

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: 2015-2420-AP-1321

Date: January 14, 2016

*"Case about a citizen's access to an insurance adjuster's report obtained by his municipality"*

## 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* ("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 this matter.
2. On January 14, 2015, the Applicant made a formal request with the Town of Rothesay ("the Town") in which he resides to obtain a copy of an adjuster's report dated December 8, 2009.
3. The adjuster's report of 2009 had been prepared in relation to the Applicant's property after the residence sustained water damage when the Town installed a draining pipeline along that property in 2009 and the Applicant incurred expenses for damage repairs as a result.
4. The Town sought the assistance of its insurer to determine any issue surrounding the cause of the damage and its liability, if any. The Town also believed the Applicant would be seeking legal action. While that matter dates back over 6 years, the Town has not yet made a decision with regards to the report.
5. In responding to the formal request in 2015, the Town refused to grant access to the adjuster's report in its entirety on the basis that it contained advice, opinions and recommendations, information felt protected under paragraph 26(1)(a) of the *Act*.
6. Not satisfied with the Town's response, the Applicant filed a complaint with our Office on April 15, 2015.

## INFORMAL RESOLUTION PROCESS

7. As with any complaint under investigation by the Commissioner's Office, we sought to resolve the matter informally.
8. Where a complaint is filed with the Commissioner's Office regarding an unsatisfactory response to an access request, our investigation and intended outcome remains: to ensure that an applicant receives the information to which he or she is entitled under the *Act*, and to ensure that sensitive information remains protected, where warranted.

9. In cases where we find that access to all or some of the information the applicant (member of the public) was entitled to receive did not occur, we will try to resolve the complaint but in conformity with the *Act*.
10. This means there are only two ways in which a complaint can be resolved informally under the *Act* and respect conformity of its rules:
- by agreeing with our findings and provide the applicant the information that should have received in the first place; or,
  - where the public body does not agree, by our Office having to issue a Report of Findings as we are required to do under the *Act* containing the same findings and recommendations.
11. Our process to resolve access complaints does not seek a mediated outcome; rather, it allows both the public body and the applicant to better understand this legislation and ensures that the person who seeks access to the information receives the information to which he or she is entitled under the *Act*. (*Note*: A full description of the steps involved in the Commissioner's complaint process can be found on our website at <http://info-priv-nb.ca/> ).

### ***Informal resolution in this case***

12. In the present case, our investigation included a meeting with Town officials to discuss the matter, along with a thorough review of the request, the response and the adjuster's report, and the reasons why the Town believed the report should remain protected.
13. The adjuster's report in question contained the following information:
- Background information about the Applicant's property
  - Site inspection details
  - Cause of the water damage
  - Recommendations and conclusions
  - Attachments:
    - i. Statement of the Applicant
    - ii. Photographs of the Applicant's property
    - iii. Diagrams of the property and Applicant's basement

14. According to our review and analysis of the content of the report, we found that the Town could not lawfully rely on paragraph 26(1)(a) to deny access to the report in full.
15. The report did contain advice and recommendations, but the Town had not made a decision regarding the 2009 report, and there had been no legal action brought by the Applicant in relation to that property issue. In effect, 6 years had passed with inaction on both sides.
16. Both counts in our view were very relevant considerations for the exercise of the Town's discretion in deciding whether there was any valid reason in 2015, at the time the Applicant requested the information, why the Applicant should not get access to the 2009 adjuster's report, as per the rules of the *Act*. We asked that the Town reconsider in the circumstances.
17. To its credit during the informal resolution process, the Town agreed and reconsidered its decision regarding access; nonetheless, the Town decided to withhold the adjuster's report from the Applicant on the same basis: that a decision by the Town had not been made in relation to the 2009 adjuster's advice and recommendations, and that the Applicant might file a lawsuit in relation to the dispute someday.
18. Regrettably, we were unable to resolve this case informally and in conformity with the *Act* and we proceeded to prepare and issue the present Report of Findings.

## LAW & ANALYSIS

19. Before we embark on the analysis for the proper application of a discretionary exception to disclosure, we must point out that the *Act* is reflective of the fundamental notion that government is required to carry on its affairs in an open and transparent manner as it makes decisions that impact the lives of citizens every day.
20. For that very reason, the *Act* has granted to citizens a right to know in order to find out how government arrives at decisions, i.e., what information was relied upon. Citizens recognize that governments are elected to spend the public purse, including in those instances where the decision-making process may be difficult and even questioned.
21. Arguably citizens will agree with some decisions and disagree with others. In either case, both citizens and governments are better suited to carry on: for government, by

receiving invaluable feedback from its citizens; and for citizens, by becoming more engaged and participating in much needed discussions.

22. In the final analysis, the *Act* is the conduit by which citizens can obtain the information that allows them to understand how those decisions were made. Our role is to ensure that the right to know, although not absolute, is nonetheless respected in each case.

### ***Application of the discretionary exception generally***

23. As a result, for a public body to properly rely on a discretionary exception to refuse access to information requested by citizens, the public body must first determine whether all of the relevant information falls within the scope of the exception, and then examine the circumstances in existence at the time of the request in deciding whether access should be nonetheless provided.
24. This is because information that falls within the scope of a discretionary exception does not mean the information can be automatically refused.
25. To do so would have the effect of converting a discretionary exception to disclosure into a mandatory one, clearly not what was intended or stipulated in the *Act*.
26. Rather, the *Act* calls on the public body to exercise its discretion.
27. The exercise of discretion requires a decision from the public body whether or not it is still appropriate, under the circumstances, to grant access, based on all of the relevant factors at the time of the request, rather than based on factors when the information was first created.
28. To assist public bodies in making such a decision, there are a number of factors that have been listed as part of the jurisprudence in right to information cases of other jurisdictions, and they include considering:
- the public body's past practices regarding the release of similar information,
  - the nature of the record and its significance to the public body,
  - the age of the record,
  - whether there is a sympathetic or compelling need to release the information,
  - the specific wording of the discretionary exception,
  - the interests the exception attempts to balance,
  - whether the request can be satisfied by providing as much information as is reasonably practicable (severing the record),

- whether the disclosure of the information will increase public confidence in the operation of the public body,
- whether previous decisions of the Access to Information Commissioner have recommended that similar types of records or information should or should not be disclosed,
- where the information is in the nature of advice, proposals, opinions or recommendations, whether the decision to which this information relates has already been made, and,
- whether the requested information is already publicly available elsewhere.

29. In essence, the above list of factors is useful in determining the overriding question:

*What interest is the public body trying to protect?*

30. That is why we state that the exercise of discretion to withhold information that falls under a discretionary exception must be lawful.
31. To hold otherwise would mean that the exercise of discretion could be misused to trump citizens' right to access the information, a broad right of access granted under section 7 that the *Act* requires to be respected.
32. Subsection 84(1) unequivocally places the burden 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.
33. This is consistent with the wording in subsection 7(3) to only refuse access to information, rather than entire records, where the protected information can reasonably be severed so as to permit an applicant to receive the remainder of the record. In our view, this clearly demonstrates the overarching intent of the *Act* to advance the right of access to government information, and restricting that right only in few and limited instances.
34. Accordingly, when challenged on its decision to refuse access to information that falls within a discretionary exception, the public body will be required by the *Act* to prove that the decision was made on a consideration of relevant factors that were in existence at the time of the request, and those considerations point to a legitimate reason for refusing access to the information.

35. Where a complaint is filed with the Commissioner or the matter is referred to the courts under the *Act*, a first determination will be whether the requested information actually falls within the scope of the exception that is relied upon by the public body, and where it does, a second determination will be how the public body exercised its discretion and whether it was proper and in conformity with the *Act*.
36. In other words, after examining the requested information and reviewing all of the relevant circumstances of the case, the assessment is whether the otherwise protected information was considered for release, and if not released, was that decision made only on relevant factors in existence at the time of the request.
37. Where the Commissioner reviews the exercise of discretion in such cases, and finds that the public body did not consider disclosure, the Commissioner will ask the public body to reconsider its decision in light of all of the relevant factors at play.
38. If the Commissioner finds that the public body did consider disclosure, but did not identify or weigh all of the relevant factors at play, the Commissioner will ask the public body to reconsider its decision in light of this.
39. We can state having undertaken this approach during our informal complaint resolution process and it has often produced the correct outcome in respect of conformity with the *Act* in many cases.
40. For example, and we underline this point, where the public body has agreed to do so and has reconsidered its decision based on relevant factors at play at the time of the request, that exercise of discretion will be upheld, notwithstanding the fact that the decision may remain that access is refused.
41. It is only in those cases where the public body agrees to reconsider its decision but continues to rely on factors that our investigation found not to be relevant that the issue of conformity with the *Act* is raised. In those cases, we cannot uphold the exercise of discretion because the public body has not met its burden of proof under section 84 in proving that the applicant did not have a lawful right of access in the circumstances in existence at the time of the request.
42. Accordingly, in those complaint investigation cases where we find that the public body has improperly relied on a discretionary exception, and its reconsideration of that decision remains based on factors we found not to be relevant, we will have no choice

but to recommend that the information be disclosed. The Commissioner's recommendation is not arrived at lightly; it is issued strictly on the basis that the public body did not meet its burden to prove that the applicant did not have a lawful right of access to the requested information.

43. In recent investigations, we have come across cases where public bodies are not applying the discretionary exceptions in conformity with the *Act*, and it is for this reason that it is necessary for the Commissioner, as the independent oversight of this legislation, to ensure that this does not become a trend.

### ***Application to this case***

44. The Applicant sought access to the 2009 adjuster's report. The report contained information in the form of advice to assist the Town in making decisions in the event of litigation; however, we also found that the adjuster's report contained facts and background information which is not considered advice or opinion.
45. As such, factual or background information cannot be protected under paragraph 26(1)(a) and we indicated to the Town that it could not refuse access to that information. The Town agreed with our findings that the factual and background information contained in the report should not have been withheld in this case.

### ***Paragraph 26(1)(a) - discretionary exception for advice and recommendations***

46. The *Act* recognizes that governments need and must rely on the free flow of opinions in assisting the decisions makers to embark on programs, services or projects. Paragraph 26(1)(a) is intended for that purpose; however, it did not intend this type of information to remain protected forever, as it would have made paragraph 26(1)(a) a mandatory exception to disclosure rather than a discretion one.
47. The Town relied on paragraph 26(1)(a), a discretionary exception regarding advice or recommendations to withhold the adjuster's report in this case. We agreed that the report contained actual advice and recommendations.
48. We then indicated to the Town that it was required to determine, based on relevant factors present when the Request was made in this case in 2015, whether that advice or recommendations should be released, despite the fact that it did constitute advice or

- recommendations. In other words, whether there was a legitimate interest in continuing to protect the advice and recommendations.
49. On that score, an important factor to be considered was whether the Town had made a decision (or had acted) on the advice and recommendations. This is what is referred to as a *point in time* consideration, a consideration that is evident in all of the subcategories of section 26.
  50. The facts of this case are such that the Town engaged the services of an insurance company in 2009 to assess the Applicant's property after the Applicant raised the issue of damage to his property following repairs undertaken by the Town.
  51. The Town obtained the adjuster's report in 2009 but refused to share it in full with the Applicant. The Town did not act on the advice or recommendations found in the report in 2009, and even at the late date of the Applicant's request in 2015, the Town still had not made a decision or acted upon the contents of the report.
  52. While the facts do indicate that the Town has not made a decision or acted upon the adjuster's report in 6 years, there comes a point in time where there is a legitimate question as to when the act of not deciding or inaction may in fact constitute a decision not to decide and not to act.
  53. To hold otherwise would mean that public bodies could continue to protect any advice or recommendations forever simply on the basis they were not acting on it, clearly not what the *Act* intended under section 26.
  54. In this regard, we found that it is a relevant factor, in conjunction with the Applicant's right of access to the adjuster's report, that when the Applicant made a formal request to obtain the report in 2015, the Town had decided not to make a decision and not to act on the advice and recommendations contained in the report it received in 2009.
  55. We find that the Town has not met its burden to prove that the Applicant was not entitled to receive access in 2015 to the advice and recommendations found in the 2009 adjuster's report solely on the basis that the Town decided not to make a decision or act on the report.
  56. In further support of its decision not to provide access, the Town said that the Applicant might bring a lawsuit. We point out that the likelihood of litigation is a separate

exception to disclosure (found in section 29) and it must be demonstrated that there is a good chance litigation will be brought and to release the information will harm the proceedings. Section 29 cannot be used as a consideration under section 26 to withhold advice and recommendations.

57. On that point we indicate in any event that many years have passed since the property dispute was raised and there have been no commencement or intention to bring a legal action on the part of the Applicant, i.e., none of it has occurred after more than 6 years. For this reason, and as we indicated to the Town, this was not a relevant consideration for its lawful exercise of discretion in refusing access to the adjuster's report in full in the circumstances.
58. When we look critically at factors that could help decide whether the Town should have considered disclosure of the report in this case, we find that are more factors that favor disclosure, such as:
- the age of the report,
  - a sympathetic need to release the information to a citizen who wants to know why the damages occurred,
  - the interests the exception regarding advice attempts to balance, which in this case, is no longer pertinent given the time that has since past;
  - the fact that the Request cannot be satisfied by providing only some of the report;
  - that the disclosure of the report will increase public confidence in the Town's operations, and,
  - that the Access to Information Commissioner has recommended that similar types of records or information should be disclosed (2013-1669-AP-901 dated September 29, 2014) where a recommendation was issued to a municipality to release an adjuster's report on the basis there were no facts that the citizen intended to commence legal action.
59. We do not dispute the fact that the Town has a discretion to protect advice and recommendation that has been prepared for the Town, before a decision is made, or in anticipation of legal action where releasing that information would harm the conduct of legal proceedings.

60. We simply point out once again that neither of these two factors exists in this case or are relevant consideration in the exercise of discretion under paragraph 26(1)(a).

## FINDINGS and RECOMMENDATION

61. Given our role to determine whether the discretion to refuse access to the requested information was properly exercised in accordance with the *Act* in this case, and based on the facts of this case and our analysis above, we find that the Town did not meet its burden to prove as per paragraph 26(1)(a) and section 84(1) that the Applicant did not had a right of access to the 2009 adjuster's report in full.
62. Accordingly, we find that the Applicant was entitled to receive access to the adjuster's report dated December 8, 2009 in its entirety.
63. In accordance with subsection 73(1), the Commissioner recommends that the adjusters' report in question be released to the Applicant without redactions.

Dated at Fredericton, New Brunswick, this \_\_\_\_\_ day of January 2016.

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Anne Bertrand, Q.C.  
Access to Information and Privacy Commissioner