

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 Matter: 2012-1004-AP-508

Date: August 28, 2013

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 a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into the matter.
2. The Applicant made a request to the Department of Environment and Local Government (the "Department") dated January 26, 2012. The Applicant asked for records between the timeframe of January 1, 2009 and the date of the Request for information in relation to the use and distribution of natural gas in the Province.
3. The Applicant sought access to:
 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.

(the “Request”)

4. 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.
5. The following December, the Province amended the *Gas Distribution Act, 1999*, which impacted the natural gas distribution rates. 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 Department.

6. As head of the Department, the Minister issued this response on March 23, 2012:

I am writing in response to your request for information under the *Right to Information and Protection of Privacy Act* regarding Natural gas in New Brunswick from January 1, 2009 to present.

A search of departmental files has produced the attached documentation. Please note that the department has records in response to paragraph 7 of Schedule A. The Department of Energy may also have documentation relating to your request. Please be advised that documents have been severed in accordance with subsection 21(1) and paragraphs 17(1)(c), 26(1)(a) and 26(1)(e) of the *Right to Information and Protection of Privacy Act*, therefore I am enclosing herewith, the necessary forms for a review under the *Act*.

(the “Response”)

7. As shown above, there was no mention as to how many documents were responsive to the Request or any indication as to their nature. For that reason, the Applicant wrote to the Department asking for a confirmation that the documents released with the Response represented all of the information in the Department’s possession pertaining to the Request and for a list of the documents believed to be in the possession of the Department of Energy, given its mention in the Response.
8. Not having received the clarifications sought after a few weeks, and dissatisfied with the Response, the Applicant filed a complaint with our Office asking us to investigate the matter (the “Complaint”).

2.0 INFORMAL RESOLUTION PROCESS

9. As with any complaint under investigation by the Commissioner’s Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*. The informal resolution process provides guidance to both public bodies and applicants with a view to better understand this new legislation. This process has been developed by our Office based on the spirit of the *Act* and in accordance with the parameters of the Commissioner’s investigative powers under Part 5. It is hoped that in all cases, the informal resolution process will lead to a prompt and satisfactory outcome to the complaint (*Note*: A full description of the steps involved in the Commissioner’s informal resolution process can be found on our website at <http://info-priv-nb.ca/>).
10. The initial step undertaken in this process was to review the Request and the Response in order to determine whether the Response met the requirements of the *Act*. We held

several meetings with officials of the Department to discuss the processing of the Request, as well as to better understand the background of the situation and the context in which the relevant records were generated.

11. We did have good cooperation from the Department during our review of relevant records it produced to us, but we could not fully ascertain the entirety of records for our examination mainly due to the Department's inability to access records in a particular employee's possession. This brought the informal resolution process to an end and the matter became the subject of the present Report of our findings.

3.0 LAW AND ANALYSIS

3.1 SEARCH FOR RELEVANT RECORDS

12. The adequacy of the search for relevant records was a crucial issue in this case. The crux of the Complaint largely focused on the lack of records and failure of the Department to provide a detailed list of relevant records raising the question whether all of the relevant records had been found.
13. Upon receiving the Request, the Department identified the relevant branches that would have relevant records regarding the Request, and the Climate Change Secretariat branch was identified as having the bulk of the relevant records. A few records were presented for our initial review, consisting mostly of email correspondence and documents relating to emissions, renewable energy, carbon pricing, and the NB Energy Commission, all of which had been released to the Applicant. We also examined records relating to email correspondence and documents relating to the NB Energy Blueprint and these records had not been released to the Applicant.
14. It became apparent during our discussions that some of the relevant records could not be located or identified because they were held by one employee whose duties and responsibilities were shared with the Department and other public bodies. The employee was part of the Natural Gas Task Force established by the Department of Energy in 2010 and on this basis alone there was a likelihood that this employee would have relevant records.
15. The employee having to provide services to more than one public body led to the creation of a virtual office of sorts, one in which the employee produced, received and stored records on a portable computer. The problem arose when it was realized that those

records were not maintained in a defined manner or in conformity with the Department's records management system, and for which no back-up copy was undertaken on the Department's shared computer network. In other words, this employee did not have a proper filing system and/or retention schedule, which made it impossible for us to determine whether the all of the requested records relevant to the Request were ever identified in this case.

16. The employee in question indicated to us that very few relevant records were generated as the Department and the employee were mainly concerned with the NB Energy Commission, the Natural Gas Task Force and the Energy Blueprint. The employee conducted an electronic search by key words but as most of the records found were duplicates also kept by the Department of Energy, the Department consulted with the Department of Energy and it was agreed that the Department of Energy would process the jointly held records in the matter of the Request. This led the employee to disregard those records when the Department was preparing its Response, although this fact was not explained.
17. We impressed upon the employee the importance of finding all relevant records, regardless of whether another public body might have the same records relating to the same Request. On this point, we directed the employee to perform another search in order to identify and retrieve all relevant records. Additional relevant records were found, which consisted of correspondence and documents related to the NB Energy Commission, the Gas Distribution Policy Task Force formed by the Department of Energy, public documents, Nova Scotia Utility and Review Board, and briefing notes. The Department advised that it was amenable to releasing most of these additional records to the Applicant.
18. Given the several meetings held with the Department regarding the search for records, this also raises further questions as to whether any additional records may been discarded or misplaced in a manner that now makes it impossible to determine what, if any, further relevant records exist or existed.
19. We inquired with the Department's officials regarding the employee's record management system but were advised that most of the records were kept on a portable computer and no copies were printed to be added to the hardcopy files. This raises an obvious concern about as to what would happen to these electronic records upon the employee's leaving the Department. The Department did not provide any explanation as to why the employee is not directed to follow its records management policy.

20. Answers to those questions can be found in records held by public bodies, and when those records are not maintained properly, the government is subject to additional scrutiny and may lose confidence from its public.
21. Although we find that the Department accepted to, and did, undertake several searches for relevant records adequate in nature, we take issue with the fact that some of the relevant records that were and should have remained in the Department's possession may not all be accounted for mainly due to the employee's own lack of records management and/or neglect in not following the Department's system in this regard.
22. The end result is that the Applicant may have been prevented from exercising a right of access to the entirety of the information contained in those records, which is contrary to the *Act*; however, we are unable to draw a definite conclusion on this point.

3.2 FORMAT AND CONTENT OF THE RESPONSE

23. A public body must ensure that its response includes all the requirements set out in section 14 of the *Act*. A response is designed to make an applicant aware of which records held by the public body are relevant to the request, which information can be released and give reasons why access to some is refused. A proper response informs an applicant:
- whether there are relevant records;
 - whether access to the relevant records is granted;
 - if access to a relevant record is refused, on what basis it is refused and why;
 - of the name and contact information of the employee who can answer questions about the content of the response; and,
 - of the right to complain to our Office or refer the matter to the Court of Queen's Bench.
24. The purpose of these mandatory requirements is to ensure that an applicant receives a complete and meaningful response to an access request, helping the applicant understand what information the public body has that is relevant to the request and whether access can take place. This is in line with the duty to assist provisions found in section 9 of the *Act*, which creates a positive obligation on the public body to offer assistance such that an applicant receives a timely, appropriate response, one that thoroughly answers the applicant's request. The response must elaborate as to why an exception applies in order to help the applicant understand why there access to the requested information is being refused.

25. 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 about how best to approach its processing, particularly where it was known some of the relevant records were held by two or more public bodies.
26. We reminded the Department, as we do with all other public bodies faced with a similar situation, that each public body must provide a full and complete response to the request and the response must address all of the records the public body has in its custody or under its control in order to remain compliant with the *Act*.
27. As per section 4, the *Act* applies “to all records in the custody of or under the control of a public body” and this signifies that a public body is obligated to respond to an access request for all records in its possession and under its control. The public body has a statutory obligation to treat each responsive record to the request.
28. To this end, we encourage all public bodies to consider preparing an index of records as part of the request process. Ideally, an index of records would:
- identify each relevant record or category of relevant records;
 - briefly describe the nature of the information contained in the record;
 - state whether access to all or part of the record is being granted or refused; and,
 - identify any reasons why access to any information is being refused in accordance with specific relevant provisions of the *Act*.
29. Instead of identifying a full list of relevant records in its possession, our investigation revealed that the Department approached the drafting of its Response on the basis that most of the records in its custody or control would be withheld under the guise of two exceptions to disclosure, namely section 17 (Cabinet confidences) and section 26 (advice to public body). This approach led the Department to dismiss the requirements of section 14 and its statutory obligation to provide a list of all relevant records to the Applicant.
30. To be compliant with the *Act*, a public body must always identify and list all of the records found to be relevant to the Request, regardless of their nature, the type of information they contain, and whether the public body may withhold them and why.
31. Furthermore, according to subsection 14(2), a public body is only permitted to refuse to identify the existence of a record where it is established that:

- the record contains information if disclosed would be harmful to an individual, public safety, or in the public interest;
- the record contains information if disclosed would be harmful to law enforcement or legal proceedings; or,
- to disclose the fact that a record exists would constitute an unreasonable invasion of a third party's privacy because it contains personal information belonging to that third party.

32. In this case, none of these instances were present at the time of the Request, and therefore, the Department had to identify the relevant records for the benefit of the Applicant. We appreciate that the Request was broad in scope; however, the Department was nevertheless obligated to list the relevant records. Disappointingly, the Response indicated that the Department had relevant records, and released some to the Applicant, but the Department failed to list and identify all of the relevant records, including those that were withheld.

33. In addition, the Response was not clear in identifying how specific exceptions relied upon applied to the records withheld as the Department did not give explanations as to why this was the case. The Response was also inaccurate as to the Department's reliance on the exceptions to refuse access to certain records as we noted from our review of the records. Only some information was redacted in accordance with subsection 21(1) privacy considerations, yet the Department relied on paragraphs 17(1)(c), 26(1)(a) and 26(1)(e) to withhold records in full but did not indicate this in the Response.

34. Issuing the Response in this manner made it impossible for the Applicant to ascertain which records were held by the Department let alone which records were being withheld in full and why.

35. For all these reasons, we find that the format of the Response was not in conformity with the requirements of a properly constituted response required by subsection 14(1) of the *Act* as it did not provide a meaningful response. As a result, we find that the Department failed to discharge its duty to properly respond to the Applicant's Request in this case.

Timeliness of the Response

36. The Department issued its Response on March 23, 2012, 57 days after the Request was made. While a public body has an initial time limit of 30 days to respond to an access request, the *Act* has recognized that there may be specific circumstances where it is not

possible to search, review and prepare the requested documents for disclosure within that timeframe. In those specific cases, as set out under subsection 11(3), the public body may self-extend the time limit for an additional 30 days. A public body, however, can only self-extend the time limit if one or more of the scenarios enumerated in subsection 11(3) apply.

37. The Department did not take any steps to inform the Applicant of the status of the Request. We believe that the Department could have followed its duty to assist and keep the Applicant abreast of the status of the processing of the Request and when the Response was expected. We have addressed this issue with the Department and are confident the Department recognizes the importance of providing timely responses to requests through its implementation of various initiatives to expedite responses to the increasing volume of requests it receives each year.

Exceptions to disclosure relied upon

Section 21- Unreasonable invasion of third party's privacy

38. Upon review of the relevant records, the Department's official's redacted personal information in some records released to the Applicant on the basis that the disclosure of the personal information would constitute an unreasonable invasion of a third party's privacy, on the basis of subsection 21(1), a mandatory exception to disclosure.
39. Our review of these redactions indicates that the information consisted of third parties' personal information within the meaning of the *Act*, the disclosure of which could have been deemed an unreasonable invasion of privacy. We therefore find that the Department properly applied subsection 21(1) to withhold information, except for its failure to inform the Applicant that the information redacted consisted of personal information.

Section 26-Advice to public body

40. The Department of Energy provided the Department with a copy of the final draft of the Energy Blueprint for its review and feedback during its consultation process. In turn, the Department provided the Department of Energy with a document containing comments in the form of recommendations and proposed amendments to the Blueprint. The Department's own document with comments was identified as relevant to the Applicant's Request in this case, along with the Energy Blueprint documents.
41. The Department also had other records relating to the Energy Blueprint, which consisted of documents attached to email correspondence between the Department, the Department of

Energy and other public bodies. Two of these documents were attached to an email chain entailing general concerns about the Energy Blueprint, being risk tolerance, resiliency, interdependencies, supply chain risks, building standards and energy efficiencies. The other documents consisted of a draft of Speaking Points prepared for the Department's Minister in relation to the Energy Blueprint.

42. Although not made clear in the Response, access to these records was denied in full based on paragraphs 26(1)(a) and (e), which relates to advice to a public body:

26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

(a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown,

...

(e) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

43. Section 26 is meant to generally protect advice to a public body in order to allow public servants to give frank and honest opinions, advice, and recommended courses of action, including in the development of departmental policies. In addition, section 26 is a discretionary exception, meaning that it is not grounds to automatically refuse access. Rather, the public body is required to determine whether disclosure should take place based on the relevant factors at the time of the request.

44. The exercise of discretion should always be in favour of the disclosure of as much information as possible. This is consistent with the spirit and intent of the *Act*, which provides that a right to access can only be curtailed in accordance with the limited and specific exceptions to disclosure. Accordingly, when a decision to refuse access based on a discretionary exception is challenged, the public body must establish how it arrived at the decision and must show that the decision was appropriate in the circumstances at the time of the request. In other words, the public body must be able to demonstrate that it exercised its discretion.

45. Based on our review of this matter, we are satisfied that the Department exercised its discretion and properly applied paragraph 26(1)(a) to refuse access to the document that the Department in fact created when providing advice to the Department of Energy in relation to the draft Blueprint.

46. With regards to the draft Blueprint, however, we find that the Department could not rely on section 26 to withhold this document. We find that the Department was not at liberty to make a decision regarding access to the draft Blueprint as it was a record created by the Department of Energy, and not by the Department. In that regard, the Department of Energy was better suited to make any decision in relation to its disclosure.
47. In a normal situation, the Department could have transferred that part of the Request to the Department of Energy for it to provide a response in relation to the draft Blueprint. In the present case, however, both Departments were aware that the Applicant had made the same Request to the Department of Energy and accordingly, the Department of Energy would be making a decision in relation to access to the draft Blueprint in its response.
48. We find that this explanation could have been added to the Response, i.e., properly informing the Applicant of the existence of the draft Blueprint as being relevant records and that a decision would be made by the Department of Energy in regards to its release.
49. As for other records identified by the Department as relevant to the Request due to its broad language and subject matter, our review found that these records were only marginally relevant to the Energy Blueprint mainly due their reference to the Blueprint as opposed to their content. We found that these records demonstrated the lengths to which the Department conducted a thorough search; however, these records did not appear to hold information specific to the Department, the environment or energy concerns. In that regard, we find that these records were simply of no significance to the Request and were not relevant. The Department did not have to make a decision as to their release in this case.
50. Finally, with regards to the draft speaking points prepared for the Minister, the Department informed us that they were never used by the Minister. Upon our review of the record, it did not appear to contain sensitive or confidential information; however, these speaking points were never used by the Minister and we are satisfied that the Department exercised its discretion properly by applying paragraph 26(1)(a) to refuse access to the information as it constituted advice to minister.
51. Given these findings, there is no need to discuss the applicability of section 17, a mandatory exception to disclosure aimed at protecting deliberations of the Executive Council. Section 17 is meant to protect “the substance of deliberations of the Executive Council” in order to allow Cabinet to discuss matters in confidence. It is important to note that the policy development process at the Department’s level is separate and distinct from the

deliberative functions of the Executive Council and these records must be considered for release outside of this context.

52. The committees of the Executive Council routinely make key decisions about budgetary and policy directions on behalf of the Province. To apply the mandatory exception found in subsection 17(1) as covering all records that generate from the implementation of these decisions down the departmental level would have the effect of creating a mandatory ground for non-disclosure of substantially all information about the public business of the Province, which is fundamentally at odds with the broad right of access provided by the *Act*. In our view, such an expansive application of subsection 17(1) is not consistent with the intent and spirit of the legislation.

53. Based on the above, we find that the Department was not entitled to rely on subsection 17(1) to refuse access to any of its records in this case.

4.0 OVERALL FINDINGS

54. Although we are satisfied that the Department conducted thorough searches for relevant records at our insistence during this investigation, we have concerns that not all of the relevant records in this case may have been accounted for mainly due to an employee of the Department being allowed to maintain a separate databank of records without proper records management and the Department's inability to access these records in a portable personal computer. In this regard, we are unable to determine whether the Applicant received a decision in relation to the entirety of the information contained in the records held by the Department.

55. The Department failed to provide a meaningful response in conformity with section 14 of the *Act* as the Department:

- did not list or identify all of the relevant records in its custody or control;
- did not indicate that, and which, records were being withheld in full; and
- did not offer any explanation as to why access to some records was being refused.

56. We find that the Department was correct in redacting some personal information on the basis of subsection 21(1), and by relying on subsection 26(1) to refuse access to its document providing advice on the Energy Blueprint. A decision regarding access to the draft Energy Blueprint which was not created by the Department was better left with the

Department of Energy that created the record. Having said all of this, we still find that the Department failed to provide these explanations to the Applicant in its Response.

57. The format and content of the Response having been thoroughly discussed above, we find that the Department did not fulfill its duty to assist the Applicant pursuant to section 9 of the *Act* by providing a meaningful response in this case.

58. With regards to the draft speaking points prepared for the Minister but never used, we are satisfied that the Department exercised its discretion properly by applying paragraph 26(1)(a) to refuse access to the information as it constituted advice to minister.

59. Section 17 is meant to protect “the substance of deliberations of the Executive Council” in order to allow Cabinet to discuss matters in confidence; we find that the Department was not entitled to rely on subsection 17(1) to refuse access to any of its records in this case.

5.0 ADDITIONAL RECORDS LATER IDENTIFIED

60. During our various meetings with the Department’s officials to conduct our review of the records, we were advised that additional records relevant to the Request had been found and that the Department was considering their disclosure along with some records originally withheld in full. Of the additional records found, the Department consulted with the Department of Energy to find out that a majority of these records had already been released to the Applicant or were publicly available documents.

61. We have been informed that the Department is willing to release the remainder of these records. We commend the Department in reconsidering its earlier decision and we agree and find that these records ought to be disclosed to the Applicant.

6.0 RECOMMENDATIONS

62. Given all of our findings above, the Commissioner recommends pursuant to subsection 73(1) that:

- a) the employee in question referred to in this Report, who serves the Department and other public bodies, allow officials of the Department to conduct a full and adequate search of relevant records in the employee’s possession, including those stored in the employee’s portable computer with a view to draw a list of such records and to print and retain a copy of such records;

- b) the Department provide to the Applicant a properly constituted Response in conformity with section 14 of the Act, which contains a list of all the records in its custody or under its control relevant to the Request, including those that are identified in the possession of the employee in question;
- c) the Department provide a full explanation as to which relevant records on this list are withheld and why, and which ones have already been released to the Applicant; and
- d) as for the additional records later located and those being reconsidered for release, the Department contact the Applicant without delay to inform of those records with a view that the Applicant select from those records those the Applicant wishes to obtain. Thereafter, the Department must provide a copy of the selected records to the Applicant without delay.

63. Finally, pursuant to paragraph 60(1)(h), the Commissioner recommends that any and all officials who work with or serve the Department be required to adhere to the Department's records management system without exception, including access, when they generate, receive and store information on behalf of the Department in the course of their duties and functions. The Department is required to notify the Office of the Commissioner by December 19, 2013 as to how it intends to implement this recommendation.

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

Anne E. Bertrand, Q.C.
Commissioner