



## Report of Findings: 23/24-AP-075 Regional Municipality of Tracadie

April 25, 2024

**Reference:** Regional Municipality of Tracadie (Re), 2024 NBOMBUD 2

**Summary:** The Municipality of Tracadie was asked to provide all invoices concerning four consultants dating back to 2016. The Municipality provided the applicant with partial access to the relevant invoices while redacting some information under subparagraph 22(1)(c)(i) (disclosure harmful to a third party's business or financial interests) of the *Right to Information and Protection of Privacy Act*. The Ombud's delegate concluded that the Municipality failed to satisfy the burden of proof incumbent on it and recommended that the Municipality disclose the invoices in question in their entirety.

### Statutes and doctrine examined:

[Right to Information and Protection of Privacy Act](#), SNB 2009, c R-10.6, subparagraph 22(1)(c)(i) and paragraph 22(3)(a); [Interpretation Act](#), RSNB 1973, c I-13; *Sullivan on the Construction of Statutes*, 5th edition, LexisNexis 2008, 773 pp.

### Jurisprudence examined:

[Dagg v. Canada \(Minister of Finance\)](#), 1997 CanLII 358 (SCC); [Merck Frosst Canada Ltd. v. Canada \(Health\)](#), 2012 SCC 3 (CanLII); [Lavigne v. Canada \(Office of the Commissioner of Official Languages\)](#), [2002] SCR 2 733 (CanLII); [Coon v. New Brunswick](#), 2014 NBBR 117 (CanLII); [Equifax Canada Co. v. Canada \(Minister of Public Works and Government Services\)](#), 2014 FC 487 (CanLII).

## 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 section 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 invoices concerning four consultants with respect to all projects on which they worked between the start of 2016 and the date on which the disclosure request was filed. The applicant asked the Municipality to provide these invoices together with details on the work performed with respect to the requested prices, cost overruns and reasons for these overruns.

[3] After conducting a search, the Municipality identified invoices for two of the named consultants that were relevant to the disclosure request.

[4] While the request was being processed, the Municipality did not contact the consultants to ask them their opinions on the potential disclosure of the invoices. Instead, the Municipality relied on observations provided by the consultants the previous year in connection with a different disclosure request. At that time, the consultants did not consent to the disclosure of their invoices in their entirety, based on various provisions of section 22 of the *Act* (disclosure harmful to a third party’s business or financial interests).

[5] Having considered its decision concerning the previous disclosure request, the Municipality decided to grant partial access to the requested invoices and then provided the applicant with redacted copies. In its response to the applicant, the Municipality explained that the disclosure of the redacted details could harm the business or financial interests of the third parties concerned under subparagraph 22(1)(c)(i) (disclosure harmful to a third party’s business or financial interests).

[6] Dissatisfied with the Municipality’s response, the applicant filed a complaint with the Office of the Ombud (“the Office”).

[7] Efforts aimed at resolving this complaint informally were unsuccessful and I decided to conduct a formal investigation under section 68(3) of the *Act*.

[8] For the following reasons, I have decided that the Municipality did not satisfy the burden of proof incumbent on it and did not successfully demonstrate that the redacted portions of the invoices in question were appropriately protected under paragraph 22(1)(c) of the *Act*. I therefore conclude that this information should be disclosed.

## QUESTIONS

[9] The only pending question involves determining whether the Municipality was justified in denying access to the redacted details in the invoices under subparagraph 22(1)(c)(i) of the *Act*.

[10] Section 84(1) of the *Act* states that the burden is on the Municipality to prove that the applicant has no right to access the information in question.

## MUNICIPALITY'S OBSERVATIONS

[11] In connection with its decision, the Municipality stated that it relied on the consultants' previous observations concerning disclosure of the information in question in line with a similar disclosure request in 2022, for the same invoices. At that time, one of the consultants (Consultant A) partially consented to the disclosure of their invoices but was unwilling to share certain details that they considered protected under paragraph 22(1)*b*) and subparagraphs 22(1)(c)(ii) and 22(1)(c)(iii). The other consultant (Consultant B) also partially consented to disclosure of their invoices, with the exception of certain details that they believed would harm their competitive position.

[12] The Municipality did not contact the consultants again when it received this request and decided to deny access to the same information in this case, on the basis of subparagraph 22(1)(c)(i). During our investigation, the Municipality held firm to its position that disclosure of the information in question is not authorized under the *Act*. In addition, it voiced concern that disclosure could also harm "its relationships with other consulting firms, given that the Municipality could not protect their business information."

## APPLICANT'S OBSERVATIONS

[13] The applicant is of the opinion that the redacted details in the invoices should not be protected. The applicant noted that the information in question does not disclose any confidential aspect of the businesses and therefore should not be protected under article 22(1) of the *Act*. In addition, the applicant stated that the fact that the Municipality is holding firm to its position suggests a reluctance to share crucial information with members of the public.

## THIRD PARTIES' OBSERVATIONS

[14] During the formal investigation process, the consultants submitted their observations to the Office.

[15] At that time, Consultant A consented in writing to the disclosure of their invoices in their entirety, given that the work performed for the Municipality dates back to 2021.

[16] The other third party (Consultant B) continued to oppose disclosure of the payment calculations set out in the three invoices in question. Consultant B is of the

opinion that this information is protected against disclosure under subparagraphs 22(1)(c)(i), (iii), and (iv) of the *Act*.

[17] In support of this position, Consultant B noted that the payment calculations are business and/or financial in nature and that disclosure of these details could reasonably harm their competitive position, lead to an unjustified loss of financial profits and/or interrupt the disclosure of similar information to the Municipality, whereas it would be in the public interest for this disclosure to continue. Consultant B's observations also included jurisprudence in support of this position.

[18] Consultant B also recognized that it might still be necessary to disclose this information and, as an alternative, requested that it be disclosed along with explanations shedding light on the context in which the payment calculations were made.

[19] I will examine the consultant's observations in greater detail in the analysis section below.

## ANALYSIS AND DECISION

[20] Section 2 of the *Act* states that the purpose of the *Act* is "to allow any person a right of access to records in the custody or under the control of public bodies, subject to the **limited and specific exceptions set out in this Act**" (my emphasis).

[21] The Supreme Court of Canada has clear jurisprudence concerning the importance of access to information legislation in protecting the country's democratic traditions. Justice Laforest, in the case [Dagg v. Canada \(Minister of Finance\)](#), stated:

61 The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.<sup>1</sup>

[22] More recently, Justice Cromwell endorsed this longstanding interpretation of the courts in the case [Merck Frosst Ltd. v. Canada \(Health\)](#), reiterating as well the interpretive approach that these statutes deserve:

[22] 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...<sup>2</sup>

[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

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<sup>1</sup> [Dagg v. Canada \(Minister of Finance\)](#), 1997 CanLII 358 (SCC), paragraph 61.

<sup>2</sup> [Merck Frosst Canada Ltd. v. Canada \(Health\)](#), 2012 SCC 3 (CanLII), paragraph 22.

accordance with its purpose. The specific exceptions under the law must be interpreted strictly in order to not subvert the intent of the Act, or interfere with its remedial purpose, as required pursuant to section 17 of New Brunswick's *Interpretation Act* and legislative interpretation principles.<sup>3</sup>

[24] Justice Gonthier in [Lavigne v. Canada \(Office of the Commissioner of Official Languages\)](#) reiterated that the necessary exceptions to the right to access must be interpreted strictly, that doubt ought to be resolved in favour of disclosure and that the burden of persuasion must rest upon the party resisting disclosure.<sup>4</sup>

[25] The courts and Information Commissioners regularly cite these interpretation principles in their reasoning. In each case, it is useful 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 is on the Municipality. The Municipality must justify the refusal to disclose by demonstrating that the cited exceptions apply to the redacted sections of documents.

[26] These interpretation principles also serve as a starting point for our analysis of section 22.

## **Section 22: Disclosure harmful to a third party's business or financial interests**

### ***Relevant legislative provisions***

[27] In denying access to the requested information, the Municipality based its position on subparagraph 22(1)(c)(i) of the Act, which 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 a third party...

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

[29] To conclude that the information falls within this exception's scope of application, the public body must demonstrate that the two following criteria are met:

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<sup>3</sup> *Sullivan on the Construction of Statutes*, 5th edition, LexisNexis 2008, pp. 255-297 and 483-485.

<sup>4</sup> [Lavigne v. Canada \(Office of the Commissioner of Official Languages\)](#), [2002] SCR 2 733 (CanLII), paragraph 30.

- the information in question is commercial, financial, scientific or technical in nature, or relates to labour relations; and
- disclosure would likely harm a third party's competitive position.

[30] If either of the above criteria is not met, the exception does not apply.

[31] Canadian jurisprudence is very clear on these questions. Simple statements to the effect that disclosure of financial information of this kind could harm a third party's competitive position, or could hinder the conclusion of future contract negotiations, are not enough to meet the criterion of a likely risk of financial harm to a third party. Third parties' potential or speculative losses are not a sufficient basis for an exemption request under the law. A real or likely financial risk must be demonstrated; even when it is demonstrated, sections 22(3) to (5) require the public body to weigh the private interest alongside the public interest in favour of disclosure.

[32] The Supreme Court of Canada, in the [Merck Frosst](#) case, dealt with the interpretation of a similar provision of federal law, citing longstanding jurisprudence that emphasizes the demonstration of "a reasonable expectation of probable harm" in order to justify the application of an exemption. The burden is lower than the normal civil standard of proof insofar as "the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed". Nevertheless, the third party must do more than show that such harm is simply possible. There must be proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged".<sup>5</sup> The Court concluded by issuing the following ruling:

[206] To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.<sup>6</sup>

### ***The information cannot be protected when the third party gives its consent***

[33] I do not have to rule on the Municipality's decision to deny access to the information in Consultant A's invoices because Consultant A consented in writing to a full disclosure in the observations submitted to this Office during this investigation.

[34] One of the circumstances in which the *Act* authorizes the disclosure of business information from a third party is when the third party consents to disclosure (section 22(3)(a)).

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<sup>5</sup> [Merck Frosst Canada Ltd. v. Canada \(Health\)](#), 2012 SCC 3 (CanLII), paragraphs 197 and 199.

<sup>6</sup> *Ibid.*, paragraph 206.

[35] In the matter at hand, the Municipality relied on Consultant A's observations from the previous year when deciding how to respond to this request and did not contact the consultant again to see whether their disclosure-related concerns had changed. The fact that Consultant A gave their written consent to disclosure when we contacted them during this investigation, on the grounds that the work had been completed in 2021, suggests that it would have been advisable for the Municipality to do the same when processing the disclosure request. If the consultant had given their consent at that time, it would not have been necessary to address this matter in connection with this complaint.

[36] Given that Consultant A consented to the disclosure of the invoices in their entirety during the investigation, I find there was no reason for the Municipality to keep on protecting this information and I recommend that it be disclosed to the applicant.

[37] The only question that remains to be addressed is whether the applicant has a right to access the payment calculations appearing in Consultant B's invoices.

***Are the payment calculations commercial, financial, professional, scientific or technical in nature?***

[38] According to the Municipality and Consultant B, the payment calculations appearing in the relevant invoices constitute business or financial information.

[39] Although the *Act* does not define the terms "business" or "financial", this Office has adopted the following definitions:

*Business information* means information pertaining exclusively to the sale, purchase or exchange of goods or services. This term may apply to for-profit companies and to non-profit organizations, as well as to smaller and larger businesses. The fact that a document may have actual or potential monetary value does not necessarily mean that it inherently contains business or commercial information.

*Financial information* means information pertaining to money or to its use or distribution, and must contain specific data or make reference thereto. This type of information includes, in particular, methods for determining cost prices, practices for setting prices, profit and loss data, indirect costs and operating costs.<sup>7</sup>

[40] The Municipality disclosed most of the information appearing on the invoices in question, including dates, a description of the services rendered and the total amounts invoiced, but redacted details concerning how the payment amounts were calculated by the consultant. Given that the payment calculations concern the financial agreements entered into by Consultant B and the Municipality, I am of the opinion that these details constitute financial and business information, which thus meets the first criterion.

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<sup>7</sup>[Harbour Station Commission \(Re\)](#), 2020 NBOMB 2 (CanLII), paragraph 28.

***Would disclosing the redacted information harm the consultant's competitive position?***

[41] As indicated above, simple statements to the effect that disclosure will harm a third party's competitive position will generally not be enough to ground an exception under subparagraph 22(1)(c)(i) of the *Act*. Objective evidence must be put forward, going above and beyond mere possibility or speculative losses.<sup>8</sup> I am required to determine whether sufficient proof was provided to the Office to justify the conclusion that the disclosure was likely to harm the third party's business or financial interests, as set out in that section of the *Act*.

[42] In this case, the three invoices pertain to two projects on which Consultant B worked for the Municipality between 2016 and 2018.

[43] For one of these projects, Consultant B submitted two separate invoices for a portion of the work on separate dates. The redacted information in these invoices indicates the amount that the municipal council allocated to this project, the percentage of the total amount invoiced in each invoice and the current status of the project at the time of each invoice.

[44] For the other project, it appears that the consultant submitted only one invoice to the Municipality; the redacted information confirms the percentage invoiced when the invoice was submitted for payment.

[45] According to Consultant B's observations, the redacted information "does not concern the total value or the substance of the services rendered, but simply the calculation and payment method determined by [Consultant B] in their management of business and financial affairs."

[46] Consultant B maintains that there is "a real risk that disclosing these details will harm [their] competitive position because it would reveal to competitors how Consultant B determines the value of [their] services". In addition, Consultant B maintains that it "would provide a competitive advantage to competitors when submitting competing offers as part of the tender process" and for this reason, disclosing this information poses a real risk that would lead to an unjustified loss of financial profits for the consultant.

[47] Finally, Consultant B maintains that if these details are disclosed, consultants would be reluctant to include such information on their invoices out of fear of potential disclosure, and that public bodies wish to have information of this type displayed on invoices and would be disadvantaged if it were excluded.

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<sup>8</sup> [Merck Frosst Canada Ltd. v. Canada \(Health\)](#), 2012 SCC 3 (CanLII), paragraphs 199-206.



[48] The consultant referred to two cases in support of their position on this point: [Coon v. New Brunswick](#)<sup>9</sup> and [Equifax Canada Co v. Canada \(Minister of Public Works and Government Services\)](#).<sup>10</sup>

[49] In the first case, the Court of King's Bench of New Brunswick held that the consultant's name and daily rates as they appeared in a contract with the province could be withheld to protect the consultant's competitive position:

It is possible to redact the personal information and daily rates mentioned in the contracts in order to protect the competitive position.<sup>11</sup>

[50] In the second case, the Federal Court concluded that "by disclosing the Contract price, there is a real, objective risk that this information will give competitors a head start or 'spring board' in developing competitive bids against the Applicant for future contracts for data protection services".<sup>12</sup>

[51] After examining Consultant B's observations and concerns about the disclosure, together with the Municipality's concerns about the disclosure's potential impact on its relationships with external consultants, I do not believe that it has been convincingly established that the payment calculations are protected under the exception set out in paragraph 22(1)(c). Similarly, I reject the submissions put forward by the third party in application of subparagraphs 22(1)(c)(iii) and (iv).

[52] I do not believe that the decisions cited in Consultant B's observations are applicable.

[53] The Court's decision in the *Coon* case focused on the daily rates in the contracts with public bodies, rather than on payment calculations in third-party invoices. Although I recognize that information of this nature has to do with more specific details on how consultants are reimbursed by public bodies for their work, the facts of this case differ appreciably from the Court's analysis in *Coon*. The latter decision pertained to the work of consultants providing consulting services to the Province of New Brunswick with a view to developing the shale gas sector, based on federal budget requirements and the existing tax and royalty regime applicable to metalliferous minerals at the time.

[54] On this point, I believe that the nature of the contracts and the issues at stake in the *Coon* decision were no doubt inherently sufficient to inform the reasonable expectation of probable harm, but the same reasoning does not apply to contracts

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<sup>9</sup> [Coon v. New Brunswick](#), 2014 NBBR 117 (CanLII).

<sup>10</sup> [Equifax Canada Co. v. Canada \(Minister of Public Works and Government Services\)](#), 2014 CF 487 (CanLII).

<sup>11</sup> [Coon v. New Brunswick](#), 2014 NBBR 117 (CanLII), paragraph 10.

<sup>12</sup> [Equifax Canada Co. v. Canada \(Minister of Public Works and Government Services\)](#), 2014 CF 487 (CanLII), paragraph 30.

pertaining to the development of feasibility studies and business plans for projects within the Municipality of Tracadie. Moreover, the redacted details in the pending invoices are not likely to lead to losses or to harm anyone's competitive position. Finally, even if disclosure led the consultant to modify the invoice details, which in my view seems unlikely, there is no reason to be unduly concerned about the public interest. The public interest leans decisively in favour of complete transparency of the invoices in this case, and the need to rely on the cited exceptions is not demonstrated.

[55] As regards the *Equifax* case, the Federal Court held that the total amount of the contract could be protected under an equivalent provision of the federal [Access to Information Act](#), given how much information is already in the public domain concerning the underlying reason for the contract in question: a massive privacy violation involving information on hundreds of thousands of student loans.

[56] Each case must be analyzed based on the purpose of the *Act* and the relevant facts of each case. In this case, the potential harm arising from the disclosure of the redacted information is not sufficiently demonstrated so as to ground the claimed exception. The Municipality would like to apply the exception as a black-and-white rule to the effect that one detail of an invoice is disclosable but another is not. However, the matter is not so simple. It requires instead the careful application of the purpose of the *Act* and the claimed exceptions to the facts of each case.

[57] The Municipality must take steps to protect the public interest as regards the transparency of public spending and must require third parties interested in safeguarding the confidentiality of certain aspects of their invoices to offer credible proof that disclosure would be likely to cause harm.

[58] As regards the Municipality's statement to the effect that disclosure would harm its relationship with other consulting firms since they would be reluctant to do business with it in order to safeguard their own financial information, I also find against these arguments as speculative and unfounded. The Municipality did not refer to section 30 of the *Act*, but even if it did, the proof of any such harm is neither demonstrated, nor likely.

[59] In this case, the nature of the redacted information, the scope of the information disclosed and the lack of tangible proof of anticipated harm all point towards a conclusion in favour of transparency.

[60] I would like to emphasize that the Municipality's decisions to commit funding for the two projects on which the consultant worked and the amount of funding allocated to each project are in the public domain. The Municipality adopted motions aimed at allocating a certain funding amount for each project at the Council's public meetings; this information is publicly available in the minutes of the Municipality's meetings, which

are posted on its website (in particular, the minutes of the meetings held on August 22, 2016 and September 11, 2017).

[61] In conclusion, I find that the redacted portions of the invoices in question deal with the manner in which the consultant invoiced the Municipality for the work performed in relation to the total amount of funding allocated by the Municipality to each project. Given that the total amounts allocated to each project are in the public domain (i.e. public meetings of the Council) and that the Municipality cannot protect the invoiced amounts, I conclude that the details of the redacted payment calculations do not reveal any sensitive information on the consultant's business practices, but rather indicate how the consultant invoiced the Municipality for the services rendered in relation to the funding allocated to each project.

[62] In my view, arguments to the effect that disclosure of the percentages and details explaining the timeline and status of the project at the time of invoicing would harm the consultant's competitive position, would lead to financial losses for the consultant and would prevent third parties from including such details in their invoices are speculative at best. Therefore, there was no objective proof providing the Municipality with any basis for its decision to apply this exception. Even if that had been the case, it would have been necessary to rule on the potential application of sections 22 (3) to (5) of the Act, which does not seem to have been taken into account.

### **RECOMMENDATION**

[63] Based on the above findings, I recommend, under provision 73(1)a)(i)(A) of the Act, that the Municipality disclose the invoices in question to the applicant in their entirety.

[64] As set out in section 74 of the Act, the Municipality must, within 20 business days following receipt of this report, notify the applicant and the Office in writing of its decision regarding these recommendations.

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

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