



Report of Findings: 19/20-AP-061
Right to Information and Protection of Privacy Act
Regional Municipality of Tracadie

October 23, 2020

Summary: The Applicant made an access request to the Regional Municipality of Tracadie for a copy of the contract between the Municipality and Embou Productions with the related special clauses, other versions of this contract subsequently drafted by the Municipality, and all information about this contract. The Municipality granted partial access to the requested information but refused access to some records until it could confirm with this Office whether those records could be disclosed. After we explained that we could not give the Municipality specific direction on disclosure outside the parameters of a complaint investigation, the Municipality informed the Applicant that these records were being refused under s. 22(1)(c)(ii) (disclosure harmful to third party business or financial interests) and s. 29(1)(o) (disclosure harmful to legal proceedings). The Applicant was not satisfied with the Municipality's response and filed a complaint with this Office.

This complaint was not resolved through the informal resolution process and became the subject of a formal investigation by the Ombud. The Ombud found that the Applicant has the right of partial access to the seven records at issue, as some information merits protection from disclosure under ss. 22(1)(c)(i).

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, ss. 22(1)(c)(i), 29(1)(o), 70(1), 70(3).

Authorities relied on: [Order MO-2852, Re: Hamilton Entertainment and Convention Facilities Inc](#), 2013 CanLII 11999 (ON IPC).

I INTRODUCTION

1. On October 16, 2018, the Applicant made an access request to the Regional Municipality of Tracadie (“the Municipality”) for the following information:
 - a copy of the contract between the Municipality and Embou Productions with the related special clauses that the Mayor gave to the RCMP on February 20, 2018;
 - the same information for the other versions of this contract subsequently drafted by the Municipality; and
 - any information about the 2016-2018 contract with Embou Productions.
2. Embou Productions is a concert and festival promotor based in southeast New Brunswick. In 2016, the Municipality renewed its contract with Embou Productions to organize and host concert events in the Tracadie area. The relationship between the parties became strained in 2018, and in May 2019, the promoter filed a lawsuit against the Mayor of the Municipality for defamation.
3. The Municipality responded to the Applicant’s access to information request by letter dated May 30, 2019, granting access to most of the requested information; however, some records were withheld as the Municipality decided to consult with this Office about whether these records could be disclosed.
4. The Applicant was not satisfied with the Municipality’s response and filed a complaint with this Office on July 12, 2019. In making this complaint, the Applicant noted that the Municipality was withholding information. The Applicant did not believe that the Municipality had provided the requested copy of the contract.
5. After receiving our notice of complaint and explanations as to why we are unable to give the Municipality specific direction on disclosure outside the parameters of a complaint investigation, the Municipality issued a letter to the Applicant dated July 31, 2019, explaining that it was refusing access to seven records, with one being withheld under s. 22(1)(c)(i) and the other six records under s. 29(1)(o) of the Act.
6. The matter was not informally resolved and the Ombud conducted a formal investigation pursuant to s. 68(3) of the Act. During the formal process, the Municipality provided explanations about the circumstances relating to this contract but maintained its position that the seven documents at issue were protected from disclosure for the reasons set out in its July 31, 2019 letter to the Applicant.

II ISSUE

7. The issue before me is whether the Applicant has a right of access to any of the information in the seven records that were withheld by the Municipality.

III BURDEN OF PROOF

8. Under s. 84(1) of the *Right to Information and Protection of Privacy Act*, the burden is on the public body to prove that the Applicant has no right of access to all or part of a relevant record:

84(1) In any proceeding under this Act, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

9. This means that the public body has the responsibility to demonstrate that it has the right to withhold information from an applicant.
10. To meet the burden of proof, a public body must provide evidence to support that the information at issue falls within the scope of the claimed exception. Unsupported or mere assertions are not sufficient to satisfy the burden of proof.

IV PRELIMINARY MATTER: PRODUCTION OF RECORDS DURING AN INVESTIGATION

11. This matter was not able to be resolved during the informal resolution process and the time required to complete our investigation. The Municipality did not provide the information and explanations our Office requested to address this complaint until after the matter was escalated to a formal investigation. This is despite requests that the information be provided throughout the informal resolution process, beginning with the notice of complaint letter that was sent on July 16, 2019. While the Municipality provided us with a copy of its subsequent July 31, 2019 letter to the Applicant with additional explanations for refusing access to the seven documents at issue, the Municipality only provided its first substantive response to this complaint on December 5, 2019, more than four months after being notified of this complaint.
12. The Municipality's failure to cooperate with the investigation in a timely manner was the reason this matter escalated to a formal investigation.
13. During the formal investigation, the Municipality provided this Office with a copy of the seven records it withheld from the Applicant, along with explanations as to why it was of the view that ss. 22(1)(c)(i)

and 29(1)(o) of the *Act* applied. The Municipality also provided additional information about the sharing of the contract with the RCMP and confirmed that this was the same document that the Applicant had received through a previous access request and that this contract does not contain any special clauses.

14. The *Act* grants the Ombud a broad authority to require production of records that they deem relevant to an investigation, as per s. 70:

70(1) With the exception of Executive Council confidences and any document that contains information that is subject to solicitor-client privilege, the Ombud may require any record in the custody or under the control of a public body that the Ombud considers relevant an investigation to be produced to the Ombud and may examine any information in a record, including personal information.

15. If this Office deems that certain information is relevant to an investigation, s. 70(3) also sets out further direction on the production of records:

70(3) Despite any other Act of the Legislature or any privilege of the law of evidence, a public body shall produce to the Ombud within 10 business days any record or copy of a record required under this section.

16. Given that the information requested by the Applicant was not complex in nature and the small number of relevant records, had the Municipality provided the records and explanations requested for our review at the outset of this matter, it is likely that this complaint could have been addressed relatively quickly, and possibly without the need for a formal investigation.
17. In future complaint investigations with the Municipality, I am hopeful that this Office will receive better cooperation with respect to the production of relevant records to an investigation in a timely manner.

V DECISION

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

18. Section 22(1)(c)(i) of the *Act* states:

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 the third party...

19. 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.
20. 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*.
21. The Municipality refused access to one record under s. 22(1)(c)(i). This record is a report that Embou Productions provided to the Municipality in February 2019 that sets out the ticket sales for each of the four concerts that were hosted by Embou Productions in the Tracadie area in 2018, as well as the revenues generated from each event. I will now consider whether any of the information in this record is protected from disclosure under s. 22(1)(c)(i) of the *Act*.

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

22. 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].

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].¹

23. As indicated in Report of Findings 19/20-AP-075 and 19/20-AP-080, this Office has adopted the above interpretation of the terms “commercial” and “financial” for the purposes of s. 22 of the *Act*.
24. In this case, the record at issue details the number of tickets that were issued for each of the four concerts that Embou hosted for the Municipality in 2018, along with the financial costs and revenues generated by these events. In my view, as the information relates to the services provided by Embou Productions to the Municipality, I am satisfied that it constitutes commercial information.

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

25. The Municipality’s position is that disclosure of this information could reasonably be expected to harm the competitive position of the promoter for the following reasons:
 - it could give an advantage to other competitor promoters, given that the report contains several kinds of commercial information, such as the different kinds of tickets the promoter offers; and
 - the promoter, in providing this report to the Municipality, specifically requested that these documents be kept confidential as they could put the promoter at a disadvantage with other promoters.
26. Having considered the Municipality’s position, I find that some of the information in the report merits protection from disclosure. The report lists on pages A-2 and A-3 the total amount of the promoter’s investment in the four events, and I find that disclosing this amount could reasonably be expected to reveal information that could be used by competitors looking to stage similar events with the Municipality. I also find that the number of tickets sold in each individual ticket category can be protected for the same reason; however, the total amount of tickets sold and complimentary tickets for each event does not merit similar consideration and should be disclosed. I do not agree that the different types of tickets offered by the promoter for each event can be protected, as the different types of tickets that were available for purchase are still accessible on the promoter’s website and I do

¹ [Order MO-2852, Re: Hamilton Entertainment and Convention Facilities Inc](#), 2013 CanLII 11999 (ON IPC), at para.31.

not see how disclosing the types of complementary tickets could be harmful to the promoter's competitive position.

27. The remainder of the information in the report sets out the amounts that are part of the revenue-sharing provisions in the contract between the promoter and the Municipality and a general statement about the economic impact of these four events on the Tracadie region. I find that the remainder of the information in this report should be disclosed and a recommendation on this point will follow.
28. As for the promoter's request that this report be kept confidential, while it speaks to the third party's intentions with respect to how the Municipality will handle this information, it is not determinative of access rights under the *Act*. Public bodies have statutory obligations to be transparent and accountable to the public, and these cannot be overridden at the request of a third party or by mutual agreement in a contract. As explained above, much of the information in this report is general in nature and would not reveal sensitive information about the promoter's business and thus does not merit protection from disclosure.

Section 29(1)(o): Disclosure harmful to legal proceedings

29. Section 29(1)(o) of the *Act* states:

29(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to

...

(o) be injurious to the conduct of existing legal proceedings to which the Province of New Brunswick or the public body is a party or anticipated legal proceedings to which the Province of New Brunswick or the public body may become a party.

30. Section 29(1)(o) is a discretionary exception to disclosure, which means that a public body has the option to either grant or refuse access to information that falls within its scope. A public body can only properly exercise its discretion to refuse disclosure if it can demonstrate that it took relevant factors into account in arriving at this decision.
31. To rely on this exception, a public body must demonstrate how disclosure could reasonably be expected to be injurious to an anticipated or existing legal proceeding, in which it or the Province is a party.

32. This means a public body must show a clear and direct connection between the legal proceedings and the contents of the record(s) at issue, as well as the anticipated harm to the legal proceeding should disclosure occur. The fact that a lawsuit related to the general subject matter of the information at issue is anticipated or has been commenced will not be sufficient.
33. In this case, the Municipality relied on s. 29(1)(o) to refuse access to six records. Five of the six records are emails between the promoter and Municipality officials dating back to 2016 about the re-negotiation of the contract between the parties. The sixth record is an email between the promoter and the Municipality in which the promoter provided its ticketing report for the 2017 concerts.
34. The Municipality stated that its reasons for refusing access under this exception are as follows:
- the Mayor of the Municipality is currently facing a lawsuit launched by the promoter following public statements made by the Mayor;
 - the Municipality does not want to make these documents public so as not to harm the Mayor's defense.
35. The Municipality provided us with proof that a lawsuit had been launched by the promoter against the Mayor of the Municipality, which was filed with the courts on May 8, 2019.
36. While the arguments presented by the Municipality show that a legal action has been commenced by the promoter, the Municipality has not provided any evidence to show how disclosing these six records could reasonably be expected to be injurious to the conduct of these proceedings. The Municipality has stated that it does not want to make them publicly available so as not to harm the Mayor's defense in the proceedings but has not stated how it anticipates or expects that disclosure of this information would harm the Mayor's defense, much less the conduct of the overall proceedings.
37. In the absence of such evidence, I have no choice but to find that the Municipality has not met the burden of proof to demonstrate that the Applicant has no right of access to these six records on the basis of s. 29(1)(o) of the Act. I also note that the lawsuit does not name the Municipality itself as a party, but rather the individual who currently holds the position of Mayor, which further raises the question of whether s. 29(1)(o) could apply at all; however, given that I find that the Municipality has not met its burden of proof in any event, this is a moot point.
38. Having reviewed these six records carefully, while the 2016 correspondences relate to the negotiating of the 2016 contract between the promoter and the Municipality, much of the information shared between the parties consists of factual information in relation to previous events hosted by the

promoter and a discussion on who the best party would be to hold the liquor license for the upcoming concerts in the Tracadie area. In my view, there is nothing particularly sensitive in these discussions, nor would this information merit protection from disclosure so as to protect the promoter's business interests.

39. The 2018 correspondence contains information similar to the record discussed above and that the Municipality withheld under s. 22(1)(c)(i) of the Act, as it is the promoter's report on the 2017 concerts it hosted in the Tracadie area. Again, much of the information in this record is factual in nature and sets out the number of tickets sold for each event, the revenue generated from these events that was to be donated to local community organizations, and the estimated economic benefit to the area as a result of these events.
40. I find that all of the information in these six records should be disclosed to the Applicant, with the exception of the amount of Embou's investments, which can be protected under s. 22(1)(c)(i) of the Act for the reasons described above. These amounts appear on pages 1-2, 2-3, 3-3, 4-3, 5-3, and 6-4 of the records provided for our review by the Municipality. A recommendation for disclosure follows.

V RECOMMENDATION

41. Based on the above findings, I recommend under s. 73(1)(a)(i)(A) of the *Right to Information and Protection of Privacy Act* that the Municipality disclose to the Applicant the seven records at issue, with the exception of the amount of the promoter's investment in various events, which merits protection from disclosure under s. 22(1)(c)(i) of the Act. These amounts appear on pages 1-2, 2-3, 3-3, 4-3, 5-3, and 6-4 of the records provided for our review by the Municipality. I also find the Municipality can protect under s. 22(1)(c) the breakdown of the number of tickets sold per event in the 2018 ticketing report, which appears on pages A-4 and A-5; however, the total amounts of tickets sold and comp tickets for each event appearing on these two pages must be disclosed to the Applicant.
42. As set out in s. 74 of the *Right to Information and Protection of Privacy Act*, the head of the public body must give written notice of its 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 23rd day of October 2020.

Original signed by _____

Charles Murray
Acting Ombud for the Province of New Brunswick