

**IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)b)
OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3**

Between:

Rhonda Whittaker,
the petitioner

And:

Madeleine Dubé,
Minister of Education
The Minister

RECOMMENDATION

FACTS:

1. This referral arises out of a request for information filed on October 17, 2005. The petitioner is a radio-show host with the Canadian Broadcasting Corporation's station in Moncton, New Brunswick.
2. The petitioner requested from the Honorable Madeleine Dubé, Minister of Education the production of "all files related to all and any payments made to Bernadette "Bonnie" Cudmore, and/or Glen Cudmore, and/or Nicholas Cudmore, and/or to the aforementioned persons held in trust by Kelly VanBuskirk."
3. The Minister responded to the request by way of letter dated November 30, 2005 denying the applicant's request citing 6(a), (b) & (f) of the *Right to Information Act*. The Minister's response stated, in part, as follows:
Unfortunately we are unable to comply with your request. This means that we are withholding 11 pages of e-mail communications between representatives of the

Department of Education and its solicitor on the basis that the release of information would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications between solicitor and client in a matter of department business, for the purposes of section (f) of the *Right to Information Act*, and would disclose information the confidentiality of which is protected by law, namely the common law of client-solicitor privilege, for the purposes of section 6(a) of the *Right to Information Act*.

Additionally we are withholding 6 pages of information on the basis that the release thereof would reveal personal information concerning another person for the purposes of section 6(b) of the *Right to Information Act*, and would disclose information the confidentiality of which is protected by law, namely the *Protection of Personal Information Act*, for the purposes of section 6(a) of the *Right to Information Act*.

4. The petitioner is seeking confirmation of any payments made to the Cudmore family as a result of the possible settlement of a Human Rights complaint by the Cudmores against the Department of Education. The complaint was heard by a Board of Inquiry which determined the issue in favour of the Department. The Board's decision was upheld by the Court of Queen's Bench on judicial review and an appeal of the Court decision was discontinued early last year.

ISSUE:

5. Is the existence of a settlement or payment of any amounts made by the Province in settlement of a human rights complaint personal information, or other wise exempted from disclosure under the *Right to Information Act*?

LEGISLATION:

6. The Department relies on the following definitions and exemptions under the *Right to Information Act* :

“personal information” means information about an identifiable individual;

...

“identifiable individual” means an individual who can be identified by the contents of information because the information

- (a) includes the individual's name,
- (b) makes the individual's identity obvious, or
- (c) is likely in the circumstances to be combined with other information that includes the individual's name or makes the individual's identity obvious;

...

6 There is no right to information under this Act where its release

- (a) would disclose information the confidentiality of which is protected by law;
- (b) would reveal personal information concerning another person;
- ...
- (f) would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

7. The New Brunswick *Protection of Personal Information Act* governs the protection of personal information in the hands of public bodies. Principle 5 in the Statutory Code of Practice states that ‘personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required or expressly authorized by law.’

ANALYSIS

8. Section 2 of the *Act* states that “[s]ubject to this Act every person is entitled to request and receive information relating to the public business of the Province...”. The Act’s purpose is “directed to disclosure not secrecy” (Justice Stevenson in **Re Daigle** [1980] 30 NBR (2d) 209 (NBCtQB)).
9. There is, to my knowledge, no New Brunswick case law directly on point. Additionally, when we look to other jurisdictions, we must remember that most of the other provinces have different legislative schemes. For instance, most other legislation includes a detailed definition of ‘personal information’. Thus, in Ontario, protection of personal information and right to information is governed by the *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 (“*FOI Ontario*”). In the Ontario Act, personal information is defined as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

10. In *Dagg v. Minister of Finance*, [1997] 2 S.C.R. 403 the Supreme Court of Canada needed to determine if logs of individuals names, identification numbers, and signatures of employees constituted personal information. LaForest discussed the purposes of Access to Information and Privacy legislation and found that 'Parliament did not intend access to be given preeminence over privacy'. In determining if the logs constituted personal information LaForest referred to the opening paragraph of the definition, which is similar to the Ontario one above, and stated that 'the general opening words are intended to be the primary source of interpretation and the subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition'.
11. If we were to look at the enumerated list provided in the definition of 'personal information' from other legislation across the country, and in particular the *Ontario FOI* above, one could conclude that the monetary amounts of the settlement information call under paragraph (b) as 'information relating to financial transactions.'
12. The decision of the Ontario Information and Privacy Commissioner in Order M-1160 is of interest. In that case a Municipality received a request under the *Municipal Freedom of Information and Protection of Privacy Act ("MFOI")* from a member of the media for the settlement agreement reached between the Regional Police, its Chief, a name police constable and an individual. As in the present case, the settlement arose as a result of a complaint under the Ontario Human Rights Code. The request encompassed the Minutes of Settlement with five pages of appendices, two sets of handwritten notes of the Police Board and minutes of Board meetings which were held in camera.
13. The definition of personal information under the *MFOI* is the same as under *FOI Ontario*. The Commissioner stated that 'I find the Minutes of Settlement and

attached appendices clearly contain personal information of the named individual, as they reflect the terms of settlement of her human rights complaint'. He goes on to find 'that the handwritten notes and minutes of the January 20 meeting contain the personal information of the named individual, since they contain the amount of the payment made to her under the terms of the settlement'.

14. Under the *FOI Ontario* and the *MFOI*, while there is a general exemption, as under the New Brunswick statute, for personal information, the laws further specify detailed exceptions that govern the circumstances when the exemption can be invoked. In particular, under subparagraph 14(1)(f) of the *MFOI*, 'A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except, if the disclosure does not constitute an unjustified invasion of personal privacy'. Subsection 14(2) and (3) provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. In particular, 14(3) lists the type of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy and 14(2) outlines what criteria should be considered.
15. In this case, the Commission considered arguments that the information related to employment or educational history which is protected by 14(3)(d), the information consisted of personal recommendations or evaluations, character references or personnel evaluations which is protected under 14(3)(g), the information could be considered the type of financial information protected under 14(3)(f), the information was desirable for the purpose of subjecting the activities of government to public scrutiny under 14(2); and the fact that the minutes contained a confidential, non-disclosure clause as to the amounts of the settlement. The Commissioner found on balancing the factors, the factors favouring privacy protection outweighed those favouring disclosure with a few exceptions. Those exceptions relate to information that dealt with process rather than substance and information that was already public.
16. Finally the Commissioner did an analysis as to whether there was a compelling public interest to override the exemption from disclosure as outlined in section 16 of that Act. The Commissioner determined that the level of disclosure through the press releases and the information disclosed in compliance with his order, satisfactorily address the public interest issues.
17. Several other decisions of the Ontario Information and Privacy Commissioner have classified settlement information as 'personal information'. In Order MO-1184 the Commission determined that the settlement agreement clearly contained information about the named individual as it included details of the terms of settlement of his wrongful dismissal suit, both financial and otherwise. The decisions of whether to release the information turn on the analysis of whether disclosure would constitute an unjustified invasion of personal privacy. In Order MO-1184 the settlement information was released.

18. As mentioned above, the legislative scheme outlined in the *MFOI* and the *Ontario FOI* as well as the definitions of personal information are different than those in New Brunswick. Justice Russell did a similar search of other Acts and caselaw in *Goodwin v. New Brunswick (Minister of Finance)* QL Reference [1999] NBJ No. 455 (NBCtQB). In that case he made reference to a Supreme Court of Canada case (*Dagg v. Minister of Finance*, [1997] 2 S.C.R. 403) that dealt with the federal Privacy Act and the Access to Information Act and in particular the definition of personal information. Mr. Justice Russell had this to say regarding the comparison:

“While the definition I must deal with is not identical to the one in *Dagg*, and while New Brunswick does not have a Privacy Act or an equivalent, nevertheless the approach by the Supreme Court of Canada to privacy through the definition of personal information in New Brunswick’s Act is instructive.”

19. In particular, Justice Russell took into consideration the words of Mr. Justice LaForest who reviewed the background to Right to Information Statutes at page 435 of *Dagg*:

“We may, for one reason or another, wish to be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act.”

CONCLUSION

20. While the legislation in Ontario and in particular the definition of ‘personal information’ differs from New Brunswick’s, the discussion of the definition of ‘personal information’ in the Ontario decisions does carry some weight. The Commission did conclude in Order M-1160 that the terms of the settlement and the amount of payment under the settlement agreement is ‘personal information’. The Ontario Commissioner went further, as required under the Ontario statute and found also that the upholding of the exemption could not be overridden by section 16 of that Act which requires disclosure where a compelling public interest outweighs the purpose of the exemption.
21. In recent decisions of this office, I have held that it is appropriate in some instances, where privacy interests and access to information interests are in conflict, to balance those interests one against another (See D.M. c. le ministère de la Formation et du Développement de l’Emploi, N.B.R.I.O.R, 2006-01). Were it necessary to do so in this case, I would have no difficulty in concluding, on the basis of this Ontario precedent, and for the reasons stated therein, that the privacy interests at stake outweigh the public interest in disclosure under the *Right to*

Information Act.

22. Where, as in Ontario Order M-1160, the parties have signed a reciprocal confidentiality clause it is appropriate to give that clause due weight. However, given that these clauses normally enure to the benefit of respondents, where Respondents to Human Rights settlements are government departments subject to a statutory obligation of transparency and open government, it may be appropriate in future cases to insist upon separate and independent proof by way of affidavit evidence contemporaneous or subsequent to the access request that can satisfy the hearing officer under the Right to Information petition that the privacy interests at stake are materially affected and genuinely in play. Otherwise government departments could too easily use confidentiality clauses in complaint settlements or other instances as a means of circumventing or contracting out of their statutory obligations under the *Right to Information Act*.
23. Given the classification of settlement information as personal information and the words of LaForest in *Dagg*, I am satisfied in the present case that on balance the Cudmore's privacy interests, such as they are, should be maintained. Given the Ombudsman's limited role in reviewing files and making recommendations on disposition and the lack of any means for obtaining further clarification of the privacy interests in play, under the provisions of the *Right to Information Act*, this recommendation, coupled with a caveat that Government departments may bear a higher burden of proof in similar cases in the future seems on balance to be the most appropriate and fairest recommendation available to me.
24. **I therefore recommend, further to these observations, that the government department's exemptions be upheld and that no further disclosure be made to the petitioner in this case.**

Bernard Richard, Ombudsman
February 14, 2006