

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

Phinney v. Municipality of Tantramar 2024 NBKB 062
2024/04/02

MM-247-2023



BETWEEN:

BRUCE I. PHINNEY,

Applicant,

– and –

MUNICIPALITY OF TANTRAMAR,

Respondent.

DECISION

BEFORE: Mr. Justice Jean-Paul Ouellette

AT: Moncton, New Brunswick

DATE OF HEARING: March 28, 2024

DATE OF DECISION: April 2, 2024

APPEARANCES: Bruce I. Phinney, on his own behalf

Tessa C. Belliveau, on behalf of the Respondent

Ouellette, J.

INTRODUCTION

- [1] Bruce I. Phinney filed an application seeking an order under the *Right to Information and Protection of Privacy Act* ("RTIPPA") for access to a copy of the Workplace Assessment Report prepared by Montana Consulting Group regarding alleged personnel issues in the Sackville Fire Department.
- [2] Mr. Phinney is also seeking an update on the status of the recommendations contained in the Montana Report, whether they have been implemented by the Municipality of Tantramar. There is no basis for this demand to be dealt with by this court under the RTIPPA.
- [3] Since the filing of his application, Mr. Phinney's request has been modified seeking only the portions of the Montana Report that contain the 20 recommendations. This has no bearing for the purpose of this application.
- [4] For the reasons that follow, this application is denied.

Factual Background

- [5] Mr. Phinney is a town councillor of 20 years for the Municipality of Sackville now the Town of Tantramar.
- [6] In the fall of 2020, Tantramar town council had concerns about the Sackville Fire Department following complaints regarding personnel issues

within. On April 27, 2021, Tantramar moved to retain Montana for the conduct of a workplace assessment regarding these issues.

- [7] On May 11, 2021, Tantramar issued a request on behalf of Montana for input and participation from current and former members of the Sackville Fire Department. In the correspondence, the members were told that notes would be taken during the interview process and that the notes and their identities would be kept confidential.
- [8] The workplace assessment was conducted in May 2021 and the Montana Report was issued on July 26, 2021.
- [9] As the Montana Report was confidential, only the clerk of Tantramar received a copy, while Montana consultants presented an oral briefing of the report and its recommendations, respecting the confidentiality content in a closed-door meeting, first to town council and later to the firefighters.
- [10] From what Mr. Phinney is hearing from constituents and firefighters, the full 20 recommendations have not been implemented, acknowledging however having been informed that most have been. Notwithstanding, he still gets complaints and would like to be able to get the report or part thereof as he submits that council and the public should have access to the information contained therein.
- [11] In the fall of 2021, D. Beal, as Director of Legislature and clerk of the former Town of Sackville, received two separate requests (one from Mr.

Phinney) under the *RTIPPA* for a copy of the report. Having been appointed as the "Head of the public body" for the purpose of this *Act*, she denied these two requests and relied on paragraph 20(1)(a) and 20(1)(b) of the *Act*.

[12] The two applicants subsequently filed complaints with the Access and Privacy Division of the Office of the Ombud. With respect to both complaints, the Ombud upheld the refusal to disclose the report, relying on the same dispositions of the *RTIPPA*.

[13] Mr. Phinney persisted and requested again to the clerk a copy of the report. This request was again denied. During council meeting held on October 5, 2023, a motion by Mr. Phinney moved and seconded, directing the Municipality to release a copy of the report to members of council and members of the public. Council voted against this motion.

[14] Mr. Phinney then filed this application to this court.

ISSUE

[15] The only issue before this court is whether Mr. Phinney's request for a copy of the Montana Report should be granted under the *RTIPPA*.

Analysis and Conclusion

[16] While Mr. Phinney's intentions to have access to the Montana Report is noble and implies openness and transparency of a public body, the

general purpose of the *RTIPPA* is intended to give access to information, but that right has its limitations.

[17] Section 2 of the *RTIPPA* defines the purpose of the legislation as follows:

2 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,

(...)

(c) to allow individuals a right of access to records containing personal information about themselves in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act,

(...)

[18] Section 20(1) of the *RTIPPA* is one of numerous exceptions to the right to access to information found in this act. It reads as follows:

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 (...)

[19] The *RTIPPA* defines the head of the public body and Tantram and the Clerk are both subject when it comes to disclosure under this *Act* and, furthermore, defines what Mr. Phinney and any other applicants cannot access.

[20] Section 20 of the Act constitutes an exception to the general principle that all information as suggested by Mr. Phinney in the possession of a public body is public information and should be accessible.

[21] As reflected in the Guidelines published by the New Brunswick Ombudsman (November 2019) and referred to in *Flewelling v. Horizon Health Network*, 2020 NBQB 211, interpreting section 20(1)(a) reads as follows:

"This exception requires public bodies to protect not only records, but the substance of records, prepared by an investigator tasked with providing advice or recommendations in the context of a harassment of personnel investigation.

The purpose of this exception is to allow an investigator in this context to conduct his or her work in a thorough, candid, and frank manner, and to provide his or her advice and/or recommendations on a particular situation to the public body in confidence. This protects the integrity and confidentiality of the investigation process and encourages those involved to speak freely and candidly during the investigation process without fear of others later learning what they have shared. Given that harassment and personnel investigations are by their very nature sensitive matters, this protection is integral to the investigation process."

[22] The Montana Report falls within the provisions of this section of the *Act* that cannot be disclosed. This is a mandatory exception to disclosure.

[23] Our Court of Appeal in *Fraser v. Haines*, 2008 NBCA 59, stated that the relevant provisions of the *RTIPPA* must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament."

[24] The Office of Access to Information and Protection of Privacy Commissioner of New Brunswick (now the "New Brunswick Ombud's Office") explained in 2012 the premise of subsection 20(1) as follows:


[26] The premise behind subsection 20(1) is to afford a certain **degree of comfort that a personnel investigation will be carried out in such a way for employees to feel free in coming forward with their concerns without fear of reprisal.** To have it any other way would prevent an investigator from getting at the truth of the matter which is essential to a proper assessment of the issues afflicting a workplace. It follows that in order to obtain frank discovery of the facts, those who participate in the investigation are assured that their comments, views, and opinions remain confidential.

[Emphasis added]

- [25] At bar, the clerk of the Municipality of Tantramar rightly refused to disclose the report and her obligation to respect the words to the letter of section 20(1) "... shall refuse..." has been respected.
- [26] If disclosure was permitted in the circumstances of this case, participants would be less inclined to discuss frankly the issues being reviewed. Without disclosure protection, personnel and harassment investigations would never serve their purpose.
- [27] In conclusion, Tantramar was well within its right to deny the request for information by Mr. Phinney and other applicants under section 20(1) of the *RTIPPA*. The disclosure of the Montana Report would undermine the purpose of section 20(1) and have a chilling effect on personnel and harassment investigations.

[28] The application is denied without costs.

DATED at Moncton, N.B., this 2nd day of April 2024.


Jean-Paul Ouellette
Justice of the Court of King's Bench
of New Brunswick