Office of the Access to Information and Privacy Commissioner
New Brunswick

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

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2013-1555-AP-830

Date: August 28, 2014

"Case about adequacy of search for relevant records and meaningfulness of response"

1.0 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 in which the Applicant requested that the Commissioner carry out an investigation into the unsatisfactory response to an access to information request.

2. On June 24, 2013, the Applicant sent an access to information request by registered mail to the Minister of the Department of Transportation and Infrastructure ("the Department"). The Applicant sent it to the Minister's office as an elected member located in Saint-Antoine, New Brunswick instead of the Department's offices in Fredericton. The Applicant received confirmation from Canada Post that the request was received by the Minister's constituency office on June 25, 2013. The Request was then forwarded to the Department in Fredericton on July 4, 2013.

3. The Applicant sought access to the following:

> … I would request the information gathered in your study on the Little Bouctouche River and the 22 other rivers. This would be the information gathered in regards to Hydrology Testing and data on Tidal Flushing and Sediment so a decision on the replacement / removal of the Route 134 Bridge at the Little Bouctouche River can be made. This information is to be used to decide on a "defendable opening" for rivers. This information would include the information from the Biologist hired to study the information collected. …
>
> ("the Request")

4. The Response, dated August 28, 2013, was issued by the Department on September 16, 2013, and in it, here is in part how the Minister responded:

> With respect to the documentation obtained in our department in regards to the Little Bouctouche River and your request, we are granting access to all requested records (documents attached).
>
> The Department is still working on a global study in regards to causeways on the east coast of New Brunswick. Since this study is not completed, some records were severed based on the following exemption under the Act:
>
> 26(1) The head of a public body may refuse to disclose information to an applicant if disclosure would reveal:
>
> a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown.

> However, once the study is complete, it will be made available to the Public. If you are not satisfied with this decision, you may file a complaint with the Access to Information and Privacy Commissioner as per section 67(1)(a)(i) within 60 days of receiving this response or refer the matter to a judge of the Court of Queen's Bench as per section 65(1)(a) within 30 days of receiving this response.
>
> ("the Response")

5. The Applicant was not satisfied with the Department's Response and filed a complaint with our Office on September 27, 2013.

2.0 INVESTIGATION

2.1 Complaint resolution process

6. The Commissioner's authority to investigate and resolve complaints is established under her investigative powers set out in section 68 of the *Act*. Subsection 68(2) delineates the parameters of an informal resolution of a complaint as follows:

> 68(2) The Commissioner may take any steps the Commissioner considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of the Act.

7. The wording of this provision gives the Commissioner a broad discretion to determine the appropriate steps to be taken and has provided the basis upon which our complaint resolution process has been developed.

8. Our complaint process is designed to respect the *Right to information and Protection of Privacy Act*, to encourage both cooperation and transparency, while striving to obtain a satisfactory resolution for both the member of the public who requests information (an "applicant") and the public body that must respond to it, all of which must be accomplished in accordance with the requirements of the *Act*.

9. In that regard, the *Act* permits the Commissioner to proceed first with any appropriate steps to resolve the matter informally, or where that is not possible, to continue the investigation that culminates in the publication of a Report of findings. For all intents and purposes the Commissioner investigates the merits of the complaint in both cases. In the approach seeking a resolution, however, the Commissioner takes the requisite time to inform the parties on the best application of the rules regarding access to information, thereby allowing the case to be "revisited and corrected" in order to bring a satisfactory resolution of the complaint. The primary goal of this approach allows both public bodies and members of the public to be guided by the Office of the

Commissioner in better understanding the *Act*'s rules and how they are applied to achieve a result that is satisfactory to both parties and that fully respects the law.

10. Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted this approach to all complaints. We consider it preferable for all parties 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.

11. A full description of all the steps involved in the Commissioner's complaint resolution process can be found on our website at http://info-priv-nb.ca/.

12. In the present case, the Department agreed to participate in the Commissioner's approach to resolve this Complaint; however, the Applicant provided comments that the outcomes were not satisfactory. As a result, we issue the present Report of Findings and include all elements of our investigation. In this Report, we speak to the information that was initially refused as a result of an inadequate search for relevant records, but which information was subsequently released to the Applicant during the complaint resolution process. We also address other issues we encountered during this investigation, namely access to background research information and the public's access to reports in draft form.

2.2 Complaint process undertaken in this case

13. In early 2014, we met with departmental officials to discuss the processing of the Request and review the relevant records identified by the Department through its initial search process.

14. The Department had initially granted access to only two records and refused access to other records, but those were not identified in the Response. Those records refused and not described in the Response were Inorganic Laboratory Reports and a Summary of Laboratory Soil Test regarding the Global study and a Soil Sample Test Report relative to the Little Bouctouche River.

15. Records regarding the Global Study had been withheld under section 26 of the *Act* because the study was not yet completed, whereas the record regarding the Little

Bouctouche River, had not been included in the Response on the belief that its content was already captured in the report that had been released to the Applicant.

Revised response

16. In April 2014, we provided our comments to the Department as to the reasons why access to the requested information had been improperly refused in this case. This led to the Department correcting the matter and issuing a revised response to the Applicant in May 2014, in which access to the records mentioned above, was provided in full.

17. The Applicant provided comments to our Office concerning the content of the second response (the revised response) on May 12, 2014, and indicated dissatisfaction stating that the revised response did not fully answer the Request; it did not include information regarding hydrology testing and tidal flushing and that it did not specifically reference the Global Study.

Adequacy of search

18. In light of the Applicant's comments, we held further discussions with the Department to ensure the Department had identified all of the relevant records and the Department agreed to conduct a more thorough second search for relevant records. It is only at this time that additional records that constituted background information in the form of raw data related to the requested information on the rivers was identified and retrieved.

19. The Department was required to explain to us how it had not identified this information in the first instance and describe in detail its search procedures when having to process access to information requests. The Department immediately recognized that relevant information had been overlooked. This information was relevant raw research data in support of the studies and the Department believed this data would not be meaningful to the Applicant given there were no explanations or analysis that accompanied those records. The Department did not have as part of its search procedure to call upon external experts (such as consultants hired for the studies in this case) in order to identify relevant information in their possession. Under the *Act*, a public body is required to identify all relevant information not only in its custody, but also under its control; this means the search does not end with records in the public body's custody, and searching must reach out to all external sources where relevant information is believed to have been kept.

20. Admittedly, the Department did not have a solid appreciation as to how wide should the search parameters be in this case, and that was because the Department made assumptions at the outset on the meaning of the request and failed to contact the Applicant to find out exactly what the Applicant was seeking. We speak more on this topic below regarding the Department's duty to assist as required by section 9 of the *Act*.

Second revised response

21. To its credit, the Department acted quickly and issued a second revised response to the Applicant on June 25, 2014 with supplementary explanations and additional relevant records. In addition, the Department granted access to more information but because of its format, it would be made available for the Applicant's viewing at the Department's office. Access was refused to one record, namely a biologist's draft report on the basis of section 26 of the *Act*. That refusal is explained more fully later in this Report.

22. The Applicant requested more explanations as to the applicability of section 26 to the biologist's draft report and a copy of the Global Study.

23. Explanations were provided and in early August 2014, the Applicant indicated that the second revised response was not satisfactory and expressed concern with the process that was not providing full access, especially because the Applicant believed, from information obtained from another government department that a final report on the Global Study did in fact exist.

24. Final meetings were held with officials at the Department in August and the Commissioner assured herself that there was no such report. That issue is also addressed further below in this Report.

3.0 ANALYSIS OF ISSUES UNCOVERED

3.1 Adequacy of the search for relevant records

Initial search for relevant records

25. As referred to above, it became evident during the resolution process that there was an issue surrounding the adequacy of the initial search for relevant records performed by the Department.

26. Upon receipt of the Request, Right to Information Coordinator sent emails to different branches of the Department to identify any relevant records; two records regarding the study on the Little Bouctouche River were retrieved and forwarded to the Right to Information Coordinator and were released as part of the Department's initial response to the Applicant.

27. The Department had also identified a record that contained background information relevant to the Little Bouctouche River, but that record consisted of a Soil Sample Test Report and was not selected to be reviewed during the processing of the Request. For that reason, the Soil Sample Test Report was not included in a list of relevant records and did not form part of the Response. The Department believed the contents of the report were captured in the final report released to the Applicant.

28. As for the Global Study on the 22 other rivers, although the study had not been completed, some relevant records were identified through the initial search process; because the study had not been completed, the Department made the decision that it would not grant access to the records and for that reason, chose not to retrieve those records for processing by the Coordinator.

29. These records were of a similar nature, i.e., background information; however, in this instance, the records were in the form of Inorganic Laboratory Reports and a Summary of Laboratory Soil Test. The records were not retrieved but they were referred in somewhat vague fashion in the Response. We found that the reference did not able the Applicant to understand what these records were.

30. Furthermore, as we became aware later on in the process, the initial search for relevant records had also failed to identify other records relevant to the Request, specifically, records containing data collected through the study on the Little Bouctouche River and that of the Global Study. As stated earlier, the Department did not call upon the external consultant hired for the studies in this case to identify relevant information in their possession. Under the *Act*, a public body is required to identify all relevant information not only in its custody, but also under its control, as this is part and parcel of an applicant's right to information found in section 8 of the *Act*. The Department had not asked the consultant and therefore did not identify this relevant information.

31. We underline the importance of carrying out an adequate search to be compliant with the *Act*. A search must identify and retrieve all the records that relate to a request for information as a starting point, not from a perspective of what information will or will not be released but rather from the perspective of identifying everything that is relevant to the information an applicant seeks to receive. Only when a full and complete search has been conducted and a list of records is prepared can the public body move to the task of reviewing each record to determine its accessibility.

32. The *Act* grants to the public a right to know all the relevant information that exists on a particular subject matter contained in a request, and of that relevant information, which information that person is able to receive and which information he is she is not able to receive as per established limited exceptions to disclosure found in the *Act*.

33. Therefore, to not retrieve all the records that were relevant to the Request in this case amounted to a breach of the Applicant's right to know what information existed on the subject matter. We find that the Department's initial search for relevant records in this case did not meet the statutory requirement to conduct a full and comprehensive search for all relevant records to the Request.

Second search for relevant records

34. As indicated above, the Department conducted a second, more comprehensive, search for relevant records, derived from discussions with experts who would have knowledge as to the existence of the information sought. These efforts led to the identification and retrieval of additional relevant records in the Department's offices, but also in those of external consultants hired on these projects. As mentioned above, this additional information constituted mainly of data that was collected as part of the Study on the Little Bouctouche River and of the Global Study.

35. After completion of this second search for relevant records by the Department, we were satisfied that all relevant records have been identified in this case.

Department's modified search process

36. To address the issue of adequacy of search, however, we have learned that the Department has since implemented a new process going forward with regards to how searches for relevant records are conducted. We understand that today, when the Coordinator contacts the various Branch offices of the Department to identify relevant

records, a "lead person" is identified within each Branch who remains responsible for the search until it is completed and the search results communicated to the Coordinator. Once the search has been conducted in each Branch, the lead person signs off on the thoroughness and completeness of the search carried out to signal to the Coordinator, and by extension, to the Department, that all relevant records have been identified and retrieved.

3.2 Department's duty to assist

37. The Department did not contact the Applicant to discuss the Request in this case as the Department was of the view it was sufficient to process only the final reports of the studies requested (on the Little Bouctouche River and the other 22 rivers) believing that all of the information the Applicant was seeking was contained in these final reports. For that reason, no background or raw data was believed to be necessary and had to be added as extra information in the Department's Response.

38. When we reviewed the final report on the Little Bouctouche River, however, we found that this final report did not in fact fully answer the Request.

39. The Applicant was not only looking to obtain the finalized reports with regards to the studies, but also all the information that had been gathered throughout the conduct of these studies.

40. The report released to the Applicant contained pertinent information stemming from the results of raw data collected but the report did not fully address the Request in regards to the background information. Background information was located in separate records and was clearly within the scope of the information requested by the Applicant in this case.

41. As indicated above, the Applicant was seeking this information:

> "… I would request the information gathered in your study on the Little Bouctouche River and the 22 other rivers. This would be the information gathered in regards to Hydrology Testing and data on Tidal Flushing and Sediment so a decision on the replacement / removal of the Route 134 Bridge at the Little Bouctouche River can be made. This information is to be used to decide on a "defendable opening" for rivers. This information would include the information from the Biologist hired to study the information collected. …"

42. As we observe from what took place in this case, making assumptions can and often will lead to issues regarding the adequacy of search and equally important, will lead to perhaps not contact an applicant to ensure the request has been understood clearly.

43. Where the type or scope of information request is unclear or where information that has been identified as relevant is believed to be already contained in records being released, a public body should contact the applicant and seek clarification or certainty as to exactly what is sought.

44. When a public body undertakes that important step of contacting the applicant, it respects the applicant's right of access and fulfills its duty to assist obligation found in section 9. More notably, the ensuing conversations or email exchanges go a long way to resolve processing issues which often times will avoid incorrect assumptions, improper contents of responses, and provide better accuracy of the information sought.

45. In this case, we find that the Department failed to fulfill its duty to assist by not contacting the Applicant to ensure it had properly understood the scope of the Request.

3.3 Meaningfulness of the Department's Response

46. Under section 14 of the *Act*, a public body is required to provide a complete and meaningful response by identifying all records found to be relevant to the request, regardless of their nature, type of information they contain, and likelihood the public body may withhold them. A response must also name the specific exception to disclosure if access to any of the records or information is being refused, and provide a brief explanation as to why the specified exception applies. 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 records. This will help an applicant understand what information a public body has that is relevant to the request and the reasons why access to any of that information is being refused.

47. The Department's initial Response in this case did not include all of the relevant records that should have been identified and retrieved; the Response failed to include a list of records of all relevant records. A list of records is not only a statutory requirement but a very useful tool in ensuring that none of the relevant records are missed when processing the request, and that none are missed when ensuring to provide a complete response to the requested information. We make mention of the fact that a list of

records is a requirement of section 14 to inform an applicant of all of the relevant information that exists and that this requirement has been upheld by two court decisions in New Brunswick. In our view, in cases where only a few relevant records exist all properly identified in the response would a list have no useful purpose.

48. The Applicant's comments on the issue that there were more relevant records than those identified point to the importance of the list and we find that a list should have been prepared and produced in this case.

49. Moreover, to be meaningful to an applicant, the response must also be written with a language that is clear and accurate so as to enable a good understanding of the answer to the request. Public bodies must therefore be careful with the wording used in their response letters to ensure that the words reflect accurately the decisions that have made regarding granting or refusing access to the requested information.

50. For instance in this case, the Department used the word "severed" in its Response when it referred to records that were being refused in full, although some of the records did not exist (a report on the Global study) but this fact had not been initially communicated properly to the Applicant. In its Response, the Department relied on words such as:

> …Since this study is not completed, some records were severed based on the following exemption under the Act…

51. This led to confusion on the part of the Applicant. What was meant by "study", and was the Department saying that it had not yet completed a report, and so on. We found the Response to be unclear and did not provide a good sense as to what records were in existence, those that were being released and which one were being withheld, or even if there were redactions ("severed" information) from those records being released.

52. The Department admitted that the wording used in the Response was confusing and that a member of the public, not being familiar with the subject matter and all of the records held by the Department, would not be able to ascertain exactly what information the Department truly had in this case. The Response was simply not meaningful.

53. For all of these reasons, we find that the Department in this case did not issue a properly constituted response as provided for in section 14 of the *Act*, did not include a list of records, and the overall content of the Response was not meaningful to the Applicant.

3.4 Timeliness of the Response

54. As per the requirement of the *Act*, a response must be issued within 30 days, or where certain circumstances exist, that time limit can be extended under subsection 11(3) for up to an additional 30 days but with written notice to the applicant. The notice must be made in writing and must be made before the initial time limit is to expire.

55. In this case, the Applicant's Request was received by the Minister's constituency office on June 25, 2013 and forwarded to the Department's head office in Fredericton on July 4, 2013 for processing. Having not heard otherwise from the Department, the Applicant was under the impression that the start date for the 30-day timeline was June 25, 2013.

56. The Department did not inform the Applicant that the June 25, 2013 was not the start date from which the Department would process the Request, as the Department only received it on July 4, 2013. The Department was in communication with the Applicant during the processing of the Request and advised of the time extension by phone on August 15, 2013; however, that date was approximately 10 days beyond the first time limit as the Department was self-extending the time to respond by an additional 30 days bringing the deadline to September 2, 2013 from the July 4, 2013 date.

57. The *Act* requires and the Applicant should have been notified in writing (by email for instance) and before the expiry of the initial deadline which fell on August 3, 2013. The Department communicated with Applicant again on August 29 and on September 14 to advise that the Response was forthcoming, but the Response was not issued until September 16, 2013 some 15 days passed the extended timeline.

58. When we looked into why the Department was late in responding, we were told that delays were mainly attributed to getting the report on the Little Bouctouche River approved by the Minister so that it could be released to the Applicant.

59. We have stated this in the past and have published formal reports on this point: obtaining ministerial approval or signoff for a response to an access to information request is not grounds to delay a response. The time needed for the approval process must be taken into consideration during the processing of the entire request to ensure that the response is issued on time.

60. The Department has assured us that it has since that time improved its processing of access requests by having identified the steps to be taken when a request first comes in up to the time when a response is to be issued. These steps are illustrated through a flow chart, and identify the staff responsible and the amount of time allotted for each step. The Department is also now using a record of action which tracks these steps to obtain proper approval on time. According to Departmental officials, this process will allow the Department to better track the access requests as they are received and processed and this ought to ensure that responses are issued within the prescribed timelines.

61. In this case, we find that the Department did not comply with its obligation under the *Act* to issue the Response within the prescribed timeline; however, we are pleased that the Department kept the Applicant informed throughout its processing of the Request in this case despite it being late to issue a Response.

3.5 Exceptions to disclosure relied upon

62. The Department refused access to records pursuant to paragraph 14(1)(c) and section 26 of the *Act*. We address each exception relied upon in this case in turn.

Paragraph 14(1)(c) – Record does not exist

63. The Department refused access to the report on the Global Study, indicating that while some data has been collected, the report regarding this study, which would contain elements such as the interpretation of the data, recommendations, options, etc. has not been drafted to date.

64. The Department added that once the report is prepared and finalized, the report will be made available to the public.

65. From our discussions with the Department, we understand that departmental resources working on the Global Study were redirected to other projects due in large part on the weather events that have occurred in New Brunswick during the last 18 months. This has resulted in redeployment of resources and staff and put on hold the drafting of the report and completion of the Global Study.

66. In our view, this decision is in line with paragraph 14(1)(c) which provides that a public body can refuse access to a requested record when the record does not exist, albeit the Department could have made this fact more clear in its Response.

67. After much discussion with the Applicant and the Department on this issue, we are satisfied that the only records in the Department's custody regarding the Global Study of the 22 rivers relevant to the Request are the Inorganic Laboratory Reports and the Summary of Laboratory Soil Test which were released to the Applicant in the Department's first revised response, and the records identified as part of the second revised response.

Section 26 – Advice to a public body

68. Where a public body deems a record to fall under a discretionary exception provision, the public body then has the option to release the requested information or to refuse access. Section 26 of the *Act* provides a discretionary exception allowing public bodies — such as the Department — the option of disclosing or withholding information that constitutes advice to a public body. This exception is designed to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free flow of advice, plans, recommendations and the like.

69. Subsection 26(1) states as follows:

> The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably 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 or other 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.

70. It is important to note, however, that the scope of what type of information can be protected under subsection 26(1) is limited by subsection 26(2) which reads as follows:

> 26(2) Subsection (1) does not apply if the information
>
> *(a)* is in a record that is more than 20 years old,
> *(b)* is an instruction or guideline issued to officers or employees of the public body,
> *(c)* is a substantive rule or statement of policy that has been adopted by the public body for the purpose of interpreting an Act of the Legislature or administering a program or activity of the public body,
> *(d)* is the result of an environmental test conducted by or for the public body,
> *(e)* is a statement of the reasons for a decision made in the exercise of a quasi-judicial function or a discretionary power that affects the applicant,
> *(f)* is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal,
> *(g)* is a statistical study,
> *(h)* is a record that is part of a quantitative or qualitative research study of public opinion, or
> *(i)* is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

71. The effect of subsection 26(2) is to qualify as fit for disclosure, information that would otherwise reveal advice, opinions, proposals, or recommendations contemplated by 26(1)(a) or a pending policy or budgetary decision under 26(1)(e), in those instances that are described in subsection 26(2). In those specific cases, the public body cannot withhold the information and is required to release it.

Background information

72. In the present case, the Department relied on section 26 to refuse access to data collected in the course of the conducting of the Global Study regarding the 22 other rivers, specifically to the Inorganic Laboratory Reports and the Summary of Laboratory Soil Test. The Department indicated that such information fell within the realm of advice, opinions, proposals or recommendations developed by or for the public body as prescribed in section 26 and would not be released given that the study was not completed.

73. The laboratory reports in question contain results of water and soil testing that was conducted by the New Brunswick Analytical Services laboratory for the Department. This information was gathered as part of the Global Study on the 22 other rivers and will

be used to generate a final report to the Department. The question raised was whether the laboratory reports could be lawfully protected under paragraphs 26(1)(a) or 26(1)(e) in this case, and if so, would subsection 26(2) reverse the protection to render the information available to the Applicant in this case.

74. As mentioned above, section 26 aims at protecting the public body's internal decision-making process by allowing advice, opinions, recommendations and it follows that paragraph 26(1)(a) provides public bodies with the option of protecting actual opinions, advice, proposals and recommended courses of action, not factual or background information. Having reviewed the lab reports, we found that they did not contain any advice, recommendations or any information of that nature; rather, they were test results related to water and soil samples collected from the different rivers across the province. The lab reports did not represent interpretation of the data and they did not recommend a course of action to be taken; they simply consisted of the results of testing.

75. In our view, this kind of information was not captured under the scope of paragraph 26(1)(a) as it did not suggest a course of action for the Department going forward or contain advice, opinions or proposals setting out different options. For those reasons, the lab reports could not be protected under paragraph 26(1)(a) as advice.

76. The Department also raised paragraph 26(1)(e) as grounds for refusing access to the lab reports relevant to the Global Study, on the basis that the study had not been completed and that the disclosure of the information would reveal a pending policy of budgetary decision.

77. Under paragraph 26(1)(e), information including proposed plans, policies or projects may be protected where its disclosure would reasonably be expected to result in the disclosure of a pending policy or budgetary decision. This paragraph applies to situations where a public body is considering a plan, policy, or project and the disclosure of related information at a particular time would reveal a pending policy or budgetary decision. This provision contemplates a point-in-time consideration and allows a public body to protect information about a decision that has not yet been publicly announced or implemented.

78. Therefore, we must determine if the disclosure of the lab reports, which contained test results related to water and soil samples collected from the different rivers across the

province, would be expected to result in the disclosure of a pending departmental policy or budgetary decision in this case. In our view, it did not.

79. The disclosure of the reports showed instead that the Department was examining issues surrounding the different rivers in order to make policy or budgetary decisions at some point in the future; however, this fact was publicly known and known by the Applicant at the time the Request was made.

80. Although the reports provided background information for future policy or budgetary decisions, we did not find that their disclosure would reveal *a pending decision* in this case. In other words, the information contained in the reports might be used to support a variety of future legislative and policy changes.

81. For these reasons, we found that the Department could not rely on paragraph 26(1)(e) to refuse access to the lab reports.

82. Having found that the Department could not rely on subsection 26(1) in this case to refuse access to the lab reports, there was no need for us to consider the applicability of subsection 26(2), although we pointed out that the Department could have looked to paragraph 26(2)(f) where background information in the nature of such environmental research could not be protected from disclosure and this would have led to the release of the lab reports.

Draft reports

83. One of the Department's relevant records identified through the second search for records was a report created by the biological consultant which aimed at providing the Department with an analysis of the estuarine invertebrate samples taken from the Richibucto River and the Little Bouctouche River in January 2013. Our review of this report revealed that it has not been completed and is currently in draft form.

84. The Department relied on section 26 of the *Act* - advice to a public body - as grounds to refuse access to this draft report. Although the data in support of this report had been collected and provided to the Applicant through the second revised response during our investigative process, the report itself had not been finalized; as such, we believe it could be protected under of the *Act*. We explain further.

85. As indicated above, subsection 26(2) must be considered whenever considering information that can be protected under subsection 26(1); however, we point out that there are other considerations that must be taken into account when a public body makes a decision regarding access of a record that is not finalized.

86. As there is nothing in the *Act* that specifically protects draft reports pending finalization from release, it is important to look to the potential impact of the premature release of a draft version of a report prior to its finalization. Draft versions of a report may contain inaccurate information that could be misleading if released to the public and it may also have a potential impact on the integrity of the results if a draft version of an uncompleted report was made publicly available. These constitute valid concerns that in our view must be taken into account when deciding whether or not to grant access, even when applying section 26.

87. It is important that a distinction be made between reports that have been completed and report that are uncompleted and at the time of the request, are still in draft form.

88. We also point out that section 26 creates a "point-in-time" consideration. Once the final version of a report has been finalized and a decision has been made by the Department, section 26 would no longer be applicable. This means that a request for information made to the Department after a report has been finalized would include in its list of relevant records, and draft versions of the same report. As such, those draft reports would have to be considered for release.

89. During our analysis, we also looked at the disclosure provisions found in paragraphs 26(2)(d) and (f) of the *Act*. These provisions would apply to the nature of the information collected in the report but in this case, the type of information from which a report would result in the future was not the only consideration. The report was in draft form and this was an equally important factor for purposes of section 26.

90. We are satisfied that the Department properly exercised its discretion in considering the possible disclosure of the report in its draft form before making a decision not to do so in this case. The Department did not simply reject the idea of releasing the draft report outright, but rather appropriately considered its possible disclosure and the potential impact of the disclosure of the draft version prior to its finalization.

91. Based on all of the above, we are satisfied that the Department properly exercised its discretion with respect to the application of section 26 and that the draft report in this case was properly withheld.

4.0 FINDINGS

92. Based on our investigation of this matter, we find as follows:

a) That the Department failed to fulfill its duty to assist as provided in section 9 by not contacting the Applicant to ensure it properly understood the scope of the Request;

b) That the Department's initial search for relevant records did not meet the statutory requirement of conducting a full and comprehensive search for all relevant records to the Request; however, this was corrected by a second search carried out by the Department which identified additional relevant records and these additional records were released in full only with the exception of the biologist's draft report;

c) That the Department did not issue a properly constituted response as provided for in section 14 of the *Act*;

d) That the Department did not comply with its obligation under the *Act* to issue the Response within the prescribed timeline;

e) That the report on the Global Study does not exist and while the Department did not make this fact clear when refusing access initially, with the additional explanations provided, the Department did properly refused access to an non-existent record under paragraph 14(1) of the *Act*;

f) That the Department could not refuse access to the background information consisting of the Inorganic Laboratory Reports and the Summary of Laboratory Soil Test concerning the Global Study under section 26 of the *Act;* however this was subsequently corrected through the issuance of the first revised response when the Department granted access to these records in full; and,

g) That the Department properly refused access to the biologist's draft report under section 26 of the *Act*.

5.0 RECOMMENDATIONS

93. Based on the above findings, the Commissioner makes to following recommendations to the Department pursuant to subsection 60(1)(h) of the *Act*:

a) That the Department continue its current revisions to improve its process when responding to an access to information requests;

b) That the Department include in its modified process all necessary steps to ensure that its various offices (Branch offices) properly identify and retrieve for the Coordinator's review all relevant information. These steps must include a component for the lead person identified in the Department's Branch office to contact external consultants or sources in order to verify if relevant information is in their possession and where that is the case, to retrieve this information for the Coordinator's review;

c) That the Department make appropriate changes to the template, form or letter used to formulate a response to an access to information request in order to ensure that the response will meet all of the requirements provided in section 14 of the *Act* and that its content be a meaningful answer to the applicant's request;

d) Given the improvements the Department has already implemented for tighter controls on the time limits to provide a response, the Commissioner makes no specific recommendation on this issue; and,

e) That the Department implement the above recommended actions and demonstrate to the Commissioner, within three months of the date of this Report, that they have been implemented.

Dated at Fredericton, New Brunswick, this 28th day of August, 2014.

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Anne E. Bertrand, Q.C.
Commissioner