



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2024-032

July 4, 2024

City of St. John's

Summary:

The Complainant made an access request for the name of a City of St. John's snow plow operator. The City denied access, claiming sections 33 (workplace investigation) and 40 (personal privacy) of the **Access to Information and Protection of Privacy Act, 2015** and later claiming section 37 (disclosure harmful to individual or public safety) as well. The Commissioner found that section 33 did not apply to the information, that section 40 does not require the City to withhold the names of its employees, and that the City did not meet its evidentiary burden in its application of section 37. The Commissioner recommended that the City disclose the name of the Operator to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 33, 37, 40, and 44(2).

Authorities Relied On: NL OIPC Reports [A-2016-011](#) and [A-2020-012](#).

BACKGROUND

- [1] The Complainant made an access request to the City of St. John's under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015):

Please provide the name of the operator who cleared the snow from [address] at around [time], [date]. I would want the name and telephone number of his supervisor.

The operator cleared the snow from every driveway on [address] and deposited it in my yard, and notably, my from [sic] walkway. It is not feasible to clear the amount of snow to permit deliveries.

The conduct is inexcusable.

I video taped the entire operation. I did not approach or speak to the driver.

I have received the same information via ATIPP in the past.

- [2] The City provided the Complainant with the names of the employee's foreman and manager and their contact information. The City did not provide the Complainant with the snow plow operator's name.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015.

PUBLIC BODY'S POSITION

- [4] The City advised that it received a subsequent access request from the Complainant that resulted in the Complainant receiving an Incident Investigation Report (IIR) from the City. The IIR involved the Operator and the Complainant on the date and location that the Complainant referred to in the access request.
- [5] The City submitted that it must withhold the Operator's name from the Complainant per sections 33 and 40 of ATIPPA, 2015. It explained that it considers the IIR to fall under subsections 33(1)(c)(iii), (2), and (3) of ATIPPA, 2015:

33.(1) For the purpose of this section

...

(c) "workplace investigation" means an investigation related to

...

(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

[6] The City further stated:

The Incident Investigation Report clearly fits within the definition of a workplace investigation as described above in section 33(1)(c)(iii) . The events of [date] were related to a workplace interaction between the snowplow operator and a member of the public which could have given rise to discipline or corrective action by the employer ...

In a normal situation, as the records are subject to section 33, the Applicant would not have received any part of them; however, the incident details were relayed to the Applicant by [the City's Legal Counsel], in correspondence dated [date] and the Applicant was present during the incident being investigated. Therefore, this office provided [the Applicant] with only the portions of the Incident Investigation Report that contained information [the Applicant] already had.

[7] The City then applied section 40 of ATIPPA, 2015 (disclosure harmful to personal privacy), and stated:

Considering the two interrelated requests, the information already provided in response to those requests, and after carefully reviewing sections 33 and 40 of the Act, this office cannot disclose the operator's name without compromising their personal privacy.

[8] The City expressed specific concern over the IIR revealing personal information about the Operator it considers evaluative, reflective of employment history, or reflective of workplace performance.

[9] The City later attempted to additionally rely on section 37 (disclosure harmful to individual or public safety) of ATIPPA, 2015 as justification for withholding the information. The City did not cite section 37 in its final response to the Complainant and it did not raise this discretionary exception to access until after the ten-day deadline to provide representations to our Office that subsection 44(2) of ATIPPA, 2015 requires.

[10] The City indicated that senior personnel within the City met to discuss this matter, but that the City had not completed a formal risk assessment regarding the Operator's concerns with the Complainant.

ISSUES

[11] The issue for this Report to address is whether the City has properly applied exceptions to access and withheld the name of the Operator from the Complainant.

DECISION

[12] With regard to the City's application of section 33 of ATIPPA, 2015, the IIR does not form part of the responsive records for the access request in question. The Complainant did not ask for it in the request. Even in the subsequent access request, the Complainant did not ask for the IIR itself. Accordingly, section 33 is not relevant to the Complainant's access request and complaint in question. While the IIR is a record that documents the Operator's name in connection with the incident involving the Complainant, it cannot be the only record in the custody or control of the City that contains the name of the snow plow operator.

[13] With regard to the City's application of section 40 of ATIPPA, 2015, this Office has previously reported on similar matters (Reports [A-2016-011](#) and [A-2020-012](#)) and we have found that confirming the name of a public body employee is usually not an unreasonable invasion of privacy, as section 40(2)(f) of ATIPPA, 2015 states:

40. (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.

[14] Specifically, in Report [A-2020-012](#) we held that “[a]n employee’s name is not considered a part of their employment history under section 40(4)(c)” and we recommended that the City disclose the name of the employee as that complainant requested.

[15] We appreciate that the City is trying to balance the access rights of the Complainant with the privacy rights of the Operator; but if any other member of the public were to submit an access request simply for “the name of the operator who cleared the snow from [residential address] at around [time], [date],” they would likely be entitled to receive that information. This would also likely be the case for a request about any other public servant performing their duties.

[16] With regard to the City’s late application of section 37 of ATIPPA, 2015, this Office normally will not consider discretionary exceptions that a public body does not either claim in its final response to an access request or raise within the first ten business days of receiving notice of an access complaint. Nevertheless, given the importance of protecting safety, we did consider this exception to access. Ultimately, the City did not provide us with adequate information to meet its evidentiary burden of establishing a risk to the Operator’s safety.

[17] However, the City did not show that it had taken significant action since the incident occurred to address any specific occupational health and safety concerns related to the incident between the Operator and the Complainant. For example, the City has not completed a risk assessment, even though the City reports that senior personnel met to discuss the matter. One would trust that if the City’s senior personnel felt there was a genuine risk to this employee, they would complete a formal risk assessment and develop associated strategies.

[18] This Office recognizes that section 37 is an important exception to protect people from harm. However, public bodies bear the burden of proving that an exception applies and, in this case, we are not satisfied that the City has met that burden. As such, we are left with no

choice but to recommend disclosure. However, this is not necessarily the end of the process for the City. If the City believes it has a legitimate concern about the safety of the employee, it can seek a declaration from the Supreme Court of Newfoundland and Labrador that it does not have to follow our recommendations. It can potentially put before the court further evidence supporting its application of section 37 that was not provided in this current process.

RECOMMENDATIONS

- [19] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the City of St. John's, within ten business days of receipt of this Report, disclose to the Complainant the name of the Operator in question.
- [20] As set out in section 49(1)(b) of the **Access to Information and Protection of Privacy Act, 2015**, the head of the City of St. John's must give written notice of his, her, or their decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within ten business days of receiving this Report.
- [21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of July, 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador