

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: 2013-1500-AP-793

Date: March 14, 2014

Case about access to records generated by *Public Interest Disclosure Act*

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 in which the Applicant requested that the Commissioner carry out an investigation into this matter.
2. The Applicant made a request for access to information on June 6, 2013 for an investigation Report stemming from a complaint made by the Applicant under the *Public Interest Disclosure Act*.
3. The Department promptly responded to the Applicant's Request on June 27, 2013 by refusing to grant access to the Report, in full, pursuant to subsection 21(1) and paragraph 21(2)(c) by explaining that the Report contains third party personal information, the disclosure of which would be an unreasonable invasion of the third parties' privacy and which could reveal the identity of a third party who has provided information in confidence to a public body.
4. The Department also relied on paragraphs 28(1)(a) and (c) as an exception to disclosure by stating that the Report contains information that identifies correctional officers and practices of which the disclosure could reasonably be expected to threaten public safety or to threaten or harm the mental or physical health or safety of correctional officers.
5. The Applicant was not satisfied with the Department's Response and filed a complaint at our Office on August 2, 2013.

INVESTIGATION

6. All steps normally undertaken during an investigation process were followed in this matter. We met with the Department's officials and learned how the Request was processed. We reviewed the Department's records to determine whether all the relevant records to the Request were properly identified and whether the exclusions to disclosure applied to the records were relied upon in accordance with the Act.
7. Given the nature of the Request, the Department was able to quickly locate the relevant record in this case, i.e., the investigator's Report, and we are satisfied that the Department conducted an adequate search for the relevant record.

Format of the Response

8. Upon review of the Department's Response, we find that it met all of the requirements for a proper response in accordance with subsection 14(1) of the *Act* in that it stated that the requested record existed; that access to the record was being refused and the reasons why by citing the exceptions to disclosure relied upon and by providing additional explanations to the Applicant; the Response informed the Applicant of his right to file a complaint with our Office or to refer the matter to the Court of Queen's Bench; and it identified the contact person the Applicant could contact in the event of questions.
9. We find, however, that the Department did not rely on the proper provision of the *Act* to refuse access to the requested Record. We explain.
10. When we receive access request complaints, our mandate is to determine whether the exceptions relied upon by a public body to refuse access were lawfully applied. Additionally, the *Act* has been designed to recognize other statutes that allow for specific procedures, collection of a wide variety of information, and instances where the public can and cannot access certain types of information.
11. As of September 1, 2013, the only provision in effect is subsection 5(2), which is known as the prevailing clause. It is meant to address the instances where a provision of the *Act* is inconsistent or in conflict with another legislation with regard to access rights. In the event that there exists an inconsistency or a conflict regarding access between this *Act* and another legislation, subsection 5(2) states that it shall prevail, unless the other statute expressly states that it shall prevail despite the *Act*.
12. Prior to September 1, 2013, however, only subsection 5(1) was in effect. As the Request in this matter was made on June 6, 2013, the provision in effect stated:

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.
13. Subsection 5(1) 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*.

14. Consequently, as the requested Report stems from an investigation having been carried out pursuant to another legislation, being the *Public Interest Disclosure Act*, we must first review that statute in order to determine whether access rights to the Report are limited or prohibited in any way.

Public Interest Disclosure Act

15. The purpose of the *Public Interest Disclosure Act* is to facilitate the making of complaints (known as disclosures) and investigation of significant and serious matters in or relating to the public service that are potentially unlawful, dangerous to the public or injurious to the public interest, as well as to protect persons who make such disclosures. As per the *Public Interest Disclosure Act*, a disclosure can be made when an employee has information about a wrongdoing committed or about to be committed.
16. The *Public Interest Disclosure Act* is also known as the “Whistleblower” legislation as it was created to allow members of the public service, as well as anonymous or members of the public, to come forth if they believe wrongdoing is occurring or is about to occur in the public service workplace, all the while protecting the individual making the disclosure from reprisal.
17. Once a disclosure is made either to the employee’s supervisor, designated officer or to the Ombudsman, and where merit to the disclosure has been found, an investigation must be carried out to determine whether or not the alleged wrongdoing did take place.
18. In the case of the Applicant’s disclosure, the investigation was processed by the Department’s designated officer.
19. The process to be undertaken when a disclosure is made to a designated officer is found in the *Public Interest Disclosure Act’s Regulation 2008-70*. It stipulates that the designated officer shall review the disclosure and interview the employee to determine merit and promptly advise the employee who made the disclosure of the decision to investigate the disclosure. Each chief executive is required by the statute to set up its own procedures to manage disclosures, and in this case, the Department determined to

- hire an independent and unbiased investigator from the Department of Justice in Nova Scotia to conduct the investigation.
20. The investigator then conducted the investigation by interviewing several employees, including the Applicant, as well as the named party in the disclosure. Upon completing his investigation, the investigator prepared a Report and submitted a copy to the Department with his findings.
 21. Subsection 9(1) of *Regulation 2008-70* provides what amount of information the employee who made the disclosure is entitled to receive once an investigation into the disclosure is finished. It states that, upon receipt of the Report, the chief executive “*shall provide the employee who made the disclosure with a written summary of the findings, the determination of the chief executive as to whether a wrongdoing has occurred and if so, of the corrective actions taken.*”
 22. We understand that the Applicant met with the Department’s officials to discuss the investigator’s findings, and was provided with a written summary of the findings of the investigation as set out in subsection 9(1) of the *Regulation 2008-70*. The Department did not allow the Applicant to view the Report, nor did it provide a copy of the Report to the Applicant.
 23. In that regard, no factors existed to permit the Department to release the Report to the Applicant in the present matter pursuant to subsection 9(1) of the said *Regulation*.
 24. We find therefore find that the Department properly withheld the Report from the Applicant in accordance with subsection 5(1) of the *Right to Information Act* as access to the Report is restricted by subsection 9(1) of *Regulation 2008-70* of the *Public Interest Disclosure Act*.
 25. Having said this, however, the Department should have provided the Applicant further explanation in the Response to indicate that the Department was lawfully refusing access to the requested Report in accordance with subsection 5(1) of the *Right to Information Act* in direct link to the other statute that prohibited their release, namely, section 9(1) of *Regulation 2008-70* of the *Public Interest Disclosure Act*.
 26. Given this finding, we do not find it necessary to determine whether the Report was lawfully withheld pursuant to subsection 21(1) and/or 28(1) of the *Right to Information Act*.

FINDINGS

27. We find that the Department conducted an adequate search for the relevant record that related to the Request and that the overall format of the Response was in conformity with subsection 14(1) of the *Act*.
28. The Department lawfully prevented access to the requested Report 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 *Act* and section 9(1) of *Regulation 2008-70* of the *Public Interest Disclosure Act*.
29. Giving our findings, no recommendation will issue.

Anne E. Bertrand, Q.C.,
Commissioner