

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-1100-AP-563

Date: June 14, 2013

Office of the Access to Information and Privacy Commissioner of New Brunswick

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") and 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 was interested in receiving a copy of or reviewing the visitor log which detailed the names of visitors at Larry's Gulch Lodge ("Larry's Gulch"). Larry's Gulch is a New Brunswick government-owned fishing lodge located in Restigouche County, a popular area for sport fishing. It is used by government for retreats, business meetings, to host guests of the Province, and to donate reservations to charitable organizations who auction these reservations as a fundraising activity. Private individuals or groups can also book days at Larry's Gulch for a fee. The Department of Tourism, Heritage and Culture (the "Department") runs Larry's Gulch.
3. In the present matter, the Applicant requested the visitor log of Larry's Gulch for the entire 2012 season. The Applicant first asked for the information informally, which is a step we encourage as applicants may be able to obtain the information without having to file a formal request with a public body. The formal request process under the Act need be engaged only when necessary.
4. In the past, it was established practice to release information to the public about the visitors who attended Larry's Gulch on official business by informal requests. The Department, however, changed its practice and asked the Applicant to make a formal request for access to information under the Act. The Department received the Applicant's Request on September 10, 2012.
5. In its Response of October 10, 2012, the Department refused to grant the Applicant access to the requested information on the basis that its disclosure would be an unreasonable invasion of the privacy of individuals whose names appeared on the log. The Department relied on subsection 21(1) of the Act, an exception to disclosure provision regarding personal information. The refusal constituted a shift from prior practice of releasing this type of information and resulted in the filing of the present Complaint.

6. The Applicant complained to our Office on November 6, 2012, including these comments:

I made an informal request on July 17 for the Larry's Gulch visitor logs. I was asked to specify a time period. On July 30 I requested logs for 2012 up to July 31.

In a July 31 e-mail, I was told that the department was checking whether they were releasable. Sometime in August, I was told that the request would need to be made through a formal Right to Information Request. I filed the formal request on Sept. 7 seeking the guest list for the 2012 season. A letter dated Oct. 10 denied the request based on section 21(1) of the Act. (...)

("the Complaint")

INFORMAL RESOLUTION PROCESS

7. As with these types of complaints 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*).
8. In this case, the initial step undertaken by the Commissioner was to determine why there was a change in the practice of disclosing such information and whether the Department was entitled to rely on subsection 21(1) to refuse access to the requested information.
9. We met with officials in December 2012 and reviewed the visitor log of all those who attended Larry's Gulch during the 2012 season. The Department explained that it was unsure whether the rules governing the protection of privacy found in the *Act* prevented the disclosure of such information, and that it chose to refuse access to the information to prevent a potential breach of privacy.
10. We found that there was no lawful reason why the information should not be released, and invited the Department to provide the information to the Applicant as part of the informal resolution process. We were unable to informally resolve the matter and had no other option but to conclude the matter by filing the present Report of findings.

LAW AND ANALYSIS

Lack of explanations in the Response

11. The Department refused in full access to the visitor log containing the names of guests at Larry's Gulch on the basis that disclosure of the information would constitute an unreasonable invasion of the privacy of those guests, relying on the subsection 21(1) exception to disclosure.
12. The Department, however, failed to explain to the Applicant why subsection 21(1) was relied upon as an exception to refuse access to the requested information, which contrary to the requirements found at section 14 of the Act when providing a response. By not explaining why access to information held by a public body is refused prevents applicants from understanding the reasons why the access is being refused.
13. The right of access not only means providing applicants with the records they are entitled to receive, but also providing meaningful explanations when refusing access to requested information. These explanations give meaning to the process and enable applicants to better understand what they are entitled to receive and why access to some information is not permitted. When applicants are able to understand why access is refused, they may be less likely to file a complaint about the refusal.
14. The Department's officials have recognized the fact that there was a failure to provide explanations to the Applicant as to why the information was withheld under subsection 21(1). We have been ensured, however, that the Department will correct the manner in which it responds to access to information requests in this regard in future cases.

Reasons for refusal

15. Our review of the single relevant record, the log for the 2012 season, however, revealed that the Department was incorrect in relying on subsection 21(1) in this case. We explain.

What is meant by 'third party'?

16. In our experience to date, including the present case, public bodies have applied an overly broad significance to the meaning of third party and often to the detriment of the proper processing of access to information requests. Public bodies have referred to other public bodies as third parties and have treated information relating to other public bodies as

meriting protection under the third party exceptions to disclosure. This is incorrect and we believe it important to discuss the meaning of “third party” to bring clarity to this term.

17. A third party is defined by the *Act* to signify: a person, group of persons or an organization other than the applicant or a public body.
18. The *Act* regulates who or which entity can be considered a third party and this excludes other public bodies.¹ This is clearly demonstrated throughout the statute where reference is made to “another public body” as distinct from a third party. For instance, the processing of a request for information may require additional time “to receive representations from a third party or to consult with another public body”, which clearly draws the distinction between the two.
19. This means that only those individuals or entities that are not public bodies can be considered third parties under the *Act*. The rules regarding the protection of third party information do not apply to other public bodies’ information.
20. Consequently, the Department erred in treating the portions of the visitor log containing other public bodies’ entries as third party information.

Personal information vs. business information

21. The *Act* sets out separate exceptions to disclosure for personal information and for business information. Section 21 (“unreasonable invasion of third party’s privacy”) applies exclusively to personal information, while section 22 (“disclosure harmful to a third party’s business or financial interests”) applies to third parties’ business information. To determine which exception may apply, it is important to distinguish between the two.
22. “Personal information” is defined in the *Act* as including all identifying information about an individual, such as name and address, date of birth, marital or family status, association or activities, source of income, employment or educational history, and so on. Personal information can only belong to a person; it cannot belong to an organization, business, or company. Ergo, as defined in the *Act*, privacy can only apply to information belonging to and identifying a person.

¹ In the English version of the definition of “third party”, reference is made to “other than ...the public body”, whereas the French version of the equivalent definition “*tiers*” refers to “*autre ...qu’un organisme public*” meaning other than a public body (emphasis is ours). We have interpreted the use of the word “the” in the English version as an oversight as the French version’s use of the preposition “a” best reflects the overall legislative scheme that no other public body can be considered a third party for purposes of the *Act*.

23. On the other hand, “business information” is not defined in the *Act*, but under the exception to disclosure relating to business information, the *Act* refers to commercial, financial, or similar types of information relating to private sector business or corporate entities. Examples include a private entity’s activities, trade secrets, confidential contracts, proposals, sources of revenues, and other information about its operations.

24. As explained above, because there are these distinct types of information, there are two concepts at play when dealing with third party information:

- a) the protection of personal information, drawing from the principle of unreasonable invasion of a person’s privacy; and,
- b) the protection of business information, governed by an assessment of whether the disclosure of the information will harm the interests of the business, organization, or company.

25. These two types of information call for different rules about their disclosure. Therefore, when dealing with third party information, a public body must first determine whether the information is personal information or business information. When this determination has been made, the public body can identify which rules regarding the disclosure or protection of the information will apply.

26. As a result, where the information requested is personal information, the rules regarding disclosure found in subsections 21(1), (2) and (3) guide the public body.

27. Where the information requested relates to information about a private sector entity, the rules regarding disclosure found in subsections 22(1), (2), (3), (4) and (5) guide the public body.

Section 21—Exception to disclosure of personal information

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

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

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

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

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

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

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

Section 22—Exception to disclosure for business information

32. Although the Department did not rely on section 22 of the *Act* in its Response, it is important we discuss this mandatory exception to disclosure in order to better understand the difference between protecting third parties' privacy regarding their personal information, and protection third parties business interests regarding information belonging to a private sector third party entity, such as a business, organization, or company.

33. Section 22 is relied upon to deny access to an applicant only where the disclosure of the information would be harmful to a third party's business or financial interest.

34. Under the section 22 exception, harm is not presumed, and it is up to the public body to prove that there is a direct causal link between the disclosure of the information and the harm claimed. This is accomplished with facts and specifics upon which the head of the public body can rest his or her decision to release or to protect the information.

Visitor Log at Larry's Gulch

35. We now discuss why the Department improperly applied subsection 21(1) in refusing access to the visitor log in full as an unreasonable invasion of privacy.

36. We understand that the log for guests and visitors attending Larry's Gulch is divided by dates (being weekends from Friday to Sunday) for the season (starting in June and ending at the end of August) each year. The log is also divided into types and dates of reservations made at Larry's Gulch (the number of *rods* means the number of people attending: one fishing rod per person).

37. The following table provides a fictional example of the type of information entered on the visitor log at Larry's Gulch:

Dates	Bookings
June 2, 3	Donations <i>4 rods - Volunteers Unlimited</i>
June 9, 10, 11	Department XYZ 1. <i>Minister S. L. Jackson</i> (Elected Official) 2. <i>Joan Crawford</i> (Government employee) 3. <i>John Wayne</i> Department MNOP 1. <i>Minister M. Freeman</i> (Elected Official) 2. <i>Tony Curtis</i>
June 16, 17, 18	Private Individual Rods or Group Rods
July 7, 8, 9	Local Day Use

Reservations by Donations

38. The reservations listed under “Donations” are those that were set aside and granted by the Department to charitable or not-for-profit organizations. The log, however, only records the names of the organizations that received the reservations to be auctioned off to the public, not the names of those who bid and who attended Larry’s Gulch. The Department records those days as set aside under the name of the particular charity.
39. As per the example illustrated above, the Department granted Volunteers Unlimited for June 2 and 3 for 4 reservations (4 rods). Volunteers Unlimited held an auction and the four individuals who successfully bid attended Larry’s Gulch on June 2 and 3. On the log appears the name of the charity, but not the names of the four individuals who attended.
40. The Department could not rely on subsection 21(1) to withhold this information because the name of the charitable organization is not personal information.
41. Additionally, even if section 22 had been considered because it calls for the protection of information belonging to organizations, it too would not have applied in this case. The information listed does not reveal information of such a confidential nature that merits protection under section 22.
42. Furthermore, because these kinds of auctions are usually public or held by invitation to a wide audience, there is no interest to protect as the fact the organization reserved Larry’s Gulch for certain dates would already be publicly known.
43. The information found under “Donations” is neither personal information that can be withheld under subsection 21(1) nor business information that merits protection from disclosure under section 22. We find that this information was not properly withheld.

Reservations by Government

44. Reservations made by various officials of government are recorded separately and refer to the name of the public body (a department) by name; i.e., the name of the public body that is hosting meetings at Larry’s Gulch. As shown in the example above, the names of the elected officials and employees of the public body having made the reservations are listed. They are identified as either being an elected official (such as a Minister), or an employee of the public body by name.

45. In the same reservations category, private guests of the public body are listed and are named. These are individuals who are neither elected officials nor employees of a public body. It is our understanding that these individuals are usually representatives of organizations or companies who were invited by a specific public body to hold business meetings. In the example above, John Wayne represents the name of the private individual who is a guest of Department XYZ, whereas Tony Curtis is the private individual who is a guest of Department MNOP.
46. Only the names of these private guests were recorded, not the name of the company or organization they represented and the Department could not identify these individuals nor was it aware of the purpose of their presence at Larry's Gulch. It therefore decided to consult with the other public bodies in an effort to ascertain who they were and whether their names could be disclosed. While the consultation process could have been beneficial, it did not yield the intended results.
47. Consulting with the other public bodies ought to have provided some advice to the Department as to whether the release of the names of their guests raised issues surrounding privacy or business interest. Furthermore, if there were concerns surrounding privacy or business interests, it was incumbent upon those public bodies to provide specific reasons to the Department so that it could assess whether those concerns were valid.
48. Most public bodies consulted did not raise any concerns about releasing the names of their guests. Others, however, indicated that these third parties were representatives of organizations and had attended Larry's Gulch to discuss current or future business opportunities in New Brunswick, and believed that the disclosure of their names could potentially harm their competitive position, interfere with contract negotiations, or result in significant financial loss or gain. They therefore proposed to the Department that the names of these third parties be withheld from disclosure pursuant to paragraph 22(1)(c) of the *Act*.
49. Despite such comments, the Department did not rely on paragraph 22(1)(c) of the *Act* in its Response. As stated above, this exception to disclosure is meant to deny access to an applicant *only* where the disclosure of the information would be harmful to a third party's business or financial interest. Harm is not presumed and it is up to the Department (in this case with the aid of the other public bodies consulted) to prove that there was a direct causal link between the disclosure of the information and the harm claimed for the Department to rely on this exception to disclosure.

50. In order for the Department to have considered withholding the names of these third parties pursuant to paragraph 22(1)(c), the public bodies consulted would have had to provide supporting facts to establish that the identity of their guests could not be revealed due to the potential harm to specific interests, such as how the disclosure of these names could have interfered with the negotiation of a particular contract.
51. The purpose or nature of the meetings of guests of other public bodies was not listed nor were the names of the companies with which they were associated. There is no reason to believe that the names alone would harm the business interests protected from disclosure in section 22 of the *Act*.
52. The Department was correct in not relying on paragraph 22(1)(c) to refuse access in this case as it could not have since it was not provided with the facts to establish that harm would result from disclosure of the names of these guests.
53. While individuals' names are considered personal information under the *Act*, the disclosure of these names solely, without any other identifying information, does not constitute an unreasonable invasion of their privacy. The names therefore cannot be withheld under subsection 21(1).
54. As the Department did not establish any reason why the disclosure of these names would be an unreasonable invasion of privacy, we find that the Department should not have withheld this information under subsection 21(1).

Reservations by Private Individuals or Groups or Local Day Use

55. Reservations made by private individuals or groups who attended Larry's Gulch were not recorded by showing the actual names of the individuals or groups. The only information entered on the visitor log showed, as in the example above, that either a private individual or a private group reserved time at Larry's Gulch on a specific day.
56. As the information under this category does not contain any personal information, we find that the Department should not have withheld this information under subsection 21(1).

Future notice to guests

57. During our discussions with the Department, it was brought to our attention that beginning with the 2013 season, guests of the Province who visit Larry's Gulch will be required to sign a notice acknowledging that their name, title, and the name of the company they represent

may be released to the public in accordance with the provisions of the *Right to Information and Protection of Privacy Act*.

58. We are pleased with this public awareness of the rules regarding disclosure of such information for all those who attend Larry's Gulch; however, we believe that the previous practice to release names of guests of the Lodge upon request was in keeping with the current legislation and its spirit of openness and transparency.

FINDINGS AND RECOMMENDATION

59. We find that based on our investigation of the Complaint, the Department did not properly apply subsection 21(1) when refusing access to the visitor log of Larry's Gulch for the 2012 season in its entirety.

60. Given all the findings in this Report, the Commissioner recommends pursuant to subsection 73(1) of the *Act* that the Department of Tourism, Heritage and Culture release in full to the Applicant the visitor log at Larry's Gulch for the 2012 season without redactions.

Dated at Fredericton, New Brunswick, this 14th day of June, 2013.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2012-1100-AP-563

June 14, 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*.