NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-019

Town of Clarenville

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to a copy of a digital audio recording of the proceedings of a meeting of the Town Council of the Town of Clarenville (the "Town"). The Town refused to disclose the recording to the Applicant claiming, in reliance on section 14, that the minutes of the meeting were published and available to the public. The Commissioner found that the Town was not entitled to deny access on the basis of section 14 because the minutes did not have the same information that was contained in the digital audio recording. The Town also argued that because section 215 of the *Municipalities Act, 1999* provides that the minutes of a Council meeting are not to be made available to the public until they are subsequently adopted by Council this means that only the adopted minutes should be made available and not the digital recording of the proceedings which are intended for use only as an aid in preparing accurate minutes. The Commissioner concluded that section 215 did not prevent the release of either the minutes or the digital recording, both of which are considered records under the provisions of the *ATIPPA*. The Commissioner also rejected the Town's argument that he should not recommend release of the digital recording because such a release would encourage other members of the public to seek access to the digital recordings of Council meetings.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(q), 3, 5, 7, 14, 19, 46, 47, 49, and 64; *Municipalities Act, 1999*, S.N.L. 1999, c. M-24, s. 215.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-004, 2007-012, 2007-018; Saskatchewan OIPC Report LA-2004-001.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 4 September 2007 to the Town of Clarenville (the "Town"), wherein he sought disclosure of records as follows:

> *A complete transcript of the recordings of the August 21st regular meeting of the Clarenville Town Council. (Recordings refer to the digital recording of the entire meeting from the point the meeting was called to order until it was adjourned.)*

[2] The Town by correspondence dated 11 September 2007 notified the Applicant that it was refusing access to the requested records. In doing so, the Town indicated that it was relying on section 14 of the *ATIPPA* on the basis that the minutes of the 21 August 2007 meeting were prepared and made available to the public.

[3] The Applicant in a Request for Review dated 13 September 2007 and received in this Office on that date asked for a review of the Town's decision to deny access to the requested information and stated in relation to the Town's reliance on section 14 as follows:

> *. . . the printed minutes of council do not reflect the discussions which take place in open and public council meetings. As a result the council minutes and the recording of council are quite different in the sense that the minutes don't provide the level of detail as the recordings do. Actual discussions are not conveyed in the printed minutes.*

[4] Attempts to resolve this Request for Review by informal means were not successful and by letter dated 2 November 2007 both the Applicant and the Town were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.

II APPLICANT'S SUBMISSION

[5] The Applicant's submission is set out in correspondence dated 6 November 2007. In order to accurately convey the Applicant's position I will quote from his submission as follows:

> *While the minutes of each public meeting of the Clarenville Town Council are made available to the public, those minutes do not adequately reflect what transpires in the council meeting.*
>
> . . .
>
> *The minutes typically list motions and those who voted in favour or against. Again, little or no mention is made of who spoke on a particular motion and what was said. This, we contend, is important information which is not being made available to the public. It's that type of information which is typically made available to the public from discussions in the House of Assembly through Hansard.*
>
> . . .
>
> *The recordings of regular Council meetings are recordings of a public meeting made by a public body, in this case the Clarenville Town Council. These recordings are also covered under the town's document retention guidelines.*
>
> *It is our understanding, that all material used in the recording of a public meeting including recordings, scratch notes, shorthand, etc, is, in fact, public information and can be accessed by the public upon request.*
>
> *The Town may argue that by allowing the release of this recording it may open the flood gates causing numerous members of the public, who either don't have time or who couldn't be bothered to attend regular council meetings, to request these recordings.*
>
> *The fact that others might request these recordings is, in our opinion, not adequate grounds to deny their release. Again, these are the recordings of a public meeting.*
>
> *And finally, as outlined in the Town's Record Retention policies, these recordings are kept for the two-week period between the actual meeting and the subsequent council meeting when the minutes are approved. After that the tapes are destroyed. We question whether it is permitted under Provincial legislation to destroy such records of a public meeting.*

[6] As part of his submission, the Applicant enclosed a copy of the Town's *Records Retention Policy* and pointed out that the majority of the Town's records are maintained for extended periods of time, with the shortest period of retention being one year for photographs, which the Applicant indicates is substantially longer than the period of retention for the digital recordings of public meetings.

[7] Also as part of his submission, the Applicant enclosed the minutes of the regular meetings of the Clarenville Town Council held on 18 September 2007 and 16 October 2007, along with the digital audio recording of these meetings which the Applicant had recorded. The Applicant refers specifically to an item in the minutes for the meeting of 18 September 2007 for which there is an annotation indicating that for this item there was a "very lengthy discussion." The Applicant states that the minutes do not reflect who spoke on the issue, what was said or which councilors may have been in favour or opposed but, the Applicant points out, by listening to the recording one gets a much better feel for the discussion which took place.

III PUBLIC BODY'S SUBMISSION

[8] The submission of the Town is set out in correspondence dated 20 November 2007, from which I will quote extensively in order to accurately set forth the position taken by the Town:

> *The request for the audio tape was refused for the following reasons: Meetings are taped solely for the accuracy of providing written minutes to Council for their adoption. The adopted minutes are then a true copy of the meeting and made available to the public. Also, let it be noted that the Municipalities Act states, Section 215 (a) that minutes are not to be made available to the public until they are adopted. It is very evident the reason for this, draft minutes are only the Town Clerks interpretation of what happened at Council meetings and are subject to changes prior to their adoption. By allowing audio tapes of meetings to be released it would create the same effect, you would have the public drawing their own conclusion to what happened at the Council meetings and would possibly have several versions of that throughout the town. The Town also have a Records Retention Policy which allows for the destruction of the tapes once the minutes are adopted. Therefore, if the tape is not permitted to be made available prior to the adoption of the minutes and destroyed immediately following the adoption there would be no point at which the tape could be given to the public.*

> *I would also like to bring to your attention Section 14(1)(b) of the Access to Information and Protection of Privacy Act. It is our opinion that this Section also provides the Town with the ability to refuse the tape as it states that a record that will be published and available to the public within 45 days after the applicant's request, may be refused. Our Council meets ever two weeks and minutes are made available to the public once adopted, 14 days.*
>
> *It is our conclusion that both the Municipalities Act and the ATIPP Act supports our theory that the only true copy of minutes is the adopted version and this should be the only version in circulation.*

[9] The Town attached to its submission letter a copy of the Town's *Records Retention Policy* and a copy of a letter dated 19 September 2007 from its Access and Privacy Coordinator (the "Coordinator") which had been previously sent to this Office. In that attached letter the Coordinator had set out similar reasons for denying access but in addition made the following statement:

> *The approval of this request causes me great concern as it could result in the public requesting copies of audio tapes after meetings and drawing their own conclusion to what took place at the meeting, or the taping of Council Meetings will possibly be banned by Councils.*

IV DISCUSSION

[10] Before discussing the issues arising in this Request for Review, I will make some general comments on the *ATIPPA*.

[11] The purposes of the *ATIPPA* are set out in section 3, as follows:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*

> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[12] Section 7 of the *ATIPPA* establishes the principle that there is a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions, as follows:

> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[13] Section 64 of the *ATIPPA* sets out the burden of proof to be applied on a Request for Review made to the Information and Privacy Commissioner as follows:

> *64. (1) On a review of or appeal 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.*
>
> *(2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.*

[14] A reading of sections 3, 7, and 64 indicates that the purpose of the *ATIPPA* is to make public bodies more accountable to the public by giving the public a general right of access to records in the custody of or under the control of a public body subject only to limited and specific exceptions. When a public body has denied access to a record and the Applicant has requested a review of that decision by the Information and Privacy Commissioner then the public body bears

the burden of proving that the applicant has no right of access to the record or part of the record pursuant to section 64(1).

[15] As I discussed in my Report 2007-004, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body in order to prove that an applicant has no right of access to a record under section 64(1). In my Report 2007-004, I adopted the civil standard of proof as the standard to be met by the public body under this section. In order for the public body to meet the burden of proof in section 64(1), the public body must prove on a balance of probabilities that the applicant has no right to the record or part of the record.

[16] I will now discuss the issues before me in this Request for Review.

[17] The Town has denied access to the responsive record on the basis of section 14 which provides in part as follows:

> *14. (1) The head of a public body may refuse to disclose a record or part of a record that*
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> *(a) is published, and available for purchase by the public; or*
>
> *(b) is to be published or released to the public within 45 days after the applicant's request is received.*

[18] The Town's argument is that it is entitled to deny disclosure of the digital recording of the proceedings of the meeting because it makes the minutes of the meeting available to the public. The Applicant, on the other hand, disagrees with the Town's position and states that the minutes do not adequately reflect exactly what transpires at the Council meetings.

[19] I have reviewed the minutes of the Council meetings for 21 August 2007, 18 September 2007, and 16 October 2007 and listened to the digital recordings for each of those meetings and it is clear that the minutes contain only a summary of the proceedings that took place. There are two distinctly different records; the minutes of the meeting and the digital recording of the proceedings of the meeting. Therefore, the digital recording requested by the Applicant is not a record that is published and made available to the public as required for the Town to rely on section 14(1) of the *ATIPPA*. As a result, the Town has not met the burden imposed on it to

prove that the Applicant has no right of access to the requested record by the operation of section 14.

[20] The Town also takes the position that section 215 of the *Municipalities Act, 1999* provides that the minutes of Council meetings are not to be made available to the public until they are adopted and that it follows from this that the digital recording of the proceedings of the meeting also cannot be made available to the public until the minutes are adopted. Section 215 reads in part as follows:

> *215. (1) The following documents shall be made available by the council for public inspection during the normal business hours of the council:*
>
> *(a) adopted minutes of the council;*

[21] I would interpret section 215(1)(a) in a manner differently than the Town. In my view, this section provides that the minutes of Council must be made available to the public for inspection once they are adopted but there is nothing in section 215(1)(a) to prevent the Town from releasing a record containing the minutes prior to their adoption or to prevent the release of the digital recording before the minutes are adopted.

[22] Even though it is the disclosure of the digital recording that is at issue in this Review, I note that the minutes whether adopted or not adopted by Council are records within the meaning of section 2(q) of the *ATIPPA*, which provides as follows:

> *2. (q) "record" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;*

[23] However, the minutes, unlike the digital recording, would likely be covered by section 14 should there be a request for them prior to their adoption. In other words, a request for the draft minutes before they are approved by Council at the following meeting should not be treated in the same manner as would the request for the digital recording. The Town could, relying on section 14, successfully argue in relation to a request for the draft minutes that they are a record

that "is to be published or released to the public within 45 days after the applicant's request is received."

[24] In addition, the definition of "record" in section 2(q) includes the audio digital recording requested by the Applicant. As a result, both the minutes and the digital recording are records within the meaning of the *ATIPPA*. Section 5 of the *ATIPPA* sets out the records to which the *Act* applies by stating: "This Act applies to all records in the custody of or under the control of a public body" and then provides a list of records that are exempted from the *Act*, with none of the exemptions being applicable to the records responsive to the Applicant's request. Furthermore, section 7 of the *Act* grants an Applicant "a right of access to a record in the custody or under the control of a public body." As such, section 215 of the *Municipalities Act, 1999* does not affect whether or not the minutes or the digital recording can be disclosed to the Applicant.

[25] Another point made by the Town in its submission is that the digital recording is destroyed upon the minutes of the Council meeting being adopted at a subsequent meeting of Council in accordance with the Town's *Records Retention Policy*. I have reviewed this policy, which was adopted by Council on 8 March 2005, and it does state that the "Audio Recordings of Council Meetings" are to be kept "Until minutes are adopted." The policy also provides that minutes are to be maintained on a permanent basis.

[26] The Applicant in his submission questions whether it is permitted under provincial legislation to destroy such records of a public meeting.

[27] The *ATIPPA* contains in section 5(2)(b) a provision dealing with the destruction of records as follows:

> *5(2) This Act*
>
> . . .
>
> *(b) does not prohibit the transfer, storage or destruction of a record in accordance with an Act of the province or Canada or a by-law or resolution of a local public body;*

[28] In my Report 2007-018, I commented upon section 5(2)(b) and the records retention policy of a local public body such as the Town at paragraph 76:

> *[76] Clearly, section 5(2)(b) allows local public bodies such as the Town to develop a Records Retention Policy. Such a policy may provide that a record is to be maintained permanently, for a short period of time, or for any other appropriate period of time, with the length of the retention time being determined by the nature of the record involved. However, a record can only be destroyed in accordance with the authorized Records Retention Policy of the local public body.*

[29] The Town properly adopted its *Records Retention Policy* by a motion of its Council on 8 March 2005. Therefore, pursuant to section 5(2)(b) the Town is entitled, in accordance with the authorization given by its adopted policy, to destroy the digital audio recording of a Council meeting once the minutes of that meeting are adopted by Council at a subsequent meeting.

[30] Although the Town is entitled to destroy records in accordance with its *Records Retention Policy*, if an access to information request is made for those records before they are destroyed the records must be disclosed to the Applicant unless excepted from disclosure. Such a situation was commented upon by the Saskatchewan Information and Privacy Commissioner in Report LA-2004-001, where he stated at paragraph 28:

> *[28] At the time an access request under the Act is received by a local authority, all undestroyed transitory records relating to the request would be subject to the Act. In these situations, existing transitory records cannot be destroyed until the Applicant's request has been processed and any appeal period exhausted.*

[31] Even though I indicated in my Report 2007-018 that I did not find the term "transitory record" a practical term for the classification of records under the *ATIPPA*, I agree with the reasoning used by the Saskatchewan Commissioner in his Report LA-2004-001. Therefore, when a record of a local public body such as the Town is scheduled for destruction on a certain date or upon the occurrence of a particular event and an Applicant makes a request for that record before it is destroyed, the record is subject to the *ATIPPA* and should be disclosed to the Applicant if not subject to any of the exceptions set out in the *Act*. As a result, the digital audio recording of

the regular council meeting on 21 August 2007 is subject to the *ATIPPA* and, not being excepted from disclosure by the provisions of the *Act*, should be disclosed to the Applicant.

[32] I note here that the minutes for the 21 August 2007 meeting indicate that there was both a privileged meeting and a regular meeting of Council on that date. I also noted this fact while listening to the audio recording. The Applicant's request is in relation to the regular meeting of Council and the portion of the audio recording for the privileged meeting need not be disclosed. Also, the portion of the audio recording for that privileged meeting contains information that if disclosed would reveal the substance of deliberations of a meeting held in the absence of the public and, therefore, is excepted from disclosure by section 19(1)(c) of the *ATIPPA*, which provides:

> *19. (1) The head of a local public body may refuse to disclose to an applicant information that would reveal*
>
> > *(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.*

[33] At this point, it is necessary for me to comment upon the suggested broader repercussions that may result from the release of the digital recordings as discussed by each of the parties in their submissions. The Town's Coordinator has indicated that she is concerned that allowing the Applicant's request could result in members of the public requesting copies of the digital recordings of the meetings and then "drawing their own conclusions" as to what happened at the meetings. The Coordinator also expressed concern that this could lead to Council banning the taping of meetings. The Applicant rejects what he calls the Town's "flood gates" argument and states that the fact that others may request the digital recordings is not adequate grounds to deny their release.

[34] In relation to the concern raised by the Town that members of the public may draw their own (supposedly mistaken) conclusions as to what happened at a Council after listening to the digital recording, I would indicate that the same could be said for a member of the public who attended the meeting and observed the proceedings in person. Furthermore, any applicant who obtains a record (in whatever format) through an access request may possibly misunderstand the

information in that record. So clearly, such a potential misapprehension by an applicant cannot be used to justify a refusal to disclose a record. In addition, there is nothing that prevents the Town from accompanying the released digital recording with a letter indicating that the adopted minutes are considered by the Town to be the official record of the proceedings of a Council meeting.

[35] My comments on the arguments of the parties on the wider implications of granting the Applicant's request will be made in the context of the purposes of the *ATIPPA.* Section 3(1) of the *ATIPPA* provides that one of the purposes of the *Act* is to make public bodies more accountable to the public and then states that one way to achieve this is by giving the public a right of access to records. I discussed the accountability of public bodies in my Report 2007-012 at paragraph 38:

> *[38] The accountability of public bodies under access to information legislation was discussed by the British Columbia Information and Privacy Commissioner in Order 00-47. The Commissioner commented on the opening words of section 2(1) of the British Columbia Freedom of Information and Protection of Privacy Act, which are identical to the opening words of section 3(1) the ATIPPA. The Commissioner stated on page 11 of that Order:*
>
> > *As the first lines of s. 2(1) make clear, the Act's dual purposes are to protect personal privacy and promote accountability to the public of institutions covered by the Act. The Act's accountability objective is achieved, as is acknowledged by s. 2(1)(a), by giving "the public" a right of access to records. That right is, necessarily, exercised by individual applicants on a case-by-case basis. But the 'right' articulated in the section belongs to "the public", not to individual applicants. This provision acknowledges the sea-change effected by the Act in relations between the public, on the one hand, and governments and other public institutions, on the other. The public's right of access to information under the Act compels public bodies to share information with citizens, within prescribed limits, so as to enable them to participate more effectively in society and government.*

[36] I view the above cited comments by the British Columbia Commissioner as indicating that the obligation imposed on public bodies to share information with the public is intended to allow all citizens to participate more effectively in the democratic process. Therefore, to argue, as the

Town has done, that it doesn't wish to share information with one citizen because this may lead to other citizens wanting access to the same or similar information, is to take a position that would interfere with what the British Columbia Commissioner called a right that belongs to "the public." I cannot accept the Town's argument in light of the wording of the *ATIPPA* which provides in section 3(1)(a) that public bodies are to be made more accountable by "giving the public a right of access to records." [Emphasis added]

[37] In relation to the Coordinator's concern that a recommendation to release the recording to the Applicant could lead to the Town's banning the taping of the meetings, I will state clearly that it would be quite regrettable if the Town were to discontinue the practice of recording its public meetings for the sole purpose of preventing "the public" from having access to information which allows the public to see how the Council conducts the democratic process during its open and public meetings. To stop the recording of the Council meetings for this purpose is to remove a mechanism by which the citizens of Clarenville can obtain information that can be used to make Council more accountable, such a removal would, in my opinion, frustrate one of the purposes of the *ATIPPA.*

V CONCLUSION

[38] The Town has not proven that it is entitled to deny access to the digital audio recording of the proceedings of its regular Council meeting held on 21 August 2007.

[39] Section 215 of the *Municipalities Act, 1999* which provides that a Town must make the adopted minutes of its Council meetings available for public inspection does not affect whether or not the minutes of, or the digital recording of, the proceedings of a public meeting of Council should be disclosed under the *ATIPPA.*

[40] The Town is permitted under the authorization of its *Records Retention Policy* to destroy the digital recordings of the proceedings of its public Council meetings once the minutes of the meeting have been adopted by Council but the digital recordings are subject to the *ATIPPA* and

any access request for the recordings received before they are destroyed must be properly processed.

VI RECOMMENDATIONS

[41] Under the Authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Town of Clarenville release to the Applicant the digital audio recording of the proceedings of its regular Council meeting held on 21 August 2007, with the portion of the recording containing the proceedings of the privileged meeting held on that same date severed.

[42] Under authority of section 50 of the *ATIPPA* I direct the head of the Town of Clarenville to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the Town's final decision with respect to this Report.

[43] Please note that within 30 days of receiving a decision of the Town of Clarenville under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of December 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador