

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: 2015-2726-AP-1506

Date: September 22, 2016

"A case about what not to do when receiving and processing a request for access to information submitted under the *Right to Information and Protection of Privacy Act*"

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 for an unsatisfactory response from the New Brunswick Liquor Corporation ("NB Liquor").
2. Crown corporations have functions and structure that might differ from main stream departments, but crown corporations are public bodies under the Act, which means that they are subject to the same rules regarding access to information and protection of privacy.
3. NB Liquor is a crown corporation. It was established pursuant to the *New Brunswick Liquor Corporation Act*, whose objectives are to:
 - carry on the general business of manufacturing, buying, importing and selling liquor of every kind and description,
 - promote the responsible consumption of liquor,
 - participate in the development of the liquor industry in the Province,
 - meet the needs of its customers, and
 - provide suitable financial revenues for the Province.
4. NB Liquor contemplated introducing a microbrewery growler program to encourage sales based on its review of an encouraging trend. From December 2013 to November 2014, microbreweries made up 2.19% share of total litres of beer sold in New Brunswick (from a total of 44 billion litres sold and 2.19% meant 974 000 liters of local craft beer sold which was an increase from the previous year's sales of 875 000 litres). Therefore a "Growler Program" would allow customers to purchase a 1.89 litres growler glass container and have it filled in those stores with craft beers available on tap, or they could bring their own growlers for fill-ups. Moreover, NB Liquor had, in anticipation, purchased several thousand of glass growler containers that would have to be sold to recoup its purchasing costs.
5. As a result, in September 2014, NB Liquor launched a pilot project in three of its stores for the sale of craft beer with growlers. The pilot project was to run until March 2015, at which time it would be evaluated and a decision made as to whether it would remain. NB Liquor would assess the public's interest in being able to purchase locally produced craft beer at reduced cost in refillable growlers. The sites were Quispamsis, Dieppe, and

one store in Fredericton. NB Liquor would sell the growlers at \$10 per unit to encourage the public in purchasing the craft beer, and some 500 units were given out at special events to encourage the public's participation. The pilot project was underway and a fourth site in Sackville was later added to the pilot project.

The Access to Information Request dated July 21, 2015

6. About a year later in July of 2015, the Applicant sought specific information about the Growler Program and filed an access to information request with NB Liquor. The Applicant was seeking, for period of June 1, 2014 to July 21, 2015, information that included:

any reviews of the Growler Program, including external and internal correspondence, meeting minutes and financial analyses, economic impact analyses, budget information, sales figures, inventory purchases and stocks. (the "Request").

7. The Right to information Coordinator at NB Liquor was, and is NB Liquor's Communications Officer. That staff member was also designated by the Board of Directors as the "Head" under the *Right to Information and Protection of Privacy Act* to make decisions regarding the public's access to information held by NB Liquor.
8. It was therefore the Communications Officer who was in charge of processing the Request in this case. In this Report, we refer to the Right to Information Coordinator who is also the Head as the "Coordinator".
9. The Coordinator contacted the Applicant and we understand 2 to 3 discussions took place about the Request itself. Those discussions included what specific information the Applicant was seeking by having filed the Request.
10. During the initial discussions with the Applicant, NB Liquor indicated that a decision regarding the future of the pilot project or making the Growler Program permanent had not been made; however, a press release and press kit would soon be released and it would answer the Applicant's Request.
11. The Coordinator raised some hesitation about how to process the Request. Nonetheless, staff that day was asked to search for information relevant to the Request, and in total, four individuals would be reviewing their records to identify any information regarding the Growler Program, including any review of the Program,

- internal and external communication, minutes of meetings, etc. The results of those searches were supposed to be reported back to the Coordinator by August 10, 2015.
12. To this day, we are uncertain if a full search was ever completed.
 13. Meanwhile, NB Liquor publically announced its decision to continue with the Growler Program. Consequently, a press release kit was produced and issued by the Coordinator on August 8, 2015.
 14. The Applicant issued a story on the Growler Program being here to stay in New Brunswick as based on NB Liquor's reports that the Program had sold 80 000 litres.
 15. A few days later, on August 12, 2015, the Coordinator wrote to the Applicant notifying that more time would be needed to process the Request based on volume of records. That self-extension meant a response could be expected by September 21, 2015.
 16. At some point, however, and by whom it is neither clear, a decision was made to stop the processing of the Request on the basis that records (emails of NB Liquor staff) were too numerous.
 17. On September 21, 2015, the Coordinator (as designated Head under the *Act*) issued NB Liquor's response refusing access to the Applicant to all of the requested information. NB Liquor responded by also indicating that most of the information had already been provided to the Applicant in the press release package. Furthermore, NB Liquor wrote that access to external correspondence was being refused on the basis of harm to third party business interests (the "Response").
 18. The Response being unsatisfactory, the Applicant filed a complaint on October 21, 2015.

The Complaint Informal Resolution Process undertaken in this case

19. As in all of access complaint investigations we undertake, we first pursue the matter with a view to resolve the complaint by determining what information the requester was entitled to receive and recommending that if not the case, that the matter be remedied by having the public body issue another response with any additional relevant information not earlier provided. Doing so is predicated upon the public body first demonstrating a respect for its statutory obligations, and having processed the request with a view to be open and transparent to provide all of the information to which the

- requester is entitled after having assisted in finding all of the relevant information and issuing a complete, meaningful and timely response.
20. So it was in this case when we met with the NB Liquor's CEO and Coordinator (designated Head under the *Act*) on January 27, 2016, and again on March 1, 2016.
 21. To our surprise, NB Liquor considered the Request too broad and unreasonable, and was of the view that the press release package should have satisfied everyone, including the Applicant, with an interest in the Growler Program. NB Liquor did not think it should be asked to provide more on the subject matter.
 22. We learned that the Response, while prepared by the designated Head, had been vetted and approved prior to issue by NB Liquor's Vice President of Finance and its CEO. In fact, our investigation revealed that the designated Head made no decisions regarding this access to information Request or other requests, that responsibility having remained with NB Liquor's upper management.
 23. We also learned that NB Liquor considered the Request as an attempt to gain access to what NB Liquor considered to be entirely confidential information of craft beer producers. NB Liquor boasted that it would guard that information fully, despite any statutory obligations regarding the public's access rights. It was primarily on that basis that NB Liquor found the Request to be unreasonable.
 24. Putting those comments aside for the moment, we reminded the top executive of NB Liquor's statutory obligations. We received the CEO's assurance that there would be cooperation to resolve the complaint, meaning that the Request would be processed properly and a proper Response provided. With that assurance, we proceeded with our complaint resolution process.
 25. We discussed the entire case and examined the facts surrounding the issues for the processing of the Request and the formulation of the Response. We found that NB Liquor processed the Request in the following manner.
 26. The Coordinator contacted the Applicant at the outset to discuss the scope of the request and nature of the information requested, during which the Applicant explained he was interested in finding out how the pilot project was working and on what basis the decision regarding the Growler Program would be made. While NB Liquor was at first helpful in assisting the Applicant, this attitude soon changed when the Applicant

refused to modify or narrow the scope of the Request at the insistence of NB Liquor. A search was commenced, but when officials believed the information would be voluminous, the search was halted. NB Liquor approximated that information from 150 to 200 third parties might be pertinent, yet NB Liquor seemed to have overlooked the Applicant having clearly stated at the outset he was not looking for access to protected third party information. The whole process was halted.

