

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: 2015-2348-AP-1282

Date: January 27, 2016

“Case about disclosure of evaluation documents relating to hospital laundry services”

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 FacilicorpNB for the following information:

Recevoir tout document d'évaluation concernant les buanderies et en particulier la note du 19 septembre 2014 [de 2013 à date].

("the Request")

3. FacilicorpNB responded by providing the Applicant with explanations that the requested briefing note was actually dated September 9, 2014, and provided a copy of that document, but with redactions for information falling under paragraphs 26(1)(a) (*advice to a public body*) and 26(1)(c) (*plans that have not yet been implemented*).

4. FacilicorpNB also identified three other relevant records in its response:

- American Laundry Systems Feasibility Study & building/Infrastructure Analysis (March 2010);
- American Laundry Systems Feasibility Study Report (September 2009); and
- American Laundry Systems Feasibility Study & Building/Equipment Infrastructure Analysis & Productivity Review (January 2015).

5. FacilicorpNB, however, did not provide any explanations as to the nature of these three records, stating only that access was being refused on the basis of paragraphs 26(1)(a) and 26(1)(c) as constituting advice, opinions, proposals or recommendations developed for FacilicorpNB as well as projects relating to the management of personnel or the administration of FacilicorpNB that had not yet been implemented.

6. The Applicant was not satisfied with FacilicorpNB's Response and filed a Complaint with our Office, questioning whether FacilicorpNB was correct in refusing access to all of the information in the briefing note, particularly given the Department of Health had previously released a copy of the same briefing note with fewer redactions. The Applicant also questioned whether there were additional records, and whether the centralization of laundry services was made on the basis of this one briefing note and the three reports listed in the Response.

7. This case points to the management of public hospital laundry services, which falls under the mandate of FacilicorpNB.
8. FacilicorpNB is a Crown corporation created in 2008 and mandated to provide the regional health authorities with non-clinical services, including information technology and telecommunications, supply chain, group purchasing, clinical engineering, and laundry services that were under the purview of regional health authorities at that time.
9. In 2009, FacilicorpNB engaged the services of American Laundry Systems, a private sector consulting company with expertise in commercial laundry operations, to conduct a feasibility study of the existing hospital laundry facilities in the Province. At the conclusion of this work, American Laundry Systems provided FacilicorpNB with a report setting out facts and findings about the existing hospital laundry facilities, as well as a recommendation for the future management of these facilities.
10. In 2010, FacilicorpNB again called upon American Laundry Systems to conduct a further feasibility study and an infrastructure analysis of the existing laundry facilities in the Province. A second report was produced with analysis and recommendations.
11. Also in 2010, Fundy Linen in Saint John was transitioned under FacilicorpNB's mandate as FacilicorpNB established an internal *Laundry Services* division. Two years later, seven on-site hospital laundry facilities were transitioned to FacilicorpNB, thereby making the total of eight facilities in its mandate.
12. During the summer of 2012, FacilicorpNB developed a Business Case Review document that set out options and a recommended course of action for the future management of hospital laundry facilities. Following discussions with the Department of Health and the two regional health authorities, a final decision was made in December of 2013 to consolidate hospital laundry facilities by reducing the number of those facilities from eight to four. The goal was to create cost savings and efficiencies in processing hospital laundry volumes, while closing down those laundry facilities that required significant investments to continue with operations.
13. The consolidation process would take place in two phases.
14. The first phase involved the laundry facilities at the Moncton Hospital and the Tracadie-Sheila Hospital being closed and their respective laundry volumes moving to Fundy

Linen in Saint John and Campbellton Regional Hospital by November 2013. This was completed as planned. The second phase involved the closing of the laundry facilities at the Chaleur Regional Hospital in Bathurst and the Georges-L.-Dumont Hospital in Moncton and moving them to Fundy Linen in Saint John and Campbellton Regional Hospital by April 2014, respectively. FacilicorpNB decided to delay these closures to ensure that both the Saint John and Campbellton facilities had appropriate resources in place to accommodate these additional volumes, as well as to assess the issues encountered during the first phase of the consolidation process. In the spring of 2014, the decision was made to delay these transition dates but in late 2014, FacilicorpNB delayed these closures indefinitely to reassess how best to move forward.

15. FacilicorpNB again engaged the services of American Laundry Systems to complete a further study of the current laundry infrastructure and operations so as to prepare a new business plan for the future of hospital laundry operations. That report is dated January 19, 2015.
16. At the time of the Applicant's Request in early February 2015, no further decision had been made in relation to hospital laundry facilities.

INFORMAL RESOLUTION PROCESS

17. 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*.
18. The Commissioner's authority to investigate and resolve complaints is established under section 68, with subsection 68(2) delineating the parameters of an informal resolution of a complaint "*in a manner consistent with the purposes of the Act*". This means that the resolution cannot be a mediated settlement or an outcome obtained by the parties' compromise. The Commissioner's authority to affect an informal resolution of an access complaint requires that it be done in a manner that respects the law, upholds an applicant's access rights, and fulfills a public body's statutory obligations.
19. 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. The process

must remain consistent with the purposes of the *Act* and 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. 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 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

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 FacilicorpNB to participate. We held discussions with FacilicorpNB officials, reviewed all elements of the Request, and obtained FacilicorpNB's input on how it processed the Request, including the reasons why only four records were identified as relevant, and how it had arrived at the decision to refuse access to most of the requested information.
22. FacilicorpNB took a very narrow approach in interpreting the Request, identifying only four records: a briefing note and the three reports by focusing only information relevant to "evaluation" of the laundry services. No discussion was held with the Applicant during processing. We asked FacilicorpNB to conduct further searches for additional relevant records because FacilicorpNB had taken a very narrow approach to interpreting evaluation documents; it appeared that there should be additional evaluation documents because a decision had been made in 2013 about the future management of

hospital laundry facilities. Furthermore, we also noted that some of the information initially refused was factual in nature and that the consolidation of laundry services had already been underway since 2013 pointing to FacilicorpNB not having properly applied these exceptions to disclosure.

23. While FacilicorpNB was amenable to conducting additional searches for records and provided additional information and records for our review, FacilicorpNB remained of the view that the vast majority of the relevant information, with the exception of the information previously released to the Applicant in the briefing note as well as three additional documents about equipment to be replaced in the future, fell within the scope of paragraphs 26(1)(a) and 26(1)(c).
24. As that information fell under a discretionary exception according to FacilicorpNB, we asked that the decision to refuse access be reconsidered and FacilicorpNB was not willing to disclose any other information to the Applicant.
25. As a result, we could not move forward with the informal resolution process as the *Act* calls for further disclosure than FacilicorpNB was willing to provide, for reasons that will be explained below. 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

Duty to assist and Search for relevant records

26. As indicated above, FacilicorpNB took a very narrow approach in interpreting the Request and did not engage the Applicant in a discussion about what information was being sought. FacilicorpNB failed to explain in its Response how it interpreted the Request, leaving the Applicant to wonder why only four records had been identified as relevant. The law requires an applicant as per section 8 to be as specific as possible about the nature of the requested information, but the law also recognizes that the person seeking the information may not know which specific records are held by the public body; accordingly, that fact places an equally important obligation on the public body to offer assistance as per section 9. The duty to assist obligation begins when the public body first receives a request, as it must ensure it fully understands what information is being sought, so that it can be sure of what to look for and not waste valuable time. The duty to assist, more importantly, requires the public body to contact the person after having received the request to ensure that both parties are clear and

- understand what is expected. All of these important components contribute to the final step of having the public body provide a meaningful response to the individual.
27. FacilicorpNB understood that it could contact the Applicant to clarify what information was being sought, where the Request was believed to unclear, but chose not do so. Instead, FacilicorpNB processed the Request maintained that its interpretation of the Request was accurate, despite it clearly having been narrow, proof of which was evident when the Applicant filed a complaint to find out why there were no additional records.
28. The Request in this case was not unclear: the Applicant was seeking information about evaluations that informed recent decisions about hospital laundry facilities. Therefore, to respect the Applicant's right, FacilicorpNB was required to conduct additional searches for all relevant records, meaning all that could be considered as an evaluation or assessment relating to laundry facilities, including any internal evaluations or assessments that may have been conducted by FacilicorpNB. Only a small number of senior officials were tasked with working on the management of laundry facilities and these officials searched their respective files. FacilicorpNB provided us with a list of all of the records found by these senior officials, as well as copies of additional records that documented evaluations or assessments relating to hospital laundry facilities. We were satisfied that FacilicorpNB had finally identified all of the relevant information held in its records in this case.
29. While we were able to rectify the search issue during the course of this investigation, we make a finding that FacilicorpNB did not meet its statutory duty to assist the Applicant, by interpreting the Request too narrowly and not conducting a thorough search for all relevant records in its possession.

Relevant records: Evaluation documents regarding laundries

30. The Request was for records between 2013 and February 2015 but most of the evaluative work was conducted before the final decision to consolidate and reduce the number of hospital laundry facilities was made in March 2013, and the Response listed two reports from 2009 and 2010. FacilicorpNB identified additional records dating back to 2010 and provided these for our review.
31. Given that the Applicant had no way of knowing what records FacilicorpNB would have in its possession, or when it would have conducted or received evaluations about laundry facilities, we find that all of the evaluation information identified, including the

records generated before 2013, are relevant to the Applicant's Request, and now consist of:

- Three reports prepared by an external consultant (2009, 2010, and 2015);
- Briefing notes and memoranda;
- PowerPoint presentations;
- A Business Case Review prepared by FacilicorpNB setting out options and supporting information, along with recommendations;
- Documents containing estimated costing and staffing impacts for options under consideration; and
- Documents detailing various equipment requiring replacement (which FacilicorpNB indicated it was willing to disclose to the Applicant).

32. We address whether FacilicorpNB's reliance on section 26 to refuse access to this information was proper in this case.
33. Before we embark on the analysis for the proper application of a discretionary exception to disclosure, we must point out that the *Act* is reflective of the fundamental notion that government is required to carry on its affairs in an open and transparent manner as it makes decisions that impact the lives of citizens every day.
34. For that very reason, the *Act* has granted to citizens a right to know in order to find out how government arrives at decisions, i.e., what information was relied upon. Citizens recognize that governments are elected to spend the public purse, including in those instances where the decision-making process may be difficult and even questioned.
35. Arguably citizens will agree with some decisions and disagree with others. In either case, both citizens and governments are better suited to carry on: for government, by receiving invaluable feedback from its citizens; and for citizens, by becoming more engaged and participating in much needed discussions.
36. In the final analysis, the *Act* is the conduit by which citizens can obtain the information that allows them to understand how those decisions were made. Our role is to ensure that the right to know, although not absolute, is nonetheless respected in each case.

Application of the discretionary exception generally

37. As a result, for a public body to properly rely on a discretionary exception to refuse access to information requested by citizens, the public body must first determine

whether all of the relevant information falls within the scope of the exception, and then examine the circumstances in existence at the time of the request in deciding whether access should be nonetheless provided.

38. This is because information that falls within the scope of a discretionary exception does not mean the information can be automatically refused.
39. To do so would have the effect of converting a discretionary exception to disclosure into a mandatory one, clearly not what was intended or stipulated in the *Act*.
40. Rather, the *Act* calls on the public body to exercise its discretion.
41. The exercise of discretion requires a decision from the public body whether or not it is still appropriate, under the circumstances, to grant access, based on all of the relevant factors at the time of the request, rather than based on factors when the information was first created.
42. To assist public bodies in making such a decision, there are a number of factors that have been listed as part of the jurisprudence in right to information cases of other jurisdictions, and they include considering:
 - the public body's past practices regarding the release of similar information,
 - the nature of the record and its significance to the public body,
 - the age of the record,
 - whether there is a sympathetic or compelling need to release the information,
 - the specific wording of the discretionary exception,
 - the interests the exception attempts to balance,
 - whether the request can be satisfied by providing as much information as is reasonably practicable (severing the record),
 - whether the disclosure of the information will increase public confidence in the operation of the public body,
 - whether previous decisions of the Access to Information Commissioner have recommended that similar types of records or information should or should not be disclosed,
 - where the information is in the nature of advice, proposals, opinions or recommendations, whether the decision to which this information relates has already been made, and,
 - whether the requested information is already publicly available elsewhere.

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

What interest is the public body trying to protect?

44. That is why we state that the exercise of discretion to withhold information that falls under a discretionary exception must be lawful.
45. To hold otherwise would mean that the exercise of discretion could be misused to trump citizens' right to access the information, a broad right of access granted under section 7 that the *Act* requires to be respected.
46. Subsection 84(1) unequivocally places the burden on the head of the public body to prove that the applicant has no right of access to the record or part of the record.
47. This is consistent with the wording in subsection 7(3) to only refuse access to information, rather than entire records, where the protected information can reasonably be severed so as to permit an applicant to receive the remainder of the record. In our view, this clearly demonstrates the overarching intent of the *Act* to advance the right of access to government information, and restricting that right only in few and limited instances.
48. Accordingly, when challenged on its decision to refuse access to information that falls within a discretionary exception, the public body will be required by the *Act* to prove that the decision was made on a consideration of relevant factors that were in existence at the time of the request, and those considerations point to a legitimate reason for refusing access to the information.
49. Where a complaint is filed with the Commissioner or the matter is referred to the courts under the *Act*, a first determination will be whether the requested information actually falls within the scope of the exception that is relied upon by the public body, and where it does, a second determination will be how the public body exercised its discretion and whether it was proper and in conformity with the *Act*.
50. In other words, after examining the requested information and reviewing all of the relevant circumstances of the case, the assessment is whether the otherwise protected information was considered for release, and if not released, was that decision made only on relevant factors in existence at the time of the request.

51. Where the Commissioner reviews the exercise of discretion in such cases, and finds that the public body did not consider disclosure, the Commissioner will ask the public body to reconsider its decision in light of all of the relevant factors at play.
52. If the Commissioner finds that the public body did consider disclosure, but did not identify or weigh all of the relevant factors at play, the Commissioner will ask the public body to reconsider its decision in light of this.
53. We can state having undertaken this approach during our informal complaint resolution process and it has often produced the correct outcome in respect of conformity with the *Act* in many cases.
54. For example, and we underline this point, where the public body has agreed to do so and has reconsidered its decision based on relevant factors at play at the time of the request, that exercise of discretion will be upheld, notwithstanding the fact that the decision may remain that access is refused.
55. It is only in those cases where the public body agrees to reconsider its decision but continues to rely on factors that our investigation found not to be relevant that the issue of conformity with the *Act* is raised. In those cases, we cannot uphold the exercise of discretion because the public body has not met its burden of proof under section 84 in proving that the applicant did not have a lawful right of access in the circumstances in existence at the time of the request.
56. Accordingly, in those complaint investigation cases where we find that the public body has improperly relied on a discretionary exception, and its reconsideration of that decision remains based on factors we found not to be relevant, we will have no choice but to recommend that the information be disclosed. The Commissioner's recommendation is not arrived at lightly; it is issued strictly on the basis that the public body did not meet its burden to prove that the applicant did not have a lawful right of access to the requested information.
57. In recent investigations, we have come across cases where public bodies are not applying the discretionary exceptions in conformity with the *Act*, and it is for this reason that it is necessary for the Commissioner, as the independent oversight of this legislation, to ensure that this does not become a trend.

FacilicorpNB's application of discretionary exceptions in this case

58. FacilicorpNB relied on paragraphs 26(1)(a) and 26(1)(c) to refuse access:

- 26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
- (a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown...
 - (...)
 - (c) plans relating to the management of personnel or the administration of the public body that have not yet been implemented..

59. Other jurisdictions have the same exception to disclosure in their respective access to information legislation¹ for administrative or management plans not yet implemented.

60. In looking to Saskatchewan, that Commissioner adopted a three-part test to assess whether a record falls within the scope of this exception:

The public body must substantiate that:

- the record contains a plan or plans,
- the plan or plans relate to either:
 - the management of personnel, or
 - the administration of the public body, and
- the plan or plans have not yet been implemented.²

61. "Plan" has been defined in other jurisdictions (based on the definition in the Concise Oxford Dictionary, 9th Ed.) as being "*a formulated and especially detailed method by which a thing is to be done; a design or scheme; an intention or proposed proceeding.*"

62. A key question of interpretation is what "have not yet been implemented" means.

63. Again, we looked to other jurisdictions to determine how they define and apply "have not yet been implemented." In Manitoba, the *Freedom of Information and Protection of*

¹ Saskatchewan (*Freedom of Information and Protection of Privacy Act*, paragraph 17(1)(d) and *Local Authority Freedom of Information and Protection of Privacy Act*, paragraph 16(1)(d)), Manitoba (*Freedom of Information and Protection of Privacy Act*, paragraph 23(1)(d)), and Alberta (*Freedom of Information and Protection of Privacy Act*, paragraph 24(1)(d)).

² *University of Regina (Re)*, 2014 CanLII 49623 (SK IPC) at para. 20.

Privacy Act Resource Manual states that: “A plan has been implemented when those who are expected to carry it out have been authorized and instructed to do so.” Service Alberta’s *Freedom of Information and Protection of Privacy Guidelines and Practices* provides the following analysis of its same exception to disclosure:

Implementation means the point when the implementation of a decision begins. For example, if a public body decides to go forward with an internal budget cut or restructuring of departments, implementation commences when this plan of action is communicated to its organizational units.

64. We also looked to the Alberta Commissioner’s interpretation of this provision:

[54] Moreover, section 24(1)(d) applies to plans *that have not yet been implemented*. The implication is that the provision protects the *premature* release of plans that have *already* been decided by a public body. The provision recognizes that a public body’s ability to manage personnel and administration might be compromised if information about its plans was released prior to implementation.³

65. We agree with and adopt the interpretation from other jurisdictions that this exception only applies during the limited timeframe between when a public body has decided on a plan and when the plan begins to be implemented.

66. In our view, this strikes the proper balance between the public body’s ability to conduct its planning activities without fear of premature disclosure of information of this nature, while at the same time respecting the public’s right to know about such plans once action has been taken to put a plan into effect.

Relevant information in this case

67. While FacilicorpNB interpreted the Request narrowly, it applied paragraph 26(1)(c) very broadly to include most of the relevant information and refuse access on the basis that the entire laundry consolidation process has not yet been fully completed.

68. We disagree with FacilicorpNB’s approach for the reasons that follow and as we apply the three-part test referred to above. It was imperative that FacilicorpNB not focus on the question of whether the information in question was sensitive at the time the

³ Order F2008-008, 2008 CanLII 88742 (AB OIPC) at paras. 53-54.

record was created, but rather whether the information in question was still subject to the same considerations at the time it was requested.

69. When these records were created, they documented steps that needed to be undertaken as FacilicorpNB moved forward with the management of laundry facilities. Had a request for this information been received while these processes were still under consideration, or not publicly announced, then the paragraph 26(1)(c) exception would have been more likely to be applicable in those circumstances.
70. At the time of the Request in February 2015, however, FacilicorpNB had announced its decision to delay the implementation of phase two, pending further evaluation. The plan to consolidate public health care sector laundry facilities in two phases was publicly announced in April 2013, and the first phase was completed on schedule towards the end of 2013. Therefore, as it concerned the first phase, there were no longer any plans to be implemented, and paragraph 26(1)(c) has no application to that relevant information. The second phase was delayed in 2014 and, at the time of the Request, FacilicorpNB was undertaking further analysis to determine how to proceed; however, no further plans had been formulated, aside from the previously announced plan to close and transition laundry services at two hospitals in Bathurst and Moncton.
71. As such, we find that none of the information in the relevant records contains details about or would reveal plans that have not yet been implemented. FacilicorpNB has not met its burden of proof to rely on paragraph 26(1)(c) to refuse access to any of the relevant information.
72. FacilicorpNB also relied on paragraph 26(1)(a) to refuse access to all of the same information.
73. This is a similar exception to disclosure is found in all Canadian jurisdictions' respective laws, and it is commonly understand that the purpose of these exceptions is to allow for public officials, employees, and others who may advise or direct a public body or Minister to have full and frank discussions of during the decision-making process. In other words, the law affords some protections from disclosure so as to allow for the free flow of advice, opinions, proposals, and recommendations during deliberative processes of government.
74. While this is a broad discretionary exception to disclosure, it is important to keep in mind that this exception only applies to information that, if disclosed, could reasonably

- be expected to reveal advice, opinions, proposals or recommendations that have been developed either by or for a public body or a Minister of the Provincial government.
75. Generally speaking, this exception will often not apply to entire records, but rather only the specific information in a record that falls within its scope. This means that it does not protect factual or background information where it can reasonably be considered separate from the advice, opinions, proposals or recommendations.
76. We reiterate the broad right of access and the requirement under subsection 7(3) to only refuse access to information where the protected information can reasonably be severed so as to permit an applicant to receive the remainder of the record.
77. On a final note, the fact that a document may be labelled as confidential or advice to Minister is not determinative of whether the record or any information in the record merits protection. All of the information in the record must be examined with a view to determine if any of the information falls within the exception, and if so, whether there is any legitimate reason why that information should not be disclosed (again, being a discretionary exception to disclosure).
78. FacilicorpNB is of the view that the vast majority of the relevant information falls within paragraph 26(1)(a) and refused access. We address FacilicorpNB's application of that exception to each category of relevant records.

External consultant reports

79. The 2009 Feasibility Study report consists of factual information about the hospital laundry facilities around Province, such as the amount of laundry processed at each facility, total annual payroll information, costs, square footage, as well as the consultant's observations about what is working well and areas of concern at each facility (production information, operational costs, infrastructure, and equipment and safety). As all of this information is factual in nature about the operations of the hospital laundry facilities dating back to 2009, we find that this information does not fall within the scope of paragraph 26(1)(a) and should not have been withheld.
80. The Feasibility Study also contains options about how to manage the hospital laundry facilities in the future, including related costing information, as well as the consultant's recommendations to FacilicorpNB. In our view, that information qualifies as proposals and recommendations that were developed by or for FacilicorpNB to assist it in making

a decision in how best to manage hospital laundry facilities, and thus falls within the exception to disclosure. The final pages of the 2009 report also include the consultant's professional references, including the references' contact information, we found not to be relevant to the Request and we will not recommend that this particular information be disclosed.

81. As for the 2010 Feasibility Study & Building/Infrastructure Analysis (a follow-up to the 2009 Feasibility Study), it consists entirely of analysis and recommendations on options for the future management of the hospital laundry facilities, as well as related costing information. We find that all of the information falls within the exception to disclosure.
82. The next question is whether FacilicorpNB exercised its discretion properly in the circumstances of this case. Because FacilicorpNB refused access mainly under this exception, we shall deal with the exercise of discretion issue for all records with information that fell within its scope.
83. As for the 2015 Facility Consulting Report, and while some of its information is factual in nature, the report primarily contains analysis and related costing and budget information about various options for the future management of the hospital laundries, as well as its recommendations to FacilicorpNB. We find that this information falls within the exception to disclosure.
84. FacilicorpNB also identified internal notes that were prepared after receipt of the 2015 consultant's report, detailing items that require further clarification from the consultant. Given that the 2015 report was received shortly before the Request and FacilicorpNB was in the process of reviewing and evaluating that record, we find that this information also falls within the scope of the exception.

Business Case Review

85. FacilicorpNB had prepared a Laundry Services Division Business Case Review in 2012. This document contains some factual information about the state of hospital laundries at the time and the challenges to address to ensure that they are effectively managed in the future. The majority of the information in this document sets out various options for the future management of hospital laundry facilities, an analysis these options, as well as FacilicorpNB's recommendations on its preferred option and the rationale behind its recommendations. While FacilicorpNB's mandate includes the administration and management of hospital laundry services, the final decision on which option to

implement was subject to the approval of Facilicorp's Board of Directors, the Regional Health Authorities, as well as the Provincial Government.

86. As such, we find that this information consists of proposals, opinions, and recommendations and falls within the exception to disclosure.
87. This document also contains some minimal factual and background information in the Executive Summary and the description of the current situation at the time, and that information should be disclosed to the Applicant.

Financial and budgetary projections

88. As part of its work in assessing the options and recommendations on how to proceed with the future management of hospital laundry facilities, FacilicorpNB prepared financial and budgetary projections associated with these options and recommendations. As such, the information in these records show the options that were under consideration at the time and as such fall within the scope of the paragraph 26(1)(a) exception.

PowerPoint presentations

89. The relevant records include two Power Point presentations, both dated 2013 (one is dated February, the other July). The first presentation consists partly of factual information about FacilicorpNB's mandate and the then-current state of hospital laundry operations in the Province. This information is not advice, opinions, proposals or recommendations and should be disclosed.
90. It also contains basic information about the options proposed in the Business Case Review, which we found fall within the scope of paragraph 26(1)(a) as explained above. We find that this consists of the only information in this document that falls within the scope of the exception. The remainder of this record should be disclosed.
91. The second presentation dated July 2013, entitled "Laundry Services Initiatives," consists entirely of factual information and does not contain any advice, opinions, proposals or recommendations and such does not merit protection from disclosure under paragraph 26(1)(a) and should be disclosed.

Briefing notes and Memoranda

92. FacilicorpNB identified a number of additional briefing notes and memoranda in addition to the briefing note specifically requested by the Applicant. Some of these are internal briefing notes and others are briefing notes for the Minister or the Department of Health. Some of these records indicate that they are “advice to Minister;” however, as explained above, this is not determinative of whether any of the information in such a document merits protection from disclosure.
93. Having reviewed these records, we note that they are primarily factual in nature and all follow a similar format. They describe the background and current status, issues and risks, financial considerations, legal, consultations (internal/external), communication plan, advice and/or recommendations, and actions required. In the briefing note that was released to the Applicant with redactions, FacilicorpNB redacted the majority of the information, with the exception of the headers, the topic of the briefing note, the opening paragraph under the “Background” heading, the information under the “Consultations (Internal/External)” heading, and the fact that a communication plan was being developed (the details about the communication plan were redacted).
94. Having reviewed all of the redacted information, we find that none of it consists of advice, opinions, proposals or recommendations and as such, should not have been withheld.
95. As for the other briefing notes and memoranda, we similarly find that they are factual in nature and only one contains an actual recommendation. With the exception of the recommendation, we find that the information in these records does not fall within the scope of the paragraph 26(1)(a) exception and should be disclosed.
96. The only exception is one FacilicorpNB briefing note from 2012, which consists partly of factual information, but largely consists of summaries and analysis of the options identified for further consideration in the Business Case Review. As such, we find that the information in this briefing note with regards to the options that were considered do fall within the scope of the paragraph 26(1)(a) exception.
97. We now address whether FacilicorpNB exercised its decision to refuse access properly in this case for those records and information that fell within the scope of section 26.

FacilicorpNB's Exercise of Discretion

98. During our investigation, FacilicorpNB indicated that it was of the view that where it finds paragraph 26(1)(a) to apply, that the law allows it to refuse to disclose on that basis alone, whether or not the proposed steps had already taken place for up to 20 years after the preparation of the advice. FacilicorpNB did not consider all of the relevant factors at play in arriving at its decision to refuse to disclose information under paragraph 26(1)(a), instead adopting a blanket refusal approach.
99. In our view, and in the least, there were relevant factors that merited consideration in deciding whether or not it would be appropriate to grant access to that information in this case, such as:
- attempting to find the appropriate balance between protecting the deliberative process of government with the public's right to know about decisions made by governments;
 - whether the disclosure of the information will increase public confidence in the operation of the public body: In this case, while the decision to move forward with the consolidation of laundry services was made and implemented, FacilicorpNB encountered areas of concern significant enough to place the second phase of this process on hold and to reevaluate how best to proceed. Providing information about the options that were proposed and/or considered would better inform public debate;
 - in a case where the "advice or recommendations" exception is claimed, whether the decision to which the advice or recommendation relates has already been made: In this case, again, the final decision was made in early 2013, and thus it merits consideration as to whether the advice, opinions, proposals or recommendations continue to merit protection from disclosure.
100. Given that FacilicorpNB would not consider doing so, and in light of the above analysis on the proper application of a discretionary exception, we find that FacilicorpNB had not met its burden to establish that the Applicant does not have a lawful right to obtain this information that fell within paragraph 26(1)(a) in this case.
101. As such, we will recommend that FacilicorpNB release that information to the Applicant.

SUMMARY OF RECOMMENDATIONS

102. Based on our findings above, we recommend pursuant to subparagraph 73(1)(a)(i) of the *Act* the following records and information be released, except where specifically otherwise stated, namely the:

External consultant's reports

- a. The factual and background information found in the 2009 Feasibility Study report does not fall within the scope of paragraph 26(1)(a) and should be released. Apart from the consultants' professional references found in the last pages of the Feasibility Study, this information, although falling within the exception to disclosure, FacilicorpNB did not prove that the Applicant did not have a right of access;
- b. As for the 2010 Feasibility Study & Building/Infrastructure Analysis (a follow-up to the 2009 Feasibility Study), we found that all of the information falls within the exception to disclosure but FacilicorpNB did not prove that the Applicant did not have a right of access;
- c. As for the 2015 Facility Consulting Report and internal notes prepared shortly thereafter, we found that this information fell within the exception to disclosure but at the time of the Request, FacilicorpNB had just received this report and was in the process of reviewing it. In that case, we find that FacilicorpNB was authorized to withhold this information at the time of the Request and we do not recommend that this information be released;

Business Case Review

- d. FacilicorpNB's Laundry Services Division Business Case Review in 2012, contained an Executive Summary and the description of the current situation information, as well as information in the form of proposals, opinions, and recommendations, and while this information fell within the exception to disclosure, FacilicorpNB did not prove that the Applicant did not have a right of access;

Financial and budgetary projections

- e. FacilicorpNB's financial and budgetary projections information fell within the scope of the paragraph 26(1)(a) exception but again, FacilicorpNB did not prove that the Applicant did not have a right of access;

PowerPoint presentations

- f. Two Power Point presentations, even which contained basic information about the options proposed in the Business Case Review, was factual except for the options that fell within the scope of paragraph 26(1)(a), and again, FacilicorpNB did not present facts upon which it could lawfully refuse access to this information. As for the second presentation entitled "Laundry Services Initiatives," consisting entirely of factual information as we found it did not contain any advice, opinions, proposals or recommendations, none of it was properly withheld;

Briefing notes and Memoranda

- g. Internal briefing notes and memos were primarily factual in nature and we found that none consisted of advice, opinions, proposals or recommendations and as such, should not have been withheld. There was one exception is one FacilicorpNB briefing note from 2012, with options identified for further consideration in the Business Case Review. While that briefing note with regards to the options contained information within the scope of the paragraph 26(1)(a) exception, FacilicorpNB did not prove that the Applicant did not have a right of access.

103. Therefore, we recommend the release of all of the requested information described above, except for the 2015 Facility Consulting Report and internal notes prepared shortly thereafter.

Dated at Fredericton, NB, this _____ day of January, 2016.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner