



Report of Findings: 22/23-AP-064
Department of Social Development
August 31, 2023

Citation: New Brunswick (Social Development) (Re), 2023 NBOMBUD 4

Summary: The Applicant made an access request to the Department of Social Development for a copy of an audit related to the management of NB Housing in the Saint John region and other documentation related to NB Housing. The Department provided the Applicant with partial access, redacting some information under various sections and withholding other records in full, including the requested audit reports, under paragraphs 17(1)(b) and 17(1)(e) (Executive Council confidences) and 26(1)(a) (advice to a public body). When the matter escalated for formal review, the only outstanding issue was the question of the Applicant's access rights to the audit reports and whether they were protected under subsection 17(1).

The Ombud found that the Department did not meet its burden of proof and recommended that it disclose the requested audit reports.

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

Authorities Considered: Office of the Ombud, Report of Findings 19/20-AP-071; *Bray v. Attorney General of New Brunswick et al* (2016 NBQB 203 (CanLII))

INTRODUCTION

[1] The Applicant made an access request under the *Right to Information and Protection of Privacy Act* (“the *Act*”) to the Department of Social Development for the following information between January 1, 2019 and August 2, 2022:

I am looking for a copy of an audit detailing how NB Housing is managed in the Saint John region, as well as all other memos, briefing materials, presentations and reports, including copies of audits, relating to NB Housing, the housing stock, repairs to NB Housing, the wait list and how resources are managed.

[2] The Department responded by providing partial access to the requested information, which consisted of 61 pages including a copy of a housing agreement and several briefing materials. The Department redacted some information under subsections 16(1.1) (information not relevant to the request), 21(1) (unreasonable invasion of third party privacy), and paragraph 26(1)(a) (advice to a public body). The Department also withheld records in full under paragraphs 17(1)(b) and (e) (Executive Council confidences) and 26(1)(e) (advice to a public body).

[3] After receiving the response, the Applicant followed up with the Department to inquire why a copy of the audit that was conducted into public housing in the Saint John area was withheld. The Department advised the Applicant that the audit was specifically withheld under paragraph 17(1)(e). During the course of the complaint investigation, the Department also maintained that audit reports were withheld under paragraph 17(1)(b).

[4] The Applicant was not satisfied with the Department’s response and filed a complaint with this office. In making this complaint, the Applicant was dissatisfied that the response did not include records of audits, including an audit on the management of NB Housing in the Saint John region. The Applicant questioned whether the entirety of the audits should be withheld and asked our office to review whether the Department appropriately applied the *Act* and whether these records should be released.

[5] Efforts to informally resolve this complaint resulted in most issues being resolved, except for the question of the Applicant’s access rights to the requested audit reports, which led me to conduct a formal investigation under subsection 68(3) of the *Act*.

CONTEXT

[6] The backdrop to this complaint involves recent changes that the government announced and implemented with respect to the housing mandate earlier this year.

[7] Prior to these changes, the Department had been performing much of the New Brunswick Housing Corporation’s responsibilities under the *New Brunswick Housing Act* under the Department’s Housing NB unit. In this capacity, the Department administered

the housing mandate, with services being delivered across the province by regional zones.

[8] Department officials explained that the South West zone was somewhat different than the other zones in that it had a larger budget and additional staff positions for services that were otherwise contracted out. As part of its routine oversight of each zone's operations, Department officials requested that the Office of the Comptroller conduct audits of certain aspects of the South West zone's operations. After conducting each audit, the Office of the Comptroller issued reports to the Department, the first in October 2021 and the second in April 2022, which are the two reports at issue.

[9] The Department advised that audits had not been conducted for the other housing zones across the province around this time as issues were specific to the South West zone. The audit reports were reviewed by the Department's internal audit committee, and the operational issues identified in the reports were addressed by the Department.

[10] In October 2022, the then Minister of Service New Brunswick was sworn in as the newly established Minister responsible for Housing. In March 2023, the government announced that it was renewing the mandate of the New Brunswick Housing Corporation as a standalone Crown corporation to oversee provincial housing initiatives, facilities, strategy and residential tenancy services.

[11] In May 2023, the government introduced *An Act Respecting the New Brunswick Housing Corporation* in the Legislative Assembly, which included amendments to the *New Brunswick Housing Act* that moved responsibility for the New Brunswick Housing Corporation from the Minister of Social Development to the Minister responsible for Housing as well as amendments to the *Residential Tenancies Act* that shifted the responsibility for the administration of that law from Service New Brunswick to the New Brunswick Housing Corporation. The Bill received Royal Assent in June 2023 and the New Brunswick Housing Corporation is now operational with its expanded mandates.

[12] Department officials explained during discussions with our office that there were a series of Memoranda to Executive Council (MEC) involved in the process of renewing the New Brunswick Housing Corporation's structure and mandate that were submitted to Executive Council for approval in early 2023, culminating in the legislative amendments mentioned above. The Department confirmed that the two audit reports in question were appended to one of the MEC's seeking Executive Council approval for proposed legislative amendments.

ISSUES

[13] The only outstanding issue is whether the Department properly refused access to two audit reports described above under the Executive Council (commonly referred to as Cabinet) confidences exception to disclosure.

DISCUSSION

Section 17: Executive Council confidences

[14] Subsection 17(1) reads, in part:

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,

...

(e) a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council...

[15] The purpose of this exception is to respect the principles of Cabinet confidentiality and solidarity and to ensure free and frank discussions at the Cabinet table, while balancing the public's right to know about the conduct of public business on behalf of the public the government serves.

[16] Section 17 is a mandatory exception to disclosure, meaning that where the exception applies, the information in question cannot be disclosed and the public body has no discretion to disclose, unless the record is more than 15 years old and the Executive Council approves disclosure (subsection 17(2)).

[17] The courts have explained this section of the *Act* in *Bray v. Attorney General of New Brunswick et al* (2016 NBQB 203 (CanLII)) at paragraph 26:

As can be seen by the heading to this section, it is mandatory, that is, that department heads are not permitted to disclose certain categories of information.... The section is explicitly related to "the substance of deliberations of the Executive Council" and protects documents provided to the Executive Council related to those deliberations.

[18] A record that would reveal the substance of deliberations of Cabinet is protected from disclosure under this provision, including the types of records listed in paragraphs 17(1)(a) to (e) of the *Act*.

[19] If the information in question is not specifically captured in the types of information described in subsection 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.

[20] 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...

[21] 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 subsection 17(1).

Applicant's representations

[22] The Applicant questioned whether the entirety of the audit reports could be withheld under the section 17 exception and asked our office to review whether they should be released.

[23] At the end of the informal resolution discussions, the Applicant stated that the audit relating to the Saint John area was now several years old and questioned why it should continue to be withheld on the basis that it would be submitted to the Executive Council at some point in the future.

[24] The Applicant also questioned whether the paragraph 26(1)(a) exception (advice to a public body) would be relevant to the issue of withholding the audit reports and asked that this also be considered as part of my review of this matter.

Department's representations

[25] At the beginning of this complaint investigation, the Department explained that it refused access to the audit reports under the section 17 exception. While the two reports at issue had not been submitted to Cabinet at the time of the access request in August 2022, in responding to the access request in October 2022, officials contemplated the inclusion of the audit reports in future MECs for consideration by Cabinet. As a result, the Department refused access to the two audit reports and maintained this position throughout the course of this investigation.

[26] In a June 2, 2023 letter to me, the Deputy Minister for the Department explained the following:

A renewal in the administration of housing support in New Brunswick and potential amendments to the New Brunswick Housing Act were explored previously a couple of years ago. They were analyzed with a renewed focus from the time of the announcement of a Minister of Housing in the Fall of 2022. Over the past 8-9 months, there have been [...] several MECs pertaining specifically to the renewal of the New Brunswick Housing Corporation

[...] The two reports from the Office of the Comptroller highlighted a number of operational challenges by the housing program area in the Southwest zone. These operational challenges were contributing factors to government's desire to renew and strengthen the mandate and governance model of the New Brunswick Housing Corporation.

[27] The Deputy Minister confirmed that the MEC to which the two audit reports were appended related to legislative amendments regarding the housing mandate. Departmental officials also explained that this was the last MEC in the series to be presented in order to formalize the changes to NB Housing that were subsequently introduced in the Legislative Assembly.

Analysis and findings

[28] I have considered the parties' representations, the audit reports in question, and the exceptions to disclosure claimed by the Department. As I will explain in more detail below, I do not find that the Department has met the burden of proof to demonstrate that it properly relied on the subsection 17(1) exception to refuse access to the two audit reports in question.

[29] While I was able to review the audit reports at issue, I did not review the related MECs, given that the Department declined to provide copies of these documents for my review, as is its right to do so under subsection 70(1) of the *Act*. 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.

[30] Though it did not share copies of the MEC's in question, the Department did provide information about the subject matter and purpose of each of the related MECs during our discussions. The information and explanations provided by the Department allowed me to understand the context in which the audit reports were created and the circumstances surrounding their inclusion in the subsequent MECs. Though I will not elaborate on this information in detail so as to maintain the confidentiality surrounding it, I note that the information was sufficient to support my findings on the Applicant's access rights.

[31] In relation to the Department's reliance on paragraph 17(1)(b) to refuse access to the audit reports, this exception protects "discussion papers, policy analyses, proposals, memorandums, advice or other similar briefing material submitted or prepared for submission to the Executive Council".

[32] Having reviewed the audit reports themselves and considered the Department's explanations about how these audit reports were created and their purpose, I do not find that the audits themselves were conducted or prepared for the specific purpose of a Cabinet submission. At the time these reviews were conducted by the Office of the Comptroller, the Department had commissioned them to examine the administration of the housing program in one of the designated housing zones and the reviews were sought to identify possible compliance issues and means of improvement.

[33] In my view, when the Department received these audit reports in October 2021 and April 2022, this was part of the Department's overall administration of the housing program and there was nothing in the audit reports, or the Department's explanations and submissions, that the issues identified at the time would be escalated or require a decision-making process at the Cabinet level.

[34] While the audit reports were subsequently appended to a MEC that was submitted to Cabinet in 2023, this does not change my analysis under this provision as I find that this was not their intended purpose when the audit reports were generated.

[35] For these reasons, I find that the audit reports cannot be refused under paragraph 17(1)(b) of the *Act*.

[36] As for the Department's reliance on paragraph 17(1)(e), this exception protects records "prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council".

[37] This provision is intended to protect records that were prepared for the purpose of briefing a Minister, i.e., a member of Cabinet, about an issue that is either before Cabinet, or has been proposed to be raised before Cabinet.

[38] It also protects records that are the subject of communications among Ministers that relate directly to the making of a government decision or the formulation of government policy; however, the Department did not rely on this ground to refuse access so I will not consider this aspect further.

[39] While the audit reports were eventually shared with the Ministers who collectively make up Cabinet when they were appended to a MEC in 2023, I do not find that they were prepared for the purpose of briefing a Minister in relation to a matter that was before Cabinet or proposed to be before Cabinet at the time they were created.

[40] As stated above, the records themselves are the results of audits and reviews conducted by the Office of the Comptroller at the Department's request as part of its oversight responsibilities for the proper management of assets and operations under its purview. In keeping with internal audit practices, they were reviewed by the Department's internal audit committee and issues were acted upon by the Department. While concerns identified in audit reports of this nature may well be brought to the appropriate Minister's attention for any number of reasons, I do not find that the audit reports in this case were prepared for this purpose.

[41] As this is the case, the question of whether they relate to an issue that is either before Cabinet or proposed to be brought before Cabinet is irrelevant. This provision only protects records prepared for the purpose of briefing Ministers on matters that are currently before or have been proposed to be brought before Cabinet, rather than all records on such matters.

[42] For this reason, I find that the audit reports cannot be refused under paragraph 17(1)(e) of the *Act*.

[43] As I have found that the Department has not presented sufficient evidence to demonstrate that the audit reports were properly protected from disclosure under paragraphs 17(1)(b) and 17(1)(e), I will also consider whether they could nevertheless be protected from disclosure under the introductory wording of section 17(1) and whether disclosure would reveal the substance of Cabinet deliberations, or in the alternative, permit the making of accurate inferences about Cabinet deliberations if they were to be disclosed.

[44] While I recognize that the issues highlighted in these two audit reports could provide Cabinet with information about management concerns in one of the zones of the Department's housing program, I note that neither audit report speaks to or proposes structural changes to the housing program.

[45] Moreover, it appears as though decisions on structural changes to the housing program would have been made prior to Cabinet's consideration of the legislative amendments to which the reports were attached. Neither of the two audit reports contemplate legislative changes directly, and an indirect connection to legislative amendments would be tangential at best.

[46] Having considered all the information that was provided to me by the Department, in my view it is difficult to see how disclosing the audit reports would reveal the substance of what Cabinet deliberated in considering the legislative amendments or how it would otherwise allow a reader to make accurate inferences about what Cabinet may have discussed in relation to the MEC to which they were attached.

[47] For all the above reasons, I do not find that the Department has presented sufficient evidence to demonstrate that the audit reports merit protection from disclosure under subsection 17(1) of the *Act*.

[48] I do not come to this conclusion lightly as I am acutely aware of the conventions and legal protections surrounding Cabinet confidences and their legitimacy. However, my overarching concern is that if I were to find that a department may attach the Cabinet confidences protections to documents by appending them to a MEC without a clear demonstration of their connection to its substantive deliberations, this could unwittingly lead to access rights being too easily circumvented in the future. To be clear, I do not believe this was the Department's intent in the present case.

[49] On a final note, I also considered the Applicant's request that I address the paragraph 26(1)(a) exception as it applies to audit reports.

[50] I will not address this question in detail as it is moot to the present case. However, I will note that paragraph 26(2)(i) speaks to audits of public body programs and policies. It specifies that public bodies are not allowed to protect "a final report or final audit on the performance or efficiency of the public body or any of its programs or policies" under the advice to a public body exception under section 26(1). In normal circumstances (i.e. when Cabinet confidences are not at issue), it appears that audit reports such as those prepared by the Office of the Comptroller could be considered as final reports or audits on the performance or efficiency of the housing program that at the time fell under the Department's mandate and suggests that information of this nature was not intended to be protected from disclosure under the *Act*.

[51] That being said, as the issues in this case involve the mandatory exceptions to disclosure that arise from Cabinet confidences, I need not further consider this provision's potential applicability.

RECOMMENDATION

[52] Based on the above findings, I recommend under section 73(1)(a)(i)(A) of the *Act* that the Department disclose the two audit reports to the Applicant.

[53] 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