

investigations into the complaints. We can confirm that we have received complaints and conducted investigations.

We are also releasing information which was provided by your client, ... as well as our responses to her, though we have redacted any names or identifying information relating to identifiable individuals pursuant to sections 6(a) and (b) of the *Right to Information Act*.

Notwithstanding your reference to section 27(3) of the *Family Services Act*, I must deny your request for the other information as section 27(3) does not remove the other protections of information found in legislation.

I would hereby draw your attention to the provisions of the *Right to Information Act*, specifically subsections 6(a), and (b) which state:

- 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;

This information is protected pursuant to section 27(3) of the *Family Services Act* which states:

27(3) Any statement, declaration or evidence made or given by a person at the request of the Minister pursuant to subsection (1) is confidential and for the information of the Minister only, and except for use in a court proceeding no such statement, declaration or evidence may be inspected by any person without the written authorization of the Minister.

This information is also protected under the provisions of section 11 of the *Family Services Act*:

11(1) All information acquired by the Minister or any other person in relation to any person or matter under this Act, whether of a documentary nature or otherwise, is confidential to the extent that its release would tend to reveal personal information about a person identifiable from the release of the information.

11(2) The Minister shall not permit the release of confidential information to any person without the consent of the person from whom the information was obtained and to whom the information relates.

Furthermore, pursuant to subsection 1(3) of the *Protection of Personal Information Act*, a person is identifiable if information provided includes his or her name, makes his or her name obvious, or information does not itself include the name of the individual or make his or her identity obvious but is likely in the circumstances to be combined with other information that does.

We are also withholding opinions and recommendations prepared for the minister as these are not subject to release pursuant to section 6(g) of the *Right to Information Act*.

2. On May 15th, 2008 my officers were able to meet with departmental officials and conduct a review of the files pulled in order to respond to the petitioner's request. Most of the file materials were deemed non-responsive records. Some of the responsive records identified were withheld on the basis of the exemptions claimed as set out in the Minister's response. I want to deal first with some of the records identified as non-responsive.
3. It appears to me that the Department has given a restrictive meaning to the wording of the access request. For instance it has focused in on the words "complaints" and "investigations" so that issues that arise out of random audits, incident reports, annual inspections or spot checks of the facilities in question are not recorded as responsive records. Similarly, records detailing findings and observations relevant to the operation of the facilities in question in the annual filings and reports were not deemed responsive records and comments relevant to these facilities that found their way into broader departmental service reviews were also not scrutinized as responsive records. The result is that while only a handful of individual complaints from residents reported in event logs were scrutinized as responsive records subject to the Act, there are in fact many other records which could have been disclosed in part or in full.
4. The difficulty in such cases is in knowing what records actually relate to the access request. The test in such matters must necessarily have a very low threshold. The right to information coordinator is not required to assess relevance as a judge might in a civil proceeding. The test is lower still. The general right proclaimed under the Act is a right of access. All government records are presumptively accessible. Non-disclosure is the exception, not the rule. The approach therefore in such matters should be to actually offer up for review all records which the government has which might possibly shed any light on the subject matter of the petitioner's request. The approach in most other Canadian jurisdictions has been well established by the practice of information Commissioner's offices and in government administration.
5. A response to an access request in Canada typically begins with a dutiful and exhaustive search for responsive records. An index of records is typically established by the responding department in accordance with an established form. For the most part the form of the index of records is not established in statute or in regulation, but is a matter of practice established by Commissioner's offices and central government agencies responsible for the administration of right to information laws. Commissioners' offices websites make available sample indexes of records¹. Minimally the Index of records should give the page

¹ See for example Saskatchewan's Helpful Tips publication:
<http://www.oipc.sk.ca/webdocs/Helpful%20Tips.%20December%2010.%202007.pdf>

- reference where the record can be found, thereby indicating its length, a brief description of the record, the section from the act applicable to any exemption claimed in respect of the record and a comment or explanation detailing how the exemption applies.
6. Once the index of records is established it usually provides an excellent tool for mediation of any access disputes. Access requests can be clarified, petitioners can zero in on the record or records they are seeking and response times and copying charges can be minimized. It also provides the main basis and approach to the Ombudsman or Commissioner with respect to any file review and also expedites the process at that end in relevant cases.
 7. In *McHardie v. Minister Responsible for the Office of Human Resources* NBRIOR-07-04 I dealt at length with concerns arising from a failure to seek clarification of an access request. There is always a danger that responding to an access request on the basis of too literal or narrow a reading of the access letter will result in non-disclosure of relevant information. It is the right to information coordinator's duty to guard against this danger, by assisting the petitioner in framing or rephrasing the access request to achieve clarity and confirmation of what is being sought.
 8. In the current matter I find generally that the exemptions claimed in respect of the responsive records identified properly apply. However, the ICSP Profile event logs for July 17 and 18, 2006 could have been disclosed with identifying information severed in addition to the disclosure made. Furthermore the exemption claimed under paragraph 6(g) in respect of the document of Dec. 3rd 2001 stamped Advice to Minister does not properly apply as the briefing note was submitted for information only and neither the first nor the second page put forward any actions or policy options for the Minister's deliberation.
 9. Regarding the exemptions claimed on the basis of paragraph 6(a), information the confidentiality of which is otherwise protected by law, the Minister has exempted all information that was disclosed to her in accordance with section 27(1) of the *Family Services Act*. According to the Minister's interpretation, these third party reports would constitute the bulk of the information requested by the petitioner, in particular if the access request is limited narrowly to the interpretation which the Minister has given. In my view a balanced application of the *Right to Information Act* and the confidentiality provisions of the *Family Services Act* require close attention to detail. The Minister must be careful in her response only to exclude records or portions of records which fall under the subsection 27(3) exemption.
 10. Section 27 of the *Family Services Act* provides a guarantee of confidentiality for records and for individuals who report information to the Minister of Family Services to assist her in her task of investigating possible breaches of regulations applicable to community placement resources. The exemption only applies to information supplied to the Minister in response to the Minister's request as part

of an investigation under 27(1). To prove the exemption the Minister should be able to show that 1) there was a section 27(1) investigation on-going at the time the record was created; 2) that the record was provided to the Minister in the course of that investigation; and 3) that the record was provided to the Minister in response to a request made as part of her investigation. The confidentiality provision does not extend any further and cannot serve as the basis for an exemption under 6(a) in any other circumstance. The Minister bears the onus of proving that the exemption applies.

11. Finally, my review of the department's records in the current matter suggests that further responsive records should have been identified and disclosed including the following:

September 5, 2001 briefing note to Minister Mockler (the first seven paragraphs could be disclosed and the last paragraph enclosing recommendations could be severed).

November 10, 2004 – Letter from Minister Huntjens to Manoir Notre Dame re breach of regulations for number of residents exceeding license limits.

June 21, 2004 complaint entry in the 2007-03-07 report run.

December 3, 2004 – Spot check report from ICSP event log.

December 10, 2004 – Complaint re staff returning to work too early following injury.

January 2005 - Undated evaluation report following January 5, 2005 annual inspection of Manoir Notre Dame.

February 2005 – undated evaluation report following February 23, 2005 annual inspection by department of Résidences O Bons Soins.

May 9, 2005 – e-mail to departmental management outlining problem with unlicensed beds at Résidences O Bons Soins

June 9, 2005 – internal e-mail among adult residential services staff re Résidences O Bons Soins and Manoir Notre-Dame

April 4, 2005 – e-mail from adult residential staff services to departmental manager re draft letter for temporary licences for operators using unlicensed beds

April 29, 2005 – response from departmental manager to April 4 e-mail with attached documents as draft response to problem of unlicensed beds

June 9, 2005 – Letter from Regional Coordinator of Adult Residential Services to Résidences O Bons Soins re number of residents

June 14, 2005 excerpt re Résidences O Bons Soins and Manoir Notre Dame from report on unlicensed beds

September 6 2005 License renewal letter for Résidences O Bons Soins

February 22, 2007 – Complaint about administrator of Manoir Notre Dame belittling residents

February 27, 2007 – 1 page report of visit inspection summary

March 7 2007 events log in particular entries for Résidences O Bons Soins on December 15, 2004, January 19, 2005 and January 13, 2006

July 10, 2007 – event log from March 23, 2008 events profile run

December 18, 2007 – incident report regarding death of resident from Manoir Notre Dame who froze in a snow bank (personal information can be severed).

Various dates - bundle of 10 pages of internal e-mails and media clippings and one page briefing note on December 2007 death of resident at Manoir Notre-Dame (personal information can be severed).

January 24, 2008 – internal e-mail re request from family of resident at Manoir Notre-Dame requesting 24hour surveillance (personal information can be severed)

12. **I recommend that the foregoing records be disclosed to the petitioner with personal information being severed, that the additional disclosures recommended in paragraph 8 of these reasons be made.**
13. **In light of the time elapsed since the request was initiated I would further recommend that the Department respond to the recommendations herein as expeditiously as possible and in any event no later than October 17, 2008**

Dated at Fredericton, this 17th day of September, 2008.

Bernard Richard, Ombudsman