



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2023-024

May 9, 2023

### Town of Musgrave Harbour

**Summary:**

The Town of Musgrave Harbour sent the Complainant a copy of an investigation report, with redactions under section 40 to which the Complainant objected. The Town did not respond to the notification of the complaint, to numerous communications from our Office, or to a Summons. The Commissioner concluded that the redactions were mainly unjustified and recommended disclosure of the information. The Commissioner also concluded that the Town had failed to meet its responsibilities to the Complainant and to this Office under various provisions of the *Act*, and recommended that the Town review its records management policies and procedures, create access to information policies and procedures, seek additional support as available, maintain communication with applicants and with this Office, and comply with its statutory duties in the future.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 15-18, 20, 40, 43, 44, 97.  
[Public Inquiries Act](#), section 9.

**Authorities Relied On:**

NL OIPC Reports [A-2023-001](#), [A-2023-018](#), A-2023-021.  
ATIPP Office: [Access to Information Policy and Procedures Manual](#).

## BACKGROUND

- [1] As a result of a previous access to information complaint to our Office, which resulted in our Report A-2023-001, the Town of Musgrave Harbour (“the Town”) sent the Complainant a copy of an Occupational Health and Safety harassment investigation report (in which he was the respondent.) Some personal information of various individuals was redacted under section 40 of the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or “the Act”). The Complainant filed a new complaint, asking that he be provided with an unredacted copy of the report, and enclosing a copy of the redacted record that he had received.
- [2] We sent our complaint notification to the Town on February 13, 2023, requesting that the Town provide our Office with a copy of the report and other documentation, and asking for a discussion. We subsequently telephoned the Town Office several times, without connecting with anyone responsible.
- [3] We wrote again March 2, 2023 explaining the need for the Town to respond to the notification. There was, however, no response of any kind.
- [4] Given the passage of time without a response, our Office took the unusual step of issuing a Summons to Produce, which was served on the Town Clerk by a police officer on Friday, March 17, 2023. We then telephoned several more times, with no answer.
- [5] We sent an “urgent” email on March 23, 2023. On Monday March 27, 2023 we received an email from the Town Clerk with a brief explanation for the lack of contact, and saying that they would call. However, there was no call from anyone at the Town, and no response to our return calls.
- [6] Although our Office does not usually engage with elected officials, we decided in this case to contact the Mayor. After some difficulty obtaining a phone number we contacted the Mayor on April 5, 2023. We explained the ATIPP process and the public body’s responsibilities. The Mayor advised that he had been present when the RCMP served the Summons on the Town

Clerk, but understood that the Town had supplied us with everything we asked for. The Mayor advised he would refer the matter to legal counsel.

[7] We subsequently received a call from the Town's legal counsel, and after some discussion we received an unredacted copy of the responsive record from the law firm, but no submissions of any kind.

[8] On April 18, 2023 we sent the Town's legal counsel our assessment of the complaint, in which we recommended additional disclosures. On April 25, 2023, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*. We received no response to our notification of formal investigation.

## ISSUES

[9] The issues to be addressed in this Report include the following:

- (1) Whether section 40 has been properly applied to the responsive record.
- (2) Whether the Town has failed to meet its responsibilities under *ATIPPA, 2015*, including
  - (a) its duty to assist the applicant under section 13;
  - (b) its duty to respond to the applicant under sections 15-18 and 20;
  - (c) its duty to respond to a notification of a complaint by the Commissioner under section 44;
  - (d) its duty to comply with a request from the Commissioner made under section 97;
  - (e) its duty to comply with a Summons issued by the Commissioner under section 97 and the *Public Inquiries Act*;

## DECISION

### (1) Section 40 (Disclosure Harmful to Personal Privacy)

[10] The responsive record at issue is a 14-page report of a workplace investigation into allegations of harassment made by a Town employee against the Complainant, a Town councillor. Although section 33 of *ATIPPA, 2015* (information from a workplace investigation) provides that all relevant information created or gathered for the purpose of a workplace

investigation is to be provided to a party in response to an access request, recent court decisions have concluded that this provision does not override the provisions of section 40. Therefore such records must be reviewed, and if disclosure of any information would be an unreasonable invasion of privacy, that information must be withheld. (For a fuller discussion of this issue, see our recent Report A-2023-021).

[11] Section 43 of *ATIPPA, 2015* provides that the burden of proving that an exception applies to information in a record is on the public body. In the present case, we received no submissions from the Town to justify the redactions. For most other exceptions to access, this failure to discharge the burden of proof would be a sufficient reason to recommend disclosure of the information. However, because section 40 is so important for the protection of personal privacy, our Office conducted its own line by line review of the applicability of section 40 to the responsive record with the information available to us, and arrived at the following conclusions and recommendations as a result.

[12] Section 40(1) reads as follows:

*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.*

Personal information is defined in section 2 as “information about an identifiable individual”. In the present case, a review of the redactions applied to the record shows that an attempt has been made to de-identify information by redacting names and some other information about individuals. Having reviewed the record our findings are as follows.

[13] First, the names and contact information of the writer of the report and of the person to whom it is addressed, on page 1 of the report, are not considered personal information but business information. Disclosure of business contact information is typically not an unreasonable invasion of privacy, so that information should be disclosed.

- [14] Similarly, the name and title of the writer on page 14 are business information and should be disclosed. (The writer's signature, however, is considered to be personal information. It is therefore reasonable to continue to withhold it in the present case.)
- [15] In a number of cases information about a person's current employment is redacted (for example, on pages 3, 10 and 11). However, those examples are all information about the person's position or functions as an employee or officer of a public body, disclosure of which is deemed not to be an unreasonable invasion of privacy under section 40(2)(f) of the Act, and so it should not be redacted.
- [16] On pages 8-9 are some statements made by the access to information applicant himself. That information was provided by the applicant, disclosure of which is deemed, under section 40(2)(a) not to be an unreasonable invasion of privacy, and so should not be redacted.
- [17] The other redactions throughout consist of the names or other identifying information of some individuals, many of whom who were witnesses interviewed by the investigator, as listed on page 1. The names appear to have been chosen for redaction where they appear together with statements made by, or sometimes about, those individuals, for example, "Ms. \_\_\_\_\_ stated...." In a few case, the names refer to people whose actions were described by the witness. In a few other cases, the redacted information indicates a relationship, for example, "Ms. \_\_\_\_\_'s husband." These are all examples of personal information – either the words, actions or opinions of identifiable individuals. Therefore each example needs to be examined to see whether section 40 will be applicable.
- [18] However, the Act requires personal information to be withheld only when its disclosure would be an unreasonable invasion of privacy. For the reasons that follow, I conclude that the redacted information does not fall into that category.
- [19] First, it is rarely the case for a disclosure to be an unreasonable invasion of privacy when the information is already publicly known. Musgrave Harbour is a small town, and the Complainant and other residents know the identity of the Mayor and councillors, the Town Clerk and other employees. Furthermore, the names of the seven individuals interviewed by

the investigator are listed on page 1, and that list has not been redacted in the copy of the report that has already been disclosed and circulated. Therefore the identities of the witnesses are publicly known.

[20] The investigation report is organized by interview, with each witness in turn having a separate section. The name of the witness is redacted from the introduction to the section. However, in the account of the interview that follows, there is information in every case sufficient to identify the witness and each of the other individuals who are mentioned. For example, on page 2 it is disclosed that the Town Clerk filed the complaint, and on page 3 a witness is identified as the former Town Clerk/Manager. Even a reader who is not resident in the Town can put enough information together, just from the already-disclosed portions of the report, to positively identify each of the witnesses, and link their names to their statements. And, of course, that information has already been disclosed to the Complainant when he was originally sent a copy of the redacted report. The redacted report has also been publicly circulated.

[21] Second, even though the courts have concluded that section 33 of the Act does not override section 40, the latter provision must still be applied carefully. In deciding whether a disclosure would be an unreasonable invasion of privacy under either subsection 40(1) or 40(4), it is necessary to consider “all the relevant circumstances” as required by subsection 40(5). While the list in subsection 40(5) is not an exhaustive list, in the present case we would refer particularly to the following.

**40(5)(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny**

[22] The result of the investigation of a harassment complaint is a matter of public importance, particularly where, as here, the complaint investigation is already a public fact and it is desirable, for accountability, that the public should know the outcome.

**40(5)(c) the personal information is relevant to a fair determination of the applicant's rights**

[23] As the respondent to the complaint, the Complainant believes he is entitled to have the full report of the investigator, including the reasons for the investigator's conclusions, and the statements of witnesses on which the investigator relied.

**40(5)(g) the personal information is likely to be inaccurate or unreliable;**

[24] The Complainant argues that the names of all of the witnesses are already listed. In the circumstances of the present case, linking the names of the individuals to the statements already disclosed will remove any remaining possibility that a reader might make an incorrect guess about an individual's identity.

[25] It is also important to consider the purpose and construction of section 33, not as overriding section 40, but as a factor to be considered in the subsection 40(5) determination. Section 33 was clearly incorporated into *ATIPPA, 2015* in order to regulate the dissemination of workplace investigation information, by authorizing its disclosure to the parties (and partial disclosure to witnesses) and prohibiting its disclosure to non-parties. Where the disclosure to parties can be made without violating the provisions of section 40, it must be made.

[26] For the reasons outlined above, we conclude that in the present case, disclosing the redacted information is not an unreasonable invasion of anyone's privacy, and therefore none of that information should be withheld, except the signature of the writer.

**(2) The Failure of the Town to Meet its Responsibilities Under *ATIPPA, 2015***

[27] Section 13(1) of the Act provides that

*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.*

[28] This, in a nutshell, is the core responsibility of every public body when it receives an access to information request. Much has been written about this duty to assist, both in the Access to Information Policy and Procedures Manual published by the ATIPP Office, and in numerous reports from our Office. (For a recent example, see Report 2023-018.) At a minimum it

requires a public body to make at least some response to a request. For the access to information process to work as it is designed to work, it requires somewhat more.

[29] Sections 14 and following set out a detailed process that should be followed by a public body in responding to a request. There are procedures for transferring a request to another public body, for advisory responses, for final responses and what they should contain, and deadlines for each step. There are good reasons for these procedural provisions, spelled out in the Policy and Procedures Manual and in various guidance materials from our Office.

[30] Other provisions of the *Act* specifically apply to dealing with this Office. First, section 42 sets out the process for an applicant who wishes to file a complaint with this Office. Section 43 provides that it is the public body that bears the burden of proving that any claimed exceptions to access apply. There are strict time limits under section 44 for providing responses to our Office, and we, in turn, have strict time limits for completing investigations. In order for our Office to fulfil its oversight function and to ensure that the rights of both applicants and public bodies are upheld, public bodies must cooperate with our Office, follow the procedures and respect the time limits. The Town has unfortunately paid no attention to any of these obligations.

[31] Section 97 of the *Act* gives our Office the power to require public bodies to provide us right away, within 10 business days, with the records and other information we need to conduct our investigation. Our Office has a very short time in which to complete our work, and when we notify a public body of a complaint, we always specify what information we need, and we always refer to our statutory authority under section 97 for requesting it. The Town of Musgrave Harbour either has not understood our repeated requests, or has simply chosen to ignore them.

[32] One would have thought that having a police officer arrive at the Town office to serve the Town with an official Summons under the *Public Inquiries Act*, requiring the Town to produce to our Office, within 10 business days, a list of documents related to the complaint, would have produced a different result. However, that Summons was ignored as well, even though it specifically states that failure to comply with the Summons would constitute a contempt of



court. If the Town officials simply did not understand their responsibilities under the Act, surely the service of the Summons should have alerted them to the seriousness of the failure to comply, or at least to the fact that something was wrong.

[33] So far, we have received no explanation for the complete failure of the Town to follow the statutory process required, not only for this access request and complaint, but for several previous ones. In addition, there has been no response whatever to several more recent access requests and complaints arising from them. There may be mitigating factors, but we are not aware of them, and we have received no explanation, nor have we been asked for assistance. On the contrary, our Office has suggested to the Town that it could benefit from the training that is offered to municipalities by the ATIPP Office, but that suggestion does not appear to have been accepted.

[34] It also appears that the failure of the Town to comply with its statutory responsibilities has not been alleviated by the involvement of legal counsel.

[35] This is extremely disheartening, because it has been the experience of this Office that the access to information process can work extremely well, both for public bodies and for applicants, if the public body first resolves to follow and comply with the statutory process, and then takes steps to obtain the necessary support and training to do so. This has been true not only for larger public bodies, but for smaller municipalities. Small size and limited resources are often a challenge, but have not proved to be an obstacle to success. Furthermore, these statutory obligations are not exactly new – the Act has existed in its present form since 2015, and our Office has been dealing with municipalities for ten years before that.

[36] We therefore make a number of recommendations to the Town. At this stage, it is unfortunately necessary to emphasize that these recommendations cannot safely be ignored. Refusal or failure to comply with a recommendation to grant access to a record may well mean that the next step is a court proceeding.

## RECOMMENDATIONS

[37] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015* I recommend that the Town of Musgrave Harbour:

1. Provide an unredacted copy of the responsive record to the Complainant, withholding only the signature of the writer;
2. Comply in future with the statutory duties imposed upon it by sections 13, 15-18 and 20 of the *Act*, to respond to an applicant in an open, accurate and complete manner, without delay, and in any event within the statutory deadlines, including keeping the applicant informed, maintaining open communication throughout the process, and providing the applicant with the necessary information so they can exercise their rights under the *Act*, including the right to file a complaint regarding a deemed refusal;
3. Comply in future with the statutory duties imposed upon it by the complaint process under section 44 of the *Act*, and in particular with the duty to respond to requests made by the Commissioner under section 97 of the *Act*;
4. Within 30 days of receipt of this Report, make arrangements for *ATIPPA, 2015* training with the Municipal Liaison of the ATIPP Office, for the Head of the Public Body, the ATIPP Coordinator, Mayor, members of Town Council and any assisting staff, regarding statutory requirements and procedures for responding to access requests and complaints;
5. Obtain additional support to help process access requests, for example by seeking approval for time extensions from this Office or support from the Municipal Liaison of the ATIPP Office, where necessary; and
6. Review and update records management policies and procedures, and create access to information policies and procedures, in accordance with *ATIPPA, 2015*.

[38] 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.

[39] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9<sup>th</sup> day of May, 2023.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador