Report of Findings: 19/20-AP-075 and 19/20-AP-080
Right to Information and Protection of Privacy Act
Harbour Station Commission

March 12, 2020

Note: 2019 amendments to New Brunswick legislation transferred the responsibility for the access and privacy mandates from the Office of the Integrity Commissioner to the Office of the Ombud for New Brunswick.

Summary: On June 5, 2019, the Applicant made an access request to the Harbour Station Commission for the current license agreement between the Commission and the local Major Junior Hockey Club that is in place until May 14, 2020, including the most recent version with two amendments. On June 6, 2019, the Applicant made a second request for an amending license agreement signed between the parties for use of Harbour Station until May 31, 2024. The Commission refused access in full to the requested information, citing ss. 21(1) and 21(2)(g) (unreasonable invasion of privacy), as well as ss. 22(1)(b), 22(1)(c)(i), 22(1)(c)(ii), 22(1)(c)(iii), and 22(1)(c)(iv) (disclosure harmful to a third party's business or financial interests). The Applicant was not satisfied with the Commission's response and filed a complaint with this Office.

The Ombud did not agree that the agreements consist of confidential third party information or that the disclosure of the information contained in these records could reasonably be expected to harm the third party's business interests as per ss. 22(1)(b) and (c). The Ombud recommended that the Commission disclose the 2004, 2005, 2009, and 2015 agreements in full, along with a number that was redacted in the version of the 2019 amending agreement that the Applicant received outside of the formal processes under the *Act*. As the Applicant is already in possession of the two most recent amending agreements, the Ombud did not make a finding with respect to these records.

Statutes Considered: *Right to Information and Protection of Privacy Act*, SNB, c. R-10.6, ss.21(1), 21(2)(g), 22(1)(b), 22(1)(c)(i), 22(1)(c)(ii), and 22(1)(c)(iii).

Authorities relied on: *Medavie v. Province of New Brunswick*, 2018 NBQB 121 (CanLII), Order MO-2852, *Re: Hamilton Entertainment and Convention Facilities Inc*, 2013 CanLII 11999 (ON IPC), Review Report 195-2015 & 196-2015, *Re: Ministry of Central Services*, 2016 CanLII 3619 (SK IPC), Order F16-27, *Re: BC Pavilion Corporation*, 2016 BCIPC 29 (CanLII), *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (CanLII), *Carmont v. Province of New Brunswick*, 2018 NBQB 53 (CanLII).

I INTRODUCTION

1. On June 5, 2019, the Applicant made an access request to the Harbour Station Commission ("the Commission") for the following:

> A copy of the current license agreement between the Harbour Station Commission and the [local] Major Junior Hockey Club... It's the agreement in place until May 14, 2020, and it should be the latest version that includes two amendments.

2. On June 6, 2019, the Applicant submitted a second access request to the Commission for the following:

> An amending license agreement signed between the Harbour Station Commission and the [local] Major Junior Hockey Club (Saint John Sea Dogs) for the use of Harbour Station until May 31, 2024.

3. The Commission responded to both access requests by letter dated July 10, 2019, in which it identified the relevant records in its possession, consisting of the original 2004 agreement and subsequent amending agreements of 2005, 2009, 2015, 2018, and 2019. The Commission refused access in full to these records, stating that disclosure would constitute an unreasonable invasion of third party privacy, as they contain information that describes third party sources of income or financial circumstances, activity or history (ss. 21(1) and 21(2)(g)). The Commission also refused access on the basis of s. 22(1) of the *Act*, stating that the records contain commercial, financial, and/or labour relations information supplied to it on a confidential basis by third parties (s. 22(1)(b), and that disclosure could reasonably be expected to harm third party business interests as per s. 22(1)(c). The Commission also indicated that the third parties had refused to consent to disclosure of the requested documents.

4. The Applicant was not satisfied with the Commission's decision and we received complaints from the Applicant on August 6, 2019 and August 8, 2019. In making these complaints, the Applicant raised the fact that some of the information had already been provided to a media outlet in 2013 as a result of an access request at that time and that the Applicant's position is that the public has the right to know the details of past and current leases for the use of Harbour Station by the hockey team.

5. The matter was not resolved informally and the Ombud conducted a formal investigation pursuant to s. 68(3) of the *Act*. During the formal investigation process, the third party was notified of this matter and invited to submit representations for my review.

II BACKGROUND

6. This is not the first time that an access request has been made to the Commission for the release of the licensing agreement between the venue and the hockey team. In 2013, a member of the media made a request to the Commission, as well as other publicly owned venues around the Province, for copies of their respective licensing agreements with local hockey teams.

7. At that time, the member of the media who made the request received copies of the agreements between the Commission and the hockey team. Based on subsequent media reporting at the time, this member of the media had received copies of the original 2004 agreement, as well as the subsequent 2005 and 2009 amending agreements.[1]

8. Since 2013, the original 2004 agreement has been the subject of three subsequent amending agreements in 2015, 2018, and most recently, in 2019.

9. On June 3, 2019, the City of Saint John, at an open Council meeting, confirmed that a new licensing agreement had been reached between the Commission and the hockey team, and that the City had agreed to provide the hockey team with financial support over the next five years. The City's contribution payments were contingent on the parties agreeing to an additional five-year license agreement until 2024 and securing a naming rights partner for the facility.[2]

10. The Applicant's two access requests to the Commission for the licensing agreements were made shortly after this development.

11. After making the present complaints, the Applicant informed this Office that they had received copies of the 2018 and 2019 amending agreements in August 2019 from another source, including an unredacted copy of the 2018 agreement and a redacted version of the 2019 agreement with one redaction to the amount payable under the naming rights agreement.

12. As the Applicant has received copies of the 2018 and 2019 amending agreements, albeit outside the formal access and subsequent complaint process, this renders further investigation on this Office's part a moot point, with the exception of the redacted amount in the 2019 amending agreement. As

[1] "Hockey contracts in Saint John, Bathurst differ in approach," CBC New Brunswick, October 10, 2013: https://www.cbc.ca/news/canada/new-brunswick/hockey-contracts-in-saint-john-bathurst-differ-in-approach-1.1958359.
[2] Common Council Meeting Agenda: June 3, 2019, City of Saint John: https://pub-saintjohn.escribemeetings.com/FileStream.ashx?DocumentId=940, at pp. 354-360.

such, I will not address the question of disclosure of the 2018 amending agreement or the remainder of the information in the 2019 amending agreement.

III ISSUES

13. The issue before me is whether the requested information merits protection from disclosure under ss. 21 and/or 22 of the *Act*. The information at issue consists of the original 2004 agreement between the Commission and the hockey team, and the subsequent amending agreements of 2005, 2009, and 2015, as well as the redacted information in the 2019 amending agreement.

14. Under s. 84(1) of the *Act,* the burden is on the public body to prove that the Applicant has no right of access to the requested information.

IV DECISION

15. In its submissions to this Office, the Commission indicated that it was relying on the confidentiality provisions set out in the original 2004 agreement between the parties as grounds to refuse access, and that the third party's objections to disclosure of the requested information informed the Commission's response to these requests.

Confidentiality provisions in the licensing agreement

16. As indicated above, the Commission indicated that it is contractually bound to protect information, based on the confidentiality provision set out in the original 2004 agreement:

> The Commission and the Licensee agree to hold all Confidential Information obtained from each other in confidence (including, without limitation, the terms of this License Agreement) unless such disclosure is required by law. This obligation will not apply to information in the public domain, information subsequently coming into the public domain by means other than disclosure by a party in breach of this section, information disclosed to a party by a third party with no obligation of confidentiality to the other party and information possessed by a party prior to disclosure of the Confidential Information to that party by the other party to this License Agreement.
>
> [Emphasis added]

17. As a starting point, I take this opportunity to note that a public body cannot, through a contractual agreement with a third party, lessen or diminish its obligations with respect to transparency and accountability in the conduct of public business on behalf of the public it serves.

