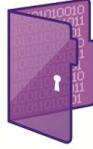


Office of the Access
to Information and
Privacy Commissioner

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: 2012-752-AP-381

Date: September 26, 2012

INTRODUCTION AND BACKGROUND

1. The present Report of the Commissioner's Findings is issued as per subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act") pursuant to an investigation into the Applicant's Complaint dated March 13, 2012 involving the Department of Natural Resources ("the Department").
2. The facts leading up to the present complaint show that a *Workplace Audit Report* ("the audit report") was conducted by an outside consultant during the summer of 2010 for one particular district office of the Department. The Applicant worked at the same district office and was therefore a part of the audit as were the other employees in that workplace.
3. Outside of the process provided under the Act, the Applicant asked the Department's human resources officials to provide a copy of the audit report when it was completed. The Department permitted the Applicant to read the audit report and even to make notes of its contents, and this, on two separate occasions, including once while accompanied by a union representative. The Applicant, however, was not allowed to receive a copy.
4. As a result, on January 18, 2012, the Applicant filed an access to information request asking to receive a copy of the audit report ("the Request").
5. In its response dated January 31, 2012, the Department refused to provide a copy of the audit report on the basis that its contents would reveal the substance of work conducted by an investigator in relation to a personnel investigation, referring to paragraphs 20(1)(a) and (b), but not providing explanation as to why these exceptions applied ("the Response").
6. On March 13, 2012, the Applicant filed a complaint with our Office claiming that the Response was not satisfactory for these reasons:
 1. The refusal was based on Section 20(1) (a) and (b) which refer to harassment and personnel investigations.
 2. An audit is not an investigation by definition and therefore section 20 (1) does not apply to it.
 3. The report does not contain information identified as personal information about any other identifiable person per the definition of personal information in the Act.
 4. Section 7(3) which limits information that can be provided under section 20 refers to section 7 (1) and does not limit the information about a person's self referred to in section 7(2).

5. Comments made about another person are not considered personal information. Refer to (L) definition of Personal Information.
6. The views or opinions expressed about the individual by another person is considered personal information. Refer to (m) and (n) definition of Personal Information.
7. The report centres around me and comments made about or concerning me are considered personal information as defined by the definition of "Personal Information" of the act and therefore allows me access to the information under section 7 (1) of the act.
8. Any information deemed prohibited under the act can easily be severed from the information per section 7(3) of the act.

(“the Complaint”)

COMMISSIONER’S POLICY ON THE COMPLAINT PROCESS

7. As in all complaint investigations, both the applicant and the public body are advised at the outset of the Commissioner’s Policy on the Complaint Process. That process is designed to respect the law, to encourage both cooperation and transparency, all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the *Act*. This approach is based on the notion that it is preferable for all parties concerned to resolve complaints informally, and for all parties to become more familiar with their rights and obligations under the new legislation. Educating the public about the application of this law is an important part of the mandate of this Office.
8. Accordingly, our Office first seeks to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations set out in the *Act*. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner’s work is the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the *Act*.
9. When this is not possible, the Commissioner concludes her work with a formal investigation and publishes her Report of Findings (*Note*: A full description of the steps involved in the Commissioner’s informal resolution process can be found in **Appendix A** of this Report).

INFORMAL RESOLUTION PROCESS

10. Our initial step in this case was to review the Request, the Response, and the comments made by the Applicant in the Complaint. We then met with the Department’s officials and

reviewed the Complaint, and we also reviewed the single relevant record in this case, i.e., the audit report.

11. We learned of the context in which the workplace assessment was conducted. Concerns were brought forward to the Department by employees of the district office where the Applicant worked. Before determining how to proceed, the Department reviewed the *Workplace Harassment Policy* established by the Government of New Brunswick, and in accordance with that process, hired an outside consultant to look into these concerns. The consultant's mandate was to assess the overall morale of the district office in question, address the specific concerns brought forward, and finally, provide recommendations on how best to improve the workplace. The consultant's work was finalized in a report entitled "*Workplace Audit Report*".
12. As indicated above, the Applicant was permitted to examine the audit report on two occasions prior to making the Request. From our investigation of the ensuing Complaint, we understand that the Department did not permit the Applicant to see the section of the audit report containing the consultant's recommendations; otherwise, access to the audit report was provided.
13. In accordance with our informal resolution process, we submitted our preliminary findings to the Applicant in June of 2012 explaining how the Department's Response appeared satisfactory based on our investigation to date. We invited the Applicant to provide us further comments as to why the Response was believed to be inadequate.
14. The Applicant submitted well thought-out comments and explained why there was disagreement with our findings that the Department's Response was proper. The Applicant maintained that a copy of the audit report should be disclosed.
15. Having reviewed the Applicant's comments thoroughly, we came to the conclusion that our preliminary findings remained unchanged. This meant that the informal resolution process would not be successful.
16. As a result, we proceeded to complete the investigation of this matter, which included a full review of the Request, the Response, the Complaint, the Applicant's comments, and a comprehensive analysis of the law to demonstrate the basis upon which we found the Department's Response to be lawful in this case.

LAW AND ANALYSIS

Review of compliance of the Response

17. The Department explained to us that the refusal to provide access in this case was only in regards to providing the Applicant a copy of the audit report, and that the refusal to do so was based on the Department's view that the audit report in fact constituted a personnel investigation. Considering the audit report to be the result of a personnel investigation directed the Department to rely on subsection 20(1) of the *Act* which is an exception to disclosure in relation to personnel investigations, and further directed the Department to refuse to disclose a copy of this record to the Applicant that had been requested.
18. The audit report was entitled "audit" although the Department insisted it was in fact the result of a personnel investigation. It therefore became essential that we determine the exact nature of the audit report. This was an important determination given the Applicant's query as to why an audit report would be the subject of the exception found in subsection 20(1) that deals with personnel investigations.
19. We asked the Department to clarify why the report had been referred to as an audit rather than of a personnel investigation report. According to the Department, that terminology was suggested by the consultant, in discussion with the Department. The Department wanted to improve its workplace given the concerns brought forth by the employees with outside advice. The consultant remarked to the Department that when having to examine issues found in a workplace setting, full participation of employees is enhanced when referring to the consultant's work as that of an audit rather than of an investigation. In this fashion, employees are less apprehensive when asked to be interviewed and are more prepared to speak openly about their concerns, and the consultant is able to carry out the workplace assessment with fewer objections or hesitations. The Department agreed.
20. Consequently, the decision to entitle the record as the *Workplace Audit Report* came about as the result of the Department's intent to investigate the concerns of its personnel but with a view to ensure full participation of all employees by referring to the investigation as an audit rather than a personnel investigation.
21. The Department agreed with us, however, that the term used to refer to the report as an "audit" instead of "investigation" was confusing. The Department's position was nevertheless that it had intended and did investigate the concerns of its personnel, and

that it was for this reason that the Department refused to provide a copy of the record to the Applicant.

22. In applying the exception to disclosure found in subsection 20(1), the Department viewed the audit report as constituting a “record or a substance of such a record made by an investigator that provides advice or recommendations in relation to a harassment or personnel investigation” such as contemplated by that provision:

20(1) The head of a public body shall refuse to disclose information to an applicant that would reveal

- (a) the substance of records made by an investigator providing advice or recommendations of the investigator in relation to a harassment investigation or a personnel investigation,
- (b) the substance of other records relating to the harassment investigation or the personnel investigation, (...)

Audit versus Investigation

23. We had to determine whether the audit report was indeed the result of an investigation into personnel matters as indicated by the Department, particularly in order to establish whether the Department could rely on the mandatory exception to disclosure found in subsection 20(1).
24. The Department produced the audit report for our review. It showed the usual parameters required for the assessment of a workplace, including on-site visits by the consultant, interviews conducted with employees, summary of the facts obtained, and an analysis addressing the concerns raised by the personnel with recommendations.

Subsection 20(1) exception – information found in reports of investigation

25. Given these facts, we found that the audit report indeed constituted a record produced by an investigator (consultant) in regards to personnel with recommendations. This type of record would attract the protection of privacy through the mandatory exception to disclosure under subsection 20(1), and in particular, paragraph (a):

(...) the substance of records made by an investigator providing advice or recommendations of the investigator in relation to a harassment investigation or a personnel investigation.

26. The premise behind subsection 20(1) is to afford a certain degree of comfort that a personnel investigation will be carried out in such a way for employees to feel free in coming forward with their concerns without fear of reprisal. To have it any other way would prevent an investigator from getting at the truth of the matter which is essential to a proper assessment of the issues afflicting a workplace. It follows that in order to obtain frank discovery of the facts, those who participate in the investigation are assured that their comments, views, and opinions remain confidential.
27. The opinions expressed by those consulted during a personnel investigation are defined as their personal information, and access to one's own personal information is a right afforded by the *Act*. Views obtained in this context, however, can also constitute the personal information of others when these opinions concern others. This is the reason why the *Act* qualifies the right of access to one's personal information by imposing a protection regarding the privacy of another. In other words, protecting the privacy of the other person to whom the opinion relates. Technically speaking, the information belongs to both, and the right to access one's personal information in such cases is qualified relative to the privacy of another. The Department had this in mind when considering its Response in this case.
28. The audit report contained excerpts of statements made by employees obtained during their interviews with the consultant. That information constituted information which would reveal the substance of other records relating to the personnel investigation, i.e., notes of the confidential interviews held with the consultant. These records are those contemplated in paragraph 20(1)(b) which refers to "other records relating to the personnel investigation" that are also protected from disclosure.
29. In the final analysis, the subsection 20(1) exception found in both paragraphs (a) and (b), in our view, are applicable to the present case as a lawful refusal to provide access to the audit report to the Applicant and the Department was correct in providing a Response in which it relied upon paragraph 20(1)(a) and (b).
30. The matter does not end there, however, due to the fact that subsection 20(1) carries an exception to the exception set out in subsection 20(2). We believe that by providing access to the records through examination, the Department applied subsection (2), and did so properly. We discuss this below.

Applicant's access to personal information in the audit report

31. The Department recognized that the audit report contained a number of comments and opinions about the Applicant and that this type of information falls within the definition of “personal information” under the *Act*, thus information which belongs to the Applicant.
32. In that regard, the Applicant would be entitled to access this information. The Department respected that right and provided access to this information prior to the access request process. Access to the personal information belonging to the Applicant took place when the Applicant was allowed to view the contents of the audit report on two occasions and allowed to make notes from it, except for access to the portion of the audit report containing the consultant's recommendations. The Department's refusal to grant access to the record, including to personal information, was only in regards to providing a copy of the audit report to the Applicant.
33. This issue brought us to discuss with the Department the rules regarding an individual's right of access to a personnel investigative report in the exception to the mandatory exception:

20(2) The head of a public body may disclose to the applicant who is a party to the harassment investigation or personnel investigation the information referred to in paragraphs (1)(b) and (c) by allowing the applicant to examine the records, but the head may refuse to provide the applicant copies of the record.
34. While subsection 20(1) makes it mandatory for the non-release of such a personnel investigation report, the *Act* recognizes the importance of providing access to those who have been privy to such an investigation and grants the public body the discretion to allow those individuals the opportunity to see the report, to examine it, and in some cases, to be given a copy. The decision remains with the head of the public body on whether this access will take place.
35. There is a central distinction between a mandatory exception and a discretionary one, the former not requiring the head to make any further considerations because it is bound by the law to withhold the requested information. In the case of a discretionary exception, however, the head of the public body is required to take an additional step, that of considering whether to release or to withhold the information notwithstanding the exception. The fact that requested information falls within the scope of a discretionary

exception does not automatically create a blanket exception to disclosure. In keeping with the spirit and intent of the *Act*, the head of a public body should, wherever possible, exercise his or her discretion in favour of disclosure of as much information as permissible.

36. Such an approach is consistent with the principle enunciated by the Supreme Court of Canada that the “overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process” (see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358, [1997] 2 S.C.R. 403).
37. Accordingly, as the legislation provides oversight of these decisions, the head must be able to establish how the discretion was exercised and whether it was appropriate in the circumstances. The head must consider all factors relevant at the time the request for information was made because the head must have compelling reasons to refuse access to the requested information. During our investigation of a complaint for refusal of access based on a discretionary exception, we look into whether the decision of the head in refusing access was reasonable in light of the particular circumstances of the case. This will involve a review of the factors identified by the head as relevant considerations, as well as how the head assessed these factors in light of the overall purpose of the *Act* to provide access in light of the specific wording of the exception and the interests the exception attempts to balance. The onus remains on the head of the public body to show why the applicant has no right of access to the requested information. As long as that discretion is exercised properly, it will be upheld upon review, whether the final decision was to grant or not to grant access.

Exercise of discretion in the present case

38. In the present Complaint, the audit report which constitutes a personnel investigation report is a protected record. It cannot be released as per the subsection 20(1) mandatory rule for non-disclosure. An exception to this mandatory exception to disclosure rule is to permit the head of the Department to exercise discretion and arrive at a decision whether to allow access to the protected record for those who were involved in the personnel investigation.
39. We found that in this case, the head of the Department, the Minister, did exercise his discretion properly.

40. The audit report is important to the Applicant who was involved in the process and it is equally important for all other employees who also participated in the workplace assessment and like the Applicant, provided their views and opinions to the consultant.
41. As stated above, opinions are defined as personal information, but these views can also constitute the personal information of others when they concern others. The *Act* qualifies the right of access to one's personal information by imposing a protection of the privacy of another where the information belongs to both.
42. Providing access to the record to the Applicant who had been involved in the investigation, both through examination or releasing a copy, was considered by the Head and was acted upon.
43. Releasing a copy of the audit report, i.e. a report of a personnel investigation, however, does not lend itself to the real purpose behind the report: for the Department to collect frank and honest views from its employees on the issues plaguing a workplace without fear of reprisal, and to seek advice on how best to address these concerns. Section 20, through the application of both its subsections (1) and (2), is designed to protect information derived from investigations while allowing some access to those who have been involved in the process.
44. Our review of the discretionary decision to refuse to provide the Applicant a copy of the record showed that the Department and its Minister considered providing access to the Applicant for relevant considerations, those normally akin to the employment context, and not for any other irrelevant considerations. The Department considered providing access in light of the overall purpose of the *Act* to grant access to personal information as well as in light of the specific wording of the interests found in section 20 which attempts to balance both access and protection of privacy.
45. We found no evidence to show that the decision in not releasing a copy of the audit report to the Applicant was one other than that intended to protect the integrity of the personnel investigation, to respect the confidentiality of those employees who were interviewed, and to address the specific concerns and the overall assessment of that particular workplace. In other words, the discretionary decision was not based on any other non-relevant purpose other than those found in this employment context.
46. The Department met the onus to show why the Applicant could not receive access to a copy of the audit report and that the Minister's discretion was exercised properly. In this

regard, we find that the Department's discretionary decision to allow access to the audit report by examination as well as the decision to refuse to provide a copy were made in accordance with subsection 20(2) of the *Act*.

Applicant's comments

47. The Applicant disagreed with our findings being of the view that this case represents one in which a public body has the right to withhold information even to the extent of trumping an individual's right to access one's own personal information.
48. The principal argument brought forth by the Applicant was that the exception found in section 20 did not apply to the audit report as the rights of an applicant to access personal information held by public bodies supersedes any exception found under the *Act*. The Applicant believes section 2, setting out the purposes of the *Act*, as well as section 7, one's right to request and receive information, are provisions which both allow the disclosure of the audit report.
49. The Applicant argues that section 2 distinguishes between provisions which are "subject to the limited and specific exceptions" when it involves personal rather than information held by a public body:

*Section 2(a) and 2(c) individually state "**subject to the limited and specific exceptions set out in the Act**". These indeed are **specific** exceptions to the stated purpose and not elusive, general or confusing ones. They are exemptions that are **specific** to their respective purpose and not transferrable to other purposes. There is no evidence that the exemptions for 2(a) and 2(c) are the same or that the exemptions for 2(a) can be applied to 2(c), in fact, the Act makes it clear that they are not since it states that the exemptions are **specific** to each purpose.*

(Emphasis is that of the Applicant)

50. This argument raised the question as to whether the *Act* provides to an individual unfettered right of access to his or her personal information when such information is contained in records held by a public body despite any exceptions to disclosure that may also apply.

Access rights under the Act

51. The relevant portions of the *Act's* purposes are set out below:

- 2 The purposes of this Act are
 - (a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act,
 - (b) (...)
 - (c) to allow individuals a right of access to records containing personal information about themselves in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act

52. The Applicant is of the view that exceptions under the *Act* are applicable to either information found in records held by public bodies or to personal information, but not both. The Applicant further argues that paragraph 7(2) of the *Act* provides an unlimited right to request and receive personal information about oneself. According to the Applicant, subsection 7(2) does not explicitly state that a request for personal information is subject to the specific and limited exceptions found in the *Act* or in other words, that subsection 7(2) does not specifically say there are exceptions which limit an individual's right to his or her personal information.

53. The Applicant further advances that subsection 7(3) only applies in the context of subsection 7(1), meaning information about that public body's business, and not an applicant's own personal information as per subsection 7(2). The Applicant submits that it does not make sense that a public body would sever an applicant's own personal information, and that in fact, an applicant has an unconditional right of access to that information.

54. Respectfully, we do not believe this to be the case.

55. Section 2 sets out a definitive intent of the legislation to provide members of the public access to records held by public bodies, including records containing personal information about them. In both cases, however, the *Act* has set rules which may limit such access (i.e., "*subject to the limited and specific exceptions set out in this Act*"). This provision is found in both paragraphs 2(a) and 2(c).

56. We take away from a reading of both paragraph 2(a) and 2(c) that the *Act* intends to grant rights of access to both general and personal information found in records held by public bodies, but that those rights are not absolute in either case.

57. The interpretation of section 7 remains the key to this larger question, as it is section 7 that grants an express right of access to information under the *Act*, not section 2. With this in mind, we examine the actual grant of rights found in section 7. Section 7 states the following:

7(1) Subject to this Act, every person is entitled to request and receive information relating to the public business of a public body, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any public body to which this Act applies.

7(2) Without limiting subsection (1), every individual is entitled to request and receive information about himself or herself.

7(3) The right to request and receive information under subsection (1) does not extend to information that is excepted from disclosure under Division B or C of this Part, but if that information can reasonably be severed from the record, an applicant has a right to request and receive information from the remainder of the record.

58. Upon close examination of this provision, we see that section 7 has been constructed in such a way as to set out an individual's right of access to information in three ways:

a) subsection 1 provides the right to receive information relating to the affairs of a public body;

b) subsection 2 provides the right to request and receive one's personal information, with a proviso; and,

c) subsection 3 outlines a specific process for exceptions to disclosure for **information** referred to in **subsection 1**, which is information relating to the affairs of a public body - not personal information.

59. The provision found in subsection 7(2) admittedly can lead to confusion; however, we do not believe that it is ambiguous. It states that an individual has a right of access to one's personal information "without limiting subsection (1)". We therefore link this provision to subsection 7(1) and interpret how they interplay.

60. Subsection 7(1) begins with "Subject to this *Act*", before going on to grant a right of access to information found in records held by public bodies. This means that the right of access

is subject to other rules regarding access found in the remainder of the *Act*, or in other words, that the right of access is not absolute as it is subject to other provisions found in the statute.

61. The expression “without limiting ...” on its face simply means without restricting, without diminishing, or without affecting. In other words, subsection 7(2) can be read as saying:

Without limiting, restricting or affecting subsection (1), every individual is entitled to request and receive information about himself or herself.

62. Then, we insert the above expansive meaning of subsection 7(1) to give a more complete interpretation of subsection 7(2) as so:

Without limiting, restricting or affecting the right that every person is entitled to request and receive information relating to the business of a public body, which right is subject to other rules found in the Act, every individual is entitled to request and receive information about himself or herself.

63. As indicated above, the *Act* intends to grant a right of access to general information and to personal information held by public bodies, neither of which is absolute. The underlying reason for this is that the purpose of the legislation not only allows individuals access to information but it also protects their personal information and other sensitive information.
64. When it concerns personal information, exceptions provided in the *Act* seek to maintain a balance between access rights and the protection of privacy.
65. We do not interpret section 7 to mean that an individual’s right to access personal information trumps an exception to disclosure permitting a public body from withholding information. Neither right trumps the other; these rights work in tandem.
66. We, like the Applicant, encourage and promote the true spirit of the legislation in New Brunswick which is that information held by a public body should generally be considered available. In that regard, public bodies should no longer look to hide information from the public only to release when legislatively mandated to do so, and must be prepared to make information public, unless otherwise directed by limited and specific exceptions found in the *Act*. We must nevertheless recognize the undeniable fact that the *Act* has authorized certain exceptions to this fundamental access to information.

67. The Applicant has framed this Complaint in terms of an individual's right to one's personal information in opposition to "*the public body's right to fail to disclose the information*". We do not perceive this to be the case. The Applicant was granted access to all the personal information contained in the audit report, not once but on two occasions, and was given the opportunity to make notes from the report. The right to access the Applicant's personal information was respected in this case.

COMMISSIONER'S FINDINGS

68. In the present Complaint, we find that the Department's audit report is indeed a personnel investigation: it constitutes the results of an investigation carried out by an outside consultant to assess employees' concerns in the workplace of a district office, and the audit report contained advice in the form of recommendations for the Department's consideration.

69. In that regard, the audit report is the subject of the protection as found in the section 20 exception to disclosure of the *Act*. We find that this provision was applicable and could be considered when the Department rendered a decision regarding access to the record. We find that the Department properly relied upon subsection 20(1) in refusing to provide a copy of the audit report to the Applicant.

70. The Department met the onus to show why the Applicant could not receive access to a copy of the audit report and that the Minister's discretion was exercised properly as it was based on relevant considerations. We find that the Department's discretionary decision to allow access to the audit report by examination as well as the decision to refuse to provide a copy were made in accordance with subsection 20(2) of the *Act*.

71. We find, however, that the format of the Department's Response in not explaining why access was refused was neither helpful nor compliant. Discussions with the Department's officials in this regard have assured us that this approach will be remedied in future access request cases. Nevertheless, we are satisfied that the Department provided a full response to the Applicant's Request that is in accordance with its obligations under the *Act*.

72. We respectfully disagree with the Applicant's assertions that there exists under the *Act* an unlimited right of access to one's own personal information. The *Act* grants a right of access to general information and to personal information held by public bodies, neither of which is absolute. The legislation seeks to maintain a balance between access rights and the protection of privacy. We do not interpret section 7 to mean that an individual's right

to access personal information trumps an exception to disclosure permitting a public body to withhold information. Neither right trumps the other; these rights work in tandem.

73. Having said this, the Applicant's right of access to personal information was respected in this case when access to personal information contained in the audit report as well as access to the remainder of the audit report (apart from the recommendations) was provided. The Applicant examined the audit report on two occasions with the ability to make notes from it.

74. Based on all of the foregoing, including our analysis provided above, it is not necessary to make a recommendation in this matter.

Dated at Fredericton, New Brunswick, this _____ day of September, 2012.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2012-752-AP-381

Date: September 26, 2012

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

“Complaint Process”