

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: 2014-1809-AP-982

Date: May 7, 2015

“Case about disclosure of salary, bonus, pension, and severance information for University employees”

## 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 this matter.
2. The Applicant made a request to Mount Allison University for the following information:
  - Salaries, bonuses, pension and severance pay, paid to the university president for the calendar years 2012 and 2013; the percentage of salaries, bonus, pension and severance pay adjustments between the calendar years 2011 to 2012 and 2012 to 2013 for the university president;
  - The same information for each university vice-president;
  - The same information for each associate or assistant vice-president;
  - The same information for each dean or director, or equivalent, who are not members of any faculty bargaining unit; and
  - Payments made to law firms or lawyers for professional services, excluding lawyers who are employees, for the years 2012 and 2013.

("the Request")
3. The University refused access to all of the requested information, doing so on the basis of its disclosure being an unreasonable invasion of the employees' privacy, citing Part 3 of the Act – Protection of Privacy.
4. The University also relied Part 2 – Right to Information, subsection 21(1) (*unreasonable invasion of privacy*), and in particular, paragraph 21(1)(e) (*employment, occupational, educational history*), and paragraph 21(2)(g) (*source of income or financial circumstances*). The University's Response further indicated that it did not consider the requested information as subject to disclosure in keeping with paragraph 21(3)(f) (*disclosure of salary and benefits paid to officers or employees of a public body*).
5. The University indicated that it published yearly travel expense and compensation reports on its website and for that reason, it need not provide the requested information, relying paragraph 33(2)(a) (*information already available to the public*).
6. Finally, the University refused access to payments to law firms or lawyers, claiming that those payments were subject to solicitor-client privilege under paragraph 27(1)(a).

7. The Applicant was not satisfied with the University's Response and filed a complaint with our Office.
8. In the Complaint, the Applicant stated that the University's claims that the information pertains to identifiable individuals was not an appropriate consideration for an access request (under Part 2), and that the University failed to take into account paragraphs 21(3)(f) and (g) that allow certain kinds of personal information to be disclosed, and also challenged the refusal to disclose the amount of payments to law firms or lawyers.

## INFORMAL RESOLUTION PROCESS

9. 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*.
10. The Commissioner's authority to investigate and resolve complaints is established under section 68, and subsection 68(2) delineates the parameters of an informal resolution of a complaint:

68(2) The Commissioner may take any steps the Commissioner considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of the *Act*.
11. The words "*in a manner consistent with the purposes of the Act*" set the standards by which a resolution can be achieved. The informal resolution cannot signify a mediated settlement or an outcome obtained by the parties' compromise.
12. The purposes of the *Act* set out in section 2 codify the public's right of access and a public body's statutory obligation to provide access while also protecting sensitive information. Section 2 also establishes an independent review mechanism led by the Commissioner for a public body's decisions made in relation to those rights and obligations:

2 The purposes of this Act are

(a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act,

(...)

(c) to allow individuals a right of access to records containing personal information about themselves in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act,

(...)

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

13. It follows that 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.
14. We recognize that a public body has the right to disagree with our interpretation of the *Act*, and in fact, we welcome such dialogues as it provides an excellent opportunity to better understand the public body's approach and its application of exceptions to disclosure. We strive to be thorough in all of our complaint investigations, and a public body's reasoning on how it thinks the *Act* should be applied in a particular case is a valuable contribution to our analysis, as are an applicant's comments or representations.
15. Having said this, however, the Commissioner and her Office will not, simply to affect a resolution of a complaint, allow the compromise of rights of access to information or a public body's statutory obligations to be fully upheld. The informal resolution process must remain consistent with the purposes of the *Act*.
16. Therefore, the Commissioner's informal resolution process is designed to achieve a lawful and proper outcome and has incorporated all of the same steps necessary to any investigation, with the added feature that a public body is invited to resolve the complaint by correcting any error it may have made in the application of the law when refusing access to information.
17. 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;
  - for the public body, the satisfaction of having complied with its obligations under the *Act*;
  - to the public who sought access to 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, the satisfaction of understanding right of access to information and having that right respected under the *Act*.
18. We underline the fact that a public body is free to participate or not to participate in the informal resolution process as it is ultimately the decision-maker for the release or protection of information under the *Act*.
19. Nevertheless, the Commissioner remains bound by her duties to ensure conformity with the *Act* and this means that a complaint must be resolved in conformity with the *Act*.
20. Where we find that the public body has not complied with the *Act*, and is not prepared to resolve the matter by correcting this compliance issue, we will issue formal recommendations in a Report of Findings under section 73.

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

21. We sought to resolve this case to the satisfaction of the parties and in conformity with the *Act* and to do so, we explained at the outset the tenor of the informal resolution process and invited the University to participate. We held discussions with University officials, reviewed all elements of the Request, and obtained the University's reasons why it had refused access to all of the requested information.
22. After our first analysis of the entire matter, we provided our initial findings to the University that included analysis and explanations why we disagreed that all of the requested information about how the University compensates certain employees was protected from disclosure, as well as the amount payments made to lawyers or law firms. Our analysis showed that the Applicant was entitled under the *Act* to receive most of the requested information, with the exception of exact salary information, which is lawfully protected from disclosure.

23. The University indicated that it was amenable to providing the Applicant with some additional information as part of the informal resolution process; however, it was unwilling to provide all of the information to which the Applicant was entitled to receive, including a breakdown of all of the requested information by position, in particular bonus information, and stated that it would not necessarily release such information in the future. The University disagreed with our interpretation of the *Act* and while it was willing to disclose some of the requested information, it was not willing to disclose all of it, and some only for the purposes of this case.
24. As a result, we thus could not move forward with the informal resolution process, as the *Act* required the University to provide more information to the Applicant than it was willing to do. As a result, the Complaint became the subject of the present Report of Findings to conclude our investigation as required by section 73 of the *Act*.

## LAW AND ANALYSIS

### ***What is meant by protecting privacy in access to request cases?***

#### ***Part 2 versus Part 3***

25. While the *Act* defines personal information as “recorded information about an identifiable individual,” this is meant to assist in determining what is - as well as what is not personal information for the purposes of the *Act* and the public’s right of access to government information and information on how public bodies spend the public purse.
26. It is commonly known and a well-established principle in many countries that privacy must be protected and that governments have a duty to protect personal information found in their records as they accomplish their daily tasks and duties.
27. Those well-established rules regarding the protection of privacy are set out in Part 3 of the *Act*.
28. Part 2 of the *Act*, however, is where legislators have expressly set out the public’s right to access government information, not under Part 3 which only concerns government’s duties to protect personal information when it handles that information to carry out its activities and programs.

29. When a public body receives to an access to request formulated under Part 2, i.e., as per section 8 of the *Act*, the public body is obligated to respond to the request as per the rules to respond set out in Part 2, i.e., in accordance with sections 9 to 36.
30. Part 2 provides all the necessary guidance and rules that direct how a public body must respond to an access to information request, including when it is necessary – or not to not disclose personal information.
31. The fundamental distinction lies in what Part 2 is designed to accomplish. Part 2 sets out the other well-established principle that the public has the right to know how public funds are spent. Accordingly, under the provisions of Part 2, legislators have granted to the public a right to know about government's affairs, decisions, programs, and how it spends public funds. Moreover, legislators have directed that all public bodies respect the public's right to know, and it follows that this right to know extends to the public knowing how public servants are compensated, which means disclosing some of their personal information.
32. As a result, when processing an access request, the test for the disclosure of personal information will not solely be based on privacy; rather, the test is whether the release of the personal information would result in an unreasonable invasion of the person's privacy. The *Act* is not designed to protect all personal information about an identifiable individual, rather, only to do if releasing the information would result in an unreasonable invasion of that person's privacy.
33. That test is set out by law under section 21. All public bodies are subject to the rules set out in section 21. In fact, the *Act* specifies that in some cases, personal information can be disclosed and doing so will not be an unreasonable invasion of a person's privacy. Those cases are premised on the public's right to know how government spends from the public purse and how it compensates its employees by directing the release of personal information that include employees' range of salary, benefits paid, and job descriptions.
34. Section 21(3) has a complete listing of these cases where the disclosure of personal information about public body officers and employees is deemed not an unreasonable invasion of their privacy.
35. In summary, when an applicant seeks access to government information that includes information belonging to persons, the *Act* has already taken this under consideration

and set out rules under Part 2 to permit the withholding of personal information where it is necessary to protect privacy while directing under section 21(3) the instances in which it is lawful to release information about a person. These rules under Part 2 regarding the release of personal information to not unreasonably intrude that person's private life, with the added public's right to know about compensation through public funds, are in conformity and not in conflict with those set out in Part 3.

36. It is for these reasons that in this case, the University was not entitled to rely upon the rules to protect privacy under Part 3 when it was required to respond to the Applicant's Request submitted under Part 2, even where the Request sought access to personal information. A recommendation in this regard will follow.

### **Access to University employees' Salaries, Bonuses, Pension and Severance pay**

37. As indicated above, the *Act* requires a high level of transparency in terms of how public bodies compensate their employees and officials. Public bodies receive funding from taxpayer dollars and the public has a right to know how it is using these funds to compensate its staff.
38. As information about how a person is compensated is considered to be personal information about the individual, the rules governing disclosure of this kind of information are found in section 21 of the *Act* (*unreasonable invasion of a third party's privacy*).

### ***Section 21: Release of personal information***

39. Subsections 21(2) and 21(3) set out deeming provisions of what kinds of personal information are lawfully protected from disclosure and what kinds are deemed proper for release to the public.
40. Although in the Complaint, the Applicant raised paragraph 21(2)(g)—“*the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body*”, that provision did not apply to the employment relationship between the officials and the University. Paragraph 21(2)(g) captures independent contractors, consultants, etc., i.e., external services providers to public bodies.
41. In responding to the Request, the University correctly identified section 21, but did not go far enough:

21(2) A disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of the third party's privacy if

(...)

(e) the personal information relates to the third party's employment, occupational or educational history,

(...)

(g) the personal information describes the third party's source of income or financial circumstances, activities or history....

21(3) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

(...)

(f) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses

(i) as an officer or employee of a public body...

42. Subsection 21(3) was key to the University's response, but more importantly, paragraph 21(3)(h) also deems the additional personal information of a financial nature not to be an unreasonable invasion of privacy if disclosed, which was a relevant consideration to the Applicant's request in this case:

(h) the disclosure reveals information about a discretionary benefit of a financial nature granted by a public body to the third party, including the granting of a licence or permit...

43. Paragraph 21(3)(h) intends to capture those benefits that a public body grants to an employee or an official that it is not otherwise required to give, such as additional discretionary benefits found in employment contracts like a negotiated severance package.
44. While the University properly identified the relevant provisions of section 21, the University did not properly apply these provisions in arriving at the decision to refuse access to all of the requested information.
45. The University applied the deeming provisions under subsection 21(3) too narrowly, resulting in the decision to refuse access to all of the requested information.
46. Indeed, the requested information in question (salary, bonus, pension, and severance payment information) is third party personal information that relates to these individuals' employment and occupational history and describes their source of income

or financial circumstances, which the *Act* deems to be an unreasonable invasion of third party privacy under subsection 21(2). The analysis, however, does not stop there.

47. These individuals are employees of the University, and as a result, paragraphs 21(3)(f) and (h) required the University to deem their compensation information as information that must be disclosed and doing so would not constitute an unreasonable invasion of their privacy. In other words, the *Act* under Part 2, paragraphs 21(3)(f) and (h) directed the University to disclose this information, not to protect it.

### ***What is meant by “Benefits”***

48. We further explain our finding by looking to other jurisdictions and their interpretations of similarly-worded provisions. We found that they gave broad interpretation to the meaning of “benefits” to include all that flow from employment in addition to base salary.
49. For example, the Ontario Office of the Information and Privacy Commissioner published a number of decisions on this point, including Order M-23, in which the Commissioner states:

...I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the *Act* that “benefits” be given a fairly expansive interpretation. In my opinion, the word “benefits” as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as, life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of “benefits.”

50. We agree with the approach to define “benefits” in a broad fashion, particularly given the fact that paragraphs 21(3)(f) and 21(3)(h) in the New Brunswick legislation both serve as overrides to the otherwise protected personal information. This demonstrates the strength of the intent to promote transparency and accountability in how New Brunswick public bodies compensate employees and the benefits and entitlements that they are granted with their positions.
51. For these reasons, we find that the term “benefits” includes bonuses, pension, and severance information for officers and employees of public bodies.

52. We now turn to the question of how much disclosure about benefits of public body officers and employees is required by the *Act*.

***“Information about” salary ranges and benefits***

53. We note that the wording of paragraphs 21(3)(f) and 21(3)(h) applies to *“information about”* salary range and benefits, meaning that it is not limited to simply the salary range and specific benefits, but also includes information about these items, so as to allow a public body to provide a meaningful and full explanation of the full range of entitlements that flow from the employment relationship.
54. In interpreting a similar provision, the Assistant Commissioner in Ontario made the following statements in Order PO-2536 (2006 CanLII 50875):

In terms of the compensation packages given to senior government employees and senior employees of government agencies, the public interest demands that complete disclosure be made. It is disingenuous to take the position that the base salary of such executives is subject to public disclosure, but that other benefits and arrangements that supplement the base salary are private. In my view, the public interest in disclosing this type of information would, in most cases, be very compelling. These types of benefits and supplemental arrangements are of significant value to the employees that receive them and are a significant cost to the government. In determining whether the compensation paid to a particular individual is appropriate, the entire package is relevant and must be disclosed.

55. We again agree with the broad interpretation presented in Ontario and find that the spirit and intent of the law, as well as the provisions of subsection 21(3), require public bodies to be open and transparent about how they compensate their officials and employees. The wording of paragraph 21(3)(f) specifically states that *“information about... salary range, benefits”* of officers and employees of public bodies is deemed not to be an unreasonable invasion of privacy and thus must be disclosed.
56. Based on the above, we are of the view that the requested salary (with the exception of exact salary amounts), bonus, pension and severance pay and corresponding adjustments all fall within the scope of paragraphs 21(3)(f) and 21(3)(h) of the *Act* and in this case, the University should have disclosed this information to the Applicant.

57. We now address each kind of requested information in turn, along with our findings as to why the Applicant is entitled to receive all of the requested information, with the exception of exact salary information.

## FINDINGS

### ACCESS TO REQUESTED SALARY INFORMATION

58. The Applicant requested the amounts of salary paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013). While exact salary amounts are protected from disclosure under paragraph 21(2)(g) (*source of income or financial circumstances*) unless the person consents, ranges of salary representing the base salary should have been provided for each specified position (President, Vice-Presidents, etc.) for the years 2012 and 2013, as required by paragraph 21(3)(f).
59. As for salary adjustment information, this constitutes information about the salary range, and can be provided for each year by indicating whether there was an increase, decrease, or no change in base salary, which could be expressed in percentage amounts.
60. Showing where a person elevates from one salary range to another will give an indication of the approximate amount of base salary, but even when that fact is paired with the salary adjustment information it will not reveal exact salary amounts. Access to this information cannot be refused on this basis.

#### *Referring to the information in the University's published Compensation Reports*

61. We reviewed the Compensation Reports on the University's website, we note that it indicates the following:

Any bonuses, severance payments (other than those paid to faculty members), and monetary benefits paid to employees during the academic year (July 1 through June 30) are added to salaries to determine compensation for placement in the ranges that follow.

62. We appreciate the University's proactive disclosure efforts; however, the information as presented in the Compensation Reports does not represent the full scope of the information that the University is authorized and required to disclose under the Act.

63. As explained above, bonus, severance, and pension information constitute benefits for the purposes of subsection 21(3) and cannot be lumped in with the base salary in calculating the salary ranges as it does not provide full disclosure of the information requested by the Applicant. Salary range and benefits constitute different kinds of information and the *Act* requires that information about both be made available. By including bonuses or severance payments in the ranges published in the Compensation Report, this means that the University is not providing meaningful information that indicates whether individuals in these positions received bonuses or severance payments.
64. During our investigation, we asked that the University consider providing the Applicant with salary ranges for each of the requested positions based on only exact salary amount, along with the calculation of the percentage change between each calendar year. While the University indicated it was willing to provide some of this information, it would not do so at this level of detail for all positions and this would not have constituted a full disclosure of all of the information to which the Applicant is entitled to receive under the law.
65. As a result, a recommendation for the disclosure of salary ranges for each position based only on the base salary amount, along with the calculation of the percentage change between each calendar year will follow.

#### **ACCESS TO REQUESTED BONUS INFORMATION**

66. The Applicant requested the amounts of bonuses paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013).
67. As explained above, bonuses that are paid to employees and officials are benefits for the purposes of subsection 21(3), and paragraph 21(3)(f) requires that information about benefits, such as bonuses, not be protected from disclosure as personal information. For this reason, we find that information about whether bonuses were granted to a particular position and if so, the amount, are subject to disclosure under paragraph 21(3)(f).

*Paragraph 30(1)(c): Disclosure harmful to financial interests of a public body*

68. The University raised the question of the applicability of paragraph 30(1)(c) to bonus information.
69. In order to rely on paragraph 30(1)(c) as grounds to protect the amounts of bonuses paid to specific positions, a public body must present evidence to show how the disclosure of this information could reasonably be expected to harm its negotiations; a statement that this could occur is not sufficient.
70. Further, this is a discretionary exception to disclosure, which means that even where the information falls within its scope, access to the information cannot automatically be refused. Instead, a public body must weigh all relevant factors at play and then make a determination whether there is good reason to protect the information under the circumstances; otherwise, the information must be disclosed.
71. While the University presented arguments as to why it was of the view that disclosing specific bonus payment information would be harmful to its negotiating interests, and that it considered bonus payments to be part of an employee's salary, it did not present convincing evidence as to how disclosing bonus information could reasonably be expected to harm its negotiations with employees.
72. We disagree that paragraph 30(1)(c) applies to bonus payment information, and are of the view that rather than having a harmful effect on its negotiations with current and future employees, making such information publicly known could reasonably be expected to have the opposite effect and improve its negotiations by encouraging consistency, fairness, and accountability in how the University awards bonuses to its employees.
73. As a result, we do not find that bonus payments made to a particular position is protected from disclosure under the *Act*, and a recommendation that this information be provided will follow. This information is to be provided by position, in addition to the salary range and salary adjustments. Where a position did not receive any such payments, this could be indicated by showing the amount as "0".

#### **ACCESS TO REQUESTED PENSION INFORMATION**

74. The Applicant also requested the amounts of pension paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013). This would capture where the University was paying

pension benefits to individuals in the specified positions, in addition to base salary, bonuses, and/or severance payments.

75. As explained above, information of this nature falls within the scope of benefits for the purposes of section 21(3) and information about these benefits is not protected from disclosure under the *Act*.
76. During our investigation, the University explained to us how its employee pension plans work, and indicated that none of its employees receive pension payments while they are University employees. Further, the University indicated that the employees identified in the Request are either members of a defined contribution pension plan or a defined benefit pension plan, both of which are administered and paid by the respective plan, and thus the University does not hold pension payment information.
77. We find that these explanations about the University's pension plans should have been provided to the Applicant when the University issued its Response and this would have signified the University's respect to uphold its duty to assist under section 9 of the *Act* in providing a meaningful response to the Applicant's Request.

#### **ACCESS TO THE REQUESTED SEVERANCE INFORMATION**

78. The Applicant also requested the amounts of severance payments paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013).
79. As explained above, information about severance qualifies as benefits for the purposes of section 21(3) and is not protected from disclosure under the *Act*.
80. This means that the University should have provided this information in its response. Where any individuals in the named positions received severance payments during the requested time frame, this should be indicated in relation to the position, along with the amount of the payment. A recommendation that this information be provided will follow. Where a particular position did not receive any such payment, this could be indicated by showing the amount as "0".

## ACCESS TO REQUESTED LEGAL FEES PAID TO LAWYERS AND LAW FIRMS

81. We were surprised to learn that the University refused to disclose this information, given that the University had previously disclosed total year amounts of legal fees in response to a previous similar request from the Applicant.
82. We note that the solicitor-client privilege exception only applies to communications between the lawyer and the client for the purposes of giving legal advice or providing legal services. The amount of the fees paid is not protected by solicitor-client privilege. Disclosing the total amount of legal fees paid over the course of a year would not disclose the nature of the advice sought or even from whom the advice was sought.
83. For these reasons, the total amount of legal fees paid by the University for the years 2012 and 2013 are not protected from disclosure under the *Act* and should have been provided to the Applicant and a recommendation will follow on this point.

## RECOMMENDATIONS

84. Based on our findings above, we recommend pursuant to paragraph 60(1)(a) of the *Act* that the University process and issue all future responses to access to information requests in accordance with the rules set out in Part 2 of the *Act*.
85. We further recommend based on our findings above and pursuant to subparagraph 73(1)(a)(i) of the *Act*, that the University release to the Applicant the following information:
- Salary information
    - paid to various senior officials for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013), including ranges of salary representing the base salary for each specified position (President, Vice-Presidents, etc.) for the years 2012 and 2013, along with the calculation of the percentage change between each calendar year;
  - Bonus payment information
    - various senior officials for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013), and where an official did not receive any such payments, this could be indicated by showing the amount as “0”;
  - Severance payment information

- paid to various senior officials for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013), and where a position did not receive any such payments, this could be indicated by showing the amount as “0”; and,
- Payment of legal fees
  - the total amount of payments made to law firms or lawyers, excluding lawyers who are employees, for the years 2012 and 2013.

Dated at Fredericton, NB, this \_\_\_\_\_ day of May, 2015.

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Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner