

# REPORT OF THE INTEGRITY COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Complaint Matter: 2017-3962-AP-2156

Date: January 16, 2018

1. On February 2, 2017, the Applicant requested the following information from the Department of Transportation and Infrastructure (the Department) pursuant to s. 7 of the *Right to Information and Protection of Privacy Act, S.N.B. CR-10.6* (the Act):

Any agreements between a third party representing Irving Oil and the Department of Transportation and Infrastructure regarding the leasing, development, and/or operation of the DTI property in St. Stephen being used for the tourism information centre, retail gas, convenience and food.

2. On May 8, 2017, the Department provided access in full to a record entitled *Land Lease*, while only identifying two other relevant records: a *Purchase Agreement* and an *Offer to Lease*. Access to these records, however, was only partially granted on July 12, 2017, with redactions made pursuant to s. 21(1) and 22(1)(c)(i) and (ii) of the Act.
3. The Department is a signatory party to all of these records, as well as a third party private company. In the *Purchase Agreement*, the Department sold certain parcels of land to a private company, Cobalt Properties Ltd. (the Third Party) in July 2014. Afterwards, the Department entered into the *Offer to Lease* with the Third Party on March 11, 2015 in order to lease certain of those premises for a 10 year period. Finally, on February 1, 2016, the parties registered the Lease as per the *Conveyances Act*, which is the *Land Lease* record that was disclosed in full to the Applicant.
4. Not being satisfied with the Department's response, the Applicant filed a complaint with our Office on July 18, 2017, pursuant to s. 67 of the Act.

## OUR INVESTIGATION

5. As required by ss. 67 and 68 of the Act, steps were then taken to investigate the complaint or try to resolve it informally by our Office's legal counsel and investigator. During the informal resolution process, the withheld records were reviewed by legal counsel and her preliminary findings were to the effect that the Department had not properly refused access to some of the requested information.
6. Further to presenting our preliminary findings, the Department was amenable to releasing most of the redacted information previously withheld from disclosure, which was done. However, the Department was not amenable to disclosing the annual net rental rate per square foot found in the *Offer to Lease* document, for the reason that it believed disclosure could reasonably be expected to harm the competitive position of

the Third Party, as well as interfere with contractual or other negotiations of the Third Party, as per ss. 22(1)(c)(i) and (ii) of the *Act*.

7. As a result of the failure to resolve the entire complaint matter during the informal resolution process, the unresolved portion of the complaint was referred to me for a review of the Department's position and the preparation of a report pursuant to s. 73 of the *Act*.
8. As a result, this Report will address the only issue to be resolved, namely, whether the Department ought to release annual net rental rate per square foot information. Of course, my review and recommendations need not be in agreement with the preliminary findings of our Office's legal counsel who has the delegated authority to investigate and try to resolve the issues through the informal resolution process. When it becomes obvious that the issues cannot be resolved in their entirety, the unresolved issues are referred to me for my findings and recommendations as provided in s. 68(3) of the *Act*.

**Department's position re: disclosure of annual net rental rate per square foot**

9. The Department relied on the following provisions of the *Act*:

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,

10. It should be noted that, pursuant to s. 84(3) of the *Act*, the burden falls on the Third Party to prove that an applicant has no right of access to the record or part of the record, as stipulated in s. 84(3) of the *Act*.
11. However, since we do not engage directly with third parties during an access content complaint at our Office, the third party's representations are presented to us through the representations provided by the public body subject to the complaint. This is because the ultimate decision regarding disclosure of information rests with the public body, whether or not the third party agrees to the disclosure.

12. At this point, a brief summary of the applicable principles pertaining to the standard of proof imposed on the Department would be useful. As pointed out by the Supreme Court in *Ontario (CSCS) v. Ontario (IPC)*<sup>1</sup> in para. 52:

“this formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the mere 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.” (underlying is mine)

13. As well, the Court stated that it is this formulation that should be used wherever “could reasonably be expected to” language is used in access to information statutes (para. 54)
14. In our case, the words used in the relevant sections of the *Act* relied upon by the Department deal with a “reasonable expectation” of harm (i.e. harm to competitive position or interference with contractual or other negotiations of the third party). Therefore, we find that the burden of proof the Department must meet in the matter before us is based on the formulation expressed by the Supreme Court of Canada, above: *would disclosure of the annual net rental rate per square foot information result in a risk of harm that is well beyond the mere possible or speculative?*
15. To rely on this mandatory exception provision, the information at issue must first be of a commercial, financial, labour relation, scientific or technical nature. The annual net rental rate per square foot found in the *Offer to Lease* document pertains to the rate being paid by the Department while leasing premises owned by the Third Party. While the information does pertain to the business and activities of the Department, we agree that it also qualifies as Third Party business information of a commercial nature.

*Harm to competitive position: s. 22(1)(c)(i)*

16. The Department argues that the disclosure of the annual net rental rate per square foot would harm the Third Party, especially where the Third Party is competing with others in Requests for Proposals with the Department. In that instance, the Third Party’s ability to compete fairly would be jeopardized, as his competitors would be able to use the annual net rental rate per square foot information to their advantage in the future Requests for Proposals and, ultimately, to the disadvantage of the Third Party.

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<sup>1</sup> [2014] 1 S.C.R. 674

17. While we understand the concerns raised by the Department, we find them to be very general in nature, and as such, we are not convinced that disclosure of annual net rental rate per square foot information amounts to the risk of harm envisaged by s. 22(1)(c)(i), namely harm to the Third Party's competitive position. In Request for Proposals, price or cost is only one factor in their evaluations – not the determining factors.

18. In our respectful view, we fail to see how disclosure of the annual net rental rate per square foot information *"will result in a risk of harm that is well beyond the mere possible or speculative."*

*Interfere with contractual or other negotiations of a third party: s. 22(1)(c)(ii)*

19. The Department argues that if the rental rate became public knowledge, this could impact the Third Party's future negotiations with other tenants and find himself pitted against other building owners who would then know the information. By finding out that the Department's annual net rental rate per square foot is lower than that of other tenants (but accepted by the Third Party because of the sought after security of a government lease), the lower rate could become the expected benchmark from all other tenants, which would put great pressure on the Third Party to give the same rate to new tenants, and to explain to existing tenants why the same rate is not extended to them.

20. Applying the same principles previously alluded to above, we are not convinced that disclosure of the annual net rental rate per square foot *"will result in a risk of harm that is well beyond the mere possible or speculative."* The Department's arguments, as advanced by the Third Party, are of a generalized concern and did not pinpoint any specific negotiations that could reasonably be interfered with in any sense other than that there would be stronger competition.

21. Based on the above, we are not satisfied that the Department could refuse access to the annual net rental rate per square foot under s. 22(1)(c)(ii) of the Act.

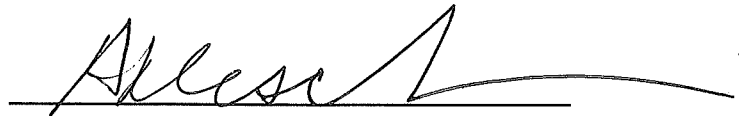
## CONCLUSION AND RECOMMENDATION

22. Disclosure of the annual net rental rate per square foot information is part of the cost of doing business with Government, including the Department. Leases for premises such as the one in this matter are obtained with public funds. This places an obligation on the Department of Transportation and Infrastructure to be transparent about its business

dealings and the profitability and debts of agreements it enters into with private companies.

23. In light of the above findings and pursuant to s. 73(1)(a)(i) of the *Act*, I recommend that the Department of Transportation and Infrastructure to disclose the annual net rental rate per square foot as found in the *Offer to Lease* record to the Applicant.

Issued in Fredericton, New Brunswick this 16<sup>th</sup> day of January 2018.



Hon. Alexandre Deschênes, Q.C.  
Integrity Commissioner