

May 18, 2017

Applicant's name and address

Dear *Applicant*,

**Re: Reporting letter under the *Right to Information and Protection of Privacy Act*
Complaint involving the Department of Tourism, Heritage and Culture**

We are writing to inform you of our findings and recommendations that we have issued to the Department of Tourism, Heritage and Culture in this case.

We found that the Department requires improvements to its information management and we also found that you, the Applicant (as you are referred to below) were entitled to more information and explanations than the Department disclosed in this case.

First, we begin with the background to this case of the timeline that was pertinent to the filing of the Request, i.e., in July of 2016, and each issue uncovered during our investigation and then our findings and recommendations.

BACKGROUND

On July 26, 2016, the Applicant requested in relation to the Parlee Beach Provincial Park the:

- 1) Procedure for determining the water quality rating posted at the beach, and the new procedure introduced in July 2016 to determine the water quality rating;
- 2) Lifeguard daily checklists from 2011 to July 2016; and
- 3) Daily rainfall records based on the water collection device.

The Department responded on August 25, 2016 by releasing the lifeguard daily checklists it had for the years 2011, 2014, 2015 and 2016, rainfall records for 2015 and 2016, and explanations with regards to the procedure for determining the water quality rating. The Applicant was not satisfied and complained to our Office on October 24, 2017.

On August 3, 2001, the Minister of Business NB announced publically that a public education project was launched to show to the public the water quality ratings for beaches in the Shediac Bay area. The program was based on similar programs North America and Europe and would result in a Recreation Water Quality Index. The Index was to have five categories, from Excellent, Good, Fair, Poor to Closed for the beaches in the Shediac Bay area. This resulted in the redaction of the Recreation Water Quality Index prepared in conjunction with Parlee Beach, Business New Brunswick, and the Department of Health and Wellness.

Our review of the Recreation Water Quality Index document shows it is a program to better inform the public of the daily recreational water quality, and intended to inform the public of potential health risk while using the Park, so that the public can make informed decisions with regards to the water activities it chooses to engage in. The Water Quality Index is supposed to be posted at Parlee Beach, and represents water quality for all of the Shediac Bay.

The Recreation Water Quality Index describes itself as a prediction of daily water quality, based on accumulated data and environmental factors, such as water samples. The Index recognizes there are delays in obtaining lab tests results.

Potential health risk is determined by using these criteria:

- Environmental health assessment (survey)
 - Potential sources of contamination from existing infrastructures (sewage outfalls, storm sewers)
 - Agricultural land usage
 - Chemical hazards
- Routine water sampling
- Presence of pathogens
 - Water samples taken after complaints or potential disease outbreaks
- Number of bathers
- Classification of recreational water
 - Shallow or Deep
 - Fresh or salt
 - Slow or continuous turnover
 - Rock or sand bottom
- Weather conditions
 - Rainfall
 - Wind or wave action
- Environmental hazard and accidents
 - Oil spills
 - Severe algae blooms

The health risk assessment for the beach showing “EXCELLENT” means that the beach is supervised (safety factor) and the water quality on bacteriological counts is categorized “the same as good”.

The health risk assessment for the beach showing “CLOSED” means the recreational water is “unfit for contact”, or there exists extreme conditions such as a chemical spill or communicable disease outbreak.

Specifically, for the water quality, the “GOOD” Rating can be used where some factors may indicate “good” but not limited to other factors such as:

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- where there was no rain within last 24-48 hours
- the bacterial count is between 0-99 E. Coli/fecal coliform or 0-14 enterococci per 100-ml sample
- excellent weather conditions (no wind or waves)
- few bathers
- clear water conditions

A “Good” rating allows for no restrictions of activities, and full body immersion in the water is not a concern.

The water quality “FAIR” Rating can be used where some factors may indicate “fair” but not limited to other factors such as:

- less than 10 ml of rain within last 24-48 hours (not less than 5 mm in 24 hr period)
- the bacterial count is between 100-174 E. Coli/fecal coliform or 15-20 enterococci per 100-ml sample
- absence of wind or waves
- moderate number of bathers
- absence of “undetermined matter” in the water
- absence of algae blooms
- moderately clear water conditions

A “Fair” rating allows for restrictions of activities: wading is fine but bathers should avoid head immersion and ingesting the water.

As for the risk assessment for the water quality of the “POOR” Rating, it is used where some factors may indicate “poor” but not limited to other factors such as:

- heavy, more than 10 ml of rain within last 24-48 hours
- the bacterial count exceeds 175 E. Coli/fecal coliform or 30 enterococci per 100-ml sample
- wind and waves
- high number of bathers
- presence of “undetermined matter” in the water
- presence of algae blooms
- particularly cloudy or turbid water conditions
- factors of surrounding environment: municipal storm and sewage, adjacent farms, natural drainage, spills, presence of large flocks of birds (geese, seagulls), malfunctioning domestic septic systems

A “Poor” rating allows for restrictions of activities: wading only, no water use for children under the age of 6, no water use for immunocompromised individuals, no water use for the elderly, no water use for people with skin lesions. Bathers cannot immerse head or ingest water (risk of infections to eyes, nose, mouth and ears).

The “Poor” rating remains in effect for 24 to 48 hours; however, it can be changed to a “Fair” rating after 24 hours as a general rule depending on rainfall and duration.

The Index document goes on to lists the various sources where the potential sources of contamination information can be found: the Department of Environment, local industries, local marinas, municipal officials and engineering departments, Public Health, Environment Canada, Weather Canada, agencies that monitor rainfall, Department of Agriculture, Department of Natural Resources, conservation authorities, bird watchers, Directorate of Inland Waters (Federal), and beach personnel.

INVESTIGATION and FINDINGS

The Applicant was looking for the procedure to determine the water quality rating posted at Parlee beach, and a new procedure introduced in July 2016 to determine the water quality rating, along with lifeguard daily checklists from 2011 to July 2016 and daily rainfall records from the water collection device.

The Department identified the relevant records below in relation to the three components of the Applicant’s Request, and this is described for each one.

1) Procedure for determining the water quality rating

The Department explained to us that a procedure to determine water quality exists but the procedure itself is not documented. This means there is no written document for staff to follow that explains what process is or the steps are involved in determining water quality ratings.

The Department’s Response on this point was as follows:

“Our procedure for determining the water quality rating is to send the beach water samples weekly to an accredited laboratory which analyses for E. coli and Fecal Streptococcus. The results are sent to us and to the Department of Health. The results will indicate to us whether, based on the attached Recreation Water Quality Index document, the rating should be good, fair or poor. The results are received two days after the laboratory receives the samples. The other factor we monitor is rainfall. We monitor daily rainfall and adjust the rating according to the same document.”

While the Index is used and provides much of the basis upon which a decision is made, the Department does not keep actual records for the decision to rate the water quality per se. The Department could not provide us with an answer as to why this is the case.

The Department nonetheless felt confident that the Applicant had asked about the procedure and that the Department provided her with those explanations. The Department added that while the Applicant believed (from information received from the Department of Environment) that the procedure for determining the water quality had changed, but the Department told us it had not.

As a result, the Index described above remains the procedure, alongside that of the collection of water samples and rainfall amounts.

2) Lifeguard daily checklists

The Department indicated to us during this investigation that a checklist is completed daily by the lifeguard staff. It is posted inside the lifeguard station and is taken down at the end of the week. Then, a new checklist begins for the new week. The same one page checklist contains information for seven days.

According to the Department, this is a checklist recommended by the Life Saving Society, a charitable organization that provides programs on water-related injury and lifesaving sport. The checklist was adopted by the lifeguard staff at the Park as a best practice but it is not a requirement of the Department.

The checklist that is removed from the lifeguard station is placed in the Park's administration building. At the end of the summer, the checklists are thrown out.

At the start of the day, the lifeguards must check the equipment (trauma, oxygen, and first aid kits, spinal board, telephone, gator, and rescue) and indicate on the checklist that this has been done. Also noted is the air and water temperature, along with the weather forecast for that day, and this is done by lifeguards who are assigned to the morning shift. At the end of the day, the lifeguards must indicate on the checklist how many incidents occurred (someone needing assistance on the beach or in the water), how many warnings were issued (when the lifeguard has to warn people that they are too deep or not appropriate behavior), the estimated amount of people on the beach, the number of guards on duty, number of chairs, and the quality of the beach and of the water (quality of the beach its condition: dry, wet, muddy, etc.).

The quality of the water is only the rating, and that is posted on the sign and initialed by one of the lifeguards. The checklist is posted inside the lifeguard station. This is not visible to the public.

If an incident occurred, the checklist containing that particular day will be kept as part of the incident file in case staff needs to refer to it in the future. Incident reports are completed by either one of the

lifeguard or security person (depending on severity) and are given to the Park Manager. The Park Manager determines whether a follow-up is required. The incident reports are then forwarded to the Department in Fredericton.

There is no retention schedule for this documentation but somehow, the Department found checklists for the years 2011, 2014, 2015, and 2016. Explanations given are that no one had discarded them. The Department has retention schedules for other records located at the Park, such as financial records.

3) Rainfall records

The Park has custody of rainfall records, and Park maintenance staff record these amounts. The rainfall record is a one page document for an entire season, i.e., contains amounts of rain each day from May to September in inches. The rainfall amount is recorded by a water collection device, which is located in the Park.

The daily rainfall amount is used to determine the water quality rating.

The Department stated that the water quality rating is established by two things: a lab test on water samples, and the amount of rainfall in a 48 hour period, although we point out that the Index contains many more factors for that determination.

The Department does not keep daily rainfall records after the summer season has come to an end, and there is no retention for these records that are discarded at random. In this case, it just happened the records for 2015 and 2017 had not been discarded but no explanations for why this is the case were provided to us, other than the Park staff discard these records at the end of the season, and no one got around to doing it for 2015 and 2017.

Two maintenance workers take water samples and send them to the laboratory for analysis on a weekly basis. The lab is the New Brunswick Research and Productivity Council (RPC), a New Brunswick Crown Corporation located in Fredericton.

Once the maintenance staff members receive the results from the RPC lab, the Park Manager then makes a decision regarding the water quality rating and the Park Manager uses the Recreation Water Quality Index.

Where rainfall is 10 ml or more, the Park will downgrade the water quality rating that is has obtained from the test results of the water samples. For instance, if there was no rain in the previous 48 hours, the rating will remain at the rating set from the results of the water sample; however, if the water quality rating is set at good after having received the results from the lab, that rating will be downgraded to poor if the rainwater amount that fell 48 hours previous to the taking of the water samples is 10 ml or more. Where the amount of rainfall is less than 10 ml, the rating remains at good but it can also be set at fair. The Park Manager makes this decision.

Search for relevant records

We now know that the Department does not have the requested records at its Fredericton head office location; rather, records are located in the administration building located directly in the provincial parks, in this case, the Parlee Beach Provincial Park. The Department's Right to information Coordinator asked that a search be conducted at the Park and relevant records for 2011, 2014, 2015, and 2016 were found. According to the Department, it does not have any relevant records for the other years being requested. We find that the Department did not find any other relevant records, and this is due to a lack of set practice or policy regarding the documenting of decisions. We address this issue.

Duty to document

As we have explained previously, the Department has a duty to document its actions and decisions. The *Act* is an expression of all of government's accountability and transparency to the public in the manner in which it conducts its affairs and the public's right to access government information can only be respected where key actions and decisions are documented. Documents created and retained appropriately help preserve a comprehensive historical record, good governance, and public trust, all of which are essential components of the public's right to know. Clear documentation practices must be established and followed so that the public body is kept accountable and the public is kept informed.

The Department reported that it has retention schedules for financial documents, incident reports, human resources records, etc. generated at the Park; however, it does not for the lifeguard checklists and the daily rainfall records. The Department has indicated to us that it has no need for these records after the day that they were created.

While we can appreciate that the Department may not have a need to keep every record it generates and that some records will be transient in nature, the retention of these types of records that impact on the Department's objective to inform the public of the quality of the water at its beaches is important. A reasonable retention schedule based on a two seasons for instance (five months per season), is not onerous, and does not require a lot of storage requirements, be it in paper or scanned electronic format.

We recognized that Park officials are responsible for obtaining and recording this information, but the Department remains ultimately responsible to the public and access rights; as such, the Department must ensure that the records at the Park are generated, kept and destroyed as per a set practice.

Also of concern to us is the fact that the process for determining the water quality is not documented and cannot be found in any record. This is particularly surprising given the public announcement in 2001 for water quality ratings to be posted, to be made known so that the public would be well informed of the conditions that exist and modify their recreational activities accordingly. This expectation was created when Government set out on that path many years ago, and as it evident by the Applicant's

request and the other media reports surrounding the issues of water quality at some of New Brunswick beaches, the public's expectation has not waned.

The decision to rate the water quality of a beach in the Shediac region is a process of significant public health and safety and, in our view, the Department had and still has a duty, both from its statutory and transparency obligations, to document those decisions and to post those ratings for the public to see.

The Department has indicated that the process is being reviewed and changes will be made to the water quality rating assessment. More comments on this are found at the conclusion of these findings.

Nonetheless, the rules for documenting the process, and the decision-making in relation to that process, along with a set retention schedule for those records and supporting documentation, must be respected. A recommendation is issued on this point.

Content of the Response and Duty to Assist

A response to a request filed under the *Act* must be clear, meaningful, and contain all the elements contained in section 14.

We find that the Department did not issue a response that is in conformity given that:

- a) It did not state that the Applicant could file a complaint with our Office or refer the matter to a judge of the Court of Queen's Bench where not satisfactory;
- b) It did not provide sufficient information to allow the Applicant to understand why she is not getting all the requested records, and make sense as to what information existed and whether access would be given. It was required of the Department to include explanations as to why the Department was only able to retrieve records for certain years and not others; and
- c) It did not have detailed explanation with respect to the procedure for determining the water quality rating for the Applicant to understand the process. This was especially important given that the decision making process is not recorded.

We remind the Department that a properly constituted response flows from the Department's duty to assist the applicant provided in section 9 of the *Act*. That obligation is present from the time the request is received and includes issuing a complete and meaningful response. Recommendations are issued on these points.

CONCLUSION –RECOMMENDATIONS ISSUED

Based on the above findings, there are many aspects to this case that will warrant action on the part of the Department through we hope the adoption of our recommendations.

Also required is to provide the Applicant with the information and explanations to which she is entitled under the *Act*, and the Department has agreed that this should have taken place. Accordingly, this reporting letter of findings contains much of that information and explanations.

As for the remaining issues, the Commissioner recommends under paragraph 60(1)(a) and section 73 of the *Act* that:

- a) The Department's respect of its duty to assist applicants under section 9;
- b) The Department's issue responses that are in conformity with section 14;
- c) The Department's adopt its duty to document obligation and establish a practice that records the decision-making process regarding the assessment of the water quality ratings at Parlee Beach, with a set retention schedule;
- d) The Department ensure that beginning with the 2017 summer season, the Park Manager at Parlee Beach posts, at a location that is clearly visible to the public, the water quality rating for each day.

In regards to the last two recommendations above, and as referred to earlier in this reporting letter, the Department advised us of changes to be implemented on the process for assessing and notifying the public of the beach water quality at Parlee. To that end, we were provided the link to and we have reviewed the Office of the Chief Medical Officer of the Department of Health's *Parlee Beach Water Quality Protocol* found on that Department's website.

That Protocol is intended to improve upon the water quality monitoring at Parlee Beach and the information that is to be made available to the public, with a goal for implementation during the 2017 season. Below are some relevant excerpts:

This Protocol defines the minimum requirements for the management of the designated recreational swimming area at Parlee Beach. The Protocol also defines the responsibilities of the Department of Environment and Local Government (DELG), Department of Tourism, Heritage and Culture (THC) and the Office of the Chief Medical Officer of Health (OCMOH).

(...)

The Guidelines for Canadian Recreational Water Quality (Canadian Guidelines) state that decisions regarding the design of a sampling monitoring program are to be

made by the appropriate regulatory and management authorities. These include decisions pertaining to:

- *areas to be monitored, including the location and depth of water samples to be collected;*
- *times and frequencies of sample collection;*
- *choice of indicator parameters to be analyzed;*
- *procedures for public notification and posting of warning signs; and*
- *process for notification of health authorities.*

(...)

Collection of samples in the morning appears to offer the best balance between practicality and generation of data that protects human health. If culture methods are used for enumerating indicator bacteria, morning samples could generate results that would allow posting of health advisories the next day or two. (Sampling and Consideration of Variability [Temporal and Spatial] For Monitoring of Recreational Waters, U.S. Environmental Protection Agency, December 2010) (on page 6 of the Protocol document)

Rationale

In order to participate in safe, enjoyable recreational water activities, the public requires access to information on the quality of the area and its facilities, as well as notification of any existing water quality hazards. Beach operators, service providers and responsible authorities have a responsibility to inform and educate the public and provide adequate warnings about any hazards relevant to their recreational water areas. (Canadian Guidelines)

Beach postings inform the public about potential risks to health and safety, based on an assessment of those risks. The owner/operator of the beach is primarily responsible for posting and removing the advisory/signs as conditions warrant (Beach Management Guidance Document, September 2014. Ontario, Ministry of Health and Long-Term Care, Public Health Division)

Signs should be posted in locations that are highly visible to the public. The information provided should be easily understood and not open to misinterpretation. Warnings should be timely and should be promptly removed once the issuing authority has determined that the risk no longer exists. (Canadian Guidelines) (on page 12 of the Protocol document)

In our view, the Protocol's wording to public notification of the water quality rating at Parlee Beach lacks specificity, and the public notification was central to the issues investigated in this complaint, namely, the Applicant's right to know, request and obtain information about the water quality at Parlee Beach and decisions made in regards to that water quality. The Department's own past practices were not followed and postings were not available to the public as had been intended.

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Accordingly, we are not certain the new Protocol will correct this issue to be compliant with the Applicant's (and the public's) right to know this information, as per our findings above.

Therefore, while the Department of Health and others may be involved in the future alongside the Department with this new Protocol, the Commissioner nonetheless impresses upon the Department that it is responsible for this important public notification and that the recommendations above issued to the Department are intended to ensure compliance by the Department of the Applicant's (and the public's) right to know and to be informed of the water quality rating at Parlee Beach for each day in the coming 2017 season.

In closing, we note that section 74 of the *Act* requires the Department to decide whether it will adopt any or all of the Commissioner's recommendations or make another decision in relation to these recommendations and to inform both the Applicant and the Commissioner of such decision.

On this basis, we conclude this complaint investigation under section 73. A copy of this letter is being forwarded to the Department.

Apart from our follow-up regarding compliance with the above recommendations, we are closing our file.

Thank you for having referred this matter to us.

Yours sincerely,

Anne E. Bertrand, Q.C.
Access to Information and Privacy Commissioner
/
c. Minister of the Department of Tourism, Heritage and Culture