Report of Findings: 23/24-AP-120
Vitalité Health Network

September 13, 2024

Citation: Vitalité Health Network (Re), 2024 NBOMBUD 7

Summary: The Applicant made an access request to Vitalité Health Network for copies of contracts with private companies that provide travel nurses and other health care workers since 2022. Vitalité denied the request in full, relying on subparagraphs 22(1)(c)(i) and (iii) (disclosure harmful to third party business or financial interests). The Applicant filed a complaint with this Office, submitting that Vitalité improperly relied on the claimed exceptions and the contracts should be disclosed in the public interest.

While Vitalité provided the Applicant with some disclosure during the formal investigation, it continued to withhold the contracts with one of the third parties in full and certain details in the contracts with the other third parties on the same grounds.

The Ombud found that Vitalité did not meet its burden of proof and recommended that it fully disclose the partially released contracts with three of the third party companies, with the exception of individual signatures, which can be protected from disclosure under subsection 21(1) (unreasonable invasion of third party privacy). The Ombud declined to make a recommendation with respect to the contracts with the fourth third party as the Applicant had already received copies through other means.

Statutes Considered: *Right to Information and Protection of Privacy Act*, SNB 2009, c. R-10.6, sections 21(1), 22(1)(c)(i), 22(1)(c)(iii), 22(3)(b), 22(4).

Authorities Considered: Office of the Auditor General of New Brunswick, *2024 Auditor General's Report – Volume I – Chapter 2: Travel Nurse Contracts*; *Carmont et al v PNB et al*, 2018 NBQB 53 (CanLII); *Medavie v. PNB (Department of Health)*, 2018 NBQB 121 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner) [Community Safety]*, 2014 SCC 31; *New Brunswick (Justice and Public Safety) (Re)*, 2021 NBOMB 1 (CanLII); *Harbour Station Commission (Re),* 2020 NBOMB 2 (CanLII); *Balmain v New Brunswick (Tourism, Heritage and Culture)*, 2018 NBQB 129; *Town of Heron Bay, (Re)*, 2024 NBOMBUD 4 (CanLII); *William H. Teed v Fundy Regional Service Commission Intervenor – Scotia Recycling Ltd.*, 2017 NBQB 173 (CanLII).

INTRODUCTION

[1] The Applicant made an access request under the *Right to Information and Protection of Privacy Act* ("the *Act*") to Vitalité Health Network ("Vitalité") for copies of contracts, including addenda and renewals, with private companies that provide travel nurses and other health care providers since 2022. In making this request, the Applicant specified certain companies that they were aware had contracts with Vitalité and asked for these contracts specifically, as well as those with any other companies that the Applicant was not aware of.

[2] While processing the request, Vitalité did not notify the third parties and decided of its own accord to refuse access to the requested contracts in full. In its response to the Applicant, Vitalité explained that it would not release the requested contracts under subparagraphs 22(1)(c)(i) and 22(1)(c)(iii) (disclosure harmful to third party business or financial interests).

[3] The Applicant was not satisfied with Vitalité's response and filed a complaint with this office.

[4] Informal resolution efforts were unsuccessful, which led me to conduct a formal investigation under subsection 68(3) of the *Act*.

BACKGROUND

[5] The records at issue in this case have been the subject of much public discussion and scrutiny over the past year. As is now publicly known, in 2022, Vitalité contracted with four out-of-province private sector staffing agencies with a view to ensure it had sufficient nursing staff available to provide health care services across its mandate. It is well-known that the New Brunswick health care system, like other jurisdictions across the country, had been experiencing a number of challenges in delivering the necessary services to the public, a situation that was exacerbated by the COVID-19 pandemic.

[6] As we now know, Vitalité was not the only public sector organization to have engaged the services of out-of-province health care professionals recently; however it was the largest user of travel nurse agreements to date, having expended over $100,000,000 for such services since 2022.[1]

[7] In March 2024, the Auditor General of New Brunswick announced that his office would be undertaking an independent audit of the Province's management of contracts

[1] Office of the Auditor General of New Brunswick, *2024 Auditor General's Report – Volume I – Chapter 2: Travel Nurse Contracts*, p. 4.

pertaining to travel nurses, including an audit of Vitalité and Horizon health networks, as well as the Department of Health and the Department of Social Development.

[8] In the resulting report published in early June 2024, the Auditor General gave an overview of the concluded contracts with the private sector agencies, including some of the financial details, and made several recommendations to the audited entities about contract management, including Vitalité.

[9] Many of these developments occurred during this office's investigation of this complaint and informed our discussions with Vitalité officials.

[10] After the formal investigation was launched and prior to the issuance of this report, Vitalité agreed to revisit its position and partially disclosed some of the requested information to the Applicant.

[11] In its revised response, Vitalité partially disclosed the contracts with three of the four private sector companies to the Applicant. In doing so, Vitalité withheld signatures in the contracts under subsection 21(1) (unreasonable invasion of third party privacy), as well as the exact dollar and percentage amounts of various financial details in these contracts, which Vitalité maintained were protected under subparagraphs 22(1)(c)(i) and 22(1)(c)(iii).

[12] As for the fourth private sector company, Vitalité maintained its original decision and refused to disclose the concluded contracts in full, again relying on subparagraphs 22(1)(c)(i) and 22(1)(c)(iii) of the *Act*.

APPLICANT'S REPRESENTATIONS

[13] The Applicant submitted that Vitalité's decision to refuse access was inconsistent with previous decisions issued by this office finding that contracts with private sector companies should generally be public unless under exceptional circumstances, as well as court decisions from other jurisdictions around the country.

[14] The Applicant also submitted that Vitalité's reliance on the third party business interests exception was superseded by the public interest override provision at paragraph 22(4), noting that there had been significant public debate about the high costs incurred by the New Brunswick health care system through the use of travel nurses hired through private companies. In the Applicant's view, transparency about these contracts is absolutely necessary because of the impact on public finances and the state of the public health care system.

[15] In making this complaint, the Applicant also shared that they had received partial copies of contracts with one of the third parties and another Provincial public body as well as full copies of similar contracts from other Canadian jurisdictions.

VITALITÉ'S REPRESENTATIONS

[16] Vitalité's position is that the withheld information in the contracts is protected from disclosure under the third party business interests exception and that disclosure could reasonably be expected to harm the third parties' competitive position and result in a significant financial loss or gain to the third parties.

[17] In support of its position, Vitalité submitted that the third parties' pricing strategies and rate structures are critical industrial secrets and that divulging these details, including the per diems and travel reimbursement amounts, would give a competitive advantage to the third parties' competitors. Vitalité submitted that if a competitor were to know these details, it could use them to recalibrate its own pricing structure to offer marginally inferior rates and undermine the position of the companies currently holding these contracts, an approach which could systematically be exploited to erode the competitive position of these companies in the marketplace.

[18] Further, Vitalité explained that the contracts with these companies could possibly be renewed at least one more time, given Vitalité's plan to continue to use these kinds of services until 2026. For this reason, Vitalité submits that there is a need to maintain a level playing field for the third parties without divulging their proprietary pricing information.

[19] On a final note, Vitalité submitted that the inclusion of confidentiality and non-disclosure clauses in the contracts reinforces the parties' expectation of confidentiality, that the third parties shared these details with Vitalité with an explicit understanding of the confidential nature of the financial details involved, and that breaking this understanding would seriously damage the third parties' competitive viability.

[20] Vitalité also relied on two 2018 court decisions that addressed the question of access rights to contracts related to the health care sector: *Carmont et al v PNB et al* and *Medavie v PNB (Department of Health)*.[2] In both these cases, the court held that certain kinds of information in the contracts between the Province and third party companies (Shannex RLC Ltd. and Medavie Health Services New Brunswick Inc., respectively), including budgetary information, staffing details, unit costs per hour,

[2] *Carmont et al v PNB et al*, 2018 NBQB 53 (CanLII) and *Medavie v. PNB (Department of Health)*, 2018 NBQB 121 (CanLII).

budgetary calculation formulas, were properly protected from disclosure under the section 22 exception.

[21] Vitalité raised the potential applicability of the subsection 30(1) exception (disclosure harmful to public body economic and other interests) in its submissions to this office; however, it did not rely on this exception either in its original response that refused access in full or in its subsequent revised decision to the Applicant where partial access was granted. As this is the case, there is no need for me to address the applicability of this provision.

[22] Vitalité did not provide submissions or representations on the potential applicability of the override to the exception found at subsection 22(4).

THIRD PARTIES' REPRESENTATIONS

[23] During the formal investigation, this office contacted the third parties to seek their representations prior to making a final decision. We did not receive a reply from three of the four third parties, leaving me without the benefit of their input.

[24] The third party that did provide a reply expressed serious concerns with having its pricing information being made available to competitors. It also raised concerns about this kind of information being made public in such a way as to provide details in an inaccurate manner, which could lead to the dissemination of misinformation.

ISSUES

[25] The issues before me are:

- Did Vitalité properly rely on the claimed exceptions to refuse access to the remaining withheld information in the requested contracts?
- If so, does the public interest override under subsection 22(4) otherwise apply to nevertheless allow for the disclosure of the remaining withheld information?

[26] As per subsection 84(1) of the *Act*, the public body (in this case Vitalité) has the burden of proof to show that the Applicant has no right of access to the withheld information.

ANALYSIS AND FINDINGS

Section 21: Unreasonable invasion of third party privacy

[27] Vitalité relied on this provision to refuse access to the signatures of individuals who signed the contracts in question. While Vitalité did not make formal submissions in support of its position on this point, I understand concerns with disclosing signatures in order to curtail risks of possible identity theft and fraud. As Vitalité redacted the signatures in a way that makes it clear for the reader who the individuals who signed the contracts were, I accept the withholding of individual signatures in this context.

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

Relevant legislative provisions

[28] The claimed exceptions to disclosure state:

> 22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal
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> …
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> (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to
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> (i) harm the competitive position of a third party,
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> (…)
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> (iii) result in significant financial loss or gain to a third party

[29] This is a mandatory exception to disclosure, which means that a public body is not permitted to disclose information that falls within its scope, unless the conditions that would otherwise authorize or require disclosure under subsections 22(3) to (5) are met.

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

- the information at issue is commercial, financial, labour relations, scientific or technical information;
- the disclosure of this information could reasonably be expected to result in one or more of the types of harm set out in subparagraphs 22(1)(c)(i) to (v) of the *Act*.

[31] If either of these criteria are not met, the exception does not apply.

[32] The widely recognized standard of proof for harms-based tests relating to third party information was set out by the Supreme Court of Canada in *Merck Frosst*, which dealt with the interpretation of a similar provision of the federal *Access to Information Act*. In a 2014 decision, the Court confirmed the applicable standard of proof for harms-based tests as follows:

> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".[3]

[33] In providing submissions to support an argument that disclosure gives rise to a reasonable expectation of probable harm, objections to disclosure should set out detailed and convincing evidence about how the alleged type(s) of harm could reasonably be expected to occur as a result of the disclosure of the information at issue. Vague assertions that knowledge of certain details may harm a third party's interests will not suffice; there must be some specificity as to the nature and content of that risk. Mere assertions that there may be some possible adverse impact in the future or reputationally will not be sufficient to meet the burden of proof.[4]

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

[34] Vitalité submitted that, aside from the signatures, the withheld information is commercial and/or financial in nature.

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

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large

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[3] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner) [Community Safety]*, 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94.

[4] *New Brunswick (Justice and Public Safety) (Re)*, 2021 NBOMB 1 (CanLII), at para. 27.

> and small enterprises. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[5]

[36] The information remaining at issue includes the full contracts concluded with one of the four third party companies and the following details in the partially disclosed contracts with the other three third parties:

- hourly rates by position, as well as hourly training rates;
- travel reimbursement amounts (kilometric and daily meal allowances);
- late payment fees (percentage amount);
- insurance and indemnification and limited liability coverage (dollar amounts);
- conversion formulas for the hiring of the company's assigned employees and fees for violating the non-hiring period (percentage amount);
- premium payments in certain circumstances (percentage amount); and
- vacation pay amount (percentage).

[37] I note that Vitalité redacted the partially disclosed contracts in a way that allowed the reader to understand the various contract terms and that it was just the dollar and percentage amounts, and conversion formulas in one contract, that remained withheld.

[38] I am satisfied the contracts and specific details described above are commercial and financial information as they set out the terms of the contracts with the third parties for the procurement of health care professionals, thus meeting the first part of the test.

Would disclosing the redacted information harm the third parties' financial or business interests?

[39] Having reviewed the withheld information, the submissions made during this investigation, as well as other developments where some of the information at issue became publicly available, I find that Vitalité has not presented sufficient evidence to support its refusal of access to the remaining withheld information.

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[5] *Harbour Station Commission (Re),* 2020 NBOMB 2 (CanLII) at para. 28.

[40] As for the contracts with one of the third parties that were withheld in full, the Applicant obtained copies through other means. There is no need for me to further consider the question of the Applicant's access rights to these records.

[41] My analysis thus only needs to address the withheld portions of the contracts with three of the third parties, which are set out above at para. 36.

[42] I note that some of the details that Vitalité continued to withhold were made publicly available in June 2024 in the Auditor General's report on the use of travel nurse contracts in the Province.

[43] The Auditor General's report sets out some details of the third party companies' hourly rates for certain positions. Specifically, the hourly rates that three of the third party companies charged Vitalité for registered nurses (RNs), licensed practical nurses (LPNs), and personal support workers (PSWs) are set out in pages 38 and 39 of the Auditor General's report.

[44] Even if I were to find that there is sufficient evidence before me to support a finding that these hourly rates are protected under paragraph 22(1)(c), paragraph 22(3)(b) states that the exception to disclosure does not apply "if the information is publicly available". As these details have been publicly available since June 2024 through a published report of another legislative officer, I do not find that they can continue to be protected from disclosure under the *Act* and should have been disclosed to the Applicant in Vitalité's revised response.

[45] The remaining withheld information, including hourly rates for other positions, were not disclosed in the Auditor General's report and must be addressed separately.

[46] In considering the kinds of information that Vitalité has continued to withhold in these contracts, I carefully considered the two court decisions relied on by Vitalité (*Carmont* and *Medavie*), both of which addressed the question of access rights to certain financial and commercial details in agreements relating to the provision of health care services. The *Carmont* decision dealt with a contract for the operation of nursing home facilities while the *Medavie* decision considered an agreement for the provision of ambulance services, both by private sector companies.

[47] In the nursing home case, the information at issue included per diem rates, as well as the total number of annual bed days and the number of full-time equivalent positions for each nursing home operated by the private company. In the *Medavie* case, the details at issue included unit hours, the cost per unit hour, the cost per staffed hour, call volume by regions, formulas, and budget costs.

[48] In both decisions, the court held that the information in question was protected from disclosure under the section 22 exception based on an assessment of the submissions and evidence before the court.

[49] Having carefully reviewed both court decisions, while I am prepared to accept that the information in question in the present case is somewhat similar in nature to the information at issue in the *Carmont* and *Medavie* decisions, I must note that in both cases, the companies submitted detailed affidavit evidence to the court explaining their concerns with the specific types of information at issue and explaining how, in their view, the disclosure of each of these types of information could reasonably be expected to harm their respective business and financial interests.

[50] In both cases, the court's decision was determined on the detailed nature and strength of the arguments and evidence submitted, which the court ultimately found were sufficient to establish a causal connection between the disclosure of these details and the alleged harms to the companies' respective interests.

[51] In returning to the present case, both Vitalité and the third party that responded to this office's request for representations asserted that the details in the contracts are considered confidential in nature, raising concerns that disclosure would allow competitors to use these details to their advantage to submit more competitive bids in the future and undermining the company's competitive position.

[52] I note that the submissions presented to this office did not engage with the various types of information contained in the contracts or how the disclosure of these specific details could reasonably be expected to harm third party interests if they were to be disclosed.

[53] I find that if I were to accept that objections of such a general nature were sufficient to meet the burden of proof in this case, this would open the door for every contract with a public body to be withheld on the same grounds, which is not in keeping with the level of transparency intended by the legislation.

[54] In arriving at this conclusion, I note that the court in the *Medavie* case highlighted that this decision was not necessarily indicative that similar information in contracts between third parties and public bodies would always be protected from disclosure:

> [40] I find that the released redacted version of the 2017 agreement complies with the letter and spirit of the *Right to Information and Protection of Privacy Act*. Consequently, the redacted portions of the agreement are not to be disclosed. **In making this decision, I am mindful of paragraph 4 of *Merck* and that each case must be decided on its own facts**.
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> [Emphasis added]

[55] While I agree that the information at issue in this case is similar in nature to the agreement considered in the *Medavie* decision, I do not find that Vitalité or the third parties have presented sufficient persuasive evidence to allow me to arrive at the same conclusion. As stated by the decision above, each case must be decided on its own merits and if there is not sufficient evidence to support a finding that the test under the exception has been met, a recommendation for disclosure may well follow.

Potential contract renewal not relevant

[56] As for Vitalité's submissions that the contracts with the third parties may need to be renewed at least one more time and that it is necessary to maintain a level playing field to preserve the third parties' respective competitive positions, I find the decision in *Balmain v New Brunswick (Tourism, Heritage and Culture)* to be instructive.[6]

[57] While this case involved the Province's reliance on the paragraph 30(1)(c) exception, a discretionary exception to disclosure that can be relied on to protect either a public body or the Province's economic or other interests, it is also a harms-based test with the same burden of proof as the section 22 exception.[7]

[58] Justice Stephenson rejected the Province's position that disclosing the licensing fees in the contract could negatively impact potential future negotiations for the operation and maintenance of a golf course as sufficient grounds to refuse access, finding as follows:

> [14] …The Province…has provided no other evidence of why or how its competitive and/or contractual negotiations position would be prejudice [sic] in a future negotiation for the operation of the Golf Course – it merely invites the Court to come to the conclusion that this outcome is self-evident were it compelled to disclose the economics of its current arrangement. **Taken to its logical conclusion, this argument could be employed to avoid disclosure of virtually any public contract.**
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> [Emphasis added]

[59] Justice Stephenson also considered the potential impact of disclosure of the existing licensing fee structure on potential future negotiations with a different operator and did not find the Department's objections on this point to be convincing:

> [16]…[A] future operator might equally question both the licensing fees it was being asked to pay and the contractual undertakings it was being required to commit to, in relation to the operation of the Golf Course, as compared to those set out in the Agreement. The answer to that type of inquiry has always been that this is a new negotiation and this is the arrangement that is now on the table

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[6] *Balmain v New Brunswick (Tourism, Heritage and Culture)*, 2018 NBQB 129.
[7] *Supra*, note 3.

> and which you are expected to bid into. **Further, the extent a party chooses to benchmark a future bid on the basis of a previous agreement, it does so at its own peril.** The Province will always have the discretion of whether to accept a bid and will also, if acting in a commercially expedient manner, have the necessary economic information from the earlier agreement to construct its own reference case analysis to establish the economic parameters of the bid it would be prepared to accept. Indeed, in my experience, the evolution of contractual covenants and refinement of economic terms based on actual experience, is a common feature of service agreements across the public and private sectors.
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> [17]… I have concluded that the level of harm/risk the Province has demonstrated does not rise beyond the level of mere possibility or speculation. There is no suggestion any proprietary or trade secrets are at issue, and it is not sufficient to simply point out the Province might potentially have to re-negotiate a new agreement with a different operator for the same period. **To conclude otherwise would, for the reasons already cited, establish a precedent which could potentially be employed to broadly circumvent the purpose of the Act and the openness and accountability function it serves in our society.**
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> [Emphasis added]

[60] I find that the arguments against disclosure before me are similar in substance and weight as the Province's arguments in the *Balmain* case. I do not find the assertion that disclosure of the current fee structure and related details could be used against the third parties currently holding these contracts in future contract negotiations or procurement processes is sufficient to find that the disclosure could reasonably be expected to harm the third parties' competitive position or result in significant financial loss or gain to a third party for the purposes of subparagraphs 22(1)(c)(i) and (iii) of the *Act*.

Confidentiality clauses

[61] As for confidentiality clauses that may be entered into by the parties to a contract, they are not necessarily determinative of access rights under the *Act*. If the terms of a contract run counter to or are incompatible with the requirements of the *Act*, then disclosure requirements under the *Act* prevail.

[62] Public bodies cannot exempt themselves from the statutory obligation to be open and transparent about their business dealings simply by including 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*.[8]

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[8] *Town of Heron Bay, (Re)*, 2024 NBOMBUD 4 (CanLII), at paras. 19-20; see also *Harbour Station Commission (Re)*, 2020 NBOMB 2 (CanLII), at paras. 17-20.

[63] This general principle has been recognized and accepted by the courts in New Brunswick:

> [13] Similarly, when a public entity conducts business with outside suppliers or partners, the parties to such an agreement ought to be keenly aware that the written agreements are subject to disclosure in furtherance of the purposes of the *Act* and in accordance therewith.
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> [14] The affidavit evidence of Fundy states, in part, that the parties considered the contents of their agreement confidential. The fact that they may have considered it so does not mean that it should be protected. The fact that a party *considers* information confidential is irrelevant as it would completely undermine the purposes of the *Act* if such an assertion was, on its own, sufficient to justify keeping an agreement from public access.[9]

[64] In this case, the contracts concluded with three of the four third party companies included confidentiality clauses. One of the contracts was an accepted offer of service submitted to Vitalité by the third party company and does not include any references to confidentiality, while the contracts with the two other third party companies appear to be the standard form developed by the companies themselves.

[65] Having reviewed the confidentiality clauses in these contracts (clause 8 in one contract – Confidentiality and Personal Information Protection & Electronic Documents Act (PIPEDA) and clause 12 in the other – Confidential Information), I do not find that they contain any specific or express wording that states that the financial arrangements between the parties or the contract itself is, or was, intended to be confidential. Even if this were the case, this would not in and of itself be determinative of access rights, for the reasons explained above.

[66] Further, neither Vitalité nor the third party companies presented submissions or evidence to show that confidentiality concerns were part of the contract negotiations, as was the case in the *Medavie* court decision.

[67] For these reasons, I do not find that Vitalité's submissions that the inclusion of confidentiality and non-disclosure provisions in the contracts support a finding that disclosure could reasonably be expected to harm the third parties' business or financial interests have merit.

[68] As the Applicant already has copies of the contracts with the fourth third party, I need not address the confidentiality clause issue further for these records, although I do note that these contracts were the only ones that specifically referenced the possibility that some information may be required to be disclosed under the *Act*.

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[9] *William H. Teed v Fundy Regional Service Commission Intervenor – Scotia Recycling Ltd.*, 2017 NBQB 173 (CanLII), paras. 13-14.

Paragraph 22(4): Limited public interest override

[69] In making this complaint, the Applicant submitted that Vitalité should have nevertheless disclosed the requested contracts on the grounds of the public interest override provision under subsection 22(4) of the *Act*:

> 22(4) Subject to section 34 and any other exception provided for in this Act, the head of a public body may disclose a record that contains the information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of
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> (a) improved competition, or
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> (b) government regulation of undesirable trade practices.

[70] During the formal investigation, Vitalité was invited to make submissions on the potential applicability of this provision in this case; however, it opted not to.

[71] As I have found that Vitalité has not met the burden of proof to substantiate that the remaining withheld details in the partially disclosed contracts merit protection from disclosure under either subparagraphs 22(1)(c)(i) or 22(1)(c)(iii), there is no need for me to consider the applicability of the public interest override in this case.

[72] Nonetheless, I take this opportunity to remind public bodies of the existence of this provision, as it points to a clear intention on the part of legislators to limit the scope of the section 22 exceptions to disclosure.

CONCLUSION

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

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

RECOMMENDATION

[75] Based on the above findings, I recommend under section 73(1)(a)(i)(A) of the *Act* that Vitalité disclose to the Applicant, with the exception of individual signatures that can be protected under subsection 21(1), the following:

- the offer of service with Third party A (6 pages);
- the general staffing agreement with Third party B (7 pages);
- the amendment and extension to service agreement with Third party B (2 pages);
- the master staffing agreement with Third party C (8 pages); and
- the addendum to the master staffing agreement with Third party C (2 pages).

[76] As the Applicant acquired copies of the contracts with the fourth third party through other means, there is no need for me to make a finding or recommendation for disclosure under the circumstances.

[77] As set out in section 74 of the *Act*, Vitalité must give written notice of its decision with respect to these recommendations to the Applicant and this Office within 20 business days of receipt of this Report of Findings.

This Report is issued in Fredericton, New Brunswick this 13th day of September, 2024.

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Marie-France Pelletier
Ombud for New Brunswick