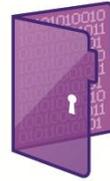


Office of the Access  
to Information and  
Privacy Commissioner  

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New Brunswick



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

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Nouveau-Brunswick

**REPORT OF THE COMMISSIONER'S FINDINGS**  
*Right to Information and Protection of Privacy Act*

Complaint Matter: 2016-3149-AP-1695

Date: February 7, 2017

“Matter concerning the disclosure of the total amount of severance paid to a senior public servant”

## INTRODUCTION

1. The following Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, SNB, c. R-10.6 ("the Act"). This response stems from a Complaint made by the Applicant requesting that the Commissioner carry out an investigation into the matter.
2. The Applicant had asked the Department of Health for a copy of the concluded agreement between the Department and a senior public servant, namely the former Chief Medical Officer of Health for the Province. The agreement followed her dismissal. The Applicant wanted to know the total amounts paid to this senior public servant stipulated in the agreement (severance, compensation, etc.).
3. The senior public servant in question was terminated by the Department in December 2015, and in January 2016, the two parties reached an agreement for dismissal without cause. The case attracted public and media attention as to why the former Chief Medical Officer of Health left her employment. The Department released a statement jointly with this former employee in January 2016. According to the statement, the agreement between the two parties is confidential, in keeping with the Department's practice in all settlement cases of this nature.
4. The Applicant wanted to know more and made a request to that effect under the Act. In processing the Request, the Department decided not to initiate the third party notification process, since the agreement was confidential and the Department was confident that none of the information requested would be disclosed, given the exceptions provided for under the Act.
5. The Department responded to the request on February 16, 2016. It refused to disclose any information on the grounds that doing so would constitute an unreasonable invasion of the third party's privacy. The Department explained that it could not release the information given the exception in subsection 21(1) that the personal information relates to the third party's employment, making it private under paragraph 21(2)(e), and, lastly, that the information describes the third party's source of income or financial circumstances, activities or history, which cannot be disclosed under paragraph 21(2)(g). The Department also invoked paragraph 27(1)(a), indicating that the requested information is subject to solicitor-client privilege, thus preventing its disclosure.
6. The Applicant, dissatisfied with the Department's Response, filed a complaint with the Commissioner's Office on April 14, 2016. In the Complaint, the Applicant stated that the requested information should be made public because the agreement involves large

sums of money paid from public funds. The Applicant stated further that trust in the government hinges on transparency regarding how taxpayer money is spent, and that disclosure of this information is in the public interest.

## INFORMAL RESOLUTION IN THIS CASE

7. As in every complaint investigation, we first seek to resolve the matter informally, in accordance with the rights and obligations set out in the *Act*. This is true, in fact, in both the informal complaint resolution process and in the formal investigation process. Any public body may disagree with our interpretation of the *Act*. We are, in fact, open to such debate, which is an excellent way to get a better sense of the public body's approach and how it applies exceptions to disclosure. The process must remain true to the purpose of the *Act*, and the Commissioner is bound by her duty to ensure compliance, meaning that complaints must be settled in accordance with the provisions of the *Act*.
8. We therefore approached this case by examining all aspects of the request, by reviewing the relevant information held by the Department, and by discussing with Department officials how they proceeded in responding the way they did, i.e., deciding not to grant access to any of the information requested. We had good discussions, and took the opportunity to impress upon Department officials the importance of transparency in these cases, while reassuring them that the privacy of the senior public servant would not be unreasonably violated, in accordance with the relevant provisions of the *Act*.
9. We found that the Department's decision not to release most of the requested information was in keeping with the requirements of the *Act*, as disclosing the information could be an unreasonable invasion of this employee's privacy. However, we impressed upon the Department its obligation under the *Act* to inform the public about how it compensates its employees, as they are paid out of public funds.
10. For that reason, we asked the Department to reconsider its decision and to disclose the total amount of the severance paid to the employee in question, as the Department is authorized to do so under paragraphs 21(3)(f) and 21(3)(h) of the *Act*, and must do so to foster government transparency.
11. The Department stood by its initial decision to not disclose the amounts paid to the senior public servant. It stated further that the Court of Queen's Bench decision in *Hans v. St. Thomas University* supported this approach. The informal resolution process thus

could not continue, and pursuant to section 73 of the *Act*, the Complaint became the focus of the present Report of the Commissioner's Findings.

12. As the senior public servant was not notified about the access request prior to this stage, we took that step to inform her of the possibility that a recommendation might issue to the Department to disclose the total amount of severance paid to her.

