

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: 2013-1315-AP-675

Date: October 30, 2013

Case about access to personal information

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into the matter.
2. The Applicant was enrolled with the Family Support Orders Service, which is a program within the Department that monitors and enforces spousal support orders and agreements. The Applicant had been making regularly scheduled support payments through the Family Support Orders Service as required by a court-issued support order. When the Applicant experienced a significant change in income level, the Applicant took steps to have the amount of support payments lowered accordingly.
3. As the amount of support was determined by a court order, the Applicant could only vary the payment amount through the courts, but was not able to get a court date for several months. In the interim, the Applicant sought assistance from the Family Support Order Service to have support payments reduced or stopped, which they were unable to authorize. When the case was heard, the Court found in favour of the Applicant by reducing the amount of support payments retroactively and ordering the spouse to repay the excess amount to the Applicant.
4. Following this lengthy spousal support dispute, the Applicant was frustrated with the process and wanted to know how the Office of the Attorney General and Department of Justice ("the Department") had handled the matter. The Applicant therefore made a request under the Act for the Applicant's own personal information held by the Department since February 1, 2005 was received on February 27, 2013 and stipulated the following:

Information that is contained in a record that is written, photographed, recorded or stored by graphic, electronic or mechanical means with the Department of Justice and Attorney General including the Office of the Minister, the Office of the Deputy Minister, the office of the Assistant Deputy Minister, the Office of Program Support Services (Branch) and the Office of Fredericton Family Support-Support Orders (Regional Office). Also the Court of Queen's Bench Family Division.

(the "Request")

5. The Department issued a response on March 28, 2013, granting partial access to the requested information with the following comments:

The Department has completed a review of its files, and has determined that there are records in the custody or under the control of the Department that relate to your request.

Your request is being granted in part. The information you are entitled to receive under the *Act* is enclosed forthwith.

Please note that parts of the enclosed documents have been redacted. The redacted information is exempt from disclosure as the information is personal information relating to third parties and is being withheld pursuant to subsections 21(1) and 43(1) of the *Act*.

Subsection 21(1) of the *Act* states as follows: "The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy." As the redacted information is personal information, and its disclosure would be an unreasonable invasion of a third party's privacy, it is exempt and is being withheld under subsection 21(1). It is also being withheld under subsection 43(1) of the *Act* on the basis that disclosure of the information is not authorized under Division B of Part 3 of the *Act*.

Some records relevant to your request are being withheld in their entirety. These records contain personal information and are being withheld for the same reasons set out above. Information that falls under paragraphs 4(a) and 4(b) of the *Act* are not subject to its application. Information found in court records and records that relate to the performance of the duties and functions of the Office of the Attorney General have consequently been withheld. Section 4 of the *Act* reads in part as follows:

4 This *Act* applies to all records in the custody of or under the control of a public body but does not apply to

(a) Information in a court record, a record of a judge, a judicial administration record or a record relating to support services provided to a judge or to a court official,

(b) a record pertaining to the legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General,

The functions of the Office of the Attorney General are set out in section 2 of *An Act Respecting the Role of the Attorney General*, which provides as follows:

2 The Attorney General is the law officer of the Executive Council and shall do the following:

(a) see that the administration of public affairs is in accordance with the law;

- (b) perform the duties and have the powers that at common law belong to the Attorney General, so far as those duties and powers are applicable to New Brunswick, and perform the duties and have the powers that, until the Constitution Act, 1867 came into effect, belonged to the Office of the Attorney General in the Province of New Brunswick and which are, under the provisions of that Act, within the scope of the powers of the Legislature;
- (c) carry out the duties and exercise the powers that are attendant to the prosecution of offences by an in proceedings under statutes and regulations in which offences are created;
- (d) advise the government on all matters of law connected with legislative enactments and on all matters of law referred to him or her by the government;
- (e) advise the heads of government departments on all matters of law connected with those departments;
- (f) conduct and regulate all litigation for and against the Crown;
- (g) advise government on all matters of a legislative nature and superintend and draft all government measures of a legislative nature;
- (h) perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant-Governor in Council.

Some of the records in the custody of the Office of the Attorney General that relate to your request pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General as described in section 2 of An Act Respecting the Role of the Attorney General. Therefore the Act does not apply to these records.

As your request is being refused in part, you have the right to file a complaint with the Access to Information and Privacy Commissioner about the refusal or to refer the matter to a judge of the Court of Queen's Bench of New Brunswick for review.

(the "Response")

6. The Applicant received several documents in full, mostly consisting of correspondence between the Applicant and Department officials, statements of account through the Family Support Orders Service, and court records and legal documents relating to the Applicant's legal case. The Applicant also received copies of the relevant Case Activity Report entries from the Family Support Orders Service and copies of email

correspondence among Department officials, with some redactions. Other records were refused in full, but the Response did not provide any further information about what those records are.

7. Not being satisfied with the Response, the Applicant filed a Complaint with our Office on April 10, 2013, raising these issues:

- Who is the third party in relation to the Request;
- That subsection 43(1) does not appear to apply to a request for personal information, therefore information that was withheld under this provision should be disclosed; and,
- Whether the information refused under paragraphs 4(a) and (b) was properly withheld, as the Applicant believed that some or all of the information does not fall under the scope of these provisions.

8. In making the Complaint, the Applicant expressed the following:

My concern has been why certain decisions were made with respect to requests that I had made to the office of Spousal Support Enforcement during 2012. To better understand how and why these decisions were made and to perhaps make constructive changes to future decisions is the purpose of my request. It has cost me several hundreds of dollars in interest and several thousands of dollars in legal fees for something which should have been very easy to accomplish.

(“the Complaint”)

INFORMAL RESOLUTION PROCESS

9. 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 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/>).

10. The initial step undertaken in this process was to review the Request and the Response in order to determine whether the Response met the requirements of the *Act*. We also held meetings with Department officials to discuss the processing of the Request and reviewed some of the relevant records, including those that were provided in full to the Applicant and the information that was redacted under subsection 21(1).
11. Despite our best efforts, the Department did not permit us to review the information that was refused under paragraphs 4(a) and (b) and also declined to provide us with further details about these records in order for us to substantiate that they were properly refused under these statutory provisions. As we were unable to investigate whether these records were properly withheld from the Applicant, this brought the informal resolution process to an end and the matter thus became the subject of the present Report of Findings.

LAW AND ANALYSIS

ADEQUACY OF SEARCH FOR RELEVANT RECORDS

12. Department officials advised our Office that upon receiving the Request, they informed the branches of the Department that may have relevant records and asked them to pull all records and files that might be relevant to the Request. The Right to Information Coordinator worked with officials from the various branches (Family Support Orders Service, Court Services, offices of the Minister, Deputy Minister, Assistant Deputy Minister) to ensure that a proper search was conducted before making a decision about access to the relevant records.
13. While it would appear that the Department undertook efforts to ensure a thorough search for all relevant records, we were not made privy to the relevant records and were not provided with any further information about the records that were refused in full under paragraphs 4(a) and (b).
14. Regrettably, this signifies that we cannot determine for the Applicant's benefit whether the Response was based on a complete search and review of all relevant records.

CONFORMITY OF THE RESPONSE

15. In responding to access requests, as a public body, the Department must ensure in all access to information request cases that its response includes all the required details as set out in section 14 of the *Act*. A response must inform an 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.
16. The *Act* has codified these requirements to ensure that an applicant receives a complete and meaningful response to an access request, one that helps an applicant understand what information is relevant to the request, the reasons why access to any of the information is being refused, and to inform the applicant of his or her right to complain where the response is not satisfactory and merits a review.
17. These requirements exist alongside the duty to assist provision found in section 9 of the *Act*, that obligates 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.
18. In our view, the discharge of the duty to assist applies throughout the request process and connects well with the principle that the response should be helpful and thoroughly answer the request.
19. Therefore, the Department's duty to assist in this case as in others carried through to when it issued the Response to the Applicant. The Department's Response had to directly address all aspects of the Request by:
- providing a list of all records found relevant to the Request;
 - indicating which information from that list of records could be released;

- indicating, where some information could not be disclosed, explanations for the reasons why access was being refused so that the Applicant could understand how the decision to refuse access was arrived at; and,
 - clearly stating the exception provision upon which access was refused and elaborating on why the exception applied in this case in order to ensure that the Applicant would understand why there was no right of access to some of the requested information.
20. The Department could have provided a more meaningful Response in this case.
21. The Response did not include a list of all relevant records but did inform the Applicant that some of the requested information was being refused and referred to sections of the *Act* that the Department relied on to refuse access. Some records were released with redactions and these records contained handwritten notes indicating which of the relevant sections of the *Act* applied to the redactions. While these efforts were helpful, the Department's Response did not provide enough detail to fully comply with section 14.
22. Some information was redacted on records released to the Applicant on the basis of third party privacy but the Department failed to explain the nature of the information and why its disclosure would be an unreasonable invasion of another person's privacy. In most cases, a simple description of the kind of personal information involved will be sufficient explanation without disclosing identity (for example: *This is personal contact information, this redaction is personal banking or financial information, etc.*).
23. Moreover, the Response indicated that some records were refused in full on the basis of third party privacy, and we questioned this action when no such records were presented for our review. The Department's officials confirmed to us that this had been written in error in the Response and no records were refused in full on the basis of third party privacy.
24. With regards to the information that was withheld by the Department on the basis of paragraphs 4(a) and (b) of the *Act*, the Department failed to identify the type of records that were refused in full and failed to provide any further explanation as to why the information was protected under these provisions. Had the Department provided a list of records and explanations as to why the records were refused, the Applicant would have been able to understand the Response. As this was not done in this case, this left the Applicant with a Response that simply did not answer the Request, thus prompting the Applicant's Complaint to our Office.

25. The fact that a public body finds certain records as falling within the scope of section 4, meaning that the *Act* does not apply to the records, does not remove a public body's obligation to provide an applicant with a meaningful response in relation to why access to the records on this basis is being refused.
26. Accordingly, while the *Act* may not apply to some of the requested information by the Applicant in this case, the *Act* still applies to the Request itself which means that the Department is nevertheless obligated to provide the Applicant with a properly constituted response under section 14.
27. For all these reasons, we find that the Department failed to provide a Response that was in conformity with the requirements of a properly constituted response as required by subsection 14(1) of the *Act*.

DECISION TO REFUSE ACCESS

Redaction of requested information – basis of relevancy

28. In the records that were provided to the Applicant, the Department redacted some information on the basis that it was “not relevant” or as “not related to personal information.”
29. Department officials explained to us during our investigation that they used both notations to distinguish between information that was not relevant at all to the Request and information that did not relate to the Applicant's own personal information. While we can appreciate that the Department meant for these notations to be helpful, we found this approach to be somewhat confusing, particularly as the intent of both notations was simply to indicate that the redacted information was not relevant to the Request.
30. The information redacted as “not relevant” included details about employees being away from the office at certain periods of time and approval processes for correspondence for the Minister's signature. The information redacted on the basis of “not relating to personal information” included other people's personal information (information related to other family court matters) and information about the processing of payments during the Christmas break.
31. Having reviewed this information, we do not find that it was improper for the Department to have refused access to this information as it did not directly relate to the Request and would not have provided the Applicant with any further details about the

Applicant's support matter. In the future, we encourage the Department to be clearer by simply indicating where information is not relevant to the Request.

Redaction of requested information - unreasonable invasion of privacy of third party

32. In redacting third party information from records released to the Applicant, the Department relied upon subsection 43(1) of the *Act*.
33. The Department is of the view that this provision imposes restrictions on public bodies not to disclose personal information in the course of their duties except as authorized, including in responding to access requests.
34. While the Department was not incorrect in seeking to ensure that it was meeting all of its obligations under the *Act*, the use of subsection 43(1) in refusing access is not appropriate and in fact proved confusing for the Applicant.
35. Subsection 43(1) reads as follows:

43(1) A public body shall not use or disclose personal information except as authorized under this Division.
36. We find it necessary to address this point in this Report because we have observed other public bodies' reliance on subsection 43(1) to refuse access and the following comments will demonstrate why this is incorrect and ultimately, unnecessary.
37. The *Act* allows a person (an applicant) to access personal information by making an access to information request under **Part 2 ("Right to Information")**.
38. Disclosure of personal information found in records held by a public body is governed by rules found under **Part 3 ("Protection of Privacy")**. The rules under Part 3 not only speak of disclosure of personal information, but also of collection, use and disclosure of personal information belonging to an individual.
39. Part 2 and Part 3 of the *Act* are set out in this fashion because they codify different rules to guide the public body in accomplishing two different categories of tasks:

- PART 2 of the *Act* guides the public body in how to properly respond to an access request, and sets out all the rules for doing so as follows:
 - **Division A** – provides rules on how to obtain access to information found in records held by public bodies:
 - how applicant can make a request;
 - public body's duty to assist an applicant;
 - time limits for public body to provide a response;
 - required content of public body's response;
 - specifying rules favouring disclosure of the requested information, subject to specific and limited exceptions found in:
 - **Division B** – mandatory exceptions;
 - **Division C** – discretionary exceptions;
 - **Division D** – provides the mechanism by which public body must ask a third party whether he, she or a company consents to the release of requested information that belong to the third party, and if not, what the public body must consider;
 - Access is granted to one's personal information and to third party personal or confidential/sensitive business information, with some limitations;
- PART 3 of the *Act* guides the public body in how to protect privacy by ensuring that it has the lawful authority, appropriate security safeguards and procedures in place whenever handling personal information it collects from the public as follows:
 - **Division A** – governs the public body in all manner of collection, correction and retention of personal information;
 - **Division B** – governs the public body in its use and disclosure (sharing) of the personal information that it has collected and retained in its records to ensure that it protects the privacy of the individual to whom the information belongs when the public body carries out its work with other public bodies or external organizations;
 - **Part 3** rules do not govern the public body's response to an access request.

40. Therefore, where an access request is made, the rules in Part 2 govern the public body's response thereto. Where the access request encompasses personal information that belongs to another person (i.e., a third party but not the applicant who is not considered a third party), the public body must look to the access rules found in Part 2.

41. The rules that govern access to personal information belonging to a third party are specifically set out in section 21 of Part 2. Section 21 provides guidance as to when the disclosure of such information would or would not result in an unreasonable invasion of a third party's privacy. Subsections 21(2) and (3) provide examples of what kinds of personal information are deemed to be an unreasonable invasion of privacy if disclosed and which are not deemed not to be such an intrusion.
42. Conversely, section 43 is found in Part 3 of the *Act* which sets out rules for a public body's handling of personal information found in its records on a day-to-day basis, rather than when processing an access request. Even if we consider the applicability of Part 3 when processing a request under Part 2 for the moment, we nevertheless find that section 43 cannot be read in isolation as it states that a public body must follow the rules on use and disclosure of personal information as further detailed in *Division B* of Part 3 where we find section 46. Section 46 sets out when a public body is authorized to disclose personal information in certain circumstances, and in particular, paragraphs 46)(b) and (c) allow a public body to disclose personal information for the purposes of complying with an Act of the Legislature and in accordance with an Act of the Legislature, which would include responding to an access request under the *Act*, which is an Act of the Legislature.
43. We reiterate, however, that Part 3 rules are used only in cases where the public body is considering the release of personal information while carrying out its functions, and those rules do not guide the public body as to when third party personal information should be protected or disclosed in response to an access request.
44. As a result, when a public body is processing an access request involving personal information belonging to a third party, the public body need only consider whether access to the said information would constitute an unreasonable invasion of the third party's privacy, which is governed by section 21 in Part 2.
45. We therefore find the Department's use of subsection 43(1) as an exception to disclosure to be inapplicable in this case. Having said this, however, the Department applied this rule to refuse access to the same information it found to be protected under subsection 21(1), which we will now consider.

Subsection 21(1)***Unreasonable invasion of a third party's privacy***

46. The Department redacted some information in the Case Activity Report records that it considered as personal information that, if disclosed, would be an unreasonable invasion of another person's privacy. The Case Activity Report records are printouts from the Family Support Order Service's case management database, used to record activity on individual files. In this case, the Applicant and the Applicant's former spouse were assigned a case file number and all activity in relation to the support payments was recorded in the database. At the top of each page of the printouts, the case file number is listed, along with the name of the "Payer" and the "Beneficiary". On the records provided to the Applicant, the Applicant is identified as the Payer and the Applicant's former spouse is identified as the Beneficiary. Both names were left in on the records provided to the Applicant as this information is obviously known to the Applicant.
47. Most of the entries in the Case Activity Reports were provided in full to the Applicant, but a number of entries were redacted on the basis of subsection 21(1) for third party information.
48. After having received the Response, the Applicant asked the Department who the third party would be in this case but was informed that the identity of the third party was also protected under the *Act*. In making the Complaint, the Applicant again questioned who would be the third party in those records.
49. While it is true that the identity of a third party may be protected under subsection 21(1) of the *Act*, this is not a general rule and must be considered on a case-by-case basis to determine whether identifying the third party in question would of itself be an unreasonable invasion of privacy.
50. In the Applicant's case, the same case file was assigned to both the Beneficiary and the Payer (the Applicant and the Applicant's former spouse), and as the entries directly related to the Payer were disclosed being the Applicant's own information, it is fairly obvious that the redactions of third party personal information related to the other person involved in the case file, i.e., the Applicant's former spouse. Given the context, we do not find that the identification of the third party in these circumstances would constitute an unreasonable invasion of the former spouse's privacy.

51. The redacted entries detailed the interactions of the Applicant's former spouse with the Family Support Orders Service, either with the former spouse or the former spouse's lawyer. We reviewed this information in the records we were provided during the investigation and we are satisfied that this information does constitute personal information of the former spouse.
52. As to the question whether the disclosure of the information would be an unreasonable invasion of the former spouse's privacy, we agree with the Department's decision to protect this information. The Family Support Orders Service routinely deals with individuals who have had a relationship breakdown and acts as an intermediary between the parties for the purpose of ensuring that support payments are made. Given that the Applicant and the former spouse were involved in a legal dispute about support payments, we are satisfied that the Department properly refused access to the information contained in these entries as disclosure would have led to an unreasonable invasion of the former spouse's privacy.
53. In redacting these entries, the Department also redacted the name of the employee who made the entry. As the names of public body employees in the course of their official duties are not protected under the *Act*, we do not find that this information was properly withheld under subsection 21(1). We do note, however, that the redacted employee names are the same as those names appearing on the non-redacted entries.
54. Finally, in one of the entries, the first name of an employee working with Revenue Canada, a department of the federal government, was also redacted under subsection 21(1). As the information only consists of the employee's first name, we find this to be an over application of the exception, but as it would not provide the Applicant with any further meaningful information, we do not require the Department to take any further action to address that particular point.

Section 4: Act does not apply

55. The Department severed some information from the records provided to the Applicant and withheld other records in full on the basis of paragraph 4(a) and refused access in full to records on the basis of paragraph 4(b).

56. Section 4 states:

4 This Act applies to all records in the custody of or under the control of a public body but does not apply to

- (a) Information in a court record, a record of a judge, a judicial administration record or a record relating to support services provided to a judge or to a court official
- (b) a record pertaining to the legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General...

57. The Department explained to us that its approach to paragraph 4(a) in this case resulted in it refusing access to all information relating to court proceedings and court officials, and declined to provide us with any additional information about the withheld information or why the Department decided the information fell within the scope of the provision.

58. As for records the Department refused under paragraph 4(b), the Department was unwilling to provide us with any details about the nature of the records or why it relied on this provision to refuse access for the same reasons.

59. The Department remains of the view that where a public body decides that the *Act* does not apply to certain information, this means that our Office does not have jurisdiction to investigate. This is not the first time the Department has refused to allow our Office to investigate on the basis that it claims that the *Act* does not apply to certain information. We have issued previous Reports of Findings to the Department as to why we disagree with this interpretation, most recently in **2012-855-AP-430** and **2012-1006-AP-510**.

60. To summarize our reasoning in these previous Reports, our interpretation is based on the foundational principles of the *Act*, in particular the provision for an independent review of a public body's decisions under the *Act*, as per section 2:

2 The purposes of this Act are

(...)

(e) to provide for an independent review of the decisions of public bodies under this Act.

61. This is mirrored in the provision that allows for a dissatisfied applicant to make a complaint to the Commissioner's office in relation to an access request:

67(1) The following persons may file, according to the regulations, a complaint with the Commissioner:

- (a) an applicant,
 - (i) if the applicant requested access to a record under Part 2 and is not satisfied with a decision, an act or omission of a head of a public body in relation to the request...

62. When processing an access request, a public body is required to make decisions about whether an applicant has a right of access to the requested information, and if not, the reasons why the *Act* prevents disclosure. In categorizing records as falling within the scope of excluded records under section 4, it follows that a public body makes a decision in relation to an access request. Based on paragraph 2(e) and subparagraph 67(1)(a)(i) reproduced above, the public body's decision is reviewable.
63. For this reason, it is essential that an independent body (the Commissioner's Office or the Court) review a public body's decision to qualify the records as excluded during an access complaint investigation to ensure that access rights are being respected and upheld. To interpret the *Act* any other way would serve to remove independent oversight of public bodies' decisions to refuse access on the basis of section 4, leaving applicants with no means of verifying whether the section was properly applied so as to refuse access, and thus whether their access rights were met.
64. In this case, when the Applicant chose to file a complaint in accordance with section 67 with our Office, we were legally obligated to investigate the matter under section 68. Our duty to fully investigate the Complaint can only be carried out by conducting a thorough review of the matter, including the decision to exclude certain information from the scope of the *Act*. In making the Complaint, the Applicant specifically challenged the Department's decision to rely on paragraphs 4(a) and (b), and believed that some of the information refused under these provisions ought to be released.
65. While we were not permitted to review any of the information that was refused on this basis, it is clear from our review of the records that the Department redacted under paragraph 4(a) the content of all emails from the Court Clerk involved in the matter, and some information in emails among Department staff in relation to the Applicant's court hearing. While this information relates to a court proceeding and the Court Clerk is a court official, it is not clear from the wording of paragraph 4(a) that it would support such a broad application, leading us to wonder whether the decision to exempt all of refused information under paragraph 4(a) was proper.

66. We raised this concern with Department officials, but the Department remained firm in its view that the *Act* does not apply to the records, that an applicant has no right of access to the information, and that our Office has no jurisdiction to investigate.
67. Respectfully, these circumstances only serve to highlight why it is imperative that there be an independent review of a public body's decision in refusing access on the basis of section 4.
68. Notwithstanding the fact that the Department refused access to some information under paragraphs 4(a) and (b), the Department still has the burden of proof to substantiate its decision that the Applicant has no right of access under subsection 84(1):
- 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.
69. The burden of proof calls on the Department to show why the Applicant has no right of access to the requested information, which includes where information is not subject to the *Act* as per section 4.
70. Given all of the above, we have no choice but to find that the Department has not met its burden of proof in relation to the information that was refused under paragraphs 4(a) and (b) of the *Act* in this case and we are unable to determine whether access was properly refused.

APPLICANT'S ACCESS RIGHTS

71. Our role is not to serve as an advocate for an applicant or to defend decisions made by a public body; however, we can appreciate why the Applicant found the access process particularly frustrating in this case. The Applicant was simply seeking to access the personal information about the Applicant held by the Department, with the goal of better understanding how the Department handled the Applicant's spousal support issues.

72. The *Act* sets out broad rights of access in section 7:

7(1) Subject to this Act, every person is entitled to request and receive information relating to the public business of a public body, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any public body to which this Act applies.

7(2) Without limiting subsection (1), every individual is entitled to request and receive information about himself or herself.

7(3) The right to request and receive information under subsection (1) does not extend to information that is excepted from disclosure under Division B or C of this Part...

73. The Applicant submitted a request for the Applicant's own information held by the Department and while the Applicant received some information, the Department refused access to an unknown amount of information with no explanation beyond the Department's statement that the *Act* does not apply to this information under paragraphs 4(a) and (b).

74. The Department's broad interpretation of the section 4 exclusions has also been used as grounds to not provide meaningful explanations to the Applicant about what personal information the Department has, and further why it is excluded from the application of the *Act*.

75. This approach constituted a serious interference with the Applicant's access rights in our view.

76. The problem was only further compounded by the Department's refusal to cooperate with our investigation thereby depriving the Applicant of an independent review of the Department's decision to refuse access to the Applicant's own personal information.

77. In other jurisdictions across the country, independent oversight bodies work with public bodies during the review process to verify claims that requested information does not fall within the scope of the *Act* to ensure that the decision to refuse access was proper.¹

78. The Applicant remains unaware of what additional personal information the Department has about the Applicant.

¹ See, for example: Office of the Information and Privacy Commissioner for British Columbia Order F10-12 (April 26, 2010); Office of the Information and Privacy Commissioner for Prince Edward Island Order No. FI-10-008 (November 10, 2010); Manitoba Ombudsman Case 2011-0025 (September 26, 2011); Information and Privacy Commissioner of Ontario Order MO-2887 (May 28, 2013); Saskatchewan Office of the Information and Privacy Commissioner Report LA-2010-002 (November 24, 2010); Nova Scotia Freedom of Information Review Officer Report FI-05-47 (September 30, 2005).

79. As a result, we find that the Department failed to respect the Applicant's rights that have been assured under the *Act*, specifically:
- a) as in subsection 7(1), the Applicant's right to access requested information found in the records of the Department in relation to its activities and functions (subject only to specific and limited exceptions); and,
 - b) as in subsection 7(2): the Applicant's right to access the Applicant's personal information found in the records held by the Department (subject only to few and precise exceptions).

FINDINGS

80. As the Department did not provide us with any details about the relevant records that it refused under paragraphs 4(a) and (b) in this matter, we find that the Department failed to demonstrate that it conducted an adequate search for all relevant records to the Request.
81. The Department did not fully meet the contents of response obligations under section 14(1) as it did not provide an explanation as to why certain information could not be disclosed on the basis that it would constitute an unreasonable invasion of a third party's privacy in accordance with subsection 21(1). In addition, with regards to the information that was withheld under section 4, the Response did not indicate what the records that were refused in full were and did not provide any further explanation as to why it determined that the *Act* did not apply to this information.
82. As for the information that was redacted as "not relevant" and "not related to personal information," we do not find that the Department improperly refused access to this information.
83. The Department was not entitled to rely on subsection 43(1) as grounds to refuse access, but as the Department only applied this provision to the same information that was also refused under subsection 21(1), we find that this had no impact on the Applicant's access rights in this case.
84. As for the information that was redacted under subsection 21(1) to protect a third party's privacy, we are satisfied that the Department appropriately refused access to the personal information relating to the Applicant's former spouse. The Department should not have redacted the name of the Department employees who made the entries into

the Case Activity Report in doing so, or the first name of the federal employee, but we do not require the Department to take any further steps on this point.

85. As for the information that was refused on the basis that the *Act* does not apply by virtue of section 4, namely paragraphs 4(a) and (b) of the *Act*, and for which the Department declined to provide us with any information to substantiate its claim that the information falls within the scope of these provisions, we have no choice but to find that the Department has not met its burden of proof in relation to this information, contrary to its statutory obligation under section 84 of the *Act*.
86. In light of all of the above findings, we also find that the Department's handling of the Applicant's access Request amounted to a serious interference of the Applicant's access rights under section 7.

RECOMMENDATION

87. Based on all of the above, we recommend pursuant to subsection 73(1) of the *Act* that:

The Department prepare and issue to the Applicant a properly constituted response, in full conformity with section 14 of the *Act*, a response that includes a complete list of records relevant to the Request that are in the custody or under the control of the Department, and that list must identify those records the Department believes to fall within the ambit of section 4 with explanations as to why.

Dated at Fredericton, New Brunswick, this _____ day of October, 2013.

Anne E. Bertrand, Q.C.
Commissioner