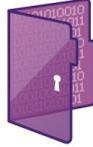


Office of the Access
to Information and
Privacy Commissioner

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: 2012-671-AP-339

Date: December 14, 2012

Case about access to information regarding a road condition

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 this Office on January 24, 2012.
2. The present complaint matter concerns a request for access to information made by the Applicant to the Department of Transportation ("the Department") on October 4, 2011 for all relevant records from January 1, 1990 to the date of the Request (for a period of 21 years) concerning this subject matter:

We would ask you to provide us with a copy of any information relating to the design, upkeep, inspection and maintenance of Route 116 between Minto and the Harcourt Road. ("the Request")

3. We understand that the Department did not have discussions with the Applicant and proceeded to process the Request.
4. By letter dated November 17, 2011 received by the Applicant on November 23, 2011, the Minister responded to the Request and advised that the Request had been processed and the information was ready for the Applicant. The Minister also advised the Applicant of the following:

With respect to the documentation obtained in our department, some parts were severed based on the exemptions outlined in Section 21(1) of the *Act* indicated below:

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

5. There was no other explanation provided for the redactions in the records released.
6. The Applicant filed a complaint through the Applicant's solicitor dated January 5, 2012 which we received January 24, 2012, stating that the Department of Transportation and Infrastructure has failed to answer the request dated October 4, 2011 by withholding certain information contained in the documents. ("the Complaint")

COMMISSIONER'S COMPLAINT PROCESS

7. 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*.
8. 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.
9. 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*.
10. 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.*)

INFORMAL RESOLUTION IN THIS CASE

11. The initial steps undertaken to informally resolve this Complaint were to review both the Request and the Department's Response, and determine whether the Response met the requirements of the *Act*. In doing so, we met with officials from the Department a few times between February and April 2012 and conducted a thorough review of the relevant records.
12. During our discussions with the Department, we examined how the information had been gathered to respond to the Request. The Department sent a memo to one of its District Offices it knew had records relevant to the Request regarding that particular highway road. This memo should have been sufficient to permit the identification of all the relevant records held by that District Office; however, when we reviewed the memo, we

noted its wording may have caused some ambiguity in relation to the scope of the Request, i.e., its timeline of 21 years. We believed this might have had an effect on the identification of all relevant records for the entire period covered by the Request.

13. The Department indeed confirmed that the District Office in question had searched for records for a few years previous to the Request.
14. Another issued was regarding the manner in which some relevant records were copied before their preparation and disclosure to the Applicant. Some records which had been reduced in size to permit photocopying (ex. legal size format to letter size) to aid in their filing. When it came to photocopying these photocopies, however, we noted that some information was missing in the margins of some pages, such that relevant information had been unintentionally cut off when photocopied. As a result, we asked the Department to locate the original whole records so that it could be reviewed and re-photocopies to provide the information inadvertently severed, and the Department was able to do so.
15. We also noticed that records relating to certain maintenance inspections for the highway road in question, specifically those dealing with inspection of culverts, only dated back to the year 2007. The Department was able to explain it was only as a result of an incident involving a culvert that it began an inspection program for all large culverts on the Province's roads in 2007. For that reason, records relevant to the highway road in question in regards to culvert inspection existed only from that date forward.
16. Our review of the relevant records released to the Applicant showed that the only information withheld were redactions of personal information:
 - a) the Department's own employees identifying numbers;
 - b) the Department's employees leave information; and,
 - c) the business information belonging to third parties, i.e., vendors of goods and services to the Department, i.e., hourly rates and unit costs prices.
17. As per our review and findings, we invited the Department to provide a revised response to the Applicant as part of our informal resolution process. The revised response would have to consider the additional records which were identified during our investigation, the information missing from the incorrect photocopying of records released, and our comments regarding the redactions.

18. The revised response process gives a public body a “second chance” to provide an applicant with a proper response to a request under the *Act*. In this case, the Department agreed to proceed in that fashion.

REVISED RESPONSE

19. On May 17, 2012, the Department provided the Applicant with a revised response to the Request, which included the additional information it had uncovered during our review. The revised response was approved by our Office to be in conformity with the *Act*, namely it comprises the information to which the Applicant was entitled to receive.
20. More importantly, we indicated to the Department to provide explanations for the lawful redactions of information. In all cases we focus a great deal on the issue of responding to a request in a manner explains to an applicant what he or she is entitled to receive with reasons why some information is withheld from the applicant. To its credit, the Department acknowledged this approach to be in line with the true meaning of access to information under the *Act*. Accordingly, it submitted to the Applicant a revised response that also provided all the required explanations regarding the redactions made to records released (“the Revised Response”).
21. Due to extenuating circumstances to no fault of either party, we did not receive input from the Applicant regarding the Revised Response until October 9, 2012.
22. The Applicant indicated that the Revised Response did not provide all of the information relevant to the Request. We came to learn that meanwhile, the Applicant had submitted a second request in relation to the same subject matter to the Department for specific information, and, it was in considering the second request that the Applicant was unable to accept the Revised Response regarding the first request.
23. We were unable to have agreement on the resolution regarding the first Request, and as per our complaint process, the Complaint could only be resolved if the Revised Response was satisfactory to the Applicant. Consequently, this brought the informal resolution process to an end, and we converted the matter to a formal investigation. This had the effect of allowing a final thorough review of the matter to ensure that all aspect of the Request had been properly addressed in this case. The present Report of Findings therefore followed.

