



August 2, 2018

Sheila Gurrie
Corporate Officer
City of Nanaimo
455 Wallace Street
Nanaimo, BC V9R 5J6

Dear Sheila Gurrie:

Re: Privacy Breach Investigation – OIPC File F17-72024

I write regarding reports you made to my office on behalf of the City of Nanaimo about three separate personal information disclosures.¹ You reported that the information in question was in the City's custody and control and was disclosed without any legal authority.

When an unauthorized disclosure of personal information is reported to the OIPC, my staff, expertly versed in such matters, normally help the public body or organization manage it. In the normal course of business, this means giving advice about preventing further disclosures and helping determine whether individuals affected by a disclosure should be notified. Usually, the public body or organization and its leadership are responsible for remedying a privacy breach, with oversight from the OIPC.

However, in this case, the disclosure reports to my office implicated senior members of the City's leadership, thereby casting doubt on the City's ability to properly remedy the alleged breaches. The former acting commissioner consolidated all of the matters you reported to our office into one investigation under s. 42(1)(a) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

On November 2, 2017, the former acting commissioner advised the City of the purpose of the investigation – to examine and assess the cause and extent of these disclosures and to assess the measures the City has taken to protect personal information and comply with the security measures required by FIPPA.

I have decided to post this reporting letter on our website given that the issues addressed in this review have been the subject of considerable public discussion and debate in Nanaimo. This letter also serves to remind those who serve in municipal offices that the public has entrusted them to protect the personal information within their custody or control and that they must take all reasonable measures necessary to do so.

¹ You are a designated "Head" of the City under s. 77 under FIPPA.

Background

My staff interviewed a number of City employees and councillors under oath about the information disclosures as well as the privacy management practices at the City. Investigators collected and examined records relating to the incidents as well as information about the City's privacy management program.

My investigators observed significant adversarial relationships between some members of the council and administration. Those relationships are not within my authority to investigate. I mention them here only because it provides some context for the findings that follow.

The information at issue in the three disclosures is summarized as follows:

1. The workplace report

The City's Chief Administrative Officer (CAO)² complained to the City's Human Resources department in early 2017 that certain conduct toward her violated the City's "Respectful Workplace Policy". In response, the department retained an outside consultant to determine whether the policy was breached.

The consultant provided a workplace report to the Director of the City's Human Resources department on July 20, 2017. The report contains sensitive personal information about the complainant and several other individuals. In general terms, the report concerns allegations of conflict and dysfunction between some members of City council and City administration.

2. The consulting group email

On March 31, 2015, the City's mayor wrote an email to a consulting group and copied the City's then CAO. The purpose of the email was to engage the firm to assist in resolving adversarial relationships on council. Among other things, the email contained the Mayor's opinions about City councillor colleagues, some of which were not complimentary.

3. The two law firm letters

Two letters were sent to the City from a law firm representing a City Councillor:

- a letter dated December 10, 2015 addressed to the City's mayor; and
- a letter dated December 14, 2015 addressed to the City's Chief Administrative Officer (CAO).

² The CAO has since left the employ of the City.

The letters set out concerns about how certain City personnel matters were handled by council. The letters name several individuals in relation to those concerns.

Application of FIPPA

Personal information can only be disclosed with legal authority

The City of Nanaimo, like all public bodies in BC, is subject to FIPPA. The requirements of the legislation extend to all of the City's officers and employees, including the Chief Administrative Officer, the mayor, and councillors. Part 3 of FIPPA sets out specific rules about how personal information in the City's custody or control must be treated.

FIPPA defines "personal information" as information about an identifiable individual. This definition has been interpreted in court decisions to mean any information that is capable of being linked to an identifiable individual, on its own or in connection with other available information.

Section 30.4 of FIPPA prohibits the disclosure of personal information by City employees, officers and directors except as authorized by FIPPA.

Obligation to protect personal information

Under s. 30 of FIPPA, public bodies, such as a city government, must make "reasonable security arrangements" to protect personal information in their custody or control from unauthorized access or disclosure. What constitutes reasonable security arrangements is contextual and can vary according to factors such as the sensitivity and amount of the personal information. Orders by my office note that while "reasonable" does not mean perfect, it does signify a very high level of rigour.

Application of FIPPA to the disclosures in this case

As the City's head under FIPPA, you reported to my office that the workplace report, the consulting group email and the law firm letters were within the City's custody and control; contained personal information; and that this personal information was disclosed without authority. In short, these were privacy breaches.

On review, my investigators confirmed the report, email and letters were within the City's custody or under its control and that they contained personal information. The question therefore is whether the report, email and letters containing the personal information were disclosed and if so did this happen without legal authority provided under FIPPA. I consider each matter in turn.

Workplace report

The consultants delivered the report to the City's Human Resources department on July 20, 2017. The department then provided a copy to the CAO and two individuals named in it. The Human Resources department temporarily³ stored the report on a shared computer drive accessible to department staff.

Copies of the report were also circulated to city councillors at a July 26, 2017 in-camera council meeting. Those councillor copies were collected and returned to the Human Resources department at the end of the in-camera meeting.

On August 2, 2017, a major newspaper published an article stating that it was provided with a copy of the report. The article's author noted that the report had not been publicly released. There is no reason to doubt the newspaper's story that it was given a copy of the report. I therefore find the report, within the City's custody and control, was disclosed to the newspaper and there was, on its face, no legal authority for doing so.

We asked the CAO if she disclosed the report as she was quoted in the newspaper article saying she was afraid the report would not be made public. The CAO admitted to making that statement but denied disclosing the report to the newspaper. We also asked the other interviewees if any of them had disclosed the report. All denied doing so.

My investigators reviewed all other relevant evidence that they had collected in addition to the testimony taken under oath. Having carefully assessed it, my staff were unable to conclusively establish who disclosed the report to the newspaper.

While I find that the disclosure of the personal information in the report was not authorized by FIPPA, there was insufficient evidence to determine who at the City contravened s. 30.4 of FIPPA.

Consulting group email

A copy of the Mayor's email to the consulting group was described, but not provided, by the CAO at an in-camera meeting of City council on or about March 21, 2016. On April 4, 2016, council passed a resolution requiring the CAO to provide it with a copy of the email. The CAO provided council with a copy of the email on June 22, 2016 redacting much, but not all, of the personal information of councillors.

A member of the public presented an unredacted copy of the email to an open meeting of City council on November 21, 2016. He said he found the email on his car windshield.

I find that the disclosure of the personal information in the email was not authorized by FIPPA, but my staff could not conclusively determine who provided the email to the

³ Less than five days.

member of the public. The likely source of the email was from within the City, considering that the consulting group had little to gain from its disclosure. We interviewed City employees and officials who we identified as having had contact with the email. However, they all denied disclosing it, and we found no other independent evidence that conclusively demonstrated who released it.

Two law firm letters

City staff distributed the December 10, 2015 letter to the Mayor from a law firm for discussion at a December 16, 2015 in-camera meeting of City council. The City could not confirm whether the December 14, 2015 letter was also distributed for the same meeting.

One councillor stated under oath to my investigators that he had received both letters by email for the purposes of an in-camera council meeting. He said that neither the email attaching the letters nor the letters themselves explicitly stated that they were confidential. He said that he disclosed both the December 10, 2015 and December 14, 2015 letters by posting them on a Facebook page that he administers.

On May 25, 2016, the City issued a written notice, pursuant to s. 73.1 of FIPPA, to the councillor demanding that he remove the information from this Facebook page. In response the councillor removed the information.

As described above, City councillors are officers of the City. They may only disclose personal information in the City's custody or under its control if there is authorization under FIPPA to do so. As the City's head, you are responsible for dealing with privacy breaches. You submitted there was no authority to disclose the personal information in the letters and I agree. The councillor in question is an experienced member of council and knew that documents distributed in-camera were not to be disclosed beyond council chambers. Common sense dictated that the lack of a "confidential" label could not be interpreted as a green light to release personal information in contravention of FIPPA, particularly given that the meeting was in-camera.

I find that the disclosure of any personal information in the letters by the councillor on the Facebook page was not authorized by FIPPA. While this constituted a contravention of s. 30.4 of FIPPA, the councillor properly took down the letters that he posted when the City first demanded that he do so under s. 73.1.

Consulting group email and December 14, 2015 law firm letter remain posted

During this investigation my staff discovered that, in addition to the councillor posting the December 14, 2015 law firm letter on the Facebook page he administers, a member of the public also posted it to this page on May 19, 2016. When clicked, the hyperlink disclosed the December 14, 2015 law firm letter. We also learned that the same member of the public posted the consulting group email on the Facebook page on

November 22, 2016. The councillor administers and is responsible for that Facebook page and therefore controls its content.

The City issued written notices to the member of the public referred to in the preceding paragraphs, pursuant to s. 73.1 of FIPPA, on May 24, 2016 and on November 22, 2016 respectively, given that he possessed both the law firm letters and the consulting group email.

On May 27, 2016, the member of the public advised the City that he had destroyed the law firm letters. However, on November 27, 2016, in respect of the consulting group email, the member of the public stated that he would not destroy it.

We have discussed the November 27, 2016 response the City received from the member of the public. The City has now advised my office that it will re-issue a written notice, pursuant to s. 73.1 of FIPPA to the member of the public.

The City also advised my office that on July 25, 2018, it issued a further s. 73.1 notice to the councillor requiring him to securely destroy the documents posted on the Facebook page by the member of the public.

If the councillor refuses the City's demands, the City can ask the Attorney General of BC to petition the Supreme Court of British Columbia to enforce them. The City advises my office that it intends to do so if the councillor does not comply. I support the City's planned course of action and my office will assist the City as appropriate.

The posts containing personal information that appear on the Facebook page administered by the councillor, as of the writing of this letter, also constitute a contravention of s. 30.4 of FIPPA and can be prosecuted pursuant to s. 74.1. Prosecution of an offence under FIPPA by my office remains an option pending the outcome of the City's actions.

Protecting Personal Information

This letter should not be taken as criticism of the actions you have taken as the City's Corporate Officer and head under FIPPA. During our investigation, you, along with other City staff, cooperated fully with my investigators and took steps, as best you could, to protect personal information within the City's custody or control. Indeed, you reported the disclosures to my office and acted to contain the breaches by ordering the recovery of the improperly disclosed personal information. I commend you for this. The steps you took are those I would expect a public body to take when managing a privacy breach.

Nevertheless, our investigation found that the disclosures of the personal information in the report, email and letters were not authorized by FIPPA. In reviewing the evidence, I can see that some officers of the City, including some members of council, lack a basic understanding of their privacy obligations under FIPPA. The City needs to remedy this to prevent future abuse.

I recommend that the City take immediate steps to implement a privacy management program to ensure it can meet all of its obligations under FIPPA. Executive-level support is the backbone of successful privacy management. City council and officers of the City should lead by example by demonstrating commitment and support for effective privacy management.

This program should include designating a staff member responsible for reviewing privacy policies and security arrangements in place to protect the personal information in the custody or under the control of the City. A privacy policy that applies to every instance of collection, use or disclosure of personal information is a necessary component of the diligence required by s. 30.

I further recommend that all employees and officers of the City who handle personal information be made aware of their obligations under FIPPA. This privacy training should be comprehensive, mandatory and ongoing for all employees and officers. The City should track participation in that training.

Conclusion

Those who are entrusted to serve the public and who possess personal information by reason of their public duties have a responsibility to treat it with respect and in compliance with the law.

While there may be, in extraordinary circumstances, a lawful basis for public disclosure of sensitive personal information in a public body's custody or control, this is clearly not one of them. In this case, personal information was disclosed contrary to law and to the duty of trust required of public officials.

I have directed a senior member of my office to meet with members of council and senior City staff to discuss their legal responsibilities as outlined in this letter. I trust that the remedial approach I am taking in this case will ensure that I do not see a repeat of such incidents in Nanaimo.

My staff will follow-up with you for an update on the City's implementation of the recommendations in this reporting letter by November 20, 2018.

Sincerely,

ORIGINAL SIGNED BY

Michael McEvoy
Information and Privacy Commissioner
for British Columbia