



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-004

January 30, 2018

Town of Paradise

Summary:

The Town of Paradise received a request for records related to its 2017 municipal election. The Town advised the Applicant that it destroyed all records responsive to the request in accordance with the *Municipal Elections Act*, following which the Applicant complained to this Office. The Town was able to locate some additional records and released them. The Commissioner concluded that while the Town's interpretation of the request was reasonable, the Town failed in its duty to assist the Applicant by not clarifying it with the Applicant. The Commissioner also found that the Town destroyed records not subject to destruction pursuant to the *Municipal Elections Act*. Those records required retention after receipt of the access request. The Commissioner recommended that the Town revise its Records Retention Policy regarding records relating to elections.

Statutes Cited:

[Access to Information and Protection of Privacy Act](#), SNL 2015, c.A1.2.

[Municipal Elections Act](#), SNL 2001, c M-20.2

Authorities Relied On:

[Report A-2010-012](#); [Vaughan \(City\) \(Re\)](#), 2012 CanLII 32908 (Ontario MO-2750).

Other Resources:

[Access to Information Policy and Procedures Manual](#)

I BACKGROUND

[1] Municipalities in the Province of Newfoundland and Labrador held elections on September 26, 2017. The *Municipal Elections Act* (the “MEA”) establishes the rules for the conduct of those elections as well as forms for their administration.

[2] On October 12, 2017, the Applicant filed an access to information request with the Town of Paradise (the “Town”) seeking:

...a copy of the 34 polling stations tally sheet signed by each polling clerk. The official tally sheet signed by the ballots, Election Ballots

[3] The Town acknowledged the request on October 13, 2017. Its advisory response on October 26, 2017 stated “some of the information that you have requested including the election ballots and tally sheets were sealed in the ballot boxes on election night as per the *Municipal Elections Act*”. The Town also cited section 5(2)(b) of the *ATIPPA, 2015* (which allows the transfer, storage or destruction of a record in accordance with another law of the province or Canada or a by-law or resolution of a local public body).

[4] The Town provided its final response on November 9, 2017, advising the Applicant that the Town had “no records responsive to your request” and that “all election materials including the ballots were destroyed on October 26, 2017” in accordance with section 59 of the *MEA*.

[5] The Applicant filed a complaint with this Office. During this investigation, the Town disclosed that other records responsive to the request did exist and provided them to the Applicant. The Town confirmed it destroyed other records (in addition to the ballot boxes and their contents) on or about October 26, 2017.

[6] The Complainant was not satisfied with the records received. After unsuccessful efforts to achieve informal resolution, the complaint proceeded to formal investigation in accordance with section 44 of the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*” or the “Act”).

II THE TOWN'S POSITION

- [7] The Town submits that it interpreted the Complainant's request as a request for the tally sheets and the ballots which it had sealed (along with other materials) in the ballot boxes after the counting of ballots on the night of the election. The tally sheets in question are in a form prescribed by the Department of Municipal Affairs and Environment under the *MEA* and designated "MEF-15".
- [8] The Town relies on section 5(2)(b) of the *ATIPPA, 2015* which states "[t]his Act ... 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". The Town submits that, in the absence of a recount or court order, section 59 of the *MEA* required destruction of the ballot boxes and their contents 30 days after the election. The Town states that it shredded the ballot boxes and their contents on October 26, 2017.
- [9] The Town further submitted that the Complainant would have had access to the ballot boxes and their contents if he had requested a recount or made an application to the Supreme Court of Newfoundland and Labrador pursuant to the *MEA*.

III THE COMPLAINANT'S POSITION

- [10] The Complainant submits that while the *MEA* provides for the destruction of election materials, on receipt of an access request, a public body must not destroy records until the request is finally resolved. The Complainant also questions the timing of the destruction, hypothesizing that labour action occurring on October 26, 2017 would have delayed destruction of the records.
- [11] Finally, the Complainant disputes the Town's interpretation that his request was for the ballot boxes and their contents, and that he sought records not subject to mandatory sealing and destruction under the *MEA*.

IV DECISION

Duty to Assist

[12] As noted above, the Complainant sought:

*... a copy of the 34 polling stations tally sheet signed by each polling clerk.
The official tally sheet signed by the ballots, Election Ballots*

[13] The request is somewhat confusing. It is not clear what records the Complainant sought. What is a tally sheet signed by the ballots? Unfortunately, the Town did not contact the Complainant to attempt any clarification. The request refers to “election ballots” and “tally sheets” (also known as form MEF-15). There is no requirement for a signature on form MEF-15. The reference to “official tally sheet signed by the ballots” further obfuscates identification of responsive records. This is a clear case where consultation with the Complainant may have clarified the request and avoided this complaint.

[14] The MEA references a number of documents used in the administration of elections, including section 57:

57.(1) The poll book, the list of voters, the envelopes containing the ballots, and all other materials related to the election, except for the returning officer statement referred to in subsection 56(3) shall then be placed in the ballot box.

(2) The returning officer or deputy returning officer shall, after the requirements of subsection (1) have been carried out, immediately seal the ballot box and in the case of a deputy returning officer shall immediately deliver it and the statements referred to in subsection 56(3) to the place designated by the returning officer.

The Complainant did not refer to the poll book, list of voters, or the returning officer statement (form MEF-16) (the “Statement”).

[15] Section 57(1) requires “all materials related to the election, except for the returning officer statement” to be sealed in the ballot box. Clearly, “all other materials” encompasses the tally sheets.

[16] Since commencing this investigation, the Town produced hand-recorded vote results for each of the 34 polls organised by the Town and the Town's official Municipal Election Report (form MEF-17). The Town also advised that other records had existed outside of the ballot boxes, including the Statements, that it also destroyed on or about October 26, 2017 with other responsive records, and were no longer available.

[17] The Town also provided its Record Retention Policy (the "Policy"), which states:

2.12 Election

- *All records related to elections are to be retained as per the Elections Act*

I accept that "Elections Act" refers to the *MEA*. However, aside from directing the destruction of ballot boxes and their contents in section 59, the *MEA* does not provide clear directions for the retention and destruction of other records related to elections, such as the Statements. As such, the *MEA* cannot inform the whole of the Town's record retention policy regarding election-related materials.

[18] The Complainant's access request was not clear. Between its receipt on October 12, 2017 and the destruction of the responsive records on October 26, 2017, a simple phone call by the Town to the Complainant could have resolved the matter and resulted in the Complainant receiving records not subject to destruction pursuant to the *MEA*.

[19] As the Town did not attempt to contact the Complainant to clarify the request, it failed to comply with its duty to assist as set out in section 13 of the *ATIPPA, 2015*.

Destruction of Responsive Records

[20] Thwarting access to information systems is easy, absent restrictions on the ability of public bodies to destroy records. One of the most important safeguards, section 115 of the *ATIPPA, 2015*, makes it an offence to destroy records with the intent to evade an access request. The *ATIPPA, 2015* also recognizes that there are valid reasons for records to be destroyed and provides, in section 5(2)(b), for the destruction of records.

[21] The Town relies upon section 5(2)(b) to justify its destruction of the records responsive to this request:

5. (2) *This Act*

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

[22] Section 59(2) of the *MEA* requires that some election materials be destroyed 30 days after an election:

59.(1) Unless it is otherwise ordered by a court or unless a recount is demanded, the ballot boxes shall remain sealed as received by the returning officer and shall be retained by him or her for a period of 30 days after the election and until the termination of a legal proceeding instituted to test the validity of the election taken within that period of time.

(2) When the time has elapsed under subsection (1), the ballot boxes shall be unsealed and the ballots and other associated material shall be destroyed as authorized by the returning officer.

[23] While there is clear statutory authority for the Town to destroy the ballot boxes and their contents, two issues remain:

- Does an access request suspend or otherwise delay the destruction of records whose destruction is permitted or required under another act?
- Do the provisions of the *MEA* permit the destruction of other responsive records?

Suspending the Destruction of Records

[24] The ATIPP Office's *Access to Information: Policy and Procedures Manual* ("Policy Manual") includes advice for public bodies regarding their obligations under the *ATIPPA, 2015*. Section 2.8 of the Policy Manual states that "once an ATIPP request has been received by a public body, no record in the custody or control of the public body that is responsive to the request can be destroyed." This applies to records due for destruction

under the public body's record retention policies, referring in particular to transitory records. This Office addressed the question of whether transitory records, which could be destroyed, are nonetheless responsive records in Report A-2010-012:

... 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.

As noted above, the *MEA* did not mandate destruction of all of the records that may have been responsive to the Complainant's request. The Applicant submitted the request on October 12, 2017. The Town concluded that the other records were not responsive to the request in deciding to shred them with the records whose destruction the *MEA* required. Had the Town fulfilled its duty to assist it is likely that it would have identified these records as responsive. Even if not responsive, why did the Town destroy these records at that time? The Town's retention schedule states only "[a]ll records related to elections are to be retained as per the *Elections Act*". The *MEA* addresses the destruction of "the poll book, the list of voters, the envelopes containing the ballots, and all other materials related to the election, except for the returning officer statement" in section 57 and 59 (set out above). Therefore, destruction of the other responsive records was outside of the Town's record retention policy and the *MEA*.

[25] While there is insufficient evidence to find that the Town destroyed these records with the intent to evade the access request, the destruction was careless at best.

Conflict between *ATIPPA, 2015* and other Acts

[26] In terms of the records mandated for destruction pursuant to the *MEA*, as the *MEA* is not in Schedule A to the *ATIPPA, 2015*, it does not prevail over the *ATIPPA, 2015* if there is any conflict between them.

[27] An access to information request is not a legal proceeding instituted to *test the validity of the election*. On receipt of the access to request on October 12, 2017, the Town was aware of the requirement to destroy records on October 26, 2017. The *ATIPPA, 2015* allowed the

Town *not more than* 10 business days to provide the Complainant with its advisory response. The tenth day coincidentally also fell on October 26, 2017. On the day the records were shredded, the Town sent the Complainant, via e-mail and ordinary mail, an advisory response stating that the records were subject to destruction pursuant to section 59 of the *MEA*. Obviously, this information was practically useless to the Complainant if he wished to institute a legal proceeding to postpone destruction of the records. This conduct is inconsistent with the duty to assist and more importantly the spirit of the *ATIPPA, 2015*. While the advisory response complied with section 15 of the *ATIPPA, 2015*, the Town had to be aware that it was essentially depriving the Complainant of his only legal recourse to attempt to access these records. Nominal compliance of this nature that serves to frustrate access to information is unacceptable.

V CONCLUSION

[28] I conclude that the Town's interpretation of the request was reasonable on its face, but it should have consulted with the Complainant as part of the duty to assist.

[29] I conclude that the Town should not have destroyed the responsive records not listed in section 59 of the *MEA* after receipt of the access request and while its final resolution was still outstanding.

[30] I conclude that the *MEA* requires the destruction of certain records and that destruction of those records was not a violation of the *ATIPPA, 2015*. However, on receipt of an access request, a public body must preserve records responsive to the request, and there were means available to the Town under both the *ATIPPA, 2015* and the *MEA* to allow it to meet its obligations under both Acts.

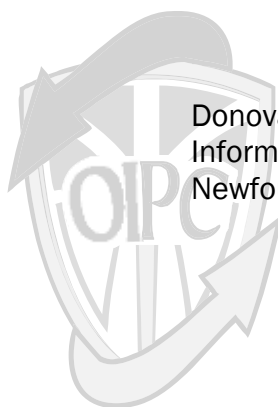
VI RECOMMENDATIONS

[31] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the head of the Town of Paradise, within 90 days of today's date, revise its Records Retention Policy to

address the retention and destruction of election-related records other than the ballot boxes and their contents.

[32] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Town of Paradise 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 (in this case, the Complainant) within 10 business days of receiving this Report.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of January 2018.



Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador