

**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:**

**X.Y.,**

the petitioner

**And:**

**Jack Keir,  
Minister of Energy**

The Minister

**RECOMMENDATION**

1. This referral, pursuant to paragraph 7(1)(b) of the *Right to Information Act*, was filed with the Ombudsman's Office on May 29, 2008. It arises out of a request for information submitted to the Minister of Energy by Jeannot Volpé, then interim Leader of the Official Opposition on August 23, 2007. The petitioner was seeking general financial and business information as well as

documentation regarding power production, accounts receivable, Point Lepreau's refurbishment, and a second international power line.

2. The Minister informed the petitioner in late October 2007 that the Department required a time extension, and also sought clarification from the petitioner on two separate occasions regarding one particular aspect of the request. NB Power Group provided a detailed response to the Minister on November 15, 2007.
3. On March 14, 2008, the Minister provided a partial response to the petitioner's request. The Minister again requested clarification with regards to the same aspect of the petitioner's request, and that the lack of specificity of the request failed to comply with subsection 3(2) of the Act. In addition, some information was withheld with the following explanation:

Please note that names and identifiable information of individuals have been redacted as per section 6 (b) of the RTIA, which states:

- 6 There is no right to information under this Act where its release *(b) would reveal personal information concerning another person*

Note as well that additional material in the possession of the Department containing specific information has been withheld as per subsections 6 (c) and (g) of the RTIA, which state:

- 6 There is no right to information under this Act where its release *(c) would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract;*  
*(g) would disclose opinions or recommendations for a Minister or the Executive Council;*

Your request was forwarded to the New Brunswick Power Holding Corporation ("NB Power"). Enclosed is a copy of a letter dated November 15<sup>th</sup>, 2007 from NB Power, which details its reply to your request. You will note that the material gathered at NB Power has also been subject to redaction under the RTIA sections noted above, as well as subsection 6(c.1), which reads as follows:

- 6 There is no right to information under this Act where its release *(c.1) would reveal financial, commercial, technical or scientific information*  
*(ii) given in or pursuant to an agreement entered into under the authority of a statute or regulation, if the information relates to the internal management or operations of a corporation that is a going concern;*

## ANALYSIS

### 1. General concerns

4. My first observation is that the Minister's reply fails to identify which information was withheld pursuant to the corresponding invoked exemption, or alternatively, which documents were affected by which exemption. The response from NB Power clearly delineates the responsive records and corresponding exemptions for withheld information; however, the Minister's response indicates that further redactions were undertaken by departmental staff and it is not clear from the Minister's response to the petitioner which information was subject to further redaction and under which exemption.
5. As this office has addressed several times in other recommendations, responses to right to information requests must provide sufficient reasons to the petitioner.<sup>1</sup> It is imperative that in responding to a request under the Act that all Ministers list for petitioners all relevant documents in their possession, along with any corresponding exemptions which the Department is claiming with respect to each specific document or piece of information to which they deny the petitioner access.<sup>2</sup> Listing all the documents in the Department's possession along with the corresponding grounds for exemption allows the petitioner to reasonably assess whether the Department has identified all the documents he or she deems to be relevant and to facilitate the petitioner in seeking additional clarification and/or information. This also facilitates the Ombudsman's review in appropriate cases by reading specific documents against specific exemptions. Further, this practice also ensures due diligence at the departmental level and allows the Minister to fairly assess which documents or portions thereof should be exempted from the right to access conferred by law.
6. I would like to take this opportunity to highlight one particular example of how failure to provide explanatory reasons for each piece of exempted information can yield absurd results. Attached to this decision is a copy of one of the redacted documents provided to the petitioner in response to this request for information. The document is an e-mail correspondence; however, all of the information contained in the document was redacted but for the date and time the e-mail was sent. As the Minister did not provide explanatory details identifying which information was withheld under which exemption, the document as provided is meaningless and without context, and it is thus impossible for the petitioner to seek clarification or further information with regards to this particular document. To have simply excluded the entire document as protected under various exemptions would have yielded a more meaningful result.

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<sup>1</sup> *Weir v. New Brunswick*, (1992) 120 N.B.R. (2d) 202 (Q.B.).

<sup>2</sup> See *Joan Kingston v. Madeline Dubé, Minister of Family and Community Services*, NBRIOR-2006-04 at para. 8; *Heather MacLaughlin v. Michael Murphy, Minister of Health*, NBRIOR-2007-11 at para. 5.

## 2. Duty to Assist

7. The petitioner's request included the following:

A copy of all correspondence including emails, memos or other written communications between the Premier of New Brunswick and/or his office, the Minister of Energy and/or Departmental staff, the Electric Finance Corporation and NB Power and its affiliated companies since October 3<sup>rd</sup> 2006[.]

8. Departmental staff was uncertain how to interpret the scope of this particular item, and contacted the petitioner's office by telephone in late September or early October to inquire whether the request had a specific topic to narrow down the scope. When the petitioner indicated that there was no particular topic, the Department then decided to issue a letter seeking clarification under subsections 3(2) and 3(3) of the Act, which provide as follows:

3(2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event so as to enable a person familiar with the subject-matter to identify the relevant document.

3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

9. The Minister's reply letter of March 14, 2008 failed to provide any response to this particular item, and instead states that the petitioner's request "does not comply with section 3(2) of the *RTIA*."
10. The Department has provided this office with a written submission in support of the Minister's position, which states that in regards to this particular item, "staff could not foresee providing all the information in the appropriate time, as it would involve every employee in the Department of Energy, NB Power and all of its companies searching through every record, with no direction."
11. It is my interpretation that the wording of subsections 3(2) and 3(3) are meant to provide guidance where requests for information are too vague to be meaningfully interpreted. Subsection 3(2) provides that the "application shall specify the documents containing the information requested," and only requires that subject-matter be identified where the applicant does not know which particular document contains the information being sought. Further, subsection 3(3) clearly refers to information that is "unable to be identified,"

which speaks to vagueness, rather than the scope, of the requested information.

12. It seems that Departmental staff have chosen to apply the broadest possible interpretation of this item and then relied on this interpretation to conclude that the petitioner's request is unreasonably broad, which has effectively resulted in a blanket denial to provide any of the requested information.
13. While recognizing that the wording of this particular item of the request is somewhat unclear, the uncertainty seems to be one of scope and whether the request was intended to include communications between all of the identified parties or only those between the Premier and/or Minister of Energy's office and the Electric Finance Corporation, NB Power, and its affiliated companies. As the Minister's office was unable to clarify the scope of the request, which led to a complete lack of response to this item, this office took the extraordinary step of acting as the intermediary between the petitioner and the Minister's office.
14. Where there is a question of interpretation of a request for information under the Act, departments have a duty to assist the requesting party. This duty means taking active steps to resolve any confusion surrounding the request, which means something beyond simply relying on subsections 3(2) and 3(3) of the Act to refuse to respond to the request and to place the onus of clarification squarely on the requesting party. Writing a letter requesting clarification is not good enough, nor does it satisfy the 30-day response as per subsection 3(1) of the Act. A telephone call to the requesting party might well have proven more effective in this situation, and in any event, the onus is on the department to clarify any vagueness or discrepancies as well as to respond to the request within 30 days.
15. In this case, the request is not vague to the point of being unable to be identified. The most reasonable interpretation is to view this as a request for exchanges between the Minister or the Premier and the Electric Finance Company and NB Power's senior management. That correspondence should be reviewed by the Minister and disclosed in accordance with the Act.

### **3. Timeliness**

16. It is regrettable that while the Act requires the Minister to respond to an access request within thirty days that in this case it took over six months to issue a partial reply. The fact that the request came from the Office of the Opposition before the opening of the fall session and that a partial response was only received the following March will do little to improve public perception in the administration of this Act, which is meant to be a cornerstone of our democratic tradition.

17. Further, the Department received a reply from NB Power on November 15, 2007 which addressed the twenty-one other items of the petitioner's request, yet the Minister seemingly held back this information pending clarification of this one point of the request. The Department has indicated that the timeliness of the response was affected by a change in personnel after the receipt of this large request; however, given the relative promptness of the reply from NB Power in response to this request, this still represents an unacceptable delay on the Department's behalf.

#### 4. Personal information

18. Our *in camera* review of the documentation revealed that Departmental staff had invoked the 6(b) exemption regarding personal information to redact the names and contact information of several public officials acting within the scope of their public duties, including the Deputy Minister of Energy and the President and CEO of NB Power.
19. While previous recommendations found that names and business contact information of public servants performing public duties not to be personal information within the scope of the 6(b) exemption,<sup>3</sup> the Court of Queen's Bench overruled my recommendation in both the *Hayes*<sup>4</sup> and *Barnett*<sup>5</sup> decisions and held that this information constitutes personal information as per the definition in section 1 of the Act. The Court noted that there are no exemptions to this definition provided in the Act.
20. With deference to the Court, the practical application of the *Hayes* and *Barnett* decisions have left privacy and access administrators with the question of how to meaningfully and properly comply with the Act while protecting relevant privacy concerns. This has led to two different results demonstrated in this request: the overzealous application of *Hayes* and *Barnett*, which resulted in the redaction of all of the information of the sender and the recipient of correspondence, thus rendering the document somewhat meaningless without this context; and an imperfect or improper redaction in which merely the names of public officials were redacted but the job titles and contact information remained intact. These practices are inconsistent with the requirements of access and privacy legislation elsewhere in Canada. Transparency and accountability are sacrificed in the name of only a theoretical or notional privacy interest and this is clearly not what the Legislature intended. The absurd lengths to which officials have gone in order to redact the name of the President and CEO of NB Power, information which is readily available to the public, points out further confusion with respect to what the Court intended in *Hayes and Barnett*. Applying the court's ratio in those cases in conformity with the legislation, in the context of the case before

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<sup>3</sup> *Barnett v. Dubé*, NBRIOR -2006-06.

<sup>4</sup> *Hayes v. New Brunswick (Intergovernmental Affairs and International Relations)*, 2007 NBQB 47.

<sup>5</sup> *Barnett v. New Brunswick (Family and Community Services)*, 2006 NBQB 411.

me, I find that withholding the name of the CEO of NB power and other senior officials within the corporation from the records disclosed in this case, or other information that may identify them is not necessary and such redactions should be removed.

21. In looking to other jurisdictions for some guidance on this issue, I note that both Ontario and British Columbia have included in their privacy and access legislation that information about a person's name and contact information in a professional capacity does not constitute personal information.<sup>6</sup> Alberta legislation takes a somewhat different approach in that this information falls under the scope of personal information, but provides a public body with the discretion to allow business contact information to be disclosed in certain circumstances, including if the information is routinely disclosed in the course of business activities.<sup>7</sup> I think the approaches in other jurisdictions are instructive in terms of asking the obvious question: whose interests are being protected here? What personal privacy interest do public servants, particularly high-ranking senior management, have in correspondences provided and received in their professional capacity?
22. It is my opinion that neither of the redaction models discussed above regarding the names and contact information of public servants strikes the proper balance between facilitating access to government information and protecting relevant privacy interests. A more meaningful and practical application of the Act in this case would be to leave the name and contact information of senior public officials intact.

## **5. Ministerial opinion/recommendations**

23. The Minister has redacted a responsive record that consists of an e-mail exchange between the President and CEO of NB Power and a third party consultant. This document is ostensibly exempted on the basis that it constitutes opinions for the Minister and is exempt under paragraph 6(g) of the Act.
24. As I have previously stated in several recent recommendations, the paragraph 6(g) exemption is aimed at protecting cabinet confidentiality and the legislative and policy development function, and thus only those documents or portions of documents which set out opinions or recommendations for the Minister's or cabinet's consideration are protected under this exemption.<sup>8</sup> The provision in the Act is construed in narrow terms and does not cover advice

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<sup>6</sup> See *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 2(3); *Freedom of Information and Protection of Privacy Act*, [RSBC] 1996, c. 165, Schedule I – Definitions “contact information.”

<sup>7</sup> *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 40(1)(bb.1).

<sup>8</sup> *Joan Kingston v. Madeline Dubé, Minister of Family and Community Services*, NBRIOR- 2006-04 at para. 15; *T.N. v. Madeleine Dubé, Minister of Family and Community Services*, NBRIOR- 2006-10, at para. 12; *Daniel McHardie v. Brad Green, Minister of Health*, NBRIOR- 2006-16, at para. 39.

generally, nor does it include advice provided by a consultant or public servant to any decision-maker.<sup>9</sup>

25. As the responsive record in question concerns an e-mail communication from an outside party to the President and CEO of NB Power, in my view, it does not fall under the scope of the 6(g) exemption.

## **6. Additional Redactions to Materials Provided by NB Power**

26. This office's *in camera* review of the documentation revealed that the Minister engaged in further redaction of the materials provided by NB Power, including:
- names, job titles, and contact information for public servants as personal information;
  - PowerPoint presentation entitled "Lepreau II" to Board of Management by Department of Energy subject to redactions by Minister under subsections 6(c) and 6(c.1)(ii);
  - an undated one-page list of discussion points on Lepreau II was withheld as lacking proper context.
27. It is of note that NB Power Corporation is more transparent than the Minister will allow, which speaks to the need for additional clarity and guidance in how best to administer the Act while striking the appropriate balance of access to government information while ensuring that relevant privacy interests are protected.

## **Recommendation**

- 28. In conclusion, I recommend that:**
- a. the Minister provide a meaningful response to the portion of the petitioner's request that required clarification; and**
  - b. the Minister provide to the petitioner unredacted copies of the documentation in which the names, job titles, and contact information for senior public servants had been redacted.**

**Dated at Fredericton, this                      day of March, 2009.**

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<sup>9</sup> *Joan Kingston v. Madeline Dubé, Minister of Family and Community Services*, NBRIOR- 2006-04 at para. 14.

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**Bernard Richard, Ombudsman**