



Report of Findings: 22/23-AP-058
Department of Justice and Public Safety
August 31, 2023

Citation: New Brunswick (Justice and Public Safety) (Re), 2023 NBOMBUD 3

Summary: The Applicant made an access request to the Department of Justice and Public Safety for records about a new correctional centre to be built in the Fredericton region as publicly announced in December 2021. The Department denied the request in full, relying on sections 17(1)(b) (Executive Council confidences) and 26(1)(a) (advice to a public body). The Applicant subsequently filed a complaint with this office.

The Ombud found that, given the mandatory nature of the provisions of the *Right to Information and Protection of Privacy Act* related to Cabinet deliberations, the Department properly relied on section 17(1)(b) to refuse access to a draft Memorandum to the Executive Council and the Department's subsequent budget submission to Treasury Board, which is a Cabinet committee.

The Ombud also found that the Department properly relied on section 26(1)(a) to refuse access to information about options presented for consideration and opinions on preferred options, while also suggesting that the Department reconsider its position on disclosure to take into account the fact that a final decision had been made and the public interest in understanding the reasons behind this decision.

The Ombud recommended that the Department disclose the remainder of the records or portions of records at issue that it withheld under section 26(1)(a) as this information does not fall within the scope of the exception.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, sections 17(1)(b), 26(1)(a), 70(1).

Authorities Considered: Office of the Ombud, Report of Findings 19/20-AP-071.

INTRODUCTION

[1] The Applicant made an access request under the *Right to Information and Protection of Privacy Act* (“the *Act*”) to the Department of Justice and Public Safety (“the Department”) for the following information between June 1, 2021 and August 2, 2022:

All records that detail the need for a new correctional centre to be built in the Fredericton region, as announced in December 2021. That includes, but is not limited to, any records that discuss the business case for the new facility or capacity issues within the existing correctional centres, and any briefing materials or memos about the decision.

[2] The Department responded by refusing access in full to the requested information. The Department’s response explained that any information related to submissions to the Executive Council (commonly referred to as Cabinet) were withheld under section 17(1)(b) (Executive Council confidences) and that information considered briefing material was withheld under section 26(1)(a) (advice to a public body).

[3] The Applicant was not satisfied with the Department’s response and filed a complaint with this office.

[4] In making this complaint, the Applicant expressed concerns that the Department did not disclose any records relevant to the request and questioned whether the Department properly applied the claimed exceptions to disclosure. The Applicant noted that the provincial government had cited capacity issues as one of the reasons for a new facility, which the Applicant believed should have generated records to substantiate this issue and questioned why these kinds of details should not be made public.

[5] The Applicant also submitted that there were likely submissions made to Cabinet and records created on this issue that would be considered as “advice to minister” and this exception is meant to exempt specific information from records, rather than withholding them in their entirety.

[6] The Applicant also noted that any advice given in this case would presumably relate to a decision that has already been made, that the decision to build the new facility was made months prior and is no longer a proposal or draft idea that remains under consideration.

[7] Prior to the issuance of this report, the Department agreed to disclose much of the information at issue to the Applicant, thus reducing the scope of this investigation. The question of the Applicant’s access rights to a small number of records that the Department continued to withhold under sections 17(1)(b) and 26(1)(a) remained at issue, which led me to conduct a formal investigation under section 68(3) of the *Act*.

ISSUES

[8] The outstanding issue is whether the Department properly refused access to the remaining records in question under sections 17(1)(b) and 26(1)(a) of the *Act*.

[9] The remaining records at issue include a draft Memorandum to the Executive Council (“MEC”) and a budget submission to Treasury Board, which the Department continued to withhold under section 17(1)(b). The Department also continued to withhold four other records under section 26(1)(a), including two documents setting out possible options for a new correctional facility, another undated historical document that outlines background information on correctional facilities, and a briefing note prepared in February 2022.

DECISION

[10] The relevant provisions of the *Act* are as follows:

17(1) The head of a public body shall refuse to disclose information to an applicant that would reveal the substance of deliberations of the Executive Council, including:

...

(b) discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council,

...

26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

(a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown...

Section 17: Executive Council confidences

[11] Section 17 is a mandatory exception to disclosure. The Department must demonstrate that the information in question falls within its scope. Where this is the case, disclosure is prohibited and there is no right of access to the information in question.

[12] Where information falls within the scope of this exception, the only way it can be disclosed is if the record is more than 15 years old and the Executive Council approves the disclosure (section 17(2)).

[13] The purpose of this exception is to protect the substance of deliberations of Cabinet by striking a balance between accountability in government decision-making processes and allowing Cabinet deliberations to be private.

[14] The test adopted by this office in a previous decision (Report of Findings 19/20-AP-071 at para. 20) is as follows:

Thus the question to be asked is this: Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exception...

[15] To meet the requirements of this exception, a public body must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations. This can be accomplished by demonstrating that the information at issue is included in the types of information described in section 17(1).

[16] If the information in question is not specifically captured in the types of information described in section 17(1), it may nevertheless still merit protection where disclosure would reveal the substance of Cabinet deliberations or otherwise permit the reader to make accurate inferences about the substance of such deliberations.

[17] In this case, the Department withheld a draft Memorandum to the Executive Council ("MEC") and a budget submission to Treasury Board.

[18] While the Department provided our office with explanations about why this exception should apply to these records, it initially declined to provide copies of these documents for our review, as is its right under section 70(1) of the *Act*:

70(1) With the exception of Executive Council confidences and any document that contains information that is subject to solicitor-client privilege, the Ombud may require any record in the custody or under the control of a public body that the Ombud considers relevant to an investigation to be produced to the Ombud and may examine any information in a record, including personal information.

[19] As such, this office does not have the power to require production of records for our review where a claim of Cabinet confidences has been raised; however, this does not prevent or prohibit a public body from providing the documents if it chooses to do so to facilitate our review.

[20] As the investigation process continued, the Department later changed its position on this point and provided the draft MEC and budget submission for our review, which greatly facilitated my assessment of the Applicant's access rights to these records.

[21] Having reviewed these two records and considered the Department's submissions in support of its position that they cannot be disclosed as Cabinet confidences, I agree that the Department properly relied on section 17(1)(b) to refuse access.

[22] In arriving at this finding, I note that the draft MEC was prepared by Department officials at the Deputy Minister's direction. The Department explained that the usual process for approval of a new facility would require a MEC and Cabinet decision to proceed, which is why the Department began working on a draft MEC as directed.

[23] The Department further explained that the MEC in this case was not finalized and submitted to Cabinet for approval. The Department instead used the draft MEC to prepare a budget submission for financial approval to proceed through Treasury Board, which is a committee of the Executive Council. As is now publicly known, approval to proceed with the new facility was granted and public announcements were made to this effect.

[24] In light of this, I find that the draft MEC falls within the scope of section 17(1)(b) as a memorandum that was prepared for submission to the Executive Council. I also find its disclosure would reveal the substance of Cabinet deliberations, based on the Department's explanations that the draft MEC was used to brief the Treasury Board during the budget submission process where the project was approved, as the Treasury Board is a Cabinet committee.

[25] I also find that the Department's budget submission to the Treasury Board qualifies as information that would reveal the substance of Cabinet deliberations, as it was submitted to a committee of Cabinet for consideration and decision.

[26] In making this finding, I note that much of the information in these documents has since been made publicly known by the province with the announcement of the new correctional facility. This raises an important consideration as to the limited scope of section 17's current wording.

[27] This is a case where, if not for the mandatory nature of the application of this provision, Cabinet could have considered disclosing the draft MEC and the budget submission since most if not all of the information they contain has already been made public. However, section 17 provides no such discretion to Cabinet to dispose of its own documents as it sees fit until 15 years have passed (section 17(2)).

[28] I note for general interest that several other Canadian jurisdictions' respective access to information legislation afford some discretion for the disclosure of information that would otherwise be protected as a Cabinet confidence.

[29] For example, Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015*, grants the Clerk of the Executive Council the discretion to disclose otherwise protected information under its corresponding Cabinet confidences exception provision where the Clerk is satisfied that the public interest in disclosure outweighs the reason for the exception (section 27(3)).

[30] In other jurisdictions, such as Ontario, Manitoba, and Saskatchewan, while Cabinet confidences are afforded a blanket level of protection for a certain number of years, the respective exceptions also allow disclosure of otherwise protected information to be disclosed at any time with Cabinet approval (see Ontario's *Freedom of Information and Protection of Privacy Act*, section 12(2); Manitoba's *Freedom of Information and Protection of Privacy Act*, section 19(2), and Saskatchewan's *Freedom of Information and Protection of Privacy Act*, section 16(2)).

Section 26(1)(a): Advice to a public body

[31] The Department relied on this exception to withhold four records:

- two documents, dated in August and September 2021 respectively, setting out possible options for a new correctional facility,
- an undated historical document that outlines background information on correctional facilities, and
- a briefing note prepared in February 2022.

[32] Section 26(1)(a) is a discretionary exception to disclosure that allows public bodies the option to protect information where disclosure could reasonably be expected to divulge details related to decision-making processes.

[33] As this is a discretionary exception to disclosure, a public body must show that the information in question falls within the scope of the exception and that the public body exercised its discretion in deciding to refuse access.

[34] In reviewing the exercise of discretion, I may find that the public body erred in exercising its discretion where, for example, it did so in bad faith or for an improper purpose, it took into account irrelevant considerations, or it failed to take into account relevant considerations. Where this is the case, I can ask the public body to reconsider its position and exercise of discretion; however, I cannot substitute my own discretion for that of the public body.

[35] Having reviewed these records, I find that the Department demonstrated that it properly relied on this exception to refuse access to some of the information at issue, but not all.

[36] In relation to the two documents from August and September 2021 setting out options for a new correctional facility, I find that the Department was authorized to withhold the portions related to options presented and opinions about preferred options, as proposals and opinions for the purposes of section 26(1)(a).

[37] However, these two documents also include factual and background information about the capacity of the existing facilities and other reasons why there may be a need

for a new correctional institution, which I do not agree consist of advice, opinions, proposals, or recommendations for the purposes of this exception. As such, I find the Department erred in refusing access to this information on this ground.

[38] In relation to the undated historical document that outlines background information on correctional facilities, it appears to have been drafted in or prior to 2011. The Department did not provide any explanations as to whether this document was prepared as briefing material; however, I find that it consists of factual information about construction and operational costs, opening and closing dates for various provincial facilities, staffing information, and the like, much if not all of which would have been publicly known since 2011. As such I do not find that this record consists of advice, opinion, proposals, or recommendations for the purposes of this exception. I find the Department erred in refusing access to this record.

[39] As for the February 2022 briefing note, the Department expressed concerns about the disclosure of briefing notes as a general principle. The Department submitted that senior officials rely on public servants to provide all manner of options and scenarios for consideration and that candor and frank discussions are a necessary part of a robust decision-making process. The Department raised concerns that the quality of the options presented in briefing notes could be expected to decline if these kinds of records were to be made generally available to the public.

[40] While I understand the Department's concerns, I am not prepared to make a blanket finding that briefing notes are protected from disclosure under the section 26 exception as a matter of principle. While many briefing notes often contain information that qualifies as the kinds of information protected under this exception, they can also contain background and factual information and other details that may not merit the same considerations or need for protection from disclosure.

[41] The question of whether a briefing note should be disclosed in keeping with access rights under the *Act* must be assessed on a case-by-case basis. Where some information in a briefing note may fall within the scope of an exception, consideration must also be given to whether the entirety of the briefing note can or should be withheld and whether access rights can be respected by only partly withholding the more sensitive information.

[42] The briefing note in question was prepared in February 2022. The headers indicate that it was prepared for information purposes and as advice to the Minister. It contains talking points, background, and financial information. The footer of the briefing note states "Spring 2022 Legislature". This implies that it was prepared to assist the Minister in public debates held in the Legislative Assembly.

[43] Having reviewed the briefing note in this case, I find that it contains some factual information, most of which is already publicly known. I thus find that those portions of the briefing note could be disclosed to the Applicant. As for the portions containing talking points, I find that these constitute advice as they are suggestions prepared by public servants to prepare senior officials to speak on a particular topic.

[44] Though the New Brunswick legislation does not require it, I note for general interest that legislative provisions in certain Canadian jurisdictions require some ministerial briefing materials to be systematically disclosed within a set timeframe. See for example, the disclosure requirements for briefing materials as set out in sections 74 and 88 of the federal *Access to Information Act*.

[45] As for the Department's exercise of discretion with respect to the remaining records, it submitted that they contain information that was the subject of the MEC, which was prepared for the Executive Council. It maintained that withholding these records is consistent with the Department's past practices with respect to the disclosure of similar information, and the records were also prepared as advice to a Minister or public body, such as briefings and budget information.

[46] While I find that the Department has provided evidence that it did take steps to exercise its discretion in arriving at the decision to continue to withhold information under this exception, I also find that there were other relevant factors that the Department did not indicate that it considered. These include the fact that a final decision had been made on this issue at the time of the Applicant's request and the demonstrated public interest in the province's decision to build a new correctional facility and its placement in the community.

[47] As stated above, I cannot substitute my own discretion on matters that fall within a discretionary exception to disclosure. Nevertheless, for the portions of the two documents from August and September 2021 that set out options for a new correctional facility and opinions on the preferred option, I encourage the Department to reconsider its position and possible disclosure, taking into account the fact that a final decision had been made at the time of the request and the public interest in better understanding the province's decision. Similarly, I encourage the Department to reconsider its position and possible disclosure of the portions of the February 2022 briefing note containing talking points for the same reasons.

RECOMMENDATION

[48] Based on the above findings, I recommend under section 73(1)(a)(i)(A) of the *Act* that the Department disclose the following to the Applicant, as this information was not properly withheld under section 26(1)(a):

- the portions of the two documents from August and September 2021 setting out possible options for a new correctional facility that do not consist of advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown;
- the undated historical document that outlines factual information on correctional facilities; and
- the portions of the February 2022 briefing note that do not consist of advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown.

[49] As set out in section 74 of the *Act*, the Department must give written notice of its decision with respect to these recommendations to the Applicant and this Office within 20 business days of receipt of this Report of Findings.

This Report issued in Fredericton, New Brunswick this 31st day of August, 2023.

Marie-France Pelletier
Ombud for New Brunswick