

Report of Findings: 19/20-AP-131
Right to Information and Protection of Privacy Act
Department of Health

October 16, 2020

Summary: The Applicant made an access request to the Department of Health for records related to locations tested as part of a Legionnaires outbreak in the Moncton area during the summer of 2019. The Department provided the Applicant with partial disclosure of a record of the sites that were tested in August 2019, but redacted information about the test site locations under s. 22(1)(c)(iii) (disclosure harmful to third party business or financial interests) of the *Act*. The Applicant was not satisfied with the Department's response and filed a complaint with this Office.

The Ombud found that the information about the sites tested as part of Public Health's investigation of the outbreak was not commercial, financial, scientific, or technical information for the purposes of s. 22(1)(c)(iii) and thus was not protected from disclosure. As the Ombud found that the location of the sites that were tested was not the kind of information protected under s. 22(1), he also found that the public interest override provision for third party business information under 22(5) did not apply. The Ombud recommended that the Department disclose the test site location information.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, ss. 22(1)(c)(iii), 22(5); [Public Health Act](#), SNB 1998, c. P-22.4, ss. 46, 47(1), 53(4).

Cases considered: [Merck Frosst Canada Ltd. v. Canada \(Health\)](#), 2012 SCC 3, [2012] 1 S.C.R. 23 (CanLII), [Order MO-2852, Re: Hamilton Entertainment and Convention Facilities Inc.](#), 2013 CanLII 11999 (ON IPC), [Saskatchewan \(Government Insurance\) \(Re\)](#), 2016 CanLII 71666 (SK IPC).



I BACKGROUND

1. On August 22, 2019, the Applicant submitted an access to information request to the Department of Health (“the Department”) for the following information between July 1, 2019 and August 22, 2019:

Records related to locations tested in Moncton as part of a Legionnaires outbreak.

2. The Department responded on October 18, 2019, providing the Applicant with partial access to one record. The Department indicated that some information, consisting of the location of the sites tested, was withheld under s. 22(1)(c)(iii) (disclosure harmful to third party business or financial interests). The Department did not notify the third parties to seek their representations on possible disclosure as part of its decision-making process on the Applicant’s access rights to this information.
3. The Applicant was not satisfied with the Department’s decision and filed a complaint with this Office on November 4, 2019. In making this complaint, the Applicant questioned whether the Department properly applied s. 22(1)(c)(iii) in withholding the test site location information. The Applicant also questioned whether the public interest override in s. 22(5) of the Act would apply, as the Applicant is of the view that disclosure would be in the public interest.
4. The matter was not resolved informally and the Ombud conducted a formal investigation pursuant to s. 68(3) of the Act.
5. In making this complaint, the Applicant also questioned whether the Department had conducted a thorough search for records, given that the Department only identified one record as relevant; however, the Applicant dropped this aspect of the complaint as the matter proceeded to formal investigation.

II CONTEXT

6. On August 1, 2019, the Province announced that the Office of the Chief Medical Officer of Health was investigating an outbreak after seven cases of legionellosis were confirmed in the Greater Moncton area.¹ The press release issued that day by the Department included the following information about legionella bacteria:

¹ Province of New Brunswick, “Cases of legionellosis in Moncton area” (August 1, 2019): https://www2.gnb.ca/content/gnb/en/departments/health/news/news_release.2019.08.0445.html.

Legionellosis is a disease caused by bacteria called Legionella. These bacteria are found worldwide. They live in the environment and can be found in both natural bodies of water (such as ponds, lakes and streams) and in constructed water systems (such as air conditioners, cooling towers, whirlpools, spas and decorative fountains). People do not become ill from Legionella by drinking water. Home and car air conditioning units do not use water to cool, so they are not a risk for Legionella.

“Although legionellosis is not spread person to person, it is spread when the bacteria are present in an infected water source and fine mists of water from that source are inhaled,” said Muecke. “Anyone exposed to the bacteria can become infected. Older persons, those with weakened immune systems or chronic diseases, smokers, alcoholics and persons working with man-made water systems, such as maintenance workers on air conditioning systems, are at greater risk of developing the disease.”

7. Cooling towers are systems attached to buildings and industrial facilities to remove heat. They are often used as or form part of a building’s HVAC system. It is well-known that cooling towers are a common source of Legionella, the bacteria that can cause Legionnaires’ disease.
8. As part of the investigation into the source of the outbreak, Public Safety Inspectors conducted the sampling at each of the test site locations, following which the samples were analyzed in an accredited lab in Quebec. It is our understanding that the initial testing was paid for by the Department.
9. Public Health officials declared the outbreak over in early September 2019. Media reports state that 16 people became ill during the outbreak, 15 of whom were hospitalized. The source of the outbreak was identified as a cooling tower in the Moncton area; however, at the time, Public Health officials declined to publicly identify the exact location of the source of the bacteria that was identified as the cause of the outbreak.

III INFORMATION AT ISSUE

10. The information at issue is found in a one-page document entitled “Cooling Tower Sampling Plan” that lists the sites that were tested as part of Public Health’s investigation into the source of the Legionnaires outbreak in the summer of 2019. The information disclosed to the Applicant revealed that six sites were tested and the dates on which each site was tested. The information listed under the columns entitled “Location” and “Towers” were withheld under s. 22(1)(c)(iii) (disclosure harmful to third party business or financial interests).
11. The information in the location column consists of civic addresses and and/or the name of the owner of the location(s) tested.

12. The information in the tower column indicates the number of towers that were tested at each location.
13. Under s. 84(1) of the Act, the burden of proof is on the Department to show that the Applicant has no right of access to the withheld information.

IV FORMAL INVESTIGATION

14. During the formal investigation, I held discussions with Department officials and notified the third parties of this investigation and invited their representations on the potential disclosure of the test site locations.
15. While the Department did not engage the third-party notification process under ss. 34 to 36 of the Act during the initial processing of this request, it did undertake to contact them directly after being notified of our investigation of this complaint. In December 2019, the Department received representations from each of the third parties (i.e., the owners of the test site locations). Two of the third parties indicated that they had no concerns with the disclosure of their respective information, while the others objected, citing various provisions of the s. 22(1) exception. The Department provided this Office with copies of these exchanges during the formal investigation process.
16. Had the Department notified the third parties during the initial processing of this request and if any of the third parties had, at that time, stated that they consented or did not have any objection to disclosure, the Department would not have been able to rely on s. 22(1) to refuse access to their respective information. This is because s. 22(3)(a) states that the exceptions under ss. 22(1) and (2) do not apply where the third party consents to disclosure.
17. As the matter had proceeded to formal investigation, I also took the opportunity to notify the third parties of this investigation and to seek any further representations that they may wish to make to assist me in arriving at a decision on the Applicant's access rights. I specifically asked for their submissions on why the information at issue should be considered as commercial, financial, scientific, or technical in nature, along with detailed and convincing evidence to substantiate how one or more of the types of harm contemplated in ss. 22(1)(c) of the Act could reasonably be expected to occur, if this was their position.
18. I also invited the Department to share any further representations or information it may wish to make as part of the formal investigation process.

V DECISION

19. The sole issue for me to determine is whether the Applicant has the right of access to the withheld test site location information.

Section 22(1): Disclosure harmful to third party business or financial interests

20. The Department relied on s. 22(1)(c)(iii) of the Act to refuse access to the test site location information, which states:

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

...

(iii) result in significant financial loss or gain to a third party

21. Section 22(1)(c) is a mandatory exception to disclosure, which means that a public body is not permitted to disclose information that falls within its scope, unless the conditions that would otherwise authorize or require disclosure under ss. 22(3), (4), or (5) are met.
22. To establish that information falls within the scope of this exception, the public body must demonstrate that the following two criteria are met:
- the information at issue is commercial, financial, labour relations, scientific or technical information; and
 - the disclosure of this information could reasonably be expected to result in one or more of the types of harm set out in ss. 22(1)(c)(i) to (v) of the Act.

Is the information commercial, financial, labour relations, scientific or technical in nature?

23. During the formal investigation, the Department maintained that the information at issue consists of the third parties' commercial and technical information. The Department's primary concern was about revealing the identified source of the outbreak; however, this is not the question before me, as the information at issue here is the location of all the sites that were tested as part of Public Health's investigation.

24. I understand from the Department's submissions that it considers the cooling towers to be part of the mechanical systems of the third parties' operations. The Department raised concerns that if the information at issue were to be disclosed, it could lead the public to have a negative impression that would impact commercial operations, resulting in significant financial losses. As such, the Department considered the location and information about its mechanical systems to be commercial or technical information that merits protection from disclosure under s. 22(1) of the Act.
25. In their respective submissions, the third parties that objected to disclosure primarily focused on arguments about the types of harm that they were concerned could occur from disclosure of the test site location information, such as negative public perception and the potential impact this could have on their respective operations. Little evidence was presented on the question of whether the information at issue is commercial, financial, scientific, or technical, as per the first part of the test under s. 22(1)(c), although there were assertions that the information was considered as financial, commercial, scientific, or technical, as it relates to technical aspects of the third parties' facilities.
26. The Act does not define "commercial" or "financial" information; however, these terms are also used in other Canadian jurisdictions' respective freedom of information legislation. In Ontario, these terms are also used in the equivalent exception to disclosure under s. 10 of the *Municipal Freedom of Information and Protection of Privacy Act*, and the interpretation of these terms as adopted by the Ontario Information and Privacy Commissioner are as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].²

27. I agree with and adopt the above interpretation of the terms "commercial" and "financial" for the purposes of s. 22 of the Act.

² [Order MO-2852, Re: Hamilton Entertainment and Convention Facilities Inc.](#), 2013 CanLII 11999 (ON IPC), at para.31.

28. I do not find that the information at issue can be categorized as financial, as it does not reveal anything of a financial nature about any of the third parties.
29. As the question of whether the information could be considered as commercial information, I do not find that it does. The information at issue is the fact that certain locations in the Moncton area have cooling towers on site and that a certain number of those cooling towers were tested as part of Public Health's investigation into the source of the outbreak. As cooling towers are a common feature of many structures and buildings, I do not see how the disclosure of the fact that a particular location has one or more cooling towers could be considered as commercial information, nor do I see how the fact that a cooling tower was tested as part of a Public Health investigation into the source of a Legionnaires outbreak would qualify as commercial information.
30. I also considered whether this information is scientific or technical in nature. Again, the *Act* does not define "scientific" or "technical" information, but again, these terms also used in other Canadian jurisdictions' freedom of information legislation. The Information and Privacy Commissioner in Saskatchewan has adopted the following interpretation of these terms:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.³

31. I do not find that the information at issue can be categorized as scientific, as it does not reveal anything of a scientific nature. The fact that a cooling tower was tested as part of a Public Health investigation is not in and of itself scientific information, nor would it reveal any scientific information of the third parties.

³ [Saskatchewan \(Government Insurance\) \(Re\)](#), 2016 CanLII 71666 (SK IPC), at paras. 18 and 19.

32. During the course of this investigation, submissions were made that the information at issue should be considered technical information, as it relates to the mechanical system of a third party. I do not find these arguments convincing, as the information at issue would not reveal anything of a technical nature about the operations of the third parties. I also do not find that the testing of a site as part of a Public Health information is information about the construction, operation or maintenance of the cooling towers.
33. As I find that the test site location information is not commercial, financial, scientific, or technical in nature, I find that the first part of the test has not been met and s. 22(1)(c)(iii) does not apply.
34. As such, I need not consider the submissions on the potential impact of the disclosure of the test site locations on the third parties, although I do note that the objections to disclosure were primarily focused on the types of harm that the third parties and/or the Department claimed could be expected to result from the disclosure of this information.
35. While I need not reproduce the arguments here, I will say that I found the concerns raised about the disclosure of the test site locations were speculative at best and would not have been sufficient to meet the second part of the test under s. 22(1)(c)(iii) of the Act.

Section 22(5): Public interest disclosure of third party business information

36. The Applicant raised the possible applicability of s. 22(5) as grounds for disclosure of the test site location information, which states the following:

22(5) Subject to section 34 and any other exception provided for in this Act, the head of a public body shall disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the significant public interest in disclosure for the purposes of public health or safety or protection of the environment.

37. In the Applicant's view, the disclosure of the test site location information is in the public interest, particularly for those who became severely sick from the outbreak. In addition, the Applicant stated:

At a news conference in September, ... [the] regional medical officer of health, indicated that outbreaks of [L]egionnaires disease can be avoided when cooling towers are properly inspected and maintained. This outbreak raises significant questions about whether that had occurred as well as oversight in the province versus other jurisdictions that have implemented measures to

protect public health. Corporations that make people sick, particularly if it results from negligence, should not be shielded by the province.

38. While I have considered the Applicant's submissions on this point, I find that s. 22(5) does not apply in these circumstances. This is solely based on my finding that the information at issue does not consist of commercial, financial, scientific, or technical information and thus does not fall within the scope of s. 22(1)(c) of the *Act* in the first place, and for this reason, s. 22(5) cannot apply so as to require its disclosure.

Public Health investigations and expectations of confidentiality

39. During this complaint investigation, the question of confidentiality of locations tested during Public Health investigations was raised, partly as Public Health officials declined to disclose the source of the outbreak publicly at the conclusion of the public health investigation. Concerns were also raised about a potential decrease in cooperation with future Public Health investigations should the location information in this case be disclosed.
40. On this point, I have two concerns.
41. First, the *Act* creates a statutory obligation on public bodies to be open and transparent in the conduct of public business. Information that falls under the custody or control of a public body, in most cases, is subject to disclosure, unless otherwise provided under the *Act*. If assurances of confidentiality were made by Provincial officials during the Public Health investigation, this has no bearing on access rights under the *Act*. While it may speak to an understanding between the parties on how the information was intended to be handled at the time of the public health investigation, a public sector official cannot create a binding obligation to keep information confidential where the disclosure of same may be required under the *Act*.
42. I am also concerned with the arguments presented about how disclosure of the information at issue in this case may reduce cooperation with future public health investigations.
43. I note that the *Public Health Act* requires individuals and organizations to assist and cooperate with public health officials, regardless of whether an order has been issued, under s. 46 of the *Public Health Act*:

Duty to assist

46 An owner or occupier of a premises and any employees or agents of the owner or occupier shall give all reasonable assistance to a medical officer of health or an inspector to enable the officer or inspector to carry out his or her duties and functions under this Act and the regulations and shall furnish the officer or inspector with such information that he or she reasonably requires for purposes referred to in subsection 43(1).

44. I also note the following provision:

Obstruction

47(1) No person shall hinder or obstruct a medical officer of health or an inspector in the carrying out of the officer's or inspector's duties or functions under this Act and the regulations.

45. Further, s. 52(4) of the *Public Health Act* states that a failure to comply with a provision of the Act that is listed in Schedule A is an offence punishable under the *Provincial Offences Procedures Act*. Schedule A includes both ss. 46 and 47(1) of the *Public Health Act*, meaning that a failure to assist or hindering or obstructing a public health official in the conduct of their duties is an offence that can be prosecuted before the courts. Were this to occur, the act of non-compliance would become part of the public record through the court process.
46. In my view, the provisions of the *Public Health Act* set out above clearly establish that cooperation with such an investigation is a statutory obligation and subject to possible punitive measures for non-compliance.
47. For these reasons, I do not accept the argument that disclosure of the test site locations in this case could prevent cooperation in future public health investigations, and in any event, this argument has no application to the question of whether the information at issue is protected from disclosure under s. 22(1)(c) of the Act.

VI RECOMMENDATION

48. Based on the above findings, under s. 73(1)(a)(i)(A), I recommend that the Department disclose the test site location information to the Applicant.
49. As set out in s. 74 of the *Right to Information and Protection of Privacy Act*, the head of the public body must give written notice of its decision with respect to these recommendations to the Applicant and this Office within 20 business days of receipt of this Report of Findings.

This Report issued in Fredericton, New Brunswick this 16th day of October 2020.



Charles Murray
Acting Ombud for the Province of New Brunswick