

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-855-AP-430

June 21, 2013

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

Case about the format of the response and refusing access in full to the requested information

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into the matter.
2. The Applicant submitted an access request to the Office of the Attorney General and Minister of Justice dated January 31, 2012, for the time period from January 1, 2009 to January 31, 2012 in relation to documentation, investigative tools, reports, explanations and any other information concerning the Applicant (the "Request").
3. The Applicant was advised on February 28, 2012 that due to the large number of records requested, time to respond to the Request would be extended to April 2, 2012. On March 28, 2012, the Department of Justice and Attorney General¹ (the "Department") issued the Response as follows:

By correspondence dated January 31, 2012 (received February 1, 2012), you made a request under the *Right to Information and Protection of Privacy Act* (the "Act") for access to certain records from the Department of Justice and Attorney General.

(...)

The Department has completed a review of its files, and has determined that there are some records in the custody or under the control of the Department that relate to this portion of your request, which is therefore being granted in part. The information you are entitled to receive under the Act is enclosed herewith.

Please note that the enclosed documents do not include records that you provided to the Department due to the volume of information you have previously provided. It is our understanding that these records are already in your possession.

Furthermore, parts of some of the enclosed documents have been redacted, and other documents have been excluded in their entirety. The redacted information and the excluded documents are either exempt from disclosure or are being withheld in accordance with the Act. In some circumstances, the Act does not apply to the record (or part of thereof) in question. In particular:

¹ The Response was signed by the Minister of Justice and Attorney General on letterhead from the Department of Justice and Consumer Affairs. The Department of Justice and Consumer Affairs was renamed the Department of Justice and Attorney General on March 15, 2012. This is why it appears as though two separate departments responded to the Request. In this Report, we consider the Office of the Attorney General and the Department of Justice and the Attorney General to be one and the same.

- Some records (or parts thereof) relevant to your request contain information about other identifiable individuals, namely their names, titles, telephone and fax numbers, and email addresses, as well as information that would tend to identify those individuals; such information has been redacted and is being withheld under subsection 21(1) of the Act on the basis that its disclosure would be an unreasonable invasion of the privacy of third parties, and under subsection 43(1) of the Act on the basis that disclosure thereof is not authorized under Division B of Part 3 of the Act;
- Some records (or parts thereof) relevant to your request constitute information in a court record, a record of a judge, a judicial administration record, or a record relating to support services provided to a judge or to a court official and, by virtue of paragraph 4(a) of the Act, the Act does not apply to such records, or parts thereof;
- Some records (or parts thereof) relevant to your request contain information pertaining to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General and, by virtue of paragraph 4(b) of the Act, the Act does not apply to such records, or parts thereof; and
- Some records (or parts thereof) relevant to your request are records of The Court of Appeal of New Brunswick, The Court of Queen's Bench of New Brunswick or The Provincial Court of New Brunswick, which are expressly excluded from the application of the Act by virtue of the definition of "public body" in section 1 of the Act.

(...)

As your request is refused in part, you have the right to file a complaint with the Access to Information and Privacy Commissioner about the refusal, or to refer the matter to a judge of the Court of Queen's Bench of New Brunswick for review. However, please note that the foregoing does not apply to a record (or parts thereof) under the aegis of the judicial branch of government, paragraph 4(a) of the Act or paragraph 4(b) of the Act.

(Emphasis added)

(the "Response")

4. Not being satisfied with the Response, the Applicant filed a Complaint with this Office on May 11, 2012.

INFORMAL RESOLUTION PROCESS

5. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the Act. The informal resolution process provides guidance to both public bodies and applicants with a view to better understand this new

legislation. This process has been developed by our Office based on the spirit of the *Act* and in accordance with the parameters of the Commissioner's investigative powers under Part 5. It is hoped that in all cases, the informal resolution process will lead to a prompt and satisfactory outcome to the complaint (*Note*: A full description of the steps involved in the Commissioner's informal resolution process can be found at our website at this link <http://www.info-priv-nb.ca/>). The initial step undertaken in this process was to review the Request and the Response in order to determine whether the Response met the requirements of the *Act*.

6. In this case, we note that the Response did grant partial access to some of the relevant records, subject only to redactions. Having said this, the Response refused full access to other relevant records because, according to the Department, the *Act* does not apply to such records. In our efforts to reach an informal resolution of this Complaint, we held meetings with officials of the Department. The subject of our discussions centered on:
 - the Department's duty to search for all relevant records;
 - the Department's duty to assist the Applicant when processing the Request;
 - the requirements of a properly constituted response pursuant to subsection 14(1); and,
 - the exceptions and exemptions to disclosure that the Department had relied on to refuse access in part or in full in this case.
7. Legislators intended to remove from the scope of the *Act* certain records, which by nature relate to judicial or quasi-judicial administration, involve elected officials' constituency work, records of the Provincial Archives, and so on. These specific records are listed in section 4 and indicate that the public cannot have access to such records under the *Act*.
8. In our view, this Complaint centered around the Department's interpretation of, and reliance on, section 4 of the *Act* as a basis for refusing to grant access to certain records. By extension, the Department's approach also sought to dismiss the independent oversight by the Courts or the Access to Information and Privacy Commissioner's Office.
9. There is clearly a disagreement as to what the lawful application of section 4 should be.
10. Nevertheless, we carried out our investigation of this Complaint with a view to determine which records in the custody and control of the Department were relevant to the Request, if we could identify the information excluded under paragraphs 4(a) and (b), and whether the Department properly applied other rules regarding the protection of personal information in redactions to records it released to the Applicant. Finally, and more importantly, we

sought to determine whether the Department could substantiate its refusal to provide access to this information as a whole.

11. The Department allowed our Office to review the records that had been released to the Applicant, but did not permit us to review the records it decided fell outside the purview of the *Act* on the opinion that they were not subject to the *Act*. In other words, we were unable to determine whether some of the requested records properly fell within the exclusions found in paragraphs 4(a) and 4(b) to substantiate the Department's decisions that those records were not subject to the *Act*.
12. This brought the informal resolution process to an end and the matter thus became the subject of the present Report of our Findings.

REVIEW AND ANALYSIS

Search for relevant records

13. Upon receiving the Request, the Department identified those Directors from each of its branches believed to have the requested information in their records and asked them to perform a search. Discussions within the Department were later held to determine the extent of the relevant records identified and whether they could be disclosed to the Applicant. We asked the Department's officials to identify the requested records it had in its custody and control to our Office, but the Department refused to do so.
14. Given this fact, we find that the Department failed to demonstrate that it conducted an adequate search for relevant records in this case.

Duty to assist

15. The duty to assist provision found in section 9 of the *Act* creates a positive obligation on the public body to offer assistance such that an applicant can receive a timely, appropriate, and relevant response to his or her request for information. The discharge of this duty applies throughout the request process up to and including the issuance of a response to the applicant, which connects well with the principle that the response should be helpful and thoroughly answer the applicant's request.
16. The Department ought to have processed the Request in conformity with the *Act*, but failed to do so when:

- the Department decided not to identify or explain to the Applicant which records existed; and,
- the Department instructed the Applicant not to complain in relation to the refused access to records it determined fell under paragraphs 4(a) and 4(b) exemptions.

17. Issuing a response that does not explain why information exists and why some cannot be released and more worrisome, tells a member of the public that he or she cannot complain on certain aspects of the response, constitutes an interference with access rights. For these reasons, we find that the Department failed to discharge its duty to assist the Applicant in violation of section 9 of the *Act*.

Department's Response

18. A response must directly address all aspects of a request as per section 14 of the *Act*. Simply put, the public body is lawfully obligated to answer a request for information in regards to all the records the public body holds.

19. The Department is fully aware of this obligation; however, the Response was only partly in conformity to the requirements found in subsection 14(1). The Department correctly:

- Indicated that the Department had records in its custody or under its control with regards to certain requested records;
- Indicated that, where the information was being refused in part or in full, the specific provisions to disclosure that applied;
- Provided some brief explanations for certain redacted information or excluded records;
- Reminded the Applicant that records the Applicant previously provided to the Department would not be disclosed since those records were already in the Applicant's possession; and,
- Notified the Applicant of the right to file a complaint with the Commissioner or refer the matter to the Court of Queen's Bench for review in relation to the Department's decision to refuse access to some information.

20. The Department, however, incorrectly:

- Failed to provide a list of all relevant records in the Department's custody or under its control;
- Failed to provide helpful explanations as to why the *Act* did not apply to some records relevant to the Request;

- Instructed the Applicant neither to complain to the Commissioner nor refer the matter to the Court of Queen's Bench because in the Department's opinion, no such lawful right exists where the *Act* does not apply.

21. For all these reasons, we find that the overall format of the Response was not in conformity with the law as it failed to provide to the Applicant a properly constituted response as per subsection 14(1) of the *Act*.

Relevant Records Reviewed

Redactions

Exception to disclosure found in subsection 21(1) - Third party information

22. We were allowed to review the relevant records that had been issued to the Applicant. In those, the Department withheld certain information on the basis that its disclosure would result in an unreasonable invasion of a third party's privacy. This information consisted mostly of names of public body employees, but did also contain names and email addresses of third parties.

23. While subsection 21(1) of the *Act* does set out a mandatory exception to disclosure of personal information on the basis that release of such information constitutes an unreasonable invasion of a third party's privacy, the matter does not end there. Section 21 in its entirety is designed to lay out the principle surrounding third party's privacy as a guide and to protect personal information but also to point the way for cases where the disclosure of some types of personal information will not constitute such an unreasonable intrusion.

24. For instance, in the case of public servants, the disclosure of their personal information will not constitute an unreasonable invasion where the information concerns job classification, salary range, travel expenses, and so on (as per paragraph 21(3)(f) of the *Act*). Consequently, access to that type of information is permitted in accordance with subsection 21(3) as holders of public office.

25. We do mention, however, that in some cases the release of public employees' personal information (such as name) may constitute an unreasonable invasion of privacy where relevant factors establish this fact. For example, where the public body has knowledge that the applicant seeks to harm or harass the employee who occupies a certain position and wants access to their name and home or email address, the release of that information may

constitute an invasion of that employee's privacy that is unreasonable in the circumstances and the public body would be correct in withholding this information.

26. In the present Complaint case, we found that most of the redacted information was already found in correspondence and/or emails either generated by the Applicant to the Department or received by the Applicant from the Department. In other words, the exchange of correspondence between the Applicant and the Department had already produced all of the information despite these redactions as the Applicant received it prior making the Request. For this reason, we find that access was not denied in relation to this redacted information.

Redactions

Part 3 – Protection of Privacy (Restriction on disclosure - Subsection 43(1))

27. The Department relied on subsection 43(1) of the *Act* as an 'exception' to disclosure on the basis that the Department believed it imposed restrictions on public bodies not to disclose personal information. The Department incorrectly looked to Part 3 Rules governing privacy when it sought to apply exceptions to prevent the disclosure of this type of information.

28. Subsection 43(1) reads as follows:

43(1) A public body shall not use or disclose personal information except as authorized under this Division.

29. This provision cannot be used as an exception for disclosure to process an access to information request; only those rules found in Part 2 of the *Act* are applicable and can be relied upon when processing requests.

30. Subsection 43(1) is found under Part 3 of the *Act* which concerns the protection of privacy in relation to a public body's regular duties to protect personal information it collects and that is found in all its records. The principle surrounding the protection of privacy, although a related concept in the overall access to information field, is specifically elaborated under Part 3 to enable public bodies on how best to collect, use and share personal information when performing their duties.

31. We therefore find the Department's use of subsection 43(1) as an exception to disclosure inapplicable in this case. Having said this, however, the Department applied this rule to refuse access to the same information it believed was protected under subsection 21(1). According to our review of these records and our analysis above for personal information

redacted from the relevant records, nothing comes of the improper application of subsection 43(1) in any event in this case.

Relevant Records Not Reviewed

Subsection 1(1)- Definition of “public body”

32. Another ground for refusing access to relevant records was the Department’s application of a definition found in section 1, rather than an exception to disclosure found in sections 17 to 33 under Part 2 of the *Act*. Again, this was an unusual approach as a definition alone does not create an exception to disclosure of information.
33. Definitions and other provisions found under Part 1 of the *Act* are intended to guide the application of the remainder of the provisions. With respect, a definition cannot be used as an exception to disclosure, but it is a means to enable the proper interpretation of the provisions of the *Act*, including its exceptions to disclosure.
34. The definition of “public body” is to inform the public as to which public department, organization, Crown Corporation, municipality, university and the like are subject to the *Act*. Those that are subject to the *Act* can receive and must process access to information requests. Those that are not subject to the *Act*, such as the Courts, do not receive and therefore do not process access to information requests.
35. We believe this is what the Department was trying to achieve when raising the definition of “public body” to bar access to certain records. In fact, all the Department had to do was to identify that there were records relevant to the Request held in Court files and that the *Act* did not apply to Court files.

Section 4 – Excluded records

36. The Department has taken the position that where requested records are excluded from the *Act* under section 4, the *Act* in its entirety does not apply to those records, adding there cannot be an independent oversight by the Commissioner’s Office or even the Courts.
37. There is a fundamental error in this position. The fact that the *Act* excludes certain records does not signify that the *Act* prevents an independent review of the public body’s decision to first qualify those records as excluded.

38. We remind the Department, and all public bodies, that a central purpose of the *Act* in accordance with paragraph 2(e) is:

“to provide for an independent review of the decision of public bodies under this Act”

39. Therefore, when a public body decides relevant records are excluded under section 4 of the *Act*, it is making a decision in relation the *Act* and that decision is reviewable. For this reason, it is essential that an independent body (the Commissioner’s Office or the Court) reviews the decision of a public body to first qualify the records as excluded where the applicant complains of such decision. To have it any other way means to take away a mechanism that verifies whether the public body has properly applied section 4 to the relevant records.

40. When the Applicant chose to file a complaint in accordance with section 67 in this case, our Office was legally obligated to investigate the matter under section 68 and our duty to fully investigate the Complaint can only be carried out when we conduct a thorough review of the matter, including the decision to exclude relevant records from the *Act*.

41. The central question of the investigation of the present Complaint was the application of section 4 to exclude certain relevant records or information contained therein. The Department made a decision that these records were excluded but we were not permitted to determine if the Department’s decision was correct.

Producing Records to the Commissioner and Burden of Proof

42. As commented above, we have concerns when records are not produced to the Commissioner and her investigative staff to allow us to conduct our complaint investigations. Positive results have been, and continue to be accomplished when public bodies work with the Commissioner’s Office to resolve complaints. Our goal is to ensure that access rights are being upheld by public bodies. This is accomplished when public bodies remain accountable for their decisions, especially where access to information has been refused.

43. Where there is a lawful decision to refuse access to information, the independent review will support such a decision, while explaining to the public why the refusal was in accordance with the *Act*. This approach can only exist where the Commissioner’s Office is allowed to review the records, particularly, when there was uncertainty as to whether

access to some information ought to have been granted or refused for privacy considerations.

44. In this case, the Department did not allow us to see the records withheld pursuant to section 4 of the *Act*. If this approach were to become a trend, it would undoubtedly affect the Commissioner's ability to conduct thorough confidential investigations of complaints, thereby rendering it difficult to successfully resolve complaints.
45. We hasten to add that this trend may encourage applicants to resort to their only other option under the *Act*: to refer their complaints to the Courts where production of records cannot be refused. Legal proceedings before the Courts to review complaint matters may not only engender longer delays for a complete disposition of the case, but are also costly for both applicants and public bodies.
46. Subsection 70(1) states that the Commissioner can require the production of any record that she deems relevant to an investigation, with the exception to Executive Council confidences and records containing solicitor-client privileged information, which are treated differently. In other words, the Commissioner cannot *require* the production of Executive Council confidences and records containing solicitor-client privileged information.
47. This provision falls squarely within the overall intent and spirit of the *Act*: to allow the public body to make a decision regarding access to information but at the same time, permit an independent oversight by the Commissioner to ensure that the public body has made the decision properly and in accordance with the law.
48. The reason why subsection 70(1) was worded in this fashion is to enable the public body to meet its burden of proof as per subsection 84(1) of the *Act* where its decision to refuse access has been challenged. The public body can prove to the Commissioner that its decision to refuse access based on a particular exclusion or exception of the *Act* is in fact lawful by satisfying its obligation to prove that the applicant has no right of access to those records under subsection 84(1) of the *Act*:

84(1) In any proceeding under this Act, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

49. To meet the burden of proof when challenged on a denial of access to information, a public body must establish reasons why there is no right of access by substantiating how the claimed exemption or exceptions to disclosure were applied to refuse access. The purposes of the *Act* include an independent review to ensure accountability of public body decisions

to refuse access to information. That purpose is not fulfilled when there are no explanations or facts to support the denied access, and the Commissioner is prevented from seeing the records to review the decision.

50. In this case, we were denied the opportunity to conduct a thorough review of the complaint by not having been able to examine the relevant records the Department decided were excluded under section 4. We were not made privy to a list of these records to assist in the Department's finding that these relevant records were records found in Court files.

51. We therefore cannot find that the Department's decision regarding access to these records was lawful in the circumstances and find that the Department failed to substantiate its decision to refuse the Applicant's access to the requested information contrary to its statutory obligation under section 84.

FINDINGS

52. As we were not made privy to all of the relevant records in this matter, we find that the Department failed to demonstrate that it conducted an adequate search for all relevant records to the Request.

53. The Department failed to discharge its duty to assist the Applicant by processing the Request in less than an open manner and by issuing a Response that, although was partly in conformity with the *Act*, was neither meaningful nor thorough. Additionally, the Department failed in its duty to assist by issuing a Response that told the Applicant a complaint could not be made on certain aspects of the Response. This constituted an interference with access rights.

54. The Department's overall format of the Response was not in conformity with the law as it failed to provide to the Applicant a properly constituted response in accordance with subsection 14(1) of the *Act*. As a useful reminder for the proper processing of an request to access information under Part 2 of the *Act*, we find that the Department ought to have:

- Identified the records that contained the relevant information;
- Made a decision regarding excluded records under section 4;
- Determined whether access to the information could take place and if so, which information;
- Examine whether exceptions to disclosure applied:

- Only in accordance with Part 2 sections 17 to 33, mandatory or discretionary exceptions:
 - Where the applicable exception was mandatory, the Department could withhold the information; and,
 - Where the applicable exception was discretionary, the Department had to consider whether to disclose the information based on relevant factors in existence at the time of the Request.
- Where a complaint was filed or matter referred to the Courts, to provide for review all relevant records in order for the Department to substantiate its decisions regarding access pursuant to section 84.

55. The Department could neither refuse access to the requested information on the basis of a definition provision found at section (1) of the *Act* alone, such as it did in this case, nor rely on the Part 3 rule regarding disclosure of personal information such as found in subsection 43(1). Based on our review of relevant records in which information was redacted pursuant to subsection 21(1), however, we find that the Applicant's access was not denied in this case.

56. The Department's decision to exclude records under section 4 is reviewable and the Applicant had a right to complain about the refusal to access those records under section 67. When the Applicant exercised that right, the Office of the Commissioner was the lawful independent authority to investigate the matter pursuant to section 68 and to require that the Department meet its burden of proof under section 84.

57. Finally, the Department's decision regarding access to records excluded under section 4 of the *Act* could not be reviewed and we find that the Department failed to substantiate its decision to refuse the Applicant's access to the requested information, contrary to its statutory obligations under section 84 of the *Act*.

RECOMMENDATIONS

58. Based on the above, we recommend pursuant to subsection 73(1) of the *Act* that:

- a) The Department prepare a complete list of records relevant to the Request that are in its custody or under its control, a list to include those records the Department believes to fall within the ambit of section 4;
- b) That the Department provide the list to the Applicant; and,

- c) The Department release to the Applicant forthwith a copy of all of the records relevant to the Request that is contained on the list that was not otherwise provided to the Applicant with the Response.

Dated at Fredericton, New Brunswick, this _____ day of June, 2013.

Anne E. Bertrand, Q.C.
Commissioner