

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: 2012-1005-AP-509

Date: August 16, 2013

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

1.0 INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office on June 7, 2013 in which the Applicant requested that the Commissioner carry out an investigation into the matter.
2. The Applicant complained of an unsatisfactory response from the Department of Transportation and Infrastructure ("the Department"). The Applicant had 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 Request dated January 26, 2012 sought:
 1. All records relating to the use and distribution of natural gas in the Province of New Brunswick including all records with respect to the subjects listed in the attached Schedule "B" (Subjects Directory).
 2. All records with respect to the regulation of the use and distribution of natural gas in the Province of New Brunswick including all records with respect to decisions of the New Brunswick Energy and Utilities Board (the "Board"), the role, functions, responsibilities and powers of the Board and any changes to or restructuring of the Board.
 3. All records with respect to proposed amendments to the Gas Distribution Act, 1999 and proposed regulations under that Act.
 4. All records with respect to the general franchise for the distribution of natural gas in the Province of New Brunswick including all records relating to the General Franchise Agreement between the Province of New Brunswick, Enbridge Gas New Brunswick Inc. and others dated August 31, 1999.
 5. All records with respect to single end use franchises for natural gas and all records relating to the single end use franchise agreements between the Province of New Brunswick and the various single end use franchisees.
 6. All records with respect to or arising from the review, consultation, recommendations and resulting discussion paper titled "The Path Forward—Shaping New Brunswick's Energy Future, A Discussion Paper On The Establishment Of An Energy Commission and Energy Plan For New Brunswick" dated August 20, 2010 by Darrel J. Stephenson and Pierre-Marcel Desjardins including all records reviewed, considered, prepared by or presented to the authors of that Discussion Paper and their respective agents, advisors, consultants and representatives and all records that consider or refer to that Discussion Paper.

7. All records with respect to or arising from the New Brunswick Energy Commission and the work of the New Brunswick Energy Commission including all records reviewed, considered, prepared by or presented to the New Brunswick Energy Commission, its co-chairs, representatives, agents, advisors, and consultants and all records that consider or refer to the New Brunswick Energy Commission, the work of the New Brunswick Energy Commission or the reports of the New Brunswick Energy Commission or which relate to any consideration, review, analysis or implementation of such work or reports.
8. All records with respect to or arising from the task force panel and the work of the task force panel respecting natural gas distribution issues formed by the Department of Energy in or about October 2010 including all records reviewed, considered, prepared by or presented to the task force, its members, representatives, agents, advisors and consultants or which relate to any consideration, review, analysis or implementation of the work of the task force.
9. All records with respect to or arising from The New Brunswick Energy Blueprint prepared in or about October 2011 by the Department of Energy including all records reviewed, considered, prepared by or presented to the Department of Energy, its representatives, agents, advisors and consultants or which relate to any consideration, review, analysis or implementation of the Energy Blueprint.

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

4. The Department responded to the Request on March 13, 2012 as follows:

This is in response to your request under the *Right to Information and Protection of Privacy Act*, in which you requested information related to the use and distribution of natural gas in the Province of New Brunswick.

After review of the documents, my decision is to deny your request pursuant to the following exceptions under the *Act*:

17(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council, including but not limited to,
(c) a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council

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.

In accordance with the provisions of the Act, I am enclosing forms prescribed by Regulation for a review under the Act of this decision to deny the release of this information.

(the “Response”)

5. There was no mention of how many documents were responsive to the Request or any indication as to their nature. For that reason, the Applicant asked the Department by letter dated May 11, 2012 to provide a list of all the records to which access was refused pursuant to paragraphs 17(1)(c) and 26(1)(a) of the Act. The Department replied on June 6, 2012 stating that only two records were relevant to the Request, but again failed to identify these records.
6. During our investigation of this matter, and our informal resolution process, we were provided for examination the two relevant records and held fruitful discussions with the Department’s officials.
7. While there were some aspects in relation to responding to the Request that needed to be corrected in this case, we found that the relevant records were properly withheld by the Department. We therefore approached the final resolution of this case by proceeding directly to issue this Report of Findings, recognizing that it would not carry any recommendations in the circumstances.
8. This Report, however, is being issued with a view to not only provide our findings in this case, but also to encourage the Department for its good work in striving for compliance with the Act while reminding the Department of its full obligation when processing requests for access to information in a completely satisfactory manner.

2.0 LAW AND ANALYSIS

2.1 DUTY TO ASSIST

9. The duty to assist provision found in section 9 of the Act creates a positive obligation on the public body to offer assistance such that an applicant can receive a timely, appropriate, and relevant response to his or her request for information:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

10. In our view, the discharge of this duty to assist applies throughout the request process up to and including the issuance of a response to the applicant, which connects well with the principle that the response should be helpful and thoroughly answer the applicant’s request.

11. According to Department officials, a search for relevant records was conducted in relation to the Request and once gathered, the records were identified and their contents reviewed. There were some uncertainties as to whether all the records retrieved were relevant to the Applicant's Request.
12. The Department therefore contacted the Applicant and held discussions to obtain further clarification in relation to the Request. By agreement, it was determined that records already in the Applicant's possession could be excluded, thereby reducing the Request in scope. The Department and the Applicant also agreed that the Department could take additional time to complete its processing of the Request as the Department realized it would not be able to issue a response in a timely manner, i.e., within the statutory time limit of 30 days.
13. We are pleased with the Department's actions in engaging the Applicant during this process by having several discussions in relation to the scope of the Request and its obligation to respond in a timely fashion. In this regard, the Department takes its duty to assist very seriously and we applaud it for doing so.
14. Having said this, however, we find that the Department could have gone further in fulfilling its duty to assist by providing a more meaningful response to the Applicant. We discuss this issue further in the next section.

2.2 SEARCH OF RECORDS AND FORMAT OF THE RESPONSE

15. Once the scope of the Request was modified by agreement, the Department determined that only two records were relevant to the Request, namely, a copy of the final draft of the *New Brunswick Energy Blueprint* ("the draft Blueprint") and a document containing the Department's comments in the form of advice and recommendations in relation to the draft Blueprint.
16. As part of its consultation process regarding the creation of a substantive multi-year energy policy statement for New Brunswick, the Department of Energy provided the Department with a copy of the final draft of the Blueprint for its review and feedback. The Department of Energy believed that several recommendations contained in the Blueprint were of special interest to the Department. After its review of the draft Blueprint, the Department provided the Department of Energy with a document containing comments in the form of advice and recommendations and proposed amendments to the Blueprint.
17. The draft Blueprint and the Department's own document for comments thereon are the only two records identified as being relevant to the Applicant's Request in this case.

18. In its initial Response, the Department failed to properly inform the Applicant as to this fact, i.e., that two relevant records had been identified and what they were.
19. As indicated above, it was only through the Applicant's insistence that the Department revealed more information by stating that it had identified two relevant records; yet, the Department nevertheless failed to inform the Applicant as to the nature of these records. The Applicant was therefore still left with having received no explanation in relation to the responsive records.
20. After discussions with officials of the Department during our investigation, we first examined the adequacy of its search for responsive records and we were satisfied that the Department conducted a thorough search for relevant records in this case.
21. Where the Department's obligations in responding fell short remained in not fully informing the Applicant as it should under the *Act*. The Response was not in full compliance with the requirements of subsection 14(1), as it failed to identify the relevant records to which access was being denied, and it failed to provide explanations as to how the specified exceptions referred in the Response applied to the records in this case. This left the Applicant uninformed as to what records were relevant and why access to these records was being refused.
22. It is important to remember that when responding to a request, a public body is obligated under section 14 to provide a relevant and meaningful response to the applicant. The response must always identify the relevant records, name the specific exception to disclosure if access to any of the requested information is being refused, and provide a brief explanation as to why the specified exception applies.
23. It is therefore not sufficient to simply re-state the wording of the exception provision as the reason for the refusal. The response must elaborate on why the exception applies in order to help the applicant understand why there is no right of access to the requested information.
24. 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*.
25. Setting out a response in this way will help an applicant better understand what information is being withheld and why. Where an applicant finds that a public body has

been forthcoming and transparent in responding to access requests, he or she will be better informed and may be less likely to file a complaint.

26. During our discussions, the Department expressed concerns with identifying the records believing that to do so might be improper because access was being refused under sections 17 and 26. These sections related to Cabinet confidences and records containing advice or recommendations respectively, and these types of information give pause before having to make a decision regarding their release. Notwithstanding this fact, the Department was nevertheless obligated to provide a list of these relevant records as per subsection 14(1).
27. To be in compliance with the *Act*, a response must always identify the relevant records regardless of their nature, the type of information they contain, and the likelihood the public body may withhold them. A list of responsive records must be drawn not from the perspective of exceptions to disclosure or protection of privacy for that matter, the list must be prepared only from the perspective of *relevance to the information sought*.
28. We point out that a response will always need to identify all relevant records, unless the public body finds itself in circumstances where the exception to that rule applies, namely that found in subsection 14(2).
29. According to subsection 14(2), a public body may refuse to confirm or deny 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.
30. As we note from the specific instances set out in subsection 14(2), a public body will have to identify relevant records in most cases because it can only be lawfully excused from doing so where one or more of the three instances apply at the time the request is made. In other words, unless these instances exist, the public body must always provide a list of relevant records.
31. In this case, none of these instances were present at the time of the Request, and therefore, subsection 14(2) could not have been relied on to omit the identifying the relevant records for the Applicant.
32. For the reasons mentioned above, we find that the Department's Response did not fully comply with the requirements for the contents of a response under section 14 of the *Act*.

2.3 EXCEPTIONS TO DISCLOSURE

33. Access to both relevant records in this case was denied in full, based on paragraph 26(1)(a) which relates to advice to a public body. Specifically, the paragraph provides as follows:

- 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

34. It is important to note that 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. The exercise of discretion should 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 a right to access that can only be curtailed in accordance with the limited and specific exceptions to disclosure.

35. 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.

36. 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 one of the relevant records, the document it created to provide advice and recommendations to the Department of Energy on the draft Blueprint. Our examination revealed that this record was in fact developed by the Department and therefore, this record fell within the ambit of this exception.

37. As for the draft Blueprint, the Department could not rely on section 26 to withhold this document. The Department was not at liberty to make a decision as to access to the draft Blueprint as that was a record created by the Department of Energy. In that regard, the Department of Energy was better suited to make any decision in relation to its disclosure.

38. In a normal situation, the Department would therefore 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. This explanation could have been added to the Response in order to properly inform the Applicant that a decision regarding access to the draft Blueprint identified as a relevant record in this case would be made by the Department of Energy in its response.

39. The Department also relied upon paragraph 17(1)(c) for both relevant records. This is a mandatory exception to disclosure aiming at protecting deliberations of the Executive Council. We disagree that this exception to disclosure could be applied in this case by the Department.
40. The Department's own record could be properly withheld under section 26, and therefore, there was no need to raise section 17 for that document. The Department was not permitted to rely on section 17 to withhold the draft Blueprint for the reasons stated above as this decision had to be made by the Department of Energy.

3.0 FINDINGS and RECOMMENDATIONS

41. We find that the Department's actions in engaging the Applicant during the processing of the Request, including its undertaking to respond in a timely fashion, signified the Department's recognition for the need to fulfill its duty to assist.
42. Having said this, however, we find that the Department could have gone further in fulfilling its duty to assist by providing a more meaningful response to the Applicant.
43. The Department did conduct an adequate search of all records relevant to the Request and we are satisfied that the Department does not have any other relevant records in its custody or under its control.
44. The Department's Response did not meet all of the requirements set out in section 14, namely, the Response failed to:
 - a) identify the two records relevant to the Request, that of the draft Blueprint, a record created by the Department of Energy, and its own document in which the Department provided advice and recommendations in relation to the draft Blueprint to the Department of Energy; and,
 - b) provide additional explanation as to why access to the records was being refused.

45. We find, however, that the Department properly relied on paragraph 26(1)(a) of the *Act* to deny access to its own record. As for the other relevant record, the Department ought to have provided explanations indicating that where the Applicant had made the same Request to the Department of Energy, and the draft Blueprint being a record of that department, a decision in relation to the draft Blueprint would be made by the Department of Energy in its response.

46. Based on all of these findings, there is no need for the Commissioner to issue any recommendations in this matter.

Dated at Fredericton, New Brunswick, this 16th day of August, 2013.

Anne E. Bertrand, Q.C.
Commissioner