REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-902-AP-459
June 28, 2013
Office of the Access to Information and Privacy Commissioner of New Brunswick

Case about access to information regarding natural gas distribution and energy policy

I N D E X

1.0 INTRODUCTION

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 the matter.

2. The Applicant made the following request to the Department of Energy (now the Department of Energy and Mines, "the Department") dated January 26, 2012. The Applicant asked for records between the timeframe of January 1, 2009 and the date of the request for information. The Applicant described the records the records sought in Schedules "A" and "B" attached to the Request. Schedule "A" set out the following:

    1. All records relating to the use and distribution of natural gas in the Province of New Brunswick including all records with respect to the subjects listed in the attached Schedule "B" (Subjects Directory).
    2. All records with respect to the regulation of the use and distribution of natural gas in the Province of New Brunswick including all records with respect to decisions of the New Brunswick Energy and Utilities Board (the "Board"), the role, functions, responsibilities and powers of the Board and any changes to or restructuring of the Board.
    3. All records with respect to proposed amendments to the *Gas Distribution Act, 1999* and proposed regulations under that *Act*.
    4. All records with respect to the general franchise for the distribution of natural gas in the Province of New Brunswick including all records relating to the General Franchise Agreement between the Province of New Brunswick, Enbridge Gas New Brunswick Inc. and others dated August 31, 1999.
    5. All records with respect to single end use franchises for natural gas and all records relating to the single end use franchise agreements between the Province of New Brunswick and the various single end use franchisees.
    6. All records with respect to or arising from the review, consultation, recommendations and resulting discussion paper titled "The Path Forward—Shaping New Brunswick's Energy Future, A Discussion Paper On The Establishment Of An Energy Commission And Energy Plan For New Brunswick" dated August 20, 2010 by Darrel J. Stephenson and Pierre-Marcel Desjardins including all records reviewed, considered, prepared by or presented to the authors of that Discussion Paper and their respective agents, advisors, consultants and representatives and all records that consider or refer to that Discussion Paper.
    7. All records with respect to or arising from the New Brunswick Energy Commission and the work of the New Brunswick Energy Commission including all records reviewed, considered, prepared by or presented to the New Brunswick Energy Commission, its co-chairs, representatives, agents, advisors, and consultants and all records that consider or refer to the New Brunswick Energy Commission, the work of the New Brunswick Energy Commission or the reports of the New Brunswick Energy Commission or which relate to any consideration, review, analysis or implementation of such work or reports.

8. All records with respect to or arising from the task force panel and the work of the task force panel respecting natural gas distribution issues formed by the Department of Energy in or about October 2010 including all records reviewed, considered, prepared by or presented to the task force, its members, representatives, agents, advisors and consultants or which relate to any consideration, review, analysis or implementation of the work of the task force.
9. All records with respect to or arising from The New Brunswick Energy Blueprint prepared in or about October 2011 by the Department of Energy including all records reviewed, considered, prepared by or presented to the Department of Energy, its representatives, agents, advisors and consultants or which relate to any consideration, review, analysis or implementation of the Energy Blueprint.

Schedule "B" set out a "Subjects Directory" that listed key words to further clarify the nature of the information the Applicant was seeking. ("the Request")

3. The Department received the Request on January 30, 2012. Given the volume of the records that the Department needed to identify and review in order to process the Request, the Department self-extended the time limit to respond on February 17, 2012 under (paragraph 11(3)(c)) for an additional 30 days, bringing its time limit to respond to March 30, 2012.

4. The Department, however, was unable to fully process all of the relevant records by this date and contacted our Office on March 23, 2012 to seek the Commissioner's approval under subsection 11(4) for additional time to respond. Based on the volume of records involved and the Department's need to consult with other public bodies, on March 28, 2012, we granted the Department a time extension to May 18, 2012.

5. The Department issued its response dated May 18, 2012 as follows:

> This letter is in response to your letter dated January 26, 2012 requesting information under the *Right to Information and Protection of Privacy Act* (the Act).
>
> Enclosed are documents in the custody of or under the control of the Department of Energy responsive to your request. We have organized the documents by subject, as enumerated in Schedule "A" of the form enclosed with your letter.
>
> You will note that some parts of the documents enclosed have been redacted pursuant to the following sections of the Act because the release of information would
>
> - reveal a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council [17(1)e)]
> - be an unreasonable invasion of a third party's privacy [21(1)]
> - reveal commercial, financial, or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information [22(1)(b)]

- reveal commercial or financial information the disclosure of which could reasonably be expected to harm the competitive position of a third party [22(1)(c)(i)]
- reveal advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown [26(1)(a)]
- reveal information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy decision [26(1)(e)]
- reveal information that is subject to solicitor-client privilege [27(1)(a)]

Please note as well that some documents have not been released pursuant to the following sections of the Act because release of the information would

- reveal discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to Executive Council [17(1)b)]
- reveal a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council [17(1)(c)]
- reveal a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council [17(1)e)]
- reveal commercial, financial, or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information [22(1)(b)]
- reveal commercial or financial information the disclosure of which could reasonably be expected to harm the competitive position of a third party [22(1)(c)(i)]
- reveal commercial, financial or technical information the disclosure of which could reasonably be expected to result in similar information no longer being supplied to the public body [22(1)(c)(iv)]
- reveal advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown [26(1)(a)]
- reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Province or the public body, or considerations that relate to those negotiations [26(1)(b)]
- reveal plans relating to the management of personnel or the administration of the public body that have not yet been implemented [26(1)(c)]
- reveal the content of draft legislation or regulations [26(1)(d)]
- reveal information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy decision [26(1)(e)]
- reveal information that is subject to solicitor-client privilege [27(1)(a) and 27(2)]
- be injurious to the conduct of existing or anticipated legal proceedings [29(1)(o)]
- harm the economic or financial interests or negotiating position of a public body or the Province of New Brunswick [30(1)]

Please be advised that records in the custody of or under the control of the Department of Energy that pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General are not subject to disclosure, in accordance with section 4(b) of the Act.

Documents that are available to the public are not included in this response, pursuant to section 33 of the Act.

If you are not satisfied with this response, you may file a complaint with the Access to Information and Privacy Commissioner or refer the matter to a judge of The Court of Queen's Bench of New Brunswick.

Should you have any questions regarding this matter, please feel free to contact [the Department's] RTIPPA Coordinator…

Sincerely,

Craig Leonard
Acting Minister of Energy

Enclosures

("the Response")

6. The Applicant was not satisfied with the Response and filed a complaint with our Office on June 7, 2012, with the following comments:

1. The Acting Minister of the Department of Energy produced certain documents portions of which were redacted pursuant to various Sections of the Act. (see letter dated May 18, 2012; Appendix 2.2).
2. In his May 18, 2012 letter, the Acting Minister of Energy also advised that some documents had not been released to me pursuant to various sections of the Act.
3. In his May 18, 2012 letter, the Acting Minister of Energy further advised that records in the custody of or under the control of the Department of Energy that pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General are not subject to disclosure.
4. I am not satisfied with the decision of the Acting Minister of Energy and request that the Commissioner conduct an investigation and make recommendations as to whether (a) I am entitled to access to any of the records in the possession or control of the Department of Energy which I have not been granted access to (ii) the redactions made by the Acting Minister of Energy to the records which have been produced were properly made under the Act (iii) the denial of access to certain records made by the Acting Minister of Justice is authorized under the Act (iv) the denial by the Acting Minister of Energy to produce certain records ostensibly because they are not subject to disclosure on the basis that they pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General is properly made and in accordance with the Act, and (v) I am entitled to a detailed listing of all the records that I am not granted access to.

("the Complaint")

1.1 BACKGROUND

7. The energy sector in New Brunswick has seen many major developments during the time period covered by the Request, particularly in relation to natural gas projects.

8. In June 2010, the Department published for public feedback and discussion a paper with options about the regulatory framework for the Energy and Utilities Board, which regulates energy utilities, including natural gas, in the Province. At the conclusion of the consultation period, the Department published a report summarizing the feedback received.

9. In mid-2010, the Department established a task force to discuss natural gas distribution issues and potential actions to address these issues. The task force was made up of Provincial departments and independent consultants.

10. As part of its election campaign, the Progressive Conservative Party commissioned a report, "The Path Forward–a Discussion Paper on the Establishment of an Energy Commission and Energy Plan for New Brunswick," and it was published in August 2010. This Energy Plan set the groundwork for the direction on energy policy for the new Provincial government in September 2010.

11. In October 2010, the Premier appointed a commission, known as the "Energy Commission," to undertake an extensive public consultation process on energy matters with a view to provide recommendations to Government on establishing a comprehensive energy plan for the Province. The Energy Commission published its final report with recommendations in May 2011 on its website.

12. In response to the Energy Commission's report and recommendations, the Department was tasked with assessing these recommendations and developing a comprehensive energy plan. This assessment culminated with the publication of the Department's Energy Blueprint in October 2011. The Energy Blueprint sets out a long-term vision for the energy sector and establishes commitments for the current Government's mandate.

13. One of the key issues in the energy sector since 2009 has been natural gas distribution rates, which had been increasing significantly. This resulted in mounting public pressure for the Government to take action to address this issue.

14. As a result, the Department undertook amendments to the *Gas Distribution Act, 1999*, which were passed in the Legislative Assembly in December 2011 (and came into force in January 2012). The *Rates and Tariffs Regulation 2012-49* under that law came into effect in April 2012.

15. In December 2011, the Province amended the *Gas Distribution Act, 1999*, which impacted the natural gas distribution rates. Thereafter, the Department received notice that a

lawsuit would follow and it observed that the same records subject of the Request would be at issue in these legal proceedings. Litigation began in February 2012.

16. The Applicant sought to obtain information dating back to 2009 to determine what information the Province held generally on natural gas matters as well as related matters in the energy sector. In doing so, the Applicant submitted the same Request to several public bodies at once, including the Department.

1.2 SAME REQUEST TO MULTIPLE PUBLIC BODIES

17. The public bodies that received the Request consulted amongst themselves about how best to approach its processing, particularly as some records were jointly held by two or more public bodies. The Department was designated as the "lead" public body, as the majority of the relevant records were under its custody and/or control.

18. The Department consulted with other public bodies about jointly held records. Collectively, the public bodies decided that records that were jointly held with the Department would be addressed in the Department's Response, rather than the other public bodies' respective responses to the Applicant.

19. From our analysis of the entire matter, the public bodies adopted this approach in a good faith effort to simplify the process and to avoid duplication in their respective responses; however, the outcome was very confusing for the Applicant.

20. From the responses provided, it was impossible for the Applicant to determine what specific records each public body had in its custody or control, and whether the information withheld was refused in accordance with the *Act*.

21. The *Act* applies "to all records in the custody of or under the control of a public body" as per section 4. This means that a public body that has a record in its possession or under its control is obligated to reply to an access request for such a record in accordance with the *Act*. The *Act* does not allow a public body to refuse access by telling an applicant that another public body will address jointly held records in its response.

22. We remind the Department and any other public body involved that in situations such as this, each public body must provide a full and complete response to the request that addresses all of the records it has in its custody or under its control in order to remain compliant with the *Act*.

2.0 INFORMAL RESOLUTION PROCESS

23. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*. The informal resolution process provides guidance to both public bodies and applicants with a view to better understand this new

legislation. This process has been developed by our Office based on the spirit of the *Act* and in accordance with the parameters of the Commissioner's investigative powers under Part 5. It is hoped that in all cases, the informal resolution process will lead to a prompt and satisfactory outcome to the complaint (*Note*: A full description of the steps involved in the Commissioner's informal resolution process can be found on our website at http://info-priv-nb.ca/).

24. The initial step undertaken in this process was to review the Request and the Response in order to determine whether the Response met the requirements of the *Act*. We held meetings with Department officials to discuss how they processed and responded to the Request, as well as to better understand the background of the situation and the context in which the relevant records were generated.

25. Our review of records in this matter was a lengthy process, not only due to the large number of relevant records and various reasons cited for refusing access, but also because the Department had not established a master list of the relevant records to guide our review, despite being the "lead" public body in this case. This meant that we had to read every record in order to determine its nature and the type of information contained therein, whether access to the information was granted or refused, and if refused, for what reason.

26. Further complicating matters was the fact that our Office was concurrently investigating complaints filed in relation to other public bodies' responses to the same Request, and some of those responses indicated that the Department would be responding on their behalf for jointly held records. None of the public bodies involved had created a comprehensive list of records in their respective custody or control, which meant that our review also had to determine what records were jointly held with these other public bodies to ensure that all relevant records had been identified and accounted for by all involved. The work to concord all of the relevant records proved arduous and time consuming.

27. Additionally, the Department did not allow us to review of all the relevant records under its custody and control. Specifically, the Department did not allow our review of some of the relevant records in relation to numbers 3 (draft legislation) and 9 (development of the Energy Blueprint) of the Request. Records refused under paragraph 4(b) (legal affairs relating to the duties and functions of the Attorney General) were similarly not provided to us. The Department also did not provide most of the records that it claimed as solicitor-client privileged under section 27 and Cabinet confidences under section 17.

28. This prevented us from determining whether all of the public bodies involved, including the Department, had identified and addressed all of their respective records.

29. The Department did not provide us with further details to establish that the records we did not review were properly withheld. As a result, the Department did not meet its burden of

proof under subsection 84(1) to establish why the Applicant had no right of access to these records.

30. As this was the case, we could not continue with the informal resolution process or complete our investigation and the matter became the subject of the present Report of Findings.

3.0 LAW AND ANALYSIS

3.1 FORMAT OF THE RESPONSE

31. In responding to access requests, a public body must ensure that its responses include all the required details as set out in section 14 of the *Act*. All responses must inform the applicant of the following:

- if access to the relevant record(s) is granted and how, or if it is refused;
- if any information is refused,
  - if a record does not exist or cannot be found;
  - where the record exists, the reasons for refusing access and what section of the *Act* applies;
  - the name and contact information for someone who can answer questions about the refusal; and
  - the applicant's right to complain to our Office or refer the matter to the Court of Queen's Bench.

32. The purpose of these requirements is to ensure that an applicant receives a complete and meaningful response to an access request. This will help an applicant understand what information a public body has that is relevant to the request, the reasons why access to any of that information is being refused, and to inform the applicant of his or her rights if he or she is not satisfied with the response.

33. It is therefore not sufficient to simply re-state the wording of the exception provision as the reason for the refusal; the response must elaborate on why the exception applies in order to help the applicant understand why there is no right of access to the requested information.

34. For example, if a public body refuses access to information that would be an unreasonable invasion of a third party's privacy, it is not sufficient to simply reference subsection 21(1) of the *Act* without explaining what the information is and why its disclosure would invade another person's privacy. In most cases, identifying the kind of personal information involved is sufficient to meet this obligation; e.g., indicate that the information is a home address, personal email address, personal credit card number, etc.

35. To this end, we encourage all public bodies to consider preparing an index of records as part of the request process. Ideally, an index of records would:

- identify each relevant record or category of relevant records;
- briefly describe the nature of the information contained in the record;
- state whether access to all or part of the record is being granted or refused; and,
- identify any reasons why access to any information is being refused in accordance with specific relevant provisions of the *Act*.

36. Setting out a response in this manner will help an applicant better understand what information is being withheld and why. Where an applicant finds that a public body has been forthcoming and transparent in responding to access requests, he or she will be better informed and may be less likely to file a complaint.

37. In this case, we found that the Response was partly in conformity with the contents of response requirements, as it referred to the provisions of the *Act* under which access to some information was refused, provided the contact information of the Department's Right to Information Coordinator, and advised of the Applicant's rights if dissatisfied with the Response. In addition, the Department organized the records that were provided to the Applicant in nine binders, corresponding with each of the sections of the Request, which helped the Applicant better understand the information received.

38. The Response, however, was not compliant in relation to the records withheld in full. While the Response provided a list of the provisions of the *Act* that the Department relied on to refuse access to records in full, it did not identify or explain what these records were, nor did it provide an explanation as to why the claimed exceptions applied to these records.

39. We appreciate that the Request was broad in scope and that there was a large number of records to account for in the Response; however, this did not remove the requirement to provide a meaningful explanation to the Applicant of what information was being refused and the reasons why.

40. This requirement was especially crucial in this case as some of the other public bodies who received the Request issued responses that cross-referenced the expected responses of other public bodies, particularly that of the Department. In this case, in order for the Applicant to understand what information was received, what information was withheld and by which public body, the responses from the public bodies had to be read in conjunction with the others, particularly the Department's, which was to address the jointly held records and this was problematic. We do mention that the Department had been designated as the "lead" public body in responding to the Request.

41. Given the fact that the overall responding to the multiple but same Request was coordinated in this fashion, the Department's failure to provide a full and meaningful reply to the Request, particularly as the lead public body in this case, left the Applicant wondering

what information had not been provided by all of the public bodies involved. The Applicant could not be sure what specific information was refused by the Department, much less whether such information had been properly withheld, and for that reason, filed the present Complaint asking the Commissioner to investigate.

42. For these reasons, we find that the Response did not fully meet the requirements of section 14 of the *Act*.

3.2 SEARCH FOR RECORDS

43. Upon receipt of the Request, the Department immediately noted the large scope of records involved, and in keeping with its duty to assist, the Department contacted the Applicant to discuss the Request, particularly to determine whether the Applicant was looking for specific information. The Applicant, however, did not wish to narrow the scope of the Request, and the Department processed the Request accordingly.

44. The Department undertook a concerted effort to identify and compile the relevant records by instructing all staff members to conduct searches for any records that they thought could be relevant to the subject matter of the Request. To facilitate this process, the Department set up a designated space on its internal shared drive as a central repository for the records identified as potentially relevant. This repository contained nine separate subfolders to correspond with each of the nine sections of the Request. Staff was instructed to identify anything that might be relevant to the full scope of the Request.

45. The final decision about relevancy of records was made by the Right to Information Coordinator in conjunction with senior management. Senior management too was involved throughout the search and processing of the relevant records before conducting a final review of the Response to ensure thoroughness and completeness.

46. As the Request was for records dating back to January 2009, as part of its search efforts, the Department also undertook to contact staff who were involved in these matters at that time but were no longer with the Department.

47. In addition, the Department grouped the records based on each of the nine sections of the Request and further subdivided the records for each by staff member records, official documents, draft documents, reports, emails, handwritten journal notes, etc.

48. The Department took steps to ensure it conducted a thorough search for relevant records, and a lot of our efforts were devoted to finding out the extent of this search to identify all of the relevant records in this matter. It appears that the search was thorough but we are unable to make a finding as to the adequacy of the search based on the fact that we did not review the relevant records identified. Having said this, however, we have no reason to believe the Department failed to perform an adequate search for all of the relevant records in this matter.

3.3 ACCESS TO INFORMATION and LITIGATION

49. Due to the fact that litigation was anticipated before the Request was filed and was commenced shortly thereafter, the Department examined all of the relevant records identified from the perspective of this litigation involving the same subject matter and records. For that reason, the Department relied principally on paragraph 29(1)(o) of the *Act* to refuse access to some of the information on the basis that its disclosure could reasonably expected to be injurious to the legal proceedings.

50. Paragraph 29(1)(o), which provides:

> 29(1) The head of a public body may refuse to disclose to an applicant if disclosure could reasonably be expected to
>
> …
>
> (o) be injurious to the conduct of existing or anticipated legal proceedings.

51. This is a discretionary exception to disclosure that requires the public body to show how the disclosure of information could reasonably be expected to have a negative impact on actual or anticipated legal proceedings.

52. As further elaborated below in this Report, in order to meet its burden of proof for discretionary exceptions to disclosure, a public body must establish that the information in question falls within the scope of one of these provisions, and how the public body exercised its discretion in deciding to refuse access, based on the relevant circumstances. The exercise of the discretion is reviewable to ensure that it was based on relevant factors at the time of the request. Consequently, when we reviewed the Department's reliance on the discretionary exception to disclosure found in paragraph 29(1)(o), our single objective was to determine whether the Department exercised its discretion in first considering the release of the information to the Applicant, and whether that discretion was based on relevant factors in existence as the time.

53. In this case, we are satisfied that the Department did exercise its discretion properly and proof of this fact is found in the Department's first consideration to release the requested information it believed would not be injurious to the on-going litigation while deciding to only withhold the information it believed would be. In that regard, our review of the Department's exercise of discretion to exclude some of the relevant information and relevant records was made in conformity with paragraph 29(1)(o) of the *Act.*

54. We do add an important point to the issue surrounding the public's right of access to information held in public records and the *Act*'s exception to disclosure of information subject to legal proceedings as found in section 29.

55. Unmistakably, the *Act* was not designed to provide parties involved in a litigation matter another forum in which to exchange evidence. That forum was established in the practices

and procedures known as the *Rules of Court*. The *Rules of Court* are utilized for all matters and procedures involving litigation and these *Rules* appropriately guide litigants in structured procedures that involve the disclosure and discovery of facts, information and records relevant to the issues being litigated. The review of a complaint filed under the *Act* was not meant to become an additional procedure to the existing litigation discovery process under the *Rules of Court*.

56. The Commissioner's Office is a statutory creation mandated to ensure that a public body properly responds to a request for access to information in accordance with the principles and the rules set out in the *Act*. It would be entirely improper for our Office to conduct our review of complaints on the premise that we act for applicants. It would be equally improper for us to conduct our work in defense of public bodies. The Commissioner's Office is an independent body whose sole's responsibility in complaint investigations is to ensure compliance with the *Act.*

3.4 REVIEW OF RELEVANT RECORDS

57. For those records that we were permitted to review, they mostly consisted of the records that were provided either partially or in full to the Applicant, along with some of the records that the Department withheld in full.

58. With respect to the records from which some information was severed, we find that the Department conducted a careful review of the information contained in them on a line-by-line basis and only severed sentences or sentence fragments wherever possible, rather than withholding entire paragraphs or pages.

59. In addition, we noted that some information that may have fallen within the scope of discretionary exceptions to disclosure was not severed or withheld, indicating that the Department did exercise its discretion in favour of disclosure with respect to information that it deemed to be no longer sensitive. This was a credible undertaking and we applaud such efforts in reviewing records with an approach that favours disclosure rather than refusing access.

3.4.1 Mandatory and Discretionary Exceptions to disclosure

60. Before we continue with our analysis, we note that the *Act* sets out two kinds of exceptions to disclosure in sections 17 to 33: mandatory and discretionary.

61. Mandatory exceptions to disclosure prohibit certain kinds of information from being disclosed, such as Cabinet confidences, sensitive personal information, and confidential business information relating to a third party. Where information falls within the scope of one of the mandatory exceptions, the *Act* does not permit the public body to release the information, unless an exception to the exception applies.

62. In order to meet its burden of proof for mandatory exceptions to disclosure, a public body must only establish that the information in question falls within the scope of one of these provisions.

63. Discretionary exceptions to disclosure, on the other hand, are not blanket exceptions that allow a public body to automatically refuse to disclose information that falls within their scope. The spirit and intent of the *Act* promotes a general presumption in favour of disclosure. Where information falls within the scope of a discretionary exception, the *Act* obligates the public body to consider whether it would be appropriate to disclose the information under the circumstances.

64. Below are a number of factors, though not exhaustive, that a public body should consider when exercising discretion to withhold records under the *Act*:

> a) the specific wording of the discretionary exception and the interests the exception attempts to balance;
>
> b) whether the applicant's request can be satisfied by severing the record and by providing as much information as is reasonably practicable;
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> c) the public body's past practices regarding the release of similar information;
>
> d) the nature of the record and its significance to the public body;
>
> e) whether the disclosure of the information will increase public confidence in the operation of the public body;
>
> f) the age of the record;
>
> g) whether there is a sympathetic or compelling need to release materials;
>
> h) whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure;
>
> i) 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; and,
>
> k) whether the requested information is already publicly available elsewhere.

65. In order to meet its burden of proof for discretionary exceptions to disclosure, a public body must establish that the information in question falls within the scope of one of these provisions, and how the public body exercised its discretion in deciding to refuse access, based on the relevant circumstances.

66. We now discuss each of the exceptions the Department applied to the records we did review and ascertain whether these exceptions were properly applied to refuse access to the information contained in these records.

3.4.2 Section 17—Executive Council confidences

67. Section 17 is a mandatory exception to disclosure that serves to protect "the substance of the deliberations of the Executive Council":

> 17(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council, including but not limited to…
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council,
> (b) discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council,
> (c) a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council,
> (d) a record that reflects communications among Ministers of the Crown relating directly to the making of a government decision or the formulation of government policy, and
> (e) a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be before, the Executive Council…

68. The Department redacted some information under paragraph 17(1)(e) and refused access in full to other records under paragraphs 17(1)(b), (c), and (e).

69. Of the records we reviewed, the Department severed some information from a record that was otherwise released to the Applicant and withheld a small number of records in full. The withheld information consisted of details about Memoranda to Executive Council, including details of draft legislation and Memoranda to Executive Council and issues that arose that may necessitate changes to these documents. These records consisted of emails among Department staff.

70. The Department indicated that it adopted a cautious approach to this kind of information in order to ensure that the substance of Cabinet deliberations was properly protected.

71. Based on our review of these relevant records, we do not find that the Department improperly refused access to the information withheld under section 17.

72. We will address the application of section 17 in further detail below as it pertained to records we did not review in this case.

3.4.3 Subsection 21(1): Unreasonable invasion of a third party's privacy

73. Section 21 governs the disclosure of personal information in response to an access request. Subsection 21(1) states:

> 21(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.

74. To further assist in the proper application of this exception to disclosure, subsection 21(2) illustrates the types of situations where a public body must withhold the personal information from those who request it. For example, a public body cannot release to an applicant information about another person's eligibility for benefits under a Provincial program, or another person's religious or political beliefs.

75. The exception found in subsection 21(1), however, does not apply to all personal information. Subsection 21(3) sets out certain instances where the release of personal information is not an unreasonable invasion of privacy and therefore cannot be withheld under subsection 21(1). For example, certain types of personal information belonging to employees of public bodies cannot be withheld under subsection 21(1), because paragraph 21(3)(f) states that their personal information can be released when it entails:

a) range of salary,
b) job classification,
c) employment responsibilities,
d) benefits, and
e) travel expenses.

76. Accordingly, to correctly rely on the exception to disclosure found in section 21 when responding to an access to information request for personal information, the public body must first assess the type of personal information at play:

- whether the personal information falls within the required mandatory protection cases listed in subsection 21(2); or,
- whether it falls in those cases under subsection 21(3) where personal information is deemed appropriate for disclosure to an applicant.

77. The Department redacted some information based on privacy concerns of third parties. This information included individuals' who were not public body employees' private email addresses, private company direct email addresses, and brief personal comments in otherwise relevant emails.

78. We find that the Department properly redacted this information.

3.4.4 Subsection 22(1): Third party business information

79. When individuals or companies deal with public bodies in a business capacity, the information generated from these interactions comes under the custody and control of the public body and is subject to possible disclosure under the *Act*. Private sector companies can and should expect that some information about their dealings with the Province will be made available to the public; however, the *Act* also recognizes that some information relating to private companies warrants protection from disclosure. The general right of access to this kind of information encourages a level of transparency and accountability of public bodies in conducting business dealings with the private sector as these activities relate to the public business of the public body.

80. In that regard, subsection 22(1) sets out a number of mandatory exceptions to the disclosure of information relating to the business or financial interests of third parties, recognizing that third party business information held by a public body may be commercially or financially sensitive in nature and thus warrant some protection from disclosure under the *Act*.

81. Upon our examination of the wording of subsection 22(1), we found two important concepts:

a) that the harm principle in this Province is set out in separate categories of concern; and,

b) that some categories of harm presume the existence of harm while others require validation that harm is reasonably expected if disclosed.

82. Subsection 22(1) provides:

> 22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal
>
> (a) a trade secret of a third party,
>
> (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party, **or**
>
> (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to
>
> (i) harm the competitive position of a third party,
>
> (ii) interfere with contractual or other negotiations of a third party,
>
> (iii) result in significant loss or gain to a third party,
>
> (iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, **or**
>
> (v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
>
> (**Emphasis added**)

83. This exception provides seven situations or categories in which the disclosure of third party information may be detrimental to its business:
    - release of trade secrets;
    - release of confidential business information;
    - release of business information which may affect:
        - competition,
        - negotiations,
        - losses or gains,
        - alter the supply of needed business information, or
        - labour disputes.

84. The use of the conjunction "or" at the end of paragraph 22(1)(b) and after subparagraph 22(1)(c)(iv) means that not all seven categories of harm must be established in order to rely on this exception. The use of "or" in this fashion means that each paragraph and subparagraph must be read as a separate category of harm, and proof under a single category will suffice for the public body to reply upon this exception to refuse access.

85. Therefore, as a first step, whenever deciding to withhold third party information under subsection 22(1), the public body must identify which of the seven categories of harm applies to the information and it must be prepared to substantiate why it relied on that category to refuse access to the relevant third party information.

86. The second step involves proof that there exists a reasonable expectation of harm to the third party if the information is released. This is based on the notion that public bodies cannot refuse access solely on the basis that the information belongs to third parties; rather, they must establish that the information cannot be released for fear it may cause harm. The refusal to grant access under subsection 22(1) is therefore a reminder that only third party information which falls within at least one of the stated seven categories may be withheld.

87. Of the seven categories, harm is presumed to exist for information that falls under the first two categories: trade secrets and the confidential business information. Harm from disclosure is not presumed in the remaining five categories which require the head to bring the necessary evidence to establish that harm can be reasonably expected to occur to a third party if the information was to be released.

88. In other words, the public body must be able to provide proof when relying upon any of the seven categories of harm to refuse access to information belonging to a third party in this fashion:

    - a trade secret - public body must prove that the information being withheld constitutes a trade secret of a third party, and harm is presumed based on that fact;

- confidential business information - public body must prove that the information was in fact supplied confidentially, and that it was intended to remain confidential, and if so proven, harm is presumed;
- release of business information which may affect:
    - competition – harm is not presumed, and public body will have to prove that releasing the information can reasonably be expected to cause harm to the third party's ability to compete;
    - negotiations – harm is not presumed, and public body will have to prove that releasing the information can reasonably be expected to cause harm to the third party's ability to negotiate a contract, etc.;
    - losses or gains – harm is not presumed, and public body will have to prove releasing the information can reasonably be expected to cause financial losses to the third party or unfair financial gains to another third party;
    - affect the supply of needed business information – harm is not presumed, and the public body will have to prove that releasing the information can reasonably be expected to harm relations with the third party such that information provided by the third party, not otherwise collected by the public body, may cease to be provided to the public body;
    - labour disputes – harm is not presumed, and public body will have to prove that releasing the information can reasonably be expected to cause harm to the third party in its handling of labour matters.

89. In this case, the Department refused access to some third party business information under paragraph 22(1)(b) (*confidential third party business information*), subparagraph 22(1)(c)(i) (*disclosure would harm a third party's competitive position*), and subparagraph 22(1)(c)(iv) (*result in similar information no longer being supplied to a public body*).

90. The information withheld under paragraphs 22(1)(b) and (c) included details relating to third party consultants retained by the Department, in particular, hourly rates, consultant fees, terms of contracts, payment structures and line of credit information. The Department also redacted from some records the names of companies participating in Department renewable energy programs.

91. Access in full was refused to submissions received from third party stakeholders about possible changes to the Energy and Utilities Board in mid-2010. While the individual stakeholders were identified by name in the public report, their respective submissions were de-identified and summarized, as the Department had indicated at the outset of the process that the submissions would be received on a confidential basis.

92. We find that this information constituted commercial and financial information of the third party consultants and companies that was shared with the Department on a confidential basis.

93. As such, we find that the Department properly refused access to this information.

3.4.5 Section 26: Advice to a public body

94. In this case, a lot of our attention focused on the Department's use of the exception to disclosure under subsection 26(1). This provision states that:

> 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,
> (b) positions, plans, procedures, criteria or instructions developed for the purpose of contractual negotiations by or on behalf of the Province of New Brunswick or the public body, or considerations that relate to those negotiations,
> (c) plans relating to the management of personnel or the administration of the public body that have not yet been implemented,
> (d) the content of draft legislation or regulations and orders of Ministers of the Crown or the Lieutenant-Governor in Council, or
> (e) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

95. The Department redacted information from records that were otherwise released to the Applicant under paragraphs 26(1)(a) (*Advice to a public body*) and (e) (*Proposed plans, policies or projects of a public body*). We reviewed the redacted information, which consisted of Departmental staff's views on possible courses of action, senior management meeting notes where options and possible courses of action were discussed, as well as some information that consisted of advice in a briefing note for the Minister.

96. As for the records that the Department withheld in full under section 26, these records mostly consisted of draft versions of reports and letters, policy analyses with recommendations, staff opinions and recommendations in relation to the Energy Commission's report and recommendations, staff advice to the Minister on various issues.

97. The Department also refused access to a number of records in relation to negotiations strategies. While we cannot provide any further details in relation to the contents of these records, we were able to review them and are satisfied that they fall under the scope of paragraph 26(1)(b).

98. As this provision is also a discretionary exception to disclosure, we must review the Department's use of its discretion in refusing access to this information. We were informed that the Department opted not to disclose this information to the Applicant under the circumstances as the disclosure would reveal advice, opinions and recommendations provided by staff and the Department was not prepared to release such information at this time.

99. Additionally, we noted that some of the information that the Department provided to the Applicant did fall within the scope of this exception, and the Department decided to release this to the Applicant, further demonstrating that the Department did exercise its discretion on information that fell within the scope of this provision.

100. As a result, we do not find that the Department improperly refused access to this information under subsection 26(1).

3.4.6 Section 27: Solicitor-client privilege

101. We reviewed one record containing solicitor-client privileged information to which the Department refused access.

102. The Department withheld one record containing solicitor-client privileged information under subsection 27(2), which creates a mandatory exception to disclosure of someone else's solicitor-client privileged information:

> 27(2) The head of a public body shall refuse to disclose to the applicant information that is subject to a solicitor-client privilege of a person other than the public body.

103. The Department had a document that consisted of a communication between another public body and its legal counsel on a matter of joint concern with the Department. We find the Department was correct in refusing access to this record under subsection 27(2), as it cannot waive another party's solicitor-client privilege.

3.4.7 Paragraph 4(b): Records relating to the Office of the Attorney General

104. We reviewed another record the Department had withheld in full from the Applicant on the basis that it related to the duties and functions of the Office of the Attorney General, which the Department claimed was outside the scope of the *Act* under paragraph 4(b).

105. For reasons that we will explain in greater detail below, the Department is not entitled to rely on paragraph 4(b) to refuse access to records. The document we reviewed consisted of a communication between the Department and counsel with the Attorney General's Office about a specific legal matter; rather, we found it consisted of the Department's solicitor-client privileged information, which would fall within the scope of subsection 27(1).

106. As a result, we do not find that the Department erred in refusing access to this record, but it improperly referenced paragraph 4(b) as an exception to disclosure which it is not.

3.4.8 Paragraph 33(2)(a): Information that is available to the public

107. The Department refused access to a number of records that were already in the public domain pursuant to paragraph 33(2)(a):

33(2) The head of a public body may refuse to disclose to an applicant information

(a) that is free of charge to the public or is available for purchase by the public…

108. This provision sets out a discretionary exception to disclosure where the information is available to the public, either for free or for purchase. The purpose of this exception is to allow a public body to refuse access to publicly available information where it would be more convenient than providing it directly to an applicant.

109. In invoking this exception, this does not mean that a public body can simply inform an applicant that it is relying on this provision to refuse access. This exception is not a refusal based on protecting a particular interest, but rather allows a public body to direct an applicant to an alternative source where the information can be found, either for free or upon payment of a fee, depending on the nature of the information involved.

110. We reviewed the records the Department identified as publicly available, and they mostly consisted of information that is available either on the Department's website or the Energy Commission's website, as well as reports and media articles from various publicly available sources.

111. From a reading of the Response, the Applicant can discern that the Department has some information that is publicly available but it is not possible to determine what it is or where to find it. This is not in keeping with the access rights established by the *Act* and is not how this provision is meant to be used.

112. Accordingly, we find that the Department was not incorrect in identifying these records as publicly available; however, in order to properly respond to the Applicant in a meaningful way, the Department was required to explain to the Applicant what these records were and where they could be found.

113. We therefore do find that the Department was correct to look to subsection 33(2)(a) to refuse access to these records, but it did not apply it properly.

3.5 RECORDS NOT PROVIDED FOR OUR REVIEW

114. The Department declined to provide us with some of the records that were refused in full, and while we have a general sense of what these records consist of, we were not able to substantiate whether these records were properly withheld.

115. The records that were not permitted to review included the following:

- Records relating to the development of the Energy Blueprint (sections 17 and 26)

- Records relating to proposed amendments to the *Gas Distribution Act, 1999* and related regulations (sections 17, 26, 27, and 30)
- Solicitor-client privileged information (section 27)
- Records relating to the performance of the duties and functions of the Office of the Attorney General (paragraph 4(b))

3.5.1 Producing Records to the Commissioner

116. The Commissioner is an independent officer of the Legislative Assembly and is tasked with statutory oversight of the *Act* (and also the *Personal Health Information Privacy and Access Act*). This legislation tasks the Commissioner with various oversight powers and duties, including an accessible and timely review mechanism to ensure that access and privacy rights are being upheld. The Commissioner's mandate is broad, but is solely based on these two statutes. A large portion of this Office's work is reviewing public body's actions and decisions in access and privacy matters, making this Office an administrative review body with specialized expertise and the principal interpreters of the law.

117. Specifically, in relation to unsatisfactory outcomes in access requests cases under the *Act*, the Commissioner's Office serves as a low-cost and more accessible alternative to the courts for the public to resolve complaints. We do so by ensuring that public bodies are meeting their obligations to be transparent and accountable in their decisions, especially where access to the information has been refused. If access is refused lawfully, the independent review will support such a decision while explaining to the public why this was so.

118. The Commissioner's Office conducts independent, impartial and thorough reviews of complaints in a manner that is quite different from the courts. We do not act as a forum for the applicant and public body to argue their respective cases before us, but rather we hold private discussions with both parties separately and confidentially, our reviews of relevant records are conducted independently and in private, and we do not share the details of our investigation with either party until our work is concluded. Also, it is important to note that we do not act as a flow-through nor do we ever disclose a public body's records. Our powers are limited to recommending that a public body disclose information, and it is up to the public body to decide whether to follow such a recommendation.

119. Subsection 70(1) sets out the Commissioner's powers of production of records:

> 70(1) With the exception of Executive Council confidences and any document that contains information that is subject to solicitor-client privilege, the Commissioner may require any record in the custody or under the control of a public body that the Commissioner considers relevant to an investigation to be produced to the Commissioner and may examine any information in a record, including personal information.

120. Subsection 70(1) states that the Commissioner can require the production of any record that the Commissioner deems relevant to an investigation. More importantly, that provision also states that Executive Council confidences and records containing solicitor-client privileged information are treated differently, i.e., for those specific records, the Commissioner cannot require their production. Subsection 70(1) allows a public body to produce such records to the Commissioner where it decides to do so.

121. Further, both the Commissioner and her staff are legally obligated to take confidentiality oaths that they will not divulge information received under this *Act* except for the purpose of giving effect to the *Act*. Disclosing information outside of these parameters is simply not permitted, and this should be the incentive with which public bodies are able to trust what we do and how we do it.

122. That is why the legislation provides an independent review of the decisions made by public bodies and in doing so, obligates public bodies to produce records to the Commissioner when asked to do so, as in subsection 70(3):

> 70(3) Despite any other Act of the Legislature or any privilege of the law of evidence, a public body shall produce to the Commissioner with 14 days any record or copy of a record required under this section.

123. The wording of subsection 70(3) states that the Commissioner's power to require production applies "despite… any privilege of the law of evidence." This signals the *Act*'s intent that production of records to the Commissioner's Office in the course of an investigation does not amount to a violation or waiver of privilege. This is why we have addressed the question of production of records.

124. We also must mention that subsection 84(1) obligates public bodies to establish why access to the requested information was refused:

> 84(1) In any proceeding under this Act, the burden is 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.

125. To meet the burden of proof when challenged on a denial of access to information, public bodies must establish reasons why there is no right of access by substantiating how the claimed exceptions to disclosure were applied to refuse access. The *Act*'s independent review ensures accountability of public bodies' decisions to refuse access to information.

126. We have found in other cases that production of sensitive records need not be an issue where a detailed list of records with brief descriptions of their content can be provided to our Office to substantiate the application of the claimed exception to refuse access. In other jurisdictions, affidavits are prepared to present these details.

127. In the present case, the Department made a decision to permit the Commissioner to review a substantive amount of relevant records but it also declined our review of records it

believed fell under the ambit of section 17, section 27 and paragraph 4(b). The only issue for us was our inability to ascertain whether qualifying these records in this manner was correct.

128. Notwithstanding this fact, the Department did provide us with explanations and details to enable us to reach the appropriate findings in regards to these records.

129. We now address each group of records that were not provided for our review.

3.5.2 Records relating to the "Energy Blueprint"

130. The Department's officials informed us that it was initially unsure how to approach the large volume of records related to the development and drafting of the Energy Blueprint policy document when processing the Request.

131. Based on legal advice received, the Department decided to refuse access in full to all records relating to the development of the Energy Blueprint that pre-dated its publication under sections 17 (*Executive Council confidences*) and section 26 (*Advice to a public body*).

132. The Department treated these records in this manner as the Energy Blueprint is a substantive multi-year policy statement. The development of the Energy Blueprint was a policy development process involving all senior management, including the Minister, in reviewing the viability of the Energy Commission's recommendations with the goal to identify five key objectives and 20 action items the Province would implement over the following three years.

133. As some of the action items involved other departments, the Department circulated an almost final version of the Energy Blueprint to the other departments for their input and feedback on the recommendations that related to their respective mandates. Once the Department received and incorporated this feedback, the Energy Blueprint was submitted to the Policy and Priorities Committee of Cabinet for approval as a multi-departmental policy statement.

134. While we appreciate that some of these records may fall under the scope of the exceptions to disclosure for Executive Council confidences and advice to a public body, we do not agree with the Department's decision to adopt a blanket refusal for all records related to the development of the Energy Blueprint.

Section 17—Executive Council confidences

135. Section 17 is meant to protect "the substance of deliberations of the Executive Council" in order to allow Cabinet to discuss matters in confidence. Given the requirement for Cabinet approval before the final version of the Energy Blueprint was published, it would appear that some of these records, including any Memoranda to Executive Council that were

involved, may well fall within the scope of section 17; however, we question whether all of these records would protect the entire policy development process under this provision.

136. It is important to note that the policy development process at the Department's level is separate and distinct from the deliberative functions of the Executive Council and these records must be considered for release outside of this context.

137. The committees of the Executive Council routinely make key decisions about budgetary and policy directions on behalf of the Province. To apply the mandatory exception found in subsection 17(1) as covering all records that generate from the implementation of these decisions down the departmental level would have the effect of creating a mandatory ground for non-disclosure of substantially all information about the public business of the Province, which is fundamentally at odds with the broad right of access provided by the *Act*. In our view, such an expansive application of subsection 17(1) is not consistent with the intent and spirit of the legislation.

138. Based on the above, we find that the Department was not entitled to rely on subsection 17(1) to refuse access to all of the Energy Blueprint pre-publication records except where those records constituted Memoranda to Executive Council.

Section 26—Advice to a public body

139. We initially had concerns about the Department's application of the advice to a public body exception under section 26 to protect the entire policy development process, particularly in light of the fact that these records were not provided for our review.

140. Section 26 is meant to generally protect advice to a public body in order to allow public servants to give frank and honest opinions, advice, and recommended courses of action, including in the development of departmental policies. In addition, section 26 is a discretionary exception to disclosure, meaning that the Department had an obligation to first consider whether it would be appropriate to disclose any information that fell within its scope.

141. The Department explained that these records consisted of public servants and lawyers offering their views and opinions about the development of the policy, as well as various drafts of the final policy document. The Department did establish to our satisfaction, however, that it did exercise its discretion rather than make a decision outright to refuse access to these records. The Department first considered whether to release the information by considering the impact such a disclosure could have on the on-going litigation involving these same records. The Department also considered whether it would be appropriate to disclose information that would reveal advice, proposals and recommendations generated throughout the development of the policy. These were proper and relevant considerations.

142. For these reasons, we find that the Department correctly exercised its discretion under section 26 and it was entitled to rely on section 26 to refuse access to most of the Energy Blueprint pre-publication records in this case.

3.5.3 Proposed Amendments to the *Gas Distribution Act, 1999* and its *Regulations*

143. The Department also refused the Applicant access to all records relating to proposed amendments to the *Gas Distribution Act, 1999* and *Regulations*. The Department explained to us that it refused access to these records under section 17 (*Executive Council confidences)*, section 26 (*Advice to a public body)*, section 27 (*legal privilege)*, and section 30 (*economic and financial interests of a public body)*.

144. Once again, while we appreciate that some of the information in these records may consist of Executive Council confidences, advice to a public body, or solicitor-client privileged information, we do not agree with the Department's decision to consider all records related to the proposed amendments as off limits. We explain below.

Section 17—Executive Council confidences

145. We had concerns about the application of the mandatory exception to disclosure for Executive Council confidences under section 17 in a manner that would protect all records related to the amendments in question under this provision. Section 17 is meant to protect "the substance of deliberations of the Executive Council" in order to allow Cabinet to discuss matters in confidence.

146. Given the requirement for Cabinet approval before new or amended legislation or regulations are introduced in the Legislative Assembly, it would appear that some of these records may well fall within the scope of section 17, but this protection would only apply to any related Memoranda to Executive Council.

147. As a result, we find that the Department was not entitled to rely on section 17 to refuse access to all of the draft legislation for the proposed amendments to the *Gas Distribution Act, 1999* and its *Regulations* except where those records constituted Memoranda to Executive Council.

Section 26—Advice to a public body

148. As for the records relating to the proposed legislative amendments, we had concerns about the application of the discretionary exception to disclosure for advice to a public body under section 26 in a manner that again seemed overly broad. Paragraph 26(1)(d) specifically refers to "the content" of draft legislation or regulations, and not to the entire work that is brought about when proposed legislation is first contemplated. We were advised that such work did entail views and opinions, advice and recommendations about

the development of the new legislation and that before relying on section 26, the Department first considered whether it would be appropriate to disclose any information that fell within its scope. We agree that these were relevant considerations when applying section 26 to refuse access to these records.

Section 27—Solicitor-client privilege

149. A substantive rule of evidence referred to as solicitor-client privilege is based on the protection of the confidentiality of communications between a solicitor and his or her client, and it follows that only the client has the ability to waive the privilege if the client so chooses.

150. This is reflected in how the *Act* treats solicitor-client privileged information belonging to a public body as a discretionary exception to disclosure:

> 27(1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to solicitor-client privilege,
> (b) information prepared by or for an agent or lawyer of the Office of the Attorney General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence, or
> (c) information in a communication between an agent or lawyer of the Office of the Attorney General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

151. This is a discretionary exception that permits the head of a public body to consider disclosing information that falls within any of the above three categories based on relevant factors at the time that an applicant makes a request. In other words, the public body, i.e., the client, can waive the privilege and allow disclosure of the otherwise protected information where it is appropriate to do so under the circumstances.

152. We were not permitted to review information that the Department claimed was subject to solicitor-client privilege in relation to the proposed amendments to the legislation and its regulations; however, we were provided enough information on the process that is undertaken in all cases of proposed legislative reforms and how these procedures required substantive legal advice and recommendations. In this regard, the Department could substantiate its claim of solicitor-client privilege for some but not all of the records in relation to the proposed legislative amendments.

Subsection 30(1)—Economic or financial interests or negotiating position of public body or the Province of New Brunswick

153. The Department also raised subsection 30(1) as grounds to refuse access to these records. Subsection 30(1) sets out a discretionary exception to disclosure of information in certain circumstances:

> 30(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Province of New Brunswick…

154. While subsection 30(1) sets out a list of situations where this exception to disclosure may apply, a public body is not limited to those situations and it may point to other situations where the requested information may merit protection from disclosure. The purpose of this exception is to provide a public body with the option of protecting sensitive information that may be harmful to its economic or financial interests, or its negotiating position or that of the Province of New Brunswick if it were made public. Therefore, the public body must establish (with facts) how a particular exception applies in order to be able to refuse access.

155. Furthermore, the exception is discretionary, which means the public body must first determine whether the information in question falls within the scope of the exception, and if it does, then the public body must determine whether the information can or should be released in light of relevant circumstances in existence at the time of the request.

156. This is a "harm" test and requires substantive proof that harm will result if disclosure is made. In this case, we were not provided with details or facts upon which the Department established this harm. Accordingly, the Department was not entitled to rely on this exception to refuse the requested information in this case. Having said this, however, we are confident that the same requested information was properly withheld under section 17, section 26 and section 27 in this case.

157. In summary, we find that the Department was entitled to rely on sections 26, 27 to refuse access to the remainder of the records relating to the draft legislation for the proposed amendments to the *Gas Distribution Act, 1999* and its *Regulations* in this case. We also find that the Department was not entitled to rely on subsection 30(1) to refuse access to any of the records relating to the draft legislation for the proposed amendments to the *Gas Distribution Act, 1999* and its *Regulations* in this case.

3.5.4 Paragraph 4(b): Records relating to the Office of the Attorney General

158. The Department also refused the Applicant access to some information under paragraph 4(b), as indicated in the Response:

> Please be advised that records in the custody of or under the control of the Department of Energy that pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General are not subject to disclosure, in accordance with paragraph 4(b) of the Act.

159. Paragraph 4(b) is a special exclusion—not an exception to disclosure—that has been specifically attributed to records held by the Office of the Attorney General. We understand there is some confusion as to whether public bodies can apply both the solicitor-client privilege exception under section 27 and paragraph 4(b) that excludes certain records from the *Act* relating to the Office of the Attorney General.

160. Paragraph 4(b) seeks to exclude from the *Act*'s application certain records relating to the performance of the duties and functions of the Office of the Attorney General from its reach. The determination of whether a record falls within the scope of paragraph 4(b) involves a consideration of the nature of the record, the context in which it was produced, and how the record relates to the Attorney General's performance of its duties and functions. *An Act Respecting the Role of the Attorney General* sets out the functions of the Attorney General and it follows that the determination of whether a record relates to the duties and functions of the Attorney General is best made by the Office of the Attorney General, rather than another public body.

161. For these reasons, we are of the view that only the Attorney General can claim the exclusion found in paragraph 4(b), and that any another public body, including the Department, cannot rely on paragraph 4(b) for its own records.

162. The exceptions to disclosure found in section 27 for solicitor-client privileged information are sufficient to ensure that this kind of information is appropriately protected from disclosure, and preserves the discretionary nature of the client's ability to waive the privilege.

163. We thus find that the Department was not entitled to rely on paragraph 4(b) to refuse access to any records.

3.5.5 Records not reviewed and the Burden of Proof

164. A question may arise as to how we could arrive at the conclusion that the Department was justified in refusing access to some of the requested information where we were not allowed to review the records in which the information was contained.

165. In previous matters where the exceptions to disclosure or exclusions under section 4 were claimed, we were not provided any explanation or any indication as to the nature of the protected records. In other words, we had nothing upon which to even entertain a discussion in regards to how the public body had arrived at the decision to refuse access in the first instance.

166. In this case, however, we must make mention of the fact that in the investigation of this Complaint, our Office held several meetings and had many discussions with the Department with a view for the Department to explain to us how it had processed the Request, along with how the relevant records were identified and searched, and even how the Department came to the decisions it made to allow and refuse access to the Applicant. In other words, we were provided sufficient details and explanations from the Department upon which we could properly assess each and every exception claimed in the Response.

4.0 FINDINGS

167. In this matter, we find that the Department performed an extensive and thorough search of all the records relevant to the Request. Moreover, the Department was in consultation with other public bodies that had also received the same Request to determine the existence of records in their custody. As lead public body in searching and identifying the requested information, we are confident that the Department assembled all of the relevant records in this matter. As we were unable to review all of these records, however, we are unable to ascertain whether the search was adequate, although there was no evidence to suggest otherwise in this case.

168. Despite the Department's large-scale work in identifying the records in this case, the Department failed to prepare a list of these relevant records and further failed to provide such a list to the Applicant. These omissions prevented the Applicant from receiving a properly constituted Response in conformity with section 14 of the *Act*.

169. We also find that the Department's Response was not in conformity with section 14 for not having provided to the Applicant the necessary explanations to enable a clearer understanding as to exactly which information, from that identified, would be received or not, namely:

- In failing to indicate which of the full list of relevant records were being released;
- In failing to give proper explanations as to why some information was redacted in the records that were being released; and,
- In failing to identify which of the full list of relevant records were those being withheld in full with reasons as to why.

170. The Department reviewed all of the relevant records in relation to the on-going litigation involving the same subject matter and records, and in doing so, the Department relied on paragraph 29(1)(o) of the *Act* to refuse access to some of the information on the basis that its disclosure could reasonably expected to be injurious to the legal proceedings. We find that the Department's reliance on this exception was proper where the Department disclosed to the Applicant the requested information it believed would not be injurious to the on-going litigation while withholding only the information it believed would be. The

Department's exercise of discretion to exclude some of the relevant information in this case was made in conformity with paragraph 29(1)(o) of the *Act.*

171. With regards to the relevant records that the Department provided for our review in this Complaint matter, we find that the Department:

a) Did not improperly refuse access to the information withheld under section 17;

b) Properly withheld personal information that was redacted in accordance with subsection 21(1);

c) Properly withheld information redacted under paragraph 22(1)(b) and subparagraph 22(1)(c)(i) and records withheld in full under subsection 22(1)(b) and subparagraphs 22(1)(c)(i) and (iv);

d) Properly withheld information redacted as well as some records withheld in full under subsection 26(1);

e) Lawfully refused access to another public body's solicitor-client privileged information under subsection 27(2);

f) Lawfully refused access to its own solicitor-client privileged information under subsection 27(1), although we find that the Department was not entitled to rely on the exclusion found in paragraph 4(b) for this purpose; and,

g) Improperly applied paragraph 33(1)(b) to the records that were publicly available for the reason that the Department neither identified these records nor directed the Applicant as to the sources where the information could be found.

172. With regards to the records that the Department did not provide for our review in this Complaint matter, we were provided sufficient explanations and additional information upon which to make the following findings:

a) The Department was not entitled to rely on section 17 (*Executive Council confidences*) to refuse access to all of the Energy Blueprint pre-publication records except where those records constituted Memoranda to Executive Council;

b) The Department was entitled to rely on section 26 (*Advice to public body*) to refuse access to the remainder of the Energy Blueprint pre-publication records in this case;

c) The Department was not entitled to rely on section 17 (*Executive Council confidences*) to refuse access to all of the draft legislation for the proposed

amendments to the *Gas Distribution Act, 1999* and its *Regulations* except where those records constituted Memoranda to Executive Council;

d) The Department was entitled to rely on section 26 (*Advice to public body*), on section 27 (*Solicitor-client privilege*) to refuse access to the remainder of the draft legislation for the proposed amendments to the *Gas Distribution Act, 1999* and its *Regulations* in this case;

e) The Department was not entitled to rely on subsection 30(1) (*Economic or financial interest or negotiating position of a public body or the Province of New Brunswick*) to refuse access to any of the records relating to the draft legislation for the proposed amendments to the *Gas Distribution Act, 1999* and its *Regulations* in this case; and,

f) The Department was not entitled to rely on paragraph 4(b) (*Litigation records pertaining to the duties and functions of the Office of the Attorney General)* to refuse access to any of the requested relevant information in this case.

5.0 RECOMMENDATION

173. Given all of our findings above, the Commissioner recommends under subsection 73(1) that the Department provide to the Applicant a list of all the relevant records in this matter and that such list include all those relevant records that were withheld in full along with explanations as to why access to this information was refused.

Dated at Fredericton, New Brunswick, this _____ day of June, 2013.

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Anne E. Bertrand, Q.C.
Commissioner