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: 2011-580-AP-296
April 26, 2013

Case about access to information regarding a heritage designation process

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 filed with our Office on November 16, 2011 in which the Applicant requested that the Commissioner carry out an investigation into the matter and provide recommendations pursuant to the *Act*, if applicable.

2. The Applicant submitted a request to the Department of Wellness, Culture and Sport (now the Department of Tourism, Heritage and Culture, "the Department") on September 18, 2011 seeking information about a particular heritage conservation matter. The Applicant was seeking access to any objections and supporting documents submitted to the Minister and any other documents or information that contributed to the Minister's decision not to designate a particular building as a Provincial heritage place under the *Heritage Conservation Act*. ("the Request")

3. In processing the Request and given the fact that the Department had received objections from two different parties (third parties), the Department undertook the third party notification process as set out in sections 34 to 36 of the *Act* to determine whether the third parties consented to the release of their information. On October 18, 2011, the Department notified the Applicant that third parties were given an opportunity to make representations about the possible disclosure of this information and that a decision by the Department would be made within 30 days of the notice.

4. On November 14, 2011, the Department issued its Response to the Applicant. The Department granted access to a briefing note that detailed the chronology and outcome of the designation process, with some names redacted, and refused access in full to the objections and supporting materials for the following reason:

> Subsection 35(4) of the *Heritage Conservation Act* indicates that these hearings are not open to the public and therefore any material presented by an Objector at a hearing is confidential under this section of the Heritage Conservation Act. Section 5(1) of the *Right to Information and Protection of Privacy Act* (RTIPPA) states that the government cannot disclose information if the disclosure is prohibited under another Act of the Legislature.
>
> ("the Response")

5. The Applicant was not satisfied with the Response and promptly filed a Complaint, including the following comments:

> My complaints regarding the Minister's refusal are as follows:
>
> (…)
>
> I contend that the Minister is interpolating this interpretation into the Heritage Act, and that this prohibition does not actually exist within the Act; the Heritage Act does not state that the disclosure of information from hearings is prohibited, only that the hearings are not open to the public. Because of the Minister's refusal was based not upon a prohibition contained in the Heritage Act but rather upon an interpolation, or overly-broad interpretation...
>
> (…)
>
> Openness is essential for public confidence in the Heritage Act, the RTIPP Act, and the Department; failure to disclose the evidence for the Minister's decision, when not grounded upon any compelling reason of privacy or public safety, undermines public confidence in the fairness of the Heritage Act, the RTIPPA, and the Heritage Branch;
>
> (…)
>
> Transparency and openness is necessary to fulfill the Heritage Branch's stated objectives: "*Engaging the public directly* in identifying places of exceptional heritage value, and developing the measures needed to conserve their special character, *is a key aspect of the process…* Once a specific place is formally proposed, *a public notification and review process must be undertaken."* (my emphasis). By using his discretionary power to withhold from the public the information upon which the Minister bases heritage decisions, the stated objectives of the Department are contradicted by the Minister's use of discretionary powers of the RTIPPA;
>
> (…)
>
> [T]he basis of evidence which is kept secret from the public for no reasonable purpose, leading to the inevitable conclusion that such evidence was unable to bear public scrutiny…
>
> ("the Complaint")

6. As with all access complaints, it is important to first understand the context in which the relevant records were produced. This matter concerned the fate of a historical building known as the Memorial Library. Plans were announced for a new performance arts centre which would require the demolition of the Memorial Library. The Memorial Library was completed in 1927 and housed a cenotaph commemorating students who had fought and died in World War I. These plans generated some public discussion and media attention, as some individuals were opposed to the demolition of a building they believed to be of historic and cultural significance.

7. In February 2011, the Minister received an application to designate the Memorial Library as a site of Provincial significance under the *Heritage Conservation Act*. The *Heritage Conservation Act* governs the designation and preservation of historical sites in the Province. This law came into force in August 2010, replacing the previous *Historic Sites Protection Act* and the application involving the Memorial Library was the first received by the Minister under the new law.

8. By developing and enacting a new piece of legislation to protect places and sites of historical significance, the Province has recognized that there is an inherent public interest in preserving and protecting historical sites as part of our collective identities and as reminders and monuments of how our communities have developed and progressed. The *Heritage Conservation Act* sets out an open invitation to the public to submit an application to ask the Minister to consider whether a particular place or site should be recognized as a heritage place of Provincial significance. The process also allows members of the public to provide input if they disagree with a possible designation.

9. Interested individuals can ask the Minister to consider designating a particular place as one of Provincial historical significance by submitting a completed application form.

10. The Minister then reviews the situation and has the sole discretion to either:
    a) refuse the application and provide reasons for this decision; or,
    b) accept the application and initiate the intention to designate process.

11. The Minister can also initiate the intention to designate process of his or her own accord. In our view, these provisions signify that the Minister makes an initial decision, one which demonstrates an interest to designate a particular place or building.

12. If the Minister decides to accept the application, the Department proceeds with the publication of a public notice of the intention to designate. The publication of this notice opens the process to all and invites a debate on the issue. Any interested parties who do not agree with this intention are allowed to file their objections with the Minister.

13. When an objection is received, the Minister must hold a hearing with the party who has objected and that hearing is not open to the public as per the *Heritage Conservation*

Act. If no objection is received, the Minister can proceed with the designation or withdraw the matter.

14. At the conclusion of this process the Minister once again is provided with the sole discretion to make another decision, i.e., whether to:

a) withdraw the intention to designate and provide reasons to the person who made the application, or,

b) proceed with the designation by issuing a designation order.

15. In either case, the Minister is lawfully obligated to provide notice to the public that the notice of intention to designate has been withdrawn and must also provide reasons why such a decision has been made, or, that a designation order is issued.

16. In the matter related to this Complaint, the Minister received an application to designate the Memorial Library as a place of Provincial significance and followed the process as established by the *Heritage Conservation Act*. The Minister made an initial decision to proceed with the designation process.

17. The Minister signed an Intention to Designate the Memorial Library as a Provincial heritage place on May 13, 2011 and gave the required public notice.

18. During our investigation, we were informed that the publication of the notice of intention to designate does not, in fact, mean that the Minister necessarily intends to make the designation, although arguably, the Minister has made an initial assessment of the matter and has decided to proceed in that direction.

19. We were left with the impression that the notice of intention to designate, by its very wording, meant that the Minister was prepared to designate unless objections were filed to change that intention; however, this is not necessarily so. Even the Applicant understood the process to be so as the Applicant understood that the Minister had "*reversed*" his decision of May 25 to designate the Memorial Library a Provincial heritage place.

20. What is clear is that the Minister makes an initial determination to proceed with the designation process, either of his own accord or upon receiving an application that is accepted. After the process has run its course, including the hearing of any objections, the Minister makes a final decision regarding the designation. We can appreciate that in the eyes of the public, an initial decision to proceed with the designation that is then

withdrawn after hearings are held for objections, points to a change of the decision to designate. That is why we believe the *Heritage Conservation Act* has been drafted in such a way as to oblige the Minister to provide reasons where the Minister has approved an application and issued a notice of intention to designate and subsequently decides to not go ahead with the designation, as in this case.

21. In this case, the Minister received objections to the intent to designate process within the prescribed 30 days, and held hearings as required to do so. Those hearings were held in early August of 2011, following which, the Minister withdrew the notice of intention to designate and gave notice to this effect on August 10, 2011. In doing so, the Minister determined that while the building exhibited heritage value, it was not of Provincial significance.

22. That is when the Applicant sought answers behind the Minister's decision to not pursue the designation and filed a complaint when those answers were not forthcoming. In the final analysis, the Applicant simply wanted to understand why the Minister decided to withdraw the notice of intention to designate the Memorial Library.

2.0 COMMISSIONER'S COMPLAINT PROCESS

23. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*. The informal resolution process provides guidance to public bodies and applicants with a view to acquire a better understanding of the legislation, and it is also intended to encourage a satisfactory outcome to the complaint.

24. If we find that the public body did not fully meet its obligations in responding to a request after completing our initial review of the complaint, we work with the public body and encourage it to provide a "revised response" to the applicant as a means of informally resolving the complaint. The revised response must have all the components of a properly constituted response as per section 14 of the *Act*. The revised response is reviewed by the Commissioner prior to being provided to the applicant and gives the public body a second opportunity to issue a response to the request in accordance with the *Act*. If the revised response satisfies the applicant's concerns, the complaint is successfully resolved. If the revised response does not satisfy the applicant's concerns, the Commissioner reviews the matter again in its entirety and determines what steps are necessary to conclude the matter. (*Note*: A full description of the steps involved in

the Commissioner's informal resolution process can be found in **Appendix A** of this Report.)

2.1 INFORMAL RESOLUTION IN THIS CASE

25. We began our work by reviewing some of the relevant records we were allowed to examine and met with officials at the Department between December 2011 and November 2012. Our efforts throughout the informal resolution process intended to engage the Department in a discussion not only on the issues of the heritage designation process generally and the application of specific provisions of the *Act*, but also the intent and spirit of the *Act*, which promotes transparency and accountability in the public business of public bodies.

26. Our initial discussions with the Department focused largely on the Department's interpretation of subsection 35(4) of the *Heritage Conservation Act* that the Minister's hearings with parties who had filed objections are not open to the public. We questioned whether this meant that all information in relation to the objection was protected from disclosure. In our view, interpreting the closed hearing as grounds to automatically refuse access to any and all information relating to an objection matter was overly restrictive and not in keeping with the broad right of access granted under the *Act*. These discussions with the Department continued throughout our investigation and were based principally on differing interpretations and the interaction between the two statutes at the heart of this Complaint.

27. In the end, the Department provided us with all the relevant records for our review, as well those later identified that had not been included in the initial processing of the Request. These were legal opinions provided to the Department. While the Department declined to provide these records for our review (relying on subsection 70(1)), it nevertheless collaborated with us and produced a list that explained the nature of the information contained in these records sufficiently for us to rely on to make a determination. This descriptive list allowed us to indeed substantiate that the records were solicitor-client privileged.

Revised Response – February 2013

28. After our entire review of records and discussions for the interpretation and application of the provisions of the *Heritage Conservation Act* alongside those of the *Act* in this lengthy but worthwhile informal resolution process, the Department was amenable to provide the Applicant with a revised response as a means to resolve this Complaint

informally, and it did so in February of 2013.

29. Although the Minister's notice of intention to designate did not necessarily mean that the Minister was prepared to designate the Memorial Library a heritage place, we did look into the relevant records for any information which would provide the answers the Applicant was seeking.

30. The facts are such, however, that there were no records to show how the Minister arrived at his decision other than a briefing note which was originally supplied to the Applicant.

31. The revised response provided to the Applicant some additional information but mainly sought to clarify the heritage designation process that had taken place in this case:

> (…)
> The Department of Tourism, Heritage and Culture would also like to take this opportunity to clarify the designation process under the *Heritage Conservation Act*; in particular, the process regarding the Minister's decision to issue a Notice of Intention to designate a particular site or building.
>
> When a nomination for the designation of a place is received from the public, the Minister may reject the application, providing reasons, or the Minister can publish a Notice of Intention to designate that place. The publication of the Notice of Intention to designate does not mean that the Minister necessarily intends to make the designation. The Minister may decide to file a Notice of Intention to Designate, should it be felt that there are varying views related to the designation, to submit formal objections to the Minister explaining their views. This is followed by a hearing between the Minister and the objector that is not open to the public. It is only after the hearing or should no notices of objection has been given, that the Minister may designate the place as a provincial heritage place or withdraw the Notice of Intention to designate the place.
>
> ("the Revised Response")

32. In our view, the Revised Response represented a frank reply to the Request and one which complied with the *Act*, although it did not provide the answers the Applicant was seeking as those answers were not found in the briefing note.

33. We then invited the Applicant to provide us with comments about the Revised Response, given these circumstances.

34. Understandably, the Applicant was not satisfied with the Revised Response as it did not provide the answers the Applicant was seeking. In addition, the Applicant did not agree that the remaining records should be protected from release.

35. As a result, we proceeded with our formal investigation, in which we reviewed the matter in its entirety once again before issuing the present Report of Findings.

3.0 REVIEW AND ANALYSIS OF DEPARTMENT'S PROCESS AND RESPONSE

3.1 REVIEW OF RELEVANT RECORDS

36. The Request sought answers to why the Minister had withdrawn the notice of intention to designate the Memorial Library and requested information to access such answers. Initially, the Department identified the following records as relevant to the Request:

a) The objections and supporting documents submitted by one of the third parties;
b) The objection filed by another third party; and,
c) A briefing note for the Minister explaining the chronology of the designation process and a brief explanation that the building was found not to be at a level of Provincial significance.

37. The Applicant was provided only the briefing note. The Applicant did not find that the briefing note provided a full explanation of how the Minister exercised his discretionary power to withdraw the notice of intention to designate. As a result, our investigation was to determine whether there was any further information that could be disclosed that would assist the Applicant in understanding how the Minister arrived at this decision.

38. When we conducted our review of the records, we were initially provided with only some of the relevant records, but these included previous versions of the briefing note. These previous versions were not directly relevant to the Request and we did not find any additional documentation in the Department's files that explained or set out the information upon which the Minister relied to exercise his discretion to withdraw the notice of intention to designate the Memorial Library as a Provincial heritage place.

39. Therefore, from the records we were initially provided, there did not appear to be any record that would provide information as to how the Minister arrived at his final

decision. We were left wondering whether this information existed, and if so, where it could be found.

40. We reviewed information that was publicly available about the designation itself, including the Minister's published notice of intention to designate and the Minister's letter to the individual who nominated the building for designation. We also examined the briefing note that had been provided to the Applicant:

> Based on:
> - the application,
> - initial meetings with the applicant and the owner,
> - hearings conducted resulting from [redacted – s. 21] objections,
> - consultation with other stakeholders,
> - other available information;
>
> it was determined that, while exhibiting heritage value, the building is not significant at a provincial level.
>
> Although a fine building by architect Andrew Cobb, it is not the last surviving or greatest example of either the Tudor Revival style or the work of the architect. The adjacent Flemington Building is also by Andrew Cobb.
>
> After discussion with [redacted – s. 26(1)(a)], it has been determined that the memorial nature of the building, or parts of it, although important, does not in itself exhibit significance at a provincial level.
>
> Many Mount Allison students and Sackville residents have had, to varying degree, a relationship with the building. Again however, this does not constitute a provincial level of significance.

41. While we found that the briefing note pointed to some of the factors the Minister may have considered in making the decision, we appreciated why the Applicant remained dissatisfied as this document did not set out which factors were identified as relevant or how the Minister weighed and considered these factors in order to arrive at the final decision to not order the designation. In short, how the Minister used his discretion to determine that the building in question was not at a Provincial level of significance remained unanswered.

42. As this was the case, we pursued our discussion with the Department and we were finally allowed to review the objections and supporting materials along with the descriptive list of legal opinions provided to the Department.

43. We asked the Department to conduct a further search for any other records that may contain some insight into the Minister's decision-making process, but no records were found to show how the Minister arrived at his decision other than these relevant records: the briefing note, the objection materials, and the legal opinions.

4.0 ANALYSIS OF DECISION TO REFUSE ACCESS

44. This Complaint was based on the Applicant's dissatisfaction with the decision to refuse access to information about the withdrawal of the notice of intention to designate the Memorial Library as a Provincial heritage place. The Applicant was concerned that this approach signified that two publicly funded organizations, the Department and the University, could determine the fate of the heritage designation process *in camera* without providing the basis upon which the Minister's decision was ultimately made, particularly given the fact that the Minister decided not to order the designation after the closed hearings had been held.

45. The *Act* obligates public bodies to be transparent and open in how they conduct their business, subject only to the limited and specific exceptions as found in sections 17 to 33. As there is an inherent public interest in recognizing and protecting historically significant sites, it follows that there is also an inherent public interest in understanding a Minister's reasons for deciding whether to designate a building or site that has been nominated, or for reversing that decision.

46. In the present case, there was also a demonstrated public interest in understanding the reasons for the Minister's decision, as evidenced by the public and media interest, as well as by this Request. In particular, the Applicant was looking to understand what happened between the initial intent to designate in May 2011 and the Minister's subsequent decision to withdraw the intention in August 2011 when the Minister decided that the building was not of a Provincial level of significance worthy of designation.

4.1 Application of subsection 5(1) of the *Act* And subsection 35(4) of the *Heritage Conservation Act*

47. The question at the heart of this matter is whether the Applicant's right of access to the objection materials was impacted by the closed hearing provision of the *Heritage Conservation Act*.

48. Whenever there is another statute which may govern the release or protection of information held by a public body, in addition to those rules found in the *Act*, it is prudent to first look to subsection 5(1) of the *Act*:

> 5(1) The head of a public body shall refuse to give access or disclose information to an applicant under this Act if the access or disclosure is prohibited or restricted by another Act of the Legislature.

49. This provision creates a mandatory exception to access and disclosure where the access or disclosure of information is governed by both the *Act* and where the other legislation limits or prevents access to or the disclosure of that information. Subsection 5(1) presumes a right of access under the *Act* but recognizes that other pieces of legislation may contain provisions that restrict this right. This means that where another statute clearly prohibits or restricts the disclosure of information that is also subject to the *Act*, there is no right of access to this information under the *Act*.

50. We then examined sections 34 and 35 of the *Heritage Conservation Act*, which set out the objection and hearing process when a notice of intention to designate has been issued:

> **Objection**
> 34 Within 30 days after the notice has been given under paragraph 32(1)(b), a person may give the Minister and the owner of the place affected a notice of objection on the form provided by the Minister setting out all the relevant facts.
> **Hearing**
> 35(1) If a notice of objection is given to the Minister under section 34, the Minister shall hold a hearing to consider the matter as soon as practicable.
> (2) At least 10 days before the date of the hearing, the Minister shall give notice of the hearing to the objecting party.
> (3) The notice of hearing shall indicate the date, time and place of the hearing.
> (4) The hearing is not open to the public.

51. We reviewed the Provincial heritage place designation provisions set out in the *Heritage Conservation Act* along with the Objection Form provided by the Department with a view to revisit this interpretation. We believed that subsection 35(4) should not be given such a broad interpretation which created a blanket exclusion for all objections submitted to the Department in the course of the designation process.

52. In our analysis, the wording of section 34 only provided a person an opportunity to make an objection known to the Minister about the potential designation of a site as a

Provincial heritage place; however, section 34 did not contain language to the effect that the objection was being submitted in confidence or that the objection would be treated in a confidential manner. Furthermore, where objections were made, section 34 required those objections to be given to the Minister as well as to the owner of the site being considered for designation. This supported our view that objections were not submitted in confidence to the Minister because they were also provided to a third party.

53. In addition, the Objection Form developed by the Department for the purpose of section 34 did not contain a confidentiality clause or a confidentiality label. The Objection Form merely contained a notice about the hearing which would ensue as a result:

> Objections are subject to a hearing under Section 35 of the *Heritage Conservation Act*. Proponents will be given 10 days notice of the date, time and location of a hearing to defend their objection(s).

54. We also pointed out that the mere labelling of "confidential" did not of itself deem it to be such and the qualification that a record is confidential must always be substantiated.

55. Consequently, the wording found in section 34 as well as the format and content of the Objection Form produced by the Department were both silent on the question of the confidential nature of an objection made under that provision. The Legislature had the opportunity to create a restriction or prohibition on the potential access to or disclosure of the objections themselves but chose not to do so.

56. In our view, the application of subsection 35(4) of the *Heritage Conservation Act* in conjunction with subsection 5(1) of the *Act* did not create an overall exclusion for all objections and such an interpretation is not consistent with the intent and purposes of the *Act*.

57. While the materials provided for the objections were intended for hearings not open to the public, we continued to have concerns about extending that fact to the act of removing outright a right of access to information contained in the objection documentation. Certainly, there may be good reasons in certain cases to protect the identity of the person(s) who object to a possible designation, but we questioned whether all of the objection materials needed to be withheld in entirety in every case.

58. We suggested that there may be sensitive or confidential information contained in objection materials (such as third party financial information or third party personal opinions, etc.) in some cases, but not in others. For example, information on the age, history, previous purposes of the building or site, and so on would not require protection and there would be a right of access to that type of information.

59. We were therefore of the view that the entire designation process ought to be balanced with the public interest in having an opportunity to understand the Minister's reasoning in the exercise of his discretion of whether to designate a site as being of a Provincial level of significance.

60. Remaining consistent with the intent and purposes of the *Act*, we found that the application of subsection 35(4) of the *Heritage Conservation Act* in conjunction with subsection 5(1) of the *Act* did not create an overall exclusion for objections made under section 34 of the *Heritage Conservation Act*. The Department agreed and reconsidered its Response in regards to the release of these records.

61. In doing so, the Department carefully re-examined the objection materials and the third parties' representations regarding their release. In its revised response, the Department refused access to these records on the basis of paragraph 22(1)(b) of the *Act*, i.e., that the records consisted of confidential third party business information.

62. Based on the above, we found that the closed hearing provision found in subsection 35(4) of the *Heritage Conservation Act* did not effectively prohibit or restrict the disclosure of the information in question. Therefore, we informed the Department that subsection 5(1) of the *Act* applied to these records, which meant that we had to determine whether the Applicant had a right of access to the information in question based on the rules access and disclosure of the *Act*, not the *Heritage Conservation Act*.

63. This exercise resulted in the Department being able to withhold some information based on the *Act*'s exceptions to disclosure which we discuss below.

64. Although we agreed in the final analysis with the use of those exceptions to disclosure, we share the Applicant's concerns that the designation process under the *Heritage Conservation Act* should be more transparent and allow the public the opportunity to understand how the Minister exercised his discretion about whether to designate a particular place or site as a Provincial heritage place.

65. Not properly documenting how a public body conducts its business on behalf of the public interferes with access rights and, as demonstrated by this case, can result in preventing an interested member of the public from understanding and having the opportunity to scrutinize the Minister's decision.

4.2 Paragraph 22(1)(b)—Confidential Third Party Business Information

66. On the exceptions relied upon in the revised response was paragraph 22(1)(b), a mandatory exception to disclosure for third party business information:

> 22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal
>
> (…)
>
> (b) commercial, financial, labour relations, scientific or technical information supplied to a public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential by the third party…

67. Paragraph 22(1)(b) sets out a three-part test for determining when the disclosure of third party business information is prohibited. In order to establish that information has been properly withheld under this provision, a public body must provide facts which support each of these three elements:

a) the information falls within at least one of the protected categories (commercial, financial, labour relations, scientific or technical information);
b) the third party supplied the information to the public body; and
c) the information was supplied in confidence, either implicitly or explicitly, and the third party consistently treated the information as confidential.

Paragraph 22(1)(b)
First element: Financial and technical information

68. For the first element, the objection and supporting materials submitted by one of the third parties consisted of representations about the impact that designating the Memorial Library would have on its financial interests by jeopardizing a major building project that was already underway. As such, we find that these objection materials constituted financial information.

69. As for the other third party's objection, it consisted of its professional opinion about the historical function and maintenance of the building.

70. While the *Act* does not define "technical information," we looked to other jurisdictions with similar provisions for guidance. The Ontario Information and Privacy Commissioner has defined "technical information" as follows in Order PO-2010:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

71. We accept and adopt the definition expressed by the Ontario Commissioner. Due to the fact that the other third party's objection consisted of its professional opinion based on its knowledge of this particular field, we find that the third party's objection consisted of technical information.

72. We were satisfied that the two objections and supporting materials consisted of financial and technical information, thus meeting the first element of the test.

Paragraph 22(1)(b)
Second element: supply of information by a third party

73. Both third parties submitted their information to the Department in response to the published notice of intention to designate the Memorial Library. This information was supplied by the third parties and therefore the second element of the test was met.

Paragraph 22(1)(b)
Third element: confidentiality of the information

74. As for the third element, we must consider whether the objection materials were supplied by the third parties on a confidential basis and that the third parties consistently treated this information as confidential.

75. Both third parties indicated during the third party notification process with the Department that it was their understanding that their objections were submitted with the expectation that the objection process was confidential. While neither the objection form nor the objection materials were marked as confidential, the third

parties understood that the subsequent hearing with the Minister was not open to the public, and thus had an expectation that their objections would not be shared outside of this process.

76. Given that the third parties decided to participate in the designation process and knowing that the *Heritage Conservation Act* made the hearing on the objections closed to the public, we find it logical for the third parties to have expected confidentiality for their written and oral submissions to the Minister. It is clear from our review of this matter that the third parties supplied the information in this regard. It is also clear that the third parties maintained this position that their records not be released when they were asked for input during the third party notification process.

77. For these reasons, we find that the objection records were submitted on a confidential basis and that the third parties expected this information to be confidential. These facts met the third element of the test.

78. Accordingly, the Department met the three part test required by the exception found in paragraph 22(1)(b) to refuse access to the objection records in this case; however, the matter did not end there.

Other considerations

79. While paragraph 22(1)(b) is a mandatory exception to disclosure that prohibits the release of sensitive third party business information, there are additional considerations. Subsection 22(3) sets out certain circumstances where the exception will not apply, two of which are relevant to this case:

> 22(3) Subsections (1) and (2) do not apply if
> (a) the third party consents to the disclosure,
> (b) the information is publicly available…

80. Paragraph 22(3)(a) overrides the mandatory exception to disclosure where the third party consents to the disclosure.

81. Therefore in this case, had the third parties consented to the release of their objection materials, the Department would have had to disclose these records to the Applicant pursuant to paragraph 22(3)(a) of the *Act*.

82. As neither of the third parties consented to the disclosure of their respective records, the Department was obligated to refuse access as these records fall within the scope of the mandatory exception to disclosure found in paragraph 22(1)(b). The override found in paragraph 22(3)(a) did not apply in this case.

83. There was also the question as to whether the objection and supporting materials submitted by the first third party could be entirely protected as confidential third party business information if some of the information was publicly available. This referenced the override found in paragraph 22(3)(b) where information is publicly available.

84. Having reviewed the objections and supporting materials supplied by the third parties, we noted that some of the information contained in the supporting materials could be found in the public domain. We considered whether partial disclosure of some of the information in the supporting materials would be appropriate.

85. One of the third parties had compiled and submitted a substantial amount of supporting materials with its objection in support of its position, which included some information that was publicly available. This information was specifically included as part of the objection package in support of the objection. In this sense, we are of the view that the publicly available information in the supporting materials could not be treated as separate from the objection itself. To provide the publicly available information separately from the supporting materials could allow a person to infer the contents of the objection itself, and/or allow for speculation and possible misinterpretation as to the contents of the objection out of context. In addition, while that third party included some publicly available information in its supporting materials, it did not make the contents of its objection or its supporting materials publicly available.

86. For these reasons, as well as that third party's expectation of confidentiality and its stated refusal about the release of the objection materials, we found that the information in the supporting materials could not be considered separately from the overall objection itself.

87. As such, we found that the objections and supporting materials were appropriately withheld in full under paragraph 22(1)(b).

4.3 Paragraph 27(1)(a)—Solicitor-Client Privilege

88. In its Revised Response, the Department refused access to two records, identified in its second search for records, on the basis of solicitor-client privilege exception found in paragraph 27(1)(a):

> 27(1) The head of a public body may refuse to disclose to an applicant
> (a) information that is subject to solicitor-client privilege…

89. The principle of solicitor-client privilege was developed to enable free and candid communication between lawyers and their clients, and is an integral component of the basis for the administration of justice. One of the fundamental tenets of solicitor-client privilege is that the privilege solely belongs to the client and only the client can waive the privilege (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at parag. 33 to 37).

90. This exception allows for the protection of communications between a public body and its legal advisors.

91. It follows that the solicitor-client privilege exception is discretionary, because it is the public body that holds the privilege and therefore the public body has the sole discretion to waive the privilege.

92. We first had to consider whether the information fell within this scope and if so, whether the Department had properly exercised its discretion in arriving at the decision to refuse access in this case.

93. The two records in question consisted of communications between the Department and its legal counsel for the purpose of providing the Department with legal advice in relation to the heritage designation process. As this was the first time the Department was processing a nominated site under the provisions of the new *Heritage Conservation Act*, the Department sought direction from legal counsel on the nomination and objection processes. Based on the information provided by the Department, we are satisfied that these two records indeed consisted of solicitor-client privileged information of the Department and fell within the scope of the exception found in paragraph 27(1)(a). As such, the disclosure of these records would reveal confidential legal advice.

94. As for the Department's exercise of discretion in refusing access to these records, the Department was aware that it had the option of waiving its privilege and allowing

disclosure of this information. In the end, the Department decided not to do so under the circumstances and we found nothing improper about the exercise of that discretion in this case.

95. We were therefore satisfied with the Department's decision to refuse access to these records under paragraph 27(1)(a) was lawful in this case.

5.0 COMMISSIONER'S FINDINGS

96. In this Complaint investigation matter, we found that the Department's application of the closed hearing provision found in subsection 35(4) of the *Heritage Conservation Act* in conjunction with subsection 5(1) of the *Act* to refuse access to all information relating to the objection process, including the objections and supporting materials, to be an overly broad interpretation of these provisions. To apply these provisions in such a manner amounts to a blanket refusal of all information related to the objection process was not in keeping with the broad right of access as granted by the *Act*.

97. As a result of all our discussions during the informal resolution process, the Department agreed and reconsidered its position in regards to the withheld information, as was reflected in the Revised Response issued to the Applicant.

98. We found that the Revised Response was in conformity with the *Act* and provided the Applicant with some of the information sought, although arguably, did not answer all of the Applicant's questions.

99. Objections and supporting materials supplied by third parties to the Minister in this case fell within the scope of the mandatory exception to disclosure for confidential third party business information under paragraph 22(1)(b). As this information consisted of financial or technical information that was submitted by the third parties to the Minister with the expectation that the information would be kept confidential, it was properly withheld. The override provisions to this exception found in paragraphs 22(3)(a) and (b) did not apply to the objection materials as a whole.

100. We also found that the Department lawfully refused access to two records consisting of legal advice, received in relation of the first designation process which it undertook under the new *Heritage Conservation Act*. This discretionary exception to disclosure for solicitor-client privilege in paragraph 27(1)(a) was properly applied in this case.

101. Based on our comments above, however, we still have concerns about the fact that the Department did not have any records to document the Minister's decision-making process following the objection hearings. The Minister ultimately decided to not order the designation of the Memorial Library as a Provincial heritage place, and the Applicant was seeking access to the reasons for that decision.

102. Not properly documenting a Departmental or Ministerial decision regarding the public affairs of a public body is akin to removing the public's right of access to such information. In this regard, we encourage the Department in future heritage designation cases under the *Heritage Conservation Act* to properly document the Minister's decision-making process and the reasons upon which the Minister's decisions are rendered to ensure better transparency and accountability, in order to respect the public's access rights.

No Recommendation

103. As we found that the Department, through the informal resolution process and the Revised Response issued to the Applicant, responded to the Applicant's Request in accordance with the rules found under the *Act*, we have no recommendation regarding additional disclosure of the information to make in this matter.

Dated at Fredericton, New Brunswick, this ____day of April, 2013.

_____

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2011-580-AP-296
April 25, 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.

Commissioner's Policy on the Complaint Process

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's 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*.