

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matters: 2013-1374-AP-707, 2013-1375-AP-708
2013-1377-AP-710, 2013-1376-AP-709
2013-1378-AP-711, 2013-1452-AP-759
2013-1462-AP-769, 2013-1465-AP-772
2013-1467-AP-774

Date: September 23, 2013

Case about access to information regarding the Shared Risk Pension Plan

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1.0 INTRODUCTION

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 multiple complaints filed with this Office involving six public bodies.
2. The Applicant made the same request dated March 14, 2013 to five public bodies (Department of Finance, Office of Human Resources, Department of Justice and Attorney General, Executive Council Office, and Office of the Premier):

I request all information, correspondence, emails, reports, analyses, studies, briefing notes, and meeting notes (typed or hand written), however generated by civil servants, consultants including pension task force members and politicians, however stored, whether paper or electronic on what is being called a Shared Risk Pension Plan for provincial government employees and retirees.

The period of time covered by this request is Sept 01, 2010 to current date.

Without limiting the forgoing this request includes information on:

1. pension plan options considered
2. savings to government for the different elements of the planned pension changes including savings due to the future indexing model.

("Request - Shared Risk Model")

3. The Applicant then filed three other requests dated March 18, 2013 with each of the same five public bodies:

I request all information, correspondence, emails, reports, analyses, studies, briefing notes and meeting notes (typed or hand written), however generated including by civil servants, consultants and politicians, however stored, whether paper or electronic on compensation, pensions and allowances of any kind to Ministers and MLAs that is based on changes to the consumer price index. The period of time covered by this request is Sept 01, 2010 to current date.

("Request - MLA & Ministers' pensions")

I request all information, correspondence, emails, reports, analyses, studies, briefing notes and meeting notes (typed or hand written), however generated including by civil servants, consultants and politicians, however stored, whether paper or electronic identifying source of funds for fees paid to consultants and pension task force members on what is being called a Shared Risk Pension Plan for provincial government employees and retirees. The period of time covered by this request is Sept 01, 2010 to current date.

("Request - Consultants' Fees")

I request all information, correspondence, emails, reports, analyses, studies, briefing notes and meeting notes (typed or hand written), however generated including by civil servants, consultants and politicians, however stored, whether paper or electronic on what is being called a Shared Risk Pension Plan for provincial government employees and retirees. The period of time covered by this request is Sept 01, 2010 to current date.

Without limiting the forgoing this request includes information on:

1. copies of consultant contracts including those for the members of the pension task force
2. all backup information including invoices and statements for payments made and are being made to consultants including the pension task force members.

(“Request-Pension Task Force”)

4. On May 1, 2013, the Applicant filed several complaints with our Office about the public bodies’ decisions, in particular, asking the Commissioner to investigate the timeliness of the processing of the Applicant’s multiple requests as follows:
 - for having extended the time to provide a response (referred to as “Time Extension Complaints”) involving five public bodies:
 - Department of Finance,
 - Office of Human Resources,
 - Department of Justice and Attorney General
 - Executive Council Office, and
 - Office of the Premier.
5. When not having received responses within the time period the Applicant had been notified to expect responses, the Applicant also filed complaints with our Office on June 24, 2013:
 - for not having provided a response within the statutory time limits (referred to as “No response complaints”) involving three public bodies:
 - Department of Finance,
 - Office of Human Resources, and,
 - Office of the Premier.
6. The Applicant also filed a separate request with the New Brunswick Services Agency dated April 22, 2013. That request called for access to all statements, payments and vouchers for all payments made or invoiced however stored, whether paper or electronic, for fees paid to consultants and pension task force members on what is being called a Shared Risk Pension Plan for provincial government employees and retirees from September 1st 2010 to the date of the request.

7. The New Brunswick Internal Services Agency transferred that request to the Department of Justice and Attorney General by letter dated May 8, 2013. Not being satisfied with this decision, the Applicant filed a complaint with our Office on June 24, 2013 involving the Internal Services Agency:
 - for having transferred the Applicant's request to another public body (referred to as a "Transfer complaint").
8. Meanwhile, the Applicant had concerns about the public bodies' decision to extend the time limit to respond and sent letters to each public body in April 2013 indicating that it found this to be unacceptable and that it would be contacting our Office if the information was not provided without further delay.
9. Responses were issued to the Applicant by the initial five public bodies referred to above and by the Department of Justice and Attorney General to which the Applicant's request had been transferred by the Internal Services Agency. The Applicant was dissatisfied with the content of those responses and filed additional complaints with our Office in late June 2013.
10. As all of the Applicant's Complaints stemmed from the same Requests made to the public bodies identified above, we investigated all of these matters at the same time. Our first approach was to conclude our work and issue our findings on the Time Extension and No Response complaints, along with that concerning the Transfer of the request. Therefore, the present Report of Findings is in relation to those complaints.
11. Our investigation into the remaining complaints regarding the content of the various responses received in this overall matter continues at this time.

2.0 BACKGROUND

12. The sustainability of pension funds has become a point of concern for many in recent times. While economic and financial instabilities have often meant lesser returns on pension fund investments, retirees drawing from pension funds are living longer and thus require greater payouts from pension funds. The long-term sustainability of pension plans is a global issue that many jurisdictions are struggling with, including New Brunswick.

13. In September 2010, the Province established the *Task Force on Protecting Pensions* to examine the long-term stability and security of pensions in New Brunswick, including a review of existing pension plans and rules, pension structures, and public consultation initiatives. The Minister of Justice and Consumer Affairs appointed three people to the Task Force. A year later in September 2011, the Province expanded the Task Force's mandate to include public sector pension plans in New Brunswick. The Task Force's work on public sector pension plans is currently on-going.
14. In May 2012, the Province announced a new pension model that was developed by the Task Force. The pension model would be available for both private and public sector plans and was based on the concept of *shared risk*. At the same time, a number of labour force unions announced their intention to adopt the new model for some of their pension plans and the Premier voiced his support for considering the new model in relation to the public sector pension plans. As a result, the Province began working with the Task Force to consider the possibility of adopting the shared risk model for the pension plans it administers for the public sector.
15. In the spring of 2013, the Province held information sessions for public sector employees and retirees to provide some information of what the shared risk model would consist of and how the model would impact contributions and benefits. Both employees and public sector retirees had many questions and concerns about this possible change to the pension plan and how it would affect their financial security.
16. The Applicant shared these concerns and sought to obtain information dating back to 2010 to determine what information the Province had gathered in relation to the shared risk pension model for public sector employees and retirees, including agreements and payments to consultants and Task Force members who had worked on this issue, and changes to pension plans for elected officials.

3.0 SAME REQUESTS TO MULTIPLE PUBLIC BODIES/CONSULTATION PROCESS

17. In this matter, several public bodies received the same requests and opted to consult amongst themselves about how best to approach the processing. This decision was based in large part on the fact that some records were held by two or more public bodies.

18. Upon those initial discussions, the Department of Justice and Attorney General was tasked to ask the Applicant whether it would be acceptable for the Province to provide a global response, one that incorporating all of the public bodies' responses. The Applicant declined indicating that it preferred to receive responses from each of the public bodies in relation to the relevant records in each of their custody or under their control. The Applicant did provide clarification that the information sought related to the public service pension plan under the *Public Service Superannuation Act*, and not the other public service pension plans that are also administered by the Province.
19. As a consequence, the public bodies consulted amongst themselves with the goal of ensuring that each public body had conducted a thorough search for relevant records in its possession and given that the subject-matter was somewhat complex, they worked together to ensure that the nature of the information sought was well understood as well as taking the time to cross-reference those records that were held jointly. Our investigation revealed that the goal of this exercise was to ensure that all of the relevant records were identified and processed before responses could be issued.
20. We point out, however, that regardless of whether the records were jointly held with other public bodies, each public body made its own decision about whether to grant or refuse access to the requested information, and issued responses to each Request referred to above for all of the relevant records in its custody or control.
21. We found that the public bodies adopted this approach in a good faith effort to ensure that each would conduct a proper and thorough search for all relevant records and with a view to provide comprehensive responses to the Applicant's various Requests. From the details we were provided, consultations were conducted by way of regular teleconferences during which officials discussed and confirmed what records were held in their respective possession. We did not find any evidence to indicate that the consultation process was undertaken or prolonged to create intentional delays in responding to the Requests.
22. We do question whether the consultation process could have been more efficient and completed in a timelier manner. The consultations resulted in delays when scheduled teleconferences had to be postponed until a time when everyone was available to participate. We find that some of the delays were caused due to a lack of lists of relevant records from which the public bodies could have worked independently and outside the consultation process.

23. We would suggest that it would be more efficient for each public body to compile a list of records identified in its possession and then to circulate that list with the others. From the six separate lists, officials would then be able to quickly cross-reference which records are held jointly and from these findings. This cross-referencing would then serve as the basis for the continued consultative discussions to decide upon processing and would expedite the preparation and issuance of responses. As a final note, a list of records proves invaluable to our investigation particularly when we are dealing with multiple complaints involving the same requests. We trust that our comments will be considered for future cases involving the processing of multiple requests.

4.0 INVESTIGATION

24. With a view to expedite our investigation of multiple complaints, we asked that the five public bodies that had self-extended the time limit to respond complete a *Complaint regarding Self Time Extension* form that we prepared for this purpose. This form provides our Office the circumstances under which the public bodies believed it necessary to extend the time limit to respond to the Requests, including providing us with copies of letters to the Applicant that notified of the time-extensions. We also met with officials from each of the public bodies to learn how the Requests were processed and to discuss the self-extension and why the responses were not issued on time.

25. The *Act* grants an applicant not only the right to access information but also timely access. For this reason, the time limit in which to provide a response is set at a maximum of 30 days as per subsection 11(1).

26. Exceptions to that that general rule are found in few and specific circumstances set out in subsection 11(3) where the *Act* permits a public body to give itself more time in which to issue a response, but that additional time cannot exceed a further 30 days. In recognizing that public bodies ought not to unduly delay or interfere with applicants' right to timely access, the *Act* allows applicants to challenge the decision to extend the time limit under subsection 11(3).

27. Similarly, a right to complain exists where an applicant submits a request to one public body but the request is transferred to another. The investigation of a Transfer complaint allows us to determine whether it was appropriate for the request, in part or as a whole, to be given to another for processing. We examine whether the public body to first receive the

request can substantiate that it conducted a thorough search and found no relevant records in its custody or under its control that responds to the request.

28. In the next section of this Report, we proceed to set out the statutory requirements for processing of requests and our findings in relation to each public body involved in this matter. We begin with the obligations placed upon a public body when transferring a request.

5.0 LAW & ANALYSIS

5.1 Transferring a request for access to another public body

29. The *Act* allows a public body to transfer an access request in specific situations and according to subsection 13(1), the public body may, within 10 days after receiving an access request, transfer the request to another public body if:

- the record was produced by or for the other public body,
- the other public body was the first to obtain the record, or
- the record is in the custody or under the control of the other public body.

30. Additionally, subsection 13(2) requires the public body transferring the request to notify the applicant of the transfer in writing and as soon as possible.

31. The public body that receives the transferred request is granted 30 days from the date of receipt to issue a response to the applicant. Of course, where circumstances permit, that time line can be self-extended but only in specific instances set out under subsection 11(3).

32. When a complaint is made in relation to the transfer of a request, we will examine whether the transfer was undertaken within the time period of 10 days, and we also look into the substantive question as to whether the public body was justified in transferring the request.

33. In this case, the Applicant submitted a request to the Internal Services Agency through the internal mail of Government by leaving it with reception personnel at the Government's main offices located at the Centennial Building in Fredericton. In turn, reception personnel deliver the mail to the appropriate office. Our investigation revealed that there was a substantive delay from the time the request was hand delivered to the reception desk on April 22, 2013 to the time the request was actually received by the Agency; the request was

only received on April 29, 2013, 7 days after having been delivered at the Government's main offices.

34. During our discussions with Postal Services responsible for processing and delivering mail throughout Government, we were informed that it is highly unlikely that it would have taken more than a couple of days for mail delivered at the Centennial Building to make its way to the appropriate department; however, for some unexplained reasons, a delay occurred in this case and despite our best efforts, we cannot find an explanation for this delay.
35. In our view, when a member of the public leaves mail addressed to a specific public body with reception recognizing that it will be forwarded to the appropriate office, it is not unreasonable to expect that the mail will be delivered and received within a short period of time, such as one work day or two at the most where offices are located within the Fredericton region. The Internal Services Agency offices are located in the Fredericton region, and it was appropriate for the Applicant to expect that request would reach the Agency's offices within a day or two at the most, but certainly not seven days later.
36. The Internal Services Agency is responsible for Government's internal mail system. Therefore, with a view to avoid such problems in the future especially for cases where time sensitive correspondence or requests must be acted upon quickly, such as took place in this case, we find that the delay for the request to have reached the Agency's office remains unexplained and unacceptable.
37. Had the reception desk personnel date stamped the envelope dropped off by the Applicant (in which the request was placed) when it was first accepted, the Agency would have recognized that there had been an unusually long delay to reach its offices. The Agency could have then addressed this issue by contacting the Applicant to inform of this delay in conformity with its duty to assist. We are not advocating that the Agency's time limit to process the request commenced on the date when reception accepted the envelope; rather, we are pointing out that by adding this step at the reception desk for internal mail, the Agency would have noticed the date stamp of delivery to reception (April 22) in relation to when the Agency received it, i.e., its date stamp of April 29, and realizing that the Applicant expected the Agency to have received the request within a day or two, not seven days later, and was expecting timely action.

38. As for the transfer of the request, we determined that it was carried out on May 8, 2013 and therefore within the statutory requirement of 10 days after receiving it; however, to the Applicant, the transfer occurred 16 days from when the request had been dropped off at the reception desk. For clarity, the time line begins when the public body receives the access request at its office.
39. The Agency's decision to transfer to the Department of Justice and Attorney General was based on its unique functions as an internal service provider for government. The Agency does not have control over the vast majority of the records it receives and in its possession as the Agency is tasked with processing invoices for various government departments but it is not a decision-making authority in relation to those invoices. For instance, the Agency is provided documentation regarding the purchase of and payment for a desk, but the Agency is not involved in the decision to purchase of the desk. For this reason, we the Agency might have relevant records in its possession but those records are not produced by the Agency and the Agency is not suited to make decisions for their disclosure. This situation has been captured by paragraph 13(1)(a) which recognizes that the decision regarding the release of a record is best made by the public body that created the record and thereby allowing for the request to be transferred.
40. In the present case, officials at the Internal Services Agency confirmed to us that it processed the request and determined that it had no relevant records; however, through consultation with other public bodies involved in this matter, it found out that records sought were in the custody or under the control of the Department of Justice and Attorney General, the public body that had produced them. The transfer was therefore undertaken, and in our view, appropriately.
41. We find that the request, once received, was transferred promptly and it was proper for the Agency to transfer the request to the Department of Justice and Attorney General in this case.
42. We also note that the Agency notified the Applicant of the transfer to the Department of Justice and Attorney General by letter on May 8, 2013 as per its obligations to do so under the *Act*. We point out that the notice could have been more meaningful to the Applicant in responding fully by adding:
- a) that it had received the request dated April 22 only on April 29; and,
 - b) that the Agency had no relevant records in this case.

43. Notwithstanding these latter comments, for the reasons indicated above, we find that the Agency was correct in its application of section 13 of the *Act* to transfer the request to the Department of Justice and Attorney General.

5.2 Duty to respond within the statutory time limits

44. While a public body has an initial time limit of 30 days to respond to an access request, the *Act* has recognized that it may not be possible in every case to search, review and prepare the requested documents for disclosure within that timeframe.

45. Those specific cases found in subsection 11(3) where a public body can make a decision to extend the time limit to provide a response include where:

- a) the applicant does not give enough detail to enable the public body to identify a requested record,
- b) the applicant does not reply in a short time to clarification required by the public body;
- c) a large number of records has been requested or must be searched or responding within the time period would interfere unreasonably with the operations of the public body;
- d) time is needed to notify and receive representations from a third party or, time is needed to consult with another public body before deciding whether or not to grant access to a record;
- e) the public body intends to release information belonging to a third party, and the third party has referred that decision to the Courts or has filed a complaint with the Commissioner; or,
- f) the applicant has requested records that relate to a court action or court application that has already been commenced.

46. After having read and reviewed the request, where the public body finds itself in any one or more of the situations described above, the public body can avail itself of more time, up to an additional 30 days to respond, and therefore up to an a maximum time period of 60 days in which to provide a response.

47. It is important to note that the public body should automatically self-extend the time for responding to the full 30 additional days. Rather, we encourage public bodies to self-extend the time limit to only the amount of time it believes will be necessary in those circumstances to properly respond to the request.

48. In this regard, the duty to assist provision found in section 9 further emphasizes the right of timely access by directing the public body to process a request in an expedient manner:

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.

49. The duty to assist applies throughout the request process and requires the public body to assist the applicant in receiving timely, appropriate, and relevant response to his or her request for information. For instance, if a public body knows that it may not be possible to respond to a request within 30 days, every reasonable effort should be made by the public body, as early as possible, to take the appropriate steps to avoid further delays and possible complaints.

50. While we can appreciate there may be valid reasons making it difficult to respond to a request within the 30 day time limit, the duty to assist goes beyond simply providing a response in a timely manner – it also requires a public body to make every reasonable effort to assist an applicant by informing him or her of any possible delays.

51. As indicated earlier, should the public body believe it necessary to self-extend the time limit under subsection 11(3), a written notice must be sent to the applicant, and this notice must set out certain explanations as per subsection 11(5):

- the reason for needing more time (specifying which circumstance under subsection 11(3)),
- the date when a response can be expected, and
- that the applicant has a right to complain to the Commissioner's Office about the extension.

52. In these matters, we reviewed each of the public bodies' notices provided to the Applicant and they were sent to the Applicant within the initial 30-day period to respond to the Requests, along with advising of the Applicant's right to complain. We did observe in some cases, however, problems in calculating the dates to self-extend the time limit.

53. The Office of the Premier and the Office of Human Resources informed the Applicant that a response could be expected to all Requests by May 17, 2013. These two public bodies each received the four Requests (referred to above) but not all on the same date. The first Request was received on March 15, 2013, and the remaining three were received on March 18. While May 17, 2013 corresponded to the maximum calculated timeline to respond to

the Requests received by these two public bodies on March 18, 2013, this time line did not correspond to the first Request that had been received three days earlier on March 15, 2013. This meant that the calculation of the maximum extended time line for that Request fell three days earlier, i.e., on May 14, 2013 (being 60 days from March 15, 2013).

54. We understand that the Office of the Premier and the Office of Human Resources relied on March 18, 2013 as being the date when they had received all of the Requests because of a decision to treat all the Requests in a simultaneous fashion to search for records. We take no issue with this approach except to point out that to avoid difficulties in meeting time lines, it would have been better to treat the Requests as having all been filed on the earlier date of March 15, 2013 to avoid being late. By failing to issue a response to the earlier Request by May 14, 2013, these public bodies were exposed to the possibility of a complaint being filed and this is what in fact occurred.

55. As for the basis for extending the time limit to provide a response, that decision was made pursuant to paragraphs 11(3)(c) and (d) of the *Act*. The content of all letters issued to the Applicant (including informing of the right to file a complaint about the self-extension) was as follows:

As per paragraphs 11(3)(c) and 11(3)(d) of the *Act*, this is to advise you that it is necessary to extend the time for responding to your requests for information for an additional thirty days, as a large number of records is requested or must be searched or responding within the initial 30 day period would interfere unreasonably with the operations of the Department. Also, time is needed to notify and receive representations from a third party or to consult with another public body before deciding whether or not to grant access to a record. (...)

56. This Report presents a good opportunity for us to provide guidance on the applicability of subsection 11(3) where validation is required for having relied on special circumstances to extend the time to respond to a request.

57. In reference to those specific situations relied upon in this case, we examine paragraphs 11(3)(c) and (d) of the *Act*:

11(3) The head of a public body may extend the time for responding to a request for up to an additional 30 days if

...

(c) a large number of records is requested or must be searched or responding within the time period set out in subsection (1) would interfere unreasonably with the operations of the public body,

(d) time is needed to notify and receive representations from a third party or to consult with another public body before deciding whether or not to grant access to a record...

58. All public bodies in this case relied on the factors found in paragraph 11(3)(c) to self-extend as they needed to search and respond to a large number of records and claimed that doing so within 30 days would interfere unreasonably with their operations. As for paragraph (d), reliance was placed upon having to consult with other public bodies and this would require more time. It was not made clear that only that part of paragraph 11(d) was being relied upon as there was no need to notify or receive representations from a third party in this case.

59. In the future, it is important to make clear which specific circumstance is being relied upon to extend the time limit in order to provide applicants proper notice.

Paragraph 11(3)(c)—large volume of records

Test

60. To rely on paragraph 11(3)(c), a public body will have to demonstrate that at least one of three factors existed when processing the request that responding within the required 30 days would prove very difficult:

- 1) that a large number of records had been requested;
- 2) that a large number of records had to be searched; or,
- 3) that to process the request within 30 days would interfere unreasonably with its operations.

61. In arriving at a decision to self-extend the time line based on the first factor, a public body must determine that the request captures a large amount of records in its possession. Even though an applicant has submitted a broadly-worded request, this will not necessarily mean that there are a large amount of responsive records. It is for this reason that when this decision has been challenged, the public body must show the actual number of records that it found to be responsive.

62. In regards to the second factor, a public body must show that due to the nature of the request, it was required to carry out extensive searches in order to find the relevant information. For instance, the request is for documentation within the last three years for

spruce budworm infestations in one area. The request does not specify actual records sought but rather the subject-matter and the public body needs to search for records where the information is found and would have to demonstrate that it in fact carried out extensive searches.

63. The third factor applies where the public body believes responding to a request within the initial 30 days would interfere unreasonably with operations, i.e., that it would not be just to require the public body to process the request within that time line due to factors existing at that time. An objective assessment of the circumstances must be made at that time that the public body decides to self-extend on this basis. What constitutes an *unreasonable interference* will vary depending on the nature and size of the public body's operations and other relevant factors at play at the time the request is being processed. For instance, if a public body has to process 500 pages of records to respond to a request and has a single staff to do this task, but that same employee is required to perform other duties essential to the operations that cannot be assigned to others or put on hold for a time, then these facts are taken into consideration when deciding to self-extend the time limit.

Paragraph 11(3)(d)—consultation with another public body

64. In this case, the public bodies also raised paragraph 11(3)(d) also as a basis to extend the time limit as they had no choice but to consult with other public bodies. When we review a complaint of this nature, we require the public body to substantiate that it was necessary for it to consult another public body before a response to the request could be issued.
65. We now address how each public body relied upon paragraphs 11(3)(c) and (d).

**5.2.1 Reliance on paragraph 11(3)(c)
Department of Finance**

66. The Department of Finance, along with its counterparts, considered the wording of the requests and noted that the reference to “Shared Risk Pension Plan for provincial government employees and retirees” as broad in scope and encompassing records relating to some pension plans that had already converted to the shared risk model as well as records relating to the possible changes to the Public Service Superannuation Plan. The Department of Justice and Attorney General contacted the Applicant on behalf of all public bodies involved shortly after the requests were received and was able to clarify that the

Applicant was seeking information in relation to the Public Service Superannuation Plan only.

67. With this clarification, the Department of Finance began conducting searches for the relevant records in its custody or control, and as the requests related to the same subject-matter, searches for relevant records to all four requests were conducted at the same time. To ensure that a proper search was conducted, the officials searched broadly and identified approximately 3,000 pages as potentially relevant that were then reviewed. This exercise resulted in approximately 1,000 pages of records being found to be directly relevant to the requests. The search process alone took over 100 hours of staff time to complete.

68. Most of the search efforts and the bulk of the relevant records related to Request-Shared Risk Model but the volume of relevant records in relation to the remaining three Requests was significantly less. As such, we find that the large volume of relevant records that needed to be searched was a legitimate reason to extend the time limit to respond to Request-Shared Risk Model pursuant to paragraph 11(3)(c); however, this did not hold true for the other three Requests.

69. Then came the question as to whether responding to the Requests during the time limit for a large volume of records would unreasonably interfere with the Department's operations. Below are factors we found to be relevant considerations in the present case:

- one staff is assigned by the Department of Finance to process *Right to Information* requests; this staff also serves as the Legislative Coordinator and has other duties relating to the Legislative Assembly; and,
- when the Applicant's Requests were received, the majority of the Legislative Coordinator's time was already allotted to duties for the Legislative Assembly as the Government had introduced the Province's Annual Budget at the beginning of the Session (which started on March 26, 2013), leaving this staff member little time to dedicate to the processing of all requests received by the Department.

70. The Applicant filed four Requests within a short time period relating to similar subject-matters and it is logical and acceptable in our view that the Department would decide to conduct its search of relevant records for all four Requests at the same time. While the Department may have been able to search for and individually process the relevant records relating to the smaller Requests within a shorter amount of time, we can appreciate that this overall work would be best done as a combined group of Requests to be handled

together. In our view, this was especially allowable because the Department's Right to Information Coordinator who is also the Legislative Coordinator was tasked with duties for the Legislative Assembly's spring Session commencing on March 26, 2013. These duties included the finalization of the estimated budget projects for Provincial departments and agencies to be introduced in the Legislative Assembly on opening day, March 26, 2013. Given the Department's key role in budgetary matters, the majority of the Legislative Coordinator's time was dedicated to these duties until the Government had completed its review and approved the estimated budget for the 2013-14 fiscal year that continued into May 2013.

71. Therefore, viewing these factors together, we find that there was collectively a large number of records and responding to the four Requests within the initial 30-day time period would have unreasonably interfered with the Department's operations. The Department was justified in invoking paragraph 11(3)(c) to self-extend the time limit to respond to all four Requests in this case on these factors.

5.2.2 Reliance on paragraph 11(3)(c) Office of the Premier

72. Our discussions with the Office of the Premier's officials revealed that manual and electronic searches were required to identify the responsive records. Nine file folders (some large accordion files), as well as multiple emails were searched and although an estimate of how many pages of records were searched could not be given, we were advised that it took officials about 15 hours to perform these searches.

73. The Right to Information Coordinator then sifted through the records and identified over 100 pages of records as being responsive to Request-Shared Risk Model and Request-Pension Task Force, but no records were found in relation to the other two Requests. It took the Coordinator approximately 25 hours to review the relevant records and make a determination as to whether access to the requested information would be granted.

74. Given these facts, we do not find that a large number of responsive records needed to be searched in this case and for that reason, the Office of the Premier was not justified in relying upon paragraph 11(3)(c) to extend the time limit to respond to the Requests.

75. As for whether responding to these Requests within 30 days would have interfered unreasonably with the operations of the Office of the Premier, we find these facts:

- the nature of the Office of the Premier is unlike other public bodies that are mandated to oversee and manage a multitude of different programs. The Office of the Premier is responsible for government affairs, communications, correspondence and community relations;
- two staff are assigned to regularly process *Right to Information* requests, both of whom have other job duties and functions and both were assigned to handle the Applicant's Requests;
- staff assigned to work on requests also have regular responsibilities in relation to the Legislative Assembly, and another factor at the time was the preparation required for the Spring Session; and,
- four Requests were received within a short time period, all relating to a similar subject matter and the Office of the Premier opted to conduct its search for all of the relevant records for all four requests at the same time.

76. Given the nature of the operations of the Office of the Premier, that two staff were assigned to these Requests, that a small number of records needed to be searched and relevant records were only found identified for two out of the four Requests, we find that responding to the requests within the initial 30-day time period would not have unreasonably interfered with the operations of the Office of the Premier and in this regard, the Office of the Premier was not at liberty to invoke paragraph 11(3)(c) to self-extend the time limit to respond in this case.

5.2.3 Reliance on paragraph 11(3)(c) Office of Human Resources

77. Having received clarification on the scope of the Applicant's Requests, the Office Human Resources began its search for relevant records, and as in the case of the Department of Finance, it conducted the search of records for all four Requests at the same time. The Office of Human Resources conducted a broad search for records, which it estimated as approximately 3,000 pages after over 100 hours of search time. Upon review, however, only 100 pages of records were found to be directly relevant.

78. As in the case of the Department of Finance, most of the search efforts and the bulk of the relevant records related to Request-Shared Risk Model, and significantly less for the remaining three Requests. Given the amount of time required to conduct searches in this

case, we find to have been a legitimate reason to extend the time limit to respond for Request-Shared Risk Model, but not for the remaining three Requests.

79. As for whether responding to the Requests during the time limit would unreasonably interfere with the Office of Human Resources' operations, we find the following factors to have been relevant considerations:

- two staff members were assigned to process the Applicant's requests, one of whom is the *Right to Information* Coordinator, but both of whom have other job duties and functions not put on hold at that time;
- at the time the Requests, the Office of Human Resources was in the process of assisting with information sessions on the possible changes to the pension plan to Provincial employees and retirees, which limited staff's time to dedicate to processing the requests; and,
- staff assigned to work on the Requests also had responsibilities in relation to the spring Session of the Legislative Assembly, particularly when the Office of Human Resources was under review for the Main Estimates for the upcoming fiscal year.

80. We understand that the Applicant filed four Requests within a short time period, all relating to similar subject matter and that, given this similarity, that the Office of Human Resources opted to conduct its search for all of the relevant records for all four Requests at the same time. While the Office of Human Resources may have been able to search for and process the relevant records relating to the smaller Requests within a shorter amount of time, particularly where it held relatively few relevant records in relation to each, we can appreciate why the Office of Human Resources opted to identify and gather all of the relevant records first before responding to each Request individually.

81. Given the time it took to search for records in relation to these four Requests, i.e., in excess of 100 hours, we find that responding within the initial 30-day time period would have unreasonably interfered with the Office of Human Resources' operations and that it thus properly invoked paragraph 11(3)(c) to self-extend the time limit to respond.

5.2.4 Reliance on paragraph 11(3)(c) Executive Council Office

82. Our discussions with the Executive Council Office's officials revealed that once the Requests were received, the Right to Information Coordinator sent an email asking that a search for documents and emails be performed to the people that may have relevant records. The

Coordinator also searched through nine files from the Records Center and although an estimate of how many pages of records were searched could not be given, we were advised that it took about 15 hours to perform the search.

83. Not knowing how many pages of records were found and reviewed, the Right to Information Coordinator nevertheless advised that approximately 20 hours was spent to review the relevant records and make a determination as to whether access to the requested information would be granted. Based on the facts presented to our Office, we are unable to substantiate the fact that a large number of relevant records needed to be searched, and therefore cannot uphold the Executive Council Office's decision to extend the time limit to respond for all Requests on this basis.
84. With regards to whether responding to the Requests within the initial 30 days would interfere unreasonably with the operations of the Executive Council Office, no detailed supporting evidence was presented to our Office either during our discussions or on the Form we required to substantiate this fact. We therefore find that responding to the requests within the initial 30-day time period would not have unreasonably interfered with the Executive Council's Office's operations. The Executive Council Office thus did not properly invoke paragraph 11(3)(c) to self-extend the time limit to respond.

5.2.5 Reliance on paragraph 11(3)(c) **Department of Justice and Attorney General**

85. Upon receiving the requests on March 18, 2013, the Department of Justice and Attorney General began to conduct a search for relevant records in its custody or under its control. Although distinct responses were ultimately issued for each Request, the Department's approach was to proceed with treating the four Requests as a whole in order to ensure that the search was as thorough and comprehensive as possible. As part of this process, a notice was sent to the different branches of the Department asking officials to identify and forward any records relevant to the requests located in their respective offices to the Right to Information Coordinator for review. Once the records were received by the Right to Information Coordinator, meetings were held with departmental officials from the various branches to determine relevancy of the records and whether or not any exceptions to disclosure applied. Following the review of records, internal discussions were had with the Department's legal branch and the responses were drafted accordingly and later approved.

86. Although the Department did not provide us with the exact number of responsive records in its possession or the number of pages searched, it indicated that at the time of the self-extension it anticipated that a substantive number of records were requested or would have to be searched due to the number of requests received and the broad nature of the scope. The search was also expected to require additional time seeing that multiple locations within the Department would have to be searched and that the search was ongoing throughout the consultation process with other public bodies. We understand that the Department spent a minimum of 40 hours performing the search up to the point when the time was extended and estimated that an additional 40 hours would be needed in order to complete processing the requests.

87. Even though the process established by the Department to process these Requests appears comprehensive, we find that the Department of Justice and Attorney General failed to provide our Office with sufficient details in support of its argument that a large number of records was requested or needed to be searched. It remains unclear exactly how many relevant records the Department has in its possession.

88. With regards to whether the processing of the four Requests would interfere unreasonably with the operations of the Department, we find the following factors to be relevant considerations:

- the Department has only one staff tasked with processing and responding to all the access requests submitted to the Department;
- at the time the Requests were received, the staff tasked with processing access requests was in addition to taking part in the consultations with other public bodies, also involved with requirements imposed by the Legislature namely, files such as budgetary main estimates and other legislative duties; and,
- four Requests filed within a short time period all relating to similar subject-matter required a search for all relevant records at the same time.

89. We can certainly appreciate that receiving four separate Requests on one day may have hindered the Department's ability to issue responses within 30 days, especially where the Coordinator established having additional duties and functions bringing other time constraints at that point in time. These factors may have interfered with the operations of the Department of Justice and Attorney General; however, without enough evidence to support this position, we are unable to make such a finding.

90. Based on the analysis above, we find that the Department of Justice and Attorney General could not rely on 11(3)(c) to extend the time to respond by an additional 30 days in this case.

**5.2.6 Reliance on paragraph 11(3)(d) – consultation with other public bodies
Office of the Premier, Department of Finance, Office of Human Resources,
Executive Council Office, and Department of Justice and Attorney General**

91. As explained above, the five public bodies that received and processed the same four Requests consulted amongst themselves to ensure that they all understood the nature of the information the Applicant was seeking and that it was from this basis that the public bodies believe they could carry out adequate searches for relevant records.

92. Then, these public bodies found there was a need to continue the consultations to deal with jointly held records to ensure that all relevant records had been accounted for by each public body. The Department of Finance played a key role in these consultations given its expertise on public sector pension matters (the *Public Service Superannuation Act* is administered by the Minister). The consultations were conducted by teleconferences held on a regular basis that continued into June 2013 at which time the public bodies were satisfied that all relevant records had been identified for processing.

93. While we found that the consultation process could have been more efficient with the preparation and comparison of lists of relevant records held by each public body, we find that the public bodies' approach to consult in this fashion was understandable and was undertaken with the correct and lawful intent to see to a thorough and comprehensive search for all relevant records to provide comprehensive responses.

94. The facts show that the Office of the Premier, the Department of Finance, the Office of Human Resources and the Department of Justice and Attorney General actively participated in these consultations and accordingly, we find that these public bodies properly relied on paragraph 11(3)(d) to self-extend the time limit to respond to the Requests in this case. We also find that self-extending for the full amount of 30 days was proper in the circumstances.

95. The Executive Council Office's officials only participated in a couple of consultations with the other public bodies due to the nature of the records the Executive Council Office would have on the subject matter. The committees of the Executive Council routinely make key decisions about budgetary and policy directions on behalf of the Province and the vast

majority of the records held by the Executive Council Office relate to cabinet deliberations that no other public body would jointly hold. Given these facts that the Executive Council Office did not fully participate in the consultations with the other public bodies, we find that reliance could not be placed on paragraph 11(3)(d) to self-extend the time limit to respond to the Requests. Accordingly, responses to all four Requests should have been issued within the initial 30-day time period and the Executive Council Office failed to do so in this case.

5.3 No response complaints

96. As we mentioned above, when a response is not provided within the 30-day time limit, or within the extended 30-day time limit, this is deemed to be an automatic refusal of the request, thus triggering the applicant's right to complain on the basis of not having received a response on time. This is reflected in subsection 11(2) of the *Act*:

11(2) The failure of the head of a public body to respond to a request for access to a record within the 30 day period or any extended period is to be treated as a decision to refuse access to the record.

97. The Applicant complained when responses to the Request-Shared Risk Model were not forthcoming by the expected date as signified by the Department of Finance, the Office of Human Resources, and the Office of the Premier.

5.3.1 Department of Finance

98. The Request-Shared Risk Model was received by the Department of Finance on March 15, 2013 and the Department self-extended and informed the Applicant that a response could be expected by May 15, 2013. The response was not issued until June 21, 2013, 37 days past this date. The Department did not provide any further communication or update to the Applicant when it did not meet the May 15, 2013 deadline. Not having heard further comments from the Department, the Applicant filed a complaint with our Office about the lack of timely response on June 24, 2013.

99. We recognize that there were factors that contributed to the Department's failure to provide a timely response and have written about these above in the self-time extension analysis. These factors did not excuse the Department's lack of timely response but explained the reasons why the Department had difficulties in meeting the time limit, even that which was extended to May 15, 2013.

100. We found no evidence of a deliberate attempt to delay the matter. The failure to provide a timely response was due only to the work and time constraints in March, April and May for the Department to speak to the Province's Budget in the Legislative Assembly and for no other reason; having said this, however, the Department could have made contact with the Applicant to explain these circumstances.
101. We reminded the Department of the importance of keeping applicants informed of the status of the response, even when they are not able to meet the time lines, in keeping with its duty to assist. In this case, we find that the Applicant's No Response Complaint in relation to the Request-Shared Risk Model has merit.

5.3.2 Office of Human Resources

102. As indicated above, the Applicant's Request-Shared Risk Model was received by the Office of Human Resources on March 15, 2013 and despite a notice to self-extend, the Office of Human Resources did not provide any further communication or update to the Applicant as to when a response could be expected when it did not meet the May 17, 2013 time extension. The response was issued 40 days past this date. In this case also, we found no evidence of a deliberate attempt to delay the matter.
103. Although working under some difficult circumstances, the Office of Human Resources could not be excused from meeting its statutory obligations and we reminded officials of the importance of keeping applicants informed of the status of the response, even when they are not able to meet the time lines, in keeping with the duty to assist.
104. We find that the Applicant's complaint about the lack of timely response to the Request-Shared Risk Model has merit.

5.3.3 Office of the Premier

105. In this case, Request-Shared Risk Model was received by the Office of the Premier on March 15, 2013. On April 11, 2013, the Office of the Premier self-extended the time limit to respond by informing the Applicant that a response could be expected by May 17, 2013. The Office of the Premier, however, only provided a response on June 24, 2013 (101 days after having received the Request) and did not provide any further communication or update to the Applicant as to when a response could be expected when it did not meet the

May 17, 2013 time limit. In our view, the Applicant rightly filed a complaint when not hearing anything further from the Office of the Premier.

106. As in the case of the other public bodies, we find that the on-going consultations on jointly held records and staff assigned to work on the Requests tasked with other responsibilities in relation to the spring sitting of the Legislative Assembly all contributed to delays but we did not find any evidence to suggest a deliberate attempt to delay the response.
107. Although providing explanations why it had difficulties in meeting the time limit, these factors did not excuse the Office of the Premier's lack of timely response to Request-Shared Risk Model. During our investigation, we reminded Officials of the importance of keeping applicants informed of the status of the response, even when they are not able to meet the time lines, in keeping with the duty to assist provision.
108. We find that the Applicant's complaint about the lack of timely response to Request-Shared Risk Model has merit.

6.0 FINDINGS

109. In this matter, most of public bodies lawfully self-extended the time limit within which to issue responses to the various Requests; however, some failed to respect the statutory extended time lines to issue a response to the Request-Shared Risk Model and for not having kept the Applicant abreast of the additional delays encountered, contrary to their duty to assist.
110. During our investigation, we reminded each public body of its obligations and expect that steps will be taken to ensure that responses be issued in a timely manner. We are confident that these public bodies will continue to respect all the rules found in the *Act* and for these reasons, we do not find it necessary to issue recommendations in that regard.
111. As for the matter of the seven day delay encountered when delivering internal mail destined for the Internal Services Agency from the Government's main offices, we will have discussions with the Internal Services Agency to identify ways in which such delays can be identified and rectified.

112. Based on the foregoing, we make the following findings:

New Brunswick Internal Services Agency

113. We find that once received, the Agency transferred the request promptly and properly in accordance with section 13 to the Department of Justice and Attorney General in this case.

Office of the Premier

114. We find that the Office of the Premier did not meet the test to self-extend the four Requests it received in this matter under paragraph 11(3)(c) of the *Act*; however, it did properly self-extend the time limit to respond under paragraph 11(3)(d).

115. In issuing its response to the Request-Shared Risk Model beyond the extended time limit, the Office of the Premier failed to respect the statutory time limits, contrary to subsection 11(1) of the *Act*.

Department of Finance

116. We find that the Department of Finance met the test to self-extend the four Requests it received in this matter under paragraphs 11(3)(c) and (d) of the *Act*.

117. In issuing its response to the Request-Shared Risk Model beyond the extended time limit, the Department of Finance failed to respect the statutory time limits, contrary to subsection 11(1) of the *Act*.

Office of Human Resources

118. We find that the Office of Human Resources met the test to self-extend the four Requests it received in this matter under paragraphs 11(3)(c) and (d) of the *Act*.

119. In issuing its response to the Request-Shared Risk Model beyond the extended time limit, the Office of the Human Resources failed to respect the statutory time limits, contrary to subsection 11(1) of the *Act*.

Executive Council Office

120. We find that the Executive Council Office did not properly invoke paragraph 11(3)(c) to self-extend the time limit to respond to the four Requests it received in this matter under paragraph 11(3)(c) or (d) of the *Act*.

Department of Justice and Attorney General

121. We find that the Department of Justice and Attorney General could not rely on 11(3)(c) to extend the time to respond to all four Requests by an additional 30 days in this case; however, it did properly self-extend the time limit to respond under paragraph 11(3)(d).

7.0 NO RECOMMENDATION

122. Based on all of the above, there is no need to issue any recommendation in this matter.

Issued at Fredericton, New Brunswick, this _____ day of September 2013.

Anne E. Bertrand, Q.C.
Access to Information and Privacy Commissioner