



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-031

July 6, 2023

Town of Grand Falls-Windsor

Summary:

The Complainant made an access to information request to the Town of Grand Falls-Windsor for correspondence and other records relating to the Complainant. The Town did not provide any records in response, claiming that section 38 of *ATIPPA, 2015* (disclosure harmful to labour relations interests of public body as employer) allowed it to withhold the responsive records. In response, the Complainant filed a complaint with this Office. The Town did not respond to this Office's requests in a timely manner and did not provide all responsive records to this Office. The Commissioner concluded the Town did not provide sufficient proof that the exception to access applied or that the Complainant had no right to the records and recommended the Town release the records withheld under section 38(b)(iii) of *ATIPPA, 2015*, less any redactions for the protection of personal information. The Commissioner further recommended that the Town conduct a new search for any further records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, Sections 13, and 38.

Other Resources:

NL OIPC [Practice Bulletin on Reasonable Search](#), March 2017.

BACKGROUND

- [1] On March 7, 2023, the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) to the Town of Grand Falls-Windsor (the “Town”) for the following:

Any and all records including emails, letters, and phone records regarding [the Complainant] dates August 2022 to present. Any complaints regarding [the Complainant] sent to [several named employees and elected officials of the Town]. Any and all records related to social media investigations including the entire red folder containing all the alleged evidence for this investigation.

- [2] In response, the Town refused access to any records citing section 38(b)(iii) of *ATIPPA, 2015*, a discretionary exception for “disclosure harmful to labour relations interests of public body as employer”.
- [3] On April 5, 2023, the Complainant filed a complaint with this Office. After being notified of the complaint, the Town did not respond until June 1, 2023, when this Office received by fax a response letter from the Town and copies of some correspondence between the Town and the Complainant. The responsive records were not provided. On June 12 and June 22, 2023, the Town provided this Office some, but not all, of the responsive records.
- [4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

ISSUES

- [5] The issues to be addressed in this Report are:
- a. whether the Town failed to meet its duty to assist as required under section 13 of *ATIPPA, 2015*;
 - b. whether section 38(b)(iii) of *ATIPPA, 2015* applies to any of the responsive records.

DECISION

[6] The relevant sections of *ATIPPA, 2015* read as follows:

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.

...

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

(a) labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or

(b) labour relations information the disclosure of which could reasonably be expected to

(i) harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,

(ii) result in significant financial loss or gain to the public body as an employer, or

(iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.

[7] On June 12, 2023, the Town provided this Office with 49 pages of Twitter posts, some of which appear to be from the Complainant's Twitter account. However, the initial request was for records beyond what was provided and we were not given an explanation for why they were not provided to the Complainant or to this Office. For example, communications between certain individuals at the Town was requested by the Complainant in the initial access request, as were any records regarding the Complainant from August 2022 to present. Such records were not provided and the Town did not state whether a search was even conducted to locate them. On June 22, 2023, the Town provided additional records to this Office mostly consisting of recent emails.

[8] As mentioned previously, in its response to the Complainant's access to information request, the Town cited section 38(b)(iii) of *ATIPPA, 2015* as justification for refusing access to all responsive records. The Town did not provide detailed submissions on the application of the exception other than to say "In our opinion, we correctly applied section 38 of the ATIPP act given that this was case grieved and heading to mediation/arbitration, which has since ended."

[9] The issue of inadequate submissions aside, the wording of the access to information request would nonetheless likely capture a large amount of records which would not be subject to section 38. This Office is not confident it has received all responsive records for review. Without submissions from the Public Body justifying its application of an exception, this Office cannot assess whether it was properly applied.

[10] On an unknown date, the Complainant attended a mediation with the Town and resolved the outstanding employment dispute between the parties. In its June 1, 2023, letter to this Office, the Town cited the settlement agreement, which the Complainant had signed, as justification for not cooperating with the Complainant's request. In particular, the Town made note of the following paragraph of the settlement agreement:

The Parties agree that this Settlement Agreement shall include any other existing or future claims or actions the Employee or CUPE has against the Employer arising from the Employee's employment relationship with, or termination from, the Employer, such as but not limited to, any claims related to workers' compensation, long-term disability, privacy, human rights, occupational health and safety or any other matter of a legal nature or related to, or involving, a legislative body or act, and the Employee agrees that the signing of this document is a release to that effect.

[11] The settlement agreement is not a factor in this access complaint investigation as no such exception is enumerated in *ATIPPA, 2015* and this Office is not privy to any agreement between the applicant and the public body. This Office has not received instruction from the Complainant to informally resolve this complaint. Without express permission from the Complainant to close their complaint file we must fulfill our statutory duty and complete the investigation process and issue a Report within the statutory deadline. In short, the Complainant may or may not have agreed, in the settlement agreement, to resolve this access

complaint informally – the interpretation of the settlement agreement is not a matter for this Office to conclude. But, in any case, the complaint is not automatically resolved by virtue of the agreement being executed – the Complainant needs to explicitly agree to resolve the matter, and this has not happened. This may or may not mean that the Complainant is in breach of undertakings under the settlement agreement, but that is not a matter for determination by the present process.

[12] Subsection 43(1) of *ATIPPA, 2015*, dealing with the burden of proof, provides:

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.

[13] Based on the limited information before this Office, we cannot conclude that section 38 was applied properly to the records we received, let alone the responsive records we have not received. Therefore, the Town has not met the burden of proof of establishing that the exception to access applies and that the Complainant has no right of access to the responsive records.

[14] In this Office's view, the Town failed to meet its duty to assist in processing the Complainant's request. The Town also failed to provide our Office with all responsive records for review.

RECOMMENDATIONS

[15] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town conduct a full search for the responsive records and use this Office's [Practice Bulletin on Reasonable Search](#) for guidance. Any records found as a result of the new search, and any records withheld from the Complainant to date, should be provided to the Complainant within 10 business days of providing its response to this Report. When providing the Complainant with the responsive records, for the protection of personal information, the Town should apply section 40 of *ATIPPA, 2015* where necessary.

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

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of July 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador