



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-039

September 19, 2023

City of Corner Brook

Summary:

The Complainant made an access to information request to the City of Corner Brook for all records relating to a city-owned parcel of land dating back to 2010. The City responded by providing 835 pages of records, the majority of which it redacted pursuant to section 30(1)(a) of *ATIPPA, 2015* (legal advice). Other exceptions to access applied to the records include sections 29(1)(a) (policy advice or recommendations), 31(1)(l) (disclosure harmful to law enforcement), 39(1)(a) (disclosure harmful to business interests of a third party) and 40(4)(g) (disclosure harmful to personal privacy). The Complainant disagreed with all redactions and made a complaint to this Office. After reviewing submissions and the responsive records, the Commissioner recommended the City maintain its position on the privileged records but that it release some records withheld under the other sections.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 29, 30, 31, 39, 40, 43, and 97.

Authorities Relied On:

NL OIPC Reports [A-2023-011](#), [A-2022-010](#), [A-2019-026](#), [A-2017-008](#), and [A-2023-024](#).

Other Resources:

OIPC's [Guidance on Redacting Non-Responsive Information](#),

[Newfoundland and Labrador \(Information and Privacy Commissioner\) v Newfoundland and Labrador \(Justice and Public Safety\), 2023 NLCA 27](#)

BACKGROUND

- [1] On May 15, 2023, 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 Corner Brook (the “City”) for the following:

“All correspondence on 49 Lundrigan Drive since 2010.”

- [2] In response to the Complainant’s access request, the City provided the applicant with 835 pages of records that is responsive to the request. However, more than half of these pages were withheld in their entirety pursuant to section 30(1)(a) of *ATIPPA, 2015* (legal advice). Of the remaining records, various other exceptions to access were applied on a line-by-line basis, including sections 29(1)(a) (policy advice or recommendations), 31(1)(l) (disclosure harmful to law enforcement), 39(1)(a) (disclosure harmful to business interests of a third party), and 40(4)(g) (disclosure harmful to personal privacy).
- [3] On June 20, 2023, the Complainant filed a complaint with this Office, objecting to all redactions made by the City, stating the information was “inappropriately” removed from the responsive records.
- [4] On July 14, 2023, the City provided its response to the complaint which included an affidavit sworn by its solicitor in support of the City’s claims of solicitor-client privilege. The actual records withheld under section 30 were not provided for our review. However, the City did provide other records withheld from the Complainant pursuant to the other exceptions for our review.
- [5] Informal resolution of the complaint was unsuccessful and the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

ISSUES

- [6] The only issue to be addressed in this Report is whether the City has met the burden of proving that the exceptions to access apply to the information withheld from the Complainant.

DECISION

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

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.*

...

(2) *The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.*

...

31. (1) *The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to:*

...

(l) *reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;*

...

39. (1) *The head of a public body shall refuse to disclose to an applicant information:*

(a) *that would reveal:*

...

(ii) *commercial, financial, labour relations, scientific or technical information of a third party;*

(b) *that is supplied, implicitly or explicitly, in confidence; and*

(c) *the disclosure of which could reasonably be expected to:*

(i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

(ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*

(iii) *result in undue financial loss or gain to any person, or*

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

...

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.*

(4) *A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where*

(g) *the personal information consists of the third party's name where:*

(i) *it appears with other personal information about the third party, or*

(ii) *the disclosure of the name itself would reveal personal information about the third party.*

...

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.*

...

97. (3) *The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.*

Section 30 – Solicitor-Client Privilege

[8] Out of the 835 pages identified by the City as responsive to the Complainant's request, 477 pages were refused pursuant to section 30(1)(a) of *ATIPPA, 2015*. As previously noted, we have not had an opportunity to review these records.

[9] In [*Newfoundland and Labrador \(Information and Privacy Commissioner\) v Newfoundland and Labrador \(Justice and Public Safety\), 2023 NLCA 27*](#) the Court of Appeal of Newfoundland and Labrador held that *ATIPPA, 2015* does not permit this Office to compel production of records over which solicitor-client privilege has been claimed. Nonetheless, the burden of proof under section 43(1) is still on the public body to demonstrate, on a balance of probabilities, that an applicant has no right to access to a record.

[10] As discussed in Reports [A-2022-010](#) and [A-2023-011](#), while we cannot compel records where there has been a claim of solicitor-client privilege for review, an affidavit with sufficient detail could potentially form the evidentiary basis to support a claim of solicitor-client privilege.

[11] In this case, the City provided this Office an affidavit dated July 14, 2023 and sworn by its solicitor in support of its claims of solicitor-client privilege. The five-page affidavit includes pages numbers and a brief description of each of the records the City has withheld.

[12] While the affidavit does not reference dates or the exact individual to which the solicitor was communicating, it is more than a blanket statement as it provides an explanation for each privileged record. For example, on page two of the affidavit it states:

k. Pages 291 to 299 consist of request for legal advice from client to lawyer, legal advice from lawyer to client, request for documentation from lawyer to client and are solicitor client privileged;

[13] Similar explanations are contained in the affidavit for all pages the City withheld under section 30. In the present case, we accept this affidavit and its descriptions of the records as evidence of solicitor-client privilege and find that it goes sufficiently beyond the blanket “trust us” assurances as referenced in Report [A-2022-010](#).

[14] In this Office’s view, this affidavit evidence forms a sufficient evidentiary basis to ground the City’s claims of privilege. Therefore, on a balance of probabilities, the City has discharged its burden of proof as it relates to the documents withheld under section 30 of *ATIPPA, 2015*.

[15] It is worth noting that the City claimed section 29(1)(a) also applied to these records. However as we have concluded there is sufficient evidence for section 30 to apply, an analysis of section 29’s application to the same records is not necessary.

Sections 29, 31, 39 and 40

[16] The following is a review of the other redactions applied throughout the records, in chronological order. Any part of the responsive records not referenced here was either fully disclosed to the Complainant or fully withheld under section 30 of *ATIPPA, 2015*, discussed above.

- [17] The first 116 pages of the responsive records contain the agenda for a City Council Meeting that occurred on May 27, 2019. This document is publicly available and was provided to the complainant via a link to the City's website. We have been provided the original agenda which was withheld from the Complainant and can confirm the full document is viewable via the link provided. The only difference between the version initially withheld from the applicant and the version available online is that the signatures are redacted in the online version. The redaction of individuals' signatures is an acceptable use of section 40 of *ATIPPA, 2015* which is discussed in Report [A-2023-024](#).
- [18] Pages 117 contains an emailed request between City staff for a summary of the land sold on Lundrigan Drive and was withheld as policy advice pursuant to section 29(1)(a) of *ATIPPA, 2015*. Pages 131 and 132 contains a duplicate of the email on page 117 along with follow-up emails between staff and was also withheld under this section. These emails merely contain a request from one employee of the City to another to compile some factual information about properties on Lundrigan Drive. Section 29 speaks to "advice, proposals, recommendations, analyses or policy options" and the emails do not contain policy advice and we therefore recommend their release.
- [19] Pages 118 and 119 contain some information relating to other parcels of land in Corner Brook and were initially withheld from the Complainant and marked as 'non-responsive'. However, records not being responsive to an access to information request is not valid justification for refusal to access under *ATIPPA, 2015*. In this Office's [Guidance on Redacting Non-Responsive Information](#), we outline best practice advice which states public bodies should avoid breaking up the flow of information. We suggest that if it is just as easy to release the information or claim an exception as to call it "non-responsive", the information should be released. The best alternative in most cases is to simply contact the Complainant when processing the request to determine whether or not they wish to include the "non-responsive" information within the scope of their request. During the investigation, the City did provide these pages to the Complainant but redacted information on certain properties as policy advice pursuant to section 29 of *ATIPPA, 2015*. We have reviewed the redacted information and have determined that it does not fit within the exception for policy advice. We therefore

recommend release of this information. Pages 135 and 136 contain similar redactions and we recommend release here as well.

- [20] Page 120 consists of a map of Lundrigan Drive with markings showing the sale status of various properties, and it was withheld under section 29(1)(a). This document was created by City staff and could be considered advice or analysis developed for a public body as per section 29(1)(a). We are therefore satisfied with the City's decision to refuse disclosure to this document. This drawing is duplicated at page 134.
- [21] Page 121 contains emails between a City staff member and a third party regarding land on Lundrigan Drive. The text of the emails was withheld pursuant to section 39(1)(a)(ii) as information harmful to business interests of a third party. Section 39 is a three-part test and failure to meet any part of the test will result in section 39 not applying. See, for example, Reports [A-2017-008](#) and [A-2019-026](#). If it does not apply, a public body must disclose the requested information to the Applicant. To summarize, the information must a) either reveal a trade secret or commercial, financial, labour relations, scientific or technical information of a third party, b) be supplied in confidence, and c) cause a type of harm specified in section 39(c).
- [22] The paragraph on page 121 withheld under this exception is an email from City staff to a third party. It is therefore not even information supplied by a third party. Moreover, no evidence of harm, such as significant harm to the competitive position of the third party, has been presented to this Office. Thus, the City has failed to prove the elements of section 39.
- [23] Page 133 is stated to be a duplicate of page 117, an email we recommend to be released, but is just an email disclaimer repeated four times. There is no exception cited or submission received as to why this page is redacted. It should be released.
- [24] Pages 137 to 145 contains various emails between City staff and third parties regarding land on Lundrigan Drive. The text of all emails is redacted as harmful to business interests of a third party and names and contact information of the third parties is redacted as disclosure harmful to personal privacy (section 40). This Office accepts the redactions made to personal information on these pages but states, similarly to the email on page 121, the text of the

emails does not satisfy the three-part test laid out in section 39 for the same reasons as page 121, addressed above. Thus, the text of all emails in this part of the records must be released.

[25] Pages 514 to 541 consists of diagrams of land available within the City, created by City staff. Information in these records was withheld under sections 29(1)(a) and 31(1)(l) (as they included links to the online map service). The information is available online through the City's publicly-accessible online map service and we recommend that the City disclose these records in full.

[26] On page 542, one line of an email was redacted pursuant to sections 29(1)(a) and 39(1)(a). The information merely consists of a one-line email where an employee of the City asks another employee about contact information for a third party organization. This does not contain policy advice pursuant to section 29 or information which would harm the business interests of a third party pursuant to section 39. Therefore, we conclude that it should be released.

[27] Pages 755 to 760 of the responsive records contain correspondence from the Complainant to the City, which has been withheld pursuant to section 29. While the Complainant's letter may contain various proposals for the City to consider, the letter cannot constitute policy advice or recommendations prepared for the City, being from a private citizen.

RECOMMENDATIONS

[28] Under the authority of section 47 of *ATIPPA, 2015*, I recommend the City release information it withheld pursuant to sections 29, 31, and 39 that is highlighted in the records attached to the City's copy of this Report, and continue to withhold the information redacted pursuant to section 30.

[29] 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.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of September, 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador