



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2011-013

September 21, 2011

Town of St. George's

Summary:

The Applicant made two applications to the Town of St. George's (the "Town") under the *Access to Information and Protection of Privacy Act* (the "ATIPPA"), one for access to records related to revenue, costs, jobs and land involved in the proposed regional landfill site and the other for tender documents for the same project. The Town claimed no responsive records existed for either request. The Commissioner determined the Town had failed in its duty to assist the Applicant by failing to conduct reasonable searches for the records. The Commissioner recommended the Town conduct the proper searches and release any records found to this Office and the Applicant in accordance with the ATIPPA.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 3, 7(1), 9, 21, and 72(b); *Municipalities Act, 1999*, S.N.L.2002, c.M-24, as amended, s.215; *Government Agency Purchasing Act*, S.N.L. 2002, c. G-6.1, as amended, s. 10.1.

Authorities Cited:

Newfoundland and Labrador OIPC Report A-2006-009, A-2009-011; Ontario OIPC Order M-909 and PO-2836; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CANLII).

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*” or the “*Act*”) the Town of St. George’s (the “Town”) received two access to information requests, one on February 9, 2010 and the other on June 14, 2010.

[2] In the February request, the Applicant requested disclosure of:

For 2009. Proposed landfill regional site. Est. annual revenue to town, est. costs to town, jobs created, amount of land required and who acquired from.

[3] The Town responded to the first request on March 20, 2010. The Town advised that access to the records was being denied as the documents were subject to solicitor and client privilege, as per section 21 of the *ATIPPA*.

[4] In a request for review regarding the February 9 access request, dated and received in this Office March 11, 2010 the Applicant asked for a review of the decision made by the Town in response to his access to information request. In his request for review the Applicant stated that:

Town did not apply proper application of client privilege.

Did not operate in the definition of solicitor client privilege.

Solicitor client privilege applies only to confidential communications between the Town and its solicitor

There was no evidence of seeking or giving legal advice from professional advisor.

The definition of legal advice was not an issue here.

There was no test of the implications of legal advice.

Documents were given to councilors and government departments.

Documents were presented at a public meeting or tabled at a public meeting. These documents would become public by virtue of sec 215 Municipalities Act.

[5] On March 12, 2010 an Analyst from this Office asked the Town to provide a copy of the February access request, the Town’s decision letter in response, any correspondence regarding the access request, and a complete copy of records that would be responsive to the first request.

[6] After a telephone discussion with an Analyst from this Office, the Town decided to withdraw its claim of section 21, solicitor and client privilege, regarding the March request and issued a new response letter to the Applicant on March 30, 2010. In this correspondence the Town indicated that “records do not exist”. This claim was based on the Town’s position that because the project was not controlled by the Town but instead by a regional committee with representatives from several municipalities, that the Town had no records related to the project.

[7] The Analyst discussed this position with the Town. The Analyst observed that the project had been discussed at a Town Council meeting on March 8, 2010. During this meeting the councilors passed a motion as follows:

A letter has been received from Municipal Affairs approving funding of \$297,047.90 (\$310,800.12 less \$13,752.22 GST) to complete Phase I of the St. George’s Landfill Upgrade.

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Resolved that council accept the approved funding from Municipal Affairs for landfill upgrade; that council agree 1) to accept waste from all communities identified in the consultant report on a cost recovery basis, 2) to charge all communities equally and at the same rate as that it will charge to itself, and 3) to turn over any capital assets purchased with these funds to the Western Regional Service Board at such time as the regional system becomes operational and the St. George’s site is required to close; and that approval be given to borrow \$12,752.22 to finance the GST rebate.

[8] The Analyst concluded that based on these minutes of council there must be some records responsive to the Applicant’s access request in the custody or under the control of the Town. However, the Town disagreed and held to its position that they had no records responsive to the access request. The Town argued that they had no records that responded to the Applicant’s specific questions as the project was not completed at that time.

[9] In the June request, the Applicant requested disclosure of:

*For Proj 2009023 Landfill Upgrading
Copies of documents requested
Tender put in paper
Name on tenders and amounts*

Documentation applicable to time and place of opening showing proof of compliance with public tendering act.

[10] The Town extended the timeframe for responding to the June request by 30 days under section 16 of the *ATIPPA* and then responded on July 13, 2010 that no records existed that were responsive to this access request.

[11] In a request for review regarding the June 14 access request, dated and received in this Office July 21, 2010 the Applicant asked for a review of the decision made by the Town in response to his access to information request. In his request for review the Applicant stated that:

*Records must exist
This transaction is subject to the public tendering act
Town agenda June 7, 2010 makes reference to approval
Abuse of process. Why 30 days to say records do not exist*

[12] An Analyst from this Office brought the issue of the June meeting of Council, as pointed out by the Applicant in his request for review, to the Town's attention. Specifically, it was noted that the Agenda for the Town Council meeting for June 7, 2010 included "approval to award Harvey Gale and Son Ltd CP2, Project 2009023 – Landfill Upgrading for the tender amount of \$92,126.69." The Town wrote on May 31 that while the project was referred to at the meeting, the Mayor "says nothing about receiving tender documents". In this same letter, the Town confirmed that their position that no records existed had not changed.

[13] Attempts at informal resolution were not successful and by letters dated July 19, 2011 the Applicant and the Town were advised that both requests 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 on both matters.

II TOWN SUBMISSION

[14] The Town provided a formal submission to this Office which repeated and confirmed its position that no records existed responsive to the first access request. The submission went on to state that:

The Town does have a report prepared at the cost and request of another town that considers certain aspects of the Landfill Project, but does not contain any of the information requested in [this access request]. The Town did not consider it necessary to disclose the existence of this Report, whether pursuant to section 9 of the ATIPPA or otherwise, as it does not contain the requested information and, furthermore, because the Town does not consider it to be properly in its custody or under their control for the purpose of the ATIPPA. Furthermore, in the event that the existence of the Report ought to have been disclosed, the Town states that the Report may have been properly refused to be disclosed under sections 24(b)(c)(d)(e) and/or 27 of the ATIPPA.

[15] On the issue of the request for information regarding the tenders for the project, the Town stated:

The Town was not involved, in any way, in the tendering process in respect of the Landfill Project, and does not have any documentation whatsoever in its custody or control. The Town has previously advised the Commissioner's office that, to its knowledge, the tendering process was carried out by the provincial Government of Newfoundland and Labrador.

III DISCUSSION

[16] The relevant sections of the *Act* state:

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;

...

(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.

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....*

9. *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.*

17. (1) *The head of a public body may transfer a request for access to a record to another public body within 7 days after receiving it, where it appears that*

(a) the record was produced by or for the other public body; or

(b) the record is in the custody of or under the control of the other public body.

[17] The issues to be reviewed by this Office are: did the Town fulfill its duty to assist the Applicant by conducting an appropriate search; and, has the Town convinced me that it does not have in its custody or control at least some records responsive to one of the Applicant's two requests?

[18] I discussed the duty to assist, from section 9 of the *Act*, in detail in Report A-2009-011 at paragraph 79:

The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

[19] In that same Report the standard to be applied and the burden of proof involved regarding the duty to assist were discussed at paragraph 79:

...the standard against which the duty to assist is measured is reasonableness, not perfection. I would also observe that while the overall burden of proving that the duty to assist has been fulfilled rests with the public body, it may be the case that on any specific issue, the burden of proof of a particular proposition may rest with the party that is asserting it.

[20] My predecessor discussed the burden of proof borne by the Applicant in A-2006-009:

It is important to note that when an Applicant, in a Request for Review, takes the position that a public body...has not undertaken an adequate search for a

record, there is some onus on the Applicant to present a reasonable basis for that position. As I noted in my Reports 2005-003 and 2006-006, adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that:

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

[21] In Ontario OIPC Order M-909 the Inquiry Officer also stated that reasonable records searches “must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.”

[22] The Applicant here has established a “reasonable basis” for concluding that records may exist that are responsive to his access requests, records that have not been provided by the Town. The reference to the Landfill Upgrade Project clearly formed part of the Town’s business, as demonstrated by the minutes of the March 8, 2010 Council meeting. The Town received a substantial amount of funding from the Department of Municipal Affairs for the Project and it seems highly unlikely that the Town has no records responsive to the Applicant’s access request regarding the details of the project. Further, the Agenda for the June 7, 2010 meeting clearly references the awarding of the tender related to the project specifically referenced by the Applicant in his access request. Again, these tender documents formed part of the Town’s business and they should have records related to it responsive to the Applicant’s access request even if, as the Town alleges, the Provincial Government handled the tendering process.

[23] A reasonable search, as defined in the Ontario Order and accepted in past Reports from this Office, that is one conducted “by knowledgeable staff in locations where the records might reasonably be located,” was not carried out in this instance. At a minimum, the letter from the Department of Municipal Affairs discussed in the March 8, 2010 meeting of Council and the tender referenced in the June 7, 2010 Agenda would likely have been responsive records, and not even these documents were provided to the Applicant.

[24] The crux of the Town's argument that they do not have any records in both matters is that the other bodies would have them instead (i.e. the regional board and the Provincial Government). This is an argument of custody or control. In Order PO-2836 the Ontario Commissioner set out a list of factors to consider when assessing the issue of "custody or control". The relevant ones among those are:

- *Does the content of the record relate to the institution's mandate and functions?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *To what extent has the institution relied upon the record?*

[25] Using these three factors, and putting aside whether or not they were in the physical custody of the Town, the records associated with the Landfill Upgrade Project and the tenders were, in the first instance, related to waste management, which is within the Town's mandate and functions. Secondly, the records were held by the Mayor, an officer of the Town, in his role as a member of the regional board, membership on which was part of his duties as an officer. Thirdly, the Town certainly had to rely on these records as part of its transition into the new landfill arrangements being planned by that board.

[26] Therefore, the Town may or may not have had physical possession of all the records related to the workings of the project or the tenders, but it clearly had some control over them as they had been created by or provided to a committee on which their Mayor sat as part of his function as Mayor. Further, the content of the tender was related to the Town's function and mandate and was relied on by the Town, therefore records surrounding its acceptance are clearly within the control of the Town.

[27] The Supreme Court of Canada recently spoke on the issue of control of documents in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*. At paragraphs 54 and 48, the Court held that "while physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control." And that "in order to create a meaningful right of access to government information, [control] should be given a broad and liberal interpretation."

[28] The Court went on, at paragraph 50, to support a two-part test advocated by the Appeal Court for whether a document was under the control of a Public Body:

in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[29] The records requested by the Applicant meet both parts of this test. They do relate to a Town matter (waste management) and it is reasonable to expect that the Town could obtain a copy on request, as a member of the regional board and as per section 10.1 of the *Government Purchasing Agency Act*:

10.1(1) Where a tender is invited by a government funded body, the government funded body shall, at the time the tender is invited, provide the Chief Operating Officer of the Government Purchasing Agency

(a) with information respecting the tender invitation in the form required by the chief operating officer; and

(b) within 30 days of awarding a tender, with information respecting the award of the tender including the name of the successful bidder and the amount of the contract.

(2) The Chief Operating Officer of the Government Purchasing Agency shall make available, upon request, the information submitted under subsection (1).

[30] Having established that the Town had these documents under its control, I must note that even if they had not been under the Town's control or custody, the Town should have transferred the request in accordance with section 17 of the *ATIPPA* if they believed the records sought were provided to and in the custody or control of another public body. The Town did not do this and in fact did not raise the argument of another public body having these records until it provided this Office with its formal response. At no point did the Town refer the Applicant to any other public body. Therefore, even if the Town's position were correct, which I do not accept, they still failed to reply to this access request in an open, accurate and complete manner, as required by section 9 of the *ATIPPA*.

[31] The Town has not met its burden of proof that reasonable searches were conducted for records responsive to either of the Applicant's requests. Furthermore, I do not accept the Town's argument that there were no responsive records in its custody or control.

[32] I must also comment on the Town's use of section 21 of the *ATIPPA*, which states:

21. The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

[33] Even though they withdrew their reliance on this section, I am left to wonder how the Town came to its decision to rely on this exception given that their current position is that no records exist. If the records do not exist then what was reviewed to determine that section 21 applied? I would caution the Town against using exceptions in the future when there is no basis for doing so. I would also note that to mislead an Applicant is contrary to the *Act* but to willfully attempt to mislead this Office is an offence under the *ATIPPA*:

72. A person who willfully

(b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing or exercising powers under this Act

is guilty of an offence and liable, on summary conviction, to a fine of not more than \$5,000 or to imprisonment for a term not exceeding 6 months, or both.

IV CONCLUSION

[34] I conclude that the Town did not fulfill its duty to assist the Applicant in that it did not conduct a reasonable search for records responsive to either of the Applicant's access requests.

[35] I also conclude that either the Town, at best, failed to understand fully the issue of control regarding the responsive records in this case, or, at worst, the Town was possibly misleading the Applicant and this Office regarding the existence of records responsive to the access request. The Town received approval for almost \$300,000 in funding from Municipal Affairs regarding a landfill

upgrade. It is very difficult to believe that that same Town has no records regarding this project which could be considered responsive to either of the Applicant's two requests.

[36] When a citizen seeks to understand the details of a municipal work being undertaken by their Town I think they have a right to receive that information. In fact, the ability of citizens to understand how their government operates is the very purpose of the *ATIPPA*, because only an informed citizen can hold his or her government accountable.

V RECOMMENDATIONS

[37] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Town conduct another search for records responsive to both of the Applicant's access requests. I recommend this be "conducted by knowledgeable staff in locations where the records in question might reasonably be located."

[38] Further, if any records are located as a result of this search, I recommend they be released within 30 days of receipt of this Report to this Office (so we may ensure full compliance with these recommendations) and to the Applicant as appropriate under the *Act*.

[39] I would also recommend that the Town ensure that it makes a full and reasonable search for all records that may be responsive to any access requests they receive in the future and to transfer any requests promptly where it appears that the records may in the custody or control of another public body.

[40] 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.

[41] 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*.

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of September, 2011.

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

