

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: 2015-2862-AP-1549

Date: June 10, 2016

*"Case about access to information about names of Crown Prosecutors,
appointments, meetings and appearances in relation to the Applicant"*

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 when an Applicant was refused access to information from the Office of the Attorney General.
2. The Applicant had previous involvement the Office of the Attorney General and requested "the records of employment" about three Crown Prosecutors (two identified by name and one who worked in a specified location) during a four-month period, including dates and times of their employment, dates and times of appointments, including court-related meetings and appearances, and corresponding locations including the specific building, office or venue.
3. The Applicant was also seeking names of other public officials who might have been in attendance at those meetings ("the Request").
4. The Office of the Attorney General responded by letter dated November 13, 2015, indicating that it had conducted a review of its files and that it was refusing access to all of the requested information on the basis of subsection 21(1) (*unreasonable invasion of third party privacy*), paragraph 21(2)(e) (*third party employment, occupational or educational history*), and paragraph 29(1)(e) (*endangerment to life or safety of another person*).
5. Records withheld pertained to information regarding letters of employment, noting the salary and compensation agreement, staff agenda (electronic and on paper) pertaining to client appointments, personal information and court appearances ("the Response").
6. In making the Complaint, the Applicant confirmed that the only information sought was that which related to the Applicant, including the actions of the Attorney General's Office in relation to the Applicant.

INFORMAL RESOLUTION PROCESS

7. 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*.

8. 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>. Below is a summary of what this process provides:
 - to the public body, the benefit of our independent Office's interpretation of the law and an opportunity to correct any error in access that may have been made, and the satisfaction of having complied with its obligations under the *Act*;
 - to the requester of the information (the applicant), the benefit of an independent analysis of which information was truly required to be released under the *Act*; and,
 - for the public in general, the satisfaction of understanding right of access to information and having that right respected under the *Act*.

Informal resolution undertaken in this case

9. We held discussions with Attorney General officials with a view to resolve this matter. We reviewed all elements of the Request, and obtained input on how the Request was processed, as well as how the decision was made to refuse access to all of the requested information. The Office of the Attorney General was unwilling to discuss any details of the Applicant's involvement with its officials. While that Office provided us with some limited information for our review, it was unwilling to allow us full access claiming that paragraph 4(b) applied so as to remove this information from the scope of the *Act*.
10. Officials with the Office of the Attorney General were also unwilling to provide the requested information to the Applicant based on their concerns for the Crown Prosecutors' safety and they continued to rely on the paragraph 29(1)(e) exception.
11. As a result, we could not move forward with the informal resolution process on the basis that the *Act* calls for further disclosure than the Office of the Attorney General was willing to provide. We explain that analysis below in this Report of Findings in conclusion of our investigation as required by section 73 of the *Act*.

LAW AND ANALYSIS

Assisting the Applicant, Adequately searching for information, and Providing a meaningful response

12. We were required to determine what relevant information existed in relation to the Request, and the Response stated that access to letters of employment, staff agendas relating to client appointments, personal information and court appearances was being refused, which indicated to us that the Office of the Attorney General had information on all of these points in its records.
13. We asked how the search for relevant information was conducted, and the Office of the Attorney General took the following steps in this case:
 - asked its internal human resources branch for the requested employment-related information;
 - asked the individuals identified in the Request to conduct searches for relevant information, including in their notes, emails and Outlook calendars; and,
 - retrieved and reviewed its internal file on the matter involving the Applicant, in which all records, notes, details of the situation are compiled.
14. The Office of the Attorney General was unwilling to allow us to review its internal legal file, so we asked that it provide us with a list of the relevant information it had in its records. While we saw very little, the Office of the Attorney General:
 - provided us the names of the Crown Prosecutors at the location specified in the Request;
 - informed us that there was no relevant information in the Crown Prosecutors' calendars about appointments, meetings or appearances;
 - informed us that there were no court-related meetings or appearances regarding this matter during the specified time period; and
 - provided us heavily redacted emails that had not been initially identified during the search in relation to meetings and/or discussions that took place in relation to the Applicant.
 - We were only permitted to review very little of the information contained in these emails (names, the date the emails were sent, and dates on which meetings and/or discussions took place), as the Office of the Attorney General claimed paragraph 4(b) applied to the remainder of

the information in the emails. As a result, we could not decipher what the redactions consisted of.

15. Therefore, we have no choice but to find that the Office of the Attorney General did not initially identify all of the relevant information in its records, and that its Response which indicated that information about staff agendas (electronic and paper) pertaining to appointments and court appearances was being withheld was as a result misleading as this information appears not to exist.
16. We also find that the search conducted during the processing of the Request did not identify all of the relevant information in the Office of the Attorney General's records, and the Response as provided did not fully explain to the Applicant what information in fact existed in relation to the Request.
17. In addition, the Response did not provide any explanation as to why the Office of the Attorney General was relying on the paragraph 29(1)(e) exception (*endangerment to life or safety of another person*) in refusing access, which was also not helpful for the Applicant to understand why access to all of the requested information was being refused, actions that were contrary to the Office of the Attorney General's duty to assist obligation as a public body subject to the *Act*.
18. For all of these reasons, we find that the Attorney General's Office failed to assist the Applicant and failed to provide the Applicant with a proper and meaningful response, contrary to sections 9 and 14 of the *Act*.

LAW AND ANALYSIS

19. Given the backdrop to this case, we set out to determine whether the Applicant had a right of access to any of the requested information, and if so, whether the Office of the Attorney General was entitled based on circumstances at the time of the Request to refuse access in entirety.
20. We begin by stating categorically that under section 7, every individual has the right to request information about him or herself held in records of a public body. Then, "personal information" of an individual is defined in the *Act* to include recorded information about an identifiable individual. Therefore, a person has the right to know when a public official is discussing a case about that person. Accordingly, when the

Applicant sought access to dates and times and names of those who met to discuss the Applicant's case, there existed for that person a right to access that information.

21. The next question is whether that right of access was otherwise curtailed as per applicable exceptions to access rights found under Part 2 of the *Act*.
22. This is the next step in our analysis.
23. Was the Office of the Attorney General's use of exceptions in this case lawful in curtailing the Applicant's right of access to the requested information that was about the Applicant?
24. We first examine the Office of the Attorney General's use of section 21 exception to the various records refused in the Response.

Access to employment-related information of the Crown Prosecutors

25. The Office of the Attorney General was unwilling to provide the Applicant with employment-related information about any of the three Crown Prosecutors. While we agree that specific employment details (such as specific salary information) would be protected from disclosure, we do not agree that confirming the names of the three Crown Prosecutors and their location of work for the timeframe of the Request is an unreasonable invasion of their privacy. Rather, this is basic information about public service employees that is generally publicly known: that a person is employed in a particular position at a particular work location. Further, this information falls within the scope of paragraph 21(3)(f), which treats information about the employment responsibilities of an officer or employee of a public body as being subject to disclosure as it would not constitute an unreasonable invasion of privacy.
26. As a result, we find that names of the three Crown Prosecutors and their location of work for the timeframe of the Request should not have been refused and rather should have been disclosed to the Applicant.
27. All other information found in the Crown prosecutors' respective records of employment was properly refused under paragraph 21(2)(e) on the basis of third party employment or occupational history, as this constitutes personal information that remains protected unless the Crown Prosecutors had consented to its disclosure.

Access to dates and times of appointments including any and all court and related meetings and appearances

28. The purpose of the Applicant's Request was to seek confirmation of when and where these Crown Prosecutors participated in appointments, meetings, and/or appearances in relation to the Applicant's case, including any other public or government body employees who may also have been present, rather than the contents of or details about any appointments, meetings, and/or appearances that may have taken place.
29. As stated above, we find this was the Applicant's personal information. Did the Applicant have a right of access to it?
30. While we were permitted to review only heavily redacted records, we could still find that access to information of this nature could not have been refused on the basis of unreasonable invasion of privacy of Crown Prosecutors. We point out that this information was created while Crown Prosecutors were performing duties in their official capacities. It cannot be said that the disclosure of that information would cause an unreasonable invasion of the Crown Prosecutors' privacy as it is not their personal information or information about them in their personal capacity. Rather, it is information in their professional capacity as employees of the Office of the Attorney General and in the conduct of their employment duties.
31. Furthermore, those duties at those times related directly to the Applicant.
32. For these reasons, we find that the Office of the Attorney General was not entitled to rely on this exception to refuse access to this information to the Applicant.
33. Also, at least one official or employee of a federal public body was involved and, we find that this information could not be refused under section 21 as an unreasonable invasion of privacy. Information about a person who is an officer or employee of a federal government body is subject to the same disclosure rules as those of Provincial public bodies, and in this case, this information is again in relation to the Applicant. Access to all of this information should have been granted.
34. As a result, we find that the Applicant was entitled to receive most of the requested information as the section 21 exception could not be relied upon to refuse it.

35. With this finding, however, we must also consider the Office of the Attorney General's application of the paragraph 29(1)(e) exception as grounds to refuse access to this same information.
36. Paragraph 29(1)(e) provides:
- 29(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to
- (...)
- (e) endanger the life or safety of a law enforcement officer or any other person...
37. This is a discretionary exception to disclosure that is based on a reasonable expectation of harm test. To be entitled to rely this exception, a public body must present detailed and convincing evidence that demonstrates a rational connection between the feared or alleged harm and the disclosure of the information in question. The public body is not required to establish certainty that endangerment will occur, but must present something more substantive than speculation.
38. Most other Canadian jurisdictions have similarly worded exceptions in their respective access to information legislation, and the corresponding oversight bodies have adopted this test.
39. In support of its reliance on this exception, the Office of the Attorney General stated that as a general rule, it has an obligation to protect its staff, particularly given the nature of the role and work of Crown Prosecutors in prosecuting criminal offences, and that its practice is to refuse to disclose information about a particular Crown Prosecutor's calendar or appointments as this information falls under paragraph 4(b) and thus the *Act* does not apply. Further, it would not disclose even general information of this nature if doing so could reasonably be expected to threaten a Crown Prosecutor's safety.
40. Specifically to the Applicant's case, the Office of the Attorney General referred to its numerous interactions with the Applicant over the past couple of years, stating that the Applicant was not accepting of explanations and clarifications on the process taken in relation to the Applicant's case. The Office of the Attorney General indicated that the Applicant's communications had become more personal in nature and were causing unease with those involved.

41. The Office of the Attorney General's primary concern was that the Applicant was seeking specific information to "build a profile" of the Crown Prosecutors involved in the Applicant's case.
42. According to our investigation, however, the information presented to us did not point to a risk of specific threat or endangerment to the life or safety of those involved, particularly in light of the relatively innocuous information that is being sought: dates, locations, names of those involved in appointments, meetings, or appearances in relation to the Applicant's case.
43. Accordingly, we find that the Office of the Attorney General did not meet its burden of proof to substantiate that it was entitled to rely on the paragraph 29(1)(e) exception to disclosure to refuse access to this information to the Applicant.
44. As a result, we find that the Applicant was entitled to receive most of the requested information as the section 29 exception could not be relied upon to refuse it.

FINDINGS AND RECOMMENDATION

45. As indicated above, we find that the Attorney General's Office did not meet its statutory obligation to assist the Applicant and to provide the Applicant with a proper and meaningful response, contrary to sections 9 and 14 of the *Act*.
46. Based on our findings above, we find that the Office of the Attorney General was entitled to rely on paragraph 21(2)(e) (third party employment, occupational or educational history) but only to refuse access to more detailed employment information found in the employment records of the Crown Prosecutors, and this information was properly withheld.
47. That being said, we find that the Office of the Attorney General was not entitled to rely on any exception to refuse access to the names of the Crown Prosecutors and appointments, meetings, and appearances in relation to the Applicant's case. This information falls within the paragraph 21(3)(f) deeming provision as not resulting in an unreasonable invasion of privacy if disclosed, meaning that this information should have been provided to the Applicant, and is in line with the Applicant's right of access to one's own personal information.

48. Finally, we find that the Office of the Attorney General did not meet the statutory burden of proof by providing sufficient evidence to substantiate that the disclosure of the requested information could reasonably be expected to endanger the life or safety of the Crown Prosecutors.
49. As a result, we find that the Office of the Attorney General was not entitled to rely on the paragraph 29(1)(e) exception to refuse access to any of the requested information to the Applicant in this case.
50. Based on the foregoing, we recommend pursuant to subparagraph 73(1)(a)(i) of the *Act* that the Office of the Attorney General release the information to which we have found the Applicant has a right of access, namely for the period stipulated in the Request:
- the names of the three Crown Prosecutors;
 - the dates, times, and location of the meetings and/or location of the discussions that took place in relation to the Applicant's case;
 - and
 - the names of attendees who are Provincial or federal public body employees.

Dated at Fredericton, New Brunswick, this 10th day of June, 2016.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner