

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2015-2223-AP-2201

Date: October 22, 2015

“Case about access to the Kingsbrae Gardens Master Plan with the Town of Saint Andrews”

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act").
2. On September 29, 2014, the Applicant made a request to the Town of Saint Andrews ("the Town") for an Agreement that resulted in the Kingsbrae Gardens Master Development Plan, ("the Kingsbrae Gardens Agreement") all letters, emails, and other communications between the Town, Kingsbrae Gardens and the Province of New Brunswick from June 1995 to October 2014.
3. The Town issued a partial response on October 22, 2014 granting access to some records with redactions and informing the Applicant that the Town was proceeding with third party notification regarding the information in the requested agreement.
4. The Town did not provide a further response after the third party process was completed and the Applicant filed a complaint with our Office on January 19, 2015 as a result.

INFORMAL RESOLUTION PROCESS

5. We have observed that unlike provincial public bodies, many municipalities have limited resources and the additional regulatory business regarding access to information held in municipal records is proving difficult.
6. For this reason, we devised a simpler but effective investigative process to best deal with complaints involving municipalities. This simpler process is meant to lend the necessary guidance to municipalities to enable a better understanding of their lawful obligations so that in turn, those who request information from municipalities receive the information to which they are entitled under the Act.
7. In our view, this practical approach allows our Office to perform its oversight role while we remain cognizant of the issues the adoption of the Act's rules into municipal administrations to effect an outcome, whenever possible, that is both satisfactory and in conformity with the law.

Informal resolution undertaken in this case

8. In the present Complaint investigation, we met with Town officials on June 2, 2015 to discuss how the Town processed the request and reviewed the redacted records that were released to the Applicant. Subsequent to our meeting, we were provided for our review the records the Town had in relation to the agreement between the Town,

Kingsbrae Gardens and the Province of New Brunswick. We issued preliminary findings to the Town indicating which information had properly withheld from the Applicant, but we also identified the information the Applicant should have received with the Town's response. After sharing our findings and ways to resolve the case, we discussed with the Town those steps necessary to resolve the complaint but despite these efforts, the Town was not prepared to do so.

9. As a result, we were required to issue the present Report of Findings with recommendations, as per section 73 of the Act.

FINDINGS

The Town's search for relevant records

10. The Town undertook a search for records that would respond to the Applicant's request and located and retrieved correspondence only, not a copy of the agreement. Not finding an existing, valid agreement to which the Town is a signatory was surprising and of serious concern to us.
11. Coincidentally, just before our investigation meeting in early June, a copy of the agreement was found by janitorial staff in a storage room of the basement of the Town's arena where some of its records were stored.
12. The agreement was provided to our Office and we noticed that some of the agreement's schedules were missing, namely:
 - Schedule G – Plan of survey
 - Schedule H – Management and Operating agreement
13. The Town stated it tried to obtain a full copy from the Province but was not successful in doing so.
14. Overall when we questioned officials about the Town's records management, given our concerns that these officials could not describe which records were held in the arena basement storage site, and could not explain why an existing agreement was not in the Town's active files. This raised the question about what other documentation of the Town's activities was missing or worse, lost. We point this out for the main reason that the public's right to access information held by the Town was put in serious jeopardy.
15. We sensed that the Town was not as concerned about the agreement in question, although the Town's officials did admit that the Town's existing records management system was poor and needed an important overhaul.

The Town's Response

16. As indicated earlier in this Report, the Town issued a partial response and was continuing the remainder of its work, but failed to issue a final response to the Applicant in this case. This was contrary to the Town's obligations under section 14 of the *Act*.
17. The Town was required to issue a response to the Applicant in conformity with section 14 within the timelines indicated in section 11 (30-60 days maximum, or more where approved by the Commissioner) and had to:
 - identify the relevant records the Town had in relation to the request;
 - indicate those that were being disclosed and for those records that were not, to explaining why not;
 - if an exception in the *Act* was relied upon, or facts and circumstances that permitted, in the Town's view, to refuse access at the time, to include those explanations;
 - the name and contact number for a person at the Town's offices who could answer questions about the response (that was done in the partial response); and,
 - to inform of the right to complain to the Commissioner or to the Courts if not satisfied with the response.
18. Although still not a satisfactory outcome, the Town should have fulfilled its statutory obligation by, in the least, making more attempts to find the missing agreement and later, the missing components of the agreement, as we were not made privy to the actual steps taken in that regard.
19. The Town did not have a lot of previous experience in handling access to information requests filed under the *Act* and understandably struggled with the processing of the request in this case. This we recognize and are we are always prepared to assist those municipalities in achieving compliance with the law.
20. We sensed, however, unwillingness by the Town to complete the tasks necessary to conclude this matter in compliance with the law, despite doing so with our help.
21. The fact remains that the Town must recognize that it is part of the New Brunswick public sector and subject to the rules of the *Act*, rules that have been designed to make governments at all levels more open and transparent in the conduct of their affairs through the expenditure of the public purse and in respect of the public's right to know.
22. The Town should take steps to adapt to this new way of doing business and implement a more rigid process to receive and respond to requests filed under the *Act* so that it fulfills its statutory obligations.

23. While we are pleased that since this case, the Town has embarked on improving its records management system which should help with the processing of access requests, for the reasons we provided above, a recommendation will issue to the Town to ensure that it continues these improvements to more importantly, respect the public's right to know.

The Applicant's rights to access the requested information

24. The Town provided access to some of the requested information it retrieved, with some minor redactions. The personal address of the Mayor was properly redacted, but again, this could have been explained to the Applicant. Most of the redactions were proper, except for a few, including redacting the Applicant's own personal contact information.

Correspondence

25. For instance, the Town provided access to correspondence but as we explained to Town officials, the use of exceptions on the basis of personal information was incorrect and a recommendation will issue for the disclosure of that specific information.

Agreement

26. To date, we have not received or examined the agreement in its entirety as the Town does not have a full copy. We will therefore make a finding on the documentation that was provided for our review.
27. We will also issue a recommendation on the steps the Town must take to obtain a full copy of the agreement before we conclude all of our work on that score.
28. During our investigation and after having found the agreement, the Town refused to release the agreement on the basis of section 22 of the *Act*.
29. We pointed out to the Town that section 22 addresses disclosure that is harmful to a third party's business or financial interest. When private sector organizations or companies do business with public bodies, the information generated from these interactions that rest in public bodies' records is subject to the rules of disclosure under the *Act*. Section 22 offers some protection to some of that information and specifically guides public bodies in knowing what should or should not be released and when.
30. There is a general right of access to this kind of information as this ensures accountability on the part of public bodies to be transparent in their business dealings with the private sector; likewise, private sector entities should expect that some information about their dealings with the public body will be made available to the public.

31. “Business information” is not defined in the *Act*, but under section 22, the *Act* refers to commercial, financial, or similar types of information relating to third party private sector business or corporate entities. Some examples include a private entity’s trade secrets, proposals, source of revenues that are protected.
32. For instance, business information can be protected if its disclosure would be reasonably expected to:
- harm the competitive position
 - interfere with contractual or other negotiations
 - result in significant financial loss or gain
33. Therefore, before invoking section 22 to withhold information, representations from the third party private sector entity must be obtained, including whether there is consent to release the information. Having said this, however, the third party does not make the decision regarding access at that decision remains with the public body.
34. It follows that when a complaint is filed on the use of section 22, such as the Applicant did in this case, the public body must demonstrate how the information if released would cause *harm* to the business interests.
35. In the present case, the agreement was signed in 1995 between a private individual, the Town, the Province and Kingsbrae Horticultural Gardens Inc. for the creation of Kingsbrae Gardens. The Town notified Kingsbrae Gardens to ask for representations regarding the release of the agreement but the Town did not receive a reply. The Town nonetheless and despite our analysis, decided not to release the agreement on the basis of section 22, although we found that it could not be protected under section 22.
36. The information in the agreement could be considered business information, but access could not be refused on that basis alone and the Town was unable to demonstrate to us that reasonable harm could result from disclosing the agreement.
37. Consequently, we find that the Town cannot refuse access to the agreement and the agreement should be disclosed to the Applicant. A recommendation will therefore issue on this point.

RECOMMENDATIONS

38. Given our findings, the Commissioner makes the following recommendations pursuant to section 73 of the *Act*:
- a) That the Town provide to the Applicant a copy of the Kingsbrae Gardens Agreement that the Town currently has in its possession today, without redactions;
 - b) That the Town respond fully to the Applicant's request by also making arrangements, without delay, to obtain a copy of any components and/or schedules that the Town does not have that make up the complete Kingsbrae Gardens Agreement, and those arrangements must include contacting the Department of Agriculture, Aquaculture and Fisheries believed to have a full copy of the agreement;
 - c) That the Town submit all components and/or schedules that the Town obtains that make up the Kingsbrae Gardens Agreement to the Commissioner's Office for our review. The Commissioner will then make a determination regarding access to those missing records at that time and submit findings to the Town and the Applicant;
 - d) That the Town provide to the Applicant the following information that was initially redacted but that should have been released to the Applicant:
 - Information in content of the email of March 17, 2014 (1:47pm) from C. Spear to A. Mosher
 - Briefing note to Council – information contained in the bullet regarding Frederick St. Street
 - Information in the email of September 11, 2014 (3:57pm) from J. Carr to S. Choptiany, C. Akagi, D. Naish, E. Bishop, and L. Sochasky
39. Given our findings, the Commissioner also makes the following recommendations pursuant to paragraph 60(1)(h) of the *Act* that the Town take steps to implement a proper process for when it receives and responds to access to information requests submitted to the Town under the *Act*, and to ensure that the new process be put in place by no later than April 1, 2016.

40. In accordance with section 74 of the *Act*, the Town has 15 days from this date to notify both the Applicant and the Commissioner that the Town will either:
- accept the recommendations and comply with them; or,
 - not accept the recommendations.

Dated at Fredericton, New Brunswick, this 22nd day of October, 2015.

Anne E. Bertrand, Q.C.
Commissioner