in the custody of legal counsel for the Town is under the control of the Town. The terms “custody” and “control” are not defined in *ATIPPA, 2015*, but there is a great deal of jurisprudence setting out how those terms are to be interpreted. First, the evidence before us is that the report at issue in the present case has been completed by the investigator, and has been “filed with legal counsel for the Town.” The Town has not contested the evidence provided to our Office that the report is in fact in the custody of its legal counsel. If it is in the physical possession of counsel, it is deemed to be in the custody of counsel.
- [11] In our view, that means that it is within the control of the Town. There is a multi-factor test for “control” that is widely accepted across all jurisdictions in Canada, which is detailed in our Report A-2021-028. In essence, a record is under the control of a public body if it has the right to possess it. The specific issue of the control of records that are in the custody of a public body’s legal counsel has been examined in a number of reports from other jurisdictions, for example Ontario OIPC Interim Order MO-2150-I (City of Vaughan).
- [12] The report in the present case, having been commissioned by the Town, is the property of the Town. In our view, the fundamental nature of the solicitor-client relationship is that in situations such as these, the solicitor, in receiving custody of the report, acts as the agent of the client. It is the client that provides instructions to the solicitor, and the Town has the legal

right to obtain the record from counsel. The Town has provided us with no evidence that there is any issue between the Town and its legal counsel that might restrict the right of the Town to obtain the record. Therefore, we conclude that the Town has control over the report within the meaning of section 8 of *ATIPPA, 2015*.

[13] While the Town's legal counsel may not have had possession of the report at the time of the Complainant's access request in September, its legal counsel – and therefore the Town – gained custody or control during the course of our investigation. Under section 13 of *ATIPPA, 2015* the Town has a duty to “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.” In the circumstances of this case, that means the Town has a duty to obtain the record from legal counsel, and provide it to the Complainant without further delay, without requiring the Complainant to make a new access to information request.

RECOMMENDATIONS

[14] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town of Musgrave Harbour obtain a copy of the requested report from its legal counsel and provide it to the Complainant, less any applicable exceptions, within 10 business days of providing its response to this Report.

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

[16] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of January 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador