

# REPORT OF THE COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Complaint Matter: 2011-235-AP-124

June 15, 2011

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

## INTRODUCTION and BACKGROUND

1. The present Report of 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. This matter stems from a Complaint made by the Applicant and received March 11, 2011, in which the Applicant questioned the response to a Request for Information received by the Minister responsible for Service New Brunswick on January 11, 2011. The Applicant made the following request:

The 2010 property tax assessment on my principal residence went up \$60,000. The request for review reduced the assessment by \$23,600. I have been asking SNB since March 2010 for the actual property sales that were used to determine the increase in my property tax assessment. To date, I have received nothing from SNB...I have been told that I am entitled to the sales information from 2009 on. I want to have copies of those actual sales, along with their calculations to which they compared my home and increased my assessment.

The time period specified: All the years that the assessor used to determine my property assessment: before 2009, 2009, and 2010.  
(the "Request")

2. Service New Brunswick issued its response on February 8, 2011, indicating that the Request was granted in part and stated:

The *Assessment Act* prevents the disclosure of any information that is not on the publicly available tax roll- the exceptions being, information related to an individual's own property, and the sale price of properties sold after January 1, 2009.

Enclosed is a list of properties that were used in the determination of your reviewed assessment as part of the Request for Review process. All four of the comparison properties used in the review are listed. The sale prices are provided for only properties sold after January 1, 2009, in accordance with the *Assessment Act*. Under the Request for Review process, the average price per square metre of these four properties was used to determine the

assessment value for your property. An average price of \$1,400 per square metre was multiplied by your property's gross living area of 90 square metres to derive the 2010 revised assessment of \$126,000.

Finally, you will find included the Residential and Agricultural Field Inspection Card. This reflects the findings of the inspection conducted on your property on July 17, 2003 plus subsequent notes.

(the "Response")

3. In the Applicant's Complaint filed with our Office, the Applicant felt that the information provided was insufficient to determine the real and true value of the Applicant's property in accordance with the *Assessment Act*. The Applicant adds:

There were 4 properties sales that SNB used in determining the "*real and true value*" of my property for 2010. As you can see from the attached Schedule prepared by me, there is not enough information for me to determine how the average sale price per m<sup>2</sup> of \$1400 was calculated for 2010.

The information for sales of the three properties before 2009, was not provided in my request for access to information, other than the address and the date of sale. I would have received this information from the Assessment and Planning Appeal Board, had they not rejected my appeal for being 5 days late...

4. Also, in the Complaint, the Applicant claimed more information than what was originally requested. In particular, the Applicant wished to obtain:

The information on the property sold in 2009, to which I am entitled, is incomplete; i.e., lot size (includes land and building), year built, gross floor area (building only), sale price per square metre, and comparison to subject.

Further, SNB did not provide the name of the person who did the calculations, the date on which the information was prepared, by whom the pictures of the "comparable houses" were taken, and the date the pictures were taken.

This type of information was provided in my past appeals.

5. The additional information requested in the Complaint, it should be reiterated, was not part of the Applicant's original Request to Service New Brunswick. In the spirit of the law, however, our Office and Service New Brunswick both treated this component of the Complaint as part of the Applicant's original Request for information during the course of our review of the matter.

## INFORMAL RESOLUTION PROCESS

6. 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 *Right to Information and Protection of Privacy Act*. The informal resolution process provides guidance to public bodies and applicants with a view to better understand this new legislation. Ideally, this process will encourage 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 was to review the Request and the Response and determine whether the Response met the requirements of the *Right to Information and Protection of Privacy Act*. In that regard, steps undertaken included:
  - a) a review of the Applicant's Request for information;
  - b) a review of Service New Brunswick's Response;
  - c) a meeting with officials of Service New Brunswick, including their legal counsel;
  - d) a review of the legal provisions relevant to the Applicant's Request in the *Assessment Act*;
  - e) a review of a subsequent letter sent to the Applicant on March 31, 2011 by Service New Brunswick during the Complaint process; this letter provided the Applicant with additional information which comprised of a more detailed explanation of how the living space of the Applicant's property was calculated.

## LAW AND ANALYSIS

8. Service New Brunswick provided to the Applicant all responsive records, except for certain records withheld under the *Assessment Act*.
9. The *Assessment Act* lists the type of information that may be released to the public. This information is available on what is referred to as the “assessment and tax roll”. The assessment and tax roll is defined by that statute to be the roll listing all persons in whose name real property is assessed and containing such information as is prescribed by regulation.
10. It is useful to refer to Regulation 84-6 of the *Assessment Act* which sets out the information contained in the assessment and tax roll:
  - a) the taxation year for which the assessment is made;
  - b) the date that the assessment and tax notices were mailed;
  - c) the tax class;
  - d) the taxing authority;
  - e) the property account number;
  - f) the location and description of the real property assessed;
  - g) the name and mailing address of each person in whose name real property is assessed;
  - h) the amount of real property assessment;
  - i) the amount of any exemption from taxation;
  - j) the net real property assessment for taxation;
  - k) the assessed value portions;
  - l) the school district;
  - m) the tax rate; and
  - n) the amount of tax.
11. The *Assessment Act* states in subsection 12(1) that no employee of the Province shall disclose information that relates “in any way to the determination of the value of any real property” to any person unless the information is required to be entered on the assessment and tax roll. The *Assessment Act* also states that any employee who violates

this section commits a punishable offence and is liable to suspension or dismissal from employment.

12. Moreover, subsection 12(3.1) emphasizes that:

Information or documentation relating to the determination of the value of any real property subject to assessment or the amount of the assessment, other than an affidavit of transfer, may be disclosed to the owner of the real property if the information or documentation:

- a) does not relate to real property owned by any other person, and
- b) does not reveal information concerning any other person.

13. For our purposes, subsection 5(1) of the *Right to Information and Protection of Privacy Act* prevents a public body from disclosing information if the disclosure is prohibited by another statute, such as the *Assessment Act* in this case. This is the reason why Service New Brunswick and its employees could not disclose to the Applicant the information that was not listed in the assessment and tax roll. Service New Brunswick's website publicly provides most of the information permitted by this law.

14. The Applicant stated having received such information in the past. It is important to note that the Applicant was provided that information by the Assessment and Planning Appeal Board during the course of an appeal of the Applicant's property tax assessment. The Appeal Board is an independent body given the responsibility of hearing appeals for provincial tax assessments. The Appeal Board is not part of Service New Brunswick. That Board is subject to the *Assessment and Planning Appeal Board Act*. On the other hand, the Property Tax Assessment Division of Service New Brunswick is subject to the *Assessment Act*, a separate piece of legislation. Procedures differ under these two laws, and as a consequence, rules for the release of information also differ.

15. When a property assessment appeal is filed with the Appeal Board, the Appeal Board obtains the necessary information from Service New Brunswick in order to conduct the appeal. This is the information that the Appeal Board releases to the parties involved in the appeal. This information is only available to the parties involved in the appeal process but it is not available to the general public. In the matter at hand, the Applicant was not permitted to proceed with an appeal before the Appeal Board and as a result,

the Applicant did not receive the information that would have been provided during the course of the appeal.

## PRELIMINARY FINDINGS

16. During the course of our informal resolution process, we were advised by Service New Brunswick that the information on the prices of properties was not subject to disclosure but pursuant to an amendment to the *Assessment Act*, this information is now available for properties sold after December 31, 2008. Service New Brunswick's refusal to release information about sales that took place prior to January 1, 2009 was based on the *Assessment Act*. Our review showed that Service New Brunswick acted properly in refusing to disclose this information to the Applicant.
17. As for the additional information requested by the Applicant in the Complaint, our review of the *Assessment Act*, in conjunction with the *Right to Information and Protection of Privacy Act*, confirms that Service New Brunswick is not permitted to disclose this information to the Applicant.
18. We wish to point out that additional information provided to the Applicant in the subsequent letter issued by Service New Brunswick in March 2011 was helpful in explaining Service New Brunswick's calculations of the living space of the Applicant's property.
19. Based on the above, the Commissioner found that Service New Brunswick made a full and frank disclosure in response to the Request and in accordance with its obligations under the *Right to Information and Protection of Privacy Act* and found that Service New Brunswick was correct in properly withholding some of the requested information.
20. The Commissioner shared these initial findings with the Applicant in a letter dated April 28, 2011, and invited the Applicant to provide comments in writing on these findings. A right to make such representations is found in section 71 of the *Right to Information and Protection of Privacy Act* and is part of the informal resolution process.

21. The Applicant provided written comments on May 19, 2011 and again questioned the reason why the square metres of the living space of other houses used in the comparison could not be released. The Applicant also questioned Service New Brunswick's assessment procedures regarding:
  - Service New Brunswick's method of calculation for the evaluation of property tax and whether Service New Brunswick's method of calculation for determining the fair market value of a property is an "acceptable" one;
  - whether assessors should rely on the sale of properties sold before the last adjustment made on the assessed value of the Applicant's property on a subsequent assessment of the Applicant's property.
22. Questions regarding Service New Brunswick's procedures and policies on methods of calculation of property tax assessments fall outside the mandate of this Office and will not be part of this review.
23. As the Applicant did not agree with the Commissioner's preliminary findings, the matter could not be resolved informally. This brought the informal resolution process to an end and converted the matter into a formal investigation process.

## FORMAL INVESTIGATION

24. Given the comments provided by the Applicant, we once again reviewed the entire matter. The *Assessment Act* stipulates which information Service New Brunswick may release. The *Assessment Act* does not permit the release of information such as the size of the building, the year built, the gross living area, and the sale price per square metre of the property sold after January 1, 2009. It also does not permit the release of the name of the person who did the calculations, the date on which the information was prepared, by whom the pictures of the comparable house were taken, and the date the pictures were taken.
25. The *Assessment Act* allows for the release of the "location and description of the real property assessed" and according to Service New Brunswick, a description of the property is defined as being the property lot number (and subdivision number). With

the lot number, an individual may then access Service New Brunswick's electronic Planet system to obtain the lot size. The living area of a house, however, is not public information and may not be disclosed to the public by Service New Brunswick.

26. Given that the *Assessment Act* does not permit the release of certain property information and given that subsection 5(1) of the *Right to Information and Protection of Privacy Act* does not alter that premise as explained in our preliminary findings, the Commissioner finds that Service New Brunswick made a full and frank disclosure in response to the Applicant's Request in accordance with its obligations under the *Right to Information and Protection of Privacy Act* and is satisfied that Service New Brunswick properly withheld the information.
  
27. Our preliminary findings therefore remain unchanged and are confirmed. Having found that Service New Brunswick acted appropriately, it is not necessary for me to make a recommendation in this matter.

Dated at Fredericton, New Brunswick, this \_\_\_\_ day of June, 2011.

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Anne E. Bertrand, Q.C.  
Commissioner

# Appendix A

Complaint Matter: 2011-235-AP-124

June 15, 2011

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

## Complaint Process

*January 2011*

## **Office of the Access to Information and Privacy Commissioner for New Brunswick**

### **Complaint Process**

#### ***Right to Information and Protection of Privacy Act* (chap. R-10.6)**

The New Brunswick *Right to Information and Protection of Privacy Act* allows for the Access to Information and Privacy Commissioner to establish the process in investigating a complaint. In that regard, the *Act* allows the Commissioner to proceed in two ways upon the receipt of a complaint: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally.

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. The complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and for both parties to become more familiar with their rights and obligations under the new legislation. Educating the public of the application of this new law is an important part of the mandate of the Commissioner's Office.

It is hoped that such a process will pave the way for improved requests for information and response procedures in the future and limit the need for the filing of complaints. The informal approach to the investigation of all complaints is intended to encourage both cooperation and transparency, all the while intending to reach a satisfactory resolution to both the public and the public body in accordance with the requirements of the *Act*.

In an informal resolution process, it is incumbent upon the Commissioner to resolve the complaint to the satisfaction of all the parties, and in a manner consistent with the purposes of the *Act*.

Below are the 6 Steps involved in the complaint investigation process.

#### **Informal Resolution Process**

##### **Step 1 – Review**

In all cases, upon receipt of a complaint, letters are issued 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 nature of the 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, and this may include requesting further information in order for us to fully understand which records may be relevant to the request. This meeting should be held shortly after the initial letter to the parties.

### **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, our Office then examines the initial response given by the public body against all records now provided in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings in writing to the public body by letter, with a suggestion that a 'revised response' to the applicant's request for information be considered, if necessary. 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.

In the event the public body chooses to proceed by proposing a revised response, a timeline during which the 'proposed revised response' must be submitted to the Commissioner is set based on the complexity of the work involved to prepare the proposed revised response. In most cases, and depending upon the complexity of the matter, it is hoped that the proposed revised response can be submitted to the Commissioner within 30 days of the date of receipt of the complaint.

### **Informal Resolution Process**

#### **Step 3 – Proposed Revised Response**

In the event the public body chooses to provide the Commissioner with a proposed revised response, the Commissioner reviews the proposed revised response 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 to the applicant as a revised response, i.e., as a revised response in answer 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. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to assist the public body in its obligations under the *Act* to encourage the public body to provide a lawful response to the request for access.

### **Informal Resolution Process**

#### **Step 4 – Applicant's Comments**

If the public body has provided and is prepared to issue a revised response which honors its obligations under the *Act*, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant. The public body issues the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response which he or

she will receive from the public body, and to provide comments regarding the revised response to the Commissioner. The applicant is usually accorded a period of 10 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 issues letters to both parties informing them that the initial response to the request for information was appropriate and in conformity with the *Act*. In her letters to the parties in such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why he or she is of the view that the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 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 these steps in the informal resolution process to date have gone beyond the initial 45 day timeframe allotted, our Office 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.

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. In this regard, both parties will become more familiar with their rights and obligations which will lead to improved requests for information and response mechanisms in the future.

### **Informal Resolution Process**

#### **Step 5 – Revised Response Satisfactory to Both Parties**

In the event the applicant is satisfied with the revised response, or that the applicant provides comments which indicate that he or she is satisfied with the Commissioner's preliminary findings that the initial response is in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed by letters to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In such an instance, there is no requirement for the Commissioner to file a formal report as 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 to Both Parties**

In the event the applicant is not satisfied with the revised response, and 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.

At the conclusion of the further investigation, if any, the Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The report will also be made available to the public on the Commissioner's Office website after de-identification (website has not yet been created).