

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2010-102-AP-047

March 31, 2011

Office of the Access to Information and Privacy Commissioner for 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 ("the Act"). This matter stems from a Complaint made by the Applicant dated November 22, 2010, in which the Applicant questions the reply to a Request for Information made by email on October 24, 2010 to the Head of the Horizon Health Network ("Horizon") for "records pertaining to me of any kind, namely written, verbal communication, tapes, videos, anything and everything that pertains to me in any way that is in the hands of the following organizations since September 1st, 2010" ("the Request").
2. The Request goes on to list a number of private and public organizations and persons, including the Minister of Health, the New Brunswick Health Council, the Human Rights Commission, and the Ombudsman's Office.
3. Horizon issued its response on November 5, 2010, indicating for the most part that:
 - a) Horizon does not have any such documentation regarding the Applicant since September 1st, 2010 with the organizations listed;
 - b) all emails communications and other correspondence regarding the Applicant were those sent by or to the Applicant, copies of which the Applicant already possessed;
 - c) verbal communications were not recorded and claimed not be under the purview of the Act; and,
 - d) some documents were withheld based on a claim of solicitor-client privilege pursuant to section 27 of the Act.

INFORMAL RESOLUTION PROCESS

4. 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. The informal resolution process provides guidance to public bodies and applicants with a view to better understand this new legislation, and in the process with a view to 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.)

5. 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 *Act*. In that regard, steps undertaken included a meeting with the officials at Horizon, and a review of the responsive records to the Request. Horizon promptly provided all relevant records for review, including those not disclosed to the Applicant.
6. After reviewing the relevant records, we determined that Horizon had conducted an adequate and thorough search for the records in relation to the Request and had provided to the Applicant all responsive records, except for those records withheld under the claim of solicitor-client privilege.
7. Furthermore, our review of the records that Horizon claimed were subject to solicitor-client privilege largely consisted of correspondences between Horizon and its legal counsel for the purpose of obtaining: a) legal advice before responding to the Request; and b) legal advice on responding to the numerous email correspondences from the Applicant.
8. Our examination of these communications showed to our satisfaction that Horizon had acted properly in refusing to disclose these records as solicitor-client privileged information. It was also noted that several of these records included copies of forwarded email correspondences between the Applicant and Horizon.
9. The Commissioner therefore found that Horizon had made a full and frank disclosure in response to the Request and in accordance with its obligations under the *Act*.
10. The Commissioner shared these initial findings with the Applicant and invited the Applicant to provide further comments in writing as to the reasons why the Applicant believed Horizon did not disclose all the records in response to the Request. A right to make such representations is found in section 71 of the *Act*.
11. The Applicant did not respond to our invitation to provide representations, and as a result, we were not able to take further steps to resolve the complaint informally.
12. There being no further representations forthcoming from the Applicant, we once again reviewed the entire matter and we found there was no need for further investigation.
13. The Commissioner is satisfied that Horizon presented all relevant records for review and that Horizon properly withheld information under the solicitor-client privilege exception

in accordance with the *Act*. The Commissioner also finds that Horizon did make a full and frank disclosure in response to the Applicant's Request and Horizon did so in accordance with its obligations under the *Act*.

14. Having found that Horizon acted appropriately, it is not necessary for me to make a recommendation in this matter.

Dated at Fredericton, New Brunswick, this ____ day of March, 2011.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2010-102-AP-047

March 31, 2011

Office of the Access to Information and Privacy Commissioner for 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).