

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: 2012-1002-AP-506 and 2012-1003-AP-507

Date: August 28, 2013

Case about access to information regarding natural gas distribution and energy policy

1.0 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 two Complaints filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into the matter. The Applicant requested information from the Office of the Premier.
2. In October 2010, an Energy Commission undertook an extensive public consultation process on energy matters with a view to provide recommendations to Government on establishing a comprehensive energy plan for the Province. The Energy Commission published its final report with recommendations in May 2011 on its website. In response to the Energy Commission's report and recommendations, the Department of Energy was tasked with assessing these recommendations and developing a comprehensive energy plan. This assessment culminated with the publication of an Energy Blueprint in October 2011, a long-term vision for the energy sector. One of the key issues in the energy sector since 2009 has been natural gas distribution rates, which had been increasing significantly. This resulted in mounting public pressure for the Government to take action to address this issue. The following December, the Province amended the *Gas Distribution Act, 1999*, which impacted the natural gas distribution rates.
3. The Applicant sought to obtain information dating back to 2009 to determine what information the Province held generally on natural gas matters as well as related matters in the energy sector. In doing so, the Applicant submitted the same Request to several public bodies at once, including the Office of the Premier on January 26, 2012. The Applicant asked for records related to the use and distribution of gas in New Brunswick for the time period of January 1, 2009 to the date of the request for information:
 1. All records relating to the use and distribution of natural gas in the Province of New Brunswick including all records with respect to the subjects listed in the attached Schedule "B" (Subjects Directory).
 2. All records with respect to the regulation of the use and distribution of natural gas in the Province of New Brunswick including all records with respect to decisions of the New Brunswick Energy and Utilities Board (the "Board"), the role, functions, responsibilities and powers of the Board and any changes to or restructuring of the Board.
 3. All records with respect to proposed amendments to the Gas Distribution Act, 1999 and proposed regulations under that Act.

4. All records with respect to the general franchise for the distribution of natural gas in the Province of New Brunswick including all records relating to the General Franchise Agreement between the Province of New Brunswick, Enbridge Gas New Brunswick Inc. and others dated August 31, 1999.
5. All records with respect to single end use franchises for natural gas and all records relating to the single end use franchise agreements between the Province of New Brunswick and the various single end use franchisees.
6. All records with respect to or arising from the review, consultation, recommendations and resulting discussion paper titled “The Path Forward—Shaping New Brunswick’s Energy Future, A Discussion Paper On The Establishment Of An Energy Commission and Energy Plan For New Brunswick” dated August 20, 2010 by Darrel J. Stephenson and Pierre-Marcel Desjardins including all records reviewed, considered, prepared by or presented to the authors of that Discussion Paper and their respective agents, advisors, consultants and representatives and all records that consider or refer to that Discussion Paper.
7. All records with respect to or arising from the New Brunswick Energy Commission and the work of the New Brunswick Energy Commission including all records reviewed, considered, prepared by or presented to the New Brunswick Energy Commission, its co-chairs, representatives, agents, advisors, and consultants and all records that consider or refer to the New Brunswick Energy Commission, the work of the New Brunswick Energy Commission or the reports of the New Brunswick Energy Commission or which relate to any consideration, review, analysis or implementation of such work or reports.
8. All records with respect to or arising from the task force panel and the work of the task force panel respecting natural gas distribution issues formed by the Department of Energy in or about October 2010 including all records reviewed, considered, prepared by or presented to the task force, its members, representatives, agents, advisors and consultants or which relate to any consideration, review, analysis or implementation of the work of the task force.
9. All records with respect to or arising from The New Brunswick Energy Blueprint prepared in or about October 2011 by the Department of Energy including all records reviewed, considered, prepared by or presented to the Department of Energy, its representatives, agents, advisors and consultants or which relate to any consideration, review, analysis or implementation of the Energy Blueprint.

Schedule “B” set out a “Subjects Directory” that listed key words to further clarify the nature of the information the Applicant was seeking.

(the “Request”)

4. In the present case, we understand that providing a response to the Request was more complicated because the same request had been submitted to multiple public bodies. These public bodies consulted amongst themselves to determine the best approach mainly due to the fact that relevant records were held by two or more public bodies. As evidenced by the reference to the Department of Energy in the Response quoted below, it became clear that the Department of Energy held most of the relevant records due to the subject matter of the Request. The public bodies decided to refer to others in their respective responses. While the public bodies may have had good intentions, issuing responses by referring to other public bodies was very confusing for the Applicant without the benefit of more explanations. The Applicant could not determine the full list of relevant records held by all these public bodies combined and therefore remained unable to sort out what specific records each public body had in its own possession, what records would be released or withheld, and what records were being referred to when the response pointed to other public bodies.

5. This point is evidenced in the initial response issued by the Office of the Premier on March 26, 2012:

We have reviewed and processed your Request dated Friday 27 January, 2012 and are granting access to the following records:

- Letter and spread sheet sent to the Chief of Staff
- Key message points: Premier to Enbridge CEO Patrick Daniels
- Information on Janet Holder, President of Enbridge Gas Distribution
- Correspondence to and from the Office of the Premier and Enbridge Gas Distribution
- Letters to the Premier's office from other individuals

Any information we have regarding this matter that is also held by the Department of Energy and the Executive Council office will be released by them.

We are currently waiting for a response in regards to third party documents and we will advise you of the result.

6. This initial response identified and released a few relevant records with redactions, records that were found at the Office of the Premier; then, the Applicant was referred to two other public bodies for the remainder of the records. The Applicant followed-up with the Office of the Premier on May 15, 2013 asking for confirmation that the records listed in the Response were the only relevant records in its possession, and if additional records existed, that they be

released. Alternatively, the Applicant asked to be provided with a list of the relevant records and for a decision as to which exceptions of the *Act* access was being refused. As for the third party documents mentioned in the Response, the Applicant asked that a decision be made given that the statutory timeline of 30 days for providing such a decision had since elapsed. It must be mentioned that the Applicant had been previously notified by letter on February 7, 2012 that the Office of the Premier had undertaken its consultation with the third party at that time.

7. The Applicant did not receive clarifications from the Office of the Premier and filed the first complaint on June 7, 2012. Meanwhile, the Applicant received a final response on June 21, 2012 in which the Office of the Premier informed that any relevant records in its possession *had been released* either by the Department of Energy or the Executive Council Office or itself, except for one record, i.e., a third party document to which access was being denied pursuant to sections 22 and 26 of the *Act*.
8. The Applicant lodged a second complaint with our Office on June 27, 2012 being unsatisfied with the Office of the Premier's final decision to withhold access to a third party document. Both complaints stemmed from the same Request and were investigation at the same time.
9. We consider the initial and final responses as one complete "Response" for the remainder of this Report. Also, findings in regards to both complaints are treated jointly for the purpose of this Report.
10. Our investigation into the present matter was conducted in tandem with the investigation of similar complaints filed with our Office involving other public bodies that had provided responses to the same Request. This reason alone made it impossible for us to proceed with our informal resolution process because we would not have been able to affect one informal resolution without resolving all of the others at the same time as we could not discern adequately what information was held by all these other public bodies.
11. Our investigative work required us to determine the full extent of the relevant records held by all these public bodies to be able to draw conclusions in regards to each complaint, including making findings in the present complaints involving the Office of the Premier.

2.0 LAW AND ANALYSIS

Duty to assist

12. 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:

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.

13. In our view, the discharge of this duty to assist 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. Being helpful and assisting an applicant means that all relevant records must be identified after conducting a proper search for relevant records so that the public body determines accurately what information exists in relation to the request.

14. According to officials of the Office of the Premier, a search for relevant records was done and records were identified. Upon reviewing their contents, there was uncertainty as to whether all the records retrieved were in fact relevant to the Applicant's Request. As a result, the Office of the Premier contacted the Applicant and held discussions to obtain further clarification in relation to the Request. By agreement, it was determined that certain records could be excluded, thereby reducing the Request in scope. We are pleased that the Office of the Premier engaged the Applicant during this process and the discussions held had the beneficial effect for both involved: the Applicant could pinpoint exactly those records sought thereby focusing on the most important information requested, while the Office of the Premier could dispense with having to prepare a larger response that would have included records the Applicant no longer required.

15. On this point, the Office of the Premier took its duty to assist seriously and we applaud it for doing so. Having said this, however, we find that the Office of the Premier could have gone further in fulfilling its duty by providing a more meaningful response to the Applicant. We discuss this issue further in this Report.

Search for relevant records

16. A search for relevant records must be thorough and comprehensive. Every relevant record in the possession or under the control of the public body must be retrieved and identified on a list of relevant records. During our investigation, five additional records not previously identified were discovered to be relevant to the Request. We understand that this was a broad based Request and that it was being processed at the same time by several public bodies. Identification of all relevant records was perhaps rendered more difficult but not impossible in our view. More importantly given the circumstances of this particular situation where the Applicant was seeking all the information in relation to a subject matter, it was essential that a thorough search be conducted.

Same request to multiple public bodies

17. Faced with a similar situation in the future of having to respond to the same request that has been submitted to more than one public body and it is found that same records are held by all, we suggested to the Office of the Premier a better approach ought to be considered. This is offered on the strength and statutory obligation that each public body must provide a full and complete response to the request by addressing all of the records the public body has in its custody (as per section 4). For this reason, informing an applicant that another public body will address jointly held records is not a lawful reason to refuse access to information under the *Act*.

18. We suggest that in those cases, the applicant be provided with a master list of the relevant records held by all of the public bodies involved, and then, by having each public body refer to the master list of records when preparing its response. This concerted effort by the multiple public bodies produces the intended outcome: fully informing the applicant of which records exists, which records can be released and those that must be withheld and for what reasons, while reducing the duplication of work by those public bodies involved. In turn, when the applicant reviews each response issued by the multiple public bodies, he or she is better suited to put together the complete picture of the information that exists in relation to the request and how access had been decided.

19. We endorse such an approach for those few cases where a same request is submitted to multiple public bodies on a broad-based subject matter of a certain scope as we believe it fully respects the applicant's lawful right of access to information.

Significance of list of relevant records

20. Preparing a list of records, also known as index of records, can be time consuming but it respects the law and produces good results in the drafting of the response. The list notes and describes all the records that the public body finds during its search, i.e., all of the records that are found to be relevant to the request.
21. It is essential that the list identify each relevant record regardless of its nature, the type of information it contains, and the likelihood that it may be withheld.
22. A list of responsive records must be drawn not from the perspective of exceptions to disclosure or protection of privacy; rather, the list must be prepared from the perspective of *relevance to the information sought*. It is only after the complete list has been assembled that the public body consider them for release.
23. By processing the request in this way with such a list, the public body is able to provide a meaningful response, one that:
 - identifies each relevant record *or category* of relevant records;
 - briefly describes the nature of the information contained in these record;
 - clearly states whether access to all or part of the record is being granted or refused; and,
 - gives reasons why access to any information is being refused (specific relevant provisions of the *Act* with explanations).
24. Not conducting a thorough search and not preparing a complete list of all relevant records found may in fact lead the public body to overlook relevant records and unknowingly disregard important and relevant information that the applicant was entitled to receive.
25. During our investigation of the present case and our discussions with the Office of the Premier, it was recognized that the search for all relevant records needed to be thorough and of the importance of drafting a list of all records found. In fact, the Office of the Premier did find additional records that were relevant to the Request. The Office of the Premier has agreed to release these additional records to the Applicant.

Format and Content of the Response

26. The Response in this case identified the records to which access was being granted in part, but neither provided an explanation as to why some information contained in the record had been redacted nor the sections of the *Act* upon which the redactions were based.
27. The Applicant was also informed that one document relating to a third party was being withheld in full pursuant to sections 22 and 26 of the *Act*. Although the wording of these specific exceptions were cited in the Response, the Office of the Premier failed to describe the third party document mentioned and how these exceptions applied to that document.
28. Section 14 makes it mandatory for a public body to provide a meaningful response by identifying the relevant records found, naming the specific exception to disclosure if access to any of the records or information is being refused, and by providing a brief explanation as to why the specified exception applies. It is therefore not sufficient to simply restate the wording of the exception provision as the reason for the refusal. The response must elaborate on why the exception applies in order to help the applicant understand why there is no right of access to the requested records.
29. Where some information has been redacted from a record disclosed to an applicant, it is equally essential that the response include the exception to disclosure upon which the public body is relying for the redaction, along with an explanation as to how the exception applies to the redacted information. Again, only in this manner is an applicant able to understand why access in full is not being provided, i.e., the response has meaning.
30. The Office of the Premier opted to treat records generated internally in the drafting of its Response, thereby leaving it to other public bodies to make decisions in regards to jointly held relevant records. As mentioned above, we took no issue with the approach to make the case of same request to multiple public bodies simpler but we questioned its results. The Office of the Premier failed to identify the other relevant records jointly held with other public bodies. In our view, this approach made it impossible for the Applicant to determine what specific records the Office of the Premier had in its possession and was refusing to make decisions as to their access. By failing to give more explanations as to which records it had and which records the other public bodies would address, the Office of the Premier left the Applicant with no real answers to the Request and with no other solution but to complain.

31. The case was made worse by the unfortunate use of the following words:

Any information we have regarding this matter that is also held by the Department of Energy and the Executive Council office will be released by them.

(Underlining is ours)

32. Issuing the Response in this fashion created unrealistic expectations on the part of the Applicant that the documents would be released by these other public bodies, which was not the case. Furthermore, the Office of the Premier, in its final letter to the Applicant confirmed that any relevant records in its possession had been released either by the Office of the Premier, the Department of Energy or the Executive Council Office, thereby confirming the expectation that access would be granted. During our investigation including a cross reference of the records considered by these other public bodies, we were unable to ascertain whether all these relevant records were released to the Applicant.

33. For these reasons, the Office of the Premier had a statutory obligation to list each relevant record in its possession, regardless of the fact that some of these records might also be in the custody or under the control of another public body, and make a decision as to whether these records should be released. Consequently, we find that the Office of the Premier failed to provide the Applicant with a meaningful response as required by section 14 as it was confusing and failed to:

- identify all the relevant records in its possession, by conducting an inadequate search and deciding not to list those records held jointly with other public bodies ;
- list and address records jointly held by other public bodies;
- explain why some information contained in the record released was redacted and on what basis; and,
- provide clear explanations as to why access to some of the relevant records was denied.

Third party notification process

34. Where a public body engages in the third party notification process, subsection 36(1) requires that a decision regarding the disclosure of third party information be made within 30 days after the notice is given to the third party unless the timeline is extended under paragraph 11(3)d).

35. In this matter, the Applicant was notified by the Office of the Premier on February 6, 2012 that a relevant record contained third party information and therefore, consultation with the third party was being undertaken. The Office of the Premier's decision to withhold the third party information was sent to the Applicant on May 28, 2012 but it should have been made by March 6, 2012. In situations where it proves impossible for the public body to provide a decision on access to third party information within 30 days, the public body should self-extend the time to respond by up to an additional 30 days pursuant to paragraph 11(3)(d) and notify the applicant accordingly.
36. Given that the Office of the Premier and the Applicant had engaged in discussions in relation to the scope of the Request, we find that the Office of the Premier could have continued in this manner by informing the Applicant that more time was required to consult the third party and to notify as to when a decision could be expected. In its Response of March 26, 2012, there is no mention as to when a decision might be made, again leaving the Applicant to wonder when a decision would be made. In fact, the Applicant took action and asked the Office of the Premier for a decision; this is not how the process was intended to be or how it must be. The Office of Premier had a responsibility to properly notify and inform the Applicant in a timely fashion of its decision in relation to third party information, including a decision to self-extend the time limit within which to do so, but in this case it failed in fulfilling this obligation.

Exceptions to disclosure

Section 21 – personal information

37. In responding to the Request, the Office of the Premier withheld personal information of individuals on certain correspondence on the basis that its disclosure would result in an unreasonable invasion of those individuals' privacy as provided for in section 21 of the *Act*. Having reviewed the relevant records on which the redactions were made, we are satisfied that the disclosure of the personal information in this case would constitute an unreasonable invasion of the individuals' privacy.
38. Therefore, we find that the Office of the Premier properly applied section 21 to withhold access to this information in this case. We reiterate that this explanation should have been added to the Response.

Section 22 – third party interests

39. The Office of the Premier also refused to disclose a third party document based on sections 22 and 26. We first discuss the applicability of the section 22 exception to disclosure.
40. The document in question was refused in full on the basis that its disclosure would be harmful to a third party's business or financial interests. We reviewed this record and identified it as a document created by a private sector enterprise that had concerns about the gas distribution rate increases and their impact on its business interests.
41. As a general rule, section 22 is referred to when records held by public bodies contain third party information that stems from business or commercial dealings carried out with individuals or private sector companies. This type of information, although generated from these business interactions, nevertheless comes under the custody and control of the public body and may be subject to disclosure under the *Act*. A right of access to this kind of information encourages accountability of the public body in conducting business dealings with the private sector. Private sector companies should expect that some information about their dealings with the Province will be made available to the public.
42. We recognize, however, that the *Act* includes provisions which protect some information relating to private companies under certain circumstances, recognizing that third party business information held by a public body may be commercially or financially sensitive in nature and thus afford some protection from disclosure.
43. In that regard, subsection 22(1) sets out a number of mandatory exceptions to the disclosure of information relating to the business or financial interests of third parties. This exception provides seven situations or categories in which the disclosure may be detrimental to the third party's business:
- release of trade secrets;
 - release of confidential business information;
 - release of business information which may affect:
 - competition,
 - negotiations,
 - losses or gains,
 - alter the supply of needed business information, or
 - labour disputes.

44. Having had the opportunity to review the third party document in question in the present case, we are satisfied that its disclosure would be harmful to a third party's business or financial interests. It was provided in confidence (as found in paragraph 22(1)(b)) and it contains financial and business information which could harm its competitive position if released (as found in subparagraph 22(1)(c)(i)). For these reasons, we find that section 22 was properly applied as a mandatory exception to the release of this record to the Applicant.

45. The Office of the Premier also relied upon section 26 to refuse access to this document, but having established that the record was properly withheld under section 22, there is no need to examine the applicability of section 26 in this case.

3.0 COMMISSIONER'S FINDINGS and RECOMMENDATIONS

46. We find that in this case, the Office of the Premier took its duty to assist the Applicant seriously. The Office of the Premier worked with other public bodies that received the same Request with a view to provide lawful access to the requested information. The search of all records relevant to the Request was not fully adequate as additional records were found during the complaint investigation and a decision has been made to release these records to the Applicant.

47. Despite these good intentions and efforts, we find that the Office of the Premier could have gone further in fulfilling its duty by providing a more meaningful response to the Applicant. The Response issued by the Office of the Premier did not meet all of the requirements set out in section 14, was confusing, and failed to:

- identify all the relevant records in its possession;
- list and address records jointly held by other public bodies;
- explain why some information contained in the records released was redacted and on what basis; and,
- provide clear explanations as to why access to some of the relevant records was denied.

48. The Office of the Premier also failed in its obligation to provide the Applicant a decision on the release of a third party document within the legislated timeframe. The Office of Premier had a responsibility to properly notify and inform the Applicant in a timely fashion of its decision, including where it needed to self-extend the time limit within which to do so.

49. As for the information withheld by the Office of the Premier in this case, we find that subsection 21(1) was properly relied upon to redact personal information from records

released to the Applicant, along with its reliance on the mandatory exception to disclosure found in section 22 to refuse access to the third party document identified as relevant in this case.

50. Given these findings above, the Commissioner recommends pursuant to subsection 73(1) of the *Act* that the Office of the Premier:

- a) provide to the Applicant a complete list of all records that are relevant to the Request in its custody or under its control, including those records that were listed in its Response, the third party document (i.e., by referring to it as "*A private sector enterprise document expressing concerns on natural gas rates*"), and those additional records found later;
- b) ensure that the list referred to in paragraph (a) above also identifies those records held jointly with other public bodies that received the Request in this matter; and,
- c) release to the Applicant without delay the five additional records found later and identified as relevant to the Request during our investigative process.

Dated at Fredericton, New Brunswick, this 28th day of August, 2013.

Anne E. Bertrand, Q.C.
Commissioner