# Report of Findings: 23/24-AP-034
# Regional Municipality of Tracadie

## April 25, 2024

**Reference:** Regional Municipality of Tracadie (Re), 2024 NBOMBUD 1

**Summary:** The Municipality of Tracadie was asked to provide all of its strategic planning-related documentation for the period 2022-2025, including communications with certain consultants, calls for tenders, service offers, invoices, minutes, etc. in line with strategic planning. The Municipality provided the applicant with partial access to the relevant documents, but withheld some information under various provisions of the *Right to Information and Protection of Privacy Act*. Some of the issues raised in the applicant's complaint were resolved informally, although the applicant still had concerns about the Municipality's reliance on subsection 16(1.1) (non-relevant information), paragraph 22(1)*(b)* (disclosure harmful to a third party's business or financial interests) and paragraph 26(1)*(a)* (advice developed for public bodies).

The Ombud's delegate concluded that the passages redacted under subsection 16(1.1) as non-relevant could remain non-disclosed given the specific nature of the information request but recommended that the Municipality disclose the consulting report in its entirety, along with the billing details redacted under paragraph 22(1)*(b)*.

**Statutes and doctrine examined:**

*Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, provisions 7 to 16, 22(1)*(b)*, 26(1)*(a)* and 84(1); *Interpretation Act*, RSNB 1973, c I-13; *Sullivan on the Construction of Statutes*, 5th edition, LexisNexis 2008, 773 pp.; Saskatchewan Information and Privacy Commissioner, *Guide to Freedom of Information and Protection of Privacy Act*, ch. 3, 179 pp.; Klein, K. and Kratchanov, D. Government Information: The Right to Information and Protection of Privacy in Canada, 2nd edition, 2013, Carswell Toronto, ch. 4 and 5.

**Jurisprudence examined:**

*Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII);
*Lavigne v. Canada (Office of the Commissioner of Official Languages),* [2002] 2 SCR 733 (CanLII); *Re Markham (City)*, Order MO-3372, 2016 CanLII 79159 (ON IPC);
*Janssen-Ortho Inv. v. Canada (Health)*, 2005 FC 1633 (CanLII); *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989), 27 FTR (3d) 180 (FCTD);
*Tracadie (Municipality) (Re)*, 2018 NBOMB 10 (CanLII).
*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), \[2010] 1 SCR 815.

## INTRODUCTION

[1] The Ombud delegated to me the power to examine and investigate this complaint, and this delegation includes the power to issue a report, in accordance with subsection 9(1.1) of the *Ombud Act.*

[2] The Regional Municipality of Tracadie (hereinafter referred to as "the Municipality") was asked, under the *Right to Information and Protection of Privacy Act* (hereinafter, "the *Act*"), to provide all documentation concerning strategic planning for the period 2022-2025, including communications with certain consultants, calls for tenders, service offers, invoices, minutes, etc. related to strategic planning.

[3] The Municipality provided the applicant with partial access to the relevant documents, but withheld some information under various provisions of the *Act*.

[4] Dissatisfied with the Municipality's response, the applicant filed a complaint with the Office of the Ombud ("the Office").

[5] Some of the issues raised in the applicant's complaint were resolved informally, although the applicant still had concerns about the Municipality's reliance on subsection 16(1.1) (non-relevant information), paragraph 22(1)*(b)* (disclosure harmful to a third party's business or financial interests) and paragraph 26(1)*(a)* (advice developed for public bodies).

[6] Efforts to resolve these concerns informally were not successful, and I decided to conduct a formal investigation under subsection 68(3) of the *Act*.

[7] For the following reasons, I decided that the passages redacted under subsection 16(1.1) as non-relevant could remain redacted, but that the exceptions cited in refusing to disclose information harmful to a third party's business or financial interests or pertaining to advice or opinions for public bodies do not apply. That information should therefore be disclosed.

## QUESTIONS

[8] At the beginning of formal stage of the investigation, only three questions pertaining to this case were still pending. It had to be determined whether the Municipality had a valid reason to deny access to the following details:

- The redacted portions of an email between a member of the municipal council and the general manager [of the Municipality] dated February 10, 2022) under subsection 16(1.1) (non-relevant information).

- The redacted portion of two invoices dated November 9, 2022 and November 27, 2022 under paragraph 22(1)*(b)* (disclosure harmful to a third party's business or financial interests).
- The redacted portion of the "Raw Data Report: Consultations Regarding 2022-2025 Strategic Planning" under paragraph 26(1)*(a)* (advice developed for public bodies).

[9] Before this Report was issued, the Municipality agreed to contact the two third parties whose invoices were at issue, one of whom agreed to the full disclosure of their information. The Municipality provided the applicant with a copy of the invoice in its entirety; therefore, that document is no longer at issue.

[10] Under subsection 84(1) of the *Act,* it is the Municipality that bears the burden of proving that the applicant is not entitled to access the requested information.

**MUNICIPALITY'S OBSERVATIONS**

[11] The Municipality maintained that it had provided access to all the information that the applicant was entitled to receive under the *Act* and that it had duly withheld the redacted portions of the documents that were still at issue.

[12] As regards the email between the municipal councillor and the General Manager [of the Municipality], the Municipality noted that the email raised a variety of questions and that comments on the strategic plan were disclosed to the applicant. The Municipality maintained that the non-disclosed information was not relevant to the information request and that access to it was lawfully denied under subsection 16(1.1).

[13] As regards the remaining invoice at issue, the Municipality redacted the number of hours worked and the hourly fee. The Municipality did not engage with the third party when the information request was being processed but agreed to do so as part of this investigation. This third party did not consent to the disclosure of those details and raised concerns about the impact that disclosure could have on their future business opportunities. The Municipality held firm to its position with respect to protecting these details under paragraph 22(1)*(b)*.

[14] As regards the redacted portions of the report, the Municipality disclosed details on how the consultations were carried out and on the questions that were asked to guide the consultation discussions, although it withheld all the details on the feedback provided under paragraph 26(1)*(a)* as regards advice and opinions.

[15] In support of its decision to protect the feedback provided, the Municipality emphasized a confidentiality notice on page 9 of the report, which stated that all responses would remain confidential and would only be used for analysis purposes,

and submitted therefore that disclosure would amount to a breach of confidentiality. The Municipality said it was concerned that disclosure of the feedback in this case could lead to difficulties in soliciting open and honest comments in such consultations in the future. The Municipality also said it was concerned that certain comments could be linked to certain categories of people, such as municipal employees.

## APPLICANT'S OBSERVATIONS

[16] The applicant questions whether the reasons cited by the Municipality in denying access to the remaining non-disclosed information are consistent with the applicant's access rights under the *Act*, i.e., emphasizing the need to demonstrate transparency in the conduct of municipal business.

[17] The applicant expressed concerns that the email between the municipal councillor and the General Manager [of the Municipality] was heavily redacted, as were the redacted invoices, and asked whether full disclosure would be in the public interest.

[18] Nor was the applicant in agreement with the redaction of the "Raw Data Report: Consultations Regarding 2022-2025 Strategic Planning", stating that relevant data was redacted. In the applicant's view, the redacted data were merely facts, resulting from a compilation process and should be publicly accessible.

[19] Finally, the applicant took note of the statement concerning the confidentiality of the responses on p. 13 of the report, pointing out that the heading was "Online survey". The applicant wondered whether disclosure would have an impact on confidentiality when the results were apparently compiled in such a way that no respondents could be identified.

## ANALYSIS AND DECISION

[20] The *Act* plays a key role in protecting the democratic rule of law in New Brunswick. It guarantees the transparency of government action and thus contributes to elected officials' accountability and to citizens' ability to make enlightened choices when exercising their democratic rights. Adopted in June 2009, the *Act* replaced the former *Right to Information Act* (1978) and extended the scope of application of the provincial statute to cover all municipalities in New Brunswick.

[21] Under the heading "Purposes of this Act", the duty of transparency is clearly set out in section 2, namely to "to allow any person a right of access to records in the custody or under the control of public bodies, subject to the <u>limited and specific exceptions set out in this Act</u>" (my emphasis).

[22] The Supreme Court of Canada has been clear in its jurisprudence concerning the importance of access-to-information laws in protecting the country's democratic

traditions. In discussing the purpose of the federal *Access to Information Act* in *Merck Frosst Canada Ltd. v. Canada (Health)*, Justice Cromwell stated:

> [21] The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).
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> [22] In *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403, at para. 61, La Forest J. (dissenting, but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation…[1]

[23] This duty of transparency is just as important at the municipal level as it is at any other level of government. The Act must be applied in a broad, fair and liberal way, in accordance with its purpose. The specific exceptions under the law must be interpreted strictly in order not to prejudice the purpose of the Act, nor its remedial intentions, in accordance with section 17 of New Brunswick's *Interpretation Act* and legislative interpretation principles.[2]

[24] Justice Gonthier in *Lavigne v. Canada (Office of the Commissioner of Official Languages)* mentioned these same interpretation principles in a case involving criteria for members of the public wishing to access their own personal information:

> 30 Given that one of the purposes of the *Privacy Act* is to provide individuals with access to personal information about themselves, the courts have generally interpreted the exceptions to the right of access narrowly. For instance, in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, Richard J. of the Federal Court, Trial Division said, at paras. 34-35:

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[1] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), para. 21 and 22.

[2] *Interpretation Act*, RSNB 1973, v. I-13 and *Sullivan on the Construction of Statutes*, 5th edition, LexisNexis 2008, pp. 255-297 and 483-485.

> The general preamble as contained in s. 2 of the *Privacy Act*, has the same general effect as s. 2(1) of the *Access to Information Act*. The *Privacy Act* must also be guided by the purposive clause…
>
> The *Privacy Act*'s purpose is to provide access to personal information maintained by government. The rules of interpretation described above also apply in this instance. The necessary exceptions to the access must be strictly construed.

> 31 Similarly, in *Reyes v. Canada (Secretary of State)*, [1984] Admin. L.R. 1135 (QL), the Federal Court, Trial Division said at para. 3:
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> > It must also be emphasized that since the main purpose of these "access to information" statutes is to codify the right of public access to government information, two things follow: first, such public access ought not be frustrated by the Courts except upon the clearest of grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure, in this case the government.[3]

[25] The courts and Information Commissioners regularly cite these interpretation principles in their reasoning. The exception and exemption regime under the New Brunswick *Act* is so extensive and detailed that is at times possible to lose one's way or commit an error by making the exception the rule. That is why it is useful in each case to use these general principles as a starting point and to base one's analysis on the purpose of the *Act*. In the questions at issue here, the burden of proof rests upon the Municipality. The Municipality must justify its refusal to disclose by demonstrating that the cited exceptions apply to the redacted sections of documents.

[26] It is based on these interpretation principles that one should approach the analysis of subsection 16 (1.1) of the *Act*, together with the two exceptions cited by the Municipality under sections 22 and 26.

**Subsection 16(1.1): Non-relevant information**

[27] This provision of the *Act* constitutes neither an exception nor a specific exemption. Instead, it deals with criteria that public bodies must follow when responding to an information request.

[28] Although section 16 may have a substantive dimension, its scope is mainly procedural, e.g., in emphasizing that documents relevant to an access request may be disclosed by sending copies of them or by giving the applicant an opportunity to examine them; and in noting that it is not necessary to translate these documents,

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[3] *Lavigne v. Canada (Office of the Commissioner of Official Languages)* [2002] 2 SCR 733, paras. 30 and 31.

but that additional information may be provided to the applicant for ease of understanding.

[29] Subsection 16(1.1) must be construed not only in the context of the entirety of section 16 in which it is found, but also in the context of sections 7 to 16 of the *Act*, which deal in general with public bodies' access procedures and the duty of transparency, in particular sections 7 and 9 of the *Act* concerning the redaction of documents and the duty to assist the applicant. These provisions, therefore, shed contextual light on the interpretation of subsection 16(1.1) as follows:

> **Access to documents**
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> **Right to request and receive information**
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> **7**(1) Subject to this Act, every person is entitled to request and receive information relating to the public business of a public body, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any public body to which this Act applies.
>
> …
>
> **7**(3) The right to request and receive information under subsection (1) does not extend to information that is excepted from disclosure under Division B or C of this Part, but if that information can reasonably be severed from the record, an applicant has a right to request and receive information from the remainder of the record.
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> …
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> **Duty to assist applicant**
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> **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.
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> …
>
> **How access will be given**
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> …
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> **16**(1.1) The head of a public body may obscure information contained in a record referred to in paragraph (1)(a) or (b) or sever information from a record referred to in paragraph (1)(a) or (b) before giving the applicant a copy of the record or permitting the applicant to examine the record, if, in the opinion of the head, the information is not relevant to the request for information.

