REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-1006-AP-510
March 18, 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

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 the matter.

2. The Applicant submitted an access request to the Office of the Attorney General dated January 26, 2012 for the following information:

> 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, [the Applicant] 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.
>
> ("the Request")

3. The Office of the Attorney General responded to the Request on February 22, 2012:

> The following is in response to your request to the Attorney General under the *Right to Information and Protection of Privacy Act* (the "*Act*"), received on January 27, 2012.
>
> You have requested records that are listed in a Schedule A attached to your request in relation to the use and distribution of natural gas in the Province of New Brunswick.
>
> Although the Office of the Attorney General has some records that would relate to your request, I must advise you that the *Act* does not apply to such records as they pertain to the legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General. Subsection 4(b) of the *Act* clearly establishes the parameters of the legislation in this respect. It reads as follows:
>
> > 4 This *Act* applies to all records in the custody of or under the control of a public body but <u>does not apply to</u>
> >
> > > b) a record pertaining to the legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General
>
> I trust that this information will be of assistance to you.
>
> ("the Response")

4. The Applicant sent a follow-up letter to the Office of the Attorney General on May 15, 2012 requesting clarification about the Office of the Attorney General's duties and functions. The Applicant wished to understand why the information requested was being withheld under paragraph 4(b) of the *Act*. The Office of the Attorney General responded by providing some additional explanation about its function and role and the general nature of the records it holds in its legal files.

5. Not being satisfied with the Response and later clarification, the Applicant filed a Complaint with this Office on June 7, 2012 as so:

> 1. The Attorney General has advised that the Office of the Attorney General has records that relate to my request but that the Act does not apply to such records as they all pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General.
>
> 2. The Attorney General has not provided me with a detailed list of the records to which I have been denied access.
>
> 3. I am not satisfied with the decision of the Attorney General and request that the Commissioner conduct an investigation and make a recommendation as to whether I am entitled to: (i) access to any records in the possession or control of the Office of the Attorney General which I have not been granted access to (ii) access to the records which have been denied, and (iii) a detailed list of all records which are denied.

("the Complaint")

INFORMAL RESOLUTION PROCESS

6. 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 in **Appendix A** of this Report).

7. 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*. In this case, we noted that the Response of the Office of the Attorney General refused access to all of the relevant records based upon its interpretation of paragraph 4(b) of the *Act*.

8. In our efforts to reach an informal resolution of this Complaint, we held meetings with officials of the Office of the Attorney General. The subject of our discussions centered on a public body's duty to assist the Applicant when processing a request and the response requirements of section 14, along with the application of the exclusion found in paragraph 4(b).

9. In the past and during this Complaint matter, the Office of the Attorney General has interpreted and applied paragraph 4(b) to mean that the *Act* does not apply to any of its records, thereby barring all access to its records. The English version of paragraph 4(b) states that the *Act* does not apply to records pertaining to "legal affairs" relating to the duties and functions of the Office of the Attorney General.

10. According to the Office of the Attorney General, most of its work involves giving legal advice to government bodies which signifies that substantially all of its records are contained in legal and even litigation files. The Office of the Attorney General applies a broad view to "legal affairs" to exempt its records from reach of access and from review by a Court or the Commissioner.

11. The Office of the Attorney General has held this view despite an earlier decision of our Office in the matter of Complaint Matter **2011-212-AP-110** involving the Office of the Attorney General. In that case, we interpreted paragraph 4(b), particularly due to the fact that the English and the French versions of paragraph 4(b) were not the same:

> 4 This Act applies to all records in the custody of or under the control of a public body but does not apply to (…)
>
> (b) a record pertaining to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General, (…)
>
> 4 La présente loi s'applique à tous les documents qui relèvent d'un organisme public, sauf: (…)
>
> (b) aux documents relatifs aux contentieux relevant des devoirs et des fonctions du Cabinet du procureur général; (…)
>
> [*Emphasis added*]

12. We found the exemption to apply to records pertaining to "litigation" rather than to legal records, thus disagreeing that all records held by the Office of the Attorney General were intended to be excluded from the *Act*.

13. The Office of the Attorney General did not appeal our decision to interpret paragraph 4(b) in this manner.

14. As a result, we carried out our investigation of this Complaint with this interpretation. We investigated with a view to determine which records in the custody and control of the Office of the Attorney General were relevant to the Request, i.e., which records were not litigious

and may contain relevant information. The decision to deny access to these records had to be reviewed.

15. Unfortunately, and in spite of our efforts to work with the Office of the Attorney General, we were not permitted to review any records at the Office of the Attorney General in this matter.

16. For that reason, we were unable to determine whether the requested records in this Complaint properly fell within the exemption found in paragraph 4(b) in accordance with the established interpretation found in Complaint Matter 2011-212-AP-110.

17. This brought the informal resolution process to an end and the matter thus became the subject of the present Report of our findings.

REVIEW AND ANALYSIS

Requirements when providing a response

18. At this stage, it is appropriate that we review the requirements all public bodies must follow when processing and responding to an access to information request filed under the *Act.*

19. When an applicant exercises a right granted by sections 7 and 8 to request access to information, a public body must:

a) assist the applicant as required by section 9;
b) perform an adequate search of records to identify records that are relevant to the request;
c) determine which records and which information can be disclosed;
d) identify and consider whether specific information must be withheld in the circumstances of the request;
e) provide a response within the delay provided by section 11 (general rule of 30 days); and
f) in accordance with section 14, provide a meaningful response which:
    - includes an explanation regarding why any requested information is withheld;
    - informs the applicant of his or her right to complain to the Commissioner or refer the matter to the Court of Queen's Bench if not satisfied with the response.

20. Section 14 is straightforward and is designed to make the applicant aware of which records held by the public body are relevant to the request for information, which information can be released, and, as where some information is not disclosed, why the decision to refuse access has been made.

21. A response must directly address all aspects of the request and section 14 makes it mandatory to respond to the applicant in this way. Simply put, the public body is lawfully obligated to fully answer a request for information contained in records it holds.

Format of the Response

22. The Office of the Attorney General's Response in this case refused access to the Applicant to all relevant records, indicating that the *Act* did not apply to the records on the basis of paragraph 4(b). While the Response indicated that the Office of the Attorney General had relevant records in its possession, it did not list or identify which records were relevant.

23. Although the Response attempted to explain the Office of the Attorney General's interpretation of the *Act*'s applications to its records when processing an access to information request generally, it failed to provide to the Applicant neither meaningful nor helpful explanation regarding relevant records in its custody and control.

24. Issuing the Response in this way with a blanket refusal to all records that were not identified made it impossible for the Applicant to ascertain which records were in existence, let alone which ones were withheld lawfully.

25. The Response also failed to state which of the records at the Office of the Attorney General were relevant (of <u>all</u> records in its possession or control), whether those records had been identified, and whether some records or some information had been considered for disclosure (the non-litigious records or information would be subject to consideration for disclosure).

26. Furthermore, the Response did not indicate that the Applicant had the right to file a complaint with our Office or refer the matter to the Court about the Office of the Attorney General's decision in refusing access. We have raised this omission with the Office of the Attorney General in previous cases, but the recommendation to correct this omission has not been followed.

27. We believe it is central to an applicant's right of access under the *Act* for all public bodies to inform an applicant that he or she has a right to challenge the decision to refuse access to information, in part or in full. The *Act* recognizes this fundamental right: whenever dissatisfied with the decision made by the public body regarding access to information, an applicant can file a complaint with the Commissioner or take the case to a Court.

28. We would have expected the Office of the Attorney General, as legal representative for public bodies, to respect this statutory right.

29. For all these reasons, we find that the format of the Response did not follow the requirements of providing the Applicant a properly constituted response as per subsection 14(1) of the *Act.*

30. As a result, the Office of the Attorney General failed in its duty to properly respond to the Applicant's Request in this case.

Search for relevant records

31. The Office of the Attorney General informed us during our investigation that upon receiving the Request, its officials conducted an electronic search to identify all relevant records on its electronic file management system. Based on this initial search, we understand that it was possible to determine that separate branches in the Office of the Attorney General might have files relevant to the Applicant's Request.

32. Directors from each branch of the Office of the Attorney General, identified through the search for records, were asked to inquire further; where they found relevant files, they had to provide feedback about the general nature of these files. Each Director provided email confirmation as to whether relevant files in his or her respective branch had been identified, and whether the files had been created in cases where government departments had requested legal advice.

33. No further steps were taken with regards to the search for relevant records.

34. As we were not made privy to the relevant records, we are unable to ascertain whether the search for relevant records was adequate in this case.

Duty to Assist

35. The duty to assist provision found in section 9 of the *Act* creates a positive obligation on the public body to offer assistance such that an applicant can receive a timely, appropriate, and relevant response to his or her request for information:

> 9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

36. In our view, the discharge of this duty to assist applies throughout the request process up to and including the issuance of a response to the applicant, which connects well with the principle that the response should be helpful and thoroughly answer the applicant's request.

37. We understand and appreciate the role and function of the Office of the Attorney General in that it serves as in-house counsel for other provincial departments. As such, we accept that the nature of the work performed is largely protected from disclosure under the *Act*; however, the Office of the Attorney General has a duty under the *Act* to respond to access requests in the same manner as any other public body.

38. In that regard, the Office of the Attorney General had a duty to assist the Applicant is processing the Request in a meaningful manner which it failed to do when claiming paragraph 4(b) without any explanation as to what records exist and reasons why it believed 4(b) applied to all the relevant records. It also failed in its duty to assist the Applicant by neglecting to inform the Applicant of its right to complain about the Response despite being aware of this statutory obligation.

39. Given our review of the Response provided in this case, we find that the Office of the Attorney General failed to discharge its duty to assist the Applicant as required by section 9 of the *Act*.

Review of Public Body's Decision

40. Given the content of the Response, the central question of the investigation of this Complaint was the application of the exemption found in paragraph 4(b) to all relevant records, and the Office of the Attorney General's decision in this case to refuse access to all relevant records under that exemption provision.

41. As we have found in previous reports, we disagree with the Office of the Attorney General's interpretation that when a public body determines that records are excluded by paragraph 4(b), the entire process of responding to an access request is removed. In addition, the Office of Attorney General remains of the view that a complaint cannot be entertained on its decisions regarding access to information.

42. We disagree. Under the *Act*, the Office of the Attorney General is designated as a public body and therefore, when requests are made to a public body, the public body must respond to the requests in accordance with the *Act*, regardless of the status of the requested records.

43. Paragraph 4(b) was first adopted when the *Right to Information and Protection of Privacy Act* was debated and passed by the Legislative Assembly in 2009 (proclaimed on September 1st, 2010). There is no equivalent provision in the *Act*'s antecedent laws or in any other access to information legislation anywhere else in Canada. It functions as a "carve out" for a certain type of records, meaning that if it is determined the information contained in records falls under paragraph 4(b), the *Act* will not apply to those records, and thus, not subject for consideration regarding their release.

44. The *Act*, however, also ensures that there where a decision of this kind is made vis-à-vis records being subject to the *Act*, there also exists an independent review of the decision to first qualify the records as excluded. Otherwise, there would be no mechanism by which to verify that the Office of the Attorney General had properly decided to exclude the records in the first place thereby leading to an incongruous outcome for the access to information process itself.

45. It is important to reiterate that the public has an express right of access to public information which is only curtailed in a few limited and specific circumstances. While the general rule is disclosure, there are exclusions found in section 4 and exceptions to disclosure in sections 17 to 33 of the *Act*.

46. In all these instances, the onus is on the public body to substantiate its decision to refuse access based on a particular exclusion or exception under the *Act,* as per subsection 84(1). The decision to refuse access to information is reviewable by a Court or by the Office of the Commissioner. The review provisions under the *Act* provide a further assurance of the public's right of access through the independent review by the Court or the Commissioner that determines whether the right of access has been upheld in all cases.

47. Consequently, when the Applicant complained to the Commissioner in accordance with section 67 about the Office of the Attorney General's refusal to provide access to information, we were by that very process entrusted under section 68 of the *Act* with the power to investigate the Complaint. In other words, the *Act* granted our Office the power to investigate whether the decision to refuse access and more precisely, the decision to exclude the records under paragraph 4(b), was made properly and in accordance with the law. To answer these questions, we were required to review the decision to exclude all the relevant records under paragraph 4(b).

48. Regrettably, we were not permitted to conduct a review of the relevant records to acquit our statutory duty in determining whether the Office of the Attorney General's decision to qualify those records as those falling under the exemption of paragraph 4(b) was made properly.

49. We were therefore unable to determine whether the Applicant's right of access to those records was respected by the Office of the Attorney General in this case. The onus nevertheless remained on the Office of the Attorney General to substantiate its decision to refuse access based on paragraph 4(b) as per subsection 84(1) of the *Act,* and in this case, it failed to meet its burden.

Production of Records to the Commissioner and Burden of Proof

50. Before we continue with our findings, we believe it important to raise our concern regarding the production of records to the Commissioner when a complaint investigation is undertaken.

51. Through the Commissioner's Office (or the Courts), the *Act* provides the public with an accessible and timely review mechanism to ensure that access rights are being upheld by public bodies. This is accomplished by ensuring that public bodies remain accountable for their decisions especially in cases where access to information has been refused. Where there was a lawful decision to refuse access to information, the independent review will support such a decision, while providing to the public the explanations why the refusal was in accordance with the *Act*.

52. In some cases, it is incumbent upon the Commissioner to interpret the important reforms that have been proclaimed in this legislation, recognizing that that these new rules are not always easy to apply. We believe it is mainly for this reason that public bodies have welcomed the Office of the Commissioner's efforts to resolve complaints informally by providing the necessary input in the interpretation of these rules.

53. Having said this, however, this approach can only be effective where the Commissioner's Office is allowed to review the records, particularly where the public body was uncertain as to whether access to some information ought to have been granted or refused; for instance, where there are privacy considerations at play.

54. We raise this issue to promote the good results that have been, and continue to be, accomplished when public bodies work with the Commissioner's Office to resolve complaints. For the most part, production of records to the Commissioner has not been an issue since the *Act* came into effect. Public body officials have allowed the Commissioner and her staff to review in private, during our confidential investigative process, the various records relevant to complaint matters.

55. In this case, the Office of the Attorney General did not allow us to see the records in question.

56. If this approach were to become a trend, it would undoubtedly affect the Commissioner's ability to conduct thorough confidential investigations of complaints, thereby rendering it difficult to successfully resolve complaints. We hasten to add that this trend may encourage applicants to resort to their only other option under the *Act*: to refer their complaints to the Courts where production of records cannot be refused. Legal proceedings before the Courts to review complaint matters may not only engender longer delays for a complete disposition of the case, but are also costly for both applicants and public bodies.

57. Subsection 70(1) states that the Commissioner can require the production of any record that the Commissioner deems relevant to an investigation, except for Executive Council confidences and records containing solicitor-client privileged information, which are treated differently. In other words, the Commissioner cannot *require* the production of Executive Council confidences and records containing solicitor-client privileged information.

58. In our view, subsection 70(1) was meant to allow a public body, if it so decides, to produce the relevant records to the Commissioner for her confidential review, notwithstanding that the Commissioner cannot require the public body to produce them. The use of the expression "cannot require" is significant in that it does not mean that the Commissioner is not entitled to see the records. This expression falls squarely within the overall intent and spirit of the *Act*: allow the public body to make a decision regarding access to information but at the same time make the public body accountable for the decision.

59. This accountability is assured by subsection 84(1) where a public body has no choice but to prove that its decision to refuse access to records based on a particular exclusion or exception of the *Act* was in fact lawful:

> 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.

60. The public body carries this burden of proof in all instances, i.e., whether the applicant challenges the decision of having been denied access before the Courts or by filing a complaint with the Commissioner.

61. To meet the burden of proof, a public body must give reasons why there is no right of access by substantiating how the claimed exemption or exceptions to disclosure were applied to refuse access. The burden cannot be met where there is insufficient explanation and when the records at the heart of the matter are not produced for examination by the Court or for the Commissioner's review.

62. Subsection 70(1) recognizes the Commissioner's role in assuring this accountability through her independent review and it has been worded to permit such a review even where complaints involve highly sensitive records.

63. Our interpretation of subsection 70(1) not only mindful of the legislative intent to provide an independent review of the decisions that public bodies make under the *Act*, but it also supports the equally clear intent of the *Act* to obligate 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.

64. In this regard, where a public body is entitled to refuse access to Executive Council confidences or records containing solicitor-client privileges because they contain sensitive information, the public body can nevertheless permit the Commissioner to see the records so that the Commissioner - for both the benefit of the public body and the applicant – can ascertain that the decision to refuse access was proper. Another effective approach in our experience has been to produce to the Commissioner a list which identifies the relevant records of the kind the Commissioner cannot require production. We have found 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.

65. The end result is for the public body to meet its burden of proof that its decision to refuse access to the information was lawful and respected the applicant's rights conferred upon the *Act*.

66. By raising this concern, we are encouraging public bodies to continue to work with the Commissioner's Office in enabling a complete independent review of complaint cases by producing all relevant records for examination, thereby paving the way for resolving complaints with the expected degree of accountability.

In this case

67. The decision of the Office of the Attorney General to deny the Commissioner's Office a review of the records, or even to provide a list or affidavit in relation to the relevant records, had the effect of denying itself the invaluable input that would have resulted from an independent review of the records, along with the Commissioner's interpretation as to whether the *Act* was correctly applied to the records in this case.

68. More problematic than simply refusing to allow the Commissioner to examine the records, in the present case, such a decision also denied the Office of the Attorney General the benefit of an independent evaluation about a complex complaint case.

69. Furthermore, we find that this action prevented the Office of the Attorney General from meeting its burden of proof under section 84 to establish that the Applicant had no right of access to the information requested in this case.

70. Consequently, we have no choice but to issue a recommendation on that issue in this Report.

Application of paragraph 4(b)

71. Paragraph 4(b) of the *Act* intends to exclude certain records pertaining to the duties and functions of the Office of the Attorney General. This rule is unique to New Brunswick where records captured by this provision are said to be *exempt* from the *Act*, meaning that certain records are not subject to the rules regarding access and privacy.

72. By virtue of paragraph 4(b), it is clear that the *Act* excludes certain records relating to the performance of the duties and functions of the Office of the Attorney General. The determination of whether a record falls within the scope of paragraph 4(b) requires a consideration of the nature of the record, the context in which it was produced, and how it relates to the "*performance of the duties and functions of the Office of the Attorney General*." The functions of the Attorney General are established in *An Act Respecting the Role of the Attorney General* (proclaimed in 2011), 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; however, the interpretation of paragraph 4(b) still resides with our Office in this matter.

73. When the Complaint was filed, we reviewed the Request, as well as the Response. Further to discussions with officials of the Office of the Attorney General, it became apparent that the Office of the Attorney General did not deem any of the relevant records in its custody or under its control to be subject to the *Act* pursuant to its interpretation of paragraph 4(b).

74. As indicated above, in a previous Report issued by our Office in the Complaint Matter 2011-212-AP-110 involving the Office of the Attorney General, we interpreted paragraph 4(b). We noticed that the English version was inconsistent with the French version: the words "*documents relatifs aux contentieux*" do not have the same meaning as those found in the English version, which are "*a record pertaining to legal affairs*".

75. The word *contentieux* is defined by the dictionary *Le Petit Robert 1* : "*qui est ou qui peut être l'objet d'une discussion devant les tribunaux*". In the *Collins Robert French English Dictionary*, the word *contentieux* is translated to signify "*contentious"* or "*litigation"*. The word "*contentieux*" means a matter relating to litigation, whereas the English word "*legal*" in the *Collins Robert French English Dictionary* is translated in French to mean "*légale"* or *"juridique*".

76. Litigation matters are legal matters, but not all legal matters are litigious. Litigation refers to cases which may be brought before the courts and not all legal matters end up in litigation. For instance, a contract is a legal document, but this does not necessarily mean that the contract will become the subject of a litigation file and be part of a court case.

77. The two versions of paragraph 4(b), therefore, did not mean the same thing: the English version signifies records relating to legal matters, whereas the French version refers to records relating to litigation matters. As the Province's *Official Languages Act* dictates that both language versions of the same legislative provision are equally authoritative, this apparent conflict could not be resolved by preferring one language version over another.

Both versions were to be read with a view to resolve their differences in a way which respected both.

78. We found that the excluded records could only be those which related to litigation rather than to legal affairs. This interpretation, we believed then and still do today, is in line with other provisions in the *Act* that places specific limits on the disclosure of court proceedings records or other litigious records while respecting an applicant's general right of access to information. It is also mindful of how the Office of the Attorney General referred to excluded records in its role as lawyer for the Province's public bodies in that case.

79. Therefore, paragraph 4(b) must be interpreted to signify that only records pertaining to the litigation matters relating to the performance of the duties and functions of the Office of the Attorney General can be excluded from the application of the *Act*.

80. While we have since discovered that paragraph 4(b) has been amended to only refer to records relating to *legal* affairs, i.e., the French version now follows the English version[1], for the purpose of this Complaint, our analysis of paragraph 4(b) remains as that which was applicable to the Request made by the Applicant to the Office of the Attorney General on January 26, 2012, meaning that the exclusion only applied to records relating to litigation matters.

81. In that regard, we find that the Office of the Attorney General was not at liberty to exclude from the purview of the *Act* any records relevant to the Request that did not relate to litigation.

82. As stated above, because we were refused an examination of the records, we remain unsure as to whether any or all of the relevant records relate to litigation. In this regard, the Office of the Attorney General has not met its burden of proof that the records relevant to the Request did in fact pertain to litigation.

83. We are consequently issuing a recommendation on this finding.

[1] The French version of paragraph 4(b) has been amended to replace the word "contentieux" with "affaires juridiques".

FINDINGS

84. The Office of the Attorney General failed to provide a response in conformity with section 14 of the *Act*. The Response did not list or identify the relevant records in its custody or control and did not inform the Applicant of the right to file a complaint with our Office or to refer the matter to the Court about the decision to refuse access.

85. Although a search for relevant records was undertaken, we were not made privy to the relevant records in this matter and we are therefore unable to ascertain whether the search for relevant records was adequate.

86. The Office of the Attorney General failed to discharge its duty to assist the Applicant as required by section 9 by processing the Request in an open and accurate manner. This finding is based on the Response not being in conformity with the requirements of the *Act* and thus failing to provide a meaningful and thorough reply, not to mention its failure to inform the Applicant of the right to refer the matter before the Courts or to file a complaint with our Office in relation to the refusal.

87. We find that the Office of the Attorney General's interpretation and application of paragraph 4(b) to mean that the *Act* does not apply to the Request was not lawful. The *Act* applies to the Request made by the Applicant to the Office of the Attorney General in this case. At the time the Request was made, the interpretation of paragraph 4(b) had been made by our Office in another complaint case to signify that only records litigious in nature could be exempted from the *Act*. The subsequent amendment to paragraph 4(b) had no bearing on this case.

88. The Office of the Attorney General could rely on paragraph 4(b) to refuse access to records in its custody; however, we find that this decision is reviewable. In this regard, the Applicant had a right to file a complaint about the refusal under section 67. In having done so, our Office assumed the lawful authority to fully investigate this Complaint under the *Act* pursuant to section 68.

89. As the Office of the Attorney General did not permit us to review the relevant records, we are unable to determine whether paragraph 4(b) was properly applied to refuse the Applicant access to all of the relevant records. For the same reasons, we find that the Office of the Attorney General failed to meet its burden of proof in refusing access to all of the relevant records as it is required by law to do under subsection 84(1).

RECOMMENDATIONS

90. Based on the above, we issue the following recommendations:

1. Recommendation pursuant to subsection 73(1) of the *Act*:

   That the Office of the Attorney General grant in part the Request by releasing to the Applicant forthwith all of the relevant records in its custody or control except for those that pertain to litigation matters.

2. Recommendation pursuant to paragraph 60(1)(h) of the *Act*:

   That the Office of the Attorney General review its process when receiving and responding to access to information requests such that it respects its statutory duty to assist the applicant in those cases, particularly in informing applicants of their right to complain to the Court of Queen's Bench or to the Commissioner.

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

_____
Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2012-1006-AP-510
March 18, 2013
Office of the Access to Information and Privacy Commissioner of New Brunswick

"Complaint Process"

The Commissioner's Policy on the Complaint Process is designed to respect the Right to information and Protection of Privacy *Act*, to encourage both cooperation and transparency, and all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the *Act*. Below is an explanation of the distinction between what is referred to as an informal resolution process and a formal complaint investigation more commonly recognized by the public, along with timelines. This Complaint Process is communicated to both the applicant and the public body at the outset of a complaint matter filed with our Office.

Upon the receipt of a complaint, the *Act* allows the Commissioner to proceed in two ways: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally. For all intents and purposes, in both the informal resolution process and the formal investigation the Commissioner's work constitutes an 'investigation' into the merits of the complaint; however, in the informal resolution process, the Commissioner takes all steps necessary to resolve the complaint to the satisfaction of all involved, and in a manner consistent with the purposes of the *Act*. When this is not possible, the Commissioner concludes her work by a formal investigation which leads to the publication of a formal Report of the Commissioner's Findings.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted a policy to treat all complaints in the first instance by way of informal resolution. Our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and to become more familiar with their rights and obligations under the legislation. Educating the public of the application of this new law is an important part of the mandate of this Office. We are of the view that such a process will make way for improved requests for information and response procedures in the future, which may limit the need to file complaints.

Informal Resolution Process
Step 1 – Review

In all cases, upon receipt of a complaint, we issue letters to both the applicant and the public body indicating that the Commissioner seeks to resolve the matter informally. A deadline is initially set to try to do so within 45 days of the date of receipt of the complaint to our Office.

Although it is called an 'informal resolution process', the Commissioner's Office must review the full substance of the complaint, which includes the initial request for information and the response by the public body, which are the same steps undertaken in any investigation process. Our Office then meets with the public body's officials to review all relevant records relating to the request. This review of all relevant records may include requesting further information from the public body in order for us to fully understand which records may have been overlooked and which could be relevant to the request. Such a meeting is held shortly after receipt of the complaint to begin the process without delay.

Informal Resolution Process
Step 2 – Preliminary Findings

Where the Commissioner is satisfied that the public body has made an adequate search and has identified and provided to the Commissioner all records relevant to the request for information, or where the Commissioner believes there are issues regarding the application of the rules of the *Act* which inhibit a full review of all relevant records, our Office analyzes the initial response given by the public body against all records provided to the Commissioner in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings to the public body by letter. Those preliminary findings inform the public body of the direction of the investigation and of the remaining issues, if any, which must be addressed before we can proceed to the next step, i.e., inviting the public body to submit a 'revised response' to the applicant's request for information. If a revised response is not required, the complaint process proceeds to Step 4.

The suggestion to consider a revised response is made with the continued intent of resolving the complaint informally and with a view to provide the applicant access to the information that the *Act* deems should be disclosed.

If the public body agrees to prepare a revised response, a timeline is set during which the 'proposed revised response' must be submitted to the Commissioner. That timeline is based on the complexity of the work involved to prepare the proposed revised response in each case.

Informal Resolution Process
Step 3 – Proposed Revised Response

When the public body provides a proposed revised response, the Commissioner reviews it to ensure that it also meets the requirements of the *Act*. If the proposed revised response meets the requirements of the law, the Commissioner invites the public body to submit it directly to the applicant as a revised response to the applicant's initial request for information.

If the proposed revised response does not meet the requirements of the law, the Commissioner will provide additional comments to the public body as required in order for the public body to achieve a properly constituted revised response. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to encourage the public body to provide a lawful response to the request for access to information under the *Act*.

Informal Resolution Process
Step 4 – Applicant's Comments

In the case where the public body is ready to issue the vetted revised response to the applicant, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant and the public body sends the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response and to provide comments in relation thereto to the Commissioner. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the revised response. The Commissioner then reviews the applicant's comments on the revised response.

Or, in the event that a revised response was not required, the Commissioner informs both parties that the initial response to the request for information was appropriate and in conformity with the *Act*. In such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why it is believed the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the matter. The Commissioner then reviews the applicant's comments.

If the culmination of the above steps to date exceeds the initial 45 day timeframe allotted, the Commissioner may decide to continue with the informal resolution process if there is a belief that a satisfactory resolution in accordance with the *Act* is possible. The timeframe at this stage is based on completing the process within the 90 day investigation deadline set by the *Act*.

In complex matters, the timeframe for the continued work on a revised response may extend beyond the 90 day period to complete the matter. In such a case, the Commissioner notifies both parties in writing of an extension of time to complete the matter as permitted by section 72. The notification indicates the new deadline within which the case will be concluded, and the

reasons why the extension of time is necessary, e.g., to bring an informal resolution to the complaint.

Again, it is important to reiterate that our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and all efforts are deployed within the allotted timeframe (or extension thereof permitted by the *Act*) to make this happen, whenever possible.

Informal Resolution Process
Step 5 – Revised Response Satisfactory

In the event that the applicant is satisfied with the revised response, the Commissioner concludes her investigation as one having been resolved informally to the satisfaction of both parties and in conformity with the *Act*. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally.

In the event the applicant provides comments which accept the Commissioner's preliminary findings that the public body's initial response was in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In both above instances, there is no requirement for the Commissioner to file a formal report under section 73 for the reason that there is no recommendation to be made to the public body on its response (revised or initial) to the request for information.

Informal Resolution Process – Formal Investigation
Step 6 – Revised Response Not Satisfactory

In the event that the Commissioner finds that the public body's revised response is not in conformity with the *Act* and the public body decides not to consider proposed changes thereto, or in the event that the applicant is not satisfied with the revised response, upon reviewing the comments obtained from the applicant the Commissioner may decide to further investigate the matter. This step brings the informal resolution process to an end and converts the matter into a formal investigation process which will eventually lead to the issuance of a formal report under section 73.

The Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The de-identified report will also be made available to the public on the Commissioner's Office website.

This complaint process is intended to encourage both cooperation and transparency, all the while remaining confidential and with the intent to reach a satisfactory resolution in accordance with the requirements of the *Act*.