

REPORT OF THE INTEGRITY COMMISSIONER'S FINDINGS

Office of the Integrity Commissioner

Right to Information and Protection of Privacy Act

Third Party Complaint: 2017-4220-AP-2284

Date: March 14, 2018

INTRODUCTION

1. On August 24, 2017, the Applicant made an access to information request pursuant to s. 7 of the *Right to Information and Protection of Privacy Act, S.N.B. CR-10.6* (the Act) to the Department of Health (the Department). The Applicant requested monthly reports related to Ambulance NB/NB EMS provided to the Department, as well as data, statistics or summaries that speak to all times when an ambulance was out of service or taken offline due to staffing shortages. The scope of the Request was from January 1, 2012 to the date of the Request.
2. In processing the Request, the Department retrieved the records relating to the monthly reports only, as it did not have any records pertaining to ambulances taken out of service or being offline due to staff shortages. As the monthly reports were prepared and submitted by NB EMS, however, the Department deemed NB EMS to be a third party and undertook the third party notification process under ss. 34 to 36 of the Act. The Department notified NB EMS (the Third Party¹) of the possible disclosure of the requested information in question and invited it make representations on whether the information should be disclosed.
3. The Third Party provided representations to the Department by indicating that it objected to the disclosure of all monthly reports, in their entirety, on the basis that disclosure could reasonably be expected to harm its business interests, as per s. 22(1)(c) of the Act.
4. After taking the Third Party's concerns into consideration, the Department sent a formal notice of decision to the Third Party, which informed that it had nevertheless decided to disclose the requested monthly reports, with certain portions redacted as per ss. 21(2)(a), 22(1)(b) and (c)(i) of the Act.
5. As the Third Party continued to have concerns about the disclosure of any and all information contained in the monthly reports, the Third Party filed a complaint with our Office on November 30, 2017 so that our Office could determine whether or not the disclosure of the information would be harmful to the Third Party's business interests, as defined in s. 22(1) of the Act.

¹ NB EMS changed its name during the course of our investigation to Medavie Health Services NB; however, for purposes of this Report, NB EMS, the Third Party and Medavie Health Services NB are all interchangeable.

6. Therefore, the main purpose of this Report of Findings is to determine whether the disclosure of the information contained in the requested monthly reports could reasonably be expected to be harmful to the Third Party's business or financial interests.
7. Furthermore, for sake of completeness, we will also examine whether the Department's proposed redactions under s. 21(2)(a) of the Act are appropriate.
8. In cases where a complaint is made to our Office when an applicant is not satisfied with the public body's response to a request for information, my staff will generally attempt to resolve the matter through our informal resolution process. They are instructed, of course, to be consistent in the application of the standard of proof and evidentiary standard within the informal process. Issues that are resolved do not need my intervention. Unresolved issues are referred to me for my report and possible recommendations. It should be made clear that I am not bound by opinions and/or statements made by my staff in the course of attempts to resolve the issues. I am free to either adopt their views or not with respect to unresolved issues, as the Commissioner has the last word.
9. In this case, it was felt that in view of the irreconcilable position of the Department of Health and the Third Party, the matter should be referred to me for a report and recommendations as provided in s. 68(3) of the Act.

SUBMISSIONS

10. The requested reports were prepared by the Third Party and provided to the Department as part of their obligations under the performance based contract. The information contained in the monthly reports pertains to Ambulance NB's operations and performance standards, such as emergency and non-emergency time reliability, transfer time reliability, responses and processing time as well as some financial statements.
11. Apart from minor redactions pertaining to privacy concerns, the Department is prepared to disclose all the information contained in the monthly reports. It does not agree with the Third Party's position that such disclosure would be harmful to its financial or business interest, as envisaged by s. 22 of the Act, save for a few pieces of information.
12. The Third Party maintains that such disclosure would compromise its competitive position by providing to potential competitors insight into its intellectual property or

trade secret and into its manner of preparing the monthly reports. As such, disclosing the monthly reports could thereby provide its competitors with an advantage in the preparation of request for proposal submissions or other procurement processes.

13. Finally, the Third Party submits that the disclosure of such information has a high potential for data misrepresentation that could, in turn, cause reputational harm to its business.

LAW ANALYSIS

Section 22- disclosure harmful to business interests

14. The relevant parts of s. 22 are as follows:

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,
- (ii) interfere with contractual or other negotiations of a third party,
- (iii) result in significant financial loss or gain to a third party,

[emphasis added by me]

The standard of proof and evidentiary standard

15. It is clear that our *Right to Information and Protection of Privacy Act* allows public bodies to refuse to disclose information captured by the mandatory (ss. 17 to 22) and discretionary exceptions to disclosure (ss. 23 to 33).
16. Section 22 of the *Act* is meant to allow a public body to protect information that is harmful to the third party's business or financial interest. In this case, the information the Third Party is seeking to protect is argued to be its business information; however, the decision on access nevertheless remains that of the Department of Health, who believes in this matter that the requested information ought to be disclosed, apart from some minor redactions.
17. In general terms, the public body will be allowed to deny access to business information under s. 22(1)(c) if three requirements are met: (a) it must be established that the

information at issue is that of a third party business; (b) that the information sought to be protected is of a “financial, commercial, labour relations, scientific or technical” nature about the third party; and (c) if the information about the third party is disclosed, it would be reasonable to expect that the third party could suffer a risk of harm contemplated by a category listed at s. 22(1)(c) of the Act.

18. In this case, this means that the Department of Health needs to be satisfied that (a) the requested information is that of the Third Party; (b) that the information sought to be protected is of a financial, commercial, labour relations, scientific or technical nature about the Third Party; and (c) that disclosure of the information could reasonably be expected to result in risk of harm to the Third Party’s competitive position or interfere with its negotiation.
19. Applying the standard of proof and the evidentiary standard just discussed, my view is as follows.
20. As defined in the Act, a third party “means a person, group of persons or an organization other than the applicant or a public body.” Having reviewed the other definitions in the Act, we are satisfied that the Third Party is neither a public body, nor the applicant. As such, we are satisfied that NB EMS is a third party, and that the information at issue was created or compiled by the Third Party. The first requirement is met. However, this is not sufficient to determine that the information relates to the Third Party’s business or financial interests.
21. For the second requirement to be met, we must find that the information at issue is of a financial, commercial, labour relation, scientific or technical nature and about the Third Party’s business. While none of these terms are defined in the Act, they have been interpreted in other jurisdictions, including in Manitoba, where they are defined in its Resource Manual². These definitions are not meant to be exhaustive, but I nevertheless adopt them for our purposes:

"Commercial information" is information related to or connected with trade or commerce, with the buying, selling or exchange of merchandise or services. Examples include price lists, lists of suppliers and customers.

"Financial information" is information relating to finance - money and the monetary resources of a person, company, etc. Examples include information on pricing practices, profit and loss data, overhead and operating expenses.

² http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/pdfs/chap_5.pdf, at pp. 77-78

"Labour relations information" means information respecting the "relations between management and labour, especially as involved in collective bargaining and maintenance of contract".

"Scientific information" refers to information relating to or exhibiting the methods or principles of science. In particular, it is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics which relates to the observation and testing of specific hypotheses or conclusions and which is undertaken by an expert in the field.

"Technical information" usually refers to information of, involving or concerned with the mechanical arts and applied sciences. Examples of mechanical arts and applied sciences include architecture, engineering and electronics. An example of "technical information" is a description of the deficiencies in the structure of a building.

22. Having thoroughly reviewed the relevant records at issue and the Third Party's submissions, I find that the Third Party has not pointed out any particular item of information that satisfies any of the above definitions. Rather, the information contained in the monthly reports contains statistical data about Ambulance NB's operations and performance standards, such as emergency and non-emergency time reliability, transfer time reliability, responses and processing time as well as some financial statements. Briefly put, all of the information contained in such reports is about Ambulance NB; not about the Third Party's business.
23. It is not information related, or connected, to trade or commerce, or connected to the buying, selling or exchange of merchandise or services. In fact, the information has nothing to do with the Third Party's finances or business operations. Of course, a look at the monthly reports does reveal a particular format or model used by the Third Party in preparing the reports about Ambulance NB. In my respectful view, however, such insight into the Third Party's format or model for a monthly report cannot be viewed as "technical" or "scientific" information that could reasonably be expected to be harmful to it in any way.
24. If the Third Party's complaint is to succeed, it must convince me that the information is commercial, financial or technical information that pertains to its operation. Here, the Third Party has not provided any evidence supporting its allegations, nor is this a case where the alleged "risk of harm" is obvious or self-evident. In my view, it has not been established that the information at issue falls within one or more of the relevant definitions alluded to earlier.

25. Accordingly, as the Third Party has not met the second requirement under s. 22(1)(c)(i) to justify refusal of access to the monthly reports. As such, my analysis could come to an end at this stage. Nonetheless, for the sake of completeness, I will examine whether the disclosure of the requested information could nevertheless reasonably be expected to bring about a risk of harm to the Third Party's competitive position, or interfering with the Third Party's contractual or other negotiations.
26. The use of certain disclosure exceptions require the public body to be satisfied that disclosure of the information "could reasonably be expected" to result in a particular harm (see ss. 18, 19, 22 to 30 of the Act). In general, the public body has the burden to prove that the Applicant has no right of access to the requested information. This burden, however, shifts where the information at issue is that of a third party individual or third party business:
- 84(1) In any proceeding under this Act, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.
- 84(3) Despite subsection (1), if the proceeding under this Act concerns a decision to disclose or to refuse to disclose, in whole or in part, a record containing information that is not personal information about a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.
27. While the burden of proof in this matter belongs to the Third Party, the Department nevertheless is responsible for making the decision regarding disclosure of the information. Therefore, to refuse access to information under s. 22(1), the Department must be satisfied that the risk of harm of disclosure is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm.
28. The formulation of this standard of proof should be used whenever "could reasonably be expected" language is used in access to information statutes (see *Ontario v. Ontario*³, paras. 52 and 54). The same standard of proof applies to a third party complainant who opposes a public body's inclination to release the information that the third party maintains is "reasonably expected" to be harmful to its business or financial interest contemplated by the exceptions.
29. The evidentiary standard (i.e. the type of evidence required to prove or demonstrate a risk of harm) "will depend on the nature of the issue" and "inherent probabilities or

3

improbabilities or the seriousness of the allegations or consequences" (see para. 54 of the Ontario case, cited above). In some cases, the Commissioner may require detailed and convincing evidence about the risk of harm. In others, the risk of harm may be self-evident or obvious despite the scarcity of evidence. In some cases, submissions may be sufficient, although a mere description of the alleged harm that may "reasonably be expected" will not be unless the risk of harm is self-evident.

30. Part of the Department's mandate is to provide for the delivery of ambulance services in New Brunswick, including the system design, regulatory framework, medical control, audit/monitoring and funding. As such, Ambulance NB was created as a public company under Part III of the *Public Service Labour Relations Act* to be a single provider of ambulance services in New Brunswick. The public company was incorporated under the *Companies Act* in June 2007 under agreement with the Department. The Department then granted Ambulance NB the licence and authority to provide ambulance services in New Brunswick, as of December 2007.
31. Although Ambulance NB is an incorporated company, it was nevertheless designated as a public body under the *Act* as a health care body, as it is listed in Part III of the *Public Service Labour Relations Act*. Therefore, it is subject to all of the rules of the *Act*, including responding to access to information requests under Part 2 and to protect sensitive personal and personal health information under Part 3 of the *Act*.
32. In order to fulfill Ambulance NB's mandate of providing ambulance services in New Brunswick, a Request for Proposal was issued for an outside company to provide management of Ambulance NB's day-to-day operations. The Third Party NB EMS was awarded the contract in December 2007 for a 10-year period, under a performance based contract. On September 11, 2017, NB EMS changed its name to Medavie Health Services New Brunswick (MHSNB), and in December 2017, Ambulance NB renewed its operations contract with Medavie Health Services New Brunswick for another 10 year period, without the need to reissue a Request for Proposal.
33. In light of the above, I am hard-pressed in finding that the Third Party could suffer a risk of harm to its competitive position given the fact that it has the service contract with Ambulance NB for 10 years already, and will continue for another 10 years.
34. As a result, I cannot reasonably conclude that disclosure of the information in the records at issue could lead to a reasonable expectation of the risk of the type of harm as submitted by the Third Party. The Third Party has not provided sufficient evidence,