[30] Subsection 16(1.1) of the *Act* was added via legislative amendment in 2017. It is therefore a relatively new right. This provision has no equivalent in any other

comparable statue in the country. No jurisprudence has been cited to me concerning its interpretation.

[31] Based on the interpretation principles of the above-mentioned statutes, I conclude that this provision aims to support the *Act*'s purpose by allowing public bodies to respond succinctly and specifically to the access requests submitted to them by focusing on transparency and by refusing to "drown" requests in a deluge of non-relevant information.

[32] The provision does not mean to limit, nor does it limit, transparency, for instance by enabling public bodies to redact or protect information in a document on the sole grounds that the applicant formulated their access request in an unclear or too narrow a manner.

[33] The public body is not required to know why a given access request is made, nor should it judge too strictly what is relevant or irrelevant to a request. The goal is to clearly understand the request and to respond to it as fully as possible within the meaning of the *Act* and in the public interest, taking into account the *Act*'s remedial intentions. However, if an access request is formulated very specifically towards a given goal or record, the public body is not obliged to go beyond the parameters of the request.

[34] On the other hand, if there is still doubt about the relevance of a document, the public body should contact the applicant for clarification, in keeping with its duty to assist the applicant under section 9.

[35] In general, for short or single-section documents, it is more efficient to disclose them in their entirety, unless redactions are required under the exceptions set out in the statute, since information requests are most meaningful within the text in which they are found and the purpose of the *Act* always tends towards disclosure.

[36] Even under statutory regimes in which subsection 16(1.1) has no equivalent, the longstanding practice is to exclude documents deemed non-relevant. In that case as well, the Commissioners ensure that the statute is applied fairly and in a remedial manner.

[37] The Saskatchewan Information and Privacy Commissioner, in the [Guide to FOIP] (that province's *Freedom of Information and Protection of Privacy Act*), offers the following guidelines:

> Avoid breaking up the flow of information (i.e., do not remove information as not responsive within sentences or paragraphs). Providing an applicant with a complete copy of a record subject only to limited and specific exemptions, even if this means providing what the government institution views as not responsive information is entirely consistent with the purposes of FOIP.

> When determining what information is responsive, consider the following:
>
> - The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.
> - A government institution can remove information as not responsive only if the applicant has requested specific information, such as the applicant's own personal information.
> - The government institution may treat portions of a record as not responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, use it sparingly and only where necessary.
> - If it is just as easy to release the information as it is to claim not responsive, the information should be released (i.e., releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions).
> - The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If it is unclear what the applicant wants, a government institution should contact the applicant for clarification. Generally, ambiguity in the request should be resolved in the applicant's favour.

[38] I adopt the Saskatchewan Commissioner's guidelines as a helpful guide when interpreting subsection 16(1.1) of the New Brunswick law.

[39] In addition, with respect to documents deemed relevant, in whole or in part, in response to an access request, subsection 16(1.1) of the *Act* does not require a word-by-word re-reading of the document in order to redact a passage out of a concern for a strict application of relevance. The wording of the section, in particular the expression "may obscure information", imposes a discretionary duty on the public body with a view to removing or extracting information that is not useful or relevant so as to streamline and clarify the response if it is determined that the information is not relevant to the request.

[40] The concept of relevance must be applied so as to favour government transparency; it should never be applied to facilitate undue reliance on reasons of state or any attempt at dissimulation. Public bodies must be careful to avoid any such actions.

[41] In connection with the application of this provision to the document at issue, in its response to the request, the Municipality identified a five-page attachment to an email that a municipal councillor sent to the General Manager [of the Municipality] raising various points that he wished to discuss at an upcoming meeting, including certain comments on the Municipality's strategic plan that were disclosed to the applicant. In its response to the request, the Municipality disclosed the passages in

the document dealing with the strategic plan while redacting nearly everything else, citing subsection 16(1.1) of the *Act*.

[42] The applicant objected to this extensive redaction and questioned whether the public interest lies in providing a more complete disclosure of the document.

[43] In my opinion, after examining the redacted portions of this document and taking into consideration the above-mentioned interpretation principles, I conclude that the Municipality could have done better. It could have clarified with the applicant the purpose of the access request by enquiring if the applicant wanted the document disclosed in its entirety. Instead, the Municipality elected to limit itself to a strict interpretation of the request by identifying only those passages in the document that dealt with the strategic plan. I conclude, however, that the disclosed passages are aligned with the specific purpose of the request as it was formulated.

[44] At this stage, given the potential application of other exceptions under the *Act* to the redacted passages, it is more appropriate to support the Municipality's decision. The applicant has other remedies available. If disclosure of the document in its entirety is being sought, the applicant could submit a new access to information request.

**Paragraph 22(1)*(b)*: Disclosure harmful to a third party's business or financial interests**

[45] Two redactions were made to the invoice of a third party who had provided communication services to the Municipality in line with the strategic planning launch. The redacted information concerned the hourly rate and the number of hours billed by the third party.

***Relevant legislative provisions***

[46] Paragraph 22(1)*(b)* reads as follows:

> 22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal:
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> […]
>
> (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; […]

[47] This is a mandatory exception to disclosure, which means that a public body is not authorized to disclose information that falls within its scope of application, unless the conditions that permit or require the disclosure under 22(3) to (5) are met.

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

- The information in question is commercial, financial, professional, scientific or technical in nature.
- The information was provided to the public body by a third party.
- The information provided by the third party was explicitly or implicitly provided on a confidential basis and was consistently treated as such by the third party.

[49] If any of those criteria are not met, the exception does not apply.

***Is the information commercial, financial, professional, scientific or technical in nature?***

[50] The number of hours worked by the third party and the hourly rate pertain directly to the services provided by the third party to the Municipality in that regard. I am therefore of the opinion that these amounts constitute financial or commercial information; thus the first criterion is met.

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

[51] For the test's second criterion to apply, the information in question must have been provided to the public body by a third party. The information may be regarded as provided or "supplied" if it was transmitted directly to the public body by a third party, or if its disclosure served to reveal information provided by a third party or to draw accurate inferences about this information.

[52] In this case, the hours worked and the hourly rate are outlined in an invoice that the third party submitted to the Municipality for payment upon the conclusion of its work. Nevertheless, in my opinion, this information was not provided to the Municipality within the meaning set out in the provisions of the *Act*, since these amounts represent what the Municipality agreed to pay to the third party in exchange for the latter's services. If the Municipality had believed that the third party's offer was unreasonable or more than what it was willing to pay, the parties would have simply renegotiated in order to arrive at a mutually acceptable price.

[53] Various decisions by the Ontario Commissioner under the *Municipal Freedom of Information and Protection of Privacy Act* [4] deal with the interpretation of similar provisions of the Ontario statute and run along the same lines.

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[4] *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. M-56.

[54] With respect to Order MO-3372, the decision-maker in the facts of the case settled a dispute with an applicant seeking detailed information on the billing involving a municipality and its waste management service provider. The municipality had already disclosed the invoice details with respect to service areas and the total amounts on the invoice but had redacted the unit price, quantity and specific amounts invoiced for different services at that date. The decision focused on the meaning of the wording of subsection 10(1) of the Ontario statute, which prohibits the disclosure of a third party's commercial information if it was "supplied in confidence implicitly or explicitly" and if its disclosure would result in a loss for the third party.[5]

[55] That provision, therefore, is not identical to paragraph 22(1)(*b*) of the New Brunswick *Act*, but its applicability is subject to a three-part test; the first two parts of that test require the same analysis as the provision cited here. In deciding that the billing details were not provided or "supplied" within the meaning of the Ontario statute, the Office of the Commissioner held as follows:

> [23] To satisfy part 2 of the section 10(1) test, the city and the waste management company must show that the specific pricing information in the invoices was supplied to the city in confidence, either implicitly or explicitly. Both the "supplied" and "in confidence" components of this test must be met. If the city and waste management company fail to establish that both of these components apply, part 2 of the section 10(1) test is not met, and the specific pricing information must be disclosed to the appellant.
> (…)
> [27] Previous IPC orders have consistently found that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[6]

[56] The decision-maker in the facts of the case went further and reviewed the established jurisprudence in Ontario on this point and described how it applies not only to the disclosure of contractual provisions but also to the billing details. If a contractual provision, such as a unit price or an hourly rate, is in question, it is presumed to be "negotiated" and not "supplied" within the meaning of the statute. There is extensive jurisprudence in Ontario in this regard. The rule is well established, as are the exceptions to it, thus enabling the Office of the Commissioner to reject the cited exception and to conclude as follows:

> (…)

[5] *Re Markham (City)*, Order MO-3372, 2016 CanLII 79159 (ON IPC).
[6] *Ibid*.

> [30] I agree with the reasoning in Orders PO-2806 and MO-3258 and find that it applies to the specific pricing information in the invoices. In my view, the specific type of waste collection service that the waste management company provided to the city and the unit price for each service would have been mutually agreed upon under the negotiated contract between the city and the company. Although the quantity for each specific service provided and the calculated total dollar amount that the company charged for each specific service in the invoices might vary over time, they are undoubtedly derived and arise from commercial and financial terms that were mutually agreed upon in the contract that was negotiated. I find, therefore, that the specific pricing information in these invoices was mutually generated by the parties rather than "supplied" by the company for the purposes of section 10(1).
>
> [31] There are two exceptions to the general rule that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The "inferred disclosure" exception applies 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 institution. The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs. None of the parties provided representations about these two exceptions with respect to the specific pricing information in the invoices that is derived and arises from the contract between the city and waste management company, and in the absence of such evidence, I find that these exceptions do not apply.[7]

[57] I see nothing in section 22 of the *Act* that would lead to a different election by New Brunswick lawmakers.

[58] Paragraph 22(1)*(b)* of the *Act* seeks to protect confidential third-party information provided to a public body with the clear expectation that it would not be disclosed any further and that the third party itself had always maintained the information's confidentiality. Details of the purchase or selling price of goods or services involving a public body are negotiated, not provided or "supplied". The purpose of the New Brunswick *Act* is to encourage greater transparency with respect to government spending.

[59] Given that the test's second criterion has not been met, I find that the number of hours and the hourly rate redacted in the invoice in question should not be protected under paragraph 22(1)*(b)*.

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[7] *Ibid.*

***Was the information provided on a confidential basis and consistently treated as such by the third party?***

[60] Since I found that the hours worked and the hourly rate were not provided or "supplied" by the third party under the circumstances, I do not need to examine the third part of the test dealing with confidentiality. For the sake of accuracy, I note that the third party did not consent to the disclosure of this information, stating that it was concerned about maintaining the confidentiality of its contractual relations with other potential clients with a view to ensuring future collaboration opportunities.

[61] Neither the third party nor the Municipality offered any concrete evidence that this information would have been treated or should be treated on a confidential basis. The Municipality did not check with the third party at the beginning of its analysis, but instead relied on the third party's anticipated response, taking into consideration the third party's positions on similar documents when previous requests had been filed. The third party's position, therefore, could only be confirmed via its email dated February 13, 2024, which provided no supporting evidence for the aforementioned statement.

[62] Canadian jurisprudence clearly states that an exception dealing with confidential documents in line with a third party's commercial and financial interests is subject to an objective standard of confidentiality going much further than a simple subjective statement made by the interested third party.[8]

[63] In *Janssen-Ortho Inc. v. Canada (Health)*, 2005 FC 1633 (CanLII), Justice Simpson affirmed, in a decision that has since been followed many times, the following comments made by Justice MacKay in *Air Atonabee v. Minister of Transport* (1989), 27 F.T.R. (3d) 180 (F.C.T.D.):

> … whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:
>
> a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it

[8] Klein, K. and Kratchanov, D. *Government Information: The Right to Information and Protection of Privacy in Canada*, 2nd edition 2013, Carswell Toronto c. 5, p. 7.

> that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.[9]

[64] The Municipality must consult a third party affected by a decision about the potential disclosure of their commercial information. The Municipality must also exercise its discretion when determining whether concrete evidence concerning the confidential nature of the shared information was put forward; before deciding against disclosure, it must ultimately assess the risk to the private commercial interest in relation to the public interest with a view to increasing competition.

[65] In the case at hand, the Municipality failed to check with the third party as it should have done when the initial request was filed; in support of its non-disclosure decision, it ultimately relied solely on the third party's statement to the effect that disclosure would harm its competitive position or hamper the negotiation of future undertakings. Moreover, the Municipality appears to have completely disregarded the fact that the public interest should be taken into consideration under subsection 22(4) of the *Act*. In support of its decision to maintain this exception, in its letter of March 11, 2024, the Municipality simply stated as follows:

> [Translation] Given that [the third party] refused to disclose the redacted portions of its invoice, the Municipality also maintains its decision to not disclose the redacted portions of said invoice.

[66] In this case, I find that the Municipality did not demonstrate sufficient evidence on which to base the application of the cited exception; nor do the third party's submissions provide a sufficient basis for the application of any aspect of the applicable exceptions under section 22. Even if there had been a private interest at stake based on the confidential nature of the information in question, or of the impact on the third party's competitive position, I find that the public interest in the transparency of government spending with a view to increasing competition would have amply justified disclosure in this case and that the Municipality erred in failing to undertake this important part of the analysis required under the *Act*.

[67] I therefore recommend that the Municipality disclose to the applicant the redacted information in the third party's invoices.

### Paragraph 26(1)(*a*): Advice developed for public bodies

[68] The Municipality availed itself of this exception to withhold the parts of the "Raw Data Report" pertaining to public consultations carried out when developing the Municipality's strategic planning process. The consultation sessions were led by a

[9] *Janssen-Ortho Inc. v. Canada (Health)*, 2005 FC 1633 (CanLII), at para. 18.

consulting firm that submitted a report to the Municipality at the end of this process on how it conducted the consultations and on the comments provided by various groups. The Municipality regarded the feedback provided during the consultation sessions as advice and opinions ostensibly protected under paragraph 26(1)(*a*).

[69] Paragraph 26(1)(*a*) is an optional exception to disclosure that enables public bodies to safeguard information whose disclosure would likely reveal details of the decision-making processes.

[70] Since this is an optional exception, the public body must prove that the information in question is in effect covered by the exception and that it is exercising its discretionary power in refusing to disclose it.

[71] If I find, based on my review, that the data is indeed covered by the exception but that the public body erred in exercising its discretionary power, I can ask the public body to review its position and its decision to exercise its discretionary power.

[72] In my view, however, the redacted data in this report simply does not constitute advice or opinions within the meaning of paragraph 26(1)(*a*) of the *Act*. Therefore, there is no reason to refer the matter back to the Municipality in order for it to reconsider its decision to exercise its discretionary power.

[73] As part of their efforts, the consultants collaborated with several different groups to gather comments on various aspects of municipal life. These efforts included sessions with municipal representatives, including the municipal council and municipal managers/employees. The consultants also worked closely with various community groups, such as civic leaders, young families, artists, entrepreneurs, business people, culture/heritage leaders, sports/tourist organizations, economic development bodies, community organizations and students, as well as an online survey for all persons residing in the Municipality.

[74] The consultants submitted their report to the Municipality in January 2022; this was subsequently used by the Municipality to develop its strategic plan for 2022 to 2025, which was finalized in March 2023.

[75] The Municipality noted that there was an expectation of confidentiality with respect to the information contained in the report and that the report indicated (p. 13) that all responses would remain confidential and would only be used for analysis purposes; this was the main reason why the Municipality redacted all the “advice and opinions” provided during this process. After examining that page of the report, I note that the wording pertaining to confidentiality only refers to the online survey that the consultants prepared for the general public. Therefore, I cannot accept that this is a valid reason for treating all comments provided by the various groups as confidential.

[76] The report presents the comments and feedback provided by the various groups that were consulted in the form of “bullet points”; they are not attributed to anyone in particular. Therefore, since all the feedback provided by the stakeholders is presented in the form of anonymized and non-identifiable bullet points, the confidentiality undertakings would be complied with even if the report was disclosed in its entirety.

[77] As regards the comments made by the municipal council, the municipal managers and the municipal employees, I note that the responses provided by these groups touch in part on municipal administration and management, as well as on internal concerns. There is nothing in the Raw Data Report, however, that states that this information was provided by anyone other than as mere participants or stakeholders in a public consultation exercise. The employees or councillors were participating voluntarily and anonymously as part of a democratic process. They were not carrying out their public duties, or at least not as advisors or consultants to the Municipality.

[78] There is therefore nothing in the document or in the Municipality’s submissions that enables me to conclude that this information should be redacted under paragraph 26(1)*(a)*.

[79] As regards the comments provided by the other community groups, I note that most of them are suggestions on how life, amenities and services in the region could be improved. Although comments of this nature may be regarded as “opinions” within the broadest possible meaning of the term, they are also part of a public discourse on the overall community. It seems that the public would be well served in having these details disclosed for the purposes of continuing this discussion.

[80] One section of the report (p. 96) presents statistical data on the online survey for the general public describing the percentage of respondents who live in each district of the Municipality, their age range and the three areas of focus that the Municipality should prioritize. Although the Municipality disclosed the diagrams concerning the various districts consulted, it redacted the corresponding criteria. In my view, the redacted criteria that explain the diagrams based on the corresponding districts are not advice or opinions either, and therefore do not fall within the cited exception and should be disclosed to the applicant.

[81] As part of his review of the applicability of the exception set out in paragraph 26(1)*(a)* of the *Act*, the Honourable Alexandre Deschênes, then Integrity Commissioner of New Brunswick, stated as follows in his report on the conclusions submitted to the Municipality in 2018:

> [8] [Translation] Information of a factual or statistical nature, or that explains the context of a policy or a legislative provision in effect is generally not covered by these

> general conditions. However, information that analyzes a problem, starting with its identification, and goes on to list a number of potential solutions, ending with specific recommendations, may well fall within the scope of section 26(1)*(a)* of the *Act*.[10]

[82] Therefore, the redacted information in the Raw Data Report is merely raw data and nothing more, as the title clearly indicates. This data reflects the findings, grievances, hopes and suggestions expressed by members of the public and by all stakeholders of the Greater Municipal Region of Tracadie concerning their municipal services and how they could be improved.

[83] Positing that the *Act* permits or requires the non-disclosure of such data would be to deny the *Act*'s clear purpose and its gist, namely to safeguard democratic values. Common sense requires me to reach the opposite conclusion, as does a purposive analysis of the *Act* and of this provision in light of the applicable case-law. If there was still any doubt in this regard, the lawmakers themselves confirm the interpretation to be given to the exception in paragraph 26(1)*(a)* when dealing with a case like the report in question.

[84] The applicability of the exception in paragraph 26(1) (a) is limited by the wording of subsection 26(2) of the Act and of paragraphs f) to i), which read as follows:

> 26(2) Subsection (1) does not apply if the information:
>
> (…)
>
> f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal,
> g) is a statistical study,
> h) is a record that is part of a quantitative or qualitative research study of public opinion, or
> i) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

[85] In my view, any of the above paragraphs would be enough to exclude the applicability of the exception in paragraph 26(1)*(a)* to the Raw Data Report. However, having carefully re-read the document in question, I rely in particular upon paragraph 26(2)(*h*) of the *Act* in stating that the exception for "advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown" does not apply to a case such as the report in question that summarizes

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[10] *Tracadie (Municipality) (Re)*, 2018 NBOMB 10 (CanLII).

the public's opinions on an aspect of municipal policy that elected officials are being asked to consider.

[86] Having decided in that fashion, I do not have to consider the exercise of the Municipality's discretionary power with respect to the redacted passages in the consulting report. I would like to point out, however, that the exercise of this discretionary power requires various important factors to be taken into account, in light of the purpose of the *Act*.

[87] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, Chief Justice McLaughlin and Justice Abella held as follows concerning the exercise of discretionary powers under a statutory access-to-information regime:

> [45] However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.
>
> [46] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.
>
> [47] By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to (…) interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.
>
> [48] In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must

> weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.[11]

[88] In this case, the Municipality's failure to exercise its discretionary power by taking into account the public interest in transparency and in the disclosure of the Raw Data Report, particularly when it concerns an access-to-information request submitted after the municipal council adopted its strategic plan, seems incongruent with the purpose of the *Act,* which is to enable citizens to clearly understand and appreciate the basis of decision-making by public bodies so that they may fulfil their civic duty.

## RECOMMENDATION

[89] Based on the above conclusions, I recommend, under clause 73(1)*(a)*(i)(A) of the *Act*, that the Municipality disclose to the applicant the Raw Data Report in its entirety, together with a non-redacted version of the invoice submitted by the third party contracted by the Municipality to provide communication services in line with the launch of its strategic plan.

[90] As set out in section 74 of the *Act*, the Municipality must, within 20 business days following receipt of this Report, send a written notification to the applicant and to the Office confirming its decision with respect to these recommendations.

This report was issued in Fredericton, New Brunswick on this 25th day of April 2024.

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**Christian Whalen**
Delegate of the Ombud of New Brunswick

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[11] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815.