

# REPORT OF THE COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Complaint Matter: 2012-645-AP-325

April 5, 2012

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 a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into the matter.
2. On October 6, 2011, the Applicant submitted a request for information to the Department of Social Development ("the Department") seeking the following information:

I am ... living in a house that have [sic] rooms of which I am sending you a picture. There may be lead & asbestos in this plaster and paint, and I also have mold [sic] in several areas of my house. Because of these conditions, I have been sleeping in the kitchen for the past 3 years.

Can you please answer the following question[:]

Can you tell me, as Minister of Social Development if this is a house that is safe for human habitation, as described in the F.R. Emergency Repair & HRD Emergency Repair Policy?

(the "Request")

3. Prior to making the Request, the Applicant had recently taken court action against the New Brunswick Housing Corporation, a Crown corporation for which the Department is responsible, regarding the state of the Applicant's house.
4. The Minister for the Department provided a response to the Applicant on October 26, 2011 as follows:

I am aware that you have recently taken court action against the New Brunswick Housing Corporation of which I am the Chair. As this matter is presently before the court, I am unable to speak to this at this time and encourage you to await the results of these proceedings, as will I.

("the Response")

5. The Applicant was not satisfied with this Response and therefore filed the Complaint with this Office on January 6, 2012.

## COMMISSIONER'S POLICY ON THE COMPLAINT PROCESS

6. The Commissioner's Policy on the Complaint Process is designed to respect the law, 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*. 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*.
7. This approach is based on the notion that it is preferable for all parties concerned to resolve complaints informally, and for all parties to become more familiar with their rights and obligations under the new legislation. Educating the public about the application of this new law is an important part of the mandate of this Office.
8. For all intents and purposes, in both the informal resolution process and the formal investigation the Commissioner's work is the same: assessing the merits of the complaint. The Commissioner first takes all steps necessary to resolve the complaint informally 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 with a formal investigation which leads to the publication of a Report. (*Note: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report.*)

## INFORMAL RESOLUTION PROCESS

9. The initial step undertaken by the Commissioner in this case was to review the Request and the Response in order to determine whether the Response met the requirements of the *Act*. We noted that the Response did not meet the requirements for the contents of a response found in section 14 for these reasons:
  - a) the Response did not indicate whether relevant records existed; and
  - b) in the case where relevant records did exist, the Response would have to state how the decision was made not to allow access to such records, i.e., on which provision of the *Act* access could be denied.
10. During our review, we asked that the Department provide an explanation to these questions. We were advised that the Department based its decision to not indicate

whether relevant records existed solely on the fact that the Request related directly to the ongoing court proceedings. In doing so, the Department relied on subsection 14(2) of the *Act*, where a public body is permitted to “refuse to confirm or deny the existence of records” that would fall under certain exceptions. The Department referred to the exception which it felt applied in this case: the exception found in section 29 relating to disclosure harmful to law enforcement or legal proceedings.

11. Therefore, we were able to determine that the Department’s Response in this case was made upon the view that the Request related directly to the Applicant’s ongoing court action against the New Brunswick Housing Corporation and for that reason, the Department intended to apply subsection 14(2) and section 29 to refuse to confirm or deny the existence of any records relevant to the Applicant’s Request. We agreed with this determination as one which was in compliance with the *Act*.
12. As noted above, however, the Department’s Response did not set out these explanations and thus did not meet the requirements for the contents of a response found in section 14 (i.e., as it did not indicate how the decision was made based on the particular provisions of the *Act* where access could be denied). Therefore, as part of the informal resolution process, we invited the Department to issue a revised response to the Applicant which clearly explained why the Department was refusing to confirm or deny the existence of any relevant records in conformity with section 14 of the *Act*.
13. The Department (per the Minister) issued a revised response to the Applicant on February 16, 2012. The revised response read as follows:

I am unable to provide you with information as per the following subsections of the *Right to Information and Protection of Privacy Act*:

- 14(2) Despite paragraph 1(c), the head of a public body may, in a response, refuse to confirm or deny the existence of
  - (a) a record containing information for which disclosure may be refused under sections 28 and 29
- 29(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to
  - (o) be injurious to the conduct of existing or anticipated legal proceedings

As I previously stated in my October 26, 2011 correspondence, I am aware that you have taken court action against the New Brunswick Housing Corporation and I am therefore

unable to confirm or deny whether any relevant records exist at this time. I encourage you to await the results of these proceedings.

14. To reiterate, the revised response was issued as part of the informal resolution process. The next step in this process was to determine whether the Applicant understood the reasons for the Department's decision and whether the revised response was a satisfactory outcome to the Applicant's request for information, and by extension, a satisfactory resolution of the Complaint.
15. We asked that the Applicant provide written comments in that regard, which we received on March 9, 2012. The Applicant did not accept the revised response as a satisfactory response to the Request or a resolution to the Complaint. This brought the informal resolution process to an end. Upon a final re-examination of this case, we were satisfied that the Department's revised response was compliant with the *Act* and the matter thus became the subject of the present Report of our findings.

## **LAW AND ANALYSIS**

16. As mentioned above, the Department's revised response was in conformity with section 14, and furthermore, the Department's reliance on the exception found in section 29, in particular paragraph 29(1)(o), as a basis for refusing to confirm or deny the existence of any relevant records was also proper.
17. Subsection 14(2) is a discretionary provision that allows a public body to refuse to confirm or deny the existence of records in certain circumstances. The public body must prove that confirming or denying the existence of a relevant record would in itself convey information to the Applicant that would fall under the exception to disclosure.
18. Paragraph 29(1)(o) is a also discretionary exception to disclosure, which means that the public body must give reasons as to why any information withheld under that exception "could reasonably be expected to be injurious to the conduct of" legal proceedings. The public body cannot simply apply that provision of the *Act* without giving reasons.
19. In the present case, the Department was able to demonstrate that the condition of the Applicant's home was the central issue of the court action brought against the New Brunswick Housing Corporation by the Applicant. For this reason, any explicit response to the Applicant's Request could reasonably be expected to have a direct and adverse impact upon the Department's conduct of that legal proceeding.

20. We agree with this view and we find that the information sought by the Applicant could be properly withheld under this exception (section 29) thereby correctly leaving the matter to be dealt with before the courts as intended by the *Act*.

21. Again, we find that due to the specific nature of the Request and its direct relevance to the Applicant's court action, the Department acted appropriately in refusing to confirm or deny the existence of any relevant records in this case. Moreover, the Department's revised response explained in a proper fashion the reasons why it was refusing to confirm or deny the existence of any relevant records as the Request constitutes the same issue at the heart of the legal proceedings before the courts brought about by the Applicant.

### **COMMISSIONER'S FINDINGS**

22. Based on all of the above reasons, we are satisfied that the Department's revised response to the Applicant presented during the complaint process in this matter was in conformity with the Department's obligations under the *Act*.

23. In that regard, it is not necessary to make a recommendation in this matter.

Dated at Fredericton, New Brunswick, this   5   day of April, 2012.

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Anne E. Bertrand, Q.C.  
Commissioner

# Appendix A

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## “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 (*NB*: website under construction).

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*.