beyond speculation, to substantiate that disclosing the information in the records at issue could create of risk of harming its competitive position s. 22(1)(c)(i) of the Act.

35. The Department proposes to redact certain information referring to the type of software used by NB EMS as the information is intellectual property and could reasonably be expected to interfere with its negotiations as per 22(1)(c)(ii). Again, I fail to see how disclosing the fact that NB EMS upgraded its software to a newer version consists of intellectual property that, if disclosed, could reasonably be expected to interfere with its negotiations.
36. While NB EMS is a subsidiary company of Medavie Health Services, it was created solely for the purpose of managing the delivery of land and air ambulance services in New Brunswick, on behalf of Ambulance NB. While the Third Party is not itself a public body subject to the Act, this does not remove it entirely from the ambit of the Act.
37. Any information generated by the Third Party on behalf of Ambulance NB about its operations is Ambulance NB's own information, as a public body. In my view, Ambulance NB cannot contract out of its obligations under the Act by awarding the management of its operations to an outside third party service provider. Therefore, while the Third Party created or compiled the monthly report data, the data is not about the Third Party's business or operations – it is about Ambulance NB's operations.
38. As such, the Third Party has failed to meet the third requirement of this exception.

Section 21- unreasonable invasion of third party privacy

39. The Department proposes to redact certain information in the monthly reports as it believes the disclosure of it would be an unreasonable invasion of a third party's privacy, being a patient's personal health information, as per s. 21(2)(a) of the Act.
40. The redacted information consists of the times when the numbers of the specific statistical data are below 5. As we understand it, the Department believes that disclosing this information could lead to the identity of the patients that were the subject of the emergency call for that specific region.
41. Having reviewed the information, I fail to see how disclosing this information could in any way lead to the identification of any patients. While some of the data is broken down into regions, we do not find it to be specific enough to lead to the identity of the

patients, as the regions are only broken down by North, West, South and East. Furthermore, the spreadsheets do not contain specific dates of when these calls took place.

42. "Personal health information" is defined in the *Personal Health Information Privacy and Access Act* to mean identifying information about an individual, in oral or recorded form, if the information relates to, i.e., an individual's physical or mental health, family history or health care history, including genetic information about the individual; the individual's registration information, including the individual's Medicare number; to the provision of health care to the individual, etc. Furthermore, that statute defines what identifying information consists of:

"identifying information" means information that identifies an individual or for which it is reasonable foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

43. I fail to see how disclosing data numbers below 5 in the reports identifies individuals or is reasonably foreseeable that the data could be used alone or with other information to identify any individuals. As such, I find that the Department cannot redact this information under s. 21(2)(a) of the *Act*.

CONCLUSION - RECOMMENDATION

44. In conclusion, I find that the Third Party's Complaint is without merit as the information at issue is not about its operations; rather, it is about Ambulance NB's operations, and as Ambulance NB is a public body, the information cannot be withheld under s. 22(1) of the *Act*. Secondly, I find that disclosure of any information contained in the monthly reports would not be an unreasonable invasion of any individuals' personal information under s. 21(1) or (2) of the *Act*.
45. Based on all of the foregoing, and pursuant to s. 73(1)(b) of the *Act*, I recommend that the Department of Health release the requested monthly reports, in their entirety, to the Applicant.

Issued at Fredericton, New Brunswick, this ____ of March 2018.



The Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner