

**NEWFOUNDLAND AND LABRADOR**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**REPORT A2008-009**

**Town of Steady Brook**

**Summary:**

The Applicant requested a copy of a tape recording of a public meeting of the Town Council, including a conversation between himself and the Mayor that occurred immediately after the adjournment of the meeting. This conversation had been recorded when the tape was left running by the Town's Administrative Assistant. Immediately after the public meeting, a privileged meeting of Council was held. The Town argued that the conversation took place during the privileged meeting and was exempt from disclosure in accordance with section 19 of the *ATIPPA*. The Commissioner held that the conversation to which the Applicant sought access did not occur during a privileged meeting, either because the public meeting of Council had not been properly adjourned or the privileged meeting had not started. Even if the conversation had occurred during a privileged meeting, the Town would still not be entitled to rely on section 19, as they had provided no evidence with respect to the substance of deliberations of the privileged meeting, and therefore had not met the burden of proof imposed by section 64 of the *ATIPPA*. The Commissioner noted that section 19 did not prevent the disclosure of all information presented or discussed at a privileged meeting, just that which would reveal the substance of deliberations of a privileged meeting. There was some evidence before the Commissioner as to the subject of the privileged meeting (put forward by the Applicant), and given the subject of the privileged meeting, the conversation at issue could not reveal the substance of deliberations of the privileged meeting, as the two were not related. The Applicant also alleged that the Town had failed in its duty to assist, pursuant to section 9 of the *ATIPPA*. The Commissioner found that the Town had not failed in its duty to assist.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 9, 11, 19, 46, 47, 49, 50, 60, and 64; *Municipalities Act*, S.N.L. 1999 c.M-24, as am, s. 213.

**Authorities Cited:** Newfoundland and Labrador OIPC Reports 2007-018 and 2007-007; Alberta Order F2005-020.

**Other Sources Cited:**

*Access to Information and Protection of Privacy Act* Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available online at:

<http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf>.

## I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request dated 11 January 2008 to the Town of Steady Brook (the “Town”). The request, received by the Town on 21 January 2008 sought disclosure of records as follows:

*A complete copy of Tape 2 side B of the September 12<sup>th</sup>, 2007 Public Meeting of Council. This recording is to include the conversation between Mayor [name] and [the Applicant] that occurred immediately after the adjournment of the meeting. The clerk, [name], had been making notes and the tape equipment continued to record beyond the official adjournment. Because of this, the conversation I had with Mayor [name] was recorded.*

- [2] The Town, by letter dated 20 February 2008, notified the Applicant that his access request was refused in accordance with section 19(1)(c) of the *ATIPPA*. The applicant, in a Request for Review dated 25 February 2008, and received in this Office on 28 February 2008 asked for a review of the Town’s decision to deny access to the requested information. The Applicant also asked that this Office investigate whether the Town had failed in its duty to assist the Applicant, as required by section 9 of the *ATIPPA*.
- [3] Although it is not indicated on the Request for Review or in the Town’s response to the Request for Review, the Applicant has informed this Office that he did receive, from the Town, a portion of the requested information. The conversation referred to in the Applicant’s request (the “Conversation”) was severed from the recording which the Applicant received. The recorded Conversation is the information to which the Applicant seeks access and which is the subject of this Request for Review.
- [4] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 29 April 2008, both the Applicant and the Town were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.

[5] In order to fully understand this issue, some additional background information is necessary. The applicant is a former councilor of the Town of Steady Brook. He was present at both the public and privileged meetings of 12 September 2007. The privileged meeting immediately followed the public meeting. The Conversation was related to an issue that had come up earlier in the public meeting, and there is dispute over when the Conversation occurred. It is the Town's position that the Conversation occurred during the privileged meeting and that it was recorded by accident. It is the Applicant's position that the privileged meeting had not yet started when the Conversation took place. Determining when the Conversation took place is important due to the Town's reliance on section 19 to refuse access to the information. This will be more fully discussed below.

## II APPLICANT'S SUBMISSION

[6] The Applicant filed a lengthy and detailed submission on this matter, including several letters from third parties in support of his position. I will set out below those parts which are most relevant to this Review.

[7] The Applicant began his submission by setting out some of the background information as follows:

1. *On September [sic] 12<sup>th</sup>, 2007, I was a duly elected municipal councilor at the Town of Steady Brook.*
2. *On September 12<sup>th</sup>, 2007, a Public Meeting of the Steady Brook Town Council was held. The meeting took place from 7:00pm to approximately 9:38pm.*
3. *The Public Meeting of Sept 12<sup>th</sup> was attended by Town Clerk/Manager, [name], Assistant Clerk [name] (recorded the meeting on cassette), Mayor [name], Deputy Mayor [name], Councilors [name], [name], [name], [name] and members of the public.*
4. *The Public Meeting was recorded on audio cassette by [Assistant Clerk].*

5. *Near the end of the Public meeting Mayor [name] and [the Applicant] had a conversation regarding [the Applicant] abstaining from a vote earlier at the same Public Meeting. This conversation was recorded.*
6. *At the time of the conversation between Mayor [name] and [the Applicant] many people including Councilor [name], Councilor [name], Town Clerk [name], Assistant Clerk [name] and members of the general public were present.*
7. *From 9:38 to 9:40pm members of the public, Mr. [name] and Ms. [name] cleared the Council Chamber as council were to convene a Privileged Meeting.*
8. *At 9:40pm a Privileged Meeting of Council began. Present were Mayor [name], Deputy Mayor [name] and Councilors [name], [name], [name] and [name].*
9. *The privileged meeting was not recorded.*

... ..

10. *The substance of deliberations of the Privileged Meeting of the Steady Brook Town Council was a ... matter related directly to [a Town official].*

[8] I would like to note that although the Applicant makes the above statement with respect to the “substance of deliberations” of the privileged meeting, I find that, based on the way “substance of deliberations” of a local public body has been interpreted by this Office (see Report 2007-018) the Applicant has only revealed the subject matter of the meeting, and not the actual substance of deliberations of the privileged meeting.

[9] As noted above, the Applicant’s submission included several letters in support of his position. One such letter was from the former Acting Clerk/Administrative Assistant (referred to by the Applicant as the “Assistant Clerk”) with the Town, who was responsible for recording the meeting, and ensuring all votes of council were recorded and documented properly. To summarize, this letter states that toward the end of the meeting the Mayor called for an adjournment, but she did not hear a “seconder” to the motion, as several discussions were occurring simultaneously. Therefore, she continued taping the Conversation, as she believed the public meeting was still ongoing. She noted that during the Conversation (for which she and

members of the public were still present), the Mayor stated that Council intended to move to a privileged meeting. She also notes that privileged meetings are not taped. These factors lead her to believe that the Conversation was part of the public meeting.

[10] Another such letter of support came from a current councilor of the Town. This letter does not provide any evidence with respect to when the public meeting ended and the privileged meeting began or what the subject matter of the privileged meeting was.

[11] The third letter of support is from another Town councilor. This councilor was present for both the public and privileged meetings of 12 September 2007 and states that the subject of the privileged meeting was a Town official. As such, this official did not attend the privileged meeting, although he was in attendance at the public meeting. The administrative assistant for the Town also did not attend the privileged meeting. This councilor also notes that privileged meetings of the Town Council are not recorded, as information discussed at these meetings are confidential to council members only.

### **III PUBLIC BODY'S SUBMISSION**

[12] The Town, in its submission, focused on when the public meeting ended, and offered no evidence with respect to the subject matter or the substance of deliberations of the privileged meeting.

[13] The Town began its submission by referring to handwritten notes taken during the 12 September 2007 public meeting by both the Town Manager and the Administrative Assistant. Both sets of notes (which have been provided to this Office) indicate that the public meeting ended at 9:37 p.m. The Town argues this was immediately following the discussion of the last item on the agenda and if the public meeting had continued beyond this, additional notes would have been taken on the subsequent discussions. The Town argues further that as both sets of notes indicate the meeting ended at the same time, there was no confusion as to when the public meeting ended.

[14] The Town continued its submission by noting that the Applicant, in his Access to Information request, states that his request is to include “the conversation between Mayor [name] and [the Applicant] that occurred immediately after the adjournment of the meeting.” [Emphasis in original]. Therefore, the Town argues that the Applicant must also believe the public meeting had ended before the Conversation took place.

[15] The third point the Town makes is that the Department of Municipal Affairs (which has also reviewed the tape in question) decided that the Conversation occurred after the adjournment of the meeting. However, the Town acknowledges, and rightly so, that the findings of the Department of Municipal Affairs have no bearing on this investigation or my findings in this Report.

[16] Finally, the Town argues that although the tape does not indicate a “mover” or a “seconder,” with respect to the motion for adjournment, it is normal practice for participants to raise their hands to indicate these things, as well as to vote. Therefore, it is the Town’s position that the public meeting was properly adjourned when the Mayor first called for the adjournment.

#### **IV DISCUSSION**

[17] Section 64 of the *ATIPPA* places the burden of proving that an applicant has no right of access to a record with the public body. The standard of proof that has been adopted by this Office is the civil standard. That is, the public body must prove, on a balance of probabilities, that an applicant has no right of access to a record.

[18] The exception claimed by the Town to refuse access to the requested information is section 19(1)(c) of the *ATIPPA*. Section 19, in its entirety, states as follows:

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

*(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;*

*(b) a draft of a private Bill; or*

*(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.*

*(2) Subsection (1) does not apply where*

*(a) the draft of a resolution, by-law or other legal instrument or private Bill or the subject matter of deliberations has been considered in a meeting open to the public; or*

*(b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.*

[19] In its submission, the Town has seemingly focused on when they believe the public meeting ended. Presumably, by trying to prove when the public meeting ended, they can show when the privileged meeting started, and argue that the Conversation was part of a privileged meeting and recorded accidentally. I agree that determining when the public meeting ended and/or when the privileged meeting began is an important starting point. If the public meeting was still ongoing, then we cannot even consider an analysis of section 19, as there is no privileged meeting involved. However, even if I determine that the Conversation took place during a privileged meeting that is not the end of the matter. As noted above, only that information which reveals the substance of deliberations of a privileged meeting is exempt from disclosure under section 19. The Town has offered no evidence or argument with respect to this point.

[20] I have listened to the tape, and I have concluded that the public meeting was not adjourned when the Conversation took place. At the same time as the Mayor calls for an adjournment and says Council is moving to a privileged meeting, the Applicant asks a question that begins the Conversation. I did not hear anyone “second” the motion for adjournment. The Conversation (which is about an issue that was discussed earlier in the public meeting) continues, and several times, the Mayor makes comments about moving to or being in a privileged meeting. There appears to be some confusion even on the part of the Mayor as to whether the privileged meeting



has begun. After the brief Conversation, and another reference to moving to a privileged meeting, a female voice (later identified as the Administrative Assistant) asks for a motion to adjourn. The Mayor indicates that he had already done so, but the Administrative Assistant says she didn't hear anyone "first" or "second" the motion. The Mayor then calls for an adjournment again, someone else audibly seconds the motion, the Administrative Assistant says "thank you" and the tape is turned off. At this point, the meeting is clearly properly adjourned. This exchange between the Mayor and the Administrative Assistant is another indication that meeting participants were confused as to when the public meeting had ended, and only after the second call for adjournment was it clear that it had, indeed, ended.

[21] I am mindful of the Town's arguments with respect to the handwritten notes from the meeting. The handwritten notes taken by the Administrative Assistant and the Town Manager indicate the meeting ended at 9:37 p.m. The Applicant also states that the public meeting ended at approximately 9:38 p.m. Therefore, I will accept that the meeting ended at approximately 9:37 p.m. However, as the tape (which is the most complete record of what happened at the meeting) contains no time reference, what I do not know is whether the Conversation happened before or after 9:37 p.m.

[22] The handwritten notes from the meeting are also of little assistance with this issue. The two sets of notes differ as to the final topic discussed prior to the end of the meeting. Neither set of notes contain any reference to the Conversation. However, the notes also do not contain any reference to the voting delegates for the "2007 Municipalities Convention." This is the last topic discussed on the tape prior to the first call for adjournment and prior to the Conversation. This leads me to the conclusion that not everything that is discussed at a meeting is recorded in the notes. Therefore, I cannot rely on the notes to determine the last topic discussed prior to the end of the meeting.

[23] Likewise, the Minutes of the meeting are also of little assistance. While they too indicate that "regular business concluded at 9:37 p.m.," the last item noted in the Minutes prior to the adjournment is a resolution pertaining to the voting delegates for the "2007 Municipalities Convention." This is also the last topic discussed on the tape recording prior to the first call for

adjournment and the Conversation. However, this item is not recorded in the handwritten notes. While the minutes of a council meeting are generally presumed to be the official version of what happened at the meeting and when it happened, the minutes of the 12 September 2007 meeting were never approved by Council. Thus, they also cannot be relied upon to determine the final issue discussed at the public meeting. While there is consistency among the three written records with respect to the time the meeting ended, there is absolutely no consistency with respect to the final topic of discussion prior to adjournment.

[24] Further, the Applicant states in his submission that between 9:38 p.m. and 9:40 p.m. the Administrative Assistant, the Town Manager and members of the public were clearing the council chambers in preparation for the privileged meeting (the Town presented no evidence on this point). The Administrative Assistant was responsible for recording the public meeting, so if she was leaving the Council Chambers between 9:38 and 9:40, then the conversation (which was caught on the tape) must have taken place before then. Therefore, although I cannot be certain, it is possible that the conversation at issue took place prior to 9:37 p.m. and there were no notes taken, just as there were no notes taken with respect to the issue of voting delegates for the “2007 Municipalities Convention.”

[25] The Town’s next argument was the fact that the Applicant stated in his access request that the Conversation took place after the adjournment of the public meeting. However, just as the Town noted that the findings of the Department of Municipal Affairs have no bearing on my decision, I am also not bound by the Applicant’s statement regarding when the meeting ended. I must consider all the evidence before me and make a determination based on that evidence. The tape recording, the notes, the unofficial minutes and the submissions of the parties all have a role in the determination of this issue.

[26] I would also like to note that when the Applicant made his access request, he obviously did not have the benefit of the tape recording, and was likely relying on memory. As noted, there was a call for adjournment but at the same time, the Applicant posed a question to the Mayor that initiated the Conversation. It is possible therefore, that the Applicant did think the public meeting

had been adjourned, but again, this has no real bearing on my decision. As well, even if the public meeting had ended, this does not mean the privileged meeting had begun.

[27] Finally, I must deal with the Town's argument that as motions are commonly moved and seconded by a show of hands, the absence on the tape recording of an audible "mover" or "seconder," does not mean the meeting was not legitimately adjourned. In general, I agree that this may often happen. Unfortunately, I do not have the benefit of video tape and can only make a decision based upon the evidence before me. At the end of the Conversation, the meeting is clearly adjourned, as a "mover" and a "seconder" to the adjournment motion are clearly audible. This is not so with respect to the first call for adjournment. If meeting participants felt it was necessary to call for adjournment a second time in order to remove any doubt as to whether the public meeting had ended, then I must conclude that it was only at this point that the public meeting was properly adjourned.

[28] The totality of the evidence before me leads me to conclude that the public meeting had not ended when the Conversation took place. Thus, section 19 is not applicable to the information at issue. However, even if the public meeting had been adjourned prior to the Conversation, then the most I can say is that the conversation took place during the break between the public meeting and the privileged meeting. I have no doubt that the privileged meeting had not yet commenced when the Conversation took place. Thus, regardless of whether the public meeting had ended, section 19 is still not applicable, as the privileged meeting had not yet started when the Conversation took place.

[29] The Applicant states that during the Conversation, members of the public were still in the Council Chambers, having not yet completely cleared the room in preparation for the privileged meeting. Section 213 of the *Municipalities Act* states as follows:

*213. (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.*

- (2) *Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.*
- (3) *A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.*

[Emphasis added]

I assume, therefore, that if the privileged meeting had, in fact, commenced, Council would have ensured that all members of the public had left the room before discussing matters that are properly the subject of a privileged meeting.

[30] There is also evidence before me that the subject matter of the privileged meeting was a Town official. This official was present at the public meeting and was also present during the conversation between the Mayor and the Applicant. This official was not present at the privileged meeting. I find this to be conclusive evidence that the privileged meeting had not yet started when this conversation took place. Council certainly would not have commenced the privileged meeting when the person to whom the meeting pertained was still in the room. To do so would have been quite inappropriate.

[31] Despite my finding regarding the applicability of section 19, I would still like to make a brief comment with respect to this section. To summarize, section 19(1)(c) states that a public body can refuse to disclose information that would reveal the substance of deliberations of an authorized privileged meeting of elected officials.

[32] As adopted in Report 2007-018, the test that must be met in order to refuse disclosure of information pursuant to section 19(1)(c) of the *ATIPPA* is as follows:

1. *The local public body must establish that it has legal authority to meet in camera;*
2. *The local public body must establish that an authorized in camera meetings was, in fact, properly held; and*

*3. The local public body must establish that disclosure of the disputed records or information would reveal the substance of deliberations of the meeting.*

[33] Assuming that factors one and two have been met, then a public body must still satisfy the third requirement. In this case, the Town has not provided any evidence with respect to the substance of deliberations of the privileged meeting, despite being specifically asked to do so during informal resolution efforts. The response from the Head of the Town was that he did not have this information and could not help with this request. While the Head may not have had this information, I find it difficult to believe that the Town did not have in its possession any information with respect to the subject matter of, or the substance of deliberations of the privileged meeting. If the Town intends to claim a particular exception to deny access to an Applicant, they should be able to provide evidence to support that claim. I will therefore take this opportunity to again remind the Town of the burden imposed by section 64 of the *ATIPPA*. The Town must prove, on a balance of probabilities, that a particular exception applies and the Applicant has no right of access.

[34] The Town has clearly not met this burden in the case at hand. The only indication I have with respect to the purpose of the meeting was provided by the Applicant. The evidence is that the privileged meeting was about a Town Official. Given the purpose of the privileged meeting, the Conversation could not reveal the substance of deliberations of Council as the Conversation is not related to that purpose. Section 19 does not exempt all information that is discussed or tabled at a privileged meeting, just that information which would reveal the substance of deliberations. Should I have needed to proceed to an analysis of section 19 in order to determine the issue in this case, I would have concluded that the Town could not rely on section 19, as they had not met the burden of proof required by the *ATIPPA*.

[35] As indicated in the Background section of this Report, the Applicant is alleging that the Town failed to honour its duty to assist. This duty is mandated by section 9 of the *ATIPPA*:

*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.*

[36] The *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice (the “*Manual*”) provides a useful summary of section 9. At section 3.3 the *Manual* states in part:

*The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant’s initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant’s wishes or needs, and to ensure that he or she understands the process.*

[37] As noted in Report 2007-007, in Order F2005-020 the Alberta Commissioner summarized as follows:

*Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is “reasonable”. In Order 98-002, Commissioner Clark adopted the definition of “reasonable” found in Blacks’ Law Dictionary (St. Paul, Minnesota, West Corp., 1999) as “fair, proper, just, moderate, suitable under the circumstances. Fit and Appropriate to the end in view.”*

[38] Section 11 of the *ATIPPA* requires public bodies to respond to an access request within 30 days of receiving it unless one of three circumstances is present. Neither of these circumstances apply in this case, therefore, the Town was obliged to respond to the Applicant within thirty days. The Town’s response letter was dated on the thirty first day. I do not consider this, in and of itself, to be unreasonable.

[39] Finally, although it appears that the Town withheld the record in its entirety, the Town did release all of the requested information with the exception of the Conversation, which the Town believed to be protected by section 19. Despite my finding that section 19 is not applicable to the Conversation, I am of the opinion that the Town misunderstood section 19 and claimed it believing that the Conversation was part of a privileged meeting and that all information discussed at a privileged meeting can be withheld under section 19. While the Town erred in this

regard, I find that it did not act unreasonably or unfairly. As such, I do not believe that the Town failed in this instance to honour its duty to assist.

## **V CONCLUSION**

[40] I have concluded that the Town is not entitled to rely on section 19(1)(c) of the *ATIPPA* to withhold the requested information from the Applicant. I have determined that the Conversation did not occur during a privileged meeting, either because the public meeting of Council had not yet been properly adjourned or the privileged meeting had not yet started. Even if the Conversation had occurred in a privileged meeting, the Town would not be entitled to rely on section 19. The Town presented no evidence with respect to the substance of deliberations of the privileged meeting and therefore has not met the burden of proving that disclosure of the information would reveal the substance of deliberations of Council at a duly authorized privileged meeting. Further, the evidence before me as to the subject matter of the meeting leads me to conclude that information to which the Applicant seeks access could not reveal the substance of deliberations of Council, as the information sought and the subject matter of the meeting were completely separate and unrelated issues.

[41] I have also concluded that despite the fact that the Town erred in its application of section 19, it did not fail in its duty to assist the Applicant.

## **VI RECOMMENDATIONS**

[42] Under the authority of section 49(1) of the *ATIPPA*, I hereby issue the following recommendations:

1. that the Town release to the Applicant the requested information, being the recorded conversation between the Applicant and Mayor;

2. that in future access requests, the Town be mindful of the burden of proof imposed upon it by the *ATIPPA* and present evidence to this Office in support of its reliance on claimed exceptions.

[43] 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 the Town's final decision with respect to this Report.

[44] 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*.

[45] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27<sup>th</sup> day of May, 2008.

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