LAW AND ANALYSIS

Duty to assist

24. When an applicant makes a request to any public body, there is an obligation on the public body to assist an applicant in a reasonable manner. This obligation is outlined under section 9 of the *Act* and reads:

The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

25. In the present matter, the Department received what is considered a very broad Request, for records spanning over 20 years.
26. During our review, we came to understand that the Department read the Request in its plain meaning and construct and was able to identify generally which records were relevant. It did, however, question whether the Applicant was seeking something in particular given the breadth of the inquiry, but it did not act on this question.
27. In such cases, we believe it is a good thing for any public body to contact the applicant and have a discussion in regards to a request. The benefits of doing so are twofold: first, it allows the public body and the applicant to work collaboratively in having the request processed and a response provided on time; second, it will permit the ensuing discussion between the parties to ascertain specific subject areas of information sought (perhaps with a view to narrowing the scope of a large request) or even reach agreement on the issuance of partial responses during a period of time in cases of large requests.
28. We have had these discussions with the Department's officials who agreed that the duty to assist obligation can be a very useful way to bring about a satisfactory processing of requests, and it intends on doing so in the future.
29. We do not find that the Department failed in its duty to assist in this matter, but we believe it could have benefitted from speaking with the Applicant in this case.

Contents of the Response

30. The Applicant requested “all information” about Route 116 between Minto and the Harcourt Road relating to its design, upkeep, inspection and maintenance. In its Response, the Department indicated that it was providing access to most of the requested information, with the exception of some information redacted as a result of the exceptions for an unreasonable invasion of a third party’s privacy and disclosure that is harmful to a third party’s business or financial interest in the Act. Although it indicated the sections of the Act that permitted redactions, the Department did not specify what type of information was being redacted from the records. As a result, we do not find that the Department’s response fully complied with the requirements for the contents of a response under section 14.
31. Section 14 of the Act sets out the requirements for the contents of a response to a request as follows:
- 14(1) In a response..., the head of the public body shall inform the applicant*
- (a) as to whether access to the record or part of the record is granted or refused...*
- (...)*
- (c) if access to the record or part of the record is refused,*
- (i) in the case of a record that does not exist or cannot be located, the record does not exist or cannot be located;*
- (ii) in the case of a record that exists and can be located, of the reasons for the refusal and the specific provision of this Act on which the refusal is based;*
- (iii) of the title and business telephone number of an officer or employee of the public body who can answer the applicant’s questions about the refusal; and*
- (iv) that the applicant has the right to file a complaint with the Commissioner about the refusal or to refer the matter to a judge of The Court of Queen’s Bench of New Brunswick for review.*
32. Paragraph 14(1)(a) refers to a record or part of a record, not to the request for information as a whole. As a result, simply stating whether access is being granted and identifying the exception to disclosure, if applicable, is not sufficient to satisfy the requirements set forth by the Act.

33. A response must always identify the records, name the specific exception to disclosure if access to any of the requested information is being refused, and provide a brief explanation as to why the specified exception applies. It is not sufficient to simply restate the wording of the exception in the *Act* as a reason for refusal. Subparagraph 14(1)(c)(ii) of the *Act* outlines the need to explain the reason for refusal of each record while identifying each corresponding section of the *Act*. To this end, we encourage public bodies to consider preparing an index of records when responding to requests for information.
34. The index of records should:
- identify each relevant record or category of relevant records;
 - include a brief description of the nature of the information contained in the record;
 - state whether access to all or part of the record is being granted or refused; and,
 - provide reasons why access to any information is being refused in accordance with specific relevant provisions of the *Act*.
35. Setting out a response in this manner will help an applicant better understand what information is being withheld and why. This will hopefully lead to fewer complaints regarding right to information requests.
36. While the Response in this case was not sufficient as it did not include all of the contents set out in section 14 of the *Act*, the Revised Response did fulfill all of these obligations and the Department properly identified all relevant records and explained why certain information was withheld.
37. We are confident that the Department has properly followed its obligations regarding the contents of a response under the *Act* and understands the process to providing a proper response in the future.

Adequate search of records

38. Adequate search of records was the main issue in this case. The Department had to gather information from different offices, including from the District Office responsible for the stretch of highway referred to in the Request. We know from the facts of this case that in communicating the subject matter of the request to the District Office in a memo, the Department missed a crucial aspect of the request, its scope of some 21 years. This

span of several years was miscommunicated and resulted in an inadequate search for records relevant to the Request.

39. Although the Department was quick to acknowledge this error and proceeded to search and prepare these additional records as part of the Revised Response, we must point out that it can be risky to communicate a request to other divisions within an organization or outside offices by first interpreting what the request signifies. This can and does lead to errors in processing the request by everyone concerned in the same fashion, and this is what occurred in this case.
40. We suggest that communicating a request to other divisions within an organization or outside offices should be done by simply photocopying the request itself to avoid any confusing as to its wording and its scope such that everyone involved in the search for relevant records is working from the same document.
41. Also as we mentioned above, when a public body identifies relevant records, it must ensure that the records appear complete as per their original format to ensure. In this matter, the Department provided records that were incorrectly photocopied thereby removing parts of the information in error. This was corrected when new copies of the originals were made and provided with proper redactions to the Applicant as part of the Revised Response.
42. With the extra efforts undertaken in this case to identify additional records, we are satisfied that the Department performed an adequate search for the records relevant to the Request in the matter.

Unreasonable invasion of third party's privacy

43. In responding to the Request, the Department withheld certain information on the basis it would result in an unreasonable invasion of third party's privacy: personal information consisting of employee numbers and employee leave, and third party business information.
44. While the *Act* in section 21 sets out a mandatory exception to disclosure of private information which would constitute an unreasonable invasion of a third party's privacy if released, it also deems in certain instances where the disclosure of some types of personal information will not be such an intrusion.

45. In this case, the Department redacted :
- a) the Department's own employees identifying numbers;
 - b) the Department's employees leave information; and,
 - c) the business information belonging to third parties, i.e., vendors of goods and services to the Department. This was hourly rates and unit costs prices.
46. We agree that the employee numbers of employees of the Department and their leave information are proper redactions as they represent on the one part, unique identifying details and personal leave information for human resources' employment purposes. This type of personal information is not deemed to be that which can be released, as opposed to that regarding the name of the employee, his or her position and salary range which are types of personal information which are.
47. We find that the Department properly applied section 21 when it comes to the release of personal information that could be an unreasonable invasion of privacy.
48. As for the redactions concerning the business information belonging to vendors, the Department withheld vendor hourly rates and unit costs prices, and we agree that such financial information if released can be harmful to a third party's business interest as set out in the mandatory exception to disclosure found in subsection 22(1). Hourly rates and unit costs prices are carefully guarded and often mean a competitive edge in any bidding proceed for contract work. Release of such financial information could lead to the loss of business opportunities if they are published to the public, and thus, to other competitors.
49. We find that the Department properly followed its obligations under the *Act* when it decided to withhold this information under subsection 22(1) in this case.

When Applicant not satisfied with Revised response

50. When asked to provide input to the Revised Response in this case, the Applicant was unsure as to whether the information provided by the Department would be able to answer the specific questions raised in the second request. We understand that while the two requests are related, the Revised Response was uniquely structured to answer the first Request in accordance with the *Act*. In doing so, the Department specifically identified additional records being provided to the Applicant, including types of documents, reasons why they were not originally provided, and explanations regarding all

redactions. Having assessed the Department's Revised Response as it applies to the Applicant's Request, we are confident that it fully responds and in conformity with the Act.

51. We do wish to add that while the Applicant may not be satisfied with the Revised Response, nothing was presented to us to change our view that it lawfully answers the Request.
52. It is also important to recognize that our Office is not responsible for responding to requests for information; rather, we have structured the complaint process in such a way as to enable a satisfactory resolution of the matter by assisting the public body in providing a response which it ought to have provided in the first place.
53. Accordingly, during this complaint investigation, we reviewed the Department's actions in relation to its processing of the Applicant's Request and we assisted the Department in providing a Revised Response that answered the Request fully. By doing so, however, we did not become the conduit for access to information in related but separate requests.

FINDINGS

54. Based on our investigation of the Complaint, we find the following:
 - a) After having provided the Applicant a Revised Response in this case, we are satisfied that the Department identified all of the relevant documents in its possession, and that it provided to the Applicant all of the relevant information related to the Request; and,
 - b) The information withheld by the Department was properly withheld under sections 21 and 22 of the Act.
55. Consequently, there is no need to issue recommendations in this matter.

Dated at Fredericton, New Brunswick, this ____ day of December, 2012.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 2012-671-AP-339

December 14, 2012

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

“Complaint Process”

Fredericton, New Brunswick
Revised April 2012

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 website (www.info-priv.nb.ca).

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*.