REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-992-AP-501

Date July 2, 2013

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

Case about failure to provide a response and the decision to refuse access to information based on another legislation

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 two Complaints filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into these matters. The Complaints concern the Department of Environment and Local Government ("the Department").

2. A request for access to information was made to the Department on May 24, 2012 in which the Applicant sought records in relation to the environmental conditions of a former, privately-owned cement plant pursuant to an Environmental Impact Assessment ("the Request"). The information the Applicant sought varied from copies of: summary tables detailing compliance status submitted to the Department; reports pertaining to Archaeological Services; records regarding the decommissioning of water supply wells and unused monitoring wells; further assessments; remediation measures; site specific environmental protection plans; monitoring well data and reports; PCB, refrigerant and Halon audits; and all correspondence between the Department and the proponent who submitted the Environmental Impact Assessment.

3. The *Environmental Impact Assessment Regulation* is designed to identify the environmental impact associated with proposed development in advance of its implementation so that such impact can be avoided or reduced. Under the *Regulation*, proponents of the projects are required to register with the Department information about the proposal at an early stage in the planning process.

4. By July 26, 2012, some 64 days after having made the Request, the Applicant asked the Department, in writing, to acknowledge receipt of and to be advised of the status of the Request as no Response had yet been received. There is no indication from our investigation of this matter that the Department replied to the Applicant's letter.

5. On August 23, 2012, the Applicant filed a complaint with our Office on the basis that the Department had failed to provide a response.

6. We began our investigation in October of 2012 by meeting with the Department's officials who informed us at that time that a response had been sent to the Applicant after the Complaint was filed, namely on September 11, 2012.

7. The Department's Response provided some access to the Applicant but the Department also had withheld some information as follows:

> (…) A search of departmental files has produced the attached documentation. Please be advised that documents have been severed in accordance with section 6 of the Potable Water Regulation-*Clean Water Act* and subsection 21(1) of the *Right to Information and Protection of Privacy Act*; therefore, I am enclosing herewith, the necessary forms for a review under the *Act*.
>
> (the "Response")

8. On October 30, 2012, the Applicant filed another Complaint with our Office in relation to the content of the Response, namely the redactions of certain information from the records received with the Response. This second Complaint challenged the Department's reliance on the exception of privacy found in subsection 21(1) of the *Act* and section 6 of the *Potable Water Regulation – Clean Water Act* to prevent access to the requested information.

9. As both of the Applicant's two Complaints stemmed from the same Request, we continued our investigation to address both matters at the same time and we also file the present Report of findings in relation to both Complaints.

LAW AND ANALYSIS

10. The first Complaint was in relation to the Department's failure to provide a response to the Applicant within the statutory time limit for doing so, and the second, the Department's decision to withhold certain information on the basis of privacy, specifically, names of individuals and test results of well water found in these relevant records.

11. Our investigation therefore called for the examination of:

- the reasons for the failure to provide a timely response and the Department's duty to assist the Applicant in this case;
- whether the Department conducted an adequate search for the relevant records;
- whether the Department's Response issued on September 11, 2012 was in conformity with the *Act*; and,
- the Department's decision to withhold certain information on the basis of privacy or the provisions of a *Regulation* of the *Clean Water Act*.

Duty to respond within statutory time limits

12. The first matter that must be addressed in this Report is the Department's lack of timeliness in providing a response to the Applicant. The *Act* grants an applicant a right to access information held by a public body and it is the public body's statutory obligation to respond to such in a timely manner. Specifically, subsection 11(1) of the *Act* requires the head of a public body to respond to a request within 30 days after receiving it.

13. While a public body has an initial time limit of 30 days to respond to an access request, the *Act* has recognized that there may be specific circumstances where it is not possible to search, review and prepare the requested documents for disclosure within that timeframe. In those specific cases, as set out under subsection 11(3), the public body may self-extend the time limit for an additional 30 days. A public body, however, can only self-extend the time limit if one or more of the following scenarios apply, as enumerated in subsection 11(3):

> (a) the applicant does not give enough detail to enable the public body to identify a requested record,
> (b) the applicant does not respond to a request for clarification by the head of the public body as soon as practicable,
> (c) a large number of records is requested or must be searched or responding within the time period set out in subsection (1) would interfere unreasonably with the operations of the public body,
> (d) time is needed to notify and receive representations from a third party or to consult with another public body before deciding whether or not to grant access to a record,
> (e) a third party refers the matter to a judge of The Court of Queen's Bench of New Brunswick under subsection 65(1) or files a complaint with the Commissioner under paragraph 67(1)(b), or
> *(f)* the applicant requests records that relate to a proceeding commenced by a Notice of Action or a Notice of Application.