18. Confidentiality clauses in contractual agreements speak to the intentions and nature of the parties. It is a truism that parties cannot agree amongst themselves to create or exempt themselves from obligations beyond what those which permitted or authorized by law. That said, contracts between private parties commonly default to confidentiality. This is distinctly not the case when public bodies contract, and private actors should understand that in choosing to contract with public bodies, confidentiality of the sort which may be routine in private contracts may not be possible. Private-public contracts will as a matter of public policy and statutory provision take place within a framework which places primacy on transparency. Government's stated and statutorily enshrined duty to allow citizens to inform themselves as to what government is doing, and how it is spending public funds – contracting with a private body does not lessen this duty. Where exceptions to the general rule of transparency are sought, they should be specifically enumerated and clearly rooted in statutory provisions.

19. In the *Medavie v. Province of New Brunswick*[3] case cited by the third party in its objections to disclosure, I note that discussions about possible disclosure under the *Act* were part of the negotiation process between the parties. I was pleased to learn that this had occurred, as it gave the third party advance notice to expect that public disclosure of information about the resulting agreement could and should be anticipated. Conducting business with public bodies means that third parties must understand that many of the details about these arrangements will be subject to public disclosure under the *Act*. I would encourage all public bodies to raise this as in issue with third parties as early as possible in the negotiation stage and to include a provision in the resulting contracts that disclosure may be required in keeping with the *Act*.

20. On this point, I would also caution both public bodies and third parties about making agreements between themselves about what information will be kept confidential about an agreement where it is possible that it would not be protected from disclosure under the *Act*. As indicated above, public bodies cannot contract out of their statutory transparency obligations.

21. In this case, I note that the confidentiality provision as set out in the original 2004 agreement does not create a blanket restriction on the disclosure of the agreement by the parties, and in fact recognizes that in certain circumstances, disclosure of information that is defined as confidential for the purposes

[3] *Medavie v. Province of New Brunswick*, 2018 NBQB 121 (CanLII).

of this agreement may be required by law. This would include cases where disclosure is required under the *Act*.

22. As such, I do not find that the Commission can rely on the confidentiality clause as set out in the original 2004 agreement between the parties as grounds to refuse access and will next consider whether the requested information merits protection from disclosure under the exceptions claimed by the Commission and the third party.

Section 22(1): Disclosure harmful to third party business or financial interests

23. The relevant provisions of s. 22(1) of the *Act* state:

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

24. While the Commission's response letter to the Applicant also cited s. 22(1)(c)(iv) of the *Act*, no details were provided as to why this exception may apply, and as such, I will not consider this provision further.

22(1)(b): Confidential third party business information

25. Section 22(1)(b) is a mandatory exception to disclosure, which means that a public body is not permitted to disclose information that falls within its scope, unless the conditions that would otherwise authorize or require disclosure under ss. 22(3), (4), or (5) are met.

26. To establish that information falls within the scope of this exception, the public body must demonstrate that the following three criteria are met:

- the information at issue is commercial, financial, labour relations, scientific or technical information;

- the information was supplied to the public body by a third party; and
- the information was supplied by a third party on an explicitly or implicitly confidential basis, and that this information has been treated consistently by the third party as confidential.

27. If any of these criteria are not met, the exception does not apply.

Is the information commercial, financial, labour relations, scientific or technical in nature?

28. The *Act* does not define "commercial" or "financial" information; however, these terms are also used in other Canadian jurisdictions' respective freedom of information legislation. In Ontario, these terms are also used in the equivalent exception to disclosure under s. 10 of the *Municipal Freedom of Information and Protection of Privacy Act*, and the interpretation of these terms as adopted by the Ontario Information and Privacy Commissioner are as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010], The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].[4]

29. I agree with and adopt the above interpretation of the terms "commercial" and "financial" for the purposes of s. 22 of the *Act*.

30. The licensing agreements in this case contain provisions outlining the terms of the agreement between the parties for the use of the Commission's facilities by the hockey team, including the length of the agreements, sales and revenue figures, parking, ticketing, and various other terms agreed to by the parties.

31. I am satisfied that the information in these agreements consists of commercial and financial information for the purposes of s. 22(1) of the *Act,* thus meeting the first part of the test.