## LAW AND ANALYSIS

### Appropriate balance between transparent government and privacy

13. Pursuant to Part 2 of the *Act*, every person is entitled to request and receive information relating to the business of government.
14. This right is important because it is based on government openness and transparency in the management of public funds; however, it is not an absolute right. The right to information is subject to specific and limited exceptions concerning the disclosure of certain information. Some exceptions prevent the government from disclosing personal information that pertains to or concerns someone other than the person seeking the information in the interest of protecting privacy. More specifically, these exceptions mean that disclosure of personal information to another member of the public will not be permitted if doing so would result in an *unreasonable* invasion of the privacy of the third party to whom the information relates.
15. Thus, the *Act* requires that the government inform the public about how it compensates its employees and senior public servants, as they are paid out of public funds. These rules are founded on transparency in the conduct of government business—transparency based on the right to information granted to the public under the *Act*.
16. This is why the default is the disclosure of information, including certain personal information. Furthermore, disclosure is limited only in specific cases so as not to result in an *unreasonable* invasion of the privacy of the employee to whom this personal information pertains. Such is the appropriate balance between a transparent government and protecting third party privacy that Part 2 of the *Act* recognizes and requires at all times.

***A transparent government informs the public about how its employees are compensated***

17. The appropriate balance we are referring to is reflected in the Government of New Brunswick's practice since 2000 to proactively publish information in its Public Accounts concerning the salaries paid to employees in the public sector. Between 2000 and 2007, the Public Accounts listed the names of employees and their exact salaries for those earning more than \$40,000 annually. In 2008, the Province changed its approach to better inform the public about other forms of compensation provided to its employees, while of course ensuring that this constituted a reasonable invasion of their privacy. The Province publishes the salary scales (salaries listed by ranges) instead of exact amounts, and other allowances its employees receive. This information is disclosed through the Province's unaudited supplementary employee lists:
- salary ranges for all employees whose total compensation exceeds \$60,000 during the calendar year;
  - retirement allowances or severance payments in excess of \$10,000 during the calendar year, in ranges commencing with \$10,000; and
  - the exact amount of payments for travel and other expenses made to employees and totalling \$12,000 or more during the calendar year.
18. For example, public service employees' salaries are presented as follows: between \$60,000 and \$74,999; between \$75,000 and \$99,999, and so on. Retirement allowances and severance payments are not published as specific amounts, but rather in ranges: between \$10,000 and \$24,999, \$25,000 and \$49,999, and so on.
19. We encourage the publication of this information in the Public Accounts, as it reflects the desired transparency.
20. However, publishing this information does not mean that the public is not entitled to know more about the compensation of public sector employees. Access to other information of this nature is governed by related rules and requirements of the *Act*.

### **How it works: use of exceptions to disclosure, transparency and privacy**

21. A member of the public who wishes to know more about the particulars of payments made to employees for travel expenses can access this information, as the *Act* stipulates that disclosure of this kind of information does not constitute an unreasonable invasion of the privacy of the employees who received these payments. The *Act* treats travel expenses as being directly related to employees' official duties, as such payments are made from public funds.
22. However, the *Act* will not allow access to a member of the public wishing to know why a public service employee has taken sick leave. In these cases, the *Act* deems the

disclosure of personal information as an unreasonable or unwarranted invasion of the employee's privacy.

23. In summary, the public has the right to know about the benefits the government gives its public service employees, but not about the personal reasons for sick leave, etc. The right to information in this context is based on transparency in the management of public funds.

### Applicable rules in this case

24. In the case at hand, the issue is whether the Applicant—a member of the public—has the right to know about the contents of the agreement between the Department and the employee in question, including about the severance paid to the employee by the Department.
25. To begin with, there is no question that most termination agreements contain personal information about the employees involved. In cases of dismissal without cause, these agreements are the outcome of confidential negotiations terminating the employment relationship. The reasons for termination of employment are not disclosed to the public.
26. The agreement in question contains a confidentiality clause.
27. It is important to note that the *Act*, and not contractual provisions, determines the right of access to government information. If the provisions of an agreement are in violation of or inconsistent with the requirements of the *Act*, the latter will take precedence.
28. The agreement in question supports this finding, since the confidentiality clause states that confidentiality is only to the “**extent possible in law.**” This supports the fact that the Department recognizes that it cannot shirk its statutory obligation to inform the public in certain instances about some of the information contained in agreements such as the one at issue here.

### ***Subsections 21(1) and 21(2) – Disclosure of personal information and unreasonable invasion of third party's privacy***

29. After reviewing this agreement, we find that the Department was correct in deciding not to release the agreement to the Applicant, so as to protect the senior public servant's privacy.

30. In our view, most of the information in the agreement consists of personal information whose disclosure is not permitted by virtue of paragraph 21(2)(e) (employee's employment history) and paragraph 21(2)(g) (employee's source of income or financial circumstances). The Department need not inform the public about the contents of the agreement in order to be transparent.

31. Subsection 21(3) of the *Act* must also be taken into account.

***Subsection 21(3) – exception to subsections 21(1) and 21(2)***

32. Subsection 21(3) limits the exceptions found in subsections 21(1) and 21(2), which generally prohibit the disclosure of personal information.

33. Subsection 21(3) permits the disclosure of certain personal information. Subsection 21(3) of the *Act* states that the disclosure of personal information in certain cases is not an unreasonable or unwarranted invasion of privacy of the person to whom the information relates, and thus, the disclosure of this information is not a violation of the *Act*.

34. Specifically, the *Act* allows for the disclosure of personal information about a public body employee's or official's job classification, salary range, benefits, employment responsibilities or travel expenses.

35. This rule is found in subparagraph 21(3)(f)(i), which reflects the appropriate balance for government that is obligated to inform the public about how it compensates its employees and to protect their privacy.

36. While it is not difficult to determine what is meant by the words "classification, salary range, benefits, employment responsibilities or travel expenses," there is less certainty about what is meant by "benefits," as this word is not defined in the *Act*.

37. This same word is found in paragraph 21(3)(h) of the *Act*, which requires that the government disclose information "about a discretionary benefit of a financial nature granted by a public body to the third party," i.e., to a person who has received a discretionary payment from public funds, for the purpose of being transparent.

38. Thus, in our view, the word "benefits" in subparagraph 21(3)(f)(i) should be construed to include any monetary payments (benefit) that may have been granted and/or paid to a member of the public service. This interpretation is in keeping with the prevailing spirit

of the *Act*, which requires government to be transparent and to disclose information about any such payment to a public servant to the public as part of this transparency.

39. The word “benefit” must therefore include severance payments.

### Decision to refuse to disclose monetary payments

40. Given the applicable rules, we find that the Department had a duty to disclose the amounts agreed upon with the senior public servant in the agreement terminating the latter’s employment with the government to the Applicant.
41. At the very least, the Department should have disclosed the range reflecting the amount promised to the senior public servant, given its practice of publishing similar information in the Province’s Public Accounts.
42. Nevertheless, the Department categorically refused to disclose any information, relying on the Court’s decision in *Hans v. St. Thomas University*. We reviewed that decision with interest. In the decision, the Court found that the word “benefit” cannot be understood to include severance payments for the purpose of paragraph 21(3)(f), and severance payments cannot be considered a “discretionary financial benefit” for the purpose of paragraph 21(3)(h). The Court held that this kind of payment is to avoid litigation and that the employee is “entitled by law to recover damages” (para. 30). The Court further held that the disclosure of information about severance payments is an unreasonable violation of the employee’s privacy under paragraph 21(2)(e). The Court found that subsection 21(3) must be strictly interpreted to protect privacy.
43. While the Court analyzed protection of privacy rights, it did not take into account the balance of the interests and rights covered by Part 2 of the *Act*. In its analysis, the Court failed to address the equal existence of two fundamental rights: protection of the privacy of citizens and the right of citizens to know about public business.
44. These rights are not at odds with each other, contrary to what the Court states in paragraph 10 of its decision. Rather, these two fundamental rights are evidence of the balance struck by the *Act* in the case of payments made to public service employees.
45. As indicated above, this balance is clearly illustrated in section 21:
- the *Act* prohibits the disclosure of the personal information
    - set out in subsection 21(2);
  - the *Act* allows the disclosure of the personal information set out

➤ in subsection 21(3).

46. We respectfully submit that the Court did not address the fundamental right to access information with the same importance that it did with privacy rights. As section 2 of the *Act* states, the right to information is subject to “limited and specific” exceptions; disclosure of information is the norm, and the application of the exceptions to limit or restrict this right constitutes exceptions to this primary rule, as the wording indicates.
47. Thus, we are of the view that the decision in *Hans* does not sufficiently address the required transparency of government, and we cannot allow it to be adopted, as it would mean the government could negotiate severance payments without regard of its obligation to taxpayers, and the public would have no way of knowing if a senior public servant received \$10 or \$1,000,000 in the termination of his or her employment. Furthermore, the Court’s decision does not reflect the Province’s practice to publish information about employee severance payments in its Public Accounts.
48. The spirit and intent of the *Act* require transparency in the business of public bodies, and some information about compensation of government employees is made publicly available to demonstrate transparency in the use of public funds. For that reason, we are of the view that the word “benefit” should be broadly interpreted to respect these two interests: government transparency and protection of the privacy of public sector employees and officials.
49. In closing, the word “benefit” in subparagraph 21(3)(f)(i) includes an array of payments that may be made to public servants, i.e., an allowance, lifetime pension or a discretionary payment that the government grants in addition to the other kinds of otherwise foreseen payments. Employees are entitled to severance under the labour law principles enshrined in common law, and this is a financial benefit that flows directly from the employment relationship. Severance is clearly the kind of information that is contemplated under subsection 21(3), which permits its disclosure to the public.
50. We therefore find that the Department was not entitled to use the exception in subsection 21(1) to not disclose the amount paid to the senior public servant to the Applicant in this case.

***Paragraph 27(1)(a) – Legal privilege***

51. The Department also cited this exception to disclosure in deciding to not disclose any of the requested information, but did not explain why the exception applied. The

Department invoked this exception solely on the basis that the agreement is a legal document. We find that even though the agreement is a legal document and the Department obtained legal advice in drawing up this agreement, the exception serves to protect the legal advice provided to the Department from disclosure. This exception does not apply to severance agreements that are finalized and signed by the parties, as these agreements reflect the decision made by the Department, not the legal advice it was given. This exception therefore does not apply in this case.

## CURRENT TRENDS

52. Before concluding this report, we would like to point out that the disclosure of information about the compensation of public sector employees and officials is a well-established principle in Canada.
53. Many provincial governments have taken the initiative of demonstrating greater transparency by providing the public with more details—not fewer—about the compensation of their employees.
54. Ontario and Manitoba were the first two provinces to establish legislation to that effect in 1996. The purpose of the Ontario statute, namely the *Public Sector Salary Disclosure Act, 1996*, as set out in section 1, is to “assure the public disclosure of the salary and benefits paid in respect of employment in the public sector to employees who are paid a salary of \$100,000 or more in a year.” The definition of the word “benefit” is related to the provisions of the federal *Income Tax Act*, specifically, to the total amount reported to the Canada Revenue Agency on the employee’s behalf. This information is published on the Province’s website at <https://www.ontario.ca/page/public-sector-salary-disclosure>.
55. In Manitoba, the *Public Sector Compensation Disclosure Act* requires that the government publish the total amount of compensation paid to employees who receive \$50,000 or more in total during the year. As set out in section 1, “compensation” includes, among other things, “all overtime payments, retirement or severance payments, lump sum payments and vacation pay-outs.” This information is reported in the financial statements drawn up specifically for that purpose, with the accuracy of these statements certified by an auditor (section 3). The Manitoba government publishes this information in its Public Accounts every year on the Manitoba Finance website: <http://www.gov.mb.ca/finance/publications/financialreports.html>

56. As for the Government of British Columbia, it discloses the salaries paid to its employees who receive \$75,000 or more in salary and benefits during the year, pursuant to the *Financial Administration Act*. In addition, in 2008, British Columbia amended the *Public Sector Employers Act* with a view to better informing the public about how public bodies compensate their senior officials. Since then, all public bodies subject to the Act are required to publish compensation provided to senior public servants who receive a base salary of \$125,000 or more during the year. Disclosure is not limited to the total amount of compensation. The information provides a complete explanation of all of the kinds of compensation that senior public servants receive, including their base salary, bonuses, total amount of benefits granted, pension contributions, severance payments and vehicle allowances. The *Public Sector Executive Compensation Disclosure Guidelines* published by British Columbia in February 2016 define what is meant by severance: “severance” is an amount payable to an employee upon termination without cause of as a lump sum based on length of service. (see [http://www.fin.gov.bc.ca/psec/disclosedocs/2016\\_Public\\_Sector\\_Exec\\_Comp\\_Disclosure\\_Guidelines.pdf](http://www.fin.gov.bc.ca/psec/disclosedocs/2016_Public_Sector_Exec_Comp_Disclosure_Guidelines.pdf)).
57. These amounts are published annually on the Ministry of Finance website at <http://www.fin.gov.bc.ca/psec/disclosure/index.htm>.
58. In 2010, Nova Scotia enacted new legislation, namely the *Public Sector Compensation Disclosure Act*, to better inform the public about how it compensates its employees. All public bodies subject to this legislation are required to publish the total amount of compensation paid to employees who receive \$100,000 or more during the year. The total amount must include the base salary, overtime payments, pension payments, severance, lump sums, vehicle allowances, etc.
59. Public bodies subject to this statute publish this information annually on their respective websites.
60. In 2015, this trend towards greater transparency was adopted by the Province of Alberta, which enacted a new statute titled the *Public Sector Compensation Transparency Act*. The provincial government has to publish detailed information describing the compensation paid to public sector employees earning more than \$105,906 per year (or \$125,000 or more for persons employed in other settings in the public sector). This disclosure also applies to physicians who are paid by the public treasury for their services in the public health care sector.

61. The information published with respect to each employee includes:
- his/her name, title, employer department or agency, classification,
  - base salary,
  - amount of monetary benefits paid,
  - amount of non-monetary benefits paid,
  - amount of severance paid (or to which the employee became entitled), and
  - any documents, records or other information set out in the regulations, e.g., employment contract, contract concerning termination of employment, etc.
62. Alberta's *Public Sector Compensation Transparency Act* defines the word "severance" as follows:
- (n) subject to the regulations, "severance" means, except in sections 11 and 12, the total of
- (i) any remuneration paid or payable to an employee or member in lieu of or supplementary to notice of termination of employment or appointment, and
  - (ii) any salary or remuneration paid or payable to an employee or member after permanent termination of the employee's employment or the member's appointment or status as a member;
63. There is an exception to such disclosure, but only if the employee has established that release of the amount could threaten his or her safety.
64. We noted that this information concerning employees of the Province of Alberta was first released in 2016 on the government's website at <https://www.alberta.ca/salary-disclosure.aspx>.
65. Lastly, the Province of Newfoundland and Labrador enacted similar legislation in 2016: the *Public Sector Compensation Transparency Act*. This statute requires that public bodies publish information with respect to the compensation of employees who receive \$100,000 or more during the year. The following information is disclosed with respect to each employee:
- employee's name and official title,
  - employer department or agency,
  - amount of total compensation paid,
  - base salary,
  - overtime pay,
  - shift premiums and bonuses,

- retroactive salary,
  - severance pay (an amount paid as an accrued benefit calculated as a number of weeks of salary based upon the length of employment) and
  - all other compensation.
66. The only exception to such disclosure is in instances where the employee has established that disclosure could jeopardize his or her safety or mental or physical health.
67. Newfoundland and Labrador will begin disclosing this information in 2017.
68. In sum, in each of the above provinces, governments have shown a commitment to greater transparency and have taken action by creating statutory obligations—not just a policy or new practice—to ensure the public continues to be informed in this regard and can readily access this information on the Internet, in accordance with its right to know.
69. Only Saskatchewan, Prince Edward Island and New Brunswick do not have legislation that requires their governments to publish information of this nature.
70. As indicated above, the Government of New Brunswick in 2000 began proactively publishing information concerning the salaries of its employees. In 2008, it began showing greater transparency by publishing information concerning the benefits paid to public sector employees, including information about their travel expenses, retirement allowances and severance payments.
71. However, we discovered that severance amounts in the Public Accounts do not include payments made under confidential agreements. This means that the total amount granted to the employee in question in this case does not appear in the Public Accounts.
72. While the Provincial government is clearly demonstrating transparency, we remind it that it is the Act that stipulates the level of disclosure of this kind of information, in accordance with the public's right of access. The Act requires, at the very least, that the public be informed about the total amount of severance granted by all public bodies, including the Department.
73. Otherwise, the public will never know if a public service employee has received \$10 or \$1,000,000 in severance.

## CONCLUSION AND RECOMMENDATION

74. In light of the foregoing, we find that the Department could not refuse to disclose all of the information requested to the Applicant, although it was entitled to refuse the contents of the January 2016 agreement between the Department and the Chief Medical Officer of Health for the Province following her dismissal without cause.
75. The Applicant wanted to know the total amount paid to this senior public servant stipulated in this agreement, and we find that the Applicant was entitled to receive this information. Access to the total amount of severance is governed by subparagraph 21(3)(f)(i) of the Act, and would not constitute an unreasonable violation of the employee's privacy.
76. In light of the foregoing, we recommend that the Department of Health, pursuant to paragraph 73(1)(a) of the Act, disclose to the Applicant the total amount of severance paid to the former Chief Medical Officer of Health named in the agreement reached in January 2016.

Dated at Fredericton, New Brunswick, this \_\_\_\_\_ day of February, 2017.

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Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner