NBRIOR- 2008-19

**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:

**Victor Boudreau,
Minister of Finance**

The Minister

RECOMMENDATION

1. This referral, dated December 3, 2008 arises out of an access to information request by the petitioner dated November 14, 2008. The petitioner, Daniel McHardie is an Editor / Reporter with CBCNews.ca. The November 14, 2008 access request is succinct and states in full as follows:

> I request the following documents through the Right to Information Act. I request a copy of each of the 2008-2009 quarterly financial updates prepared by the department. This should also include but not be limited to any updates prepared as a result of the sudden economic shift that occurred in mid September.

2. The response of the Minister, the Honorable Victor Boudreau, dated November 28, 2008, states:

> These financial updates are prepared specifically as briefings to the Premier and Cabinet, and they provide the fiscal parameters to guide policy decisions. For this reason, these documents are not made publicly available, and all past requests

for them, from legislative committees and other sources, have consistently been denied.

I have therefore decided to deny your request on the basis of sections 6(a) and 6(g) of the Act, which provide that there is no right to information where its release would disclose information the confidentiality of which is protected by law, or would disclose opinions or recommendations for a Minister or the Executive Council.

However, consistent with section 14 of the Fiscal Responsibility and Balanced Budget Act, the same financial data used in presentations to Cabinet is currently also being used to prepare, for presentation in the Legislative Assembly, a fiscal update that contains revised forecasts of the economic situation and financial condition of the Province for the current fiscal year. This fiscal update will be completed and released within a few days.

Further, various indicators of national and provincial economic performance are publicly available at any time on the Department of Finance Internet site at http://www.gnb.ca/0024/economics/index.asp. The data tables provided there are updated regularly.

I have attached a copy of the most recent New Brunswick / Canada Economic Indicators data table, updated to November 4, 2008, which I trust you will find useful for your purposes.

Pursuant to subsection 5(1) of the Act, I am also enclosing herewith the necessary forms for a review under the Act and I am returning your application fee.

3. My office met with officials from the Department of Finance ("the Department"), including the Senior Policy Advisor responsible for Right to Information requests and the Assistant Deputy Minister for the Fiscal Policy Division, on December 11, 2008.

4. The Department identified five documents that were within the scope of the request for information being made. The following table provides a summary of the information identified and the related exemption claimed by the Minister:

Exemption(s)	Date of Documents	Description
1. 6(a) & (g)	June 2008	Multi-year forecasts prepared for cabinet
2. 6(a) & (g)	Sept 2008	Multi-year forecasts prepared for cabinet
3. 6(a) & (g)	Nov 2008	Multi-year forecasts prepared for cabinet
4. 6(g)	Aug 5, 2008	1st quarter expenditure projections; 1 page
5. 6(g)	Nov 26, 2008	2nd quarter expenditure projections; 1 page

5. My office is satisfied that the exemptions claimed for documents 1, 2 and 3 are valid and that no further disclosure is required with respect to these

documents. Before going into detail as to why the exemptions sought are appropriate, I wish to comment on the Department's handling of the request for information in light of its duty to seek clarification of the access request, to make a diligent search of its records and to refer, if necessary, the petitioner to the appropriate responding department.

Need to Seek Clarification

6. I am confident that in this case, the Department officials made a *bona fide* effort to fully answer the Petitioner's request. As the process was described to my office, as soon as the request came in, a senior manager, in this case the Assistant Deputy Minister for Fiscal Policy, in conjunction with a senior policy advisor, were given the task of overseeing the request to ensure that all relevant documents were identified and reviewed to determine whether they could be disclosed or not.

7. Unfortunately, the Department's efforts fell short on two accounts, both of which are preventable in the future. The first shortcoming is that Department failed to seek clarification from the Petitioner as to the exact nature of the documents sought and also whether there were specific documents the Petitioner had in mind when making his request. Instead, the officials responsible attempted to surmise what the Petitioner was after from the very brief letter provided.

8. Also included in the materials that accompanied the November 8, 2008 request for information was a print-out of the proposed *Fiscal Transparency Act*, Bill 65, which was tabled by the current government when it was in opposition. One of the key attributes of the proposed Bill 65 was to increase government accountability by requiring that the Minister of Finance provide "an updated statement of the province's finances to the auditor-general within 60 days of the end of each quarter of the fiscal year."[1]

9. The Department quickly indicated that this Bill never became law and that there was currently no legislation that mandated quarterly updates. The only applicable legislation identified was the *Fiscal Responsibility and Balanced Budget Act* ("FRBBA"), section 14 of which requires:

> 14. The Minister shall lay before the Legislative Assembly, not later than December 31 and March 31 in each fiscal year, fiscal updates that contain revised forecasts of the economic situation and financial condition of the Province for the current fiscal year.

10. The Minister noted in his letter that the first fiscal update would be "completed and released within a few days" and, in fact, the update was made public on December 3, 2008.

[1] "A better way to govern." Times and Transcript (Moncton), April 24, 2004.

11. The Department officials were confident that no formal quarterly updates were prepared for use by the Minister or anyone else. The Fiscal Policy Branch did prepare briefing notes for the Deputy Minister to be referred to in case the Minister had any specific questions. These are documents 4 and 5 in the earlier table and will be discussed in detail below.

12. However, subsequent to responding to the Petitioner's request, the Department discovered that quarterly updates were prepared by every department in the government for the Comptroller's Office. This represents the second deficiency my office noted in the handling of this complaint. The documents prepared for the Comptroller's Office contain historic financial data by department showing actual revenues and expenditures as compared to budget. They also include brief narratives from each department explaining any large variances.

13. It is our understanding that this information is aggregated by the Comptroller's Office, based on its review and adjustments, on a quarterly basis. This information provides the foundation from which the fiscal policy projections and contingencies prepared for the Cabinet Ministers, noted as documents 1 through 3 above, are made.

14. It is unclear from the Petitioner's request whether he was seeking historic financial data or projected changes in government spending. The simplest way to find out would have been to seek clarification with him directly. While it is understandable that some petitioners may not be able to clearly articulate what they are looking for, the onus is still on the government to attempt to seek clarification so as to be consistent with the spirit of the *Right to Information Act (*"RTIA").

15. This complaint is another example[2] that underscores the need for legislative reform aimed at requiring both sides to reach a common understanding of the search requested and the information being sought. Other legislative schemes provide explicitly for a duty to assist requesters in formulating their access to information request. Even in the absence of such a legislative duty privacy and access commissioners have interpreted access to information laws as requiring a public authority to make inquiry and seek clarification of right to information requests.

16. McNairn and Woodbury in their annotation of the Ontario FIPPA laws[3] conclude as follows:

> *Order 134* (Re Ministry of Financial Institutions; December 27, 1989)

[2] See for example, NBRIOR-2007-04 *McHardie v. Minister of the Office of Human Resources*, November 20, 2007.

[3] McNairn and Woodbury, 2005 Annotated Ontario Freedom of Information and Protection of Privacy Acts, Thomson-Carswell 2006, pp. 279-280.

> An institution has an obligation to seek clarification regarding the scope of a request and, if it fails to discharge this responsibility, it cannot rely on a narrow interpretation of the scope of the request on an appeal to the Commissioner [This principle was applied in *Order PO-1730* (Re Ontario Hydro; November 17, 1999).]
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> *Order 38* (Re Ministry of the Solicitor General; February 9, 1989)
> An institution that receives a broadly worded request has three options in making its response. It can choose to respond literally to the request, which may involve an institution-wide search for records requested. It may request further information from the requester so that it may narrow its area of search. Finally, it may narrow the search unilaterally but, if it does so, it must outline the limits of the search to the requester.

17. New Brunswick Courts have also held public authorities to account where they have failed to make a diligent search to identify and collect responsive records which supply parts of the information sought. (See *Woods v. Premier of New Brunswick* [2003] NBJ 149 (NBQB), Russell, J.)

18. In *Order PO-1857-I* (Re Ministry of the Solicitor General; January 19, 2001) the Ontario Information and Privacy Commissioner's Office held that on an appeal challenging the reasonableness of a government authority's search, the authority must provide sufficient evidence of the details of the search including the name of the employee(s) who conducted the search, the level of experience of these employee(s) and details concerning their familiarity with the subject matter of the request.

19. While this case is one where the Department attempted to make a full and diligent search, the results point to the necessity of following up with the petitioner whenever there is some confusion as to what information is being requested.

20. Further, I would suggest that the right to information landscape has evolved to the point where it is no longer sufficient to simply deny a member of the public disclosure without providing any detail as to what documents are being exempted and on what basis.

21. A simple response index, much like the table created above, would go a long way in reassuring the public that its government has taken all necessary steps to ensure that it is being as transparent and accountable as possible, and that where the government has identified documents that should be exempt from disclosure, it has done so based on valid exemptions.

Exemptions Claimed

22. The Department relies on the following exemptions under the *Right to Information Act*:

> **6** There is no right to information under this Act where its release
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> > (a) would disclose information the confidentiality of which is protected law;
> > …
> > (g) would disclose opinions or recommendations for a Minister or the Executive Council;

23. In a 2006 recommendation, this office previously looked at the 6(a) exemption in detail and concluded that the 6(a) exemption is a broad exemption directed primarily at the preservation of Cabinet secrecy, official secrets and common law privileges.[4]

24. Having reviewed the documents 1, 2 and 3, I must agree that these fall within the type of information to be exempted from disclosure based on 6(a) of the RTIA.

25. The documents in question are presentations prepared by the fiscal policy branch to be presented to the cabinet ministers at special retreats. They contain estimates and projections, including contingencies based on varying policy choices. Much of the information contained in these documents will never be scrutinized by the public as it will never be acted upon. These documents form a basis from which fiscal policy decisions are made.

26. It is in the public interest that Cabinet or any Minister has as full a picture as possible of the various options available, without concern that choices that weren't made will be open to public debate.

27. The exemption set out in 6(a) is sufficient to exempt these documents from disclosure. There is no need to determine whether these documents would also be exempt based on 6(g).

28. As for documents 4 and 5, the first question to determine is at what point is a document considered an opinion or recommendation for the Minister or cabinet to consider.

29. As noted earlier, these documents represent briefing notes prepared for the Deputy Minister to prepare him in case of any questions from or for the Minister. As described by department officials, these notes are for the Deputy Minister's "coat pocket" and are only used when needed.

[4] *T.N. v. Minister of Family and Community Services*, NBRIOR- 2006-10 at para. 20.

30. In this case, the notes were compiled specifically for the Deputy Minister and so would normally not be exempt. As I have noted in a previous decision, the provision allowing for an exemption based on advice to the Minister is a narrow exemption. It relates to opinions or recommendations, not advice generally. Only those documents or portions of documents that set out opinions or recommendations for the Minister or cabinet to consider are protected by the 6(g) exemption. Further, where the records in the Minister's possession do not reveal opinions or recommendations which cabinet or the Minister are required to weigh and consider in a decision-making function; where the records constitute factual background to a given option or recommendation, that portion of the document can and should be disclosed without offending the exemption.[5]

31. How far into the civil service should the 6(g) exemption be allowed to extend? Is a document prepared by an administrator to respond to a Ministerial question that is never actually used exempt from disclosure? The answer, as in most areas of the law, will be determined on a case by case basis and will largely depend on what balance is struck between the public's right to access information and the government's need to able to efficiently conduct the business of state.

32. In this case, there is a strong link between the document and the Minister as it was prepared specifically to address any possible Ministerial questions. The information gathered is directly responsive to the needs or potential needs of the Minister, and are not peripheral to the functioning of government. The fact that the documents may never have actually been reviewed by the Minister to make a decision should not be a limiting factor as to do so would simply create a disincentive within the government to be prepared for all eventualities.

33. The civil service must be allowed to provide the information necessary on as timely a basis as possible to allow our elected officials to make decisions. Preparing documents ahead of time to give a Minister or Cabinet the full picture in a given situation should not be discouraged.

34. The next questions with respect to these two documents are whether the information contained in them is fact or opinion, and whether the facts can be severed from the opinions.

35. The documents in question were reviewed by investigators from my office with departmental officials and it was concluded that the majority of the information contained in them can clearly be classified as facts. The only redaction suggested is based on forgivable assistance given to a party corporation, which falls within the scope of s.6(c.1)(i) of the RTIA, which states:

[5] *MacLaughlin v. Minister of Health*, NBRIOR-2007-11.

> 6 There is no right to information under this Act where its release
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> > (c.1)would reveal financial, commercial, technical or scientific information
> >
> > > (i)given by an individual or a corporation that is a going concern in connection with financial assistance applied for or given under the authority of a statute or regulation of the Province

36. One line of reasoning put forth by the Department that the numbers are not facts but opinions is that the numbers are unaudited and so the government has no way to ensure their veracity. However, the information contained in the November briefing note was exactly the same as the information tabled to the legislature in the fiscal update on December 3, 2008 without ever having been reviewed by the public auditor. Not all financial data released to the public is audited. To require that all numbers be audited for *Right to Information* requests to be met would be requiring too high a standard for disclosure.

37. The Department is also contending that the legislature has already contemplated the level of disclosure required of the government and that to allow for greater disclosure would be to use one piece of legislation to countermand the intention of another piece of legislation.

38. As noted earlier, section 14 of the Fiscal Responsibility and Balanced Budget Act sets out the government's responsibility with regards to fiscal updates. However, the legislation provides for a minimum level of disclosure but not a maximum. The government is mandated to provide fiscal updates at least twice a year, but there is no legislation stopping it from providing updates daily if it so chooses.

39. I suggest it would be too much of an assumption into what government intended when it drafted the FRBBA to assume that the legislation was drafted to only allow for two updates a year. The intention of the FRBBA was to provide for a certain level of accountability and transparency by providing for a minimum level of disclosure. However, the FRBBA does not dictate a maximum level of disclosure as it gives the government the freedom to provide for additional disclosure as it deems necessary. Additional disclosure outside of the time frames set out in the FRBBA becomes a political tool for the government of the day to wield at its discretion.

40. Furthermore, the Supreme Court has long recognized that privacy and access rights are fundamental in the Canadian legal system and found privacy and access legislation to be quasi-constitutional in nature. In the context of the Federal *Privacy Act*, In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*[6], the Court ruled at paragraphs 24 and 25:

[6] 2002 SCC 53

> In *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at p. 652, Noël J. of the Federal Court, Trial Division wrote:
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> The enactment by Parliament of Part IV of the *Canadian Human Rights Act*, later replaced by the *Privacy Act*, illustrated its recognition of the importance of the protection of individual privacy. A purposive approach to the interpretation of the *Privacy Act* is thus justified by the statute's quasi-constitutional legislative roots. [Emphasis added by Supreme Court.]
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> In *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403, at para. 65-66, La Forest J. wrote (although he dissented, he spoke for the entire Court on this point):
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> La Forest J. also did not hesitate in that case to recognize "the privileged, foundational position of privacy interests in our social and legal culture" (para. 69). **La Forest J. added, at para. 61, that the overarching purpose of access to information legislation is to facilitate democracy**:
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> It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. [Emphasis Added]

41. At para. 31, the Court goes on to say:

> 31. Similarly, in *Reyes v. Secretary of State*, (1984), 9 Admin. L.R. 296, at p. 299, the Federal Court, Trial Division said:
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> It must also be emphasized that since **the main purpose of these "access to information" statutes is to codify the right of public access to government information,** two things follow: first, such public access ought not be frustrated by the Courts except upon the clearest of grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure, in this case the government. [Emphasis added]

Conclusion

42. I can not limit the public's right to information because it demands more of the government than the minimum it has set in another statute, particularly given the quasi-constitutional nature of the RTIA and therefore its paramountcy over the FRBBA. If the legislature really wanted to limit the ability of the public to request information other than when it was mandated to provide it, it should have explicitly excluded that right in the FRBBA; an option which is still available to it.

43. I recognize that this puts more pressure on the civil service to be mindful of the information prepared for the Deputy Minister. Given that this information may be used by the Minister to respond to public questions, it does not seem to be too great a burden, particularly when balanced against the rights at stake.

Recommendations

44. I recommend that the Department seek clarification from the Petitioner when no documents are found that clearly satisfy the request for information, or at any point where there is uncertainty as to the information being sought.

45. Further, I recommend that in the future the Department consider preparing a response index which lists which documents were identified and what specific exemptions, if any, were applied to each document.

46. I also recommend that the Department disclose the unredacted portions of the briefing documents from August 5, 2008 and November 26, 2008, noted as documents 4 and 5, containing only factual background material as indicated in the appendices provided under separate cover to this report.

47. The Department should redact the name of the private company noted on the August 5, 2008 memorandum on the line mentioning BNB as per s.6(c.1)(i) of the *Right to Information Act*.

Dated at Fredericton, this 11th day of February, 2009.

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Bernard Richard, Ombudsman