



**Report of Findings: 22/23-AP-074**  
**Department of Transportation and Infrastructure**  
**September 29, 2023**

**Citation:** New Brunswick (Transportation and Infrastructure) (Re), 2023 NBOMBUD 6

**Summary:** The Applicant made an access request to the Department of Transportation and Infrastructure for a copy of a lease agreement that the Department entered into with a third party company in 2022 for a temporary place for the New Brunswick Museum Research and Archives Library. The Department denied the request in full, relying on paragraph 22(1)(b) (disclosure harmful to third party business or financial interests). When the matter escalated for formal review, the only outstanding issue was the question of the Applicant's access rights to the name of the landlord which was withheld under subsection 21(1) (unreasonable invasion of third party privacy) and the amount of operating costs per square foot which was withheld under paragraph 22(1)(b) (disclosure harmful to third party business or financial interests) of the *Right to Information and Protection of Privacy Act*.

The Ombud found that the Department did not meet its burden of proof and recommended that it disclose the landlord's name, if it had not already done so, and the amount of the operating costs per square foot.

**Statutes Considered:** [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, sections 21(1) and 22(1)(b).

**Authorities Considered:** [Harbour Station Commission \(Re\)](#), 2020 NBOMBUD 2 (CanLII), *Saint John Sea Dogs v. Harbour Station Commission and Ombud of the Province of New Brunswick* (March 19, 2021), Saint John SJM-28-2020 & SJM-96-2020 (NB KB), [Order F16-27, Re: BC Pavilion Corporation](#), 2016 BCIPC 29 (CanLII), [Order MO-2852, Re: Hamilton Entertainment and Convention Facilities Inc.](#), 2013 CanLII 11999 (ON IPC).

## INTRODUCTION

[1] The Applicant made an access request under the *Right to Information and Protection of Privacy Act* (“the Act”) to the Department of Transportation and Infrastructure (“the Department”) for a copy of a lease agreement that the Department entered into with a third party company in 2022 for a temporary place for the New Brunswick Museum Research and Archives Library.

[2] While processing the request, the Department verbally contacted the third party (“the landlord”) to advise of the request and to seek its representations on the potential disclosure of the lease agreement (“the offer to lease”). The Department stated that the landlord objected to disclosure of the offer to lease on the grounds that its business was competitive and confidentiality was vital, noting that it had not shared the details of the previous tenant’s lease with the Province.

[3] After considering the landlord’s representations, the Department refused access in full. In the response to the Applicant, the Department explained that disclosure of the offer to lease would harm a third party’s business or financial interests and thus it was being withheld under section 22(1)(b) (disclosure harmful to third party business or financial interests).

[4] The Applicant was not satisfied with the Department’s response and filed a complaint with this office.

[5] In making this complaint, the Applicant stated that the agreement should be public information, referring to a previous decision from this office ([Harbour Station Commission \(Re\)](#), 2020 NBOMBUD 2 (CanLII)) and related Court of King’s Bench decision (*Saint John Sea Dogs v. Harbour Station Commission and Ombud of the Province of New Brunswick* (March 19, 2021), Saint John SJM-28-2020 & SJM-96-2020 (NB KB)).

[6] Prior to the issuance of this report, the Department agreed to disclose much of the offer to lease to the Applicant. The Department continued to withhold the name of the landlord under subsection 21(1) (unreasonable invasion of third party privacy) and the operating costs portion of the rental rate, which the Department maintained was protected under section 22(1)(b). This led me to conduct a formal investigation under section 68(3) of the *Act*.

## ISSUES

[7] As the Department has subsequently agreed that the landlord’s name should not have been withheld under subsection 21(1) as disclosure of their name in this context would not be an unreasonable invasion of privacy, I need not consider this point further.

I will recommend that the Department disclose this to the Applicant if it has not already done so.

[8] Thus, the only outstanding issue is whether the Department properly refused access to the exact amount of the operating costs per square foot, which is one component of the overall rental rate, under section 22(1)(b) of the *Act*.

[9] The Department has the burden of proof to show that the Applicant has no right of access to the withheld information, as per subsection 84(1) of the *Act*.

### **DEPARTMENT'S REPRESENTATIONS**

[10] The Department's position is that the operating costs portion of the rental rate is commercial or financial information as it is "the pro rata amount of the third party's total operating costs (including all operating costs and property taxes, except cleaning and janitorial of the warehouse portion."

[11] The Department submitted that the exact amount of the operating costs amount per square foot should be considered as confidential information based on the wording of the lease, "as well as representations made by the third party and accepted by the Province when forming the lease."

[12] The Department stated that the third party provided this amount to the Province, and that it is the Province's understanding that the third party intended it to remain confidential, and to the best of the Province's knowledge, the third party has consistently treated it as confidential information.

[13] Our office contacted the third party to seek their representations prior to making a final decision, but received none by the set deadline.

### **APPLICANT'S REPRESENTATIONS**

[14] The Applicant's position is that the operating costs portion of the offer to lease should not be withheld, that the Department's decision to refuse access does not have a basis in the legislation, and is contrary to previous rulings of this office.

[15] In support of this complaint, the Applicant submitted a previous ruling from this office ([Harbour Station Commission \(Re\)](#), 2020 NBOMBUD 2 (CanLII)) and the New Brunswick Court of King's Bench decision (*Saint John Sea Dogs v. Harbour Station Commission and Ombud of the Province of New Brunswick* (March 19, 2021), Saint John SJM-28-2020 & SJM-96-2020 (NB KB)).

[16] The Applicant later submitted a further court decision ([Balmain v. New Brunswick \(Tourism, Heritage and Culture\)](#), 2018 NBQB 129 (CanLII)) to support the position that the offer to lease should be disclosed.

## ANALYSIS AND DECISION

### Section 22: Disclosure harmful to third party business or financial interests

#### *Relevant legislative provisions*

[17] Section 22(1)(b) states:

22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

...

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party...

[18] This 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 subsections 22(3) to (5) are met.

[19] To establish that information falls within the scope of this exception, the public body must demonstrate that the following three criteria have been met:

- the information at issue is commercial, financial, labour relations, scientific or technical information;
- the information was supplied to a public body by a third party; and
- the information supplied by the third party was shared on an explicitly or implicitly confidential basis and has been treated consistently by the third party as confidential.

[20] If any of these criteria are not met, the exception does not apply.

#### *Relevant case law*

[21] In *Harbour Station Commission (Re)*, my predecessor recommended full disclosure of the licensing agreements between the Harbour Station Commission and the local Major Junior Hockey Club. In that case, the public body refused access to the agreements under subsections 22(1)(b) and (c). My predecessor found that the public body failed to meet its burden of proof and recommended that the Commission disclose the agreements in full. This case is directly on point and will be considered further in my analysis below.

[22] In that case, the public body accepted the recommendation for disclosure, following which the third party sought to further challenge disclosure by filing a referral to the court under the *Act* and a judicial review application against the public body and

this office. The court held that the third party did not have standing to make a referral under the *Act* and dismissed the judicial review applications. As the court's decision spoke to procedural matters, rather than the question of access rights, I will not consider this further.

[23] The Applicant raised the *Balmain v. New Brunswick (Tourism, Heritage and Culture)* decision as being relevant in this case. In *Balmain*, the court held that the Department could not refuse access to the operating agreement between the Province and a third party company for the management of the Mactaquac Golf Course. In that case, the Department relied on paragraph 30(1)(c) (disclosure harmful to economic and other interests of a public body), arguing that disclosure would negatively impact the Province's ability to negotiate future such arrangements for the golf course. The court found that the Department did not meet the burden of proof and ordered disclosure of the full agreement. As this case was based on a different exception to disclosure, I do not find it has application to the present case.

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

[24] The Department submitted that the amount of operating costs per square foot is commercial or financial information.

[25] While the *Act* does not define the terms "commercial" or "financial", this office adopted the following definitions:

*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. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.

*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.<sup>1</sup>

[26] The exact amount of the operating costs per square foot is one part of the overall rental rate charged by the landlord to the Province for the premises. I am thus satisfied that this amount is commercial information, thus meeting the first part of the test.

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<sup>1</sup> [Harbour Station Commission \(Re\)](#), 2020 NBOMBUD 2 (CanLII) at para. 28.

***Was the information supplied to the public body by a third party?***

[27] For the second part of the test to apply, the information at issue must have been supplied to the Department by a third party. Information may qualify as supplied if it was directly provided to the public body by a third party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>2</sup>

[28] The contents of a contract between a public body and a third party generally do not qualify as consisting of information that was supplied by a third party. Rather, the terms of contractual agreements are better categorized as having been mutually generated by the parties.

[29] This is consistent with the approach adopted by other Canadian access oversight bodies in interpreting their respective similar third party business information exceptions to disclosure.<sup>3</sup> Other jurisdictions, including British Columbia and Saskatchewan, have identified two exceptions to the premise that information in contracts is mutually generated, rather than supplied. If either of the two following situations apply, the information at issue may be considered as having been supplied by the third party:

Inferred disclosure – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body;

Immutability – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.<sup>4</sup>

[30] In this case, the offer to lease sets out the terms between the parties for the lease of the premises owned by the landlord; however, the Department submitted that the exact amount of the operating costs portion of the rental rate represents the landlord's costs for the listed items, and that this amount was supplied by the landlord. The Department stated that the amount was not negotiated and thus was supplied by the third party.

[31] While the Department accepted the operating costs amount as presented by the landlord without negotiation, I find there is nothing inherent about this amount that makes it not susceptible to negotiation. If the Department had been of the view that the

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<sup>2</sup> *Ibid.*, at para. 32.

<sup>3</sup> See for example, [Order F16-27, Re: BC Pavilion Corporation](#), 2016 BCIPC 29 (CanLII), at para. 33 and *ibid.*, at para. 38.

<sup>4</sup> [Order MO-2852, Re: Hamilton Entertainment and Convention Facilities Inc.](#), 2013 CanLII 11999 (ON IPC), at para.31.

landlord's offer on the operating costs for the premises were unreasonable or more than it was willing to pay, I fail to see what would have prevented the parties from having discussions to arrive at an amount that was mutually acceptable.

[32] While the landlord supplied a proposed amount for the operating costs portion of the overall rental rate, the fact that the Department did not negotiate the amount in this case is not sufficient to merit a finding that it was supplied by the third party for the purposes of paragraph 22(1)(b). Had the Department instead negotiated with the landlord to arrive at a different amount, it would not be considered as having been supplied by the landlord and could not be protected under this exception. The fact that the Department found the landlord's offer on this amount as acceptable should not result in a different outcome in terms of access rights.

[33] I find that while the landlord did provide the operating costs amount to the Department, the fact that it was subsequently agreed to and incorporated into the offer to lease without negotiation means it was mutually generated between the parties.

[34] As the second part of the test has not been met, I find that the operating costs amount is not protected from disclosure under paragraph 22(1)(b) of the *Act*.

***Was the information provided on an understanding of confidentiality and treated consistently by the third party as confidential?***

[35] In support of its position on this point, the Department submitted that the wording of the lease and the landlord's representations when the offer to lease was concluded supports the finding that it was provided by the landlord on an understanding of confidentiality.

[36] While there may have been a verbal discussion between the parties while the offer to lease was being negotiated, the Department has not presented evidence to support what the confidentiality expectations may have been. The Department's description of the telephone call with the landlord during the initial processing of the request also did not reference any prior understanding or previously stated expectation of confidentiality; rather, the information provided by the Department states that the landlord objected to disclosure of the offer to lease on the principle that its business dealings were confidential as a matter of principle.

[37] Further, while the Department submitted that that the words of the offer to lease informed its position that the operating costs amount should be considered as confidential, the Department did not point to any specific provisions of the offer to lease. Having reviewed the offer to lease, I note that it does not contain a confidentiality clause, nor does it make any reference to confidentiality. I also note that even if it did contain such wording, this would not necessarily be indicative of access rights as public bodies cannot contract out of their transparency obligations under the *Act*.

[38] Even if I had found that the operating costs amount had been supplied by the landlord to satisfy the second part of the test, I would not find that the Department has presented sufficient evidence to demonstrate that the third party did so on an understanding of confidentiality.

[39] For these reasons, I also find that the third part of the test has not been met.

[40] This case speaks to the ongoing challenges to transparency in public sector contracts. Over the years, this office has investigated several complaints about public bodies refusing access to concluded contracts with third parties. In many cases, the public body's decision was largely based on the third parties' objections to disclosure, which may not be sufficient to meet the requirements of the section 22 exception.

[41] Private sector companies can be keen to contract with the public sector as these contracts can represent a stable source of income. These companies are often used to a degree of autonomy in their operations, like deciding what information they put out in the public realm. In the public sector, on the other hand, the default is transparency and public disclosure, unless there is a founded reason in law to protect the information.

## **RECOMMENDATION**

[42] Based on the above findings, I recommend under section 73(1)(a)(i)(A) of the *Act* that the Department disclose to the Applicant the offer to lease in full, including the name of the landlord if the Department has not already done so, and the exact amount of the operating costs per square foot.

[43] As set out in section 74 of the *Act*, the Department 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 29<sup>th</sup> day of September, 2023.

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**Marie-France Pelletier**  
Ombud for New Brunswick