[4] Order MO-2852, *Re: Hamilton Entertainment and Convention Facilities Inc*, 2013 CanLII 11999 (ON IPC), at para.31.

Was the information supplied to the Commission by a third party?

32. For the second part of the test to apply, the information at issue must have been supplied to the Commission by a third party. Information may qualify as supplied if it was directly provided to the public body by a third party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[5]

33. In this case, the original and amending agreements set out the negotiated terms between the parties for the hockey team's use of the Commission's facilities.

34. The contents of a contract between a public body and a third party generally do not qualify as consisting of information that was supplied by a third party. Rather, the terms of contractual agreements are better categorized as mutually generated by the parties.

35. This is consistent with the approach adopted by other Canadian access oversight bodies in interpreting their respective similar third party business information exceptions to disclosure.[6] Other jurisdictions, including British Columbia and Saskatchewan, have identified two exceptions to the premise that information in contracts is mutually generated, rather than supplied. If either of the two following situations apply, the information at issue may be considered as having been supplied by the third party:

> Inferred disclosure –where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body;
>
> Immutability – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.[7]

36. As the information at issue is the final result of negotiations between the Commission and the hockey team, which resulted in the original licensing agreement and subsequent amending agreements agreed to and executed by both parties, I do not accept that the information contained in these agreements was supplied by the hockey team to the Commission. I find that they were mutually generated.

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[5] Review Report 195-2015 & 196-2015, *Re: Ministry of Central Services*, 2016 CanLII 3619 (SK IPC), at para. 26.
[6] See for example, Order F16-27, *Re: BC Pavilion Corporation*, 2016 BCIPC 29 (CanLII), at para. 33 and *ibid.*, at para. 38.
[7] *Supra,* note 4 at para. 32.

37. Having reviewed the agreements at issue, I do not see any evidence to support a finding that either of the two above-noted exceptions would apply to any of the information at issue should otherwise be protected under s. 22(1)(b).

38. As the second part of the test has not been met, I find that s. 22(1)(b) does not apply in this case.

Was the information provided on an understanding of confidentiality and treated consistently by the third party as confidential?

39. While I need not address the third part of the test on confidentiality where the second part of the test has not been met, I will for the sake of completeness.

40. While it is clear that the parties had turned their minds to their intentions with respect to the confidentiality of information related to the licensing agreement, as indicated by the confidentiality clause in the original 2004 agreement, as I stated above, it does not create a blanket prohibition on all disclosures of information related to the agreements.

41. Throughout the complaint process, the third party maintained its position that the requested information falls within the scope of this provision, as it contains the types of information described in this exception and that it has consistently treated this information as confidential.

42. Even if I had found that the information at issue had been supplied by a third party to the Commission to satisfy the second part of the test, I would find that the assertion of confidentiality in this case would fail in part for the following reasons.

43. As indicated above, in 2013, a member of the media made an access request to the Commission for the agreements between it and this hockey club.

44. During the investigation process, there was disagreement between the parties as to what and how disclosure took place at that time. Based on the information provided during the investigation, as well as my review of the media reporting on this issue that was published in October 2013, I find that the original 2004 agreement, along with the amending agreements of 2005 and 2009, were disclosed in full with consent of the team, and possibly directly by the team's senior management at that time.

45. As a result, I do not agree with the assertion that the hockey team has consistently treated the 2004, 2005, and 2009 agreements as confidential, based on their prior disclosure in full in 2013. For these

reasons, I would not have agreed that the third part of the test for s. 22(1)(b) was met with respect to these records.

46. As to the remaining relevant records, it does not appear that the 2015 amending agreement was subject to prior disclosure. As for the 2018 and 2019 amending agreements, I note that the Applicant is now in possession of these two records, although they were disclosed outside of the access request and subsequent investigation process. If the source of disclosure of the 2018 and 2019 amending agreements was the hockey team, then the same reasoning above would apply; however, as I find the s. 22(1)(b) exception does not apply in any event, this is a moot point.

22(1)(c): Disclosure could reasonably be expected to harm third party interests

47. Section 22(1)(c) is a mandatory exception to disclosure, which means that a public body is not permitted to disclose information that falls within its scope, unless the conditions that would otherwise authorize or require disclosure under ss. 22(3), (4), or (5) are met.

48. To establish that information falls within the scope of this exception, the public body must demonstrate that the following two criteria are met:

- the information at issue is commercial, financial, labour relations, scientific or technical information; and
- the disclosure of this information could reasonably be expected to result in one or more of the types of harm set out in ss. 22(1)(c)(i) to (v) of the *Act*.

49. The s. 22(1)(c) exception merits different considerations than s. 22(1)(b), as it requires an assessment of whether harm to a third party could reasonably be expected to occur as a result of the disclosure of the information at issue. The widely-recognized standard of proof for harms-based tests relating to third party information was set out by the Supreme Court of Canada in the *Merck Frosst* decision:

> [204] …A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason…. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively": Watt v. Forests, [2007] NSWADT 197 (AustLII), at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove

> that harm is more likely than not to occur would impose in many cases an impossible standard of proof.
>
> [206] To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.[8]

50. In providing submissions to this Office in support of a finding that information is protected under the s. 22(1) exception, objections to disclosure should set out detailed and convincing evidence about how the alleged type(s) of harm could reasonably be expected to occur as a result of disclosure. Vague assertions that knowledge of certain details may harm a third party's business interest will not suffice, and there must be some specificity as to the nature and context of that risk. Specifically, the overall cost to the public treasury of an agreement or contract should normally be expected to be disclosed through the myriad of accountability frameworks and mechanisms which regulate public bodies. Assertions otherwise would require detailed and convincing evidence as to the mechanism by which such information, if publicly known, would lead to harm. Mere assertions that there may be some possible adverse impact in the future or reputationally will not be sufficient to overcome the counterweight obligation of public bodies to inform citizens as to what decisions have been made and how much public monies are spent.

51. In this case, ss. 22(1)(c)(i), (ii), and (iii) were raised as grounds to protect the agreements in full.

Is the information commercial, financial, labour relations, scientific or technical in nature?

52. As explained above in the discussion on the applicability of s. 22(1)(b), I find that the information contained in the agreements in question constitute commercial and financial information for the purposes of s. 22(1)(c) of the *Act*, as they contain provisions outlining the terms of the agreement between the parties for the use of the Commission's facilities by the hockey team.

53. As I find the first part of the test has been met, I will next consider whether disclosure of these agreements could reasonably be expected to result in the types of harm described in ss. 22(1)(c)(i), (ii), and/or (iii) of the *Act*.

[8] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (CanLII).

54. As the third party's arguments against disclosure under each of these provisions are related, I will address them together below. As the third party expressed concerns about the disclosure of the details contained in their representations to this Office, this Report will only give a general summary of the main points of these arguments.

Harm to the third party's business or financial interests as a result of disclosure

55. In the third party's view, disclosure of these agreements would cause significant harm to its competitive position, interfere with its contractual negotiations, and as a result, cause significant financial loss to the third party.

56. The third party is of the view that disclosing these agreements would not only set out the full history of its contractual relations with the Commission, but would also provide information about its past and future commercial strategies, which the third party states could be used by its competitors to undercut them in the market place. The third party also raised concerns about the impact of disclosure of these agreements with respect to its competitive position and other negotiations.

Recent New Brunswick court decisions on s. 22

57. In support of its position, the third party made reference to two recent New Brunswick court decisions on s. 22: *Carmont v. Province of New Brunswick*[9] and *Medavie v. Province of New Brunswick*,[10] in which the court upheld the protection of certain kinds of financial and commercial information in contracts between public bodies and third parties. While the third party stated that it appreciated that the funding agreements in the *Medavie* case is different than this situation, it believed that a court would apply similar considerations.

58. As for the *Carmont* and *Medavie* court decisions cited by the third party, I note that the vast majority of the information in the contracts were disclosed to the applicants in those cases prior to being referred to the courts – only specific financial and commercial information were at issue, not the agreements in their entirety. On this basis alone, neither of these decisions support a finding that the agreements at issue in this case be protected in full.

59. The contracts in these two cases were respectively for the operation of nursing home facilities and the provision of ambulance services throughout the Province by private companies. The information at

[9] *Carmont v. Province of New Brunswick*, 2018 NBQB 53 (CanLII).
[10] *Supra,* note 3.

issue before the courts were specific details only, not the entire agreements. In the nursing home case, the information at issue included per diem rates, as well as the total number of annual bed days and the number of full-time equivalent positions for each nursing home. In the *Medavie* case, the details at issue included unit hours, the cost per unit hour, the cost per staffed hour, call volume by regions, formulas, and budget costs.

60. In my view, the nature of the agreements in those cases differ from the ones at issue in this case, as the agreements between the Commission and the third party are for access to and use of a publicly owned facility to host the third party's hockey games. While the details of the arrangements between the parties have changed since the original 2004 agreement, all of the agreements set out the parties' respective rights and obligations and speak to the overall management of the facility by the Commission, including the amounts to be paid either to or by the parties as part of the contractual relationship. In my opinion, details about rent payments and participation payments to be paid or received by the parties are quite different in nature to the types of information at issue in the *Carmont* and *Medavie* cases and thus merit different considerations in determining whether that kind of information is protected from disclosure under s. 22(1)(c) in these circumstances.

Recent developments with respect to the operation of the facility

61. The third party also raised concerns about disclosure of these agreements, given recent developments respecting the facility. In January 2020, the City of Saint John issued a public Request for Statements of Interest for the purchase or lease, and related operation, of the facility. The third party is concerned that the disclosure of the requested agreements would reveal details about its financial relationship with the Commission that could be used against it in the event that another entity purchases or otherwise takes over the operations of the facility, and possibly impact the upcoming negotiations in this process.

62. I have carefully considered these recent developments and the potential impact of disclosure of these agreements at this time. I find it difficult to accept the argument that the details contained in these agreements could impact negotiations as a result of the City's Request for Expressions of Interest to take over the operation of the facility. Presumably, any serious contender who is in negotiations for taking on this role would be made privy to the details of the existing contractual agreements for the facility as part of due diligence considerations, thus rendering the argument on this point moot.

Application of s. 22(1)(c) to the requested agreements

63. In turning to the agreements at issue in this case, as indicated above, the original 2004 agreement and 2005 and 2009 amending agreements were disclosed to a member of the media in 2013, and no evidence was presented as to how this previous disclosure has had a negative impact on the third party's interests, which I certainly would have been interested in considering in determining whether further disclosure should take place in this case. As I accept that these records were previously disclosed to a media applicant in 2013 with the full consent and cooperation of the third party at that time, it is difficult to accept the argument that disclosure of this same information at this time could be expected to result in harm to the third party's interests as alleged. Where the applicant in that case received these records as a result of an access to information request, neither the Commission nor the third party can be certain as to how many people may already be privy to all of the contents of these agreements. In fact, the applicant in that case did publicly report on certain details in these agreements in October 2013.

64. While the previous disclosure of the 2004, 2005, and 2009 agreements may not mean that they should be considered as being publicly available, I do find this a relevant factor in assessing the third party's assertion of harm that could reasonably be expected to result in the event that this same information were to be disclosed at this time.

65. As these records were previously disclosed to a member of the media in 2013, and no evidence was presented to me on how that disclosure caused harm to the third party's business interests at the time, I do not agree with the third party's assertions that further disclosure of the same information at this time could reasonably be expected to harm its competitive interests, interfere with its current and anticipated negotiations, or result in significant financial loss or gain to the third party or another third party.

66. As such, I find that the 2004, 2005, and 2009 agreements should be disclosed to the Applicant in full.

67. As for the 2015 amending agreement, it does not appear to have been subject to previous disclosure, thus this is not a relevant factor with respect to this record. The third party is specifically concerned about the disclosure of two clauses in this agreement that set out certain payment structures between the parties and details about a then anticipated request for proposal process to market and sell the naming rights for the facility, the disclosure of which the third party states will harm its competitive position and could be used by competitors and other entities to their advantage.

68. Having reviewed the 2015 agreement as well as the stated objections to disclosure, I do not find that disclosure could reasonably be expected to result in the harms as stated by the third party. While the disclosure of information about a specific payment structure between the parties would reveal

financial information about the third party, I am not convinced by the evidence presented by the third party that disclosure could be expected to result in harm to its interests as it stated. I note that the payment structure is not solely the third party's financial information, but also the Commission's financial information, and that this fact also supports a finding in favour of disclosure.

69. As for the details about the request for proposal process for naming rights for the facility, I note that some of this information is now publicly known, as this process was publicly announced in 2015 and an agreement was reached with the successful proponent last year. The remainder of the details set out the payment structure for the naming rights that were to be set out in the request for proposal.

70. Given that much of the information in this provision sets out details of a process that has since unfolded in the public domain, I find it difficult to accept the third party's agreements against disclosure. Again, this information is not solely about the third party, as it sets out the process to be followed in issuing a public request for proposal for naming rights for the facility, which is owned and operated by the Commission.

71. For these reasons, I find that the 2015 amending agreement should be disclosed in full to the Applicant.

72. As for the 2018 and 2019 amending agreements, as indicated above, as the Applicant already has copies of these records in their possession, there is no need for me to consider the third party's position with respect to these records or to make a decision with respect to further disclosure.

73. That being said, there was one amount that was redacted in the 2019 agreement in the copy received by the Applicant setting out a fee that is to be payable under the naming rights agreement for the facility. While I did not receive any specific arguments on why this figure should be protected from disclosure, I have considered the third party's objections to disclosure generally in relation to this amount.

74. Again, this figure relates to payments to be made as a result of the naming rights agreement for the facility, which is owned and operated by the Commission, a public body for the purposes of the *Act*. On this basis alone, I do not accept that disclosure of this amount could reasonably be expected to harm the third party's competitive position, interfere with its negotiations, or result in significant financial loss or gain. The public has the right to know about the arrangements that have been made with respect to the naming rights of a publicly owned facility. I find that this amount should also be disclosed to the Applicant.

75. Were these agreements between the third party and a private owner of a facility, the *Act* would not be at play as neither party would be subject to access to information legislation; however, in this case, the Commission is a public body for the purposes of the *Act* and has statutory obligations to be open and transparent about the use of publicly owned properties and how the Commission manages its operations.

76. While I appreciate that the third party objects to disclosure in full of the requested agreements, I do not find that they merit protection from disclosure under s. 22(1)(b) or (c) of the *Act*.

Section 21: Unreasonable invasion of third party privacy

77. The relevant parts of s. 21 of the *Act* state:

> 21(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.
>
> 21(2) A disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of the third party's privacy if
>
> …
>
> (g) the personal information describes the third party's source of income or financial circumstances, activities or history….

78. The main information at issue with respect to this exception is the name of an individual who signed as guarantor in one of the recent amending agreements.

79. Both the Commission and the third party state that disclosure of the name of the individual in this case would be an unreasonable invasion of privacy, as the guarantee was signed in the individual's personal capacity. The third party submits that, as this is a personal guarantee, the entire agreement is that individual's personal financial information and thus falls within the scope of the s. 21 exception.

80. As indicated above, the Applicant is already in possession of this information, having received the 2018 and 2019 amending agreements from another source. As this is the case, the Applicant already has this information and there is no need for me to make a finding on this point or to recommend further disclosure.

V RECOMMENDATION

81. Based on the above findings, I recommend under s. 73(1)(a)(i)(A) of the *Act* that the Commission disclose to the Applicant the original 2004 agreement and the 2005, 2009, and 2015 amending agreements in full, along with the redacted amount in clause 5(i) of the 2019 amending agreement.

82. As the Applicant is already in possession of the remainder of the information in the 2018 and 2019 amending agreements, there is no need for me to issue a recommendation to the Commission for further disclosure.

83. As set out in s. 74 of the *Act*, the head of the public body must give written notice of their decision with respect to these recommendations to the Applicant and this Office within 20 business days of receipt of this Report of Findings.

This Report issued in Fredericton, New Brunswick this 12
th day of March 2020.

original signed by

Charles Murray
Acting Ombud for the Province of New Brunswick