



Report of Findings: 19/20-AP-098
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 the number of lawsuits filed by or against it and the Town of Tracadie-Sheila between 2011 and 2019, as well as the insurance rates and costs paid per year for legal counsel services for the same time period. The Applicant also asked for explanations about how the insurance rates for legal services work, as the Applicant's understanding was that the insurance rates would vary annually, depending on their use. The Municipality indicated that it did not have a record with the number of lawsuits as requested. The Municipality refused access to the insurance rates and costs paid per year for legal counsel services under ss. 30(1)(b) and 30(1)(c) (Disclosure harmful to economic and other interests of a public body), and refused to provide explanations about how its insurance scheme for legal costs works, as it has no obligation under the *Act* to provide explanations. 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. While some of the issues were resolved when the Municipality provided the Applicant with some information about lawsuits in which it was involved and associated legal and insurance fees paid, this was not sufficient to fully address this matter. The Ombud found that the Municipality failed to meet its duty to assist the Applicant in how it processed and responded to the request, that the Municipality did not cooperate with our investigation in a timely and helpful manner, and that the Municipality did not provide the Applicant with all of the information and/or explanations that should have been provided. The Ombud recommended that the Municipality disclose the insurance contract to the Applicant.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, ss. 9, 30(1)(b), 30(1)(c), 70(1), 70(3).

I INTRODUCTION

1. On June 4, 2019, the Applicant made an access request to the Regional Municipality of Tracadie (“the Municipality”) for the following information since 2011:
 - the number of lawsuits filed by or against the Municipality and the Town of Tracadie-Sheila;
 - the insurance rates and costs paid per year for legal counsel services; and
 - explanations on how the insurance rates for legal services work, such as whether they vary annually depending on their use.
2. The Municipality responded by letter dated August 23, 2019, informing the Applicant of the following:
 - it has no records, nor do the archives for the Town of Tracadie-Sheila, with the requested number of lawsuits, thus this part of the request cannot be fulfilled;
 - information about the insurance rates and costs paid per year for legal counsel services was refused under s. 30(1)(b) and 30(1)(c) of the *Act*, as disclosure could reasonably be expected to harm its economic interests or its negotiating position, as the Municipality has a proprietary interest or right of use, and that disclosure could reasonably be expected to cause the Municipality financial loss and harm to its competitive position in divulging information that could interfere with negotiations led by the Municipality to conclude insurance contracts; and
 - the Municipality refused to provide the requested explanations about its insurance scheme for legal services as it has no obligations to provide explanations under the *Act*.
3. The Applicant was not satisfied with the Municipality’s response and filed a complaint with this Office.
4. The matter was not informally resolved and the Ombud conducted a formal investigation pursuant to s. 68(3) of the *Act*. During the formal investigation process, the Municipality disclosed some information to the Applicant about the lawsuits in question and the corresponding legal fees and insurance deductibles paid by the Municipality in each case; however, the Municipality refused to provide the Applicant and this Office details about the insurance scheme itself.

II ISSUE

5. The issue before me is whether the Applicant has a right of access to any additional information in relation to this request.
6. 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 the requested information.

III PRELIMINARY MATTER: PRODUCTION OF RECORDS DURING AN INVESTIGATION

7. Among the reasons why this matter was not able to be resolved during the informal resolution process and the investigation has taken so much time to complete is the fact that the Municipality did not provide the information and explanations this Office asked for to address this complaint until after the matter was escalated to a formal investigation. This is despite repeated requests throughout the informal resolution process, beginning with the notice of complaint letter that was sent on September 10, 2019. The Municipality provided its first substantive response to this complaint on December 10, 2019, three months after being notified of the matter.
8. The Municipality's failure to cooperate with the investigation in a timely manner was the reason this matter escalated to a formal investigation.
9. During the formal investigation, the Municipality provided this Office with a list of the lawsuits it was involved in between 2011 and June 4, 2019, along with the names of the parties involved in each and the accompanying legal costs and insurance fees for the cases where this information was available. At our direction, the Municipality then shared this information with the Applicant.
10. As this did not fully address the Applicant's request, particularly the third point for explanations about how the Municipality's insurance scheme for legal fees works, and given the significant delays already encountered in getting timely information and explanations from the Municipality, we asked that the Municipality consider providing the Applicant with a copy of the contract, as well as to provide a copy of same for our review to determine whether it is relevant to this request.
11. The Municipality was not amenable to this as the Applicant had not specifically requested the contract in the request. The Municipality also stated that if the Applicant wished to specifically request this contract, the annual costs paid for the insurance policy, along with deductible amounts, the Applicant is free to make a new request and Municipality would treat it accordingly.
12. With all due respect to the Municipality, the *Act* grants me a broad authority to require production of records that I 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.

13. 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.

14. In the present case, I find it difficult to accept that the contract that sets out the details of the insurance coverage that the Municipality holds with respect to legal fees would not be directly relevant to this request, given that the Applicant requested explanations about how this works.
15. The burden of proof is on the Municipality to show that the Applicant has no right of access to information that is requested. Where a public body chooses not to cooperate with an investigation or provide records and explanations as requested by this Office during an investigation, I have no choice but to conclude the matter and render my findings with the information that is before me.
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.

IV DECISION

Section 9: Duty to Assist

18. Section 9 of the *Act* states:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

19. The duty to assist provision compels all public bodies to be helpful and assist applicants throughout the processing of an access request. The duty to assist includes having discussions with applicants to ensure that the public body understands what information he or she is looking for, that a reasonable

search for the relevant records is conducted, and that the public body provides a meaningful response to the access request.

20. In the present case, the Municipality's handling of this request left much to be desired. In addition to taking over two months to provide the Applicant with explanations as to why access to information was being refused, the explanations the Municipality did provide were not helpful.
21. A strict reading of the wording of a request to say the public body has no such information in its records, when it is clear that the public body should be able to provide some insight on the subject matter of the request, does not fulfill the public body's duty to assist. Further, this increases the likelihood that the applicant will resort to the review mechanisms provided under the *Act*, such as filling a complaint with this Office or referring the matter to the courts.
22. In this case, I do not find the Municipality's decision to refuse to provide the Applicant with any details on the number of lawsuits it had been involved in over the previous 8-year period was reasonable.
23. I also do not find that the Municipality's position that it has no relevant records on how its insurance scheme for legal fees work is tenable. While the Municipality may not have a separate document that contains explanations about this particular issue, presumably, the contract that governs the relationship with its insurer would contain the requested explanations. For this reason, I find that this contract is a relevant record to this request, that the Municipality should have identified it as such, and provided the Applicant with access to this record, in keeping with the provisions of the *Act*, including any possible applicable exceptions to disclosure under ss. 17 to 33.
24. For the above reasons, I find that the Municipality failed to meet its duty to assist the Applicant.
25. In the future, I am hopeful that the Municipality will better meet its duty to assist obligations under s. 9 of the *Act*. To this end, I caution the Municipality against adopting a strict or overly narrow interpretation of the wording of access requests. I also caution the Municipality to not respond to an access request by merely stating it has no relevant records where it is clear that the Applicant would have a right of access to the requested information where the Municipality could easily compile an answer with a reasonable amount of effort.
26. I will now address the question of whether the Applicant's access rights have been met with respect to each of the three points of the request.

Number of lawsuits

27. As indicated above, during the formal investigation process, the Municipality provided the Applicant with a list of the fourteen lawsuits it was involved in since 2011. While the Applicant had only requested the number of lawsuits, the Municipality provided an enumerated list that identifies the parties to each of the lawsuits.
28. While the Municipality failed to provide any information on this point to the Applicant in its initial response, I find that the Municipality has since rectified this deficiency and has now provided the Applicant with a meaningful response.

Insurance rates and costs paid for legal counsel services, explanations on insurance rates

29. In its initial response to the Applicant, the Municipality refused access to information about the insurance rates and costs paid per year for legal counsel services, relying on ss. 30(1)(b) and 30(1)(c) of the *Act* (Disclosure harmful to economic and other interests of a public body). The Municipality also stated that it has no obligation to provide explanations on how insurance rates for legal services fluctuate and thus denied this part of the request.
30. As indicated above, during the formal investigation process, the Municipality provided the Applicant with a list of the lawsuits it was involved in since 2011, along with the associated legal fees and insurance fees that it was able to locate in its records for each of these lawsuits. The Municipality indicated that it had reconsidered its position with respect to this information and that in its view, the disclosure of this information satisfied the second part of the request.
31. The Municipality also provided us with copies of invoices it found in its records to substantiate the amounts included in the list that it provided to the Applicant. For four of the listed lawsuits, the Municipality indicated that it had not incurred any costs. The Municipality provided this Office with explanations as to why. One matter was criminal in nature, and thus the Municipality did not incur any costs (no. 3). Another matter was against the Tracadie Port Authority, and thus the Municipality did not directly incur any legal costs (no. 12). One matter was handled entirely by the Municipality's insurer (no. 13). Finally, one matter had only been filed with the courts a few days before the Applicant submitted this request, thus no fees had been incurred to date on that matter (no. 14).
32. After receiving this information from the Municipality, the Applicant stated that this did not answer the question of annual insurance rates paid by the Municipality for legal services, nor did it provide the requested explanations about how the Municipality's insurance scheme works.

33. Despite our many requests to the Municipality to provide us with further information to better understand this issue, and our last request that the Municipality provide us with a copy of the contract in question for our review and determination on the Applicant's access rights to this information, I do not have this information before me to assist in making my final decision on the Applicant's access rights.
34. From the limited information before me, it appears that the information that the Applicant is seeking would be found in the relevant insurance contract, under which the Municipality pays for and receives insurance services for legal fees.
35. As indicated above, the burden of proof is on the public body to show that the Applicant has no right of access to the requested information.
36. While I accept that the Municipality may not have a separate document that contains the specific explanations the Applicant requested, I do not agree that in the absence thereof that the Municipality is excused from providing the Applicant with any information whatsoever. The details of how the insurance scheme works would undoubtedly be found in the contract that governs the relationship between the Municipality and its insurer, and the Act presumes that the Applicant has a right of access to such information, unless any of the information contained in the record merits protection from disclosure under the exceptions to disclosure set out in ss. 17 to 33.
37. The Municipality has indicated that it does not agree that the contract with its insurer was specifically requested by the Applicant, and if the Applicant wants to receive a copy of this document, the annual costs paid by the Municipality under the insurance policy, and deductible amounts under the policy, the Applicant would have to make a new request and the Municipality would treat it accordingly.
38. If I were to accept the Municipality's position on this point, I would be agreeing that this information is not directly relevant to this request and thus would have no further authority to address these issues. Further, this would put the onus on the Applicant to restart the process and to incur further delays in having to wait for the Municipality's response, and possibly to engage the review process should the Applicant not be satisfied with the Municipality's subsequent response. I am not prepared to take this position, as this would only further delay addressing the issues raised in this complaint, and it is clear to me that this information is directly relevant to the Applicant's request.
39. As such, I find that the contract in question is directly relevant to this request and the Municipality has not met its burden of proof to show that the Applicant has no right of access to this information. As such, I recommend that the Municipality disclose the contract to the Applicant. It may be that some

of the information in the contract would merit protection from disclosure under one or more of the exceptions to disclosure under ss. 17 to 33 of the Act; however, there is no evidence before me as to what this information may be or which exception might apply.

V RECOMMENDATION

40. 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 insurance contract that contains the requested information about annual insurance rates and costs for legal counsel services and explanations about the variance of insurance rates under the contract.
41. 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