

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2010-120-AP-055

March 17, 2011

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

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 of December 16, 2010 in which the Applicant requests that the Commissioner carry out an investigation into the matter and provide recommendations pursuant to the Act, if applicable.
2. The Applicant's Request of October 4, 2010 to the New Brunswick Liquor Corporation ("NB Liquor") was for:
 - ...any studies or reports, commissioned or received between September 1, 2009 and October 4, 2010 into salaries, compensation, remuneration and pension eligibility for any and all executives at NB Liquor ...[and also for] any correspondence or documents relating to any such studies or reports, including any e-mails, handwritten notes and Board of Directors' minutes. (the "Request")
3. On November 3, 2010, NB Liquor advised the Applicant by letter that it was extending its 30-day time limit to respond to the Request until December 3, 2010 in order to consult with a public body. The name of this public body was not disclosed to the Applicant.
4. On December 1, 2010, NB Liquor provided its Response to the Applicant by letter as follows:
 - ...response by ANBL [Alcool NB Liquor] to your request for all documents relating to the ANBL Executive Compensation study. This study has not been implemented in whole or part, and no action has been taken based on the content. If the content of the study becomes a basis for future compensation adjustments, ANBL will then consider your request. With respect to pension eligibility, that request should be made to the Clerk of the Executive Council at the Executive Council Office.(the "Response")
5. The Response did not specifically address the matter of related correspondence or documents including emails, handwritten notes or Board of Directors' Minutes also requested by the Applicant.

6. Upon filing his Complaint, the Applicant asked the Commissioner to consider the following:
 - a) NB Liquor's failure to indicate whether the request was refused or granted as per paragraph 14(1)(a);
 - b) NB Liquor's failure to provide reasons for not granting the Applicant's request as required under subparagraph 14(1)(c)(ii); and,
 - c) NB Liquor's failure to inform the Applicant of his right to file a complaint with the Commissioner's Office as required under subparagraph 14(1)(c)(iv).

INFORMAL RESOLUTION PROCESS

7. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties and in accordance with the rights and obligations provided by the *Act*. The informal resolution process provides guidance to public bodies and applicants with a view to better understand this new legislation, and in the process with a view to encourage a prompt and satisfactory outcome to the complaint. (*Note: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report.*)
8. The initial step undertaken by the Commissioner was to review the Request and the Response and determine whether the Response met the requirements of the *Act*. In doing so, we held meetings with officials at NB Liquor and asked that they provide a complete copy of the relevant records in response to the Request for our review. In that regard, NB Liquor was prompt and did provide to us all relevant records for review.
9. Upon examination, we noted that the relevant records were grouped into two categories. The first category of records related to the matter of remuneration, compensation or salaries for NB Liquor's executives. These records were documents consisting of an internal report, a consultants' report, and related correspondences and documents including emails, internal memos, and Board of Directors' Minutes. The second category of records related to the matter of pension eligibility for NB Liquor's top executive, specifically a separate pension from that which is available under the *Public Service Superannuation Act*.
10. After reviewing all of the relevant records, we asked for further input from NB Liquor regarding its Response to the Applicant's Request. We also provided comments on the processes of right to information requests and responses generally, and specifically as it pertained to the present case.

11. NB Liquor explained that its decision to deny the Request was based on the exceptions found in paragraphs 26(1)(a) and (c) of the *Act*. In particular, NB Liquor's position was that the information contained in the relevant records constituted a plan to change the scheme of remuneration, compensation and salaries for its executives which had not yet been implemented. In adopting this position, NB Liquor was of the view that the related documentation (i.e., emails, handwritten notes, Board of Directors' Minutes) was also captured under these exception provisions for the same reasons. Similarly, NB Liquor used the same rationale for not releasing the records relating to the pension eligibility of its top executive.
12. We indicated to NB Liquor that its Response of December 1, 2010 did not meet the requirements of the *Act* and the Commissioner invited NB Liquor to reconsider its decision and to provide a revised response to the Applicant's Request.
13. On February 24, 2011, NB Liquor informed the Commissioner that it was declining to issue a revised response. In doing so, however, NB Liquor acknowledged there were indeed two reports on the subject of remuneration, compensation or salaries for its executives, but refused to disclose either of these reports or any of the related correspondences and documents for the following reasons:
 - a) that the internal review report on remuneration, compensation and salaries for its executives ("internal report") as well as the consultants' report on the Executive compensation package ("consultants' report") qualified as advice, opinions and recommendations developed by or for the public body, and therefore, not subject to disclosure under paragraph 26(1)(a) of the *Act*;
 - b) that the information contained in both reports had never been acted upon or implemented, and therefore, neither the reports nor the related correspondences and documents were subject to disclosure under paragraph 26(1)(c) of the *Act*.
14. NB Liquor reiterated its position that it need not release any records on the matter of the pension eligibility of its top executive by relying on the paragraph 26(1)(c) exception and stated that those records related to a plan which had not yet been implemented.
15. At that time, the next step in our review process before concluding this matter was to invite the Applicant to make further representations on the matter of his Complaint, as required under paragraph 71(1)(a) of the *Act*. The Applicant provided comments

emphasizing his right to request and to receive the records of the business of NB Liquor in accordance with section 7, subject only to the severing of exempt information permitted by a “narrow” reading of section 26.

THE LAW AND ANALYSIS

16. A number of issues surrounding the procedure and the interpretation of the *Act* adopted by NB Liquor in responding to the Request were discovered during our review process. These issues have already been discussed with NB Liquor with the view to provide useful assistance in responding to future requests for information. This Report will address all of these issues.

Duty to Assist

17. The first issue which bore discussion in this matter was the failure on the part of NB Liquor to provide assistance to the Applicant upon first receiving the Request for information. NB Liquor indicated that they had some concerns about how to provide an appropriate response to the Request as they were uncertain of the level of detail of information the Applicant was seeking. Given that the Request included “any correspondence and documents... including e-mails, handwritten notes, and Board of Directors’ minutes,” NB Liquor had concerns about the volume of relevant records and was not sure which records would best respond to the Request. NB Liquor, however, did not initiate a dialogue with the Applicant to determine which specific information was sought or to discuss the volume of relevant records to ensure it was providing a meaningful response to the Request.
18. Section 9 of the *Act* sets out a “duty to assist” which provides as follows:
19. This section creates a positive obligation on public bodies to offer assistance to applicants in order to ensure that they receive timely, appropriate, and relevant responses to requests for information. Where there is any uncertainty about what information an applicant is seeking, it should be established as a best practice that the applicant be immediately contacted to ask which specific information he or she is seeking. For instance, if a request for information is broad in scope, a discussion with the applicant may simplify both the request and the process. Through such discussions, the public body will be better able to inform the applicant of any existing relevant documents, thereby allowing the applicant to identify specifically which documents he

or she is seeking. Often, broad requests are due to the fact that applicants are uncertain as to which specific information to request.

20. NB Liquor's first decision not to grant the Applicant's Request was based largely on its view that the requested records constituted a "study which had not been implemented", referring to the exception found in paragraph 26(1)(c) of the *Act*. There was no mention of the existence of an internal report as well as a consultants' report which also dealt with the question of remuneration, compensation or salaries for NB Liquor's executives. As for the matter of the pension eligibility of its top executive, NB Liquor referred the Applicant to the Executive Council Office without further explanation.
21. Our investigation revealed that there were no discussions with the Applicant to clarify what information was relevant to the Request. As a result, the Applicant was not advised that NB Liquor had identified two categories of records relevant to the scope of the Request.
22. As indicated above, the first category of relevant records included an internal study relating to "remuneration, compensation or salaries for NB Liquor's executives" (from the Request) and a consultants' report dealing with the same subject matter which had been commissioned by NB Liquor. This category of records also included corresponding documents such as correspondence, emails, notes and Minutes of Board of Directors' Meetings. The second category of relevant records related to the pension eligibility of NB Liquor's top executive and included related documents such as correspondence, emails, internal memos, and Minutes of Board of Directors' Meetings.
23. Where NB Liquor indicated there was uncertainty about the scope of the Request, NB Liquor should have informed the Applicant of the records it had identified as relevant to the Request and should have asked the Applicant which records he was requesting.

