



REPORT OF FINDINGS

Right to Information and Privacy Protection Act

Matter No: 2018-4447-AP-2420
August 30, 2018

I BACKGROUND

1. This Report of Findings the Commissioner's investigation is issued in accordance with section 73(1) of the *Right to Information and Protection of Privacy Act*¹ (the "Act") and is further to the investigation of a complaint filed pursuant to section 68(1).
2. In his complaint dated May 2, 2018, the Applicant expressed dissatisfaction with the response issued by the Regional Municipality of Tracadie (the "Municipality") to his access request dated March 27, 2018, aimed at obtaining access to two documents in his employee file, i.e. two complaints concerning him that were submitted to the Municipality.
3. In its response to the request on April 12, 2018, the Municipality refused to grant access to the requested information pursuant to section 26(1)(a). This discretionary exception to disclosure reads as follows:

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;
[...]

II INVESTIGATION

4. In accordance with the investigation process set out in the *Act*, my staff first attempted to resolve the complaint informally. To that end, on July 6, 2018, preliminary findings were shared with the Applicant informing him that the relevant information could not be protected under section 26(1)(a), although it could be protected under section 21(2)(c) because its disclosure was deemed to be an unreasonable invasion of a third party's privacy.
5. In his email dated July 12, 2018, the Applicant indicated that he was not satisfied with the findings. Therefore, it was impossible to resolve the matter informally; the case was transferred to me for resolution prior to the issuance of this report.

III ANALYSIS AND FINDINGS

¹ SNB., c. R-10.6

Section 26(1)(a) – Advice to a public body

6. Following the investigation into this matter, I find that the requested information may not be protected under section 26(1)(a) of the *Act*, as cited in the Municipality's response. In this regard, I would like to share the following comments.
7. The aim of section 26 is to protect the public body's decision-making process by enabling its personnel to hold frank discussions and to weigh various options before reaching a final decision. Pursuant to this provision, the public body may protect documents generated in connection with the decision-making process that contain advice, opinions, proposals and/or recommendations developed by or for the public body.
8. For example, section 26 may be used to protect correspondence between employees, in which opinions or viewpoints are shared on a project that is underway, or to protect documents generated by a consulting or engineering firm that contain recommendations or proposals to the public body concerning the approach to be followed.
9. In the matter at hand, although the documents contain opinions, they were not issued in connection with the Municipality's decision-making process, nor were they developed by or for the Municipality, as set out in section 26(1)(a). For that reason, the Municipality is therefore not able to refuse access to the information under s. 26(1)(a).
10. However, having examined the relevant records, I am of the opinion that they must be protected under section 21(2)(c) of the *Act*. Here are my comments in this regard.

Section 21 – Third-party's privacy

11. Section 21 is designed to protect personal information where disclosure would be deemed an unreasonable invasion of a third party's privacy. To facilitate enforcement of this provision, the *Act* details various disclosures deemed to be unreasonable invasions of a third party's privacy and others that are not. These situations are described in sections 21(2) and 21(3).
12. For the purposes of this investigation, I would like to focus on section 21(2) of the *Act*, which lists situations in which disclosing personal information is deemed to be an unreasonable invasion of a third party's privacy. In particular, I would like to focus on section 21(2)(c), which reads as follows:

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:

[...]

(c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an Act of the Legislature or an Act of the Parliament of Canada;

[...]

13. The aim of this section is to ensure the protection of the identity of persons who provide information in confidence to public bodies for the purposes of law enforcement, an expression which under the *Act* that means:
- policing, including criminal and security intelligence operations,
 - a police, security intelligence or administrative investigation, including the complaint given rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, and
 - proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred.
14. In order to protect personal information under section 21(2)(c), the following criteria must be met:
- The personal information must have been provided to the public body by a third party;
 - The personal information must have been provided in confidence;
 - The personal information must have been provided for the purposes of law enforcement or administering a provincial or federal law;
 - Disclosure of the personal information would be reasonably expected to reveal the identity of the third party who provided it.
15. If all four of the above criteria are met, access to the requested information may be refused under section 21(2)(c) because its disclosure would be deemed an unreasonable invasion of a third party's privacy.

16. Having applied the above the test, I find that the requested documents may be protected under this exception. My analysis in this regard is provided below.
17. I must first determine whether the relevant documents were provided in confidence to the Municipality by third parties.
18. Following my investigation and upon reading the relevant documents, I am satisfied that they were provided to the Municipality by third parties; but were they provided in confidence?
19. According to the Municipality, there is an expectation of confidentiality whenever complaints are submitted to it. Complaints are treated in confidence to protect the integrity of the complaint process and to ensure that individuals feel comfortable voicing concerns without fear of repercussions.
20. Following my investigation, I am in agreement that there is an expectation of confidentiality when a complaint is submitted to the Municipality. Therefore, I am satisfied that the relevant documents were provided to the Municipality in confidence, thus meeting the second criterion above.
21. Continuing my analysis, I must now determine whether the information was provided to the Municipality for the purposes of law enforcement.
22. As may be discerned from the above, the definition of “law enforcement” is very broad. In the matter at hand, I will focus on the second point, which deals with an administrative investigation potentially resulting in a penalty or a sanction.
23. When a complaint is received by the Municipality concerning compliance with its policies and bylaws, the complaint is investigated, and a determination is made with respect to its merits. If the complaint has merit, appropriate corrective action is taken with the employee in question.
24. In my opinion, the Municipality's complaint process may be regarded as an administrative investigation via which a penalty or sanction may be imposed. I therefore find that the complaint documents were indeed provided to the Municipality for the purposes of law enforcement, as stipulated in the definition.
25. In accordance with the fourth and final criterion, I must determine whether disclosing the relevant documents would identify the third parties who provided the information. Having

examined the documents, I note that the information therein amounts to a detailed description of various events that occurred. In my opinion, the Applicant could identify the third parties from the details provided in the documents. Even if the third parties' names were redacted, identification would still be possible due to the nature of the complaints and the context. Therefore, I am satisfied that disclosing the relevant documents would be reasonably expected to reveal the identity of the third party who provided it.

26. Given that all the necessary criteria for the application of section 21(2)(c) have been met, I find that the relevant documents in the matter at hand may be protected under this exception.

IV RECOMMENDATIONS

27. Pursuant to section 73(1)(a)(ii)(A) of the *Act*, I uphold the decision of the head of the public body to refuse the document disclosure request in its entirety.

28. In accordance with section 74(2), the head of the public body has 20 business days to notify the applicant whether or not the head of the public body accepts the above recommendation. If the recommendation is accepted, section 74(3) states that follow-up action must be taken within 20 business days following receipt of this report.

29. It should also be noted that according to 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 of the Commissioner."

30. This report was issued in Fredericton, New Brunswick on the 30th day of September 2018.

Original signed by

Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner