



**Report of Findings: 23/24-AP-102**  
**Town of Heron Bay**  
**May 21, 2024**

**Reference:** Town of Heron Bay, (Re), 2024 NBOMBUD 4

**Summary:** The Town of Heron Bay was asked to provide access to all correspondence concerning a monetary agreement entered into with a former employee. The municipality provided the applicant with copies of a resolution adopted by the municipal council and of the agendas of relevant meetings, but refused to provide other relevant documents, citing various disclosure exceptions set out in the *Right to Information and Protection of Privacy Act*. The Ombud concluded that the municipality was entitled to avail itself of the solicitor-client privilege exception to protect communications with its lawyer and that the settlement agreement was protected as personal information of a third party but that the settlement amount should be disclosed because this financial detail was not protected from disclosure under section 21(3)(h) of the *Act*.

**Statutes and doctrine examined:**

[Right to Information and Protection of Privacy Act](#), SNB 2009, c R-10.6, 21(1), 21(2)(e), 21(2)(g), 21(3)(f)(i), 21(3)(h), 27(a), 29(1)(o), 70(1), 70(3); [Freedom of Information and Protection of Privacy Act](#), RSA 2000, c F-25, 17(2)(h).

**Jurisprudence examined:**

[Ontario \(Criminal Code Review Board\) v. Hale](#), 1999 CanLII 3805 (ONCA); [County of Vermilion River #24 \(Re\)](#), 2008 CanLII 88773 (AB OIPC); [Solosky v. The Queen](#), 1979 CanLII 9 (SCC), [1980] 1 SCR 821 (CanLII); [Daniels v. Wolfville \(Town\)](#), 2023 NSSC 126; [New Brunswick \(Justice and Public Safety\) \(Re\)](#), 2021 NBOMB 2 (CanLII); [University of New Brunswick \(Re\)](#), 2021 NBOMB 4 (CanLII); [New Brunswick \(Agriculture, Aquaculture and Fisheries\) \(Re\)](#), 2021 NBOMB 6 (CanLII); [Hans v. STU](#), 2016 NBQB 49 (CanLII); [New Brunswick \(Health\) \(Re\)](#), 2017 NBOMB 1 (CanLII); *Société Radio-Canada v. Department of Health* (unpublished oral decision; the formal judgment was issued by order on May 29, 2017, Court file number: MM-40-17); [New Brunswick \(Executive Council\) \(Re\)](#), 2018 NBOMB 5 (CanLII).

## INTRODUCTION

[1] The Town of Heron Bay (hereinafter referred to as “the Municipality”) was asked to provide, under the *Right to Information and Protection of Privacy Act* (hereinafter, “the Act”), all correspondence between September 2022 and September 2023 concerning a monetary agreement entered into with a former employee.

[2] The Municipality decided to grant partial access to the relevant documents, including a resolution adopted by the municipal council and agendas for the relevant meetings.

[3] In its response to the applicant, the Municipality mentioned three reasons why the rest of the information was protected from disclosure:

- the requested information constituted the Municipality’s confidential documents produced by its lawyers to settle the matter in question;
- various other documents pertained to deliberations that took place during a closed-door meeting of the municipal council under subsections 68(1)(f) and 68(1)(j) of the *Local Governance Act*, i.e., legal advice or opinions provided to the Municipality by its lawyer and current litigation involving the Municipality; and
- all the documents in question were also subject to legal privilege, as set out in section 27 of the *Act*.

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

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

## QUESTIONS

[6] The only pending question is to determine whether the applicant is entitled to access the relevant documents withheld by the Municipality.

[7] The documents in question include communications between the Municipality and its external lawyer generated during the access request period and the agreement entered into by the Municipality and the former employee.

[8] The Municipality confirmed that even though its response indicated that information had not been disclosed with respect to the closed-door meetings under section 68 of the *Local Governance Act*, it did not have any records in its possession because no notes or minutes had been taken during the closed-door meetings at which the underlying question had been discussed.

