

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: 2012-900-AP-457

Date: August 16, 2013

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

1.0 INTRODUCTION

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 dated January 26, 2012 to the Executive Council Office asking for records relating to the use and distribution of natural gas in New Brunswick. The scope was between January 1, 2009 and the date of the request for information. The Applicant described the records sought in Schedules "A" and "B" as follows:
 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”)

3. Believing it not able to process the Request within the statutory time limits within which to respond of 30 days, the Executive Council Office applied to the Commissioner on March 23, 2012 to seek approval under subsection 11(4) for additional time. Based on the broad scope of the Request and the Executive Council Office’s need to consult with other public bodies before being able to provide a response, we granted the Executive Council Office a time extension to April 26, 2012.
4. The Executive Council Office issued its Response on April 24, 2012 which provided as follows:

The Executive Council Office has conducted a review of the records in the custody and under the control of this Office with respect to the subject matter of your January 26, 2012 request.

The Executive Council has records related to the subject matter of your request that are Cabinet documents, the release of which is precluded by subsection 17(1) of the *Right to Information and Protection of Privacy Act*, which provides as follows:

- 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,
- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council,
 - (b) discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council,
 - (c) a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council,

- (d) a record that reflects communications among Ministers of the Crown relating directly to the making of a government decision or the formulation of government policy, and
- (e) a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council or that is the subject of communications referred to in paragraph (d).

The Executive Council has records related to the subject matter of your request that, pursuant to section 26, of the Act 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,
- b) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Province of New Brunswick or the public body, or considerations that relate to those negotiations,
- c) the content of draft legislation or regulations and orders of Ministers of the Crown or the Lieutenant-Governor in Council, or
- d) 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.

The Executive Council has documents related to the subject matter of your request that, pursuant to subsection 27(1) of the Act is information that is subject to legal privilege. Subsection 27(1) provides as follows:

- 27(1) The head of a public body may refuse to disclose to an applicant
- (a) information that is subject to solicitor-client privilege,
 - (b) information prepared by or for an agent or lawyer of the Office of the Attorney General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence, or
 - (c) information in a communication between an agent or lawyer of the Office of the Attorney General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

The Executive Council has documents related to the subject matter of your request that, pursuant to section 29 of the Act, the disclosure of which could reasonably be expected to be injurious to the conduct of existing or anticipated legal proceedings.

For the purposes of section 17, section 26, section 27 and section 29 of the Act, disclosure of records relevant to the request would reveal the substance of deliberations of the Executive Council. This would include, but not be limited to: agendas, minutes or other records of the deliberations or decisions of the Executive Council; proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council; proposals or recommendations

prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council; and, records that reflect communications among Ministers of the Crown relating directly to the making of a government decision.

As such, we are unable to grant your request for access to these records.

Please be advised that those records in the possession of this Office that are also held by the Office of the Premier and by the Department of Energy will be dealt with in the responses that you receive from those public bodies.

The Executive Council Office is in possession of records in the form of correspondence that was provided to Government by and on behalf of [Applicant]. Should you require copies of such correspondence please contact this office.

If you are not satisfied with this decision, you may file a complaint with the Access to Information and Privacy Commissioner as per subparagraph 67(1)(a)(i) within 60 days of receiving this response, or refer the matter to a judge of the Court of Queen's Bench as per paragraph 65(1)(a) within 30 days of receiving this response. For your convenience, please find enclosed copies of the relevant forms.

(the "Response")

5. The Applicant was not satisfied with the Response and filed a complaint with our Office on June 7, 2012. The Applicant complained as to the entirety of the Response challenging the denial of access based on the multiple exceptions to disclosures relied on by the Executive Council Office. The Applicant also made these comments:

1. (...)
5. The Clerk of the Executive Council further advised me in his April 24, 2012 letter that for the purposes of Sections 17, 26 and 29 of the Act, disclosure of records would reveal the substance of deliberations of the Executive Council.
6. The Clerk of the Executive Council further advised me in his April 24, 2012 letter that the Executive Council Office has records related to the subject matter of my request that are also held by the Office of the Premier and by the Department of Energy.
7. I am not satisfied with the decision of the Clerk of the Executive Council and request that the Commissioner conduct an investigation and make recommendations as to whether: (i) I am entitled to access to any records in the possession or control of the Executive Council which I have not been granted access (ii) the applicability of the many and various sections of the Act that have been relied upon by the Clerk of the Executive Council to deny me access to records in the possession or control of the Executive Council (iii) I am entitled to production of documents in the possession or control of the Executive Council

irrespective of whether they may also be held by the Office of the Premier and the Department of Energy, and (iv) I am entitled to detailed lists of records in the possession or control of the Executive Council which I have not been granted access to with such list indicating the specific section of the Act and the facts which the Executive Council Office relies upon to justify denying me access to the records.

(the “Complaint”)

1.1 BACKGROUND

8. One of the key issues in the energy sector since 2009 has been natural gas distribution rates and the fact that they had been increasing significantly. This resulted in mounting public pressure for the Provincial Government to take action to address this issue. As a result, the Department of Energy undertook to amend the *Gas Distribution Act, 1999* and this work was concluded in the Legislative Assembly in December 2011 (coming into force in January 2012). The new *Rates and Tariffs Regulation 2012-49* came into effect in April 2012.
9. The Province’s amendments to the *Gas Distribution Act, 1999* impacted the natural gas distribution rates. After December 2011, the Executive Council Office received notice that a lawsuit would follow and in fact, litigation began in February 2012. The Executive Council Office was therefore aware when the notice of pending litigation was served that many of its records would be subject to those legal proceedings, a fact that it observed when it received the Request in this case.
10. The Applicant was seeking information dating back to 2009 to determine what information the Province held generally in relation to the energy sector in this Province and more specifically on the question of natural gas. The Applicant therefore proceeded to submit the same request to several public bodies at one time for access to that information same as in the case of the Request submitted to the Executive Council Office.

2.0 INFORMAL RESOLUTION PROCESS

11. 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/>*).

12. The initial step undertaken in this case was to review the Request and the Response provided to the Applicant and to consider the fact that there were multiple public bodies and multiple responses issued in order to determine whether the Executive Council Office's Response met the requirements of the *Act*.
13. We held meetings with officials of the Executive Council Office to discuss how its officials processed and responded to the Request, as well as to obtain a better understanding of the background of the subject matter and the context in which the relevant records were generated.
14. Officials of the Executive Council Office advised us that they qualified the records in their possession as falling mostly within the exceptions to disclosure found in sections 17 and 27 of the *Act*. For that reason, the Executive Council Office declined to produce those records for our review in accordance with subsection 70(1) of the *Act*.
15. We explained that our role was to determine whether all of the relevant records were identified and considered for release, as well as, to determine whether the information that was withheld was done so in accordance with the *Act*. In this regard, we inquired as to whether the Executive Council Office would be willing to provide us with further details concerning the records in its possession that related to the exceptions found under either sections 17 or 27 of the *Act* in order to assist us to conduct our investigation of the Complaint. The Executive Council Office was amenable and provided us with some additional information, but not all as we had requested.
16. The Executive Council Office reported to us as it had identified as relevant documents that consisted of communication between outside counsel and the Deputy Minister of Strategic Initiatives that were created for the purposes of obtaining legal advice and for providing such advice. The Executive Council Office considered these documents to contain information that was subject to solicitor-client privilege.
17. Another group of documents contained information derived from the performance of duties carried out by the Office of the Attorney General. The Executive Council Office relied on paragraph 4(b) of the *Act* in stating that those records were not subject to the application of the *Act* and for that reason we would not be able to review them.

18. It is to be noted that the Executive Council Office had not previously raised paragraph 4(b) as an exemption to disclosure, neither in the Response to the Applicant, nor during our prior discussions. The main purpose for doing so was to reinforce its decision not to permit our examination of the relevant records.
19. Despite this, we asked the Executive Council Office to allow us to see a list that briefly described the subject-matter of the records withheld under sections 17 and 27, those withheld under sections 26 and 29, and the time period in which they were generated to permit us to make a determination as to whether the requested information was properly withheld under the *Act*.
20. Unfortunately, the Executive Council Office opted not to provide our Office with this list or additional explanations. For this reason, we were unable to determine whether the records relevant to the Request properly fell within any of the exceptions relied upon in this case, namely those under sections 17, 26, 27 and 29. This brought the informal resolution process to an end and the matter thus became the subject of the present Report of our findings.

3.0 LAW AND ANALYSIS

3.1 SEARCH FOR RELEVANT RECORDS

21. Officials at the Executive Council Office advised our Office that upon receiving the Request, they retrieved all of the Cabinet records, including appointments, policies, records of decisions and agendas that related to the Request. A meeting was held with the Department of Energy to cross-reference these records and it was determined that the Department of Energy also had these same records, except for agendas and records of decisions that are unique to the Executive Council Office.
22. As we were not made privy to the relevant records or provided a list of relevant records withheld under sections 17 and 27 and those withheld under sections 26 and 29, we are unable to ascertain whether the search for relevant records was conducted adequately in this case.

3.2 FORMAT OF THE RESPONSE

23. In responding to access requests, a public body must ensure that its response includes all the required details as set out in section 14 of the *Act*. All responses must inform the applicant of the following:

- if access to the relevant record(s) is granted and how, or if it is refused;
- if any information is refused,
 - if a record does not exist or cannot be found;
 - where the record exists, the reasons for refusing access and what section of the *Act* applies;
 - the name and contact information for someone who can answer questions about the refusal; and
 - the applicant's right to complain to our Office or refer the matter to the Court of Queen's Bench.

24. The purpose of these requirements is to ensure that an applicant receives a complete and meaningful response to an access request, helping an applicant to understand what information a public body has that is relevant to the request, the reasons why access to any of the information is being refused, and lastly, to inform the applicant of his or her right to complain where not satisfied with the response.

25. 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 can receive a timely, appropriate, and relevant response to a 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.

26. 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.

27. Section 14 is straightforward and is designed to make an applicant aware of which records held by the public body are relevant to the request for information, which information can be released, and, as where some information is not disclosed, why the decision to refuse access has been made. A response must directly address all aspects of the request and section 14 makes it mandatory to respond to an applicant in this way.

28. 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.

29. In this matter, responding to the Request was more complicated because it was known that the same request had been submitted to multiple public bodies. The public bodies that received the Request 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. As evidenced by the reference to the Department of Energy in the Response quoted above, some records were held by that Department as it was evident it would hold most of the relevant records to the Request in this case.
30. The Executive Council Office also consulted with the other public bodies involved. Collectively, the public bodies in question decided that records held jointly would be addressed in each of their respective responses rather than in the response to be provided by the Executive Council Office.
31. We observed that adopting this approach was made with good intentions: to simplify the process and to avoid duplication when having to issue the multiple responses. Regrettably, the approach in this case, in having many public bodies respond by referring to the others, was very confusing for the Applicant without the benefit of more explanations. It was not possible for the Applicant to determine what was the full list of relevant records held by all these public bodies, nor was it possible to assess what specific records each public body had in its own possession, what records would be released or withheld when referring to other public bodies, and in which specific manner access to the requested information was being granted or refused.
32. We reminded the Executive Council Office 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*.
33. 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. Accordingly, in the case of a same request to multiple public bodies, informing an applicant that another public body will address jointly held records in its response is not a lawful reason to refuse access to information under the *Act*. The public body has a statutory obligation to treat each responsive record to the request.

34. By providing the applicant a master list of all the relevant records and by having each public body refer to the master list of records when preparing its response, then the concerted effort by the multiple public bodies produces the intended outcome: to fully inform the applicant of which records exist, which records can be released and those that must be withheld and for what reasons, while reducing the duplication of work by those public bodies involved. Only by approaching the case of a same request to multiple public bodies in this manner will an applicant's right of access be fully respected in our view. When the applicant reviews each response provided by the multiple public bodies, he or she is better suited to put together the complete picture of the information sought and how access was determined. We endorse such an approach for those few cases where a same request is submitted to multiple public bodies on a broad-based subject matter of a certain scope.

35. 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*.

36. We found that the Executive Council Office approached the drafting of its Response on the strength that it would be not required to provide access because most of its records normally fell within the ambit of section 17 and 27. These sections relate to Cabinet confidences and records containing solicitor-client privilege information respectively, and these types of information may in large part be withheld. Notwithstanding this fact, the Executive Council Office was nevertheless obligated to provide a list of these relevant records as per subsection 14(1). To be compliant with the *Act*, a public body 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*.

37. We appreciate that the Request was broad in scope and that there was a large number of records to account for in the Response and the matter was a sensitive one given the pending litigation. These circumstances, however, did not remove the requirement to

provide a meaningful explanation to the Applicant of what information was being refused and the reasons why.

38. The Executive Council Office's Response had the effect of refusing access to all relevant records pursuant to sections 17, 26, 27 and 29 of the *Act*. While the Response indicated that the Executive Council Office had relevant records in its possession, it did not list or identify any of the relevant records, nor did it list any records that would be dealt with by other public bodies, being the Department of Energy and the Premier's Office.
39. Further, the Response was not clear in identifying how specific exceptions relied upon applied to refuse access. For example, the Response stated that "*the Executive Council Office had records related to the subject matter of your request that, pursuant to section 26 of the Act could reasonably be expected to reveal: a) advice, opinions, ...*" and so on by going on to recite the entire section 26 without further explanations.
40. The Response neither identified the type of records referred to, nor pinpointed the particular category in the section 26 exception upon which the Executive Council Office was relying in relation to those records. The Response listed four separate categories of records that may be withheld under section 26 in certain circumstances. The Applicant in this case, however, was left with not knowing which of the category applied to these unidentified records.
41. This format was also repeated for all other records referred to in the Response set out above in this Report. Again, issuing the Response with a blanket refusal to all records that were not identified made it impossible for the Applicant to ascertain which records were in existence, let alone which ones were withheld lawfully.
42. In essence, providing a Response in this format did very little to respect the Applicant's right to receive a meaningful answer to the Applicant's question put in these simple words: *What information does the Executive Council Office have about this subject matter?*
43. This poor format was made worse by the fact that the Applicant was told some of the relevant records would be treated in responses to be provided by other public bodies, with little more explanations, and with the Applicant's inability to verify the accuracy of such a statement.
44. The Executive Council Office's failure to provide a full and meaningful reply to the Request left the Applicant wondering what information existed and had not been provided. The

Applicant could not be sure what specific information was refused by the Executive Council Office much less whether such information had been properly withheld.

45. 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.

46. Failure in this regard also extended to the Executive Council Office's duty to assist the Applicant in providing an appropriate and relevant response to a request for information. As a result, we find that the Executive Council Office failed to discharge its duty to properly respond to the Applicant's Request in this case.

3.3 PUBLIC BODY'S ACCOUNTABILITY

47. Before we continue with our findings, we believe it important to raise our concern regarding the production of records or sufficient explanations to the Commissioner when a complaint investigation is undertaken. By raising this concern, we are encouraging public bodies to continue to work with the Commissioner's Office in enabling a complete independent review of complaint cases by producing all relevant records for examination or a list of relevant records with sufficient details to ascertain their identification. When a public body adopts this approach, its cooperation will pave the way for resolving complaints with the expected degree of accountability.

48. Accountability is mandated by subsection 84(1) where a public body has no choice but to prove that its decision to refuse access to records based on a particular exclusion or exception of the *Act* was in fact lawful:

84(1) In any proceeding under this Act, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

49. The public body carries this burden of proof in all instances, i.e., whether the applicant challenges the decision of having been denied access before the Courts or by filing a complaint with the Commissioner, i.e., the public body must give reasons why there is no right of access by substantiating how the claimed exemption or exceptions to disclosure were applied to refuse access. The burden cannot be met where there are insufficient explanations.

50. The review mechanism ensures that access rights are being upheld by public bodies as they remain accountable for their decisions especially in cases where access to information has been refused. Where there was a lawful decision to refuse access to information, the independent review will support such a decision, while providing to the public the explanations why the refusal was in accordance with the *Act*.
51. We believe that an independent review is made possible where the Commissioner's Office is allowed to review the records or review a list of relevant records that have been described with sufficient details to permit their identification.
52. Subsection 70(1) states that the Commissioner can require the production of any record that the Commissioner deems relevant to an investigation, except for Executive Council confidences and records containing solicitor-client privileged information, which are treated differently. In other words, the Commissioner cannot *require* the production of Executive Council confidences and records containing solicitor-client privileged information. We believe that this provision was meant to allow a public body, if it so decides, to produce the relevant records to the Commissioner for her confidential review, notwithstanding that the Commissioner cannot require the public body to produce them. The use of the expression "*cannot require*" is significant in that it does not mean that the Commissioner is not entitled to see the records. This expression falls squarely within the overall intent and spirit of the *Act*: to allow the public body to make a decision regarding access to information, but at the same time, to make the public body accountable for the decision.
53. Subsection 70(1) recognizes the Commissioner's role in assuring this accountability through her independent review and it has been worded to permit such a review even where complaints involve highly sensitive records.
54. In this regard, where we accept that the Executive Council Office is not required to produce its confidences or records containing solicitor-client privilege for our review, we find that it may have considered another effective approach such as producing a list which identified the relevant records for our purposes. Production of sensitive records ought not to have become an issue in this case where a detailed list of records with brief descriptions of their content could have easily have been provided to our Office.
55. In this manner, the Executive Council Office might have been able to substantiate the application of the claimed exception in refusing access to the Applicant. Failing to do so, however, resulted in our finding that the Executive Council Office failed to meet its burden in establishing that access to the relevant records was lawful in this case.

3.4 USE OF EXCEPTIONS TO DISCLOSURE

56. While this was not made clear in the Response, our investigation revealed that the Executive Council Office withheld the same records under several exceptions to disclosure. This meant that a single record was withheld under subsection 17(1) as well as subsection 26(1) of the *Act* but it was not possible for us to determine to which record or what exceptions were applied.

57. Furthermore, as per our findings, we could only at best speculate whether the records relevant to the Request in this case were properly withheld from disclosure. We instead offer these comments in relation to the application of the exceptions claimed.

Section 17- Executive Council Confidences

58. As mentioned above, the Executive Council Office relied upon subsection 17(1) to deny access to records relevant to the Request. Subsection 17(1) sets out a mandatory exception to disclosure:

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,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council,

(b) discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council,

(c) a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council,

(d) a record that reflects communications among Ministers of the Crown relating directly to the making of a government decision or the formulation of government policy, and

(e) a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council or that is the subject of communications referred to in paragraph (d).

59. The vast majority of records held by the Executive Council Office directly relate to Cabinet functions and deliberations. As such, we accept that the nature of the work performed by the Executive Council Office is largely protected from disclosure under the *Act*. Section 17

was intended to protect “*the substance of deliberations of the Executive Council*” in order to allow Cabinet to discuss matters in confidence.

60. Given the requirement for Cabinet to approve new or amended legislation or regulations before they are introduced in the Legislative Assembly, it would appear that some of the records in relation to the amendments to the *Gas Distribution Act, 1999* may well fall within the scope of section 17, but this protection would only apply to any related Memoranda of Executive Council. Subsection 17(1) would not necessarily protect other records generated during the entire development process for those amendments.

Section 27(1)-Solicitor-Client Privilege

61. A substantive rule of evidence referred to as solicitor-client privilege is based on the protection of the confidentiality of communications between a solicitor and his or her client, and it follows that only the client has the ability to waive the privilege if the client so chooses. Where the public body engages the services of the Provincial legal counsel (Office of the Attorney General) to provide legal advice, the public body is the “client” and as such, the public body is the holder of the right to privilege, which it can waive where it wishes to do so.

62. This is reflected in how the *Act* treats solicitor-client privileged information belonging to a public body, i.e., it has made such information subject to a discretionary exception to disclosure:

27(1) The head of a public body may refuse to disclose to an applicant

- (a) information that is subject to solicitor-client privilege,
- (b) information prepared by or for an agent or lawyer of the Office of the Attorney General or the public body in relation to a matter involving the provision of legal advice or legal services in relation to the investigation or prosecution of an offence, or
- (c) information in a communication between an agent or lawyer of the Office of the Attorney General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

63. This discretionary exception permits the head of a public body to consider disclosing information that falls under privilege based on relevant factors at the time a request is made.
64. To meet its burden of proof for use of any discretionary exception to disclosure, a public body must establish that the information in question falls within the scope of the exception, and then the head must exercise his or her discretion in arriving at a decision to allow or refuse access to the information. The exercise of the discretion is reviewable to ensure that the head made the decision based on relevant factors in existence at the time the request was made.
65. For this reason, by virtue of its creation as a discretionary exception to disclosure, section 27 obligates the public body to first consider releasing the information. This provision does not create an automatic blanket exception to the disclosure of any and all information that falls within its scope. Rather, a public body must decide whether it would be appropriate to grant access to solicitor-client privileged information in light of all relevant circumstances at the time of the request. The public body, which is the “client”, can waive the privilege and decide to release the otherwise protected information where it is appropriate to do so.
66. It is important to note that, while the Office of the Attorney General or outside legal counsel can provide advice to a public body to assist it in its decision whether to waive the privilege and disclose the privileged information, the Office of the Attorney General cannot make the decision to waive or not waive the privilege for its client. The decision to waive the privilege rests solely with the head of the public body, the “client”, that owns the privilege.
67. The main reason why the Office of the Attorney General cannot make the decision to waive the privilege on behalf of its client (the public body) is because as counsel, it is precluded from disclosing solicitor-client privileged information of its clients (a mandatory exception to disclosure under subsection 27(2) under the *Act*), a recognized common law principle.
68. In this matter, the Executive Council Office claimed some records to be subject to solicitor-client privilege, and they consisted of communication between outside legal counsel and its officials. We understand that the Executive Council Office probably considered the nature of these records before denying access; yet, we are unable to ascertain whether the Executive Council Office exercised its discretion to refuse access to relevant records under subsection 27(1) of the *Act* in this case.

Section 26-Advice to a public body

69. The categories found in subsection 26(1) are discretionary exceptions to disclosure, meaning that the head must first consider whether to disclose the information depending on the facts relevant at the time of the request. Section 26 is generally meant to 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. There is, however, a caveat to subsection 26(1) exception to disclosure. The *Act* states that the exception to disclosure will not apply in certain instances found under subsection 26(2). For instance, if the information consists of a statement of policy that has since been adopted by the public body (paragraph 26(2)(c)), or the information is a final report of any of the public body's programs or policies (paragraph 26(2)(e)), the information cannot be withheld pursuant to any paragraph of subsection 26(1).
70. Therefore, the Executive Council Office had an obligation to first consider whether it would be appropriate to disclose any information found in those records on the basis of subsection 26(1). We have no indication as to whether the Executive Council Office in fact exercised its discretion before refusing access to relevant records under section 26 of the *Act* in this case.

Section 29-Disclosure harmful to legal proceedings

71. Due to the fact that litigation was anticipated before the Request was ever submitted and that the lawsuit was launched shortly thereafter, the Executive Council Office examined all of the relevant records identified from the perspective of this litigation. The identified relevant records were the same as those akin to the litigation. We would not take issue with such an approach under those circumstances.
72. As a result, the Executive Council Office relied principally on paragraph 29(1)(o) of the *Act* to refuse access to some of the information on the basis that its disclosure could be harmful to the legal proceedings:

29(1)The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to:

...

(o) be injurious to the conduct of existing or anticipated legal proceedings.

73. Again, this is a discretionary exception to disclosure that requires the public body to demonstrate how disclosing the information could reasonably be expected to have a

negative impact on actual or anticipated legal proceedings before it can decide to refuse access. When we reviewed the Executive Council Office's decision to rely on subsection 29(1), our single objective was to determine whether discretion was first exercised in considering the release of the information to the Applicant and whether that discretion was based on relevant factors in existence at the time.

74. We regrettably cannot discern whether the Executive Council Office exercised its discretion in this regard in this case.

Use of paragraph 4(b) Exemption

75. We understand that there is some confusion about solicitor-client privileged information and the application of paragraph 4(b) that excludes certain records from the Act.

76. By virtue of paragraph 4(b), the Act excludes certain records relating to the performance of the duties and functions of the Office of the Attorney General from its reach. The determination of whether a record falls within the scope of paragraph 4(b) involves a consideration of the nature of the record, the context in which it was produced, and how this relates to the Attorney General's performance of its duties and functions. In that regard, *An Act Respecting the Role of the Attorney General* (proclaimed in 2011) sets out the functions of the Attorney General, and it follows that the determination of whether a record relates to the duties and functions of the Attorney General is best made by the Office of the Attorney General, rather than another public body.

77. For these reasons, we are of the view that only the Attorney General can claim that records concerning that Office fall within the scope of paragraph 4(b), but another public body cannot claim paragraph 4(b) in relation to its own records.

4.0 OVERALL FINDINGS

78. The decision of the Executive Council Office to deny the Commissioner's Office a review of the relevant records or be provided a detailed list or affidavit in relation to the relevant records had the effect of denying itself the invaluable input that would have resulted from an independent review of the records, along with the Commissioner's interpretation as to whether the Act had been correctly applied to the relevant records in this case. That decision also denied the Executive Council Office the benefit of an independent evaluation about a complex complaint case.

79. We are unable to ascertain whether the search for relevant records was conducted adequately in this case, or that the Executive Council Office exercised its discretion when applying the discretionary exception to disclosure found in sections 26, 27 and 29.
80. The format of the Response issued by the Executive Council was not in conformity with the requirements of a properly constituted response as required by subsection 14(1) of the *Act* as it did not provide a meaningful response to the Applicant. This failure also extended to the Executive Council Office's duty to assist the Applicant in providing an appropriate and relevant response to a request for information in this case.
81. The Executive Council Office failed to meet its burden of proof under section 84 to establish that the Applicant had no right of access to the information requested in this case. The Executive Council Office might have been able to substantiate the application of the claimed exception in refusing access to the Applicant by providing a list of relevant records along with sufficient explanations as to why access could be lawfully refused under the claimed exceptions in this case. Failing to do so, however, results in our finding that the Executive Council Office has failed to meet its burden in establishing that access to the relevant records was lawfully refused in this case.
82. Consequently, we have no choice but to issue a recommendation in this case.

5.0 RECOMMENDATION

83. Given all of our findings above, the Commissioner recommends under subsection 73(1) that the Executive Council Office provide to the Applicant a properly constituted Response in conformity with section 14 of the *Act* which includes a list of all the records in its custody or under its control relevant to the Request, and that this list indicate all relevant records that were withheld in full, along with explanations as to why access to this information was refused.

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

Anne E. Bertrand, Q.C.
Commissioner