REPORT OF THE INTEGRITY COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2017-4034-AP-2201

Date: January 16, 2018

INTRODUCTION and BACKGROUND

1. On May 25, 2017, the Applicant requested the following information from the Department of Tourism, Heritage and Culture ("the Department") under s. 7 of the *Right to Information and Protection of Privacy Act*, S.N.B. c. R-10.6 ("the *Act*"):

> Contract between the Province and Kingswood Golf for the operation/management of the Mactaquac Golf Course.

2. The background to this matter is the operation and management of the Mactaquac Golf Course. The Golf Course is owned by the Province and is located on Mactaquac Provincial Park, which is managed by the Department under the *Parks Act*. In February 2017, the Department announced that a private operator (Golf Co. Inc., also known as Kingswood Ventures Inc.) would be taking over the operation and management of the Golf Course under a 10-year agreement with the Province. Previously, the Department was responsible for the operation and management of the Golf Course, which had been running a deficit in recent years.

3. On June 8, 2017, the Department informed the Applicant that it would be seeking the representations of a third party as the requested contract may contain information that could affect a third party's interests if it were to be disclosed. For this reason, the Department invited the third party to make representations prior to making a final decision about the disclosure of the agreement and informed the Applicant that it would respond by no later than July 24, 2017.

4. On July 7, 2017, the Department issued a further letter to the Applicant, informing that it had not received a response from the third party and that the Department would be granting access to the requested agreement with 21 days so as to allow the third party to exercise the right to complain to the Commissioner or to refer the matter to the courts if it wished to challenge the disclosure of the agreement.

5. On July 31, 2017, the Department provided the Applicant with a copy of the requested agreement and advised that some information had been redacted under s. 30(1)(c) of the *Act*, explaining that the disclosure "could reasonably be expected to result in a financial loss to a public body or to the Province of New Brunswick or prejudice the competitive position of or interfere with or prejudice contractual or other negotiations of a public body or the Province of New Brunswick."

6. Not being satisfied with the Department's response, the Applicant filed a complaint with our Office on August 25, 2017, pursuant to s. 67 of the *Act*. In making the complaint, the Applicant noted that certain parts of the agreement appeared to be blank and "intentionally deleted", in addition to the licensing fee information that the Department had withheld under s. 30(1)(c) of the *Act*.

OUR INVESTIGATION

7. As required by ss. 67 and 68 of the *Act*, steps were taken to investigate the complaint and try to resolve it informally by our Office's legal counsel and investigator. During the informal resolution process, the withheld records were reviewed by legal counsel and preliminary findings were issued to the Department explaining our reasoning as to why we found that the Department had not properly refused access to some of the withheld licensing information and that further explanations were necessary to help the Applicant better understand the contents of the agreement.

8. While the Department was amenable to providing additional explanations to the Applicant about the portions of the agreement that appeared to blank and "intentionally deleted", specifically, clauses 8, 13(h), 20(h), and Schedule C – Monthly Revenue Statement, it maintained its decision to refuse access to the licensing fee information.

9. As for the additional explanations, clauses 8, 13(h), and 20(h) of the agreement state that they were "intentionally deleted." The Department did not redact or withhold the contents of these clauses, and explained that the parties agreed during negotiations to not include the initial text of these clauses in the final agreement. Rather than removing the clause numbers from the text of the final agreement, the content of the clause simply states "intentionally deleted." As for Schedule C – Monthly Revenue Statement, the Department explained that this was intentionally left blank in the agreement at the time it was signed.

10. As for the licensing fee information, the Department maintains its decision to refuse access on the basis that the licensing terms were negotiated between the two parties and that releasing the license fee terms in the public domain would affect future negotiations, relying on s. 30(1)(c) of the *Act*.

11. As we were unable to resolve the entire complaint matter during the informal resolution process, the complaint was referred to me for a review of the Department's position and the preparation of a report pursuant to s. 73 of the *Act*.

12. As a result, this Report will address the only issue to be resolved, namely, whether the Department was entitled to refuse access to the licensing terms found in clause 12 of the agreement. Of course, my review and recommendations need not be in agreement with the preliminary findings of our Office's legal counsel who has the delegated authority to investigate and try to resolve the issues through the informal resolution process. When it becomes obvious that the issues cannot be resolved in their entirety, the unresolved issues are referred to me for my findings and recommendations as provided in s. 68(3) of the *Act*.

Section 30: Disclosure harmful to economic and other interests of a public body

13. The Department relied on s. 30(1)(c) of the *Act*, which reads as follows:

> 30(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Province of New Brunswick, including but not limited to, the following information:
>
> > (c) information the disclosure of which could reasonably be expected to result in a financial loss to a public body or to the Province of New Brunswick or prejudice the competitive position of or interfere with or prejudice contractual or other negotiations of a public body or the Province of New Brunswick...

14. The purpose of this exception is to allow public bodies the option of disclosing or withholding information where its disclosure could reasonably be expected to result in one of the following kinds of harm to the public body's interests:
    a) a financial loss to a public body or the Province,
    b) prejudice a public body's or the Province's competitive position, or
    c) interfere with or prejudice a public body's or the Province's contractual or other negotiations.

15. To properly rely on this exception, a public body must first demonstrate how the disclosure of the information in question could reasonably be expected to result in one of these specified types of harm, and, if this has been established, the public body must

show how it exercised its discretion in deciding to refuse access, based on relevant factors at play at the time of the access request.

16. It should be noted here that pursuant to s. 84(1) of *Act*, the Department bears the burden of establishing that the Applicant has no right of access to the withheld licensing information.

17. At this point, a brief summary of the applicable principles pertaining to the standard of proof imposed on the Department in cases where exceptions are based on a reasonable expectation of some type of harm would be useful. As pointed out by the Supreme Court in *Ontario (CSCS) v. Ontario (IPC)*[1] in para. 52:

> ...this formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the mere possible or speculative but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm. (emphasis added)

18. As well, the Court stated that it is this formulation that should be used wherever "could reasonably be expected to" language is used in access to information statutes (para. 54).

19. In this case, the words used in the relevant section of the *Act* relied upon by the Department deal with a "reasonable expectation" of harm. In this case, the Department is specifically concerned about the impact of the disclosure of the licensing fee information on its future contractual negotiations of this nature. The burden of proof the Department must meet in the matter before us is based on the formulation expressed by the Supreme Court of Canada, as set out above above: *would disclosure of the licensing fees result in an interference with or prejudice to its future negotiations that is well beyond the mere possible or speculative*?

The Department's position on disclosure of the licensing fee information

20. In this case, the Department's reliance on this exception is that the disclosure of the licensing fee information could reasonably be expected to interfere with or prejudice future contractual negotiations for the operation and management of the Golf Course. The Department notes that this is the first time it has looked to the private sector to run a golf course on Provincial Park land and it is of the view that disclosing the licensing fee information in this contract would affect its future negotiations, which it anticipates will

[1] [2014] *1 S.C.R. 674.*

occur at some point given that the current agreement is for a fixed period of time (10 years).

Our findings with respect to the licensing fee information

21. Having reviewed the contract in full, we note that clause 12 sets out the license fee structure and how the payments by the operator are governed. The only portion of this clause that the Department protected is the license fees that are to be paid by the operator to the Province, which are found in clause 12(a). Clause 12(b), which was disclosed to the Applicant, indicates that the "prescribed fees shall be reviewed in the fifth year of this agreement." This means that the licensing fees for the final five years of the contract are subject to review and possible renegotiation at the mid-way point of the agreement and thus may not be binding.

22. With this in mind, we understand the concerns raised by the Department on this point and agree that there is an argument to be made about the impact of disclosing the licensing terms that are subject to review and renegotiation at the five-year point of the agreement. We accept the Department's position that disclosing this information at this time could reasonably be expected to negatively impact future negotiations of this nature, particularly in the event that this agreement is prematurely terminated and the Department wishes to enter into negotiations with a different third party to operate and manage the Golf Course. For these reasons, we find that the Department was entitled to rely on the s. 30(1)(c) exception to disclosure and that it took relevant factors into account in arriving at its decision to refuse access to this information.

23. That being said, the same arguments and principles cannot be said to apply to the current licensing fee structure between the operator and the Department. While we understand the concerns raised by the Department in disclosing the future licensing fee structure that is subject to review and possible renegotiations before coming into effect, we are not convinced that disclosure of the current licensing fee information could reasonably be expected to result the kind of harm envisaged by the legislation, namely an interference with or prejudice to future negotiations with respect to the operation and management of the Golf Course. Knowledge of the current licensing fee structure will only reveal the current arrangement that is in place and the Department has not presented convincing arguments as to how disclosing this information could reasonably be expected to harm any future such negotiations.

24. Further, the public has the right to know the current licensing fee arrangement, given that it concerns the operation and management of a publicly owned facility in a Provincial park. While the Department has been transparent and disclosed all of the other terms of the agreement, including the Province's and the operator's respective roles, responsibilities, and obligations, it also needs to be transparent and accountable to the public about the current license fees that are in place with respect to this agreement.

25. For these reasons, we do not agree that the current licensing fee information falls within the scope of the s. 30(1)(c) exception.

26. As we find this exception does not apply to the current licensing fee arrangement, the Department was not in a position to exercise its discretion not to disclose this information for the reasons explained above.

27. In our respectful view, the current licensing fee information must be disclosed.

RECOMMENDATIONS

28. In light of the above findings and pursuant to s. 73(1)(a)(i) of the *Act*, I recommend that the Department of Tourism, Heritage and Culture disclose the licensing fee information found in clause 12(a)(I) of the agreement to the Applicant.

Issued in Fredericton, New Brunswick this 16th day of January 2018.

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