



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2023-049

November 30, 2023

Town of Stephenville

Summary:

The Complainant made an access to information request to the Town of Stephenville for records relating to investigations into the conduct of Town councilors dating from September 2021 to August 2023. The Town responded by refusing access to the responsive records, citing sections 35 and 40 of *ATIPPA, 2015*. The Complainant filed a complaint with this Office. After reviewing the submissions and responsive records, the Commissioner concluded the Town failed to meet its burden of proving that section 35 applies to the responsive records. As such, the Commissioner recommended the Town disclose the records to the Complainant subject to any necessary redactions for personal information under section 40.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 33, 35, 40, 43.

Authorities Relied On:

NL OIPC Reports [A-2019-020](#) and [A-2023-034](#).

SK IPC Report [166-2018](#).

BACKGROUND

- [1] On August 16, 2023, the Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* to the Town of Stephenville (Town) for the following:

I am looking for records and communications – digital, paper and other – related to any code of conduct complaints, or investigations, into any and all members of Stephenville Town council, including the mayor, from September 2021 to August 2023.

- [2] On August 29, 2023, the Town responded and refused access to all records, citing sections 35(1)(c) (disclosure harmful to the financial or economic interests of a public body) and 40(1) (disclosure harmful to personal privacy) of *ATIPPA, 2015*. The Complainant disagreed and on September 5, 2023 filed a complaint with this Office.

- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with Section 44(4).

PUBLIC BODY'S POSITION

- [4] In its response to the complaint, the Town did not provide submissions explaining how the records qualified for the exceptions it had relied on to deny access, but did state the following:

The ATIPPA request PB/940 2023 was denied related directly to the fact that the Code of Conduct investigations was on-going at the time of the request, and at the time of the denial, that council had yet to review the complaints and the report of the investigator...[.]... The final part of the process is a public meeting to inform on the outcome of the investigation, although the town is still awaiting legal advice on what a public meeting would entail and the wording of the public statement of and what information can be provided to the complainant. This is required due to the newness of the code of conduct process, and the lack of clarity of the process necessitating the requirement for legal advice.

- [5] During our investigation, the Town, through its Chief Administrative Officer (CAO), reiterated that none of the responsive records – investigation reports addressing complaints

against various elected officials with the Town – can be released before they are approved by Town Council and that process is still ongoing.

COMPLAINANT'S POSITION

- [6] The Complainant submits that section 35 does not apply to the requested records as code of conduct complaints are not “plans that relate to the management of personnel of or the administration of a public body.” The Complainant references decisions from Information and Privacy Commissioners in other provinces addressing similar provisions in support of this position, such as, for example, *Saskatchewan Legal Aid Commission (Re)* Report [166-2018](#).
- [7] Moreover, the Complainant states sections 35 and 40 are information-level, not record-level exceptions and that, even if the sections apply to some information within the records, they are entitled to the remainder.

ISSUES

- [8] This Report must address whether the Town properly applied sections 35 and 40 to withhold the records. As the records relate to complaints about the conduct of public officials, including in at least one instance an employee of the Town, it will also be necessary to consider whether section 33 (Information from a workplace investigation) has any application

DECISION

- [9] The relevant provisions of *ATIPPA, 2015* are:

33. (2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

...

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

...

(c) *plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*

...

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.*

...

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.*

[10] Responsive to the access to information request are various investigative reports into the conduct of elected officials created pursuant to the Town's Code of Conduct. The Code of Conduct was established in accordance with the *Municipal Conduct Act, 2021*. It is worth noting that the Town also provided for our review reports relating to investigations into employees; however, they are not responsive to the access request filed by the Complainant.

[11] Since section 33, an exception for records relating to workplace investigations, is a mandatory exception to access, it would be pertinent to consider it in this Report. The exception was recently considered in [A-2023-034](#), which addressed the applicability of the workplace investigation exception to elected officials. In that case, this Office confirmed that section 33 cannot be used to withhold investigative reports about the conduct of elected officials and recommended the release of the report at issue. This Office also considered section 40(2)(f) which states it is not an unreasonable invasion of personal privacy if the information relates to individuals' "positions, functions, and remuneration as an officer, employee, or member of a public body". We therefore recommended redaction of unrelated personal information such as cell phone numbers and leave status and disclosure of the remainder.

[12] The exceptions claimed by the Town in this case, sections 35(1)(c) and 40, are information-level exceptions, not record-level. This means public bodies cannot rely on these provisions to withhold entire records but rather they should conduct a line-by-line review. Any information within a record that does not qualify for these exceptions would have to be released. As the Town did not do this, instead taking the position that the entirety of the reports had to be withheld because of sections 35 and 40, we must determine whether these exceptions apply to the entirety of the records.

[13] As noted above, no submissions or arguments were submitted by the Town on the issue of how section 35 applies to the investigative reports. The reports were commissioned by the Town to investigate complaints against the Mayor and Town councilors. The reports address allegations of harassment, misuse of public position, and conflicts of interest. They do not appear to relate to plans regarding the administration of the Town not yet made public, as described in the exception under section 35(1)(c) which was relied on by the Town. That the Town Council has not approved these reports is not relevant.

[14] In [A-2019-020](#), this Office determined that Section 35 “requires a reasonable expectation that release of the records would disclose plans developed for the purpose of contractual negotiations.” None of the responsive records discuss plans not yet made public as per the language of section 35. Further, there is nothing we have seen in the responsive records which suggest that any potential plans are anticipated. As previously noted, section 33 would not apply either given the complaints relate to elected officials, not employees. These reports should be disclosed, subject to redactions to protect the personal information of third parties as required by section 40,

[15] One report addresses allegations made against both the CAO and Town Council. The portions of that report which discuss the allegations against the CAO ought to be withheld entirely under section 33(2) of *ATIPPA, 2015* as the present Complainant is not a party to the investigation. Those sections which discuss the Town Council’s conduct, however, should be released subject to redactions to protect the personal information of third parties.

RECOMMENDATIONS

- [16] Under the authority of section 47 of *ATIPPA, 2015* I recommend that the Town:
- disclose to the Complainant, within 15 business days of receipt of this Report, the reports titled “2”, “3”, “8”, and those portions of record “7” which discuss alleged conduct of Council members. Redactions for the protection of personal information should be applied in accordance with section 40;
 - arrange for a training session with the provincial government’s ATIPP Office on handling access requests and complaints to the OIPC.
- [17] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Stephenville 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.
- [18] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 30th day of November 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador