

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: 2015-2858-AP-1546

Date: May 25, 2016

"Case about access to a government department's archaeologist inspection report"

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") and stems from a Complaint filed on November 27, 2015 by the Applicant for having received an unsatisfactory response to an access to information request filed in August 2015 with the Department of Tourism, Heritage and Culture ("the Department").
2. The Applicant wanted to receive a copy of an archaeological inspection report for the Sisson Mine Area ("the Request").
3. The Department responded by refusing access in full on the basis of paragraph 26(1)(a), i.e., that the report provided advice and recommendations to the Minister which the Department had not yet decided whether to accept.
4. The Department also refused on the basis of third party business information after consulting related third parties on the basis of paragraphs 22(1)(c)(i) and 22(1)(c)(iii), explaining that the disclosure would possibly harm the competitive position and/or result in significant financial loss to them.
5. The Applicant disagreed, adding that the report was an archaeological analysis conducted with public monies on behalf of the people of New Brunswick.

BACKGROUND AND INFORMAL RESOLUTION UNDERTAKEN IN THIS CASE

6. The Sisson Mine Project was brought about from a proposal by private industry (the Sisson Partnership) to develop a tungsten and molybdenum open pit mine and processing plant on Crown lands in New Brunswick (the "Project").
7. Given the scope and nature of the Project, substantial amount of preliminary work, including assessments and approvals from both Provincial and federal authorities were required, including environmental impact assessments.
8. The Project also involved significant excavation and disruption to the ground around the proposed site, bringing about its need to be compliant with the *Heritage Conservation Act*, a statute that governs the preservation and conservation of archaeological and paleontological objects and burial sites. The Department administers that statute and

- the Department has oversight and enforcement powers to ensure compliance with that law.
9. To conduct archaeological work at the proposed site, the Sisson Partnership retained Stantec Consulting Ltd. (“the Consultant”), a professional archaeological consulting firm. The Consultant obtained the requisite permits from the Department and undertook an archaeological work on behalf of the Sisson Partnership.
 10. As the preparatory work on the Project site progressed, First Nations communities in the surrounding area had concerns about the impact on heritage and archaeological resources; therefore, they asked the Department for a full-time on-site inspector to monitor whether the obligations under the *Heritage Conservation Act* were being met.
 11. The Department is authorized to conduct inspections as part of its enforcement powers under section 74 of that law. The Department hired a private sector archaeologist (J. Jeandron, “the Inspector”) to conduct an inspection on the Department’s behalf (retained in 2014).
 12. The Inspector submitted a report to the Department (“Provincial Inspector’s Report on Archaeological Activity at the Sisson Mine, 2014”). The Department received the final version of the Report from the Inspector in March 2015, following which the Department had to make a determination on how to proceed. This is the Report requested by the Applicant in this case.
 13. At the time the Department received the Applicant’s Request on August 25, 2015, a final decision had not yet been made in relation to the Report and its recommendations.
 14. Thereafter, in December 2015, the Province approved the environmental impact assessment for the Project, subject to the Sisson Partnership developing a Heritage Resource Protection Protocol and other archaeological assessment and mitigation activities before moving forward with the Project. In April 2016, the federal government approved the environmental impact assessment, subject to recommendations about heritage resources similar to the conditions imposed by the Province.

INFORMAL RESOLUTION UNDERTAKEN IN THIS CASE

15. As in all complaint investigations, our Office first seeks to resolve the matter informally to the satisfaction of both parties and in accordance with the rights and obligations set

out in the *Act*. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner's work remains the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the *Act*.¹

16. We sought to resolve this case by first reviewing how the Department processed the Request, then reviewing the requested Report, and finally, by obtaining input from the Department about its concerns to grant access to this information. In our preliminary findings that we shared with the Department, we agreed that at the time of the Request, the Department was entitled to rely on the exception regarding advice as a final decision about the Report had not yet been made. We pointed out, however, that this exception did not apply to the factual and background information also contained in the Report and found that at the Department should have granted partial access to this information to the Applicant.
17. We therefore asked the Department to reconsider the decision to refuse access in light of these considerations. The Department was amenable to proceeding informally and offered to have the Applicant attend its offices to review the Report. The Applicant did not find this to be a satisfactory outcome and asked that we conclude our investigation with formal findings. This brought the informal resolution process to an end and the Complaint became the subject of the present Report of Findings under section 73 of the *Act*.
18. We reiterate that during the course of this Complaint investigation, we were informed by Department officials that a final decision had been made in relation to the Report. More on this at the end of this Report.

LAW AND ANALYSIS

Department's reliance on paragraph 22(1)(c)—third party business information to refuse access to the Inspector's Report

19. Paragraph 22(1)(c) is intended to protect certain kinds of information that could reasonably be expected to harm a third party's business interests. If the information

¹ The Commissioner's authority to investigate and resolve complaints is established under section 68, with subsection 68(2) delineating the parameters of an informal resolution of a complaint "in a manner consistent with the purposes of the Act". This means that the resolution cannot be a mediated settlement or an outcome obtained by the parties' compromise. The Commissioner's authority to affect an informal resolution of an access complaint requires that it be done in a manner that respects the law, upholds an applicant's access rights, and fulfills a public body's statutory obligations. A full description of the steps involved in the Commissioner's information resolution process can be found on our website at <http://info-priv-nb.ca>.

meets the two elements of this exception, a public body must refuse access.² The public body must present detailed and convincing evidence why harm could result with disclosure, rather than rely on speculation or beliefs that harm might occur.

Scientific or technical information

20. The Report was prepared by a professional archaeologist, retained by Government as an inspector to assess the level of Consultant's compliance with the *Heritage Conservation Act*. The Inspector reviewed:
- reviewed the Consultant's work conducted to date,
 - reviewed the Consultant's reporting documents, and,
 - conducted on-site inspections.
21. The Inspector stipulated his observations and findings about the archaeological work conducted by the Consultant at the proposed Project site. Given the content of the Report, we find that this information qualifies as scientific or technical information, thus meeting the first part of the test.

Harm to a third party's business interests

22. The Department sought representations from both the Consultant and the Sisson Partnership on the possible disclosure of the Inspector's Report. The Department was correct in not considering the Inspector as a third party, as the Inspector was acting in the place of the Department in this case (normally, inspections are conducted by Department staff).
23. Both third parties (Consultant and Sisson Partnership) objected on the basis of paragraph 22(1)(c).
24. The Consultant's written representations raised the following concerns:
- a) that the Report contains its own scientific and technical information (description/analysis of its field methodology, its reports, maps, log information, excavation processes);

² It is a two-part test: a) that the information is in fact commercial, financial, scientific, technical or concerns labour relations; and, b) that releasing the information could reasonably be expected to result in one of the types of contemplated harm described in subparagraphs 22(1)(c)(i) to (v) – competitiveness, contractual negotiations, financial losses or gain to others, loss of similar information being provided to government, or due to revealing labour relations dispute information.

- b) that the Consultant believed the Report contains unfounded opinions and/or misstatements about its services and the performance of its professionals and disclosing the Report could lead to a loss of business and damage to its reputation as a provider of professional archaeological consulting services;
 - c) that the Inspector, a professional archaeologist, is a direct business competitor to the Consultant;
 - d) that the Report was still in draft form;
 - e) that the Department would take the Consultant's input into consideration before making a decision about the Report; and,
 - f) should the Department disclose the Report, that the Consultant's comments also be disclosed to mitigate any damage to its professional reputation.
25. The Sisson Partnership's representations were also provided in writing and stated that the Report contains scientific and technical opinions of the Inspector and that its disclosure would harm the competitive position and business of the Consultant. The Sisson Partnership added that where the Department decided to disclose the Report, that it do so along with the Consultant's comments about the Report.
26. The Department considered these representations and decided to refuse access, agreeing that it could harm the Consultant's business interests (Report unfairly cast the Consultant in a negative light) or impact the Consultant's business reputation.
27. We examined the third parties' representations and the Department's reasons for refusing on this basis.
28. The Report does not contain protected business information of either the Consultant or the Sisson Partnership; rather, the Report clearly serves as an assessment of the Consultant's level of compliance with its legislated obligations under the *Heritage Conservation Act* in undertaking archaeological work at the proposed Project site.
29. While the Inspector's Report does contain some third party business information (about proposed drill locations and test pits), there is nothing to suggest how releasing this particular information would harm either the Consultant's or the Sisson Partnership's business interests, or the Project itself. The test is not met in this case.
30. We also point out that while a private company may not like or agree with the contents or result of such an inspection and has concerns about the impact of a negative

inspection finding may have on its business interests, this is not sufficient to meet the test for the exception to disclosure found in paragraph 22(1)(c).

31. In fact, to adopt this approach would mean that any inspection report that finds full compliance would be made available while those that found non-compliance issues would be protected from disclosure. Such an approach cannot be supportable to the Department's oversight duties in monitoring compliance of the *Heritage Conservation Act*.
32. More importantly, we also considered the reason why the Department hired the Inspector in the first place that resulted in the drafting of the Report: to inspect and report on the Consultant's level of compliance with the requirements of the *Heritage Conservation Act*.
33. For all of these reasons, we find that the Report is not protected from disclosure under paragraph 22(1)(c) and the Department was not entitled to rely on this exception to refuse access to the Applicant in this case.

Department's reliance on paragraph 26(1)(a)—advice information to refuse access to the Inspector's Report

34. This is a discretionary exception to disclosure, meaning that the public body must first determine if the information is or could reveal "*advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown*", and secondly, it must look to the relevant factors at play at the time of the request to first consider disclosure (proper exercise of discretion), and only refuse where it is appropriate to do so, based on relevant factors present.
35. Part of the information contained in the Report is about the Inspector's mandate and description of work, historical information, the list of cited reference works, and figures (at the end of the Report). This type of information does not qualify as advice, opinions, proposals or recommendations, nor would it reveal the Inspector's opinions and recommendations. We find this information does not fall within the scope of this exception, meaning this exception cannot be relied upon to refuse access to this specific information.
36. As for other parts of the Report that provide the Inspector's opinions (observations and findings about the Consultant's work) and the Inspector's recommendations (eight

recommendations at the conclusion), we find that this specific information does fall within the ambit of this exception. As such, the Department then had to exercise discretion in first considering whether these parts of the Report should be released, at the time it received the Applicant's Request. We know that the Department did so in this case.

37. In exercising its discretion at the time of the Request, the Department considered the fact that it had not yet made a decision with regards to the Report and the Inspector's recommendations, and the third parties' concerns about the potential impact on their business should the Report be released.
38. We find that it was a relevant factor for the Department to consider the question of a decision not having been made in how to proceed with the Report at the time it received the Request. We disagree that the Department's concerns with the content of the Report can be a relevant factor in determining access rights under the *Act*. Concerns about the content of a report prepared by or for the Department is not within the realm of the section 26 exception to refuse access.
39. The Department's Report (even where carried out by an external inspector in its stead) as part of its oversight of the Consultant's performance under or compliance with the *Heritage Conservation Act* should be made available. The Department expended public funds in the performance of that regulatory role and must be transparent in how it monitors compliance of a public statute.
40. The only caveat is that the Report was not a *final audit* on the Consultant's performance under or compliance with the *Heritage Conservation Act* as a decision had not yet been made in relation to the Report's recommendations at the time of the Request.
41. This therefore supports the application of paragraph 26(1)(a) so as to allow the Department to refuse access to the Inspector's advice and recommendations, on the basis that a final decision had not yet been made at the time the Applicant filed the Request in November of 2015.

FINDINGS AND RECOMMENDATION

42. We therefore find that the Department:
 - was not entitled to rely on paragraph 22(1)(c) to refuse access to the Inspector's Report in this case;

- was entitled to rely on paragraph 26(1)(a) to refuse access to the opinions and recommendation information only found in the Inspector's Report at the time the Request was made; but,
 - was not entitled to rely on paragraph 26(1)(a) to refuse access to the remainder of the content of the Inspector's Report as described above.
43. Based on the above findings, we recommend pursuant to subparagraph 73(1)(a)(i) of the *Act* that the Department provide to the Applicant a copy of the Inspector's Report, with redactions only for opinions and recommendations.

COMMISSIONER'S FINAL COMMENTS

44. We comment further on the above access rights given the timing of this Report of Findings, as well as the fact that the Department has decided not to take further action on the Inspector's recommendations. In our view, this constitutes the Department's final decision with respect to this Report.
45. It follows that were the Department to receive an access to information request today, paragraph 26(1)(a) would no longer apply to any of the content of the Report, meaning that the entire Report would have to be disclosed. The Department showed good judgement in wanting to resolve this complaint during our resolution process by being willing to let the Applicant examine the Report and put questions to its officials.
46. Therefore, despite our recommendation above, we would encourage the Department to consider granting access to the full Report to the Applicant in respect of its rights of access as they exist today, i.e., by again exercising good judgement and provide the Applicant with an unredacted copy of Report.

Dated at Fredericton, New Brunswick, this 25th day of May, 2016.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner