

Office of the
INTEGRITY
COMMISSIONER



Bureau du
COMMISSAIRE
À L'INTÉGRITÉ

REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter: 2018-4413-AP-2401

September 10, 2018

I INTRODUCTION

1. My investigation as Integrity Commissioner is established in conformity with s. 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6 (“the Act”). This Report of Findings is in conclusion of a complaint filed by the Applicant asking the Commissioner to investigate the matter pursuant to s. 67(1)(a)(i) of the Act.
2. On March 21, 2018, the Applicant submitted an access to information request to the Saint John Board of Police Commissioners, seeking communications to and from two named individuals in regards to the Applicant.
3. The Saint John Board of Police Commissioners (“the Board”) replied on April 4, 2018, stating that it is not a “public body” as defined in the Act and that, as such, it was not prepared to entertain the Applicant’s request for information.
4. The Applicant was not satisfied with the Board’s reply and submitted a complaint to our Office. In doing so, the Applicant provided us with a copy of the Board’s January 12, 2018 response to an access request previously submitted by the Applicant, in which the Board stated at that time that access was being refused in keeping with s. 14(c)(i) of the Act as the information in question did not exist. The Applicant did not understand why the Board initially responded as if were subject to the first request but later stated that it was not subject to the Act in response to the subsequent request.
5. As with all complaints filed with this Office, this complaint was initially assigned to an investigator to undertake the informal resolution process. Despite numerous exchanges between this Office and Board officials, the question of whether the Board is subject to the Act was not resolved at the informal stage. As such, it was referred to me for my review and final disposition. I am concluding this investigation with the issuance of this Report of Findings under s. 73 of the Act.

II ISSUE

6. The sole issue is the jurisdictional question of whether the Board is subject to the Act by virtue of being one of the various kinds of public bodies as defined in s. 1 and whether it is lawfully obligated to accept and process the Applicant’s request.

III BACKGROUND

7. As a starting point, it is helpful to consider the role and purpose of boards of police commissioners and how they are created, which is provided for in the *Police Act*, S.N.B. 1977, c. P-9.2.
8. Under s. 3(1) of the *Police Act*, municipalities in the Province are responsible for providing and maintaining adequate police forces within their respective jurisdictions. The *Police Act* allows municipalities three options for doing so: they can establish their own police force (as is the case in Fredericton and Saint John), they can enter into an agreement with RCMP to provide policing services on their behalf (as is the case in the Moncton area), or they can enter into an agreement with another municipality for joint police services (as is the case with the Kennebecasis Regional Police Force, which provides police services to the Towns of Rothesay and Quispamsis).
9. Where a municipality opts to establish its own municipal police force, it can either do so of its own accord or, under s. 7(1) of the *Police Act*, it can approve the establishment of a board of police commissioners by resolution of council. The City of Saint John opted to establish a board of police commissioners by resolution of its Common Council on November 24, 1997.
10. Under s. 7(1.1) of the *Police Act*, a board of police commissioners shall:
 - (a) provide and maintain an adequate police force within the municipality and comply with the provisions of any collective agreement to which it is a party, and
 - (b) be deemed to be the employer of the members of the police force and persons employed to serve a police force in matters relating to labour relations.
11. In addition to the above, s. 10(1) of the *Police Act* also requires a board to, subject to its budget, do the following:
 - (a) shall appoint a chief of police,
 - (b) shall provide the police force with such accommodation, arms, equipment, clothing and other items as the board considers necessary, and
 - (c) shall appoint police officers to the police force from candidates recommended by the chief of police pursuant to paragraph 2(a) or may by resolution authorize the chief of police to appoint officers.
12. The composition and term of a board of police commissioners are set out in s. 7(4) of the *Police Act*:
 - 7(4) Subject to subsection (7), a board shall consist of

- (a) one more persons who are ordinarily resident in the municipality, appointed by the Minister [of Justice and Public Safety],
- (b) one or more members of council, one of whom shall be the mayor or a person designated by the mayor,
- (c) one or more persons appointed by the council who are ordinarily resident in the municipality, but who are not members of council, and
- (d) the chief of police, *ex officio*, who shall be a non-voting member.

13. Board members can be removed for cause by the Minister, mayor, or council, depending on how he or she was appointed (s. 7(9) of the *Police Act*). A municipality can also dissolve its board of police commissioners by resolution (the same way it can opt to create one), at which time it would take over the board’s obligations.
14. Boards of police commissioners are funded by their respective municipalities, and under s. 7(2) of the *Police Act*, “the municipality shall budget the necessary money to enable the board to provide and maintain an adequate police force”, and the municipality is also required to provide “reasonable remuneration” for board members who are not part of council and may provide for an allowance payment for council members who also sit on a board (s. 7(10)).
15. As boards are funded by their respective municipalities, they have financial reporting requirements and are required to provide financial statements “showing the current financial position of the police force as compared with its budget” on a regular basis as determined or requested by the respective municipality.
16. Section 7(11) of the *Police Act* also allows a board to undertake certain actions on behalf of their respective municipalities as follows:

7(11) A board, **on behalf of the municipality for which it is established** and within its budget, may acquire, deal with and dispose of personal property, may enter into contracts and may sue and be sued, and the municipality for which the board is established is liable for the debts of the board arising out of any matter coming within the scope of this Act. [emphasis added]
17. In short, boards of police commissioners are established by resolution of council to, in lieu of the municipality acting in this capacity, provide and maintain an adequate municipal police force and to act as the employer of the municipal police force.

18. Information about the Board, including its meeting agendas and minutes are available on the City of Saint John's website. On the link to information about the Board on the City's website is the following description of the Board and its role:

The Saint John Board of Police Commissioners is the governance authority for the Police Force. The role of the Board is to establish a vision and actionable objectives for the community, to provide oversight (including complaints) and to ensure accountability in the application of Police resources to accomplish the objectives.

The Saint John Board of Police Commissioners has a responsibility under the Police Act to "provide and maintain an adequate police force" and to advise Common Council accordingly, so the municipality can budget the necessary money. In determining what constitutes an adequate police force, the Board (in consultation with the Chief of Police) has established priorities and objectives.

19. With the above in mind, I now turn to the question of whether the Board is an office of the City of Saint John for the purposes of the Act.

IV ANALYSIS

20. One of the founding principles of the Act is to create statutory obligations on public sector entities to be open and transparent in the conduct of public business on behalf of the public they serve. By design, the Act was intended to be broad in scope and inclusive of public sector entities at the Provincial and municipal level, as well as to capture the public education system and the public health care system.
21. While the Act sets out definitions as to what kinds of entities are public bodies, it does not include a definitive schedule or list of which entities are captured within its scope. This means that when there is a question as to whether a particular entity is or is not subject to the Act, as is in this case, a careful examination of the relevant definitions must be undertaken.
22. The definition of "public body" found in s. 1 of the Act is broad and includes Provincial departments, secretariats and offices, government boards, Crown corporations and commissions, government bodies, offices of Ministers of the Crown, and local public bodies. The definition of "local public body" includes educational bodies, health care bodies, and, particularly applicable to municipal entities, local government bodies:

"local government body" means

- (a) a municipality or any office of a municipality, including a municipal police force,
- ...
- (d) a local board as defined in subsection 87(1) of the *Local Governance Act*...

23. As for paragraph (d), s. 87(1) of the *Local Governance Act* defines a local board as follows:

“local board” means

- (a) a body whose entire membership is appointed under the authority of a council,
- (b) a water or wastewater commission established under section 15.2 of the *Clean Environment Act*, and
- (c) any body prescribed by regulation.

24. Boards of police commissioners are not designated in the regulations to the *Local Governance Act* as a local board, nor are they commissions as described in paragraph (b). As for paragraph (a), entities are considered to be local boards if their entire membership is appointed under the authority of a municipal council. In this case, the Board’s membership is mostly, but not entirely, appointed under the authority of the Saint John council, as one of its members is appointed by the Minister of Justice and Public Safety (as per s. 7(4) of the *Police Act*). As such, the Board is not a local board as per s. 87(1) of the *Local Governance Act*.

25. In looking at paragraph (a), the definition of “local government body” captures municipalities, as well as “any office of a municipality, including a municipal police force”. This means that a municipal police force is deemed to be an office of a municipality by definition, but does provide any direction on what other entities are considered to be “an office of a municipality”. The terms “office” and “office of a municipality” are not defined in the *Act*.

26. While this is the case, it is helpful to note that the French version of the definition of “local government body” reads as follows:

« organisme d’administration locale » S’entend :

- a) d’une municipalité et de **ses institutions**, y compris un corps de police municipal;
 - ...
- [emphasis added]

27. The term “office” is translated in the French version of this definition as “institution.” In my view, the use of the term “institution” in the French version is helpful to better understand the legislators’ intent, particularly where the term “institution” is used in other Canadian jurisdictions’

access legislation as they apply to municipal entities. No other Canadian jurisdictions' access legislation includes the wording "office of a municipality".

28. For example, Ontario has a standalone statute for municipal entities: the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c. M.56. This statute applies to institutions as defined in s. 2(1):

"institution" means,

- (a) a municipality,
- (b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts...

29. In the French version of this statute (*Loi sur l'accès à l'information municipale et la protection de la vie privée*), the term « institution » is also used.
30. While I cannot simply adopt the Ontario statute's definition of "institution" in interpreting the *Act*, it does seem to me that the use of the term "institution" in the French version of the definition of "local government body" gives insight into the interpretation of the term "office" as used in the English version.
31. On this point, I do note that this is not the first time that a jurisdictional question of this nature has been raised in the context of an access complaint investigation under this *Act*. In 2016, the former Access to Information and Privacy Commissioner, in Report of Findings 2015-2859-AP-1547 considered the question of whether AcadieNor Inc. was an office of the Town of Caraquet for the purposes of the *Act*. In investigating that complaint, the former Commissioner reviewed the relevant definitions of the *Act*, the structure and function of AcadieNor, and jurisprudence and guidelines from other Canadian information commissioners and the courts on how they have addressed the same issue in their respective jurisdictions.
32. Based on this review, the former Commissioner found that while AcadieNor Inc. is a separate legal entity from the Town of Caraquet, having been incorporated under the *Companies Act*, based on the company's economic development mandate, the overlap between its board membership and Town officials, and the significant financial assistance provided to it by the Town, AcadieNor Inc. is an office of the Town of Caraquet for the purposes of the *Act*.

33. The Town of Caraquet did not agree with the former Commissioner’s findings and resulting recommendation and the applicant in that case brought the matter on appeal to the Court of Queen’s Bench.
34. In a decision dated December 4, 2017 (2017 NBQB 230), Justice Ouellette agreed with the former Commissioner’s finding:

[32] AcadieNor was created in order to achieve the Municipality’s economic goals that are set out in its letters patent, which expressed the clear will to create an organization devoted to the Municipality’s economic development.

...

[34] There is no doubt that AcadieNor is an extension of the Municipality, designed to ensure its own economic development under its management. Although for multiple reasons the Municipality can legally justify the incorporation of AcadieNor as a separate legal entity, it still remains that AcadieNor is dependent on the Municipality and must pursue the economic development goals that were entrusted to it by the Municipality. AcadieNor is tasked with responsibilities that usually fall on a municipality, and its close connection favours the identification of AcadieNor as an “office” of the Municipality.

...

[37] In these circumstances, it would make no sense to try to have us believe that AcadieNor is a private entity that is not subject to the Act...

[translation]

35. In concluding his decision, Justice Ouellette further stated:

[40] The Court finds, as the Commissioner did in her October 29, 2016 report, that AcadieNor is an office of the municipality of Caraquet and is subject to the Act, having close and significant ties to the Municipality. The Municipality cannot escape its obligation to provide information to its citizens simply by delegating its powers to a board of directors on which it holds effective control.

[41] The legislator’s intention in its use of the expression “or any office of a municipality” covers all entities in which municipalities have a proximate connection based on common goals, such as AcadieNor Inc., and it must ensure that these entities remain open and transparent to the public eye.

[42] For the above reasons, the Court finds that AcadieNor is an office of the municipality of Caraquet because of its proximate and significant ties with the Municipality and its council.

[translation]

36. The court in that case did not set out a definitive test for determining what qualifies as an “office of a municipality”, but rather found that this must be determined on a case-by-case basis by looking at the nature of the entity in question and its relationship with the corresponding municipality. Where there are significant and close ties between the entity and the municipality or a “proximate connection based on common goals,” the entity should be considered as an “office” of the municipality for the purposes of the *Act* and to ensure that they are subject to the same transparency and accountability as other municipal entities.
37. In this case, the Board does not agree that it is an office of the City of Saint John for the purposes of the *Act*. The Board’s submissions as presented to this Office are summarized as follows:
- the Board is a separate entity from the City of Saint John as an independent board appointed pursuant to the *Police Act* “to provide civilian oversight and governance of the Saint John Police Force”;
 - as of May 2018, the Board had seven members, six of whom were appointed by the municipal council (the remaining member was appointed by the Minister of Justice and Public Safety), only two of whom are also members of the municipal council, which the Board submits is inconsistent with it being an office of the City;
 - section 71(3) of the *Police Act* refers to certain municipal offices and that a person may be appointed to more than one “office”;
 - under s. 7 of the *Police Act*, the Board acts as the employer of police force members for labour relations purposes, which distances it from the City;
 - the Saint John City council cannot make resolutions that bind the Board and has no direct control or direction over it and the Board only has financial reporting requirements to the City under the *Police Act*;
 - the definition of “local government body” expressly includes a municipal police force as an “office” of a municipality, but not a board of police commissioners constituted under the *Police Act*;
 - the Legislature could have expressed its intention to include the Board as public body under the *Act*, either in the definitions found in s. 1 or by designating it as one in Schedule A of the *Act*, but it did not; and
 - having reviewed the former Commissioner’s Report of Findings and subsequent Court of Queen’s bench decision in the AcadieNor Inc. case, that the facts in that case are entirely different, based on the level of control the Town of Caraquet has over AcadieNor Inc.

38. As for the Board's previous response to the Applicant in January 2018 that referenced s. 14 of the *Act*, the Board submitted that this was not intended to accept that the *Act* applied to the Board and that the Board had previously responded to a different access request by stating it was not subject to the *Act*.
39. I have carefully reviewed the relevant provisions of the *Act*, the *Police Act*, the *Local Governance Act*, and the Board's submissions. I cannot agree with the Board's position that it is not an office or an institution of the City of Saint John for the purposes of the *Act* for the reasoning set out below.
40. While it is true that the definitions under the *Act* do not specifically name the Board as a public body, this in and of itself is not determinative nor does it point to a clear legislative intent to specifically exclude boards of police commissioners from the scope of the *Act*. In the absence of this, a thorough review of the nature and function of the Board was necessary to determine whether it should be considered as an office of the City of Saint John for the purposes of the *Act*.
41. As for the Board's reliance on s. 71 of the *Local Governance Act*, this provision is found in Part 7, entitled "Officers and Employees," which states:
- 71(1) The council of every local government shall appoint a clerk, a treasurer and an auditor.
- 71(2) A council may appoint the officers that are necessary for the administration of the local government.
- 71(3) A person may be appointed to more than one office.
42. This provision requires local governments to establish three positions (a clerk, a treasurer and an auditor). Section 71(3) allows that the same person may hold one or more of these positions, which are referred to in this provision as an "office". I note that the French version of s. 71(3) uses the term "un poste," which indicates that this provision is intended to refer to the positions of clerk, treasurer, and auditor, rather than an office in the sense of the definition of "local government body" in the *Act*, which is translated as "ses institutions". For these reasons, I do not find that this provision can be relied upon to restrict the interpretation of an "office of a municipality" under the *Act* to only the positions listed in s. 71 of the *Local Governance Act*.
43. In my view, the following factors support a finding that the Board is an office of the City of Saint John and is thus a public body for the purposes of the *Act*:

- the City of Saint John exercised the option under s. 7(1) of the *Police Act* to create a board of police commissioners to provide and maintain an adequate police force on its behalf, which was done by resolution of Common Council on November 24, 1997;
- under s. 7(2) of the *Police Act*, the City provides the Board with “the necessary money to enable the board to provide and maintain an adequate police force,” meaning that the Board’s budget is entirely provided by the City;
- under s. 7(10) of the *Police Act*, the City is required to provide reasonable remuneration for board members who are not members of council and has the discretion to provide allowances to those who are council members, meaning that the City is also responsible for remuneration of Board members;
- Board membership and appointment are set out under s. 7(4) of the *Police Act*, and as described above, all but one of its members were appointed under the authority of council, with the exception of one member who was appointed by the Minister of Justice and Public Safety, meaning that all of the Board’s membership was appointed under the authority of public sector officials;
- Board members can be dismissed either the mayor of the City or the Minister, depending on how the member was appointed (either by council or the Minister) (s. 7(9));
- under s. 7(11) of the *Police Act*, the Board may only acquire, deal with and dispose of personal property, enter into contracts and sue and be sued on behalf of the City, and further, the City is liable for Board debts “arising out of any matter coming within the scope of” the *Police Act*; and
- the City may dissolve the Board by resolution under s. 7(15) of the *Police Act*, following which council would assume the Board’s rights and obligations.

44. I also note that the Board’s website forms part of the Saint John Police Force’s website, which is hosted on the City of Saint John’s website. The Board’s letterhead that it uses in its official correspondence includes the City of Saint John’s logo, its main email address is policecommission@saintjohn.ca, and the Board appears to share office space with the Saint John Police Force as they have the same mailing address. While these facts are not determinative, they do support a close connection between the City and the Board’s resources and demonstrate that the Board does hold itself out as part of the City’s overall operations.

45. I recognize that the Board has autonomy in how it exercises its powers to meet its obligations to provide and maintain an adequate police force and in its capacity as the employer of the members

of the Saint John Police Force, and that the municipality has no lawful authority to interfere with or exert control over matters that fall exclusively within the Board's jurisdiction.

46. That being said, the City has some measure of control over the Board in the sense that the mayor (or a person designated by the mayor) and City council members are part of its membership, council can remove members that it has appointed for cause, and the City can decide to dissolve the Board by resolution. While the Board has independence in its own decision-making processes, the mayor (or his/her designate) and council members who sit on the Board are part of its composition and thus the City does have some influence on the Board's collective decisions. Further, the Board is not independently financed and its entirely reliant on the City for its budget and operating funds. All of these factors point to the City having considerable input on and a level of control in the Board's operations.
47. Had the City of Saint John not opted to establish the Board, it would have the Board's responsibilities of its own accord. Information generated by the City in the maintenance of its municipal police force, including as the employer of police force members, would fall within the scope of the *Act*. Similarly, other municipalities that have opted not to create a board of police commissioners to administer their respective police forces are subject to the *Act* and all information that is generated by them in this capacity falls under the scope of the *Act*.
48. I find it very difficult to accept that the City, in opting to create a board of police commissioners to administer its municipal police force on its behalf, a responsibility that would otherwise fall within the City's mandate, in effect created an entity that is not subject to the same accountability and transparency requirements as the City. I fail to see how the Board could be considered as a private entity that falls outside the scope of the *Act*, given that its purpose is to administer the municipal police force on behalf of the City, and by extension, the residents of Saint John, and further given that it is entirely funded from the public purse.
49. For these reasons, I find that there are sufficient connections between the Board and the City that point to the Board being an office or institution of the City of Saint John for the purposes of the *Act*. While boards of police commissioners are not specifically designated in the definition of "local government body" under s. 1 of the *Act*, in looking at the Board's role and functions, as well as its relationship with the City that created it, I am satisfied that it should be considered an office or institution of the City and thus subject to the same accountability and transparency as the City under the *Act*.

50. In my view, there are even clearer connections between the Board and the City in this case that support the Board being an office or institution of the City of Saint John than in the case of AcadieNor Inc. and the Town of Caraquet as discussed above.

RECOMMENDATION

51. In light of the above, I find that the Saint John Board of Police Commissioners is an office or institution of the City of Saint John and thus is subject to the *Act*. As such, I recommend pursuant to s. 73(1)(a)(i) of the *Act* that the Applicant's request be processed and responded to in keeping with the requirements of Part 2 of the *Act*.
52. As set out in s. 74(2) of the *Act*, the Board is to notify the Applicant of its decision with respect to this recommendation within 20 business days after receiving this report. If the recommendation is accepted, the *Act* requires that the Board also comply with it during this same timeframe.
53. If the recommendation is not accepted, the Board is to include reasons for its decision in its notice to the Applicant and inform of the right to appeal the matter to the Court of Queen's Bench in accordance with section 75 of the *Act*.
54. This Report issued in Fredericton, New Brunswick this 10th day of September 2018.



The Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner of New Brunswick