



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report P-2020-001

July 31, 2020

City of Mount Pearl

**Summary:** The Complainants alleged that the City of Mount Pearl breached their privacy by improperly disclosing harassment complaint letters they had written, without their consent, to the individual about whom they had complained. The Commissioner concluded that the disclosure had been made contrary to the privacy provisions of the *Access to Information and Protection of Privacy Act, 2015*, and recommended that the City acknowledge the violation of the Act, review its policy and procedure to ensure it reflects the privacy provisions of the Act, and undertake privacy training for members of Council.

**Statutes Cited:** [Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, ss. 2(a), 2(u), 33, 40, 66, 68, 69, 115.

**Authorities Relied On:** OIPC Report [P-2017-005](#).

**Other Resources:** City of Mount Pearl, [Harassment Free Workplace Policy](#); [Harassment Free Workplace Procedure](#); [Respectful Workplace Policy and Procedure](#).

## I BACKGROUND

- [1] A Complainant filed a privacy complaint under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or “the Act”) with this Office on December 3, 2019, alleging that Mount Pearl City Council (“Council”) had disclosed a letter complaining of harassment that he had written. He complained that this disclosure was made without his consent, against his wishes that it be kept confidential, and without notifying him or any of the other individuals named in the letter that it was going to do so. Attached as part of the privacy complaint were communications from several of the individuals who had been named in the earlier letter of complaint, giving their consent for the Complainant to add their names to the privacy complaint. To understand the privacy complaint and the conclusions reached by this Office, some background is necessary.
- [2] The Complainant, an employee of the City of Mount Pearl (“the City”) wrote a letter of complaint on September 26, 2019 to the Mayor, containing an account alleging harassment by the Chief Administrative Officer (CAO). The letter also related similar accounts, which the Complainant stated he had heard from other employees who were named in the letter, alleging harassment and fears of retaliation. At around the same time, another employee wrote a separate signed letter of complaint. Other employees, some of whom may have been individuals named in the Complainant’s letter, sent similar but anonymous complaints.
- [3] The Mayor and Deputy Mayor consulted the City’s external legal counsel, and then called a privileged meeting of Council (a meeting held in the absence of the public) to deal with the complaints. At that meeting on October 1, 2019 Council voted to place the CAO on leave. Council also voted to retain an independent external investigator to conduct an investigation of the complaints under the City’s *Harassment Free Workplace Policy and Procedure*.
- [4] The investigator specializes in conducting workplace investigations, and was given copies of the two signed complaint letters. Under the retainer agreement with the City, the investigator was to provide to the City a report containing a statement of facts, but not recommendations for action or a legal opinion. In turn, the City was to facilitate access to any individuals the investigator wanted to interview.

- [5] After the investigator was retained on October 10, 2019 and had commenced the investigation, a majority of Council in another privileged meeting on November 19, 2019 made a formal decision to provide the signed complaint letters directly to the CAO, outside the context of an access request, without asking the writers or any of the individuals named in the letters for their consent, and explicitly to do so without notice to any of them.
- [6] In June 2020, when our investigation of this privacy complaint was in its final stages, the other individual who had signed a complaint letter to the City, and whose letter had also been disclosed to the CAO as described above, also filed a privacy complaint with this Office. Because the complaints involve the same facts, raise identical issues and were treated in the same way by the City, our Office has decided to deal with both complaints in this Report.
- [7] The City's investigator has reportedly interviewed both Complainants as well as many of the individuals named in the letters of complaint. The City's investigator had, at the time of issuance of this report, not yet completed the investigation.

## II THE CITY'S POSITION

- [8] The City states that following receipt of the two signed and 18 anonymous complaints it commenced an investigation, which it characterized as falling within both the City's *Respectful Workplace Policy* and its *Protected Disclosures (Whistleblower) Policy*. It engaged an external investigator to conduct an independent investigation, which is still ongoing.
- [9] The City states that the disclosure of the Complainants' letters to the CAO was made prior to the date on which the CAO's access request for information in relation to the investigation was received.
- [10] The City states that the first Complainant did not make any statement indicating that his complaint letter should be treated as confidential. The City argues that therefore the harassment complaint was reasonably dealt with in accordance with the *Respectful Workplace Procedure*, which provides that the identity of a complainant and the allegations contained in the complaint will be made known to the individual alleged to have engaged in disrespectful behaviour.

- [11] The City states that the second Complainant did not state under which policy the complaint was brought, and the indication that his name not be disclosed was a preference only. The City argues that therefore it was reasonably accepted and dealt with under the *Respectful Workplace Procedure*, which mandates disclosure.
- [12] The City further argues that pursuant to section 33 of *ATIPPA, 2015*, the identity of a complainant is “relevant information” subject to disclosure to the responding party. It was therefore under a statutory obligation to disclose the complaint letters to the CAO.
- [13] The City states that in order to comply with the requirement of a fair and impartial investigation, the City was required to notify the CAO of the identity of the Complainants.
- [14] The City cited OIPC Report P-2017-005 as support for the proposition that a request for confidentiality of a complaint is not reasonable if the complainant wishes to have the complaint addressed.

### III THE COMPLAINANTS' POSITIONS

- [15] The first Complainant states that he asked that his letter to the City remain confidential, because he and other individuals feared retaliation. His privacy complaint requested that:
- “...if found in violation of the Act, Council give a written statement to all named employees outlining the violation, their role in the violation and the steps they are going to take to ensure that such a violation will not take place in the future.*
- Assurances to be made through new City policies to ensure workers that when they come forward to report violations in the workplace every effort will be made to protect their anonymity and limit any fear they may have of possible repercussions.”*
- [16] The first Complainant also states that he was assured by the City’s investigator that neither his identity nor his letter to the City would be provided to the CAO.
- [17] The second Complainant similarly states that his letter to the City was explicitly to remain confidential, and that he was assured by the City’s investigator that it would not be disclosed. He further stated that he wishes the City’s actions to be made public, because many

employees are now in fear of retaliation, and that “the City does not release anything like this in the future without thinking about the consequences.”

#### IV DECISION

[18] The letters of complaint at issue were disclosed as a result of a decision of Council of the City of Mount Pearl to another party, who was the subject of the complaints. The issue is whether that disclosure contravened the privacy provisions of *ATIPPA, 2015*.

[19] *ATIPPA, 2015* is divided into several parts. Part III, “Protection of Personal Information” is about privacy. It governs how personal information is to be collected, and for what purposes, how personal information is to be used and protected, and under what circumstances personal information may be disclosed.

[20] Personal information is defined in *ATIPPA, 2015*, section 2(u) as “recorded information about an identifiable individual...” The information contained in the letters at issue, which included the names and other information of the Complainants and of other named individuals, and linked those names to allegations of harassment, clearly contains the personal information of those individuals.

#### “Use” of Information

[21] *ATIPPA, 2015* provides, in section 66, that a public body may use personal information only for the purpose for which it was obtained or compiled, or for a use consistent with that purpose. In a case where a complaint is about a supervisor or a middle manager, the City’s policy provided that it would be handled by the CAO. However, because the complaint was about the CAO, the policy provided that it must be handled by the Mayor and Council. Therefore, when the complaint letters were brought before Council and discussed in the private meetings, that would have been a legitimate use of the information by the City, consistent with the purpose for which it was obtained. Once the CAO was placed on leave, he could no longer be part of any internal administrative process relating to the complaint. Therefore subsequently giving the letters to the CAO was not a use of the information by the City, but a disclosure.

## Disclosure of Information

[22] Disclosures of personal information are governed by section 68 of *ATIPPA, 2015*, the relevant provisions of which read as follows:

*68. (1) A public body may disclose personal information only*

*(a) in accordance with Part II;*

*(b) where the individual the information is about has identified the information and consented to the disclosure in the manner set by the minister responsible for this Act;*

*(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in section 69 ;*

*(f) to an officer or employee of the public body or to a minister, where the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister;*

## Disclosure In Accordance with Part II

[23] This disclosure was not made “in accordance with Part II” since it was not made in relation to an access request. As the City concedes, the decision to disclose the letters to the CAO was made on November 19, 2019. The access to information request from the CAO was not received by the City until November 22, 2019. Therefore the disclosure decision could not have been made in response to the access request, and so none of the provisions governing access to information requests, or the exceptions to such disclosure in Part II of the Act, are applicable to the disclosure.

## Disclosure with Consent

[24] The City submits that the Complainants did not make clear that their letters were to be treated as confidential. Whether there exists an intention that information be treated as confidential is a factor to be considered in a number of other provisions of *ATIPPA, 2015*. However, an expression of, or a demand for, confidentiality from the individual whose personal information is involved, is not what section 68(1)(b) of *ATIPPA, 2015* requires. Rather, that section permits disclosure of the information only if the individual has identified the information and consented to its disclosure, which did not occur in this case.

### Disclosure for Employee Duties

[25] Section 68(1)(f) of the *Act* provides for disclosures to an officer or employee when the information is necessary for the performance of his or her duties. Under other circumstances this provision might be invoked to justify the disclosures of the letters to the CAO. However, as noted above, the CAO was on leave, was no longer acting as an officer or employee, and had no duties to perform. Therefore the disclosure cannot be justified under this provision.

### Disclosure for a Consistent Purpose

[26] Section 68(1)(c) of the *Act* permits disclosure of information “for the purpose for which it was obtained, or for a use consistent with the purpose for which it was obtained”. Section 69 defines a “consistent purpose” as one that is “...*necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.*” We will examine each part of this provision in turn.

### Disclosure under a Statutory Duty

[27] The City has argued that it was required to disclose the identities of the Complainants and their letters of complaint to the CAO in accordance with the provisions of section 33(3) of the *Act*, which reads:

*33.(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).*

[28] This provision of the *Act*, like all of the provisions of Part II, is applicable only in the context of a public body’s response to an access request. The information referred to in subsection (2) above is limited to information that is created or gathered for the purpose of a workplace investigation. While the letters of complaint became “relevant information” for the purpose of subsection (2) once the investigation had begun, subsection (3) provides that such information may only be disclosed to “an applicant” who is a party to a workplace investigation. At the time the disclosure was made, the CAO was not an applicant as defined by section 2(a) of the *Act*, since the access request had not yet been made.

[29] *ATIPPA, 2015*, section 33, is the only statutory duty relied upon by the City in support of the disclosure. We have concluded, therefore, that the disclosure was not made in accordance with a statutory duty.

#### **Disclosure Necessary for a Legally Authorized Program**

[30] We have further concluded that the disclosure to the CAO was not necessary for “operating a legally authorized program” of the public body. That expression, in the case of the City, would mean activities related to the core functions of a municipality or activities otherwise authorized by statute, and would include, for example, collecting taxes, regulating construction and issuing permits, and providing municipal services of various kinds. The legal authority for such activities is found in applicable provincial legislation, such as the *City of Mount Pearl Act*.

[31] That legislation also contains provisions for the administration of the City, including staffing, in accordance with the policies created by Council. Conducting the workplace investigation, in the present case, was an internal administrative process undertaken under the provisions of City policy, and was necessary in order for the City to carry out its other core functions. Therefore it was part of a “legally authorized program” of the City. However, the issue is whether the disclosure of the letters to the CAO by Council was necessary for operating that program.

[32] The City has argued that the letters of complaint were dealt with in accordance with the *Respectful Workplace Procedure*, which provides that the identity of a complainant and the allegations contained in the complaint will be made known to the respondent. However, the *Respectful Workplace Policy and Procedure* apparently referred to by the City’s submissions was not in effect at the time the letters of complaint were given to the City, nor at the time the letters were disclosed to the CAO. It only came into effect in January 2020. The City policy that was actually in effect at the relevant times was the *Harassment Free Workplace Policy and Procedure*.



[33] The latter *Procedure* was issued in June 2018, and defines harassment generally as engaging in a course of vexatious comment or conduct that is known to be, or ought reasonably to be known to be, unwelcome. Its section on confidentiality reads as follows:

*2. Confidentiality*

*Every effort will be made to maintain the confidentiality of all complaints concerning harassment and discrimination. Confidentiality will be maintained throughout the process to the extent practicable and appropriate under the circumstances except where disclosure is required by law or is necessary for a proper investigation or resolution of the matter. All stages of the investigation will be handled as discreetly as possible. All written statements, documents or other materials pertaining to the complaint will be stored, released or disclosed in accordance with the requirements set forth by the Access to Information and Protection of Privacy Act, 2015.*

[34] Far from requiring that the letters of complaint be disclosed to a respondent, the *Harassment Free Workplace Procedure* requires that confidentiality be maintained, except where required by law or necessary to conduct a proper investigation. We have already concluded that the disclosure was not required by law. The issue then becomes whether the disclosure was necessary to conduct a proper investigation.

[35] It is clear that after receiving the complaints, the City, ethically and practically (and perhaps even legally) was bound to conduct an investigation in accordance with its own policy. However, the City determined that it was not appropriate to conduct the investigation internally. The City retained an external investigator, allowing Council to stay out of it, exerting no influence over the investigation.

[36] It is to be presumed that the City, and specifically members of Council, are aware of the privacy provisions of *ATIPPA, 2015* and of the contents of their own policies and procedures. If so, then it would be reasonable to expect certain results to have followed.

[37] The *Harassment Free Workplace Policy and Procedure* delegates the investigative process, including decisions such as what to disclose to the Respondent, to the investigator. It was the independent external investigator who ought to have had full carriage of the investigation, without interference from Council. Therefore it ought to have been the

investigator, not Council, who decided how far the principle of confidentiality needed be preserved. Specifically, it ought to have been the investigator, not Council, who decided whether, or at what stage, the complaints, or any part of them, or the identities of the complainants, would be disclosed to the Respondent.

[38] In the circumstances of an ATIPP request for this information, the City's Coordinator and designated Head would be required to engage in the process and the Head (or a delegate) would have to make a decision about whether to disclose the information. However as noted above no ATIPP request had been received for this information at the time the disclosure decision was made by Council.

[39] Council decided to provide the complaint letters directly to the CAO. Having retained an external investigator to carry out the investigation, it is clear that Council was not directing the investigation. Therefore, this disclosure cannot be considered to have been necessary for conducting a proper investigation, and may even have constituted interference in the investigation.

[40] The City has cited a portion of Report P-2017-005 in support of its argument that the disclosure was reasonably necessary. That Report commented, in the portion cited in the City's submissions, that in the circumstances of that case the complaints could not be properly addressed without providing the complainant's personal information to those individuals whose actions were the source of the concerns. However, that Report also went on to conclude that:

*...ATIPPA, 2015 may have permitted the disclosure of the Letter, had steps been taken to limit disclosure to the minimum necessary, and only to those individuals to whom it was necessary to disclose in order to address the issues raised in the Letter. Further, best practices require that complainants expressing expectations of confidentiality should be contacted prior to using or disclosing personal information in the course of addressing their complaints;*

[41] Report P-2017-005 further stated that,

*...as the Complainant had expressed the desire to keep the matter confidential, before sharing the letter with anyone, the local government bodies should have contacted the Complainant to either seek their consent for the disclosure of their*

*personal information or notify them that their personal information would be disclosed to the extent necessary to address the matters raised in the Letter. In the circumstances of this matter if the Complainant did not consent, they would have to be advised that the complaints might not be investigated.*

[42] The conclusions in that Report are consistent with the view we have expressed above, that in the absence of an access request, and in compliance with *ATIPPA, 2015*, it ought to have been the investigator, not Council, who decided whether the complaints, or any part of them, and the identities of the complainants, would be disclosed.

### **Fair and Impartial Investigation**

[43] The City argues that in order to comply with the requirement of a fair and impartial investigation, the City was required to notify the CAO of the identity of the Complainants. However, in our view this argument misunderstands the nature of the investigative process. The external investigator was retained to interview the complainants, other witnesses and the CAO, and to produce a report to Council containing a statement of facts.

[44] It may be that to ensure a fair and impartial investigation, the investigator, at some stage, would have needed to provide the Respondent with details of the allegations, prior to conducting an interview. However, as noted earlier, as provided for by City policy, that process ought to have been in the hands of the investigator, without interference from Council, while the investigation was ongoing. Therefore we are of the view that it was not necessary for Council to make the disclosure it did, at the time it did, in order to ensure a fair and impartial investigation.

[45] None of the other provisions of Section 68 would appear to apply. We have concluded that the City's *Harassment Free Workplace Policy and Procedure* did not justify the disclosure, and that the disclosure was not made with the consent of the complainants.

## **V CONCLUSION**

[46] The disclosure of the Complainants' harassment complaint letters to the CAO by Council without the Complainants' consent, and without giving them an opportunity to either consent

to the disclosure or withdraw the letters, or conceivably to negotiate the disclosure of a version of the letters with the names of the other employees redacted, cannot be justified under section 68 of *ATIPPA, 2015* and was therefore a violation of the Act.

[47] It is clear that the disclosure of the complaint letters was intentional, but it is equally clear that the City did not believe it was a breach of privacy. There are no grounds on which to pursue a prosecution for an offence under section 115 of the Act. However, the City should consider means by which to make amends to the Complainants and the other named individuals, such as written letters of apology.

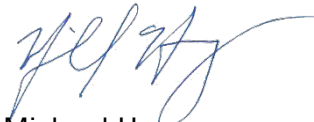
## VI RECOMMENDATIONS

[48] Under the authority of section 76 of *ATIPPA, 2015* I recommend:

- (a) That the City of Mount Pearl acknowledge that its actions in disclosing the workplace complaint letters constituted an unreasonable invasion of privacy of the Complainants and the other named individuals and a violation of *ATIPPA, 2015*;
- (b) That the City of Mount Pearl review its current *Respectful Workplace Policy and Procedure* to ensure that it reflects the principles of confidentiality and the privacy provisions of *ATIPPA, 2015*;
- (c) That the City of Mount Pearl implement a program of privacy awareness and training specifically for the benefit of members of Council.

[49] As set out in section 78 of *ATIPPA, 2015*, the head of the City of Mount Pearl 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.

[50] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31<sup>st</sup> day of July 2020.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador