



Report A-2018-012

May 23, 2018

Town of Portugal Cove-St. Philip's

Summary:

The Complainant made a request to the Town of Portugal Cove-St. Philip's for access to the cell phone numbers for each person at the Town Hall with a cell phone and the cost or estimated cost of cell phones at the Town Hall for a year. The Town provided the total cost, and the number of cell phones, but did not disclose the names of each person with a Town cell phone or their respective cell phone numbers. The Town withheld this information pursuant to sections 37 (disclosure harmful to individual or public safety), 38 (disclosure harmful to labour relations interests of public body as employer) and 40 (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015*. The Commissioner recommended that the Town continue to withhold some of the records and disclose the remainder to the Applicant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, ss. 37, 38 and 40.

Authorities Relied On:

Newfoundland and Labrador OIPC Reports [A-2015-003](#), [2007-001](#), [A-2017-024](#); Saskatchewan IPC Reports [F-2008-001](#), [LA-2013-002](#).

Other Sources:

OIPC Practice Bulletin [Use of Personal Email Accounts for Public Business](#); BC OIPC [Is a Bring Your Own Device \(BYOD\) Program the Right Choice for Your Organization?](#)

I BACKGROUND

[1] The Complainant made an access to information request to the Town of Portugal Cove-St. Philip's (the "Town") as follows:

1. Cell phone numbers for each person at the Town Hall with a cell phone.
2. Cost or estimated cost of cell phones at the Town Hall for a year.

[2] The Town responded to the first part of the request by providing partial disclosure to the Complainant. It produced a list of 39 cell phones, but redacted the names and numbers assigned to each (providing only the positions or programs/departments of the associated phone user). The Town responded to the second part of the request by providing full disclosure of the amount paid by the Town for cell phones.

[3] The Complainant filed a complaint with this Office seeking full disclosure of the list of 39 cell phone numbers and the names of the staff using them in the course of their employment or position with the Town.

[4] In the course of our investigation, the Town agreed to provide the Complainant with full disclosure of 8 of the 39 cell phone numbers, including the names of those using them. The Complainant remained dissatisfied. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*.

II PUBLIC BODY'S POSITION

[5] The Town, in its submission to this Office, argued that disclosing the numbers with the names assigned is:

"...an invasion of the employees' privacy, interferes with the employer/employee relationship, has potential to interfere with operations, and in some cases may result in claims for call back duty."

The Town went on to indicate it withheld its emergency numbers to avoid those being tied up by the public, noting that contact with staff is readily available from Monday to Friday between 8:30 am and 4:30 pm through the main office. Additionally messages left at the main office outside of regular business hours go to a call center with the ability to contact staff via cell phones.

[6] The Town maintains that most of the devices and communication plans in question, “are provided to the employees to enable the employer to communicate with the employees according to terms of employment which does not include uncontrolled contact by the public.” In arguing that disclosure of the names and numbers would be an unreasonable invasion of employees’ personal privacy, the Town relied on section 40(1) in combination with section 40(5). The Town argues that the cell phone numbers and assigned names constitute personal information of third parties (its staff), the disclosure of which would be an unreasonable invasion of their privacy. It went on to note that the information was provided in confidence and its release would unfairly expose third parties to financial or other harm, stating, “phone calls to Town employees may present negative effects on employees or depending on the time and frequency of calls, may interfere with public safety.” The Town’s position is that disclosing the number of cell phones and billing information would, “provide relevant information for public scrutiny versus the release of personal information.”

[7] Additionally, the Town stated that releasing the cell phone numbers and assigned names would place undue cost and hardship on the municipality and that labour relations would be impacted, as it believes a number of employees would return their cell phones if the numbers were made public. Losing a means of communicating with staff after hours and, “eliminating no cost benefit of receiving after hour remote work (e-mails, conferencing, research, website and social media monitoring)” would be detrimental. The Town’s position is that the benefit of afterhours and remote contact outweighs the cost of providing cell phones and plans for staff. Where staff own their cell phones the Town believes that a release of the numbers and assigned names would lead to many immediately changing them to avoid the concerns it raises, which would be an additional administrative cost to the Town.

[8] Finally, the Town raised the prospect of renegotiation of employment terms (especially for unionized positions), to incorporate a requirement to retain devices with unchanged numbers to compensate for the benefit of uncontrolled public access to employees during their private time through either salary adjustment, call time reimbursement or return to work rate. The Town claims this potential administrative burden does not warrant the release of information “that does not appear to be in the public interest.” The Town argued that, “phone numbers are of interest only if direct contact with the holder of the device at any time is the intent.” It submitted that providing the number of cell phone devices, funding and positions satisfies “all public interest with respect to the supply of communication devices to the employees of the public employer.”

III COMPLAINANT’S POSITION

[9] The Complainant argues that “these are cell phones/mobile devices paid for by public funding from taxpayers in the Town” and therefore “the holders of these devices at taxpayers’ expense cannot be secret from the taxpayers.”

[10] The Complainant contended that the redacted list provided by the Town in response to his request only provided limited recognizable Town staff: i.e. the Mayor, Deputy Mayor, etc. The rest of the titles provided by the Town were either of departments or positions where the names of those holding them were not readily known, or were such that multiple persons hold them (i.e. “Councilor”), and therefore were not distinguishable. The Public Body’s disclosure of 8 of the 39 numbers with the names assigned attached did not satisfy the Complainant.

[11] During our investigation, the Complainant supplied additional information in support of his position, in the form of a response provided to him by the Town to a previous similar access request. In 2016, the Complainant made an access request to the Town seeking:

1. *Record of names of person/persons to whom the Town issues cell phones/blackberries/other such communication devices.*

2. *Record of cost for each person to the Town for the Year 2015 from January 1 to December 31 (This would include the cost of device, contracts for usage, etc.).*

The Town responded to this request by providing him with full disclosure of the records requested, including all cell phone numbers along with the names of any individual staff assigned to them for the majority of the numbers, and the program or department holding the number for the remaining. The Complainant maintained that this previous request and response highlighted a different handling by the Town to essentially the same request in the present complaint. The Complainant asked what, if anything, had changed in the *ATIPPA, 2015* to allow such varied responses, and how the Town could explain its conflicting positions.

IV DECISION

[12] The issues to be addressed are:

1. Whether the disclosure of the cell phone numbers and corresponding names of staff would be harmful to individual or public safety;
2. Whether the disclosure of the cell phone numbers and corresponding names of staff would be harmful to the labour relations interests of the public body as an employer; and
3. Whether the disclosure of the cell phone numbers and corresponding names of staff would be an unreasonable invasion of personal privacy.

Disclosure Harmful to Individual or Public Safety

[13] Section 37(1) of the *ATIPPA, 2015* states:

37.(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to

- (a) threaten the safety or mental or physical health of a person other than the applicant; or*
- (b) interfere with public safety.*

The burden of proving section 37(1) of the *ATIPPA, 2015* applies is on the Town. It must prove that the disclosure of the names and numbers could reasonably be expected to threaten the safety or mental or physical health of individuals or interfere with public safety.

[14] In Report [A-2015-003](#) at paragraph 10, this Office outlined the harms test to consider when applying this section:

“[Public bodies] cannot rely on speculation that harm might take place but must establish a reasonable expectation that harm would result from the disclosure of the specific records or information at issue and not from unrelated factors.”

Report [2007-001](#) (also involving the Town), noted that a public body must present evidence of a reasonable expectation of a threat to the safety or mental or physical health of a person if the records were released.

[15] The Town provided little in the way of evidence to support its reliance on this section. It simply stated that public release of the cell phone numbers and associated Town staff names could lead to the public calling those staff, which the Town viewed as possibly presenting “negative effects” on the respective staff, “depending on the time and frequency of calls” as well as “interfere with Town safety.” The Town offered only speculative arguments to suggest there was a valid link between the release of the records and the potential for harm described in section 37 to occur.

[16] Section 37(1)(a) requires more than mere nuisance or inconvenience and 37(1)(b) contemplates real interference with public safety. While it may be reasonable to conclude that public disclosure of the cell phone numbers, along with assigned staff names, could lead to an increase in attempts to contact some Town staff directly, there is no reasonable expectation that this would threaten the actual safety, mental or physical health of anyone, nor interfere with public safety. The Town cannot withhold disclosure of the records pursuant to this section.

Disclosure Harmful to Labour Relations Interests of Public Body as Employer

[17] Section 38(1) of the *ATIPPA, 2015* states:

38.(1) The head of a public body may refuse to disclose to an applicant information that would reveal

- (a) labour relations information of the public body as an employer that is prepared or supplied, implicitly or explicitly, in confidence, and is treated consistently as confidential information by the public body as an employer; or*
- (b) labour relations information the disclosure of which could reasonably be expected to*
 - (i) harm the competitive position of the public body as an employer or interfere with the negotiating position of the public body as an employer,*
 - (ii) result in significant financial loss or gain to the public body as an employer, or*
 - (iii) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer, staff relations specialist or other person or body appointed to resolve or inquire into a labour relations dispute, including information or records prepared by or for the public body in contemplation of litigation or arbitration or in contemplation of a settlement offer.*

[18] As with its submissions on section 37, the Town provided little in the way of evidence to support its reliance on this section to warrant withholding the records from disclosure. In Report [A-2017-024](#), this Office addressed section 38 of the *ATIPPA, 2015*, including the definition of “labour relations,” as: “... information concerning the collective relationship between an employer and its employees.”

[19] The fact that a cell phone is being paid for by the public body for an individual employee does not fall within the exception in section 38 as it is not “labour relations information” as defined above. As noted in the Town’s submission, the payment of cell phone bills was not negotiated between the Town, as employer, and its unionized staff. As these payments are not concerning the collective relationship between an employer and its employees, it is not

subject to the exception of section 38. Not all of the employees with cell phones are union members in any event.

Disclosure Harmful to Personal Privacy

[20] The relevant sections of the *ATIPPA, 2015* include sections 40(1), 40(2)(f), 40(4)(g) and 40(5)(a),(e) and (f):

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.

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

[21] The Town submitted that the cell phones are provided by the Town to staff or are the personal cell phones of staff, with the Town paying for the cell phone plan. The latter arrangement is sometimes referred to as a 'bring your own device' program. The Town argued that the numbers and names of staff for the cell phones in question, "represent a direct means for the public to contact the employees at all hours, thus making the numbers private information despite the fact that the employer paying for the equipment is a public body."

[22] The potential uses of the requested information once publicly released does not inform whether the information is personal information as set out in section 40(1) such that it ought to be withheld from release. Instead, the question is whether release of the information represents an "unreasonable invasion of a third party's personal privacy," where, in the case of this complaint, the third parties consist of staff of the Town.

[23] Paragraph 40(2)(f) establishes that it is not an unreasonable invasion of a third party's personal privacy where the information is "about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff." In the case of the cell phones supplied by the Town, the numbers and names is information regarding the staff's positions and functions with the Town. The cell phone numbers and names assigned to them therefore do not meet the definition set out in section 40(1) and cannot be withheld from disclosure as an unreasonable invasion of privacy.

[24] However, under section 40(4)(g), where the Town is paying the cell phone bills of staff with personal cell phone numbers (i.e. not provided by the Town), the numbers are the personal information of the employee. These numbers may be withheld but the names may not. For the personal phones, the personal information of the name does not "appear with other personal information of the third party" as the fact that the Town is paying for the phone is not personal information.

[25] There are numerous reports from other jurisdictions that address the issue of cell phones, and specifically whether information about cell phones used for work or business

purposes constitutes personal information. The Town itself explicitly acknowledged that it pays for the cell phones in question and that these devices allow it to connect with employees for work purposes. The Town submitted that the devices allow other means of communications (e-mail, text), as well as provide employees the ability to work remotely (offering access to work e-mail, the Town's website and social media platforms, etc.). It is the Town's position that these cell phones afford employees some control over the level of disruption to their private lives through the alternate forms of communication they provide, "and therefore is an acceptable means of communication between the public and the Town staff after hours." All of this information makes it clear that the cell phones in question are used for work or business purposes, and the Town failed to provide any evidence to suggest otherwise.

[26] For those numbers which are private cell phone numbers that are now being paid for by the Town, the numbers themselves do have a "personal" quality to them as set out below, which allows those numbers to be withheld under section 40.

[27] In paragraph 28 of Report [F-2008-001](#) from the Saskatchewan Information and Privacy Commissioner held that there are different expectations of privacy for employees of public bodies:

The Act, in my view, should not be taken to say that names, addresses and telephone numbers of individuals in government records must never be disclosed. Rather, it requires that such information must not be disclosed if the protection of privacy of an individual so requires. Individuals engaged in discharging public functions obviously do not have the same expectation of privacy when so doing as when they are going about their personal or private affairs.

Accordingly, while the addresses and telephone numbers in question may coincidentally be either a home or business address or telephone number of at least some of the individuals in question, they are, in the context and circumstances with which I am dealing, the address and telephone numbers of persons holding public offices, and as such should not be characterized as "personal information"...

Consequently, it is my recommendation that the Department should disclose its record of the addresses and telephone numbers of the individuals in question to the Applicant.

[28] This same finding was reiterated in Saskatchewan [Report LA-2013-002](#),

In order to qualify as personal information under LA FOIP, the information in question must be of a personal nature. This distinction was discussed in my Review Report F-2010-001:

[126] Further on this question, I found Ontario IPC Order PO-2420 of assistance in this regard:

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.

[29] The Town submitted that in relying on section 40(1) to withhold the cell phone numbers and names from release, it considered paragraphs 40(5)(e) and (f). As previously discussed, there is no evidence demonstrating a reasonable expectation of financial or other harm to the staff from the disclosure of these numbers and their names. Neither was the personal information in question “supplied in confidence.” The Town provided most of the cell phones to the staff. These cell phones are issued and used for work purposes and as such the associated numbers are not the personal information of the phone’s user.

[30] Section 40(5) sets out the factors for consideration when deciding if disclosure would be an unreasonable invasion of privacy. One factor, in section 40(5)(a) is if the “disclosure is desirable for the purpose of exposing the activities of the...public body to public scrutiny”. In the case of the ‘bring your own devices’ with the Town paying for the plans, public accountability for the spending of Town funds is satisfied by releasing the names but does not require the numbers to be released.

[31] In 2016 the Town released a list of cell phone numbers and the names of staff assigned to each. The Town offered little in the way of explanation as to why it had previously released a similar set of records yet is now refusing to release the information. It indicated that it had become “more proficient with protection of privacy” between the time of the previous and present access requests, and now believes it erred in previously releasing those records and that the release itself could constitute a privacy breach of staff involved. These issues are not clear and the role of the numbers being once personal and now paid for by the Town

complicates the analysis. The past release of similar information is not determinative but the Town's handling of this access request has raised some other concerns.

[32] Through correspondence with the Town during the investigative process, it became clear that the Town was considering factors outside the Act in its response to this access request. Namely, the Town was focused on both the purpose behind the request and considerations set out in the privacy provisions of the *ATIPPA, 2015*.

"We released the minimum amount of information necessary to accomplish the purpose we have the phones for – for public to contact Council and the Town Manager and, for staff to contact each other after hours or while out of the office. Releasing the remaining numbers would not be for the purpose it was obtained and we do not see any section where public interest or public rights outweighs the rights to protect our staffs personal information and as well, to protect our emergency service resources"

[33] Anyone is entitled to make a request for information for any reason and they do not need to provide that reason to the public body. Absent an allegation that an applicant is vexatious or otherwise within section 23, an applicant's motive is irrelevant. Instead, the question for a public body in receipt of an access request is whether there is an exemption in the Act allowing or requiring it to withhold responsive records. If not, those records must be disclosed in response to the access request.

[34] Additionally, the Town must distinguish between access requests and privacy complaints and how the *ATIPPA, 2015* sets out a public body's differing obligations in dealing with these. Provisions regarding access to information requests are set out in Part II of the *ATIPPA, 2015* (sections 8-60). The Town cannot consider the privacy provisions in Part III when responding to an access request. The question of whether a public body is releasing the minimum amount necessary for a purpose (as set out in s. 68(2)) relates to a disclosure of personal information in a context other than an access to information request, and is not relevant when responding to an access request.

[35] Additionally, the Town referred to the release of information being "consistent for the purpose it was obtained." The record is a list of cellphone numbers and the names of staff assigned to each as part of the Town's public work and payment for these cellphones

(through public funds). This is not a situation where the Town collected personal information and must safeguard it in context of the privacy provisions in Part III of the *ATIPPA, 2015*.

[36] Some of the cell phone numbers are personal in nature because they are associated with devices owned by staff, and those numbers can be withheld. In terms of the cell phones issued by the Town, the associated staff names and the phone numbers must be disclosed to the Complainant.

[37] While not essential to the disposition of this complaint, any report referencing a ‘bring your own device program’ would be incomplete without noting the increased risk of privacy breaches when employees use their own devices. Further, public bodies permitting employees to use their own devices for work purposes must ensure that those employees are aware that work related communications stored on the devices are records of the public body. We encourage the Town to develop a “Bring Your Own Device” policy addressing issues outlined in BC OIPC’s guidance, *Is a Bring Your Own Device (BYOD) Program the Right Choice for Your Organization?:*

- User responsibilities;
- How personal information in its control may be subject to reasonable and acceptable Town monitoring on a BYOD device, and how BYOD users are informed of these monitoring practices;
- Whether geo-tracking information generated by the mobile device will be tracked by the Town;
- The privacy practices of the Town in respect of the employee’s personal use of a BYOD device;
- Training for BYOD users;
- Acceptable and unacceptable uses of BYOD devices;
- Sharing of devices with family members or friends;
- Application (app) management;
- Data/voice plan responsibility;
- Device and information security requirements;
- Approved devices, operating systems, operating system versions, and cloud services;
- Employee functions and roles that may not be appropriate candidates for a BYOD program;

- Classes, categories, or types of information that are not appropriate;
- Access controls for which BYOD users can retrieve certain classes, categories, or types of information;
- The issues of legal discovery;
- How access requests received by the Town will be handled;
- Practices related to investigations or litigation concerning information on a BYOD device;
- What happens to information on the device in the event that an employee leaves the town; and,
- The responsibilities of the Town and employees for devices that exit a BYOD program (including if an employee changes their device, if a device is reported lost or stolen, or if an employee leaves an organization).

[38] The Town should also require that all communications/records of Town business be copied into the Town's email to preserve records as referenced in our practice bulletin on the *Use of Personal Email Accounts for Public Business*.

V CONCLUSIONS

[39] Sections 37, 38 or 40(1) do not apply to the names of the staff who have their cell phones issued by and paid for by the Town, therefore the Town is not permitted to withhold associated numbers or the names of staff assigned to them.

[40] Section 40(1) however does apply to the cell phone numbers associated with personal devices used in a 'bring your own device' manner. In respect to these cell phones, staff names must be released where the Town pays for usage/plans but the associated cell phone numbers can be withheld.

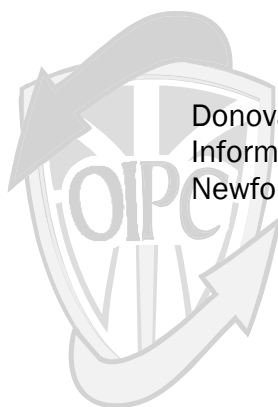
VI RECOMMENDATIONS

[41] Under the authority of section 47(a) of the *ATIPPA, 2015*, I recommend that the Town grant access to the list of Town names of staff that have their cell phones issued by and paid for by the Town, including staff names and the cell phone numbers.

[42] Under the authority of section 47(a) of the *ATIPPA, 2015*, I recommend that the Town provide only staff names and continue to withhold the cell phone numbers of staff using their personal cell phones for work purposes and the Town pays for usage/plans.

[43] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Town 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.

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of May 2018.



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