



## REPORT OF FINDINGS

*Right to Information and Protection of Privacy Act*

Matter Nos: 2017-4238-AP-2296  
2017-4239-AP-2297

December 11, 2018

## I BACKGROUND

1. This report on the conclusions of my formal investigation is issued in accordance with section 73(1) of the *Right to Information and Protection of Privacy Act*<sup>1</sup> (“RTIPPA”) and is further to the investigation of two complaints submitted under section 68(1) thereof.
2. On December 8, 2017, the applicant complained to my office and expressed dissatisfaction with the responses issued by Opportunities NB (“ONB”) to his requests for information filed on September 21 and 28, 2017, through which he sought to obtain details on financial aid granted by ONB to certain companies. In particular, the requests concerned the information described below.

### **Request dated September 28, 2017 (file number AP-2296)**

3. In this request, the applicant sought to receive the following information for the period extending from September 22, 2014 to September 28, 2017:
  - a) the list of companies that received/concluded wage subsidy agreements;
  - b) the job creation targets, by company;
  - c) the amounts paid to each company, by fiscal year, and the remaining amounts; and
  - d) the number of jobs created, by company.
4. On October 30, 2017, ONB responded to the request and granted access to the list of companies having received/concluded a wage subsidy agreement, but refused to disclose, in accordance with sections 22(1)(b) and 30(1)(c) of the *RTIPPA*, the job creation targets, the subsidy amount, the remaining amounts and the number of jobs created.

### **Request dated September 21, 2017 (file number AP-2297)**

5. In his second request, the applicant sought to receive the following information for the period extending from September 24, 2015 to September 21, 2017:
  - a) the total amount of wage subsidies granted to a particular company, by year, since 2015;
  - b) the number of jobs for which wage subsidies were granted;
  - c) the government's annual targets for job creation by the company; and

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<sup>1</sup> SNB, c R-10.6

d) the government's financial commitments towards this company, by year, from 2015 to 2020.

6. On October 27, 2017, ONB responded to the request and granted access to the information concerning items a), c) and d) above, but refused to disclose, in accordance with sections 22(1)(b) and 30(1)(c) of *RTIPPA*, item b), i.e. the number of jobs for which wage subsidies were granted.

## II INVESTIGATION

7. Following the complaint process set out in *RTIPPA*, my staff initially attempted to resolve the complaints informally. To that end, on June 5, 2018, preliminary findings were shared with ONB, informing it that the relevant information could not be protected under sections 22(1)(b) or 30(1)(c) of *RTIPPA*. With a view to resolving the matters informally, ONB was asked to consider sending a revised response to the applicant granting him access to the requested information.
8. In a letter received on August 30, 2018, ONB indicated that it did not agree with the preliminary findings and was unwilling to issue a revised response with a view to resolving these matters.
9. In addition to the sections mentioned in its initial response, ONB, in its letter dated August 30, 2018, cited section 22(1)(c) of *RTIPPA* as an additional ground for its refusal to disclose the requested information, along with the recent decision of Justice Rideout of the Court of Queen's Bench concerning the interpretation of section 22.<sup>2</sup>
10. In that same letter, ONB also informed us that it was unable to provide the information for the period extending from September 22, 2014 to March 31, 2015 because the information in question was not in its possession since it predated ONB's creation. According to ONB, this information is the property of Invest NB.
11. Moreover, ONB indicated that some of the requested information, e.g. the names of the companies that signed financial aid agreements, the companies that received payments, the amounts granted and the type of financial aid, have been available online on the ONB's website since August 2018. At the time this report was being prepared, the information available online covered the period extending from April 1, 2015 to late September 2018. It is my understanding that the information is posted on the website on a continuing and quarterly basis for the agreements signed, and on an annual basis for the payments to companies.

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<sup>2</sup> *Medavie vs. GNB (Department of Health)*, 2018 NBQB 121

12. Since ONB refused to provide a revised response with a view to resolving the case in accordance with the preliminary findings, it was impossible to resolve these matters informally and they were referred to me for resolution and for the issuance of this report on my conclusions.

### III ANALYSIS AND FINDINGS

13. As indicated above, some of the requested information was disclosed in ONB's initial response and some information is now available on the ONB's website. Therefore, this report only deals with the information for which the issue of access is still in dispute, as follows:

- the job creation targets, by company;
- the remaining amounts to be paid to the companies;
- the number of jobs created, by company; and
- the number of jobs for which subsidies were granted to the company identified in the request for information dated September 21, 2017.

14. Having examined this information, I am of the opinion that it cannot be protected under sections 22(1)(b) and 30(1)(c), as claimed by ONB, and that it should have been disclosed to the applicant. In this regard, I am providing the following comments.

#### **Section 22(1)(b) – confidential information supplied by a third party**

15. Section 22 of *RTIPPA* sets out a mandatory exception designed to protect information whose disclosure could harm the commercial or financial interests of a third party. If the requested information meets the criteria established by this provision, it cannot be disclosed.
16. In the case at hand, ONB availed itself of section 22(1)(b) of *RTIPPA* to refuse access to the information. The mandatory exception stipulates as follows:

22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal:

[...]

commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; [our emphasis]

[...]

17. To avail itself of section 22(1)(b), the public body must be satisfied that the relevant information:
- is commercial, financial, labour relations, scientific or technical information;
  - was supplied to the public body by a third party, explicitly or implicitly, on a confidential basis; and
  - is treated consistently as confidential information by the third party.
18. In applying section 22, the public body must also consider section 22(3), which stipulates that sections 22(1) and (2) do not apply if the third party consented to the disclosure or if the information is publicly available.

### **Applicability to the case at hand**

- Nature of the information
19. As indicated above, the first stage of my analysis of the applicability of section 22(1)(b) involved determining whether the relevant information was commercial, financial, labour relations, scientific or technical information, within the meaning provided for in the exception.
20. The relevant information is clearly not labour relations, scientific or technical information; however, it could potentially be commercial or financial information.
21. The terms “commercial” and “financial” are not defined in *RTIPPA*; however, in a previous report,<sup>3</sup> we adopted the following definitions, which were adopted by Ontario's Office of the Access to Information and Privacy Commissioner:<sup>4</sup>

[Translation]

*Commercial information* designates information that pertains solely to the purchase, sale or exchange of goods or services. This term may apply variously to for-profit companies, non-profit organizations, small firms or large companies. The fact that a document may have real or potential monetary value does not necessarily mean that it inherently contains commercial information.

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<sup>3</sup> Paragraph 43 of the Report on the Conclusions – Complaints 2016-3042-AP-1642 and 2016-3136-AP-1689

<sup>4</sup> Please see Ontario's Access to Information Order PO-2695 (2011 CanLII 24269)

*Financial information* designates information that pertains to money or to its use or distribution and must contain specific data or make reference thereto. For example, this type of information includes methods for determining cost prices, pricing practices, data on profits and losses, indirect costs and operating costs.

22. Upon reading the requested information and the above definitions, I was satisfied that the relevant information is financial in nature because it pertains directly to third-party monetary resources and how third parties manage their funds. That being the case, I continued with the second phase of my analysis, which involved determining whether the information was supplied to ONB by a third party on a confidential basis.
- Supplied to the public body by a third party
23. I then had to determine whether the following information was supplied to ONB by a third party:
- the job creation targets, by company;
  - the remaining amounts to be paid to the companies;
  - the number of jobs created, by company; and
  - the number of jobs for which subsidies were granted to the company identified in the request for information dated September 21, 2017.
24. Many companies benefit from ONB's financial aid programs. To do so, they must provide information about their business operations so ONB can determine whether they meet the financial aid criteria. This process also applies to the wage subsidy program.
25. According to ONB, companies seeking a wage subsidy must provide certain types of information in their applications, including a business or expansion plan, financial statements, forecasts and the number of jobs that will be created, in addition to the amounts earmarked for salaries.
26. If the application is accepted, the company then enters into an agreement with ONB setting out the parameters of the financial aid to be granted, in addition to the requirements to be met. The agreement takes the form of a letter of offer that requires the company's signature as confirmation that the financial aid offer has been accepted. The letter also indicates the number of new full-time jobs that will be created, the average wage and the terms and conditions in place for disbursing the funds. A copy of the template for this letter was shared with my office during my investigation.

27. The applicability of section 22(1)(b) depends on one's interpretation of the phrase "supplied... by a third party". Although this phrase is not defined in *RTIPPA*, it was interpreted by my office in previous reports.
28. Regarding access to information, the phrase "supplied... by a third party" pertains to third-party commercial and financial information that is not likely to change, unlike information shared with the public body during negotiations or when a subsidy application is submitted.
29. The content of an agreement entered into by a third party and a public body is not normally recognized as having been "supplied... by a third party". Such information is instead regarded as having been mutually generated by the public body and the third party in order to conclude the agreement.
30. For example, when a third party shares its financial statements with a public body to obtain an offer or an agreement, these financial statements constitute financial information that was "supplied... by a third party" to the public body because it clearly belongs to the third party and is not likely to change. This information would then be protected under section 22(1)(b), unless the third party consents to its disclosure. It should be noted that ONB did not seek to obtain the third party's consent to disclose the information in the case at hand.
31. The information included in an agreement or a contract could also be protected under section 22(1)(b) if its disclosure might enable inferences to be drawn about confidential information supplied to the public body by the third party that is not included in the agreement or the contract.
32. In the case at hand, the companies that filed wage subsidy applications clearly provided information concerning their companies to ONB for the purposes of their financial aid applications. That said, in my opinion, the information at the centre of the complaints in question cannot be regarded as having been supplied to ONB within the meaning of section 22(1)(b). In this regard, I would like to share the following comments.

#### **AP-2296**

- *Job creation targets*

33. According to ONB, company applications must indicate the proposed number of jobs for which a subsidy is being requested. In this regard, it can be assumed that the information was supplied.

In light of the foregoing, however, my analysis went further because the job creation targets are included in the agreements signed with the companies. Indeed, each agreement includes the number of jobs for which financial aid is granted.

34. Following my interpretation of the *RTIPPA*, as well as my review of the jurisprudence and the relevant facts, I am of the opinion that the job creation targets cannot be protected under section 22(1)b) because they are included in the agreement. Therefore, this information was generated by the parties involved, instead of being supplied to ONB by the third party.

- *Remaining amounts to be paid to the companies and the number of jobs created*

35. I used the same approach in my analysis of the two other aspects of this request for information. In contrast with the job creation targets, which are speculative in nature, the remaining amounts to be paid and the number of jobs created actually reflect the results of the process.

36. In my opinion, the remaining amounts, as well as the number of jobs created, do not constitute information that can be protected under section 22(1)(b) because it was clearly not supplied to ONB by the third party.

#### **AP-2297**

- *Number of jobs for which a subsidy was obtained*

37. Following the same reasoning outlined above, I find that the number of jobs for which subsidies were granted to the company identified in Application AP-2297 does not constitute information supplied by the company to ONB.

38. Despite the fact that the company's financial aid application indicated the number of jobs that it hoped to create with the funding, ONB must approve this figure, which is subject to change during the negotiation process. The number of jobs specified in the company's application may differ from the number set out in the agreement between the parties. In my opinion, the number of jobs for which a subsidy was granted was negotiated, not supplied. Therefore, this information cannot be protected under section 22(1)(b) of *RTIPPA*.

- Supplied on a confidential basis and treated consistently as confidential



39. In light of my opinion that the relevant information was not supplied to the public body by the third party within the meaning of *RTIPPA*, it was not necessary to examine the third criterion for testing the applicability of section 22(1)(b), i.e. the issue of confidentiality.
40. Because I found that the requested information cannot be protected under section 22(1)(b), I then turned my attention to the potential applicability of section 30(1)(c), i.e. a discretionary exception dealing with the public body's economic and other interests.

### **Section 30(1)(c) – public bodies' economic and other interests**

41. ONB also availed itself of section 30(1)(c) of *RTIPPA* in refusing access to the requested information. This discretionary exception reads as follows:

30(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Province of New Brunswick, including but not limited to, the following information:

[...]

c) information the disclosure of which could reasonably be expected to result in a financial loss to a public body or to the Province of New Brunswick or prejudice the competitive position of or interfere with or prejudice contractual or other negotiations of a public body or the Province of New Brunswick;

[...]

42. In the case of a discretionary exception, the public body must first determine whether the relevant information is covered by the provision; if it is, the public body must exercise its discretion in determining whether access to the information should be granted or not.
43. When a complaint concerning the applicability of a discretionary exception is filed, the first step is to determine whether the information is covered by the *RTIPPA* section cited; if it is, it must be determined whether the public body exercised its discretion properly.
44. Under section 84(1), the burden is on the head of the public body to prove that the applicant has no right of access to the requested information in connection with proceedings initiated under *RTIPPA*.
45. In the course of an investigation conducted by my office, the public body must provide compelling arguments or proof explaining the decision to refuse access under a given exception. If the public

body cannot do that, the requested information cannot be protected and we must recommend disclosure.

46. In the case at hand, I am of the opinion that ONB did not meet the burden of proof in attempting to demonstrate that the disclosure of the relevant information was likely to result in a financial loss to a public body or to the province of New Brunswick, to harm its competitive position or to interfere with negotiations that it is conducting with a view to entering into contracts or for other purposes. In fact, ONB merely cited section 30(1)(c) without indicating the reasons why, in its opinion, the exception applied to the case at hand.
47. For the reason stated in paragraph 45 above, I am of the opinion that the information cannot be protected under section 30(1)(c) of *RTIPPA*.

### **Additional arguments**

48. In its letter dated August 30, 2018, ONB indicated that its refusal to disclose the requested information was also based on section 22(1)(c) of *RTIPPA*, i.e. a mandatory exception that reads as follows:

22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal:

[...]

c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to:

- (i) harm the competitive position of a third party,
- (ii) interfere with contractual or other negotiations of a third party,
- (iii) result in significant financial loss or gain to a third party,
- (iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or
- (v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[...]

49. Within the informal process, my staff asked ONB to specify on which provision of section 22(1)(c) it had based its decision to refuse access and to provide us with explanations concerning the applicability of section 22(1)(c). ONB refused to comply.
50. To avail itself of section 22(1)(c) with a view to protect information, a public body must be able to demonstrate that there is a direct link between the disclosure of the relevant information and the alleged harm.
51. Since ONB merely cited the *RTIPPA* provision without providing any compelling arguments or proof justifying its application of this exception, I am of the opinion that ONB did not meet the burden of proof of establishing that the applicant was not entitled to access the requested information under section 22(1)(c) of *RTIPPA*, as set out in section 84(1) concerning the burden of proof. Therefore, the information cannot be protected under this provision.

#### IV RECOMMENDATION

52. Under section 73(1)(a)(i)(A) of *RTIPPA*, I recommend that ONB's head agree to partial disclosure of the relevant documents and to disclose the following information to the applicant for the period extending from April 1, 2015 to September 28, 2017.

##### Request dated September 28, 2017 (AP-2296)

- The job creation targets, by company.
- The remaining amounts to be paid to the companies.
- The number of jobs created, by company.

##### Request dated September 21, 2017 (AP-2297)

- The number of jobs for which subsidies were granted to the company identified in the request for information.

53. As regards the information preceding the creation of ONB, i.e. prior to April 1, 2015, I am satisfied that ONB does not have this information in its possession and thus cannot provide it to the applicant.

54. As regards the financial aid paid to the companies, the amounts are now available online on the ONB's website. Since the applicant is able to consult this information, I am of the opinion that the appropriate access has been granted.
55. In accordance with section 74(2), ONB's head has 20 business days following receipt of this report to advise the applicant and my office whether or not the above recommendation is accepted.
56. If the recommendation is accepted, section 74(3) stipulates that follow-up action must be taken within 20 business days following receipt of the report. If the recommendation is not accepted, ONB's head must inform the applicant of the grounds for the decision not to accept the recommendation and must inform him of his right under section 75 to file an appeal with the Court of Queen's Bench.
57. It should also be noted that, in accordance with section 74(4), if the head of a public body fails to notify the applicant within 20 business days after making his or her decision, the failure shall be treated as a decision not to accept the recommendation.

This report was issued in Fredericton, New Brunswick on December 11, 2018.

Original signed by

The Hon. Alexandre Deschenes, Q.C.  
Integrity Commissioner