



REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter No: 2018-4344-AP-2361
July 25, 2018

I BACKGROUND

1. This report on the Commissioner's conclusions is issued pursuant to section 67(1)(a)(i) of the *Right to Information and Protection of Privacy Act* (the "Act"),¹ following the investigation conducted by the Office of the Integrity Commissioner into a complaint submitted by the applicant.
2. The Applicant submitted an access-to-information request to the Regional Municipality of Tracadie (the "Municipality") on December 5, 2017 with a view to obtaining access to copies of studies presented by a consultant. In its response to the Applicant's request on January 31, 2018, the Municipality refused to disclose the requested documents in their entirety, pursuant to section 26(1)(a) of the Act. The Applicant was not satisfied with the Municipality's decision and subsequently filed a complaint with the Office of the Integrity Commissioner on February 21, 2018. The matter was then assigned to one of my Senior Legal counsel for her informal investigation in an attempt to resolve the matter informally.
3. To that end, my Senior Legal counsel notified the Municipality of the complaint and asked a number of questions relating to its decision not to disclose the requested documents. In addition, she asked the Municipality to provide her with a copy of the requested documents for review purposes. Following her review of the relevant documents, my Senior Legal counsel had additional questions for the Municipality concerning its decision to refuse access pursuant to section 26(1)(a) of the Act; nevertheless, after several attempts to obtain answers to her questions, she never received the Municipality's responses.
4. Consequently, since the complaint could not be resolved informally, the matter was referred to me for investigation purposes and for my conclusions, pursuant to section 73(1) of the Act.

II INVESTIGATION AND FINDINGS

5. The relevant documents are two copies of PowerPoint presentations (studies) prepared by MSC Consultants for the Municipality on July 17 and September 6, 2017. Focusing on a program aimed at transferring various roads from private to public ownership, both studies were intended to provide Municipal Council with an estimate of the program's costs. In addition, the study outlined the costs that each citizen/owner concerned would have to cover to transfer the roads from private to public ownership.

¹ SNB, c. R-10.6

6. According to explanations provided by the Municipality, these studies were presented to the Municipal Council during a closed-door meeting. During the ordinary council meeting on September 11, 2017, the Municipality also adopted a resolution to cancel the private road transfer program because a majority of the citizens/owners concerned refused to pay the cost difference in order to turn their private access into public roads. In the end, the Municipality decided not to follow the consultant's recommendations.
7. The objective of the discretionary exception set out in section 26(1)(a) is to protect information (not necessarily documents) established in connection with a public body's internal policy development processes:

26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal:

- a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown;

8. In general, information that is factual or statistical in nature, or that explains the context of an existing policy or legislative provision, is not covered by these general conditions.² However, information that analyzes a problem, beginning with the identification thereof, and goes on to outline potential solutions, concluding with specific recommendations, may be covered by section 26(1)(a) of the *Act*.
9. Therefore, the standard practice is to read the relevant documents line-by-line with a view to determining whether they contain information falling within the scope of this exception, rather than refusing access to the document altogether.
10. In addition, in order to refuse access to information falling within the scope of this section, the public body must exercise its discretion when determining whether disclosure is in the public interest and when reconciling these competing interests, keeping in mind the objectives of the *Act*.³ British Columbia's Freedom of Information and Privacy Commissioner identified various factors that public bodies must consider when exercising their discretion under this section:⁴
- the purpose of the legislation is to make public bodies more accountable;
 - the promotion of public confidence in the Ministries operations; and
 - the nature and sensitivity (or lack thereof) of the information; and

² This concept was accepted in a New Brunswick Court of Appeal decision: *New Brunswick Crown Counsel Association v. Minister of the Office of Human Resources* [2006 NBQB 320 (CanLII)].

³ *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 SCR 3, sections 22 and 28.

⁴ Order F09-02, 2009 CanLII 3226 (BC IPC), section 31.

- the passage of time, including a change in circumstances since the request.
11. Finally, pursuant to section 84(1) of the *Act*, the head of the public body has the burden of proof to demonstrate that the Applicant is not entitled to access the requested document, in whole or in part.
 12. For the purposes of my investigation, I accept the Supreme Court's conclusions in the *Babcock* decision, as well as the British Columbia Commissioner's conclusions concerning factors that the Municipality must consider when exercising its discretion to disclose the requested documents or not. Having reviewed the documents in question, I am not convinced that they fall within the scope of section 26(1)(a) of the *Act* because, in my opinion, the Municipality did not base its decision on the relevant factors when it refused access to the documents. My explanation is provided below.
 13. The documents in question were prepared for the Municipality to outline the costs associated with transferring the ownership of private roads. Most of the information contained in the documents is factual in nature (objectives, work to be performed, services to be provided, the private roads in question, a map of the municipal region in question, cost sharing). Therefore, this information cannot be protected pursuant to section 26(1)(a) of the *Act*.
 14. The other information in the studies consists of summaries of preliminary cost estimates for transferring the roads, including the unit and total costs of the work to be performed, the amount of gas tax funding, the VTS contribution amount, the deficit/surplus amount (or the difference between the cost of the work and the Municipality's contribution), the valuation amount and the property tax amount for each of the roads. In addition, the documents outline the gas tax funding and the contributions made by the Municipality and by the owners. They also include the next steps to be taken if the project goes ahead, i.e. the next meetings required, the signing of agreements, the timetable for the next steps and the consultant's recommendations.
 15. Having reviewed this information, I do not see how its disclosure could harm the Municipality. Although we do not have the benefit of more in-depth explanations from the Municipality in this regard, the general public is clearly aware of this project and some of these details because the citizen/owners affected by the project did not vote in favour of it due to excessively high costs. Therefore, the citizen/owners clearly must have been consulted on details of the costs before voting for or against the project. In this regard, I maintain that the information is not sensitive in nature. Moreover, the documents in question were prepared nearly a year ago.
 16. Based on the above factors, I am of the opinion that the Municipality erred in exercising its discretionary power in support of its refusal based solely on the fact that these documents were presented during a

closed-door council meeting and that they contain recommendations. Therefore, I do not believe that the Municipality met its burden of proof to establish that the Applicant was not entitled to access these documents.

IV RECOMMENDATION

17. For the above reasons and pursuant to section 73(1)(a)(i)(A) of the *Act*, I recommend that the Regional Municipality of Tracadie disclose to the Applicant both of the requested documents in their entirety.
18. In addition, pursuant to section 74(2) of the *Act*, the Municipality is required to notify the Applicant of its decision concerning this recommendation. If the Municipality decides to accept the recommendation, section 74(3) stipulates that it must take follow-up action within 20 business days of receipt of this report. If the Municipality decides not to accept the recommendation or if it fails to notify the Applicant of its decision, the applicant will be entitled to appeal the matter to the Court of Queen's Bench pursuant to section 75 of the *Act*.

This report was issued in Fredericton, New Brunswick on the 25th day of July 2018.

(Original signed by)

Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner of New Brunswick