



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-020

August 23, 2019

Central Newfoundland Waste Management Authority

Summary:

Central Newfoundland Waste Management Authority (“CNWM”) received a request for all records, including all information and records regarding an agreement between CNWM and the Western Newfoundland Waste Management Authority, and including records of all meetings relevant to that process. CNWM denied access to all existing records under section 35 (disclosure harmful to the financial or economic interest of a public body). The Complainant requested a review of this decision and raised further questions about an interim agreement regarding a fee for disposal of WNWMA garbage at the CNWM facility. The Commissioner found that CNWM has appropriately applied section 35 but did note that its failure to document the verbal agreement regarding the interim fee exacerbated the concerns of the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 3, 17, and 35.

Authorities Relied On:

[Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act](#), Queen’s Printer, St. John’s, NL, 2015; [Saskatchewan OIPC Dictionary](#)

I BACKGROUND

- [1] On April 24, 2019 the Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015” or “the Act”) to Central Newfoundland Waste Management (“CNWM”) for access to records regarding an agreement with Western Newfoundland Waste Management (“WNWM”) as follows:

I am requesting all information with respect to the agreement between CNWM/CRSB and the WRSB/WNWM regarding Western Garbage being disposed at Norris Arm. I am requesting copies of all documents associated with this agreement. It is to include but not limited to records of all meetings between CNWM/CRSB and WNWM/WRSB. CNWM/CRSB and government. CNWM/CRSB and the third party consultant/arbitrator/mediator. Records of any other parties involved in the process.

- [2] On May 16, 2019 CNWM replied to this request stating that they could not provide the Complainant with the information he had requested citing:

Disclosure harmful to the financial or economic interest of the public body; Article 35.(1) The head of a public body or the government of the province; plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public.

- [3] On May 21, 2019, in response to not being granted access to the records, the Applicant inquired as to the source of the agreement to a fee of \$35 per ton for processing waste which had been ratified in an October, 2018 meeting. In response to this inquiry, CNWM further explained that:

There is no formal agreement at this time. Motions in Sept. 20th 2018 and Oct. 18th 2018 confirms an interim Arrangement with western at \$35.00 per tonne for disposal, until a formal agreement is in place.

- [4] A complaint was filed with this Office on May 22, 2019. In the complaint it was noted that the response received was less than adequate, there is information that was not provided that should have been provided, and that the response did not advise the complainant of his right to appeal to the Office of the Information and Privacy Commissioner or the Courts.

- [5] As an informal resolution could not be reached, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [6] The Public Body advised this Office that the two waste management authorities have been working on an agreement regarding how the disposal of waste from WNWM at the CNWM facility can be accomplished and at what fee. A draft agreement is being worked on.
- [7] Regarding the follow up question from the Applicant, CNWM explained that there had been a meeting on the issue of cost. No minutes were taken at this meeting and it ended without an agreement being reached. The Department of Municipal Affairs and the Environment ("MAE") attempted to negotiate between the parties, but this too was unsuccessful. These negotiations were all completed verbally, either in person or by phone, with no records being created.
- [8] An independent firm was engaged by MAE in order to review the costs and make recommendations on a framework for the future long term agreement. An interim fee, until such time as a contract is put in place, in the amount of \$35 per ton was verbally negotiated between the chairs of the Western and Central Regional Service Boards and brought back to the Central Regional Service Board ("CRSB") for review. The minutes of October 18, 2018 ratifies the interim agreement reached. CNWN referred the complainant to its website to view this document. This figure has not yet been ratified by WNWM.
- [9] The Public Body relies on section 35(1)(c) as its basis for not providing any responsive records to the Applicant. It argues that as the agreement is not complete, that to release any of the records regarding its negotiation could reasonably be expected to disclose plans that have not yet been implemented or made public.

III COMPLAINANT'S POSITION

- [10] The Complainant does not agree with CNWM using the exception in the Act that they have cited as, in his view, it does not apply. He argues:

The CRSB, WRSB and ERSB are controlled by government. If the WRSB and CRSB cannot agree, the government will tell the WRSB what they will pay and the CRSB to take it. It is a government representative that is supposed to be calculating an acceptable tipping fee. Citizens do have a right to know exactly what is going on. I am confident a Supreme Court justice will not be pleased with the lack of record keeping on the part of the CRSB/CNWM. Garbage has been delivered to CNWM by WRWM now for several months. There is a verbal agreement. How did we get to a verbal agreement. Who discussed it? Who was involved? What facts were presented? Presented by who? I could keep going. There are so many unanswered questions. How is it possible to have an agreement between 2 parties, when only one had ratified it?

IV DECISION

Issues

- [11] Issues to be decided in this Report:
1. Did the public body properly apply the exception in section 35 to the responsive records?
 2. Did the public body breach section 17(1)(c)(ii) by not advising the Applicant of his right to file a complaint with the Commissioner or appeal directly to the Trial Division as part of their final response?

Did the public body properly apply the exception in section 35 to the responsive records?

- [12] Section 35(1)(c) of the Act states:

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

- (a) trade secrets of a public body or the government of the province;*
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*

[13] Administration of a public body has been defined by the Saskatchewan OIPC:

Comprises all aspects of a public body's internal management, other than personnel management, that are necessary to support the delivery of programs and services. Administration included business planning, financial operations, and contract, property, information, and risk management.

[14] We accept this definition and find that financial operations and contract management fall squarely within the meaning of administration of a public body as outlined in section 35(1)(c).

[15] The access request was for the “agreement between CNWM/CRSB and the WRSB/WNWM regarding Western Garbage being disposed at Norris Arm”. No final agreement has been entered so the release of records, including the release of any draft agreement would be premature. We find that CNWM is entitled under section 35 to continue to withhold the records regarding any draft agreement.

[16] Regarding the issue of the interim fee agreed to per ton, only one party has ratified the verbal agreement on this point and negotiations are still ongoing. There have been meetings and discussions about what this agreement should contain, but no records were generated from these conversations, aside for the ratification of the proposed fee by CNWM.

[17] The absence of documents has fueled the complainant's concerns about the transparency of this process. While we accept that the draft, as yet to be finalized agreement, can be withheld under section 35, we note that the failure of the public bodies involved to document the interim fee decision is troubling. The complainant in this case is trying to understand why he, as a citizen of this region, is being charged a certain fee for garbage collection. This request for information goes to the core principle of the *ATIPPA, 2015*, as set out in the purpose section of the Act:

3. (1) *The purpose of this Act is to facilitate democracy through*
 (a) *ensuring that citizens have the information required to participate meaningfully in the democratic process;*

[18] The duty to document is not yet a legal requirement, but it has been discussed by the Wells Committee in its statutory review of the *ATIPPA* in 2014. The committee made a general statement about the importance of record keeping to the ATIPP process on page 309:

The connection between quality record keeping and the successful completion of access requests is well documented.

The Committee then quoted from the submissions of Canada's Information Commissioner and the Newfoundland and Labrador OIPC:

Canada's Information Commissioner, Suzanne Legault, recommended a legal duty to document decisions, "including information and processes that form the rationale for that decision." Commissioner Legault noted that without such a legal requirement, there is no way to ensure all information related to the decision making process is recorded. (page 312)

The OIPC also addressed the "duty to document," and promoted the view expressed in a joint resolution by Canada's Information and Privacy Commissioners, by recommending "the creation of a legislated duty on public bodies to document (that is, create records relating to) any non-trivial decision relating to the functions, policies, decisions, procedures and transactions relating to the public body." (page 313)

The Committee summarized its views on page 315:

The OCIO speaks in terms of "responsibility" and it would be logical to assume that all public officials should feel the responsibility to record their decisions and plans. Such a practice is not only useful for the ATIPP system, but provides an accurate record for others who need to take direction from officials. Indeed, it would be irresponsible to expect officials to proceed on matters of public importance only on the basis of oral instructions, and without any documentary backup.

[19] In the facts of this case, when the Applicant requested information about how the CNWM Authority had decided on the interim figure of \$35/ton there were no records to document this decision. The lack of records, beyond the ratification in the minutes, raised further questions for the Applicant. Had records existed surrounding this verbal agreement, this Office would have been able to assess whether or not these records were also excepted from release by section 35.

[20] Section 35 requires a reasonable expectation that release of the records would disclose plans developed for the purpose of contractual negotiations. This exception is intended to allow public bodies to negotiate contracts freely and to protect these planning documents from disclosure while the contract is not yet agreed upon. However, this protection will lose its purpose if the negotiations go on for an inordinate amount of time. The agreement to the \$35/ton fee has been in place for almost a year now; it may be possible that the protection of the exception to access in section 35 may expire if no final agreement is ever reached.

Did the public body breach section 17(1)(c)(ii)?

[21] The Complainant indicated in his complaint that the response did not advise him of his right to appeal to the Office of the Information and Privacy Commissioner or the Courts. A review of the final response of the public body confirms this.

[22] Section 17 states:

17. (1) In a final response to a request for access to a record, the head of a public body shall inform the applicant in writing

- (a) whether access to the record or part of the record is granted or refused;*
- (b) if access to the record or part of the record is granted, where, when and how access will be given; and*
- (c) if access to the record or part of the record is refused,*
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based, and*
 - (ii) that the applicant may file a complaint with the commissioner under section 42 or appeal directly to the Trial Division under section 52 , and advise the applicant of the applicable time limits and how to file a complaint or pursue an appeal.*

...

[23] CWMN does not receive many access requests, and we accept that they made an error and simply missed a step in the process. However, this Office must find a breach of section 17(1)(c)(ii) in this case and must recommend that in future CNWM ensure that it includes a notice of the rights to complain or appeal in all its final responses under the Act.

V RECOMMENDATIONS

- [24] The application of the exception to access in section 35 was properly applied by CNWM in this case. While it failed to document a decision regarding the \$35/ton fee, it was ultimately documented in Board minutes.
- [25] Under the authority of section 47(a) of the *ATIPPA, 2015*, I recommend that the Central Newfoundland Waste Management Authority continue to withhold the records from the Complainant.
- [26] Under the authority of section 47(d) of the *ATIPPA, 2015*, I recommend that the Central Newfoundland Waste Management Authority advise all applicants of their right to complaint or appeal decisions in all final responses under the Act.
- [27] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of CNWM 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.
- [28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of August 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador