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: 2013-1345-AP-691

Date: February 7, 2014

Case about a request to access information regarding shale gas submitted to the Department of Finance

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*").

2. This Report stems from a Complaint involving the Department of Finance filed with our Office on April 24 2013. The Applicant filed an access to information request to the Department dated February 13, 2013 seeking the following:

    1) Copies of contractual agreements made with parties contracted to analyze, evaluate and/or propose shale gas royalty systems/taxes for the province of New Brunswick.
    2) Copies of reports submitted by parties/consultants under 1) above.

    ("the Request")

3. The Department issued a response on March 8, 2013 indicating that it had records in its custody but refusing access to the information at that time. The refusal was based on the exceptions found in paragraphs 26(1)(a) and (e) and subparagraph 30(1)(e)(i) of the *Act*. We address these exceptions further below in this Report.

4. In New Brunswick, shale gas has been and continues to be a controversial topic and according to media reports, the Applicant and members of the public have serious concerns about the Province's decision to move forward with shale gas exploration and development in New Brunswick.

5. The Province wants to encourage development in this industry as part of its efforts to improve the economic situation in New Brunswick, and the royalty regime for industry is one of the key regulatory considerations that must be settled before shale gas development can begin. Shale gas is a natural resource that belongs to the Province. The Province regulates access to natural resources and requires industry comply with several regulatory measures, including royalty payments to compensate the Province for the extraction of the natural resource.

6. The royalty structure for shale gas is found in Regulation 2001-66 to the *Oil and Natural Gas Act*, which is jointly administered by the Department of Natural Resources, the Department of Energy, and the Department of Finance.

7. We understand that the Province began working on the issue of changing the existing royalty structure in 2011. In May 2012, the Province's Natural Gas Group launched a series of discussion papers on oil and natural gas standards and the Province opened up

a public consultation process for proposed changes to the oil and natural gas industry, including the royalty regime. The goal was to find an appropriate balance to maximize royalty revenue for the Province while being competitive to attract industry to the Province. At that time, the Province hoped to move ahead with changes in 2013.

8. During the period of July 2011 to November 2012, the Department, designated as the lead department, engaged in a series of contracts with external consultants to analyze the existing royalty structure, to provide feedback on possible royalty models, and to propose a new structure. The Provincial Government's commitment to moving forward on these issues was confirmed with the release of the Oil and Natural Gas Blueprint in May 2013.

9. At the present time, the Province anticipates introducing legislative changes to implement the new royalty regime in early 2014.

INVESTIGATION

10. Armed with the Request and the Department's Response, we sought to review the relevant records and glean a better understanding as to the reasons why access to the requested information had been refused in this case.

11. During our investigation, Department officials informed us that the proposed legislative amendments would be made publicly available once introduced for debate in the Legislative Assembly. It was projected this would occur in early 2014.

12. The Department also continued to believe that the contracts and resulting reports requested had been properly refused on the basis that a final decision about the royalty regime changes had not been rendered at the time the Applicant submitted the Request.

13. We recognized the Department's willingness to share the information but questioned whether it was appropriate to delay releasing the information to the Applicant as first stated.

14. As with any complaint under investigation by the Commissioner's Office, we sought to resolve the matter informally. The informal resolution process is not a mediated outcome; rather, it allows both public bodies and members of the public better understand this legislation and ensures that a person who seeks access to information (an applicant) receives the information to which he or she was entitled under the *Act*. (*Note*: A full description of the steps involved in the Commissioner's informal resolution process can be found on our website at http://info-priv-nb.ca/).

15. We were not able to convince the Department that some of the requested information should have been released, although we also established through our investigation that the Department had lawfully withheld the remainder. We therefore proceeded to report on our findings and issue a recommendation for the information, in our view, that should be released to the Applicant at this time.

LAW AND ANALYSIS

RELEASE OF CONSULTANT'S INFORMATION

16. Consultants do not draft or participate in the development of policy and are not part of the decision-making process of government. They stand to inform and provide advice only. The drafting of policy, budgets, and the entire decision-making process exclusively rests with government.

17. In other words, governments are free to hire consultants to help them in arriving at the right decision; however, consultants do not influence government on the question of what information should be disclosed to the public.

18. It is not for consultants to dictate to government what information will be released or withheld as the *Act* has clearly set out that third party input into the question of disclosure is strictly limited to business and financial information, the release of which may cause harm to third party private interests.

19. When consultants or other third parties do business with government, they must be prepared to accept that their information will be subject to the *Act*'s rules of access to information. For instance, when lawyers are hired by government to give advice on files, they can expect their legal fees to be made public.

20. Contracts with third parties include a small amount of business information, namely the specifics of how the external consultants will be paid and so on. Such contracts, as those we examined in this case, specify per diem and travel expenses, in addition to the maximum value of the contract.

21. We do not find that the details of the consultants' compensation or the total value of the contracts fall within the scope of the protected third party business information exception found in subsection 22(1) of the *Act*. This information should have been disclosed to the Applicant, particularly where there is a public interest in knowing the costs borne by the Province for obtaining external expertise.

22. Having said this, the *Act* recognizes that some information can be protected at a point in time, such as advice and recommendations. This protection is found in the discretionary exception to disclosure of paragraph 26(1)(a).

Advice, opinions, proposals or recommendations

23. Paragraph 26(1)(a) states that:

> 26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
>
> (a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown…

24. This is a discretionary exception to disclosure, meaning that in a nutshell, the public body looks at the advice and recommendations and the public body determines whether it is alright to release that information at that time. This decision is based on factors that exist at that time. Such a factor can be that the public body has not yet made a final decision on the advice and recommendations received.

25. This also means, however, that when a final decision has been made, the public body is hard pressed to continue to withhold the advice and recommendations upon which the decision was made and release to the public the factors that led to the decision.

26. This principle is in keeping with the *Act*'s principal objective to promote the disclosure of information held by government whenever possible on the basis that the public has a right to know decisions made by government, a right of access to government's business is essential to a healthy democracy.

DECISION TO REFUSE ACCESS

27. We understand and recognize that at the time the Request was made in this case, changes to the royalty regime for shale gas had not yet been rendered.

28. The Department, however, treated all the relevant records with the same considerations (different type of records but as a whole) to arrive at a decision to refuse access to both the consultants' contracts as well as the resulting consultant reports based on its view that these records are directly related to each other.

29. Treating a package of relevant records as a whole when deciding about access rights may be appropriate but not if doing so will interfere with these rights. In other words, a

public body can treat a number of relevant records with the *same considerations* but only where all the records contain the same type of information.

30. Access rights are exemplified with the section 84 burden of proof that rests with the public body to show why access to "a record" or part thereof cannot take place, because a person has a statutory right of access to "information" under section 7. Furthermore, subsection 7(3) requires a public body to sever the information that can be released from a record that could be protected under an exception.

31. This demonstrates the lengths to which the *Act* calls upon a public body to consider each piece of information before making a decision about its release.

32. Therefore, a public body must carefully consider for disclosure each relevant record and the information contained in it, again based on the statutory principle that a public body should only protect the information that it needs to protect.

33. The presumption remains at all times in favour of disclosure and is derived from the spirit and intent of the *Act* that promotes access and respects access rights.

34. In this regard, we draw attention to the difference in the nature of the information found in the two kinds of relevant records identified in this case. One kind of records was contracts with external consultants. These four contracts set out the nature of the work that was to be performed with anticipated costs, process, and so on.

35. The consultants' contracts contain information that is quite different in nature than that found in the consultants' resulting reports. The resulting consultant reports attest to advice, proposals, opinions, and recommendations, information designed to assist the Department in making an informed decision about shale gas royalties.

36. Discretionary exceptions of the *Act* regulate the kinds of information that can be at a time protected and at another time, released to the public. For instance, paragraph 26(1)(a) regulates information in the form of advice and recommendations that can be found in such records as a consultant's report. Advice and recommendations information may be protected in certain circumstances if it is appropriate to do so, or it can be released.

37. One of the factors to consider protecting this kind of information is that a decision has not yet been made on the advice and or recommendations given, and this will depend on the circumstances in existence at the time access to this information is sought.

38. External consultants' contracts, however, do not contain advice and recommendations and as a result, a different kind of consideration must be taken for these types of records.

39. Consultants' contracts do not carry information considered to be advice, recommendations, opinions, or the like; they simply set out basic information as to how the consultants will set out the subject matter and the process that will be undertaken to provide the advice or recommendations. This kind of information is in large part accessible by the public (except for minor redactions for personal or sensitive business information the release of which would harm private interests).

40. With these principles in mind, we now consider the reasons why the Department refused access to all of the requested information.

Exception: paragraph 26(1)(a)

41. The Department intended to protect the information *until a decision was made* and the Department would table reports for public access with the Legislative Assembly.

42. Given these explanations, we find the Department properly exercised its discretion at that time to refuse access to the consultants' reports under paragraph 26(1)(a).

43. The Department was not correct, however, in withholding the consultant's resulting reports under the other exceptions relied upon.

44. We begin with the exceptions relating to the early or "premature" release of pending policy decisions.

Exceptions: paragraph 26(1)(e) and subparagraph 30(1)(e)(i)

45. The Department refused access in full to all consultants' contracts as well as the reports under the same discretionary exceptions, i.e., those exceptions that permit a public body to withhold requested information where that information relates to pending decisions:

> 26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
>
> (…)
>
> (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.

> 30(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or the negotiating position of a public body or the Province of New Brunswick, including but not limited to the following information:
>
> (e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to
>
> (i) a contemplated change in taxes or other source of revenue…
>
> (Emphasis added)

46. The Department refused access to the relevant records because the Department had not arrived at a final decision on the changes to the royalty structure and the Department was contemplating making amendments to the existing *Regulation* at some point in the future.

47. The above provisions, however, are not applicable to the information contained in either the consultants' contracts or resulting reports.

48. As stated above, the information contained in consultants' contracts and reports consists altogether of the terms of reference for the consultants' work to be undertaken and the consultants' advice and recommendations to government at the conclusion of the consultants' work.

49. The question therefore becomes at what point will disclosing the requested information reveal a *pending policy or budgetary decision*. What does *information that would reveal pending policy* actually mean?

50. A public body is allowed the option of protecting information that would result in the disclosure of either "*a pending policy or budgetary decision*" or "*premature disclosure of a pending policy decision*" and, where it has valid reasons to do so. We recall that discretionary exceptions require the public body to consider relevant factors to see if disclosure should nevertheless take place in the circumstances.

51. We looked to another jurisdiction in Canada where the same provisions and same wording exist, that of the Manitoba *Freedom of Information and Protection of Privacy Act*. Our New Brunswick legislation was developed in large part on the basis of that statute. The similar provisions in question are clauses 23(1)(f) and 28(1)(e) and their wording has been written in the Manitoba statute's *Resource Manual* based entirely on the Concise Oxford Dictionary's definition to signify:

> *a policy that awaits a decision, that is not yet settled or decided, that is about to come into existence*.

52. This definition is helpful and allows us to go further by saying that the exception looks to the nature of the information. In other words, at the time of the request where the information is still in the form of background facts, opinions, advice or recommendations, none of which constitutes policy, draft or pending. None of this information is *decision information*.

53. In the context of a government's decision-making process, not all information can be treated the same. Information can be one of three types when considering the affairs of government, i.e., in making a governmental decision. It can be:

a) information such as facts, expertise, opinions, advice and recommendations and so on gathered to develop policy and/or assist in the formulation of a decision to be made for a government program or activity;

b) information that forms the basis of a plan, draft policy, pending policy for a decision to be made in relation to the program or activity; and,

c) information that actually constitutes the decision that has been made by government.

54. The *Act* in essence acknowledges the existence of these different types of information and treats them differently.

55. For instance, for the first category of information described above, the *Act* provides that advice and recommendations can be protected in some instances where proper to do (paragraph 26(1)(a)); however, the *Act* will require that background scientific or technical research information (not used to formulate tax or economic policy subsection 26(3)) be made available to the public (see paragraph 26(2)(f)).

56. As for the second category of information, the *Act* stipulates under paragraph 26(1)(e) or paragraph 30(1)(e) that it can be withheld; then, it falls upon the public body whether to exercise discretion to release the information, but a relevant factor is whether a final decision has been made.

57. This brings us to the third category, i.e., information that constitutes the actual decision made. This information is not protected under the *Act*.

58. Information that constitutes the decision is public by its very nature because government has concluded its decision making process and has made a final decision for the particular program or activity it had contemplated.

59. It remains within the public body's discretion to protect the information it gathers in order to arrive at a decision and where it has not yet made a decision; the exercise of this discretion by the public body will depend on the circumstances that exist at the time access is sought.

60. We emphasize that at the time the Applicant submitted the Request, it was publicly known that the Province was exploring options with a view to change the existing royalty structure under the Oil and Natural Gas Act Regulation and that the Province had hired outside experts and engaged in a public consultation process to debate a proposed new royalty scheme.

61. The reason for hiring outside expertise was to seek guidance in how best to amend the royalty scheme such that business development could be encouraged in this field, all the while, ensuring adequate compensation to the Province for access to shale gas resources.

62. With this in mind, we examined the nature of the information contained in the consultants' contracts and resulting reports.

Consultants' contracts

63. The Department had four contracts in total involving two consultants that related to shale gas royalty structures.

64. Each of these contracts contained the same format:

- Purpose of the contract;
- Payment and Schedule of Fees (per diem, travel expenses, maximum amount of contract);
- Term of Contract (dates);
- Property Rights (that the resulting reports would become owned by - the property of the Province);
- Confidentiality (consultants was prohibited from divulging nature of services or information during and after contract term); and,
- Deliverables (details of what consultant was to report on at end of work, deadlines for providing final reports, etc.).

65. The format of each of the consultants' contracts set out what information was sought by the Department, i.e., that the Department was looking for expertise, advice and

recommendations on the royalty structure. The consultant's contracts did not contain advice and recommendations or any information of that nature; rather, they consisted of the terms and conditions of the work to be performed by the consultants.

66. In this regard, could the Department refuse access to this type of information?

67. The simple answer is no, the Department could not. To lawfully refuse access to these consultants' contracts, the Department had to establish that they contained financial or commercial information, the release of which could reasonably cause harm to the consultants.

68. In this case, the Department refused access to the contracts on the basis that they related to the pending changes to the shale gas royalty structure and predicated on the fact that a final decision on the changes had not yet been made. There was no other consideration. In fact at that time, the Department did not consider that contracts with third parties that conduct business with government are subject to the rules regarding access to information.

69. In this regard, and only where the Department believed there were concerns about releasing the contents of the consultants' contracts, then it should have consulted the consultants on the question of release. The Department could have sought: a) their consent or b) their input if the consultants likewise had valid concerns about the release of some of the information contained in the contracts.

70. This process is already provided for under the *Act* pursuant to section 34 and it allowed for the consultants to make representations to the Department before the Department decided whether or not to disclose the contents of the contracts to the Applicant. If the consultants consented, then the Department had to release the contracts.

71. If the consultants had further concerns, but the Department was still of the view the contracts should be released, the consultants could have complained to our Office. Had this been done, the consultants would have had recourse to complain to us about the intended disclosure of the contracts and would have been permitted to present their concerns to the Commissioner and the Commissioner, in turn, would have ruled on the issue of disclosure.

72. We now know that this process was not undertaken when the Request was received.

73. We did receive some information from the Department on this issue of concerns raised by consultants, but just before the issuance of this Report. As it stands today, however,

the ruling on this question will be made in this Report as we do not believe that there was cause in any event for the Department to refuse access to the contracts on the basis of the concerns raised by the consultants.

74. Having reviewed the four contracts, we do not find that they contain information of such sensitive nature that would warrant their protection on the basis of the concerns raised by the consultants.

75. Therefore, to establish that disclosure would cause harm so as to prevent the public from having access to such information, the argument must be well founded, i.e., the public body must provide detailed and convincing evidence and show a direct link between the intended disclosure and the harm it alleged would result. It must be able to show that there is a direct causal link, based in evidence rather than argument, between the disclosure of the information requested and the harm claimed. In other words, the public body must make a case.

76. This evidence was not brought in this case and upon review of the few details we received, we found that the concerns were speculation at best.

77. When an individual or a company is hired to provide consulting advice and expertise to government, he or she of the company must recognize that this information is now part of the public records domain. To say that the public should not know who the government hired for this expertise and to say how much the government paid for this expertise is not only unlawful, but it also infringes upon established statutory rights of access to information.

78. While three of the contracts dealt with resource royalties generally and shale gas specifically, one contract was primarily for the purpose of engaging outside expertise to assist the Department in relation to a negotiation strategy in another but related industry, although one component was in to provide input and advice on shale gas royalty structures for New Brunswick.

79. We agree that the portion of this latter contract that relates to the negotiating strategy for another industry can be properly protected and therefore not subject to disclosure in accordance with paragraph 26(1)(b) of the *Act*. Paragraph 26(1)(b) sets out a broad discretionary exception to disclosure allowing a public body the option to protect information in relation to negotiations as follows:

(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…

80. We therefore find that the four contracts of consultants should be released to the Applicant in full, except for redactions to one contract that contains the terms of reference for a negotiating strategy to be undertaken in another industry.

Consultants' Reports

81. The Department had four reports submitted by two consultants that resulted from their contract work. In each case, the Department commissioned these outside experts to provide specific and detailed input on royalty structures in the Province.

82. The first three reports were submitted by one consultant and include a comparative analysis of royalty structures in other jurisdictions as well as a comparison with the New Brunswick situation, with advice and recommendations on specific royalty schemes for the Province's consideration, as well as advice and feedback on the implications of recent changes at the federal level on the royalty structure in New Brunswick and in relation to a report on mining taxation in Canada.

83. The fourth report was prepared by the second consultant for the primary purpose of providing the Department with advice on developing a negotiating strategy in relation to another industry in light of the impending changes to the royalty structure, as well as to seek the consultants' comments and advice specifically on the shale gas royalty structure model.

84. Having reviewed these reports, we are satisfied that they collectively consist of advice, opinions, proposals and recommendations that were submitted to the Department in order to assist the Department (which is jointly responsible for the administration of the *Oil and Natural Gas Act* with the Department of Natural Resources and the Department of Energy) in deciding how to move forward with changes to the royalty structure. As such, we agree that the consultants' reports fall within the scope of the exception to disclosure found in paragraph 26(1)(a) of the *Act*.

85. Further, as this is a discretionary exception to disclosure, we reviewed which factors were considered by the Department officials in arriving at the decision to refuse access. The Department did not wish to grant access to these reports at the time of the Request

as the Department was still in the process of analyzing the matter and a final decision on changes to the royalty regime would be had not yet been rendered.

86. We agree with that statement. The Department intended only to protect the information *until the decision was made* and the Department would table the reports for public access with the Legislative Assembly. Given these explanations, we find the Department properly exercised its discretion in making the decision to refuse access to the reports under paragraph 26(1)(a).

87. As a final decision had not yet been made in relation to the shale gas royalty structure, however, the information contained in the consultants' reports still did not constitute information in the form of a plan, draft policy, or pending policy. That information was strictly expertise, advice and recommendations, thus properly protected under paragraph 26(1)(a) rather than paragraph 26(1)(e) or paragraph 30(1)(e).

OTHER FINDINGS

ADEQUACY OF SEARCH FOR RELEVANT RECORDS

88. Based on our review, we are satisfied that the Department took the appropriate steps to conduct an adequate search and identified all of the relevant records in this case. The Department's Right to Information Coordinator forwarded the Request to appropriate senior management in the Tax and Policy Branch, and searches included paper records and electronic files. The search results identified four contracts with consultants and the corresponding consultant reports that specifically addressed oil, gas and mineral royalty structures. These relevant records are dated between July 2011 and November 2012, and Department staff confirmed that activity on possible changes to the existing shale gas royalty regime did not begin until 2011.

TIMELINESS OF THE RESPONSE

89. Although the Response was dated March 8, 2013, the Applicant did not appear to receive it until April 4, 2013 and this was due to the fact that the Minister only signed the Response on March 22, 2013, following which the Request was sent to the Applicant by regular mail. Department officials acknowledged that the Response was not timely as it was not issued within 30 days, but were unable to provide an explanation for this delay. We reminded the Department of the obligation under subsection 11(1) to ensure timely responses to access to information requests and the importance of keeping

applicants informed of the status of their requests so that they know when to expect to receive a response. We note for the record that this Department as a matter of practice issues timely responses.

CONFORMITY OF THE RESPONSE

90. The Response was somewhat helpful in that it indicated that the Department had relevant records and identified the specific provision of the *Act* on which it relied to refuse access to all of the requested information. Regrettably, the Response did not:

- identify each of the four contracts and corresponding reports (the relevant records);
- provide explanations as to why the records fell within the claimed exceptions to disclosure (26(1)(a), 26(1)(e), 30(1)(e)(i)); or,
- provide explanations as to why the Department was exercising its discretion in favour of refusing rather than granting access to the records as is required whenever a public body relies on a discretionary exception to disclosure.

91. While the Applicant was informed that Department has records that directly related to the requested information, the Applicant was left wondering what these records were and of the reasons why the Department refused access in full. As a result, we found that the Response did not fully conform to section 14 and we have issued recommendations on this point in a recent Report that we trust should address this concern.

CONCLUSION

92. In conclusion, we find as follows:

<u>Consultants' contracts:</u>

a) These records were not properly refused under paragraph 26(1)(a), paragraph 26(1)(e), or subparagraph 30(1)(e)(i);
b) The Department did not meet the burden to establish that the contracts contained sensitive third party business information the release of which would cause harm to the consultants' interests; and,
c) Contracts should be disclosed in full, subject to redactions for information relating to a negotiation strategy for another industry, protected under paragraph 26(1)(b);

Consultants' reports:

d) These records were not properly refused under 26(1)(e) or 30(1)(e)(i);
e) The contents of these reports fall within the scope of paragraph 26(1)(a) exception; and,
f) The Department appropriately exercised its discretion in refusing access to these reports at the time of the Request on the basis that a decision regarding shale gas royalty structure had not yet been rendered.

RECOMMENDATIONS

93. Based on all of the above, we recommend pursuant to paragraph 60(1)(h) of the *Act* that the Department prepare a list of these relevant records, i.e., a list of the four consultants' contracts and of the four consultants' reports in this matter.

94. Based on all of the above, we recommend pursuant to subsection 73(1) of the *Act* that the Department release to the Applicant the consultants' contracts in full, except for the information regarding the negotiation strategy in relation to another industry which can be properly redacted pursuant to paragraph 26(1)(b) of the *Act*.

Dated at Fredericton, New Brunswick, this _____ day of February, 2014.

_____
Anne E. Bertrand, Q.C.
Commissioner