**NBRIOR-2007-23**

**IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)(b) OF THE *RIGHT TO INFORMATION ACT***

**Between**:

Q.R., **the petitioner**

**And**

Acadie-Bathurst Health Authority, **the RHA**

## RECOMMENDATION

1. The petitioner has been employed by the RHA for several years. The petition, dated May 29, 2007, arises from an information request that she filed with the RHA on March 13, 2008. The information request reads as follows:

> SUBJECT: Access to report on review of housekeeping department workplace at Lamèque CHC
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> Dear Mr. Losier:
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> I am officially requesting that I be provided with a copy of the said report pursuant to two acts: the *RIGHT TO INFORMATION ACT* and the *PROTECTION OF PERSONAL INFORMATION ACT* OF NEW BRUNSWICK.
>
> I wish to receive all information about me and all decisions concerning me, along with the general information, decisions, and recommendations. In the event of a refusal on your part, please send me your reasons stated clearly in writing.
> *[Translation]*

2. Owing to a change in the RHA's chief executive officer, the response prepared by Mr. Losier on March 27, 2007, was sent to the petitioner after having been endorsed by acting chief executive officer Stéphane Legacy on May 2, 2008. The response

3. The applicable provisions of the *Right to Information Act* read as follows:

> **2** Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any department to which this Act applies.
>
> **2.1** Without limiting section 2, subject to this Act, every individual is entitled to request and receive information about himself or herself.
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> …
>
> **6** There is no right to information under this Act where its release
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> …
>
> *(f.3)* would disclose advice, opinions, proposals, recommendations, analyses or policy options provided, given or made to or for a school board, a community board, the board of directors of a regional health authority or a committee of any such board for the purposes of the board or committee in exercising its powers and performing its duties and functions;

4. However, the petitioner's request refers explicitly to the information and decisions concerning her and is based as well on the rights she enjoys under the *Protection of Personal Information Act*. The applicable provisions of that act read as follows:

> **5**(2) Where another Act confers on a public body, or an officer or employee of a public body, a discretion that may be exercised in relation to personal information, that body or person shall have regard to this Act in the exercise of that discretion, to the extent that the other Act allows.
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> …
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> **Principle 9: Individual Access**
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> Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information and shall be given access to that information, except where inappropriate. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
>
> …
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> **Principle 9: Individual Access**
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> **9.1** A public body to which the *Right to Information Act* applies may only refuse to provide an individual with personal information relating to himself or herself if the individual would have no right to that information under the *Right to Information Act*.

…

**9.4** When an individual has made a challenge to the accuracy or completeness of personal information relating to himself or herself but has not satisfied the public body that an amendment is appropriate, the public body shall note that the individual disputes the information in its possession.

5. The petitioner's request is similar to several other requests that I have handled in recent months. In one case, *D.M. v. New Brunswick (Training and Employment Development)* NBRIOR-2006-01, the petitioner sought to obtain the release of an investigation report concerning a complaint of personal harassment that she herself had filed against her supervisor. The recommendation in that case contains an exhaustive analysis of the complementary interpretation of the *Right to Information Act* and the *Protection of Personal Information Act*. The provisions of section 5 of the latter act and a study of the jurisprudence in this case led to the following findings:

> It was also the intent of New Brunswick legislators that the *Right to Information Act* be interpreted in the light of the provisions of the *Protection of Personal Information Act*. These two statutes are correlative and complementary: the former strives for the disclosure of public information in order to safeguard democratic principles, whereas the latter strives for the non-disclosure of personal information in order to prevent authoritarianism from taking hold. The statutory duty of, and the challenge facing, the courts and authorized administrative bodies is to ensure the balanced application of both pieces of legislation in each case at bar.
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> …
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> The context of a request for access to the investigation report of a public body on a harassment complaint filed by one of its employees places a heavy burden of transparency on the government and the parties in question. At issue are serious allegations that have a significant impact on all the parties in question. It would also be exceptional for the duty of disclosure in those circumstances to be lesser than that demanded by the strict application of the principles of procedural fairness. The notion of procedural fairness in common law derives its rationale from two premises: (1) it serves to optimize the quality of the decisions made; and (2) it makes the outcome of these decisions more acceptable. Contrary to these advantages, when common law limits the extension of principles of fairness, it does so most often on the grounds that it would result in unjustifiable expense for the government or overjudicialization of proceedings with its attendant delays.

6. Furthermore, as in the present case, NBRIOR-2006-01 was not a matter in which the principles of access to information and protection of privacy were opposed:

> In other words, this is not a case where the principles of access to information run counter to respect for privacy, such as when a media representative or a third party seeks to obtain information concerning the private life of an individual. Basically, what is at issue is a request by an individual affected by the findings of an administrative investigation who is seeking disclosure of the investigation report to ensure that the procedure followed was fair and who is also insisting that all personal information in the report concerning her be

> disclosed so that she can verify its accuracy. In this case, the aims of both pieces of legislation complement, not oppose, each other.

7. In fact, in that case, I recommended disclosure of the investigation report with the exception of certain passages where personal information about third parties had obviously been shared in confidence. It was this option that, to my mind, best reconciled the various applicable provisions of the acts in question.

8. However, in *B.C. v. Atlantic Health Sciences Corporation* NBRIOR-2006-15, the petitioner sought disclosure of an investigation report, and certain evidence to which the report referred, concerning a harassment complaint she had filed 10 years earlier against a physician with whom she had worked. At the time of the investigation, she received a copy of the full investigation report. In that matter, I concluded, by weighing the duty of transparency and access to information on the one hand against the protection of personal information on the other, that no new disclosure was justified.

> Generally, a complainant's interest in reaching a fair result through the harassment investigation process and achieving closure through an impartial and transparent investigation will favour disclosure, even in circumstances where witnesses to an investigation would prefer to remain anonymous or offer their testimony in confidence. The rules of natural justice require more transparency, even when rights are not finally or judicially determined. However, as the petitioner in this case lodged her complaint over ten years ago and as any opportunities for review or appeal were exhausted long ago, her rights or interests in accessing the information weigh very little in the balance as compared to the rights of witnesses and other individuals involved with the complaint to keep confidential what was disclosed so long ago.

9. Finally, in the matter of *Rhonda Whittaker v. South-East Regional Health Authority* NBRIOR 2006-14, a CBC reporter sought to obtain an investigation report concerning a harassment complaint filed against one of the hospital's physicians. In that matter, I concluded as follows:

> I have recently had occasion to comment upon s. 6 exemptions under the ***Right to Information Act,*** in the matter of *Whittaker v. Dubé.* (NBRIOR 2006-02**).** It is unnecessary to repeat that analysis here, save to reiterate that it is sometimes appropriate, where privacy interests and access to information interests are in conflict, to balance those interests one against another.
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> In the present case, I conducted an *in camera* review of the documents at issue on April 27, 2006. My examination of the materials sought by the petitioner confirms that they do indeed contain personal information relating to parties other than the petitioner, and that this information cannot reasonably be severed from the materials as a whole. Nor is there a compelling public interest in the disclosure of the materials, such that it would be appropriate to weigh this interest against the privacy rights at stake. I am therefore satisfied that the South-East Regional Health Authority's refusal to grant the petitioner's request was justified.

10. In many ways, the present petition raises a problem very similar to that in the above-cited matters. The situation actually more closely resembles *D.M. v. New Brunswick (Training and Employment Development)* since the investigation report continues to have repercussions on the petitioner in terms of her employment and what is at issue is an individual's request for access in particular to the passages in a report concerning her, rather than a request for access by the media or a third party. However, although the facts may be somewhat similar, the present petition raises a point of law that is quite different from that in the earlier cases.

11. In this case, the RHA based its refusal to disclose not on exemption 6(b) or (b.1) concerning personal information but on exemption 6(f.3) concerning recommendations and reports to the boards of directors of a regional health authority. To my mind, the exception regime applicable in this type of situation is the one aimed at protecting personal information, and section 6(f.3) does not apply in this case.

12. I note that the burden of proof for demonstrating the existence of an exception regime lies with the public authority invoking it. The right conferred by the act is a right of access to information, specifically, a privileged right of access to all information held by a public authority that constitutes personal information about a petitioner. Exceptions to this right of access must be interpreted restrictively. Even though certain documents may be subject to more than one exception measure, where one of the exceptions set out in the act is more appropriate than another, the exception measures must be analyzed from that angle, and, if the exemption is not justified, it will then be more difficult to justify exclusion of the right of access through reference to another exception measure.

13. Exception (f.3) was added by one of the more recent legislative amendments to the act. Before the act was proclaimed, the only aspect of the policy development process in the public sector that it protected was the deliberations of Cabinet. Exception 6(g) of the act stipulates that access rights do not apply when disclosure "would disclose opinions or recommendations for a Minister or the Executive Council." By adding section 6(f.3) to the act, legislators extended protection for policy development and the ministerial decision-making process to other independent public bodies, including schools boards and the boards of directors of regional health authorities.

14. A number of recommendations have interpreted exception 6(g) restrictively such that it applies only to recommendations made to the Minister that invoke the Minister's decision-making power and deliberative function. The Court of Queen's Bench of New Brunswick has endorsed this interpretation of the exemption as well in its most recent decisions. For the exemption to be invoked, the document being sought must have been submitted to the decision-making authority in order to have it make a choice regarding the policies to be adopted or the decision to be made or to provide it with information so as to clarify the choice to be made. If the document in question merely relates facts or is just a briefing note to the Minister, it will not be protected by the exemption.

15. In my opinion, section 6(f.3) must be interpreted along those lines. Although this section is worded more broadly than section 6(g), I do not detect any intent by legislators to give this exemption a disproportionately broad scope or a scope that is much broader than that attributed to the decision-making process of Cabinet itself. The distinction is undoubtedly important given the principles of legislative drafting, but there is no reason to establish a new right based on the wording of this provision. It is my conclusion that, in order to rely on exception (f.3), the RHA has to prove that the document in question had been submitted to the RHA's board of directors to assist it in a decision-making process giving rise to a choice on the basis of the advice, opinions, proposals, recommendations, analyses, or policy options provided.

16. In the case in point, I was provided with no evidence that exemption 6(f.3) applies to the investigation report requested. It is addressed not to the RHA's board of directors or chair but to its chief executive officer. Basically, the report investigates a problem relating to the workplace and interpersonal relationships within a particular sector of the department. It is not a report on a workplace harassment complaint per se, but the administration refused to formally investigate such a complaint related to the same facts on the basis of that report. Both subsection 26(4) of the *Regional Health Authorities Act* and the workplace harassment policy that applies to the RHA give the RHA's chief executive officer decision-making power with regard to labour relations issues within the RHA. The text of the RHA's response to the present petition seems to confirm that this is the decision-making process that was used in this case as well.

17. I have to conclude that the RHA's refusal to disclose pursuant to exemption 6(f.3) of the act is unfounded. Since the RHA did not invoke any other reason for its refusal, I would normally be inclined to recommend the report's release. However, other considerations are in order. Although the usual practice of Canadian information commissioners is to require that the Minister invoke all of the reasons for his or her refusal at the time of a first refusal, it seems to me that this practice is tenable only if the exemption set out in the act benefits the public administration alone. For example, if a minister or a public authority subject to the act, such as an RHA, fails to invoke, during its first refusal to disclose, the application of lawyer/client privilege or the section 6(f.3) or (g) exemption, the exemption will be considered renounced. However, where the exemption confers a benefit or some form of protection on a third party, I must determine whether third parties were consulted and whether the recommended disclosure is consistent with the protection conferred upon them by that right.

**18. Given all of the circumstances of the case at bar and for the reasons set out above, I recommend that pages 1 to 11 of the investigation report and the first paragraph on page 12 be disclosed to the petitioner. The remainder of the report should be severed pursuant to section 6(b) of the act.**

**Dated at Fredericton, this 13th day of August 2007.**

**Bernard Richard, Ombudsman**