

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matters: 2012-1048-AP-537 and 2012-1051-AP-540
March 22, 2013

Office of the Access to Information and Privacy Commissioner of New Brunswick

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from two Complaints filed with this Office on October 2, 2012 in which the Applicant requested that the Commissioner carry out an investigation into these matters.
2. The Applicant submitted two access requests under the Act to Mount Allison University ("the University") dated September 4, 2012 seeking the following:

I request documents detailing the salary and expenses of Dr. Robert Campbell, the president of Mount Allison University, for the last 12 months. This should include a detailed breakdown of all expenses.

- and -

I request a list of salaries and expenses of all vice presidents, assistant vice presidents, directors, executive directors, officers and deans or any other staff members who are considered to be senior staff for the last 12 months. This should also include any funds, such as a salary or an expense, paid to the university's chancellor in the last 12 months.

(the "Requests")

3. As the University was planning on disclosing information of this general nature on its website, the University provided two separate but same response to both Requests on September 27, 2012 as follows:

...It is our intention to release information about the requested salary/salaries and expenses within 90 days after your request, that is, on or before December 3, 2012, although we will not release information that is excepted from disclosure under Division B or Division C of Part 1 of the Act. As a result, and in accordance with section 33(2)(b) of the Act, we will not disclose that information at this time. However, we will notify you when the information is released.

("the Response")

4. The Applicant filed the Complaints not being satisfied with the Response to either Request. Given the Requests' similarity in subject matter and that the investigation of these Complaints involved the same issues we decided to provide our findings in a single Report.

INFORMAL RESOLUTION PROCESS

5. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*.
6. The informal resolution process provides guidance to both public bodies and applicants with a view to better understand this new legislation. This process has been developed by our Office based on the spirit of the *Act* and in accordance with the parameters of the Commissioner's investigative powers under Part 5. It is hoped that in all cases, the informal resolution process will lead to a prompt and satisfactory outcome to the complaint (*Note: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report*).
7. The initial step undertaken by the Commissioner in this process was to introduce the University to the rules provided under the *Act* and the role of our Office as oversight body for the legislation when a complaint is filed with us.
8. These introductory discussions form part of our complaint investigation process, but more importantly, they are intended to solicit useful insights into how the public body processes and responds to access to information requests generally, i.e., how it applies the various rules under the *Act*, as well as how it did so in this matter. We have found this to be a beneficial exercise from which the public body acquires improved methods for the processing of future access to information requests to avoid similar complaints.
9. The University is defined under the *Act* as an "educational body", which is incorporated into the definition of a public body in section 1. As such, educational bodies assume all the duties and obligations imposed upon them by law as other public bodies such as government departments, crown corporations, and the like.
10. Public universities such as the University only became subject to the *Act* on September 1, 2012 and the Applicant's Requests were the first to be received and processed by the University.
11. The first Request was for copies of records containing the President's Salary and a detailed breakdown of expenses. The second Request was for a list of salaries and expenses of senior staff, including the Chancellor.

12. In response, the University opted to answer the request by informing the Applicant that it would release information about the requested salaries and expenses within 90 days and that it would notify the Applicant when it was released.
13. The University responded to the Requests in this manner because in becoming a public body subject to the *Act*, it recognized the need to publish salaries and expenses of its President and senior staff on its website for the benefit of the general public.
14. During our discussions, the University indicated to us that its intention was to publish a summary that would include not only the salary and expenses of the President, but also those of some of the University's staff, along with additional information to provide context. The University wanted this summary to present a fuller picture of the University's salaries and expenses generally.
15. It was for this reason that the University relied upon paragraph 33(2)(b) of the *Act*. The University believed that the publication on the website would not only respond to the Requests but also provide more information than the Applicant was seeking.
16. The University's proactive intention to publish information regarding salaries and expenses of its President and senior staff, including the Chancellor, was never questioned; to the contrary, we applauded and encouraged the University to continue with these efforts.
17. We expressed our concerns to the University, however, as to whether the intended publication of the summary would provide a full response to the Requests. We explained that the Response had the effect of refusing access to the requested records to the Applicant and the Applicant had the right to challenge that decision.
18. In this regard, these Complaints were about the University's decision to refuse access to the requested salaries and expenses at that time based on its intention to release related information within 90 days as per paragraph 33(2)(b). The main focus of our discussions with the University was therefore the interpretation and application of paragraph 33(2)(b).
19. We informed the University that our interpretation of paragraph 33(2)(b) signified the University had not properly applied that exception when it responded to the Requests. The University did not agree with our interpretation, but despite this difference of opinion, it cooperated in allowing us to investigate these matters and to review the relevant records.

20. Based on our assessment of these cases, our review of the Requests and the Response, and our interpretation of paragraph 33(2)(b), we invited the University to participate in the informal resolution process which entailed providing a revised response to the Applicant. Unfortunately, the University was unwilling to fully participate in this process as we were not able to reach an agreement on the interpretation and application of paragraph 33(2)(b).
21. This brought the informal resolution process to an end and the matter thus became the subject of the present Report on our findings.

LAW AND ANALYSIS

Duty to Assist

22. The duty to assist provision creates a positive obligation on a public body to offer assistance to an applicant in order to ensure that he or she receives a timely, appropriate, and relevant response to the request for information:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

23. In our view, the discharge of this duty to assist applies throughout the request process up to and including the issuance of a response to an applicant. This encourages a good working relationship between the public body and the applicant and is in line with the overall principle of this legislation that the public body should be helpful and thoroughly answer the applicant's request as quickly as possible.
24. In our discussions with University officials, we pointed out the main duties and obligations of the University whenever responding to a request:
- a) Its duty to assist the applicant throughout the request process;
 - b) Its duty to conduct a reasonable and thorough search for all relevant records;
 - c) Its obligation to provide a full and frank response to the request, including explanations of why any information is withheld; and,
 - d) Its obligation to provide a response in a timely manner.

25. It is important that we mention that the Applicant's Requests were not ambiguous. The Applicant asked for the salary and expenses of the University's President and those of

senior staff, including the Chancellor. Furthermore, the Applicant wanted to obtain copies of documents in which that particular information was recorded.

26. On the other hand, the University was intending to publish a summary of the salaries and expenses of the President, and senior staff, including the Chancellor, but not to publish the originating records. This is reflected in the Response, which indicates that the University intended “to release information about the requested salaries and expenses” [emphasis added].
27. Perhaps the Applicant would have been amenable to accepting an alternative format that provided the level of detail that the Applicant was seeking, such as a comprehensive summary; however, University officials did not engage the Applicant in a discussion on this point.
28. In addition, the Response indicated that the University only had an “*intention to release*” related information and that it would inform the Applicant when it was released; however, the Response did not indicate how or where the information would be released. The Response did not indicate that the summary would be published on the University’s website as we found out of this intention during our investigation.
29. The duty to assist also requires a public body to assist an applicant without delay. This in keeping with an applicant’s right to receive timely responses to requests, which in most cases means within 30 days.
30. In this case, the University did not immediately begin processing the Requests by searching for the relevant records to review them for possible release. Instead, it decided to invoke paragraph 33(2)(b) to allow itself 90 days from the receipt of the Requests to prepare and publish a summary containing information about the requested salaries and expenses. This had the result of delaying the Applicant’s right of access well beyond the initial 30-day period.
31. By invoking paragraph 33(2)(b), the University effectively delayed access to basic information about the salaries and expenses for up to three months (and beyond, as we have noted that all of the requested information still has not been provided). As such, we do not find that the University’s application of paragraph 33(2)(b) in this context was in keeping with the spirit and intention of the *Act* to provide timely access to information about the public business of the University. In other words, the University failed to honour

its statutory obligation to process the Requests and provide the Applicant with copies of the requested records without delay.

32. For all of the above reasons, we find that the University failed to meet its duty to assist the Applicant.

Content of the Response

33. Section 14 sets out the requirements for the contents of a response:

- 14(1) In a response..., the head of the public body shall inform the applicant
- (a) as to whether access to the record or part of the record is granted or refused,
 - ...
 - (c) if access to the record or part of the record is refused,
 - ...
 - (ii) in the case of a record that exists and can be located, of the reasons for the refusal and the specific provision of this Act on which the refusal is based...

34. Paragraph 14(1)(a) refers to a record or part of a record rather than to the request for information as a whole. Consequently, it is insufficient for a public body to merely indicate that access to the requested information or documents generally is not being granted.

35. A response must always identify the relevant records, name the specific exception to disclosure if access to any of the requested records or information contained in the requested records is being refused, as well as provide a brief explanation for claiming a particular exception.

36. It is also insufficient to simply reference the claimed exception provision as the reason for the refusal; paragraph 14(1)(c)(ii) requires that the response provide reasons for the refusal in order to help the applicant *understand* why there is no right of access to the requested information. The response must be meaningful to an applicant. Where an applicant finds that a public body has been forthcoming and transparent in responding to access requests, he or she may be less likely to file a complaint.

37. The contents of the University's Response did not comply with requirements with section 14 for a number of reasons.

38. First, the Response did not directly address the Requests as it only stated that the University intended to release information “*about*” the requested salaries and expenses. The Applicant requested all documents in the first Request and a list in the second Request. There is no mention of records in the Response, despite the fact that the Requests asked for copies of documents. On this point alone, the Response fails to identify the relevant records and fails to respond as to whether or not the Applicant will receive access to them.
39. Second, the Response did not specify exactly what information would be released at a later time. It indicated that information that is “*excepted*” from disclosure under Divisions B or C would not be released but the University failed to identify what information would be withheld and why. There are 18 separate categories of exceptions to disclosure in Divisions B and C. To merely state in a response that some information will not be provided without referring to a specific exception leaves an applicant uninformed about what information will or will not be released at the end of the 90-day period, and whether a full and complete disclosure is indeed forthcoming.
40. Accordingly, framing the Response in this manner was contrary to the University’s obligations as a public body to properly respond to a request as dictated by section 14 and likewise, contrary to the intent and spirit of the *Act* to *inform* the applicant about what would and would not be disclosed.
41. Third, the University stated its intention to release information about the requested salaries and expenses within 90 days by referencing paragraph 33(2)(b) in its Response, but it neither recited the wording of this exception nor provided any explanation as to where or how the information would be released. The Response also stated the Applicant would be informed but fell short by not providing any explanation as to how this would be accomplished.
42. For all of the above reasons, the Response did not meet the requirements of section 14.

Interpretation of Section 33 Information that is or will be available to the public

43. As indicated above, these Complaints focused for the most part on the interpretation of paragraph 33(2)(b) of the *Act*: how it was intended to be used and whether the University could rely on that exception in these cases.

44. As this is the first opportunity we have had to consider the interpretation and application of this provision, we had to determine under what circumstances a public body can rely on paragraph 33(2)(b) to refuse access pending publication of the requested information.

45. Paragraph 33(2)(b) is one component of an entire process found in subsections 33(2) and 33(3). These subsections specifically address cases where the requested information has already been made public or will be made available to the public within 90 days of receipt of the request, and instances where the intended publication does not take place.

46. Subsections 33(2) and (3) state as follows:

33(2) The head of a public body may refuse to disclose to an applicant information

- (a) that is free of charge to the public or is available for purchase by the public, or,
- (b) that the head reasonably believes will be published within 90 days after the person's request is received.

33(3) When the head of a public body has refused to disclose information under paragraph (2)(b), the head shall

- (a) notify the applicant when the information becomes available, or
- (b) if the information is not available to the public for 90 days after the person's request is received, reconsider the request as if it were a new request received on the sixtieth day of the 90 day period and shall not be entitled to refuse access to the information under paragraph (2)(b).

47. We consider this exception to afford a public body the convenience of not having to gather and provide the requested information in a response issued to a single person (an applicant) where it is already publicly available or when there are plans to publish the same information for everyone's benefit within a relatively short period of time.

Discretionary exception to disclosure

48. It is important to notice that paragraph 33(2)(b) is a discretionary exception to disclosure, which means that it is not grounds to automatically refuse access on the basis of future publication of the information. This means that the public body must first determine whether the requested information falls within the scope of the discretionary exception provision; if it does, the public body must then exercise its discretion whether to grant or refuse access after considering all of the relevant circumstances. In other words, despite finding that a discretionary exception applies, the public body is required to determine

whether disclosure should take place in any event based on the factors at play at the time of the applicant's request.

49. Accordingly, when the decision to refuse access under a discretionary exception is challenged, the public body will be required to establish how it arrived at the decision and show that the decision was appropriate given the circumstances existing at the time of the request. The public body will have to demonstrate that it in fact exercised its discretion.
50. Moreover, the exercise of discretion should be undertaken in favour of disclosing as much information as possible. This is consistent with the spirit and intent of the *Act* which provides a right of access can only be curtailed in accordance with the limited and specific exceptions to disclosure.

Other jurisdictions

51. Our research on point for similar cases led to cases in both Saskatchewan and in Ontario. The Saskatchewan Information and Privacy Commissioner, in his Report 2004-005, considered a complaint where an applicant requested "all materials" relating to a survey conducted on behalf of the Executive Council of that Province. The Executive Council did not provide the requested information because the final report on the survey was to be published within 90 days, relying on the similar exception provision found in paragraph 7(2)(c) of the *Freedom of Information and Protection of Privacy Act*. The Commissioner in that case found that the Executive Council did not properly apply the exception for information to be published as the request was for all of the materials, including the background data used to prepare the final report for these reasons:

[21] ... In responding to an access request, it is not sufficient for the government institution to either prepare or produce a summary and disclose only that summary instead of the source documents from which it has been prepared.

[22] Similarly, it is not appropriate for a government institution to invoke only section 7(2)(c) if the intention is to release within 90 days only some of the records that would be responsive to the access request. If section 7(2)(c) applies to certain records then it would be necessary for the government institution to provide access to the balance of the responsive records or advise the Applicant why access was being denied...

52. As we observed, it was the important distinction between access to information versus records which proved to govern the applicability of the future publication provision in that Province.

53. In Ontario, Assistant Commissioner Mitchinson considered the application of the similar provision in the *Freedom of Information and Protection of Privacy Act* in Order PO-2109:

Section 22(b) of the *Act* reads:

A head may refuse to disclose a record where,

The head believes on reasonable grounds that the record or information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

(...)

In my view, the purpose of the section 22(b) exemption, like section 22(a) relates to questions of convenience (Order 170). Where the record will be published and made publicly available within a relatively short time after a request has been made under the *Act*, the balance of convenience in the circumstances favours the institution and the record can be properly withheld. The exemption is not available to deny access to records that may be made available at some unascertained date through an alternate access mechanism (See Order M-467). (Emphasis added)

54. Again, the all important distinction of requested records rather than requested information dictated in Ontario how public bodies there could apply the similar exception.

55. While we recognize that the New Brunswick version found in paragraph 33(2)(b) does not include the additional words of “*printing or translation of the records*”, we found these words useful in providing the context within which this similar exception was first developed.

56. Moreover, the Ontario provision does provide additional context for the application of that exception because it refers to “records” rather than “information” and does not limit the extra time to 90 days.

57. In the case of New Brunswick, our legislators intended to provide a limit of 90 days and not refer to records but rather information which would be published soon. In our view, the interpretation of these similar provisions in other jurisdictions support how we have interpreted paragraph 33(2)(b) to be applied by public bodies in this Province.

Process under subsections 33(2) and 33(3)

58. As indicated above, paragraph 33(2)(b) allows a public body the option of temporarily refusing access to an applicant where it reasonably believes the same information will be published within a short period of time (i.e., not more than 90 days after the receipt of the

request). When a public body decides to refuse access for this reason, it must issue a response to the applicant explaining its decision.

59. While doing so constitutes a response to the request, a public body's obligations to the applicant do not end there, as the public body is further required to provide additional notice to the applicant under subsection 33(3):

33(3) When the head of a public body has refused to disclose information under paragraph (2)(b), the head shall

- (a) notify the applicant when the information becomes available, or
- (b) if the information is not available to the public for 90 days after the person's request is received, reconsider the request as if it were a new request received on the sixtieth day of the 90 day period and shall not be entitled to refuse access to the information under paragraph (2)(b).

60. As is noted above, paragraph 33(3)(a) requires the public body the additional obligation of notifying the applicant when the information becomes available. This obligation supports the public body's duty to assist an applicant as per section 9 of the *Act*.

61. Continuing to ensure that the public body fulfills its duty to assist in this way, the *Act* has recognized another possible outcome and has imposed another obligation on the public body. In the event that the information will not be made available within 90 days as previously believed, the statute stipulates in paragraph 33(3)(b) that the public body process the request as if it were a new request received on "day 60", and, it cannot refuse access a second time under paragraph 33(2)(b). This means the public body will have to provide a second response to the applicant despite its earlier reliance on the later publication.

62. Paragraph 33(3)(b) requires the public body to consider the request once more and to respond to it by no later than the end of the 90-day period following the date upon which the request was first received. This will ensure that the applicant's right of access is not further delayed beyond the latest date of the publication of the information simply because the publication did not take place as intended.

63. For example, on September 1, an applicant requested access to a public body's report on the construction of a bridge; therefore, the applicant sought access to a specific record which is the report. The public body was preparing to publish that very report on its website in a few weeks and it decided to respond to the applicant's request by relying on paragraph 33(2)(b) to refuse access to a copy of the entire report at that time. In its

response, it advised the applicant that the entire report would be published on its website within 90 days of the date of the request, thus no later than November 29. The fact that the entire report was already intended to be published was a relevant consideration in this example. When the public body realized that the report would not be published until late December, it could no longer rely on paragraph 33(2)(b) to refuse access as it had done initially. The public body was therefore required to reconsider the same request as having been received on day 60, i.e., as if it had received the request on October 31 and proceed to process it and provide a second response to the applicant by day 90, i.e., by November 29, as per paragraph 33(3)(b).

64. This explains the full process under subsections 33(2) and 33(3) which must be kept in mind whenever considering refusing access to information that is believed will be published in a few weeks.

Publication of the information requested

65. Another important point we raise in our interpretation and analysis of paragraph 33(2)(b) is that a public body can rely upon it when it intends to publish the same information as that which was requested by the applicant. It is clearly a different scenario where the public body is not intending to publish the same information requested, i.e., that it intends only to publish some of it and withhold the rest due to other considerations. Another example explains such a case.
66. An applicant requested access to obtain a copy of the public body's report on the construction of a bridge. The public body was preparing to publish that report on its website in a few weeks, but not the entire report, only the report's conclusions. For the reason that the applicant was seeking access to the record itself, i.e., the full report, the public body cannot rely on paragraph 33(2)(b) to refuse access. In other words, intending to publish only the report's conclusions does not constitute a full and complete response to the request for a copy of the entire report.
67. The public body is required to process the request and provide a response within 30 days notwithstanding its intentions to publish some of the same information requested at a later time. Perhaps the report contained proprietary information which could not be made public. Therefore, by informing the applicant that the information will be published in the future, the public body has in effect promised to make protected information publicly available which it cannot do.

68. As is done during the processing of other requests, information that is protected from disclosure must be identified in the response and the applicant must be given reasons why it is being withheld. In the above example, the public body would have to examine the entire report and arrive at a decision regarding the disclosure of its contents in accordance with the public body's obligations to respond to an access request under the *Act*.
69. Consequently, before relying on paragraph 33(2)(b) to refuse access to the requested information, it is essential that the public body first identify all relevant records and ensure that all information contained therein is intended to be published. Then, the public body must decide whether all of the information requested will or can be published within 90 days, because relying on that exception has the effect of informing the applicant that the public body intends to publish all of the information in that time period.

Application to present matters

70. The Applicant's Requests were for documents detailing the President's salary and expenses, as well as that of the University's senior staff, including the Chancellor. As indicated earlier in this Report, the Applicant submitted these Requests shortly after public universities became subject to the *Act* as salary and expenses had not previously been made publicly available by the University. At the time of the Requests, the University was planning to create a summary for its website to proactively disclose this kind of information.
71. The steps undertaken by the University to provide general information to the public about its compensation and expenses did not remove the University's obligation to provide a full and complete response to the Applicant's Requests in conformity with the *Act*.
72. We reviewed the information since posted on the University's website to determine whether this disclosure fully responded to the Applicant's Requests as part of our review.
73. The University published two documents: a "Salaries Report" and a "Travel Expenses Report." Both reports were for the 2011-12 academic year.
74. The Salaries Report sets out salary ranges for employees and officials of the University who had annualized, full-time salaries in excess of \$80,000. The salary ranges begin at \$80,000 to \$104,999 and go up to \$305,000 to \$329,999. While the President's salary range is clearly indicated as he is the only individual in the highest salary range, the rest are lumped by salary range in general categories and thus do not clearly identify which specific position falls within each salary range (ex.: \$155,000 to \$179,000: 3 Vice-Presidents; \$130,000 to

\$154,999: 23 Faculty). The Salaries Report does not indicate whether the Chancellor receives a salary, and if so, what the salary range is.

75. The Travel Expenses Report sets out information about travel expenses “of administrators on the highest level of the administrative pay scale or with annualized salaries over \$100,000.” This Report lists the President’s total expenses for the academic year, with an explanatory note indicating the total amounts for the categories of hotels and transportation only. Other specific positions are listed with total amounts of travel expenses in a lump sum, which the explanatory notes indicate may include vehicle allowances. The Chancellor’s expenses are not specifically listed, but rather included in a lump sum for “Non-Employee Officers” which include the Chancellor.

76. Although salaries and expenses are considered to be personal information under the *Act*, there are certain situations where disclosure of this type of information is not deemed to be an unreasonable invasion of privacy, particularly where it concerns officers and employees of a public body. Paragraph 21(3)(f) provides as follows:

21(3) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party’s privacy if

...

(f) the information is about the third party’s job classification, salary range, benefits, employment responsibilities or travel expenses

(i) as an officer or employee of a public body...

77. This means that while there is no right of access to exact salary amounts, the Applicant was entitled to receive:

- a) President’s salary range;
- b) A detailed breakdown of the President’s expenses;
- c) Salary ranges for senior staff in a manner that clearly identifies which position falls within each salary range;
- d) Specific details about senior staff expenses;
- e) Salary range for the Chancellor, if any; and,
- f) Specific details about the Chancellor’s expenses.

78. The Applicant was seeking copies of the documents containing details of salaries and expenses of specific personnel at the University, rather than a summary of the information. This was an important distinction from the perspective of the applicability of paragraph 33(2)(b).

79. The information in fact published was a summary and provided neither the originating records nor the level of detail requested by the Applicant and to which the Applicant was entitled. Plainly, the Response did not directly or fully address the Applicant's Requests.

80. At the time the Requests were received, the University was compiling relevant information in summary format for its website but it did not intend to publish originating records or the level of detail that had been requested by the Applicant. Consequently, the University could not rely on paragraph 33(2)(b) to refuse access to the requested information.

81. While the information published on the University's website provides the salary range for the President, which is directly responsive to that aspect of the Requests, it does not provide sufficient detail to fully address the remainder of the Applicant's Requests.

82. In this regard, the Applicant has still not received to date:

- a) A detailed breakdown of the President's expenses;
- b) Salary ranges for senior staff in a manner that clearly identifies which position falls within each salary range;
- c) Specific details about senior staff expenses;
- d) Salary range for the Chancellor, if any; and,
- e) Specific details about the Chancellor's expenses.

FINDINGS AND RECOMMENDATION

83. Based on all of the above, we find that the University failed to meet its duty to assist the Applicant fully, accurately and without delay.

84. We also find that the contents of the University's Response were not in accordance with section 14 of the *Act* for the following reasons:

- a) It did not identify the relevant records;
- b) It did not explain why it was refusing access under paragraph 33(2)(b);
- c) It did not explain that some of the requested information would not be released at a later time; and,
- d) It did not specify whether any other exceptions to disclosure were being applied to refuse access to some of the requested information and if so, why.

85. Finally, we find that the University was not entitled to rely on paragraph 33(2)(b) to refuse access to the President and senior staff's salaries and expenses, including those of the Chancellor, as requested by the Applicant as it did not intend to publish the same information as that which had been requested by the Applicant, and, that the University had not intended to make public the records in which all of the requested information was recorded.

86. While the University has since published some information about the President's and senior staff's salaries and expenses on its website, including the President's salary range, we do not find that the published summary provides a full and complete response to the Applicant's Requests, which was for more specific information.

87. We therefore issue the following recommendation:

That the University provide the Applicant without delay a response that is in conformity with the *Act* and that includes:

- A detailed breakdown of the President's expenses;
- Salary ranges for senior staff in a manner that clearly identifies which position falls within each salary range;
- Specific details about senior staff expenses;
- Salary range for the Chancellor, if any; and,
- Specific details about the Chancellor's expenses.

Dated at Fredericton, New Brunswick, this 22 day of March, 2013.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matters: 2012-1048-AP-537 and 2012-1051-AP-540
March 22, 2013

Office of the Access to Information and Privacy Commissioner of New Brunswick

“Complaint Process”

The Commissioner's Policy on the Complaint Process is designed to respect the Right to information and Protection of Privacy Act, to encourage both cooperation and transparency, and all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the Act. Below is an explanation of the distinction between what is referred to as an informal resolution process and a formal complaint investigation more commonly recognized by the public, along with timelines. This Complaint Process is communicated to both the applicant and the public body at the outset of a complaint matter filed with our Office.

Commissioner's Policy on the Complaint Process

Upon the receipt of a complaint, the *Act* allows the Commissioner to proceed in two ways: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally. For all intents and purposes, in both the informal resolution process and the formal investigation the Commissioner's work constitutes an 'investigation' into the merits of the complaint; however, in the informal resolution process, the Commissioner takes all steps necessary to resolve the complaint to the satisfaction of all involved, and in a manner consistent with the purposes of the *Act*. When this is not possible, the Commissioner concludes her work by a formal investigation which leads to the publication of a formal Report of the Commissioner's Findings.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted a policy to treat all complaints in the first instance by way of informal resolution. Our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and to become more familiar with their rights and obligations under the legislation. Educating the public of the application of this new law is an important part of the mandate of this Office. We are of the view that such a process will make way for improved requests for information and response procedures in the future, which may limit the need to file complaints.

Informal Resolution Process

Step 1 – Review

In all cases, upon receipt of a complaint, we issue letters to both the applicant and the public body indicating that the Commissioner seeks to resolve the matter informally. A deadline is initially set to try to do so within 45 days of the date of receipt of the complaint to our Office.

Although it is called an 'informal resolution process', the Commissioner's Office must review the full substance of the complaint, which includes the initial request for information and the response by the public body, which are the same steps undertaken in any investigation process. Our Office then meets with the public body's officials to review all relevant records relating to the request. This review of all relevant records may include requesting further information from the public body in order for us to fully understand which records may have been overlooked and which could be relevant to the request. Such a meeting is held shortly after receipt of the complaint to begin the process without delay.

Informal Resolution Process

Step 2 – Preliminary Findings

Where the Commissioner is satisfied that the public body has made an adequate search and has identified and provided to the Commissioner all records relevant to the request for information, or where the Commissioner believes there are issues regarding the application of the rules of the *Act* which inhibit a full review of all relevant records, our Office analyzes the initial response given by the public body against all records provided to the Commissioner in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings to the public body by letter. Those preliminary findings inform the public body of the direction of the investigation and of the remaining issues, if any, which must be addressed before we can proceed to the next step, i.e., inviting the public body to submit a 'revised response' to the applicant's request for information. If a revised response is not required, the complaint process proceeds to Step 4.

The suggestion to consider a revised response is made with the continued intent of resolving the complaint informally and with a view to provide the applicant access to the information that the *Act* deems should be disclosed.

If the public body agrees to prepare a revised response, a timeline is set during which the 'proposed revised response' must be submitted to the Commissioner. That timeline is based on the complexity of the work involved to prepare the proposed revised response in each case.

Informal Resolution Process

Step 3 – Proposed Revised Response

When the public body provides a proposed revised response, the Commissioner reviews it to ensure that it also meets the requirements of the *Act*. If the proposed revised response meets the requirements of the law, the Commissioner invites the public body to submit it directly to the applicant as a revised response to the applicant's initial request for information.

If the proposed revised response does not meet the requirements of the law, the Commissioner will provide additional comments to the public body as required in order for the public body to achieve a properly constituted revised response. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to encourage the public body to provide a lawful response to the request for access to information under the *Act*.

Informal Resolution Process

Step 4 – Applicant's Comments

In the case where the public body is ready to issue the vetted revised response to the applicant, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant and the public body sends the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response and to provide comments in relation thereto to the Commissioner. The applicant is usually accorded a period of 10 to 15 days

within which to do so, depending on the complexity of the revised response. The Commissioner then reviews the applicant's comments on the revised response.

Or, in the event that a revised response was not required, the Commissioner informs both parties that the initial response to the request for information was appropriate and in conformity with the *Act*. In such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why it is believed the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the matter. The Commissioner then reviews the applicant's comments.

If the culmination of the above steps to date exceeds the initial 45 day timeframe allotted, the Commissioner may decide to continue with the informal resolution process if there is a belief that a satisfactory resolution in accordance with the *Act* is possible. The timeframe at this stage is based on completing the process within the 90 day investigation deadline set by the *Act*.

In complex matters, the timeframe for the continued work on a revised response may extend beyond the 90 day period to complete the matter. In such a case, the Commissioner notifies both parties in writing of an extension of time to complete the matter as permitted by section 72. The notification indicates the new deadline within which the case will be concluded, and the reasons why the extension of time is necessary, e.g., to bring an informal resolution to the complaint.

Again, it is important to reiterate that our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and all efforts are deployed within the allotted timeframe (or extension thereof permitted by the *Act*) to make this happen, whenever possible.

Informal Resolution Process

Step 5 – Revised Response Satisfactory

In the event that the applicant is satisfied with the revised response, the Commissioner concludes her investigation as one having been resolved informally to the satisfaction of both parties and in conformity with the *Act*. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally.

In the event the applicant provides comments which accept the Commissioner's preliminary findings that the public body's initial response was in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In both above instances, there is no requirement for the Commissioner to file a formal report under section 73 for the reason that there is no recommendation to be made to the public body on its response (revised or initial) to the request for information.

Informal Resolution Process – Formal Investigation

Step 6 – Revised Response Not Satisfactory

In the event that the Commissioner finds that the public body's revised response is not in conformity with the *Act* and the public body decides not to consider proposed changes thereto, or in the event that the applicant is not satisfied with the revised response, upon reviewing the comments obtained from the applicant the Commissioner may decide to further investigate the matter. This step brings the informal resolution process to an end and converts the matter into a formal investigation process which will eventually lead to the issuance of a formal report under section 73.

The Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The de-identified report will also be made available to the public on the Commissioner's Office website (www.info-priv-nb.ca).

This complaint process is intended to encourage both cooperation and transparency, all the while remaining confidential and with the intent to reach a satisfactory resolution in accordance with the requirements of the *Act*.