

Office of the
INTEGRITY
COMMISSIONER
New Brunswick



Bureau du
COMMISSAIRE
À L'INTÉGRITÉ
Nouveau-Brunswick

REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Files:

2018-4793-AP-2605

2018-4794-AP-2606

May 14, 2019

I BACKGROUND

1. This Report on the Findings of my formal investigation is issued in accordance with sec. 73(1) of New Brunswick's *Right to Information and Protection of Privacy Act*¹ ("the Act") and follows the investigation of two complaints submitted to my office pursuant to s. 68(1).
2. On November 28, 2018, the Applicant submitted a complaint to my office stemming from his dissatisfaction with the responses provided by the Regional Municipality of Tracadie ("the Municipality") to his information requests dated October 16, 2018. The Applicant was seeking to obtain detailed information on an agreement with Embou Productions Inc., in addition to the construction of a communications tower.

Embou Productions Inc. (file AP-2605)

3. In this request, the Applicant sought to receive all information concerning an agreement entered into by the Municipality and Embou Productions Inc., including a copy of the agreement with all special provisions relating thereto, together with versions of any agreements drafted subsequently.
4. The Municipality responded to the request on November 14, 2018 and granted access to a full copy of the agreement. The Municipality, however, did not address the other points raised in the request.

Communications tower (file AP-2606)

5. In his second request, the Applicant sought to obtain the following information on the communications tower:
 - a) The estimated project costs at the outset and approved by Municipal Council;
 - b) The current costs of the project and the expected costs upon completion;
 - c) The reasons why the project is overrunning the expected costs and why it is not finished; and,
 - d) The expected date for the completion of the project and the date on which the tower will be operational.
6. On November 14, 2018, the Municipality responded to the request by granting access to the updated project costs, but indicated that it had no other documents that were relevant to the request.
7. In addition, the Municipality indicated to the Applicant that the Act grants the right to access documents but that its purpose is not to provide explanations.

¹ L.N.B., ch. R 10.6

II INVESTIGATION

Informal resolution process

8. In accordance with the complaint process set out in the *Act*, the files were assigned to a lawyer within my office, who was tasked with looking into the complaints and attempting to resolve the matters informally.
9. Following her review, the lawyer assigned to the files noted that the Municipality did not undertake an adequate search to identify all relevant documents in its possession and/or under its control. It is true that the purpose of the *Act* is not to provide explanations or responses to questions; nevertheless, if the public body has documents in its possession containing such explanations or responses, it must process the documents and refer to them when formulating its response.
10. Since that was indeed the case, the lawyer requested that a search be carried out immediately for each file and that all relevant documents identified be sent to her for review. Although the Municipality indicated its willingness to conduct the search and provide her with the relevant documents, it did not do so within the 90-business-day time limit set out in the *Act*.
11. For that reason, it was impossible to resolve these matters informally. Therefore, they were entrusted to me for my own review and findings.

Commissioner's formal investigation

12. Having closely examined the files in question, I noted that a formal investigation of these files would need to be carried out. In this regard, the Municipality was notified in my letter dated April 5, 2019 of my intention to conduct a formal investigation. In that letter, I also asked the Municipality to share its comments with me by May 17, 2019.
13. As I have yet to receive any comments from the Municipality, I must conclude my investigation by publishing this report containing my findings.

III ANALYSIS AND FINDINGS

Requirements under the *Act*

14. It is common knowledge that under the *Act*, any person is entitled to request and receive information relating to the public business of public bodies, including any activity or function carried on or performed by any public body to which the *Act* applies. It should be noted that this right is limited by certain exceptions to disclosure set out in sections 17 to 33.

15. As a public body within the meaning of the *Act*, the Municipality is required to respond to information requests submitted to it, in accordance with the provisions of the *Act*. Among other things, the Municipality must provide a timely, complete and clear response.
16. To that end, the Municipality must begin by conducting a search to identify and recover all documents relevant to the request. Conducting a search is the first step when processing an information request and, in my opinion, it is the most important one. It is only when all relevant documents have been identified that the Municipality will be able to determine the access level to be granted. The right to access is determined by conducting a careful review of the contents of each document; any decision to refuse access must be based on a provision of the *Act*.
17. For a search to be complete, the Municipality must review all documents in its possession and/or under its control, in either paper or electronic format. The *Act*, I repeat, applies to all documents in the Municipality's possession, including, for example, emails, handwritten notes, video recordings, etc.
18. In addition to carrying out a complete search, the Municipality must also ensure that the search is conducted on a timely basis in order to comply with the deadlines set out in the *Act*. If additional time is needed to carry out a search, the Municipality may avail itself of sec. 11 of the *Act*, which authorizes an extension of the deadline if a more in-depth search is needed when responding to the request.
19. I would like to add that in order to ensure compliance with the *Act*, a response to an information request must identify the documents found during the search and must indicate whether access will be granted to them. If access is refused, the public body must identify the applicable section of the *Act* and must explain how the section applies to the document in question. The response must provide the applicant with information on which documents exist, whether access is granted and, if it is not, the reasons why. To meet those requirements, the public body must have conducted an adequate search in the first place.

Files AP-2605 and AP-2606

20. Regarding the files in question, I agree with the findings of the lawyer assigned to the files to the effect that the Municipality did not meet its requirement under the *Act* to provide an adequate response because when processing the requests, it did not conduct a proper search that would have enabled it to identify all relevant documents.
21. Even more troubling is the fact that the Municipality was given several additional months during our investigation yet still proved unable to conduct the requested search or to share the relevant documents with us. It is essential that the document search take place while processing the information request. It

is unacceptable that the Municipality has still not identified the relevant documents six months following the submission of the requests.

IV RECOMMENDATION

22. In light of the foregoing and pursuant to sec. 73(1)(a)(iii) of the *Act*, I recommend that for each file (AP-2605 and AP-2606), the head of the Municipality complete the search for the relevant documents, determine whether access should be granted to them and provide a response to the Applicant in accordance with the provisions of the *Act*.
23. In accordance with sec. 74(2), the head of the Municipality has 20 business days after receiving this report to notify the Applicant, as well as my office, whether or not the above recommendation is accepted. If it is accepted, sec. 74(3) stipulates that the head must comply with the recommendation within 20 business days after receiving the report. It should be noted that the Applicant will be entitled to complain to my office if he is not satisfied with the content of the responses provided.
24. If the head of the Municipality does not accept the recommendation, the Applicant must be notified of the reasons underlying the decision not to accept the recommendation and must be informed of his right, pursuant to sec. 75, to appeal the matter to the Court of Queen's Bench of New Brunswick. It should also be noted that, pursuant to sec. 74(4), if the head of the Municipality fails to notify the applicant within 20 business days after making his or her decision, this failure shall be treated as a decision not to accept the recommendation.

This Report was issued in Fredericton, New Brunswick on the 17th day of May 2019.

Original signed by
Charles Murray
Integrity Commissioner