27. We found nothing in the wording of Request that was either too broad or unreasonable.
28. We also point out there was no requirement on the part of the Applicant to modify or narrow the scope of the Request, and we elaborate on that point more fully below.
29. The Commissioner asked NB Liquor to identify all the relevant records and to provide a list of records to us, and NB Liquor did so. From that list, the Commissioner then asked NB Liquor to go over the records and make a decision regarding access to all of the records' content that we would then review, again as part of our investigative process to resolve the complaint.
30. NB Liquor refused to do so and instead, NB Liquor instructed outside legal counsel to send us a letter advising that processing the records would unreasonably interfere with NB Liquor's operations.
31. Meanwhile, to verify facts of this case, we met with the Applicant who made it clear to us that he had wanted access to "a report" that explained how the decision had been made to continue with the Growler Program.
32. The Applicant reckoned that there must have been facts and analysis gathered by NB staff that had informed the decision, as well as input and/or feedback from third party brewing companies (regarding the pilot project that had allowed NB Liquor to come to the decision to continue with the Program).
33. The Applicant is a regular requester of government information and is very familiar with the Act, as well as with decisions of this Office that confirm what information the public can and cannot have access to. The Applicant was not looking for confidential third party information and assured us that fact was made clear to NB Liquor at the outset.
34. The Applicant was equally clear that the press release and kit did not indicate the basis upon which NB Liquor had decided to continue with the Program, which was the entire

objective of the Request. This is why, when the Right to Information Coordinator wrote to the Applicant contemplating whether the Request would still be applicable given the press release information, the Applicant was surprised especially since he had explained the Request was predicated upon learning how the decision had been derived. According to the Applicant, the media kit provided some facts about sales and the Program's pilot sites, but little else.

35. Given all of the above, and the fact that almost a year had passed since the Applicant had expressed his interest in the Program and NB Liquor's decision in September 2015, the Applicant shared with us concerns that the entire process was frustrating and ineffectual. Access to information in a timely and meaningful manner had failed in this case, and we completely agree with the Applicant on that score.
36. As a result of all of the facts and circumstances surrounding the case, and NB Liquor's protracted actions to prevent any effective resolution of the complaint case, we found there was little benefit in continuing with our resolution process. More importantly, we believed the seriousness of the issues raised in this case merited concluding our work in a published Report of Findings.

ANALYSIS AND FINDINGS

The true facts about access requests of "broad scope"

37. The public has a right to request and receive information from government subject only to limited and stipulated exceptions. Public bodies cannot choose to apply the law simply when it is convenient. The public's right of access does not change depending on the reasons why an individual seeks information or dependent upon *who* is asking. These are irrelevant considerations when processing an access to information request submitted under the *Act* (save only in those very rare instances when one is using the legislation for purposes other than the legitimate exercise of the right to know).
38. It is important to say that when an access to information request is clearly expressed, the person who requests the information is not required to narrow or reduce the scope at the insistence of government. Such an approach borders on disrespect. We take this opportunity to remind everyone, the public and public bodies alike, that the rules of the *Act* regarding access to government information are predicated upon specificity and reasonableness.

39. Applicants have responsibilities as well, to be as specific as possible when requesting government information, and be reasonable in their requests.
40. Specificity of the subject matter of interest allows government officials who are tasked with searching for the requested information to be more focused and timely in their searches. A reasonable exercise of one's right to access information requires one to also consider government's resources, efforts required, and length of time to look for and produce the requested information.
41. The public must not arbitrarily seek government information without such considerations. Likewise, public bodies cannot disregard requests they consider to be unreasonable or unclear on the basis of the breadth of subject matter and/or time period.
42. Accordingly, broadly stated requests need to be reviewed objectively, with a view to seek agreement between the parties as to what can be done in a timely fashion, or when that is not possible, with a Commissioner's time extension ruling that will strive for the best outcome:

Striking the right balance between the public's right to access government information and government's ability to provide it with finite resources.

43. Furthermore, access requests that are in fact vague or unclear when viewed objectively, can be dealt with by seeking clarifications, and individuals who file similar or multiple access requests risk losing their right of access in such cases. These avenues are stipulated in the *Act* and serve as a check and balance on the specificity and reasonableness of access requests, while ensuring that public bodies fulfill their statutory obligations to provide timely and meaningful responses.

NB Liquor's repetition of past mistakes

44. It became immediately obvious to us that NB Liquor at its highest management level did not care to recognize the relevance of the legislation or the impact of its approach in this case, especially to the oversight Office tasked with ensuring the law is well applied and followed.
45. We recalled that in 2010 and 2011, when the *Act* was first put into effect and NB Liquor became subject to it, we obtained, despite initial wrangling, good cooperation during

- our access complaint investigations. Those investigations had drawn attention to a culture of secrecy that provided less information to the public – rather than more, about its operations and decisions that impact the Province's bottom line.
46. During those early years, and with a lot of effort on the part of both NB Liquor and the Commissioner's Office, NB Liquor changed its approach, adapted to the *Act*, and implemented a better process to respond to access to information requests in a meaningful way. NB Liquor also followed our recommendations, and from what we observed, NB Liquor was poised to continue that good work. We were equally surprised and concerned to see that NB Liquor was returning to its former incorrect practices.
 47. We had observed in the past that NB Liquor saw itself as an independent business entity, created to provide much needed revenues to the Province, or that NB Liquor's business affairs ought to be left alone and safe from the prying eyes of the public. That attitude had not changed, and the stark disregard for the legislation and the public's right to access government information was remarkable. The fact that the "designation of Head" was placed upon NB Liquor's Communications Officer with a direction by upper management that he make no decisions as to what information should or could be released, also raised serious concerns that progress might not be forthcoming.
 48. When faced with a Commissioner's investigation into an access complaint under the *Act*, NB Liquor was first "prepared to cooperate and resolve the case", although that quickly changed when asked to complete the work that should have been done at the outset.
 49. We point out that our Office has no role or comment to make regarding NB Liquor's business. Our oversight work is strictly focused on ensuring NB Liquor's accountability to the public for the openness and transparency of its decisions.
 50. The Commissioner has grave concerns especially when considering the major issues at NB Liquor we identified that prevent transparency and openness and effective processing of access to information requests: willful blindness to obligations under the right to information legislation, and a culture of protectionism for any information about its decision-making process and the private sector in which it deals. At NB Liquor, requests received under the *Act* are not considered a priority; they are seen as an unnecessary inconvenience or irritant.
 51. Government bodies have a duty to document how decisions are made. The Applicant was looking to understand how NB Liquor came to the decision to keep the Growler

Program. It was therefore entirely logical for the Applicant to expect that the decision regarding the Growler Program and pilot project was derived from information generated during meetings (handwritten notes, minutes), or from exchanges with third party producers, or financial analysis and projections, and so on. None of this relevant information was searched, much less produced.

NB Liquor's processing of the present access request

52. In all, NB Liquor failed in so many respects, as NB Liquor:
- a) Considered itself above the law and allowed to disregard its obligations
 - b) Did not remain open and transparent
 - c) Did not respect the Applicant's right to know
 - d) Did not assist the Applicant and process the Request in conformity with the *Act*
 - e) Refused to see that the Applicant sought information about the decision-making process
 - f) Did not inform the Applicant that NB Liquor considered the request too broad
 - g) Negated to advise the Applicant that NB Liquor believed access was sought for protected third party producers' information when that was not the case
 - h) Failed to consider disclosure as a default, where requested information that is not otherwise protected must be released
 - i) Disregarded the Applicant's access rights, rather approaching the case in regards to the identity of the Applicant and that it was inconvenient to process the Request
 - j) Did not conduct a thorough search for all relevant information
 - k) Did not retrieve or review the relevant records before issuing a Response that decided the information was being entirely refused, therefore without any lawful basis
 - l) Failed to issue a response that was lawful, meaningful, or made sense as required by law, and
 - m) Failed to cooperate with the Commissioner during a duly constituted access complaint investigation under the *Act*.
53. These are very serious issues and they must be addressed.
54. In New Brunswick, the Commissioner's approach is to first try to resolve the matter informally and if the matter cannot be resolved in that fashion, then a formal Report of

- Findings will be issued. We work with public bodies in addressing the issues with education relative to the *Act's* best application, and by encouraging full compliance.
55. For this approach to work however, public bodies must be willing to work with the Commissioner's office and must participate fully in the process while respecting the Commissioner's legislative role and responsibilities.
 56. It is a sad day when a public body cannot be open and transparent about its decisions, including those regarding one aspect of its overall operations; but then, if NB Liquor cannot explain how it decided to go forward with the Growler Program, what does this mean for other matters and its transparency in how it conducts its business?
 57. When that fundamental statutory obligation is disrespected, everyone loses. The public should not have to accept this and the law does not.
 58. While the Applicant was frustrated that so much time has passed and relevance lost since he sought information in September of 2015, we cannot accept NB Liquor's actions in not processing or responding properly to the Applicant's Request. It is not too late to recommend that the Request be processed properly, and that changes within NB Liquor's ranks be implemented to prevent a similar situation.
 59. NB Liquor's decision-makers, including those at the highest level, must accept that they have a duty to document their decisions, and that they have a corresponding duty to inform the public about those decisions.
 60. For this important reason, the Commissioner's recommendations below are intended to impress upon NB Liquor the importance of its respect for the *Act* and of its public accountability.

COMMISSIONER'S POWERS UNDER SUBSECTION 60(1)

61. Subsection 60(1) of the *Act* gives the Commissioner broad authority to address areas of concern with a public body being able to meet its duties and obligations with respect to access and privacy rights. The Commissioner's power to issue recommendations about "*the administration of this Act*" encompasses questions of interpretation, application and execution of specific provisions of the *Act*, and includes a public body's overall compliance with its statutory obligations and duties.

62. The Commissioner does not tell government what to do or how to conduct its work; however, the Commissioner is charged with oversight and where issues are identified during a complaint investigation that reveal an underlying factor that is hindering the public body's ability to meet its lawful obligations, the Commissioner has the power to see those concerns addressed.
63. In that regard, the Commissioner's recommendations under subsection 60(1) reflect the intent of the law, and where appropriate, suggest workable solutions to ensure compliance with the *Act*. To hold otherwise would diminish the Commissioner's ability to fulfill the mandate as the independent overseer of this legislation.
64. In the present case, the facts give rise to a genuine concern about NB Liquor's overall respect in meeting its statutory obligations and we find it necessary to issue formal recommendations to NB Liquor under subsection 60(1) to address this non-compliance.
65. As required by the *Act*, NB Liquor will have to make a decision whether or not to accept the Commissioner's recommendations and NB Liquor will have to inform the Applicant and the Commissioner.

RECOMMENDATIONS

66. Based on our investigation and all of the above, the Commissioner recommends under section 73 of the *Act* that:
- a) NB Liquor thoroughly process the Applicant's Request, by completing a thorough search of the relevant information, and after examining those records identified, to formulate and issue to the Applicant a meaningful response in conformity with section 14 of the *Act*, by no later than October 25, 2016.
67. Also based on our investigation and all of the above, the Commissioner recommends under subsection 60(1) of the *Act* that:
- a) NB Liquor adopt and follow an established process that will require the creation of records to document key actions and decisions that account for and support the continuity of its operations and preserve its history (as per its business needs and public accountability/expectation), such records that will also allow for an independent evaluation and review of its policies and programs;

- b) NB Liquor adopt and follow an established process that will ensure that in every case going forward, that all access to information requests submitted under the *Act* will be thoroughly processed, with complete searches and examination of the relevant information identified, resulting in the issuance of a meaningful response to the requester.

68. As per the *Act*, NB Liquor will have **until October 7, 2016** to inform the Commissioner and the Applicant, in writing, of its decision regarding these recommendations.

Issued at Fredericton, New Brunswick, this _____ day of September, 2016.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner