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: 2013-1669-AP-901
Date: September 29, 2014

"Case about a citizen's access to an insurance adjuster's report from his municipality"

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*") and stems from a Complaint filed by the Applicant who requested that the Commissioner carry out an investigation into the matter.

2. On October 30, 2013, the Applicant made a request to the Town of Quispamsis to obtain the following information:

> All internal written communications (including reports, emails) regarding my claim against the Town for damages to the retaining wall at the address listed above. This would include all correspondence amongst the Mayor's office, the Town Administrator, the Engineering department.
>
> All external communications regarding the claim against the Town for damages to the retaining wall. This includes any electronic or written documentation amongst the Town, the Town's insurance carrier, the Claimspro adjuster and/or legal counsel regarding my claim for water damages against the Town.
>
> Please note, this request for information is in addition to the previous submission requesting the report from the insurance company regarding my property. This report would be dated Sept or Oct 2013.
>
> (the "Request")

3. The scope of the Request was for September 1, 2013 and October 30, 2013.

4. The Town responded on November 28, 2013 and refused to grant access in full to the requested information. The Town wrote to the Applicant as so:

> We have reviewed and processed your request dated October 30, 2013, and unfortunately have decided to refuse access to the following:
>
> - The Final Report produced by the Town's Insurance Company, Claimspro, on failure of retaining wall at [Applicant's address]
> - All internal written communication (including reports and emails) regarding the insurance claim between the dates September 1, 2013 and October 30, 2013
> - All external written communication (including electronic) regarding the insurance claim between the dates September 1, 2013 and October 30, 2013.

Access to these records were refused because of the following reasons under the *Right to Information and Protection of Privacy Act*:

- They would reveal advice, opinions or recommendations given to a public body and reveal legal negotiating positions. The Insurance Report was prepared for the dominant purpose of being used in and to aid in the conduct of litigation for which there is a reasonably prospect of [Section 26(1)(a) and (b)]
- Information is subject to legal privilege [Section 27]
- Disclosure could reasonably be expected to be injurious to the conduct of existing or anticipated legal proceedings [Section 29(1)(o)]
- Disclosure could reasonably be expected to be harmful to the legal negotiating position and financial interests of a public body [Section 30(1)].

5. The Applicant was not satisfied and complained to our Office on December 11, 2013.

6. The facts of this case are that in September of 2013, the Applicant asked the Town to clear a catch basin on his property as he felt the accumulated water runoff contributed to damages to the retaining wall on his property. The Applicant also asked that the Town repair the retaining wall.

7. The Town issued a work order to clear the catch basin but denied responsibility for the repair to the retaining wall as it felt that the failure of the retaining wall was poor workmanship and its age.

8. Nevertheless, the Applicant saw the Town as being responsible and had to repair the retaining wall and gave general costs to do so. According to the Town, the Applicant made no specific damage assessment or claim at that time. The Applicant did not commence a court action and did not serve notice on the Town that an action would commence if the Town did not pay for the repairs.

9. Given the Applicant's assertions, the Town followed its process and asked that its insurance company (the "insurer") review and assess the case. The Town wanted to know whether it was liable for repairing the Applicant's retaining wall due to the accumulated water runoff from the un-cleared catch basins.

10. In turn, the insurer retained an adjuster to investigate the damages to the retaining wall and to advise the insurer on whether or not the Town was liable. The adjuster issued its report on October 8, 2013 and advised the Town of its assessment. By separate letter, the Applicant was also informed of its assessment. The Town arrived at a decision and refused to pay for the repairs.

11. The Applicant wanted to obtain a copy of the adjuster's report but was denied; therefore, the Applicant proceeded to file an access to information request under the *Act* to pursue the matter.

12. The Town believed that the Applicant might begin litigation and the requested information could therefore be properly refused on the basis that the disclosure would reveal the Town's legal negotiating position.

INVESTIGATION

13. We met with officials of the Town and reviewed the relevant records to glean a better understanding as to the reasons why access to the requested information had been refused in this case. As with any complaint under investigation by the Commissioner's Office, we sought to resolve the matter informally. Where a complaint is filed with the Commissioner's Office regarding an unsatisfactory response to an access request, our investigation and intended outcome must remain the same: to ensure that an applicant receives the information to which he or she is entitled under the *Act* and to ensure that sensitive information remains protected, where warranted.

14. In cases where we find that access to all of the information the applicant (member of the public) was entitled to receive did not occur, we will try to resolve the complaint, but we do so while remaining in conformity with the *Act*. This means there are only two ways in which a complaint can be resolved under the *Act*:

    a) by agreeing with our findings and recommended course of action to provide the applicant the information that was initially refused (i.e., the information the applicant should have received in the first place); or,

    b) where the public body does not agree with our findings and recommended course of action, by our Office having to issue a Report of Findings as we are required to do under the *Act*. The Report contains the same findings and recommendations (i.e., that the applicant be given access to the information) and is made public.

15. Our process to resolve access complaints does not seek a mediated outcome; rather, it allows both the public body and the applicant to better understand this legislation and ensures that the person who seeks access to the information receives the information to which he or she is entitled under the *Act*. (*Note*: A full description of the steps

involved in the Commissioner's complaint process can be found on our website at http://info-priv-nb.ca/).

16. In the present case, the Town was amenable to accept some of our findings and part of our recommended course of action to release some additional information to the Applicant. Regrettably, the Town did not agree to release all the records we found should have been released to the Applicant. For those reasons, we were not able to resolve the matter and proceeded to report on our findings and issue recommendations to the Town.

17. We add that we were informed the Applicant had in recent weeks filed a formal court claim involving the Town to seek damages for the repairs to the retaining wall on his property.

LAW AND ANALYSIS

Search for relevant records

18. Although the Applicant complained that only one aspect of the Request had been processed by the Town believing there were two sets of records regarding the repairs to the retaining wall, we thoroughly reviewed all of the relevant records and found there was no distinction between records relating to the Applicant's claim for repairs and the Town's records relating to the repairs.

19. We find that the Town conducted an adequate search and identified all the records that pertained to the Request in this case.

Town's decision not to release relevant records

20. During our review of the relevant records, we noticed that the bulk of the records consisted of correspondence between the Applicant and the Town (including between the Applicant and the Mayor and the Town Engineer), as well as between the Applicant and the Town's insurer. Additionally, the records contained photographs of the Applicant's property. These records are documents that are known to the Applicant or are in his possession as they represent exchanges between the Applicant and the Town or the Town's insurer.

21. The Town cannot refuse access to this information based on any exception to disclosure under the *Act* and there is no interest in protecting this information given that it is known to the Applicant. Additionally, the Town could have asked the Applicant whether he wanted copies of these records in order to uphold its duty to assist obligations set out in section 9 of the *Act*.

22. Other relevant records were the Town's internal emails that contained information relating to the work done by the Town to clear the catch basin on the Applicant's property, email exchanges between the Town's staff regarding the insurer's comments, as well as excerpts of case law precedents. Having reviewed these records, we find the information to be of a generic nature and not requiring any protection under the *Act*. The Town could not refuse access to this information as it did not warrant protection under the *Act* and these records should have been released to the Applicant.

23. Other relevant records were the Town's external email exchanges with the insurer, and the adjuster's report. The email exchanges of a generic nature did not contain information considered confidential or needing to be protected. The name of the Town's insurer, as well as that of the adjuster is known to Applicant given that he received communication directly from the adjuster in relation to his claim. Therefore, this information should not have been withheld from the Applicant.

Town's emails with insurer and adjuster's report

24. Other external emails, however, consisted of comments on the question of the insurance policy deductible if the Town were to be found liable, and opinions from the insurer as to what steps the Town might undertake in the event that legal action was brought against the Town, or where the Town would be found liable for the damages to the retaining wall in a court case. The adjuster's report was prepared on behalf of the Town and it contains factual and background information, as well as opinions from the adjuster. We now explain how the exceptions relied upon by the Town did not apply to its emails exchanges with its insurer and the adjuster's report in this case.

<u>Exceptions relied upon by Town to refuse access</u>

Paragraph 26(1)(a) - Advice to a public body

25. Paragraph 26(1)(a) provides a discretionary exception to disclosure and it protects actual advice, opinion, recommendations, meant to allow for the free flow of opinions,

advice, recommendations. "Advice" refers to suggestions (less formal than recommendations) about particular approaches or courses of action to follow. In order to qualify as advice, there must be evidence of some type of communication of information from one person to another. An "opinion" on the other hand is a judgment or belief on grounds short of proof, such as a view held as probable. It can also be a formal statement of professional advice.

26. Discretionary, however, means that the information may be released and that it should only be refused based on relevant factors at the time of the request. A relevant factor is whether a decision has been made. Subsection 26(1) is used to protect information where a decision has not yet been made; it cannot be used to refuse access to information after a decision is made and has been communicated. Additionally, subsection 26(1) does not protect factual or background information contained in a document. When a record contains advice, opinions or recommendations as well as factual or background information, it is not lawful to refuse the entire record.

27. In this case, we agree that some of the information contained in email exchanges and the adjuster's report could be construed as advice or opinion. That information was developed for the Town by the insurer and the adjuster to assist the Town in making decisions in the event of litigation. The adjuster's report, however, contained facts and background information which is not considered advice or opinions. As a result, the Town could not refuse access to the entire adjuster's report.

28. Furthermore, although we agree that the remaining information contained in the adjuster's report, as well as certain emails exchanges between the Town and its insurer could be construed as advice or opinion, the exception in subsection 26(1) can only be used to protect advice or opinion where a decision has not yet been made in relation to the advice or opinion. This factor was an important facet of this case, i.e., the time at which the Request was made to the Town by the Applicant.

29. We take the requisite time to talk about the relevance and importance of keeping in mind relevant factors that exist when a request for access to information is made under the *Act*.

Governing rule when processing requests

30. When processing a request for access to information, the public body should keep in mind the relevant factors and circumstances at play at the time the request is made.

This governing rule is based on the fundamental notion that government is required to carry on its affairs in an open and transparent manner. Citizens recognize that government decisions are made with information that exist at a point in time and are based on circumstances in effect at the time of the decision. Government decisions, however, are made on a daily basis and they impact the lives of citizens so it follows that citizens have a right to know and want to find out how decisions are made. For citizens to better understand those decisions, they need to know what information was relied upon. Taking into consideration factors that exist at the time will therefore allow the public body to respond to the citizen's request (i.e., the question) in a meaningful way.

31. Arguably citizens will agree with some decisions and in other cases, they will disagree. 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. All of this results in well-informed public debates, better government-decision making processes, and healthier democracies.

32. In the present case, when the Town received the adjuster's report, it made a decision not to pay the Applicant for the repairs to the retaining wall. The point in time consideration is therefore important because the Applicant requested a copy of the adjuster's report after the Town made a decision on the issue. The Applicant wanted to know the basis for that decision, and rightfully so in our view.

33. Therefore, the Town could not lawfully rely on the exception found in paragraph 26(1)(a) at the time of the Request made on October 30, 2013 as the advice had been acted upon by that date.

Subsection 27(1): Legal Privilege

34. Another exception relied upon was legal privilege based on the Town's belief that its correspondence with the insurer and the ensuing adjuster's report had been prepared for possible litigation with the Applicant.

35. First, we point out that legal privilege under that provision applies to communication with legal counsel, not those with insurance companies or adjusters. Second, legal privilege – also known as litigation privilege, protects records created for the dominant purpose of litigation, or in other words, the records were produced:

1. with existing or contemplated litigation in mind;
2. for litigation that is on-going or is believed will take place, and that belief must be reasonable rather than simple conjecture.

36. In the present case, the Town asked the insurer to determine whether the Town would be liable to repair the Applicant's retaining wall *in the event* that the Applicant filed a claim against the Town. The facts, however, show that when the Town requisitioned an adjuster's assessment, the Applicant had not signified any intent to file a formal claim or commence a court action for damages. This was observed as late as October 2013 when the Applicant filed the Request to the Town.

37. Furthermore, the Town informed us that such claims are not unusual and that there are regular instances in which citizens look to the Town for compensation for damages or repairs to their property. For that reason, the Town routinely seeks insurer's advice when having to make decisions regarding such claims. In our view, this signifies that the dominant purpose in seeking advice is to permit the Town to make a decision regarding compensation or payment of damages for repairs rather than for the purpose of preparing itself for possible litigation in every case.

38. We do not dispute that the records were prepared on behalf of the Town for the purpose of determining whether it would be liable for the repairs to the Applicant's retaining wall in the event the Applicant filed a claim. We simply indicate that for the statutory litigation or legal privilege found in section 27 to apply to this case, i.e., to the Town as a public body that is asked to explain its decision to a citizen, there must be more than a general belief – or apprehension of litigation.

39. The information must have been created with existing litigation or contemplating in a reasonable fashion that the Applicant would file a legal suit <u>at the time the adjuster's report was requisitioned</u>, and that was not the case when the Town asked for the report in September of 2013.

40. We reviewed the letter dated September 3, 2013 sent by the Applicant to the Mayor and did not find that the Applicant was contemplating litigation at that time. It is clear the Applicant was asking the Town to pay for repairs to the retaining wall on his property; however, those facts did not indicate that litigation was being contemplated at that time. We reiterate that the belief of contemplated litigation must be reasonable, and cannot be simple conjecture or assumption.

41. We also point out an important distinction between assessing liability and *preparing for litigation*. Assessing liability can be done to be better able to arrive at a decision to spend public funds (and avoid legal proceedings) rather than meaning in all cases preparing for litigation.

42. We find that the Town could not substantiate a reasonable belief that litigation would ensue when it requisitioned the adjuster's report, i.e., when it followed its normal process before making a decision regarding compensation for damages or repairs.

43. We reinforce the point that, to claim litigation privilege, the record at issue must have been produced with existing or reasonably contemplated litigation in mind. We underline the fact that the adjuster's report was produced well before the formal claim that has been recently filed (August 2014), about a year later. And, the adjuster's own belief that the Applicant might file a claim had no bearing on why the report was first requisitioned in September of 2013. "*In the event of*" does not point to a reasonable belief that a legal action will be commenced. As a result, we do not find that the adjuster's report was prepared for the dominant purpose of a reasonable belief of contemplated litigation.

44. Based on all these facts, at the time when emails were exchanged between the Town and its insurer and when the adjuster's report was created, we find that litigation by the Applicant was not reasonably contemplated such that the litigation privilege would apply to those relevant records. The fact that the Applicant commenced a formal action for costs of repairs to the retaining wall on his property almost a year later does not affect our findings. We reiterate the importance of looking at relevant factors at the time a request is made. In this case, a relevant factor was that the Applicant simply sought answers to why costs for repairs were being denied by the Town. The adjuster told the Applicant these costs were being denied, and so did the Town, but no explanation was provided. We can only speculate as to whether the Applicant would have proceeded with a legal action had he received the answers to his question in 2013.

45. We find that the Town could not rely on section 27 litigation privilege to refuse access to these records in this case.

Other exceptions relied upon

46. The Town also relied upon paragraph 26(1)(b) to refuse access in this case. Given the facts of this case and our findings above, we point out that paragraph 26(1)(b) cannot be

relied upon to protect information on the basis that its disclosure would reveal the public body's negotiating position in the event of legal proceedings. The same reasoning and finding is applied to the Town's refusal because these records (internal emails and adjuster's report) were believed to be injurious to the conduct of anticipated litigation if released (paragraph 29(1)(o), harm to legal proceedings). Finally, the Town relied upon subsection 30(1), harm to public body's economic interests, in refusing access to those same records, believing that negotiations, including legal negotiations, fell into that category. While they might, there was neither actual nor contemplated lawsuit at the time that called for any negotiations at that time and for that reason, we find that the Town could not rely on that exception to withhold this information from the Applicant.

CONCLUDING COMMENTS

47. In the present case, the Applicant wanted to know what information the Town had relied upon to decide not to compensate him for the costs to repair the retaining wall on his property. The Town was not facing a court challenge at that time and there was no evidence that the Applicant wanted to pursue formal legal proceedings. The Applicant simply wanted to know the reasons why the Town decided it was not responsible for those repairs. We state once again that with that information, it is arguable that the Applicant might have decided not to proceed with a claim.

48. The point remains, however, that the Town's conjecture that the Applicant would file a court challenge could not and was not a proper or lawful basis upon which to refuse access to the information in the first place. We found no facts or circumstances **at the time of the Request** that permitted the Town to refuse access to the internal emails and adjuster's report, records all produced as part of the Town's regular public body duties and functions, and a report requisitioned and paid for with public funds. The Applicant complained about this refusal rightly in our view.

49. Almost a year has passed since the Request was made and proves the point of this entire case: the Applicant simply wanted to know what was contained in the adjuster's report and became frustrated in not getting access to that information. We can appreciate that the Applicant had no other option but to proceed by court action to find out this information.

50. We make no comment about the legal case itself, i.e., whether the Town should or should not be liable for the costs of repairs, but we do want to underline the importance

of the rules of the *Act* and why they were developed for public bodies: provide access to information to uphold transparency for their operations and to remain accountable to the public for the decisions they make.

FINDINGS AND RECOMMENDATION

51. We find that the Town conducted an adequate search of its files and identified all the records that pertained to the Request, and could have exercised its duty to assist in finding out from the Applicant if he wished to receive correspondence that he already had in his possession that were relevant to his Request.

52. As for the Town's internal emails generic in nature, we found no information that warranted protection under the *Act*. The Town's external correspondence with its insurer, which included the adjuster's report, could not be lawfully refused under any exception relied upon by the Town for the overriding reason that these records were not produced for the dominant purpose or in relation to any actual or reasonably anticipated legal proceedings at the time of the Request, namely in the late summer and fall of 2013.

53. Based on all of the above, the Commissioner recommends, pursuant to sub-paragraph 73(1)(a)(i) of the *Act*, that the Town disclose all records relevant to the Request described above, including an unredacted copy of the adjuster's report, to the Applicant.

Dated at Fredericton, New Brunswick, this 29th day of September 2014.

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Anne E. Bertrand, Q.C.
Access and Privacy Commissioner