[9] According to section 84(1) of the *Act*, the burden of proof lies with the Municipality to establish that the applicant is not entitled to access the information.

### **APPLICANT'S OBSERVATIONS**

[10] The applicant is of the opinion that the reasons provided by the Municipality for refusing to disclose most of the relevant information were not justified and asked this Office to review the case in order to determine whether the Municipality acted in accordance with the *Act*.

### **MUNICIPALITY'S OBSERVATIONS**

[11] Throughout the review process, the Municipality maintained that the applicant is not entitled to access the information in question, including the agreement entered into by the former employee and the Municipality.

[12] The Municipality maintains that the documents generated by communications with an external lawyer pertaining to the legal case involving the former employee are subject to solicitor-client privilege and are protected from disclosure under section 27(a) of the *Act*.

[13] Although the Municipality initially claimed that the agreement entered into with the former employee was protected under solicitor-client privilege, it subsequently raised the potential applicability of subsection 29(1)(o), as well as section 21(1), after reviewing prior decisions of my predecessors and of the Courts concerning freedom-of-information rights with respect to severance pay granted to employees and government workers at the end of their employment. In particular, the Municipality cited the decision in *Hans v. STU* to support its position that disclosing the settlement amount would constitute an unreasonable violation of the former employee's privacy.

### **DISPOSITION**

[14] For the following reasons, I conclude that the Municipality was entitled to claim the legal privilege protected under section 27(a) of the *Act*, with respect to documents appearing in the list submitted by its lawyer; I also conclude that the settlement agreement is generally protected under section 21. However, the settlement amounts indicated in paragraph 1 of the settlement agreement are not protected by this exception and subsection 29(1)(o) does not apply in this case.

## **ANALYSIS AND DECISION**

### **Communications between the Municipality and its external lawyer**

[15] As regards communications between the Municipality and its lawyer, which were withheld under solicitor-client privilege under section 27(a), although I did not receive the detailed list in the usual form as requested, I am ready to conclude in this case that the documents identified as Category A in the list of documents provided by the Municipality's lawyer dated December 21, 2023 can be withheld for that reason.

[16] The underlying facts show that there was a legal dispute underway between the Municipality and the former employee when those documents were generated; the Municipality had hired an external lawyer to represent it in that case. The only documents listed include letters from the Municipality's lawyer to the Municipality's general manager, in addition to a list of emails exchanged between them.

[17] Although the provision with respect to solicitor-client privilege is a discretionary disclosure exception, the Municipality was not willing to disclose those documents, noting that "legal privilege is a quasi-constitutional right that we must jealously protect."

### **Agreement entered into by the Municipality and the former employee**

[18] Having received on May 16, 2024 the settlement agreement entered into by the Municipality and its former employee, I note that the agreement in question was entered into for the purpose of settling the former employee's legal action against the Municipality and that it contains a number of standard contractual provisions, including a non-disclosure clause and the amount of the negotiated settlement agreed to by the parties.

### ***The confidentiality clause does not determine access rights***

[19] As regards the non-disclosure clause in the agreement entered into by the parties, it does not determine freedom-of-information rights under the *Act*. If the terms of an agreement run counter to or are incompatible with the requirements of the *Act*, then the *Act* shall prevail.

[20] Public bodies cannot exempt themselves from their statutory obligation to inform the public by including such confidentiality clauses in contractual agreements. Although confidentiality clauses may reflect the parties' intention to keep certain details confidential, public bodies cannot use contractual means to circumvent their transparency and accountability obligations under the *Act*.<sup>1</sup>

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<sup>1</sup> [Ontario \(Criminal Code Review Board\) vs. Hale](#), 1999 CanLII 3805 (ONCA), 35.

***Section 27: The agreement entered into does not constitute privileged solicitor-client information***

[21] At the outset of the discussions between my Office and the Municipality, the latter claimed that the agreement entered into by the parties to the dispute constituted privileged solicitor-client information under section 27(a) of the *Act*. I do not accept that argument.

[22] The applicable law governing solicitor-client privilege appears clear in situations such as the present case.<sup>2</sup> Although the Municipality retained the services of a lawyer who was able to take part in drafting the agreement, the settlement agreement in and of itself does not constitute communication between a lawyer and a client and does not contain any legal advice. Solicitor-client privilege and privilege with respect to settlements are different types of privilege; they are clearly defined in common law and are subject to different forms of evidence.

[23] Moreover, the *Act* does not provide specific protection for settlement privilege, nor is it covered by the exception set out in subsection 27(a) of the *Act*.<sup>3</sup>

***Paragraph 29(1)(o): Communication injurious to the conduct of a legal proceeding***

[24] I do not accept the Municipality's argument that the agreement falls within the scope of application of subsection 29(1)(o) of the *Act*. That provision is designed to protect information whose disclosure would in all likelihood be injurious to the conduct of a legal proceeding. In the case at hand, the agreement entered into by the parties did bring to an end the legal action initiated by the former employee and, consequently, it no longer appears that there are any legal proceedings underway, nor are any anticipated. In the past, my Office and my predecessors concluded that this section insists on the existence of tangible evidence that disclosure would be injurious to the conduct of legal proceedings underway or anticipated.<sup>4</sup> Speculative losses are not a sufficient basis for applying the disclosure exception, and all the more so the exception cannot be applied in the absence of any legal proceedings.

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<sup>2</sup> [County of Vermilion River #24 \(Re\)](#), 2008 CanLII 88773 (AB OIPC), 71, citing [Solosky v. The Queen](#), 1979 CanLII 9 (SCC), [1980] 1 SCR 821 (CanLII).

<sup>3</sup> [Daniels v. Wolfville \(Town\)](#), 2023 NSSC 126 (CanLII), 27-31.

<sup>4</sup> [New Brunswick \(Justice and Public Safety\) \(Re\)](#), 2021 NBOMB 2 (CanLII); [University of New Brunswick \(Re\)](#), 2021 NBOMB 4 (CanLII); [New Brunswick \(Agriculture, Aquaculture and Fisheries\) \(Re\)](#), 2021 NBOMB 6 (CanLII).

### **Section 21: Privacy of a third party**

[25] Having carefully read over the settlement agreement, I find that it may, at least in part, be protected under section 21(1) as personal information whose disclosure would constitute an unreasonable violation of the former employee's privacy.

[26] After her employment ended, the former employee sued the Municipality. The settlement agreement contains details about the former employee, which would be regarded as personal information, including personal information concerning her professional history and information specifying her source of income or her financial situation, activities or history, which may be protected under subsections 21(2)(e) and (g) because their disclosure would constitute an unreasonable violation of the former employee's privacy.

[27] As regards the amount of the settlement negotiated by the parties, it appears that there is no direct New Brunswick precedent on this point. However, the question of severance pay granted to employees of public bodies at the end of their employment has been the subject of various decisions by my predecessors and by the Courts<sup>5</sup>; these decisions are relevant when evaluating the question of disclosing the settlement amount in this case.

[28] In all those decisions, my predecessors and the Courts considered the question of disclosing severance pay amounts granted to employees and government workers at the end of their employment and whether such disclosure would constitute an unreasonable violation of their privacy. My predecessors and the Courts all concluded that the severance pay amounts were personal information concerning the individuals in question and that disclosure in response to an access request was governed by section 21 of the Act.

[29] In four of those five decisions, my predecessors and the Courts concluded that severance paid to an employee at the end of his or her employment constituted a "benefit" as an "officer or employee of a public body" for the purposes of

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<sup>5</sup> *St. Thomas University (Re)*, 2015 NBOMB 7 (CanLII); *Hans v. STU*, 2016 NBQB 49 (CanLII); *New Brunswick (Health) (Re)*, 2017 NBOMB 1 (CanLII); *Société Radio-Canada v. Department of Health* (unpublished oral decision whose formal judgment was issued by order on May 29, 2017, Court file number: MM-40-17); *New Brunswick (Executive Council) (Re)*, 2018 NBOMB 5 (CanLII).

subsection 21(3)(f)(i) of the *Act* and that disclosure did not constitute an unreasonable violation of privacy.

[30] In *Hans v. STU*, Justice Morrison ruled that disclosure of the information concerning severance pay was protected within the meaning of subsection 21(2)(e) and was deemed to constitute an unreasonable invasion of privacy because this “personal information” related to the third party’s “employment history”. In his view, a broad interpretation of “benefits” does not “strike the right balance between privacy and transparency which the purposes of [the Act] require”.<sup>6</sup>

[31] However, the other four decisions, including two subsequent reports by my predecessors and a prior decision by Justice Dionne of the Court of King’s Bench, while recognizing the fundamental importance of protecting privacy, ultimately concluded that public bodies’ transparency and accountability requirements under the *Act* would not be met if severance payments were not subject to public scrutiny.

[32] In my opinion, the question of the settlement amounts merits similar considerations, although I conclude that there is a distinction between severance pay granted to employees at the end of their employment and settlement payments negotiated between the parties following the period of employment.

[33] A settlement granted to an individual who is no longer an employee of a public body in order to settle an employment-related dispute cannot be regarded as a “benefit” granted to an employee of a public body for the purposes of subsection 21(3)(f)(i) of the *Act*. Under those circumstances, settlements are not granted to individuals as employees of public bodies, but rather as former employees and as potential or actual litigants. I therefore conclude that subsection 21(3)(f)(i) does not apply to the settlement amounts so as to require their disclosure.

[34] However, I find that the settlement amount in this case constitutes “information about a discretionary benefit of a financial nature granted by a public body to the third party” for the purposes of subsection 21(3)(h) of the *Act*.

[35] In my opinion, the amount of compensation paid to the former employee to resolve the legal dispute constitutes information concerning a discretionary financial benefit that the Municipality granted to the former employee. In exchange for ending the legal proceedings, the parties agreed to negotiate conditions for the purpose of resolving the dispute without taking the case to court. In my view, this is a financial benefit for the purposes of this provision.

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<sup>6</sup> [Hans v. STU](#), 2016 NBQB 49 (CanLII), 22.

[36] I also conclude that compensation was granted to the former employee at the Municipality's discretion because the Municipality was able to choose how it wished to proceed in dealing with the legal claim. Settlement payments are carried out at a public body's discretion to resolve disputes and avoid legal proceedings.

[37] In reviewing the equivalent provision in the Alberta statute,<sup>7</sup> the Alberta Commissioner concluded that the disclosure of details concerning settlement payments would not constitute an unreasonable invasion of privacy:

[para 28] The purpose of subsection 17(2)(h) is to ensure that the presence of personal information in a record does not prevent a public body from being accountable for the discretionary payments it makes to third parties. Interpreting this provision as encompassing settlements aligns with this objective and ensures that an area in which public bodies have discretion to expend public funds is subject to public scrutiny.<sup>8</sup>

[38] That decision goes on to examine what is encompassed in the disclosure of "details" of discretionary benefits. Given that the purpose of this provision is to ensure that these details are subject to public scrutiny, the Office of the Alberta Commissioner ruled that the following details should be disclosed:

- the name of the recipient of the benefit;
- the reason for providing the benefit to the recipient;
- any consideration received by the recipient in exchange for granting the benefit; and
- personal information relating to the public body's act of granting the benefit.<sup>9</sup>

[39] In support of this position, the decision indicates that this provision "recognizes that accountability would not be achieved by merely disclosing that a public body paid a certain amount to a third party. Rather, details of the benefit, such as the reasons for it and whether it was duly given, must necessarily also be included to ensure transparency and accountability."<sup>10</sup>

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<sup>7</sup> [Freedom of Information and Protection of Privacy Act](#), RSA 2000, c F-25, subsection 17(2)(h): "A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (...) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body..."

<sup>8</sup> [County of Vermilion River #24 \(Re\)](#), 2008 CanLII 88773 (AB OIPC), 28.

<sup>9</sup> *Ibid.*, 29.

<sup>10</sup> *Ibid.*, 29.



[40] I note that the equivalent provision of the Alberta statute uses the term “details”, whereas subsection 21(3)(h) of the New Brunswick statute refers to “information”. I do not believe that this is a significant distinction requiring different considerations, and I adopt this interpretation for the purposes of subsection 21(3)(h) of the *Act*.

[41] In so doing, I also note that this analysis is in keeping with the approach adopted by my predecessor, the Honourable Alexandre Deschênes, in the most recent decision that this Office issued on the question of severance pay:

[In] the event of dismissal or termination followed by a negotiated agreement touching on severance payments, in my view the amounts paid are “a discretionary benefit of a financial nature granted by a public body to the third party” within the meaning of section 21(3)(h) of the *Act*. In accordance with this legislative provision, disclosing this information is not an unreasonable invasion of a third party’s privacy.<sup>11</sup>

[42] For those reasons, I conclude that disclosing some information in the settlement agreement entered into by the parties, including the settlement amount, as set out in paragraph 1 of the settlement agreement, would not constitute an unreasonable invasion of the former employee’s privacy and that said information is not protected from disclosure under subsection 21(3)(h) of the *Act*.

## RECOMMENDATION

[43] Based on the above findings, I recommend, under provision 73(1)(a)(i)(A) of the *Act*, that the Municipality inform the applicant as to the amount of the settlement granted to the former employee and the name of the recipient of the benefit.

[44] 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.

## CONCLUSION

[45] Before concluding this report, I must raise the issue of respect as it pertains to the Ombud’s investigative powers in this case. Compliance with the deadlines set out in the *Act* is of the utmost importance when applying access-to-information laws in Canada. Therefore, I am concerned by the slowness of the informal resolution and formal investigative processes, due in part to the Municipality’s lack of cooperation.

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<sup>11</sup> [New Brunswick \(Executive Council\) \(Re\)](#), 2018 NBOMB 5 (CanLII), 15.

[46] The *Act* grants me broad powers to require the submission of documents that I deem relevant for an investigation, in accordance with section 70:

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

[47] The only information that I am not authorized to ask a public body to provide for review purposes is that which the public body claims as confidential Cabinet documents or as protected by solicitor-client privilege.

[48] If I find that certain information is relevant to an investigation, section 70(3) also sets out other provisions concerning the submission of documents:

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

[49] Under section 70(3), my power to require the submission of documents for investigative purposes is not affected by a non-disclosure clause in a relevant document.

[50] However, in this case, although the Municipality did provide a list of the relevant documents, including those that are presumably protected by solicitor-client privilege, it did not submit the list of documents in the format that we ask all public bodies to provide when they themselves refuse to provide the documents for our review.

[51] In this case, the settlement agreement entered into by the Municipality and its former employee was not submitted to us within the prescribed timeframe. Despite repeated efforts during the informal resolution process and three express requests in March, April and May, the settlement agreement was not submitted to us for inspection until May 16, 2024.

[52] As a senior official of the Legislative Assembly tasked with ensuring the proper application of provincial access to information and privacy protection laws, the Ombud plays an important role in upholding the province's democratic traditions. However, my Office and I cannot fulfil the responsibilities entrusted to us without the full and complete

cooperation of the public bodies subject to these laws, as well as of the members of the Bar who represent them.

[53] I will therefore look forward to better cooperation from the Municipality in the future, not only during the informal settlement process but also during the formal investigative process, with a view to upholding the fundamental principles and rights underpinning this *Act*.

This report was signed in Fredericton, New Brunswick, on this 21<sup>st</sup> day of May 2024.

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