

Office of the Access  
to Information and  
Privacy Commissioner

New Brunswick



Commissariat à l'accès  
à l'information et à la  
protection de la vie privée

Nouveau-Brunswick

## REPORT OF THE COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Complaint Matter: 2014-1810-AP-983

Date: May 7, 2015

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

## INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into this matter.
2. The Applicant made a request to St. Thomas University for the following information:
  - Salaries, bonuses, pension and severance pay, paid to the university president for the calendar years 2012 and 2013; the percentage of salaries, bonus, pension and severance pay adjustments between the calendar years 2011 to 2012 and 2012 to 2013 for the university president;
  - The same information for each university vice-president;
  - The same information for each associate or assistant vice-president;
  - The same information for each dean or director, or equivalent, who are not members of any faculty bargaining unit; and
  - Payments made to law firms or lawyers for professional services, excluding lawyers who are employees, for the years 2012 and 2013.

("the Request")

3. The University responded by providing the Applicant with the total amount paid to law firms or lawyers for 2012/2013, noting that it had previously provided the amount for 2011/2012 to the Applicant. The University refused access to the remainder of the requested information about salaries, bonus, pension, and severance payments.
4. In explaining its decision, the University indicated that it prepares a yearly salary report that provides information by salary range for all positions with an annualized salary of \$60,000 or more, which represents salary ranges as of July 1<sup>st</sup> (the date at which salary adjustments are made pursuant to collective agreements and administrative policies), and provided a link to this information on its website.
5. The University further stated in its Response:

The salary information is provided by salary range, consistent with section 21(3)(f) of the Act, therefore it is not possible to show salary changes as percentage changes, although one can see whether the salary range under which a position falls has changed over time by reviewing the salary reports over a number of years. This information as of July

1<sup>st</sup> for the academic years 2004/05 to 2013/14 is available at [link to STU website]. Any bonuses are included in the salary ranges of these public reports. Specific pension and severance pay are not included in the salary reports, as that type of information is considered to be personal information, the release of which would represent an unreasonable invasion of privacy.

6. The Applicant was not satisfied with the University's Response and filed a Complaint with our Office, stating that in refusing access to the requested salary, bonus, pension and severance information, the University failed to take into account subsections 21(3)(f) and (g) of the *Act*, which states that certain kinds of personal information are not protected from disclosure.

## INFORMAL RESOLUTION PROCESS

7. 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*.
8. The Commissioner's authority to investigate and resolve complaints is established under section 68, and subsection 68(2) delineates the parameters of an informal resolution of a complaint:

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

2 The purposes of this Act are

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

(...)

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

(...)

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

11. It follows that the Commissioner's authority to affect an informal resolution of an access complaint requires that it be done in a manner that respects the law, upholds an applicant's access rights, and fulfills a public body's statutory obligations.
12. We recognize that a public body has the right to disagree with our interpretation of the *Act*, and in fact, we welcome such dialogues as it provides an excellent opportunity to better understand the public body's approach and its application of exceptions to disclosure. We strive to be thorough in all of our complaint investigations, and a public body's reasoning on how it thinks the *Act* should be applied in a particular case is a valuable contribution to our analysis, as are an applicant's comments or representations.
13. To affect a resolution, there can be no compromise of rights of access to information or a public body's statutory obligations; the informal resolution process must remain consistent with the purposes of the *Act*. 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*.
14. A full description of the steps involved in the Commissioner's information resolution process can be found on our website at <http://info-priv-nb.ca>. Below is a summary of what this process provides:
- to the public body, the benefit of our independent Office's interpretation of the law and an opportunity to correct any error in access that may have been made;
  - for the public body, the satisfaction of having complied with its obligations under the *Act*;

- to the public who sought access to the information (the applicant), the benefit of an independent analysis of which information was truly required to be released under the *Act*; and
- for the public, the satisfaction of understanding right of access to information and having that right respected under the *Act*.

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

15. We sought to resolve this case to the satisfaction of the parties and in conformity with the *Act* and to do so, we explained at the outset the tenor of the informal resolution process and invited the University to participate. We held good discussions with University officials, reviewed all elements of the Request, and obtained the University's reasons why it had refused access to all of the requested information.
16. After our first analysis of the entire matter, we provided our initial findings to the University that included analysis and explanations why we disagreed that all of the requested information about how the University compensates certain employees was protected from disclosure. Our analysis showed that the Applicant was entitled under the *Act* to receive most of the requested information, with the exception of exact salary information, which is lawfully protected from disclosure.
17. The University indicated that it was amenable to providing the Applicant with much of the requested information as part of the informal resolution process; however, the University, while recognizing and having considered our interpretation of the law, expressed reservations about disclosing severance payment information.
18. The University remained of the view that severance payment information is protected personal information. The University also indicated that these amounts were subject to confidentiality agreements, which it believed prevented it from releasing information of this nature.
19. In this regard, the University was prepared to release much of the information that the Applicant had requested, save for the severance payment information.
20. As a result, and despite the good cooperation demonstrated by the University throughout our investigation, we could not move forward with the informal resolution process as the *Act* calls for further disclosure than the University was willing to provide, for reasons that will be explained below.

21. 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*. Again, we point out that the University continued to be prepared to release most of the information we indicated should have been disclosed with the Response.

## LAW AND ANALYSIS

### Access to Employee's Salaries, bonuses, pension and severance pay

22. The *Act* requires a high level of transparency in terms of how public bodies compensate their employees and officials. Public bodies receive funding from taxpayer dollars and the public has a right to know how it is using these funds to compensate its staff.
23. As information about how a person is compensated is considered to be personal information about the individual, the rules governing disclosure of this kind of information are found in section 21 of the *Act* (*unreasonable invasion of a third party's privacy*).
24. We point out that the University recognizes that disclosing most of the requested compensation information to the Applicant would not be an unreasonable invasion of privacy for the individuals to whom the information relates. The only issue surrounds the disclosure of severance payments.

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

25. It is commonly known and a well-established principle many countries that privacy must be protected and that governments have a duty to protect personal information found in their records as they accomplish their daily task and duties. Those well-established rules regarding the protection of privacy are set out in Part 3 of the *Act*.
26. Part 2 of the *Act*, however, is where legislators have expressly set out the public's right to access government information, not under Part 3 which only concerns government's duties to protect personal information when it handles that information to carry out its activities and programs. Part 2 provides all the necessary guidance and rules that direct how a public body must respond to an access to information request, including when it is necessary – or not to not disclose personal information.

27. The fundamental distinction lies in what Part 2 is designed to accomplish. Part 2 sets out the other well-established principle that the public has the right to know how public funds are spent. Accordingly, under the provisions of Part 2, legislators have granted to the public a right to know about government's affairs, decisions, programs, and how it spends public funds. Moreover, legislators have directed that all public bodies respect the public's right to know, and it follows that this right to know extends to the public knowing how public servants are compensated, which means disclosing some of their personal information.
28. As a result, when processing an access request, the test for the disclosure of personal information will not solely be based on privacy; rather, the test is whether the release of the personal information would result in an unreasonable invasion of the person's privacy. The *Act* is not designed to protect all personal information about an identifiable individual, rather, only to do if releasing the information would result in an unreasonable invasion of that person's privacy.
29. That test is set out by law under section 21. All public bodies are subject to the rules set out in section 21. In fact, the *Act* specifies that in some cases, personal information can be disclosed and doing so will not be an unreasonable invasion of a person's privacy. Those cases are premised on the public's right to know how government spends from the public purse and how it compensates its employees by directing the release of personal information that include employees' range of salary, benefits paid, and job descriptions. Section 21(3) has a complete listing of these cases where the disclosure of personal information about public body officers and employees is deemed not an unreasonable invasion of their privacy.
30. Although the Applicant raised in the Complaint paragraph 21(2)(g)—“the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body”; however, that provision does not apply to the employment relationship between the officials and the University. Paragraph 21(2)(g) captures independent contractors, consultants, etc., i.e., external service providers to public bodies.
31. In responding to the Request, the University correctly identified section 21, but applied it too narrowly:

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

(...)

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

(...)

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

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

(...)

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

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

32. We also find the following provision of paragraph 21(3)(h) to be relevant, i.e., that which deems the following kinds of information not to be an unreasonable invasion of privacy if disclosed:

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

33. This provision captures benefits granted to an employee or an official by a public body that it was not otherwise required to provide. Usually, such benefits are found in employment contracts, but in some cases, the public body may grant additional benefits, for example, a negotiated severance package.
34. In summary, the University applied the deeming provisions under subsection 21(3) too narrowly, resulting in the decision to refuse access to all of the requested information in its Response.
35. The information in question (salary, bonus, pension, and severance payment information) is third party personal information that relates to these individuals' employment and occupational history, and describes their source of income or financial circumstances, which the *Act* deems to be an unreasonable invasion of third party privacy under subsection 21(2). The analysis does not stop there.
36. These individuals are employees of the University, and as a result, paragraphs 21(3)(f) and (h) deem their compensation information as information that must be disclosed and doing so will not constitute an unreasonable invasion of their privacy. In other words,



the *Act* under Part 2, paragraphs 21(3)(f) and (h) directed the University to disclose this information, rather than to protect it.

***What is meant by “Benefits”***

37. We further explain our finding by looking to other jurisdictions and how similar provisions were interpreted in their respective access legislation. We found that they gave broad interpretation to the meaning of “benefits” to include all that flow from employment in addition to base salary.
38. For example, the Ontario Office of the Information and Privacy Commissioner has published a number of decisions on this point, including Order M-23, in which the Commissioner states:
- ...I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the *Act* that “benefits” be given a fairly expansive interpretation. In my opinion, the word “benefits” as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as, life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of “benefits.”
39. We agree with the approach to define “benefits” in a broad fashion, particularly given the fact that paragraphs 21(3)(f) and 21(3)(h) in the New Brunswick legislation both serve as overrides to the otherwise protected personal information. This demonstrates the strength of the intent to promote transparency and accountability in how New Brunswick public bodies compensate employees and the benefits and entitlements that they are granted with their positions.
40. For these reasons, we find that the term “benefits” includes bonuses, pension, and severance information for officers and employees of public bodies.
41. We now turn to the question of how much disclosure about benefits of public body officers and employees is required by the *Act*.

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

42. We note that the wording of paragraphs 21(3)(f) and 21(3)(h) applies to “information about” salary range and benefits, meaning that it is not limited to simply the salary range and specific benefits, but also includes information about these items, so as to allow a public body to provide a meaningful and full explanation of the full range of entitlements that flow from the employment relationship.
43. In interpreting a similar provision, the Assistant Commissioner in Ontario made the following statements in Order PO-2536 (2006 CanLII 50875):
- In terms of the compensation packages given to senior government employees and senior employees of government agencies, the public interest demands that complete disclosure be made. It is disingenuous to take the position that the base salary of such executives is subject to public disclosure, but that other benefits and arrangements that supplement the base salary are private. In my view, the public interest in disclosing this type of information would, in most cases, be very compelling. These types of benefits and supplemental arrangements are of significant value to the employees that receive them and are a significant cost to the government. In determining whether the compensation paid to a particular individual is appropriate, the entire package is relevant and must be disclosed.
44. We again agree with the broad interpretation presented in Ontario and find that the spirit and intent of the law, as well as the provisions of subsection 21(3), require public bodies to be open and transparent about how they compensate their officials and employees. The wording of paragraph 21(3)(f) specifically states that “*information about... salary range, benefits*” of officers and employees of public bodies is deemed not to be an unreasonable invasion of privacy and thus must be disclosed.
45. Based on the above, we are of the view that the requested salary (with the exception of exact salary amounts), bonus, pension and severance pay and corresponding adjustments fall within the scope of paragraphs 21(3)(f) and 21(3)(h) of the *Act* and should have been disclosed to the Applicant.
46. We now address each kind of requested information in turn, along with our findings as to why the Applicant is entitled to receive all of the requested information, with the exception of exact salary information.

## FINDINGS

### ACCESS TO REQUESTED SALARY INFORMATION

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

#### *Referring to the Information in the University's published Salary Reports*

50. The University's Response indicated that any bonus amounts that were paid were included in the salary ranges as published in the yearly salary reports, and we noted that this was not stipulated in the Salary Reports.
51. As explained above, bonus payments constitute benefits for the purposes subsection 21(3) and cannot be lumped in with the base salary in calculating the salary ranges as it does not provide full disclosure of the information requested by the Applicant. Salary range and benefits constitute different kinds of information and the *Act* requires that information about both be made available. By including bonuses in the ranges published in the Salary Reports, this means that the University is not providing meaningful information that indicates whether individuals in these positions received bonuses.
52. During our investigation, the University indicated that it was willing to disclose salary ranges for each position based only on the base salary amount, along with the

calculation of the percentage change between each year as requested by the Applicant. As this information is not protected from disclosure, a recommendation for the disclosure of this information will follow.

### ACCESS TO REQUESTED BONUS INFORMATION

53. The Applicant requested the amounts of bonuses paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013).
54. As explained above, bonuses that are paid to employees and officials are benefits for the purposes of subsection 21(3), and paragraph 21(3)(f) requires that information about benefits, such as bonuses, not be protected from disclosure as personal information. For this reason, we find that information about whether bonuses were granted to a particular position and if so, the amount, are subject to disclosure under paragraph 21(3)(f).
55. As a result, we do not find that bonus payments made to a particular position is protected from disclosure under the *Act*, and the University indicated that it was willing to disclose this information to the Applicant. A recommendation that this information be provided will follow. This information is to be provided by position, in addition to the salary range and salary adjustments. Where a position did not receive any such payments, this could be indicated by showing the amount as "0".

### ACCESS TO REQUESTED PENSION INFORMATION

56. The Applicant also requested the amounts of pension paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013). This would capture where the University was paying pension benefits to individuals in the specified positions, in addition to base salary, bonuses, and/or severance payments.
57. As explained above, information of this nature falls within the scope of benefits for the purposes of section 21(3) and information about these benefits is not protected from disclosure under the *Act*.
58. During our investigation, the University explained that for all employees (except the President and Vice-Chancellor), the pension is a defined contribution plan based on

monthly contributions of a certain percentage of salary by both the employer and the employee, and that pension remuneration information for the President and Vice-Chancellor had been previously provided to the Applicant as a result of a previous access to information request made by the Applicant.

59. We find that these explanations about the University's pension plans should have been provided to the Applicant when the University issued its Response and this would have signified the University's respect to uphold its duty to assist under section 9 of the Act in providing a more meaningful response to the Applicant's Request.

### ACCESS TO THE REQUESTED SEVERANCE INFORMATION

60. The Applicant also requested the amounts of severance payments paid to various senior officials at the University for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013).
61. As explained above, information about severance qualifies as benefits for the purposes of section 21(3) and is not protected from disclosure under the Act.
62. As for the University's concerns that the amount of severance payments are subject to confidentiality agreements, we find that this cannot be relied on as a means to refuse access, given that the University cannot contract out of its obligations under the Act.
63. Again, we agree with the broad interpretation applied to Ontario's legislation that requires public bodies to be open and transparent about how they compensate their officials and employees. The exception to the otherwise protected personal information: "*information about... salary range, benefits*" when it regards officers and employees of public bodies is deemed not to be an unreasonable invasion of privacy and must be disclosed. As a result, when the Applicant requested severance pay, the Act, through paragraph 21(3)(h), called for the Applicant to receive this information.
64. This means that the University should have provided this information in its Response. Where any individuals in the named positions received severance payments during the requested time frame, this should be indicated in relation to the position, along with the amount of the payment. Where a particular position did not receive any such payment, this could be indicated by showing the amount as "0".

## RECOMMENDATIONS

65. Based on our findings above, we recommend pursuant to subparagraph 73(1)(a)(i) of the *Act* that:
- Salary information
    - paid to various senior officials for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013), including ranges of salary representing the base salary for each specified position (President, Vice-Presidents, etc.) for the years 2012 and 2013, along with the calculation of the percentage change between each calendar year;
  - Bonus payment information
    - paid to various senior officials for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013), and where an official did not receive any such payments, this could be indicated by showing the amount as “0”; and
  - Severance payment information
    - paid to various senior officials for 2012 and 2013, including adjustments between these years (i.e., for 2011-2012 and 2012-2013), and where a position did not receive any such payments, this could be indicated by showing the amount as “0”.

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

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Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner