



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-012

August 19, 2010

Town of St. George's

Summary:

The Applicant applied to the Town of St. George's (the "Town") under the *Access to Information and Protection of Privacy Act* (the "ATIPPA") for access to the recordings of the Town Council meetings of March 8 and April 12, 2010. The Town refused access to these records, pursuant to section 13 of the *ATIPPA*, stating the requests are repetitive. The Commissioner determined that the minutes for each meeting are separate and unique records and that the Town was incorrect in its application of section 13 as there is no evidence that previous requests for these records had been made. Further, the Commissioner did not accept the Town's argument that these recordings need not be disclosed because of their transitory nature. The Commissioner concluded that because the request was made while the records were still in existence, the Town should release them to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 2(q), 7 and 13. *Municipalities Act, 1999*, S.N.L.1999, c.M-24, as amended, s.24.

Authorities Cited:

Newfoundland and Labrador OIPC Report 2007-019; Saskatchewan OIPC Report LA-2004-001.

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*” or the “*Act*”) the Applicant submitted an access to information request on March 9, 2010 to the Town of St. George’s (the “Town”), in which he requested disclosure of records as follows:

Tape recording of Town Council Public meeting Monday March 8, 2010. Wish to listen to tape of recorded meeting.

- [2] Further, and also in accordance with the *Act*, the Applicant submitted another access to information request on April 12, 2010 to the Town, in which he requested disclosure of records as follows:

Listen to tape public meeting 12-Apr-10.

- [3] The Town responded to these requests on April 7, 2010 and May 12, 2010, respectively. In each response the Town advised that access was being refused in accordance with section 13 of the *ATIPPA*, as a repetitive request.

- [4] In a Request for Review dated and received in this Office April 9, 2010 and a Request for Review dated May 18, 2010 and received on May 19, 2010, the Applicant asked for a review of the decisions made by the Town in response to each of his access to information requests. While these are two separate reviews, for convenience they have been dealt with together in this Report.

- [5] Efforts by an investigator from this Office to facilitate an informal resolution were unsuccessful.

- [6] By letters dated May 19, 2010 and June 14, 2010 both the Applicant and the Town were advised that the Request for Review had been referred for formal investigation, in keeping with section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

- [7] The Town made separate formal submissions regarding the March tape and the April tape. The Applicant chose not to make formal submissions.

II TOWN'S FORMAL SUBMISSION

[8] The formal submissions of the Town were the same for each of these matters. They submit:

...these tapes are for note taking and are not part of the public record. The Minutes of the meeting are typed and passed as official record not the tapes.

III DISCUSSION

[9] Section 7 of the *Act* states:

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 .*

[10] The issues to be decided are as follows:

1. Are the tapes “records” under the *ATIPPA*?
2. Was either of the Applicant’s access requests repetitive, coming under section 13?
3. Is the Town correct in its argument that the tapes are not required to be produced because they are “not part of the public record” and transitory in nature?

[11] Section 2(q) of the *Act* defines a “record” as:

a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner...

[12] The recordings of the meeting are therefore “records” as defined in the *Act*. This position is consistent with Report 2007-019 of this Office, which found that the recording of a Town Council meeting is a separate record from the minutes themselves.

[13] The Town originally refused access to these records on the basis of section 13 (repetitive request). Section 13 states:

The head of a public body may refuse to disclose a record or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant.

[14] The Town has offered no evidence that a request for these specific records has been made in the past. Based on its formal submission, we can only assume the Town's claim of repetitiveness is due to the Applicant having received a copy of the Minutes or having made previous requests for recordings. As stated above, the Minutes and the recording are two separate records and the recording of each meeting creates its own new record.

[15] There is no evidence that a previous request for either of these recordings has been made, therefore the Town's reliance on section 13 cannot be supported and is not valid.

[16] In its formal submission, the Town stated that the recordings were "not part of the public record", that the minutes were the "official record", and that the recordings were transitory in nature in that their purpose was only to facilitate the creation of the minutes.

[17] There is no definition in the *Act* of "public record" or of "official record", only of "record". If this definition is met, the record is within the custody and control of the public body, and not excepted, then it must be disclosed.

[18] The issue of the record being transitory was addressed in this Office's Report 2007-019:

Although the Town is entitled to destroy [recordings] 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:

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.

[19] In the case of the records which are the subject matter of this Report, they were still in existence at the time of the access request and fall squarely within the *Act*.

[20] I must note as well, these meetings were public meetings held pursuant to section 24 of the *Municipalities Act, 1999*. Any member of the public could have attended and listened. In larger municipalities the council meetings are not only recorded, but are broadcast on local cable television. The contents of the minutes of the Town council meetings record decisions made but do not contain the same level of detail of discussion as the actual recordings.

[21] The purpose of the *Act* is to make public bodies more accountable to the public by giving the public a right of access to records. I see no reason why an elected official should have any reservation about a citizen hearing the remarks they have made at a public meeting. The Town, as a public body subject to the *ATIPPA*, should not hesitate to release a recording of these meetings to a citizen requesting it.

IV CONCLUSION

[22] The recordings in question are “records” as defined by the *Act*. There is no evidence that previous requests have been made for these recordings, therefore they are not excepted under section 13 of the *Act*. Further, even though the records are transitory in nature, they had not been destroyed at the time the request was made. They are records currently in the custody and control of the Town and therefore they must be disclosed to the Applicant.

V RECOMMENDATIONS

[23] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Town give the Applicant access to the recordings of the council meetings of March 8 and April 12, 2010.

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

[25] Please note that within 30 days of receiving a decision of the Town 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*.

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of August, 2010.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador

