

**IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF MONCTON**

**In the Matter of a Referral Under Paragraph 65(1)(a) of the *Right to Information and  
Protection of Privacy Act, S.N.B. 2009, Chapter R-10.6***

**BETWEEN:**

**BRUCE I. PHINNEY,**

**APPLICANT**

**-and-**

**TOWN OF TANTRAMAR**

**RESPONDENT**

**-**

**PRE-HEARING BRIEF**

**On behalf of the Applicant**

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MM-247-2023

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NOTE: The Applicant's request for documents held by the Town of Tantramar has been modified. Rather than requesting the entire copy of the Montana Workplace Assessment of Sackville Fire & Rescue [hereinafter "the Montana Report"], I am now seeking *only those portions of the Montana report that contain the consultants' 20 recommendations* (along with any redactions as needed to protect privacy).

Also sought is any available updated information from the Town of Tantramar regarding which of the 20 recommendations have been implemented to date, and information as to whether they have been implemented in full or in part.

## **PART I – A BRIEF SUMMARY OF THE FACTS**

### **Background**

1. I have been a town councillor of the Municipality of Sackville, and now the Town of Tantramar, since 2004, when first elected to Sackville Town Council. In the municipal election of 2022, I was elected to serve on the newly amalgamated Tantramar Town Council as a councillor for Ward 3 (Sackville).
2. During my twenty (20) years of continuous service, I have supported the volunteer firefighters in Sackville Fire & Rescue, by consistently voting with other members of council to allocate the monies needed to make sure the firefighters were among the best trained and equipped in the province.
3. Over the years, the municipal councils on which I have sat have spent, on average, about 25 per cent of the town's annual operating budgets on protective services (police and fire), along with significant ongoing capital investments in advanced fire-fighting equipment and safety gear. The firefighters in Sackville have always been highly respected because of their dedication and skills.
4. In the fall of 2020, I began hearing complaints from firefighters about bullying,

harassment, favouritism, discrimination against female volunteers, unwanted sexual comments and low morale in the department. 4

5. I asked the Fire Chief Council about the complaints I was hearing. I was told that everything was fine and that one or two "chronic complainers" were making false or inflated claims.
6. I then raised these matters with colleagues on council, but they seemed unconcerned and unwilling to get involved. (See my affidavit of Bruce Phinney, attached.)
7. In April 2021, a local news website, run by a retired CBC journalist, began publishing a series of reports based on interviews with current and former firefighters as well as portions of resignation letters some of the firefighters had submitted to the Fire Chief.
8. The news reports alleged that over the previous five years, 17 firefighters had resigned because of persistent bullying, harassment, favouritism and safety violations in the department. The firefighters had indicated that there had been little response when these issues were raised repeatedly with the Fire Chief, with two different town CAOs, and at least two mayors.
9. In response to these reports, then-Sackville-CAO Jamie Burke asked town council to approve hiring outside consultants to produce two professional workplace assessments --- one for Sackville Fire & Rescue and the other for the town administration.
10. I voted in favour of hiring outside consultants, with the expectation that these consultants would identify any serious problems in the fire department, and that they would recommend steps to correct them.
11. I neither knew, nor would have expected, that when I cast my vote authorizing an outside study, that no one on council would be allowed to read what the consultants had found and what they had recommended.

12. The CAO, Jamie Burke, hired the Montana Consulting Group, of Moncton, to conduct both assessments, which ultimately cost the town approximately \$63,000 (HST included) or about \$31,500 for each.
13. On or about September 10, 2021, the town announced that the workplace assessment of Sackville Fire & Rescue had been received. A statement on the town's website read:

"There are several areas that will require attention in order to address the 20 recommendations provided in the report. These actions will be implemented by the Chief Administrative Officer with the support of Council and will include dialogue and consultation with firefighters. Sackville Town Council and the Sackville Fire and Rescue personnel have both met with the consulting team to hear the results of the workplace assessment. As to be expected, since the results and recommendations are human resources related, they will not be made public and will remain confidential."
14. As referenced in the town statement (above), the Montana consultants presented their recommendations to town council and to the firefighters in two separate closed-door, oral briefings. During these briefings:
  - a) members of council were warned that talking about them publicly would be a breach of confidentiality;
  - b) members of council were told that the consultants had promised everyone they had interviewed that whatever they said would remain confidential;
  - c) members of council were also told that we would not be given a written copy of the Montana recommendations, but that we would be asked to approve a series of changes to the by-law governing the fire department after those by-law changes were drafted by town staff.
16. In my 20 years as a municipal councillor, I have voted many times to authorize outside consultants' reports on a wide range of matters (including confidential personnel matters). This was the one and only time that members of council were not allowed to read the final report or its recommendations.

17. The local journalist, whose reporting had led to the hiring of the outside consultants, published a story on his website, which mentioned that the town had denied his RTIPPA request for the Montana report on the grounds that, as a personnel or harassment investigation, it could not be released under Section 20(1) of the Act. Several months after the town refused to disclose the Montana Report, the local journalist reported that the Ombud had upheld the town's position. 6
18. Over the next several months, council was asked to approve changes to the bylaw governing the fire department. The new *By-law No. 280* defines volunteer firefighters as part-time town employees.
19. *By-law No. 280* eliminated the grievance procedure from the old by-law.
20. The old procedure allowed volunteer firefighters to submit complaints to an independent Grievance Committee (although it had never been used). The new procedure requires firefighters to file their complaints with the Chief.
21. As firefighters are now deemed to be employees, they are now subject to the town's social media use policy which bans any commentary on Facebook (for example, negative commentary would reflect badly on how the town is run).
22. Further to the above, firefighters have also been warned that any requests for information or comment from the media must be referred to the Fire Chief.
23. In 2022, the town brought in whistleblowing procedures for firefighters that were the same as or similar to those for town employees. Under these procedures, firefighters were required to report their concerns about illegal or unethical activities using the existing chain of command (i.e. to the Fire Chief, the Chief Administrative Officer or the Mayor if their concern was with the CAO.)
24. Municipal elections were held on November 28, 2022, and the new Tantramar Town

25. The new Tantramar town Council has oversight of three separate fire departments in Sackville, Dorchester and Point de Bute.
26. To date, these three fire departments have not been merged, although we understand there are long-term plans to amalgamate them at some unspecified time.
27. I continued to hear about serious problems and low morale in the Sackville Fire & Rescue. I was told repeatedly that "nothing has changed."
28. On August 15, 2023, I filed a written RTIPPA request for a copy of the Montana Group's workplace assessment of Sackville Fire & Rescue as well as their 20 recommendations. (See Case No. MM-247-2023, Appendix 1.)
29. The town clerk (head) responded the next day by rejecting my request, and by citing RTIPPA Sections 20(1)(a)(b). (See her letter to me Case No. MM-247-2023, Appendix 2.)
30. On September 6, 2023, I filed a referral of the clerk's decision to the Court of King's Bench with a follow-up on September 15, 2023 to include a minor correction. (See Form 1 REFERRAL, Court of King's Bench, MM-247-2023)
31. I had a three hour meeting with George Raine, President of the Montana Consulting Group, to better understand my inability to access the Montana Report. The recommendation from that meeting was to try asking my colleagues on town council to authorize its release, as the Montana Group was not authorized to release it.
32. On September 12, 2023, I served a Notice of Motion (during a Tantramar council meeting) that I would ask council to authorize the release of the Montana Report.

33. On October 10, 2023, during a Tantramar council meeting, I moved my Motion and it was defeated: #23-218 MOVED BY COUNCILLOR BRUCE PHINNEY AND SECONDED BY COUNCILLOR DEBBIE WIGGINS-COLWELL THAT COUNCIL DIRECT THE CAO TO RELEASE THE MONTANA WORKPLACEASSESSMENT OF SACKVILLE FIRE & RESCUE TO COUNCIL AND THE PUBLIC SO THAT EVERYONE CAN READ THE REPORT ON THE PROBLEMS WITHIN THE FIRE DEPARTMENT AS WELL AS THE 20 RECOMMENDATIONS THAT THE CONSULTANTS PUT FORWARD TO RESOLVE THE ISSUES THAT MEMBERS OF THE FIRE DEPARTMENT BROUGHT FORWARD. AYE VOTES RECORDED BY COUNCILLORS BRUCE PHINNEY AND DEBBIE WIGGINS COLWELL. NAY VOTES RECORDED BY MAYOR ANDREW BLACK, DEPUTY MAYOR GREG MARTIN AND COUNCILLORS ALLISON BUTCHER, MATT ESTABROOKS, JOSH GOGUEN, BARRY HICKS AND MICHAEL TOWER. MOTION DEFEATED. 8
34. On January 9, 2024, during an in-camera council meeting, the town clerk stated that the referral of my RTIPPA case to the Court of King's Bench would cost the town approximately \$14,000 in legal fees.
35. On January 21, 2024, I delivered written notices to the mayor, each of my fellow councillors, the CAO, the clerk and the assistant clerk, and proposed that instead of going to court, the town release the Montana Report's 20 recommendations, and that they also provide a progress report on how many of them had been implemented.
36. On January 30, 2024, I received an e-mail from the town's solicitor stating the Municipality of Tantramar maintained its refusal to release the Montana Report in whole or in part.

## PART II – ISSUES & ORDERS SOUGHT

- A. Does the public right to information extend to Municipal Governments?
- B. Does the Applicant's Request for Information under RTIPPA fall within its jurisdiction?
- C. Are there reasonable accommodations that can be made to ensure the Right to Privacy is balanced with the Right to the Requested Information?

## PART III - ARGUMENT, LAW AND AUTHORITIES

37. Although openness and transparency in government have become popular buzzwords, I believe that the principles behind them are as applicable today as they were in 1977 when the Hatfield government published a White Paper entitled *Freedom of Information: Outline of Government Policy Pertaining to a Legislated Access by the Public to Government Documents*. The White Paper said the public had a right to government information "since the need to know what a government is doing is as basic to the democratic process as are the freedom to vote and the secret ballot." Premier Hatfield himself introduced New Brunswick's *Right to Information Act* in the spring of 1978; the Legislature passed it by the end of June that year and it came into force on January 1, 1980. (See, Cannon, Anita. *The Right to Government Information in New Brunswick and Its Use by the Scholarly Community* in *Journal of New Brunswick Studies*, Vol. 13, No. 2, Fall 2021.)
38. The principle of the public's right to government information did not change when the Act was reviewed in 1990, 1998 and 2007. In 2009, the laws governing access to information and protection of privacy were combined in the *Right to Information and Protection of Privacy Act [RTIPPA]*.
39. Subsequent reviews in 2015, 2017 (when amendments were made), and most recently in 2023, reiterated the law's basic purpose. As the Hon. Ernie Steeves stated in his Minister's Message accompanying the most recent review: "Since its proclamation in 2010, the Act has promoted open, transparent, and accountable government and public bodies. It gives every person the right to access information about the public business of these bodies, with some exceptions."
40. "The culture of public bodies/institutions must be founded on the fundamental principle that information under their control belongs to the people they serve," said a joint resolution issued in October 2023 by Canada's federal, provincial and territorial information commissioners and ombuds. Their resolution urged that any legal exclusions and exemptions be "limited and specific."
41. This language is already reflected in Section 2 of *RTIPPA*, which states:

"The purposes of this Act are (a) to allow any person a right of access to

records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act..." (emphasis added.)

42. Here the Town of Tantramar relies on what the Act refers to as a "mandatory exception," i.e. "Information from a harassment, personnel or university investigation."

*20(1)The head of a public body shall refuse to disclose information to an applicant that would reveal*  
*(a) the substance of records made by an investigator providing advice or recommendations of the investigator in relation to a harassment investigation or a personnel investigation,*  
*(b) the substance of other records relating to the harassment investigation or the personnel investigation...*

The Act does not define the terms "harassment" or "personnel" nor does it define what is meant by "substance of records."

43. As I stated in my initial *RTIPPA* request to the town clerk, Sackville Town Council did not authorize the hiring of Montana Consulting to conduct a harassment or personnel investigation, but to investigate complaints about how the town's fire department was being managed, especially to understand the environment and circumstances that had led to the resignations of so many of its volunteer members. It's worth noting that Council gave its authorization at a time when firefighters had not yet been designated as part-time town employees.
44. As an elected member of Tantramar Town Council, I believe I have a responsibility to review the Montana Report's 20 recommendations, and to receive updated information from the town on how many of them have been implemented and are being followed, especially as I am expected to vote on changes to address 'unknown recommendations'. Without seeing the recommendations, I have no way of knowing to what extent this has happened or if it has happened at all.
45. My request includes the redacting of any possible identification of individuals to protect privacy and confidentiality.
46. I respectfully request that the town clerk (head) be ordered to:
- a) grant my request for a copy of the Montana Report's 20 recommendations;
  - b) also, that the Montana Report's recommendations be made available to members of the public with any redactions that are needed.
  - c) provide an update to me and the public on which recommendations have been implemented in full or in part.
47. Members of the Sackville community are justly proud of these volunteer firefighters for their successes in protecting the safety of our town and its surrounding communities. I believe that supporting our fire service is one of the most important aspects of my work as a municipal councillor. One aspect of this support is to ensure that the work environment

of these volunteers – who risk their lives to save our communities – be expected to be respectful and accountable.

#### **PART IV - RELIEF SOUGHT**

1. The Applicant Seeks an Order from this court that:
  - (a) The Town of Tantramar provide the Applicant and the public with a copy of the 20 recommendations of the Montana Report; and that
  - (b) The Town of Tantramar redact any private information that might be contained within the 20 recommendations of the Montana Report; and that
  - (c) The Town of Tantramar provide the Applicant and the public with updated information about which of the recommendations have been implemented in full or in part.
  - (d) Any other recommendation as this Court may deem right and proper.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of March, 2024

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BRUCE PHINNEY  
*Per Se*

## TABLE OF AUTHORITIES

### Statutes:

1. *Right to Information and Protection of Privacy Act, S.N.B. 2009, Chapter R-10.6*
2. *By-law No. 280: A by-law governing the Fire Department of the Town of Sackville, read a third time and passed by Council, August 9, 2022*
3. *By-law No. 248: A bylaw governing the Fire Department of the Town of Sackville, read a third time and passed by Sackville Town Council, March 14, 2016*

### Caselaw:

- 4.

### Articles

5. Cannon, Anita. (2021). The Right to Government Information in New Brunswick and Its Use by the Scholarly Community. *Journal of New Brunswick Studies*, Vol. 13, No. 2.

## APPENDICES