Format of Response

24. It is useful to refer to the requirements of the *Act* when responding to a right to information request under this new legislation. Section 14 of the *Act* sets out these requirements, and in essence, the head of the public body must inform the applicant in its written response:

25. In our initial discussions, NB Liquor indicated that none of the relevant records were subject to the *Act* because the information contained in the records consisted of a plan which had not been implemented, and by extension, NB Liquor was not obligated to comply with section 14 in responding to the Applicant's Request.
26. With respect, this position is not in keeping with the spirit of the legislation, in particular the duty to assist provision found in section 9 which obligates public bodies to assist applicants "fully and in an open and accurate manner." Furthermore, Section 14 obligates public bodies to provide specific detailed information to applicants in responding to requests, particularly where information is being withheld in order to assist applicants to understand why their request is not granted in whole or in part. By providing clear reasons why any information is withheld in accordance with specific provisions of the *Act*, public bodies can better demonstrate that they are abiding by the *Act* in both its spirit and its practical application.
27. As a general principle when responding to requests for information, a public body must follow the requirements of section 14 of the *Act*. If the public body is of the view that all of the requested information falls under the exception provisions of the *Act*, this should be clearly stated in its response along with the specific provisions upon which it is relying in support of this assertion.
28. In the present case, NB Liquor's Response should have identified all of the responsive records, i.e., both categories and the types of records identified as relevant to the Request, and then alongside each record, the specific exception of the *Act* ought to have been identified. Furthermore, NB Liquor's Response should have included the name of the appropriate contact person with whom the Applicant could communicate in the event that he had questions about the Response. Moreover, the Response should have informed the Applicant of his right to make a complaint to the Courts or to the Commissioner.

Discretionary decision to disclose - section 26

29. It is important to note that the new legislation provides both mandatory and discretionary exceptions to disclosure. Where a public body determines that a record falls under a mandatory exception to disclosure, the *Act* places a positive obligation on the public body not to release the record in question.

30. Where a public body determines that a record falls under a discretionary exception provision, the public body has the option to release the requested information or to refuse access. The application of the discretionary exception involves a two-step process. The public body must first consider releasing the information where it invokes a discretionary rather than mandatory exception. When required to review how the public body applied the discretionary exceptions, the Commissioner will require the public body to demonstrate that it did in fact exercise its discretion, meaning that the public body must show that it considered whether the requested information should have been released even though it had the option of withholding the information. Secondly, if the public body decides that the information should not be released, it must also demonstrate that such a decision was based on the specific exception provisions set out in sections 23 to 33 of the *Act*.
31. Section 26 of the *Act* consists of a discretionary exception allowing a public body—such as NB Liquor—the option of disclosing or withholding information that constitutes advice to a public body. In support of its decision to refuse disclosure to the Applicant in this case, NB Liquor indicated that it relied on section 26, and in particular, on paragraph 26(1)(c):
32. When we embarked on our review of the Complaint, we had concerns about whether NB Liquor had indeed exercised its discretion to release or withhold the relevant records. As part of the informal resolution process, we invited NB Liquor to reconsider the Applicant's Request in light of its obligation to exercise its discretion.
33. NB Liquor considered the Commissioner's comments and declined to provide a revised response to the Applicant, maintaining its original position that the records could be withheld under paragraphs 26(1)(a) and (c) of the *Act*. This Report will therefore address the analysis of the exception provisions raised by NB Liquor and their applicability to the responsive records.

Paragraph 26(1)(c): Plans that have not yet been implemented

34. NB Liquor indicated that the decision not to disclose the requested records was based on its interpretation of paragraph 26(1)(c), which provides that:
35. The first step in interpreting this provision is to consider the scope of the meaning of “plans” in this particular context, the key words of this provision being “plans....that have not yet been implemented”. In interpreting the word “plans”, we considered both

the dictionary definition as well as its consideration by other jurisdictions with similar legislation.

36. The Oxford Dictionaries Online defines a “plan” as:
- a. *A detailed proposal for doing or achieving something;*
 - b. *An intention or decision about what one is going to do.*
37. The Ontario *Freedom of Information and Protection of Privacy Act* contains a similarly worded provision which has been interpreted by the Ontario Information and Privacy Commissioner. One case in particular provides a useful guideline in determining whether a consultants’ report containing recommendations constitutes a “plan” for the purposes of paragraph 18(1)(f) of the Ontario statute (please refer to Order P-348). In that case, the Assistant Commissioner found that:

[the report] contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan.
(Emphasis added)

Records relating to compensation, remuneration or salaries of executives

38. In this case, NB Liquor’s position was and remains that both the internal study and the consultants’ report set out information for consideration of future changes to its executive compensation scheme, and thus fell within the scope of “plans” for the purposes of paragraph 26(1)(c). NB Liquor maintained that the information formed part of a plan that had not been implemented, and as such, it relied on paragraph 26(1)(c) as a valid basis for non-disclosure. With respect, the Commissioner disagrees with NB Liquor’s interpretation of this provision and its application to the relevant records.
39. The internal study was an informal review that involved requesting information from other Canadian jurisdictions about compensation paid to executives in organizations similar to that of NB Liquor. The consultants’ report set out a more formal communication of information of this nature as well as that of the private sector. The consultants’ report also provided recommendations for NB Liquor to consider in assessing the current compensation scheme paid to its executives. In our view, neither of these reports sets out a plan for changing the current compensation scheme by NB Liquor.

40. Accordingly, we adopt these interpretations and we do not find that either record constitutes a “plan” pursuant to paragraph 26(1)(c) of the Act. Rather, these reports provide information and recommendations to NB Liquor to assist it in making a decision about possible changes to the compensation package paid to its executives. As we find that the reports do not set out a “plan” for the purposes of paragraph 26(1)(c), we need not consider whether NB Liquor implemented or acted upon any of the information contained in the reports.
41. For these same reasons, we do not find that the paragraph 26(1)(c) exception applies to the corresponding records.

Records relating to pension eligibility of executives

42. NB Liquor also acknowledged to the Commissioner that it was maintaining its earlier decision not to release the records relating to pension eligibility of one of its executives under paragraph 26(1)(c) for the reason that no changes were implemented on this question. The matter of pension eligibility concerned only one executive, and while that matter had been considered internally, nothing came of this consideration because the question of eligibility was ultimately removed from NB Liquor’s authority and transferred to the Executive Council Office for consideration. Therefore, NB Liquor reasoned that its actions had merely constituted “plans” that “had not been implemented” and as a result, it refused to disclose the records relating to the pension eligibility of NB Liquor’s top executive. As a result, NB Liquor directed the Applicant to request this information from the Executive Council Office in its Response.
43. Our review revealed that the records pertaining to the pension eligibility of the top executive consisted of a number of documents including emails, internal memos, and Minutes of NB Liquor’s Board of Directors’ meetings. The records outline modifications to pension eligibility, as well as communications with the Province’s Office of Human Resources and with an external private company detailing specific pension calculations.
44. With respect, we do not find that these records set out a “plan” for the purposes of paragraph 26(1)(c). NB Liquor not only had planned to make changes to the top executive’s pension eligibility but it had also taken steps to put these changes into effect with the Board of Directors’ approval. In other words, NB Liquor undertook specific steps to implement changes to the criteria for the top executive’s pension eligibility, which signified that the contemplated changes were no longer plans under consideration but rather a clear decision to proceed with those changes. Accordingly,

we find that the records do not in whole or in part set out a “plan” for the purposes of paragraph 26(1)(c).

45. We do not find that NB Liquor properly withheld the records pertaining to the pension eligibility of its top executive pursuant to the paragraph 26(1)(c) exception. We do add, however, that there are other relevant considerations which also must be addressed.

Personal information and Section 21

46. The records relating to the pension eligibility of the top executive were specific to the circumstances of an individual, and as such contained personal information about the individual, including date of birth, current salary, details of previous employment, as well as related information about the individual’s spouse.
47. The definition of “personal information” in section 1 of the *Act* means recorded information about an identifiable individual of several forms including but not limited to the following:
48. In preparing a response to any request for information where the records contain personal information of someone other than the applicant (i.e., a third party), it is essential that the public body pause to consider whether the release of the personal information might constitute an unreasonable invasion of the third party’s privacy (*Note: a third party is an individual or entity other than the applicant and the public body*). In that regard, it is important for the public body to review section 21 in its entirety.
49. Firstly, subsection 21(1) sets out the general principle that personal information cannot be disclosed to an applicant if the disclosure would be an unreasonable invasion of a third party’s privacy. This provision requires the head of the public body to be certain that the release of the personal information is an unreasonable invasion of that person’s privacy before deciding not to disclose.
50. To assist the head of the public body in making this determination, subsection 21(2) provides deeming provisions that set out nine specific circumstances where the disclosure of personal information will always be considered to be an unreasonable invasion of a third party’s privacy. For instance, this includes personal information that was collected on a tax return, relates to social service benefits, consists of character references, and so on.

51. On the other hand, subsection 21(3) directs the head of the public body to disclose the personal information of a third party where that disclosure is deemed not to be an unreasonable invasion of the third party's privacy. That provision sets out nine situations when it is appropriate and in accordance with the law for the public body to release personal information.
52. We will now apply these provisions to the matter of the release of records pertaining to the pension eligibility of NB Liquor's top executive. As stated earlier, those records contained personal information of the top executive and the executive's spouse. As per section 21, the first step is to identify the personal information belonging to third parties in the relevant records. In the present case, this would include the personal information belonging to the top executive and the executive's spouse, such as their names, dates of birth, and other kinds of personal information as defined in section 1 of the *Act*.
53. Next, the records must be examined in order to determine whether they contain personal information that if disclosed to an applicant would be deemed to be an unreasonable invasion of the third parties' privacy, as per subsection 21(2). In the present case, the release of records containing personal information would be an unreasonable invasion of the executive's privacy and that of the executive's spouse if the records include:
54. The analysis surrounding privacy concerns of the personal information of a third party, however, does not stop here. The next question to consider is whether the personal information falls within the nine categories described in subsection 21(3). If that is the case, the law has deemed that these types of personal information belonging to a third party are subject to disclosure and that the disclosure of these types of personal information is not an unreasonable invasion of the third party's privacy.
55. For purposes of the present case, paragraph 21(3)(f) applies to the personal information of the top executive and the executive's spouse:
56. Paragraph 21(3)(f) recognizes that where individuals are officers or employees of public bodies, their personal information relating to their public service and compensation from the public purse are subject to disclosure. Paragraph 21(3) (h) further provides:

57. The operative words in paragraph 21(3)(h) are “benefits of a financial nature” and “granted to a third party”. In the present case, the records in question relate to pension eligibility of the top executive of NB Liquor, which effectively amounts to a calculation of a financial benefit which vests in this individual as a result of the executive position held with NB Liquor. The records also make it clear that the pension benefits were to be “granted” to the top executive with NB Liquor Board of Directors’ approval. These facts alone would direct the head of NB Liquor to release this personal information about its top executive as per the requirements of paragraph 21(3)(h).
58. Other considerations became apparent in this case. The top executive did not actually receive pension benefits from NB Liquor as the facts show that the matter was transferred to the Executive Council Office. NB Liquor did substantiate to the Commissioner that while there was a clear intent and steps were undertaken to make changes to the pension eligibility of its top executive, those changes did not materialize. Consequently, while NB Liquor had the intent to exercise its discretion to provide a financial benefit in the form of a pension to its top executive, NB Liquor ultimately did not grant it.
59. This raises the question of whether the fact that this pension benefit was not actually provided to the executive is sufficient grounds to remove the personal information from the applicability of paragraph 21(3)(h). In our view, the fact remains that there was a clear intent to make changes to the pension eligibility of NB Liquor’s top executive and that steps to make this intention a reality had been taken. Had this issue not been addressed by the Executive Council Office, the top executive would have remained eligible to receive the pension benefit from NB Liquor.
60. As a result, we find that the relevant records relating to the pension eligibility of NB Liquor’s top executive were improperly withheld from the Applicant. We therefore recommend that these records be released, subject to the necessary redactions to protect the personal information of the top executive and the executive’s spouse as indicated above.
61. Releasing information relating to financial benefits awarded to a third party by a public body is not an unusual demand nor an anomaly; it is the law. There is a significant public interest in knowing how public funds are used and it follows that there is also a significant public interest in knowing how public bodies compensate their employees, particularly those who hold senior management and executive positions. In the case of

NB Liquor's top executive, who is an employee and an officer of a public body, such personal information is subject to disclosure.

Paragraph 26(1)(a): Advice, opinions, proposals or recommendations

62. NB Liquor also relied on paragraph 26(1)(a) as grounds for refusing the Applicant's Request as it related to the first category of records, that of the internal report, the consultants' report, and the corresponding documentation. This paragraph provides as follows:
63. This provision affords public bodies the discretion to either release or withhold information where disclosure could reasonably be expected to reveal advice, opinions, proposals or recommendations developed by or for the public body. This allows public bodies to protect these communications but that protection generally does not extend to background or other information of a factual nature.
64. A large portion of the information contained in the internal report and the consultants' report, however, is factual in nature. The information includes the existing compensation scheme paid to the executives, the composition of NB Liquor's executive team, and salary ranges for executives at other Crown agencies and similar bodies in other jurisdictions, most of which is already public knowledge and is not captured under the scope of "advice" under paragraph 26(1)(a).
65. Again, in looking to Ontario jurisprudence for assistance in interpreting the meaning of "advice" in this context, the Ontario Commissioner determined that to qualify as "advice", "the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making" (refer to Order PO-2028). Furthermore, information that constitutes "advice" will manifest itself in one of two forms:
 - a) the information itself consists of advice; or
 - b) the information, if disclosed, would permit one to accurately infer the advice given.
66. The Ontario Commissioner's interpretation is in keeping with similarly worded provisions of access to information legislation in other Canadian jurisdictions. For example, the Nova Scotia *Freedom of Information and Protection of Privacy Act* provides a discretionary exception for information that would reveal advice or recommendations

developed by or for a public body under subsection 14(1). Subsection 14(2) further provides that “a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.” “Background information” is defined in paragraph 3(1)(a) as meaning “any factual material”.

67. Consequently, information of a factual nature such as that found in the internal report and the consultants’ report does not fall under the paragraph 26(1)(a) exception and should have been provided to the Applicant.
68. While we do not find that the factual information contained in the consultants’ report meets the criteria for the 26(1)(a) exception, this is not so for the recommendations found in that report. We are satisfied that the consultants’ recommendations meet the criteria of “recommendations developed by or for the public body” and in that regard, this information was properly withheld by NB Liquor.
69. Where we find that some of the information contained in the consultants’ report was properly withheld under the paragraph 26(1)(a) exception, this is not sufficient grounds to withhold the consultants’ report in its entirety. Subsection 7(3) of the *Act* provides that where “information can be reasonably be severed from the record, an applicant has the right to request and receive information from the remainder of the record.” Consequently, we find that the consultants’ report should have been released to the Applicant with the recommendations severed from the report.
70. There were no recommendations contained in the internal report, and therefore we find that none of the information contained in that report falls under the paragraph 26(1)(a) exception.
71. Similarly, in the corresponding documents of the first category of records (relevant to the question of compensation paid to NB Liquor’s executives), we did not find information containing recommendations or advice within the purview of paragraph 26(1)(a).

Paragraph 18(1)(b): Confidentiality of information from other jurisdictions

72. Concerning the first category of records, we found that the consultants’ report contained details regarding other jurisdictions’ executive salaries which had been provided to NB Liquor on a confidential basis only. In this case, we pointed out to NB Liquor the importance of making a written reference to the continuing intent to treat

this type of information confidentially, so as to respect the mandatory exception for information provided in confidence to a public body by another government under subsection 18(1). We are satisfied that this information was properly withheld.

73. Again, in reference to subsection 7(3) of the *Act*, both reports and the corresponding documents should have been released to the Applicant with the above information severed.

COMMISSIONER'S FINDINGS

74. **Duty to assist**—NB Liquor indicated that there was some uncertainty about what information the Applicant was seeking in making the Request but NB Liquor did not take steps to clarify the Request with the Applicant. Instead, NB Liquor decided to process the Request based on a narrow reading of the Request and did not inform the Applicant of the existence of the internal report. As a result, NB Liquor did not meet its duty to assist under section 9 of the *Act*.
75. **Format of Response**—NB Liquor's Response to the Request did not meet the requirements of the contents of a response as set out in section 14 of the *Act*. All responses to requests for information must provide the details required by section 14. When public bodies decide not to grant a request for information, they are obligated to indicate in their responses the specific provisions under which the information is being withheld and of the right of applicants to file a complaint with the Commissioner or to refer the matter to the Court of Queen's Bench for review.
76. **Discretionary exception under paragraph 26(1)(c): "Plans that have not yet been implemented"**—NB Liquor raised this exception as grounds to withhold both categories of relevant records.

First category of relevant records

Records relating to compensation, remuneration or salaries of executives

Our review of the internal report, the consultants' report, and the corresponding documentation showed that these records set out a large amount of factual information along with recommendations for changes to the existing executive compensation scheme for NB Liquor's consideration. It is our finding that neither of the reports sets out a plan that would fall within the scope of this exception. Likewise, the

corresponding emails, letters and Minutes of Board meetings relating to this first category of records do not fall within the parameters of this exception. Furthermore, NB Liquor obtained information from other jurisdictions regarding their executive compensation on a confidential basis and we find that this information falls within the scope of the paragraph 18(1)(b) exception and we are satisfied that this information was properly withheld. Therefore, this information can be severed from the reports prior to their release.

Second category of relevant records

Records relating to pension eligibility of executives

Our review showed that these records did not set out a plan, but rather that the records demonstrated an established decision with the Board's approval to change the pension eligibility of NB Liquor's top executive, a decision which only became a nullity when the matter was transferred to the Office of the Executive Council. It is our finding that these records do not fall within the scope of the paragraph 26(1)(c) exception and we recommend that they be released to the Applicant, subject to the appropriate redactions to protect the personal information of the top executive and the executive's spouse that is not subject to disclosure in accordance with section 21 of the *Act*.

77. **Discretionary exception under paragraph 26(1)(a): "advice, opinions, proposals or recommendations"**—NB Liquor also raised this exception as grounds to withhold the first category of records which included both the internal report and the consultants' report. Our review of these records showed that they contained a large amount of factual information about executive compensation in other provincial public bodies and similar organizations to that of NB Liquor in other jurisdictions. It is our finding that this kind of information cannot be withheld under the scope of this exception; however, the consultants' report clearly sets out recommendations for NB Liquor and we find that these recommendations meet the criteria for paragraph 26(1)(a) and were properly withheld.

RECOMMENDATION

78. Based on the above, the Commissioner recommends that NB Liquor release to the Applicant the following records:

- a) the first category of records which includes the internal report and the consultants' report, and the corresponding documents, subject to the following redactions:
 - the consultants' recommendations under paragraph 26(1)(a); and
 - information provided in confidence to NB Liquor with regards to executive compensation levels of other jurisdictions under paragraph 18(1)(b); and,
- b) the second category of records relating to the pension eligibility of NB Liquor's top executive, with appropriate redactions to protect the personal information of the executive and the executive's spouse.

Dated at Fredericton, New Brunswick, this 17th day of March, 2011.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2010-120-AP-055

March 17, 2011

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

“Complaint Process”

The Commissioner's Policy on the Complaint Process is designed to respect the Right to information and Protection of Privacy Act, to encourage both cooperation and transparency, and all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the Act. Below is an explanation of the distinction between what is referred to as an informal resolution process and a formal complaint investigation more commonly recognized by the public, along with timelines. This Complaint Process is communicated to both the applicant and the public body at the outset of a complaint matter filed with our Office.

Commissioner's Policy on the Complaint Process

Upon the receipt of a complaint, the *Act* allows the Commissioner to proceed in two ways: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally. For all intents and purposes, in both the informal resolution process and the formal investigation the Commissioner's work constitutes an 'investigation' into the merits of the complaint; however, in the informal resolution process, the Commissioner takes all steps necessary to resolve the complaint to the satisfaction of all involved, and in a manner consistent with the purposes of the *Act*. When this is not possible, the Commissioner concludes her work by a formal investigation which leads to the publication of a formal Report of the Commissioner's Findings.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted a policy to treat all complaints in the first instance by way of informal resolution. Our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and to become more familiar with their rights and obligations under the legislation. Educating the public of the application of this new law is an important part of the mandate of this Office. We are of the view that such a process will make way for improved requests for information and response procedures in the future, which may limit the need to file complaints.

Informal Resolution Process

Step 1 – Review

In all cases, upon receipt of a complaint, we issue letters to both the applicant and the public body indicating that the Commissioner seeks to resolve the matter informally. A deadline is initially set to try to do so within 45 days of the date of receipt of the complaint to our Office.

Although it is called an 'informal resolution process', the Commissioner's Office must review the full substance of the complaint, which includes the initial request for information and the response by the public body, which are the same steps undertaken in any investigation process. Our Office then meets with the public body's officials to review all relevant records relating to the request. This review of all relevant records may include requesting further information from the public body in order for us to fully understand which records may have been overlooked and which could be relevant to the request. Such a meeting is held shortly after receipt of the complaint to begin the process without delay.

Informal Resolution Process

Step 2 – Preliminary Findings

Where the Commissioner is satisfied that the public body has made an adequate search and has identified and provided to the Commissioner all records relevant to the request for information, or where the Commissioner believes there are issues regarding the application of the rules of the *Act* which inhibit a full review of all relevant records, our Office analyzes the initial response given by the public body against all records provided to the Commissioner in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings to the public body by letter. Those preliminary findings inform the public body of the direction of the investigation and of the remaining issues, if any, which must be addressed before we can proceed to the next step, i.e., inviting the public body to submit a 'revised response' to the applicant's request for information. If a revised response is not required, the complaint process proceeds to Step 4.

The suggestion to consider a revised response is made with the continued intent of resolving the complaint informally and with a view to provide the applicant access to the information that the *Act* deems should be disclosed.

If the public body agrees to prepare a revised response, a timeline is set during which the 'proposed revised response' must be submitted to the Commissioner. That timeline is based on the complexity of the work involved to prepare the proposed revised response in each case.

Informal Resolution Process

Step 3 – Proposed Revised Response

When the public body provides a proposed revised response, the Commissioner reviews it to ensure that it also meets the requirements of the *Act*. If the proposed revised response meets the requirements of the law, the Commissioner invites the public body to submit it directly to the applicant as a revised response to the applicant's initial request for information.

If the proposed revised response does not meet the requirements of the law, the Commissioner will provide additional comments to the public body as required in order for the public body to achieve a properly constituted revised response. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to encourage the public body to provide a lawful response to the request for access to information under the *Act*.

Informal Resolution Process

Step 4 – Applicant's Comments

In the case where the public body is ready to issue the vetted revised response to the applicant, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant and the public body sends the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response and to provide comments in relation thereto to the Commissioner. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the revised response. The Commissioner then reviews the applicant's comments on the revised response.

Or, in the event that a revised response was not required, the Commissioner informs both parties that the initial response to the request for information was appropriate and in conformity with the *Act*. In such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why it is believed the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the matter. The Commissioner then reviews the applicant's comments.

If the culmination of the above steps to date exceeds the initial 45 day timeframe allotted, the Commissioner may decide to continue with the informal resolution process if there is a belief that a satisfactory resolution in accordance with the *Act* is possible. The timeframe at this stage is based on completing the process within the 90 day investigation deadline set by the *Act*.

In complex matters, the timeframe for the continued work on a revised response may extend beyond the 90 day period to complete the matter. In such a case, the Commissioner notifies both parties in writing of an extension of time to complete the matter as permitted by section 72. The notification indicates the new deadline within which the case will be concluded, and the reasons why the extension of time is necessary, e.g., to bring an informal resolution to the complaint.

Again, it is important to reiterate that our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and all efforts are deployed within the allotted timeframe (or extension thereof permitted by the *Act*) to make this happen, whenever possible.

Informal Resolution Process

Step 5 – Revised Response Satisfactory

In the event that the applicant is satisfied with the revised response, the Commissioner concludes her investigation as one having been resolved informally to the satisfaction of both parties and in conformity with the *Act*. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally.

In the event the applicant provides comments which accept the Commissioner's preliminary findings that the public body's initial response was in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In both above instances, there is no requirement for the Commissioner to file a formal report under section 73 for the reason that there is no recommendation to be made to the public body on its response (revised or initial) to the request for information.

Informal Resolution Process – Formal Investigation

Step 6 – Revised Response Not Satisfactory

In the event that the Commissioner finds that the public body's revised response is not in conformity with the *Act* and the public body decides not to consider proposed changes thereto, or in the event that the applicant is not satisfied with the revised response, upon reviewing the comments obtained from the applicant the Commissioner may decide to further investigate the matter. This step brings the informal resolution process to an end and converts the matter into a formal investigation process which will eventually lead to the issuance of a formal report under section 73.

The Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The de-identified report will also be made available to the public on the Commissioner's Office website (*NB*: website under construction).

This complaint process is intended to encourage both cooperation and transparency, all the while remaining confidential and with the intent to reach a satisfactory resolution in accordance with the requirements of the *Act*.