14. Consequently, if the public body reviews the request and believes it would take up to an additional 30 days to respond, the public body is allowed to self-extend if it meets one of the above criteria. If the public body believes that an additional 30 days is not sufficient to process the response, the public body should request a longer time extension from the Commissioner.

15. Should the public body self-extend the time limit under subsection 11(3), a written notice must be sent to the applicant, as a requirement of the *Act*, setting out the reason for the extension, when a response can be expected and that the applicant has a right to complain to the Commissioner's Office about that extension.

16. Subsection 11(4), on the other hand, points a public body to ask the Commissioner for approval to extend the time limit beyond the additional 30 days in special cases.

17. When a response is not provided within the 30-day time limit, this is deemed to be an automatic refusal of the request, thus triggering the applicant's right to complain on the basis of not having received a response on time. This is reflected in subsection 11(2) of the *Act*:

> 11(2) the failure of the head of a public body to respond to a request for access to a record within the 30 day period or any extended period is to be treated as a decision to refuse access to the request.

18. The duty to assist provision found in section 9 further emphasizes the right of timely access by directing the public body to process a request in an expedient and transparent manner:

> 9 The head of a public body shall make every reasonable effort to assist an applicant, <u>without delay</u>, fully and in an open and accurate manner.
> (Emphasis added)

19. The duty to assist provision applies throughout the request process and requires the public body to assist the applicant in receiving a timely, appropriate, and relevant response to his or her request for information. For instance, if a public body knows that it may not be possible to respond to a request within 30 days, every reasonable effort should be made by the public body, as early as possible, to take the appropriate steps to avoid further delays and possible complaints.

20. While we can appreciate there may be valid reasons making it difficult to respond to a request within the 30 day time limit, the duty to assist goes beyond simply providing a response in a timely manner – it also requires a public body to make every reasonable effort to assist an applicant.

21. The Department only provided its Response to the Applicant in September 2012, that is to say, 110 days after having received the Request.

22. The duty to assist in this case included the obligation of the Department to keep the Applicant abreast of the status of the processing of the Request and when the Response was expected. There was no indication that the Department contacted or notified the Applicant that a response was forthcoming, or even as to the status of the matter, despite the Applicant having written to the Department on July 26, 2012, asking the Department to acknowledge receipt of the Request and to be advised of the progress being made.

23. During our investigation, the Department's officials informed our Office that they were aware of the time extension provisions, and even though they felt that the requested records were voluminous, they could not self-extend as the main reason was due to unexpected staff absences. Absence of staff is not a criterion found in subsection 11(3) of the *Act*.

24. We were also informed that the Department receives a large number of access requests each year (more than 130) and every reasonable effort is made to respond to each request within the 30 day time limit but it is not always possible. One employee is assigned the duties of processing all access requests made to the Department, and this signifies an average of 11 requests per month.

25. This number of requests is a substantial undertaking for only one employee on a full-time basis, and can be particularly overwhelming where the employee is also responsible for other duties outside of processing access requests.

26. Upon further examination, however, we came to understand that a large number of those requests comprise mostly of specific requests for information relating to the environmental condition of particular a site or property. This type of information can be obtained from the Department by means other than through right to information requests process.

27. Individuals wishing to obtain such information relating to environmental conditions of a property can make an Application for Property-Based Environmental Information through Service New Brunswick, for a fee. The Application is then submitted to the Department's Remediation and Material Management Division for processing.

28. We do not understand why the Department chose to treat these Applications in the same manner as requests to information submitted under the *Act* that are processed by a single employee. Choosing to place the burden of all requests to information on a single employee will inevitably lead to a backlog and delays.

29. The *Act* did not intend to replace various procedures already established by government to make certain information or documents available to the public for a fee or free. This is supported by the discretionary exception to disclosure found at paragraph 33(2)(a). This exception is available to public bodies that receive right to information requests for the same information that can be obtained through other means. Paragraph 33(2)(a) allows public bodies to refuse access in such cases and instead, they redirect applicants to the source where the information can be obtained directly (publicly available) or to the form to

be completed and submitted with a specified fee to obtain the information sought, such as in the case of the Applications described above.

30. It is therefore difficult for us to accept that the Department is unable to provide timely access to information for requests filed under the *Act* on the basis of that the Department receives multiple requests each month if some of these requests can be redirected or processed separately by other means.

31. Another factor was raised in this case regarding the amount of time the Department requires to process right to information requests. We understand that the single employee tasked with this duty faces additional challenges within the Department itself. When the employee in question issues an internal call to the appropriate divisions to search, identify, and locate any record relevant to a request for information, staff in these divisions is given a short turnaround time so that all records forwarded to the employee may be reviewed before a determination is made on disclosure. It is our understanding that the turnaround time is not always respected by staff which inevitably delays the entire processing of the request, including delays in issuing a timely response to the applicant.

32. The Department could benefit from an examination into its internal procedures with a view to ensure that all staff support the *Act*'s right of access to information and understand individual role and responsibilities in upholding the *Act*'s rules regarding timeliness. Providing a timely response is a statutory obligation for the Department and its staff, and all involved must respect that obligation.

33. The Department has not established why it could not provide timely access to the Applicant in this case in accordance with its obligations under section 11; therefore, we find that the Department failed to discharge its duty to assist by not providing a timely response to the Request within the time limit provided by the *Act* and by not communicating any possible delays to the Applicant.

Search for relevant records

34. The Request was broken down into eleven categories each relating to the Minister's Determination-Conditions of Approval, and the Department then identified the Community Planning and Environmental Protection Division as the office which had all the relevant records. We reviewed notes in relation to the search conducted and the Division's staff identified the records that were relevant to the categories listed and those that did not exist. We confirmed that only records relating to the reports issued to Archaeologist

Services were not found as for this particular Environmental Impact Assessment, this type of report was not required.

35. We find that the Department conducted an adequate search for all relevant records that related to the Request in this case.

Conformity of the Response

36. In its Response, the Department informed the Applicant that a search of departmental files has produced the attached documentation and that certain information in the records released had been redacted in accordance with section 6 of the Potable Water Regulation-*Clean Water Act* and subsection 21(1) of the *Act*. The Department also enclosed the necessary forms for a review under the *Act*.

37. It is important to mention that in accordance with subsection 14(1), the public body is required to explain its decision thoroughly in its response. The public body must identify all of the relevant records (provide a list), where access to information is refused, to name the specific exception to disclosure and provide a brief explanation as to why the specified exception applies. It is therefore not sufficient to simply restate the wording of the exception in the *Act* as a reason for refusal. By clearly communicating with the applicant as to why access is refused, it is possible a complaint may be avoided. The response must clearly state that the applicant has a right to file a complaint with the Commissioner or to refer the matter to a Judge of the Court of Queen's Bench for review as opposed to simply providing the necessary forms.

38. While in this case the Department did identify all relevant records, including those which did not exist in relation to the categories listed in the Request, and had generated a list of these records, the list was not provided to the Applicant in the Response. Further, the Department did not identify or explain to the Applicant that reports issued to Archaeologists Services were not required in this particular Environmental Impact Assessment so the Applicant was left with wondering why those records were not being released when in fact those records did not exist in this case.

39. Although the Department correctly referred to sections of the *Act* to show the basis upon which it was relying to redact certain information, the Department did not provide explanation as to why these exceptions applied to the redactions, i.e., why the exceptions permitted the Department to bar access to that specific information in this case. These are important aspects of a well drafted response: list all of the information which is relevant, indicate which is released and explain that which is not. The Response, in its entirety, must

be a meaningful answer to the request so that the applicant understands. The last requirement is to inform the applicant properly that if not satisfied, there is a right to challenge the response.

40. Therefore, through its Response in this case, the Department:
    - did not identify all of the existing or non-existing records relevant to the Request by providing a list;
    - did not explain why some records simply did not exist;
    - fell short of providing additional explanation as to why some information was being redacted; and,
    - could have better informed the Applicant of the right to challenge the decision rather than simply providing the appropriate forms.

41. Therefore, we find that the overall format of the Response was not in conformity with subsection 14(1) of the *Act*.

Lawfulness of redactions of relevant information

42. As stated above, the Department released all records relevant to the Request, except that it redacted some of the information contained therein, namely the names of individuals found in correspondence and certain well water test results.

43. Names of individuals were redacted on the basis of subsection 21(1) of the *Act* where the Department claimed that the disclosure would be an unreasonable invasion of a third party's privacy. As for the redactions of the well water test results, the Department relied on subsection 6(1) of the *Potable Water Regulation* under the *Clean Water Act*, which prohibits the release of well water test results to individuals other than to the owner of the well, except for limited circumstances. We explain further below.

Subsection 21(1): privacy

44. According to our investigation, the Department redacted names of individuals because the Department was unable to verify the identity of these individuals, meaning that it was unclear whether these individuals were employees of a public body or a private company.

45. Reliance was placed on subsection 21(1), a mandatory exception to disclosure of personal information due to privacy considerations when access to information concerns personal information. "Personal information" is defined in the *Act* as including all identifying information about an individual, such as name and address, date of birth, marital or family

status, and so on. Release of such identifying information, as a general rules, can constitute an unreasonable invasion of privacy.

46. Before being able to rely on this mandatory exception to disclosure, a public body must first discern whether the information consist of personal information within the meaning of the *Act and* if the disclosure of the personal information may cause an ***unreasonable*** invasion of the privacy. Not all personal information warrants protection as there are exceptions to the general principle surrounding privacy.

47. For instance, if the personal information belongs to employees of a public body, certain types cannot be withheld under subsection 21(1) because there are rules governing their release. Under paragraph 21(3)(f), a public employee's range of salary, job classification, employment responsibilities, benefits and travel expenses, although all personal information, must be released. The *Act* considers these types of personal information belonging to employees of a public body to be properly subject to release without constituting an unreasonable invasion of privacy.

48. There is also the other question of personal information belonging to an employee of a private enterprise, i.e., a third party. A third party is defined by the *Act* to signify a person, group of persons or an organization other than the applicant or the public body. A third party can be another individual, but not an employee of a public body.

49. Names of third party employees of a private company can be found in records held by public bodies; however, access to these names cannot be barred without facts to establish why the disclosure of these names would constitute an unreasonable invasion of their privacy. For this reason, while an individual or third party' name is considered personal information, its disclosure without any other identifying information or fact to support its protection does not constitute an unreasonable invasion of privacy.
50. In the case at hand, there is no question that the individuals' names found in the relevant records consist of personal information within the meaning of the *Act*. The Department, however, was not certain whether the individuals, whose names were redacted, represented third parties, or employees of public bodies.

51. As the Department did not establish any reason why the disclosure of these names would be an unreasonable invasion of privacy, we find that the Department should not have withheld this information under subsection 21(1).

Section 6- Potable Water Regulation-Clean Water Act

52. The Department relied on section 6 of the *Potable Water Regulation-Clean Water Act* to redact well water test results contained in some relevant records released to the Applicant. We understand that the Department redacted this information on the basis that the disclosure of this information is prohibited by section 6 of that *Regulation*. The matter does not end there. Whenever a public body relies on another legislation to refuse access to requested information, it must ensure that it does so in accordance with the *Right to Information and Protection of Privacy Act*.

53. The question at the heart of this matter is whether the Applicant's right of access to the well water test results was impacted by the restrictions to disclosure found in the *Potable Water Regulation-Clean Water Act.* 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*, however, 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.

54. 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*.

55. We then were required to examine the *Potable Water Regulation*. It applies to all potable (or drinking) water, but not to a water supply system that is owned or operated by a municipality or the Crown in right of the Province. Consequently, as the well water samples were taken from a water supply system located on a privately owned property, being a former cement plant, we are satisfied that the well water samples, in this case, properly fall within the ambit of the *Potable Water Regulation*.

56. Thereafter, we reviewed and interpreted section 6 of the said *Regulation* relied upon by the Department in this case, and it states:

> 6 The results of a test of a sample of water from a well are confidential and shall

> not be disclosed by the Minister, the Minister of Health or any person employed by the Department of Environment and Local Government of the Department of Health to a person other than the owner of the well unless
>
> (a) the person requesting the results has obtained the written consent of the owner, or
>
> (b) the disclosure is in aggregate form and does not identify the individual well from which the sample was taken.

57. In accordance with our review of section 6, we can clearly discern that there is indeed a restriction on the release of protected confidential information, i.e., the information that if disclosed could identify the owner of a well.

58. Section 6 contains language to the effect that the information obtained through well samples is confidential and will be treated in a confidential manner. Unless the person requesting the information is the owner of the well, or has received consent to access this information from the owner of the well, or the water results can be released in such a way as to not identify the owner of the well, access to such information will be prohibited. The Legislature intended to create such a restriction or prohibition on the potential access to or disclosure of well water test results, and section 6 of the said *Regulation* is consistent with that purpose.

59. Therefore, where the facts in this case show that the Applicant was not the owner of the wells from which the results were obtained nor had the written consent of the owner to permit the Department to release the information to the Applicant. Rather, as indicated above, the wells were situated on a privately owned land belonging to a company. Finally, the well water test results were not in aggregate form and their release to the Applicant could have identified the individual who owned the well.

60. In that regard, no factors existed to permit the Department to release the well water results to the Applicant in the present matter pursuant to section 6 of the said *Regulation*. We find that the Department properly redacted the well water test results from the relevant records in accordance with subsection 5(1) of the *Act*.

61. Having said this, however, the Department should have provided the Applicant further explanation in the Response to indicate that the Department was it lawfully refusing access to the requested well water test results in accordance with subsection 5(1) of the *Right to Information and Protection of Privacy Act* in direct link to the other statute that prohibited their release, namely, section 6 of the *Potable Water Regulation* under the *Clean Water Act*.

FINDINGS

62. In this case, the duty to assist obligated the Department to keep the Applicant abreast of the status of the processing of the Request and when the Response was expected. There was no indication that the Department contacted or notified the Applicant that a response was forthcoming, or even as to the status of the matter, despite the Applicant having written to the Department asking to be acknowledged and advised of the progress being made on the Request.

63. The Department has not established why it could not provide timely access to the Applicant in this case in accordance with its obligations under section 11; therefore, we find that the Department failed to discharge its duty to assist by not providing a timely response to the Request within the time limit provided by the *Act* and by not communicating any possible delays to the Applicant.

64. We find that the Department conducted an adequate search for all relevant records that related to the Request; however, the overall format of the Response was not in conformity with subsection 14(1) of the *Act*. The Department ought to have:
    - identified all of the existing or non-existing records relevant to the Request by providing a list;
    - explained why some records simply did not exist;
    - provided additional explanation as to why some information was being redacted; and,
    - better informed the Applicant of the right to challenge the decision rather than simply providing the appropriate forms.

65. The Department failed to give reasons why the disclosure of names of employees or of private companies would constitute an unreasonable invasion of privacy and the Department ought not to have withheld this information under subsection 21(1).

66. The Department lawfully prevented access to the requested well water results in the present matter, but the Department should have provided the Applicant further explanation in the Response to indicate that access was being refused in accordance with subsection 5(1) of the *Right to Information and Protection of Privacy Act* and section 6 of the *Potable Water Regulation* under the *Clean Water Act*.

RECOMMENDATIONS

67. This is the second Report of Findings in one month regarding the Department's failure to provide timely access to information. Pursuant to paragraph 60(1)(h) of the *Act*, the Commissioner recommends that the Minister and senior staff of the Department meet with the Commissioner at their earliest opportunity to discuss how best to enable the Department to fulfil its statutory obligations set out in the *Act.* This recommendation has been issued in an earlier reported complaint case and we await the Department's communicated decision in relation to that recommendation without delay.

68. As for the denied access to information in this case, pursuant to subsection 73(1) of the *Act*, the Commissioner therefore recommends that the Department release to the Applicant forthwith the information that was redacted pursuant to subsection 21(1) of the *Act*.

Dated at Fredericton, New Brunswick, this _____ day of July, 2013.

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Anne E. Bertrand, Q.C.
Commissioner