



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-011

May 14, 2019

Town Of Gander

Summary:

The Town of Gander received an access request for all emails sent and received by a Town Councillor. The Town completed a search for these records that led to a large number of records being located; however, many of those records were later found to be duplicates or not responsive to the request. The Town therefore released a significantly smaller number of records than what was originally located, with some of the information withheld under section 40 (disclosure harmful to personal privacy). The Commissioner concluded that the Town appropriately withheld information in accordance with section 40; however, the Town failed to process the attachments to emails that were responsive to the request, and as a result no attachments were initially provided to the Complainant. The Commissioner recommended that the Town review the attachments to the emails, consider any exceptions that may apply and release them to the Applicant as appropriate. The Commissioner also recommended that the Town draft and implement policies regarding record searches and email use and provide training to all employees with access to email, including Council, regarding best practices for the use of business email accounts, records management, and records retention.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 13 and 40.

Authorities Relied On:

[Government of Newfoundland and Labrador E-mail Guidelines](#); NL OIPC Reports [A-2019-003](#) and [P-2018-004](#)

I BACKGROUND

- [1] On July 12, 2018, the Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“the *ATIPPA, 2015*” or “the *Act*”) to the Town of Gander seeking all correspondence sent to and from a named Councillor’s Town email account. There was no timeframe specified in this request. During informal resolution of the complaint, the Applicant clarified that the timeframe for the request would be limited to the time the Councillor was in office as an elected member of Council.
- [2] The Town failed to respond to the request within the statutory timelines and the Applicant made his first complaint to this Office. The Commissioner addressed the Town’s failure to respond to the access request in Report A-2019-003. The recommendations set out in that Report included that the Town conduct a full review of the records requested by the Applicant, consider any exceptions that may apply and release them to the Applicant as appropriate. In response to Report A-2019-003, on January 29, 2019 the Town released some records to the Complainant. The Town applied section 40 to withhold some information. Upon receiving the records from the Town, the Complainant submitted a second complaint to this Office requesting that the Commissioner review the response and records provided.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II COMPLAINANT’S POSITION

- [4] The Complainant submits that the final response from the Town contained significantly fewer records than he believed to be responsive to the request. The Town had previously advised this Office and the Complainant that there were over 3500 records responsive to the request. The Complainant received approximately 800 records. The Complainant also states that many of the records that he received were heavily redacted, with over 100 pages severed entirely.

[5] The Complainant asked this Office to do a complete review of the records to ensure he received all the information to which he was entitled.

[6] The Complainant also took issue with the manner in which Town employees and Council use their Town of Gander email accounts. He submits that public body email accounts should be used strictly for public body business. As such, the Complainant believes that all information contained within emails of Council and other employees should be available to him, regardless of whether or not it is a personal email, as Council and Town employees are officials acting in a public capacity when they use the Town email.

III PUBLIC BODY'S POSITION

[7] The Town began by addressing the fact that it had originally identified a total of more than 3500 records in its initial search, but later reduced that number substantially. The Town explained that when the original search was conducted by its technical support staff ("IT Services"), the Town used older software to complete the searches. The older software was "limited in its functionality" and was only able to conduct a search using a keyword. As a result of this limited search functionality, IT Services conducted a broad search across its entire email system using the Councillor's last name. These results (approximately 3500) then had to be manually reviewed to determine which records were responsive to the Complainant's request.

[8] The Town advised the Complainant in the final response that he was being granted partial access to some records; however, a large number of duplicates were removed:

All email's [sic] excluding emails forwarded from the Town's address to Councillor [Name]'s personal address. [Named Councillor] forwarded all of the emails received at his Town email sent to his home account. These were just duplicates of what had been sent to you.

[9] The Town further advised that access to some of the remaining records and/or information contained within those records was refused under section 40 of the *ATIPPA, 2015*:

Councillor [Name] has numerous personal emails sent to him at this Town email address. The contents of these emails, as well as the information on who

sent or received them was retracted [sic] under Section 40 of the Act. I have also redacted any personal information including names, addresses, phone numbers and email addresses of residents contained in the business emails under Section 40 as well.

[10] The Town argued that section 40 of the *ATIPPA, 2015* applied because the information was personal information relating to the Councillor and did not relate to his position as a public official. Other redacted information included names, personal email addresses, civic addresses, and personal telephone numbers of private citizens.

IV DECISION

[11] There are three issues that must be considered:

1. Did the Town fulfill its duty to assist the Complainant as set out in section 13 of the *ATIPPA, 2015*?
2. Did the Town appropriately redact information in accordance with section 40 of the *ATIPPA, 2015*?
3. Did the Town have adequate policies and procedures about the use of email and records management?

Did the Town fulfill its duty to assist the Complainant as set out in section 13 of the *ATIPPA, 2015*?

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

13. (1) 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.

Discrepancy in Number of Records

[13] The Town's initial handling of the access request caused significant confusion. During the previous investigation into the Town's failure to respond to this access request, the Town advised this Office that the search resulted in over 3500 records (see Report A-2019-003).

The Town provided that number to explain its failure to respond to the Complainant's access request within the legislated time period, despite receiving approval for an extension of 30 business days from this Office.

[14] Section 13 of the *ATIPPA, 2015* requires public bodies to communicate with applicants and to respond to them without delay and in a manner that is "open, accurate and complete." The Town advised this Office and the Applicant of the number of records that resulted from their search. This number was significantly larger than the records actually responsive as it was based on an overly broad, ineffective search using a single keyword across the Town's entire email system.

[15] This Office reviewed the discrepancy in volume and attempted to determine what caused the significant drop in the number of records from the original number indicated to the Applicant to what was ultimately provided to the Applicant. The explanation provided did not adequately explain the discrepancy. Upon review of all the records provided, this Office determined that the original search had captured:

1. emails prior to the beginning of the Councillor's term on Council,
2. emails sent from another employee's Town email account to the personal account of the Councillor,
3. emails of other people who share the Councillor's last name, and
4. emails that the Councillor himself had forwarded to his personal account as part of a larger thread.

[16] The Town further explained that the volume had been reduced by the removal of duplicates created when email threads had been captured several times. The Town left the last email of the thread in the final responsive records package and removed the earlier versions.

[17] Prior to the investigation into this complaint, but subsequent to the initial search in response to the Applicant's request, the Town installed newer, more functional software to allow it to conduct more precise searches. The Town indicated that unfortunately this new

software could only search emails created since its installation; therefore, it would not be of assistance in re-doing or refining the search for records relevant to the this request.

[18] Knowing that its software had significant limitations in its search functionality, the Town ought to have realized that a single keyword search of all accounts using only the Councillor's last name would generate a significant number of non-responsive records. The Town should have conducted a more specific search by using either both the Councillor's first and last name or using the Councillor's email address as the search term.

[19] I find that the Town failed in its duty to assist by not conducting a specific enough initial search for records, by misidentifying the number of responsive records to both the Complainant and this Office, and by not providing the Complainant with a more thorough explanation as to why not all 3500 records were responsive to the request.

[20] Further exacerbating this failure is the fact that approximately 100 of the emails sent to the Complainant included attachments that were not processed by the Town or sent to the Complainant. In total, there are approximately 150 attachments, consisting of appropriately 1000 pages of additional records.

[21] It is generally accepted that attachments to an email are considered to be part of an email record. Public bodies should assume that attachments to responsive emails are also responsive. If a public body is uncertain whether an Applicant wishes to obtain email attachments, it must consult with the Applicant.

[22] Section 4 of the Government of Newfoundland and Labrador's Email policy aligns with the view that an attachment is part of the email record:

Email is defined as messages, including attachments sent and received electronically between personal computers or terminals linked by communications facilities. This includes address information (to, from, cc, bc, subject and date) and the message content.

[23] As the Town did not include any of the attachments to the emails, I find that the Town did not fulfill its duty to assist by failing to respond to the request in an open, accurate and complete manner, contrary to section 13 of the *ATIPPA, 2015*.

Did the Town appropriately redact information in accordance with section 40 of the *ATIPPA, 2015*?

[24] The Town claimed that the information that was redacted was subject to section 40 of the *ATIPPA, 2015*. Upon review of the records, this Office discovered that the Town had erroneously included, and then redacted in full, emails that had been sent to and from the personal email account of the Councillor. Those records had only been located in the original search as they were present in the Town email account of another employee. These records should not have been included in the responsive records as they were not to or from the Councillor's Town email account, as specified in the Complainant's request.

[25] I have reviewed the records containing partial redactions. These records contain personal information of residents who had contacted the Councillor, such as contact information, photos, and other identifying information. Under section 40 of the *ATIPPA, 2015*, the head of the public body shall refuse to disclose personal information to an applicant where disclosure would be an unreasonable invasion of a third party's personal privacy.

[26] I therefore find that, with the exception of the records that were improperly included in the responsive package which were then redacted in full by the Town, the information that was severed in the final response to the Complainant was appropriately redacted under section 40 of the *ATIPPA, 2015*.

Did the Town have adequate policies and procedures about the use of email and records management?

[27] During this investigation, the Town acknowledged that some of the original group of approximately 3500 records identified from the initial search were captured by the search because the Councillor had been copying work emails to his personal email account. The Town

advised that Town employees and Council members have access to their work accounts from home, negating any rationale to forward emails from the public body account to a private account.

[28] These work emails were released to the Complainant as the carbon copy sent to the personal address was the last email in the thread. But this practice confused the issue of which records were responsive and delayed the processing of the records.

[29] Unnecessarily forwarding work emails to a personal email account also heightens the risk of a privacy breach. Many common email platforms available free to the public are not secure and are prone to hacking. Section 64(1) of *ATIPPA, 2015* sets out public body requirements for maintaining personal information securely:

64 (1) The head of a public body shall take steps that are reasonable in the circumstances to ensure that

- (a) personal information in its custody or control is protected against theft, loss and unauthorized collection, access, use or disclosure;*
- (b) Records containing personal information in its custody or control are protected against unauthorized copying or modification;*
- (c) Records containing personal information in its custody or control are retained, transferred and disposed of in a secure manner.*

It is very difficult for the Town to ensure compliance with this requirement of the *ATIPPA, 2015* if members of Council or employees are forwarding work emails to a potentially unsecure personal email account. Policies should be put in place to prevent or severely limit such activity.

[30] Another issue that was uncovered in the course of the review by this Office was the use of work email for personal reasons by Council and employees of the Town. Town employees used their work email account for personal matters, contrary to best practice. The use of work accounts for personal correspondence as well as the overly broad search resulted in a substantial and unjustified delay in processing this access request for five months because the original search captured thousands of non-responsive records.

[31] The Complainant argues that the fact that employees are using public body email accounts to send and receive personal emails should entitle him to access those emails. While he is correct that all Town emails must be reviewed, these records were not responsive to the request as they were not sent to or from the Councillor's Town email address. Further, even if the emails had been responsive, they still must be reviewed for any exception to disclosure that may apply, including section 40, and information that falls within such an exception must be withheld by the public body.

V RECOMMENDATIONS

[32] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Town of Gander:

1. Continue to withhold information containing the personal information of the Councillor and other third parties;
2. Review attachments not included in the emails sent to the Complainant and release those records, subject to any exceptions to disclosure, by June 3, 2019;
3. The Town draft and implement a policy regarding record searches bringing Town record searches in line with best practices in order to meet the statutory deadline for responding to access to information requests; and,
4. The Town draft and implement a policy regarding email use and that Council and all employees with access to Town email should undergo training regarding best practices for the use of business email accounts, records management, and records retention.

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

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of May 2019.



Victoria Woodworth-Lynas
Information and Privacy Commissioner (A)
Newfoundland and Labrador