



Report of Findings: 23/24-AP-050
Department of Natural Resources and Energy Development
July 12, 2024

Citation: New Brunswick (Natural Resources and Energy Development) (Re), 2024 NBOMBUD 6

Summary: The Applicant made an access request to the Department for correspondence and other records involving Forest Protection Ltd. over a two-month time period. The Department denied the request in part, relying on several provisions of the *Right to Information and Protection of Privacy Act*, including sections 21 (unreasonable invasion of third party privacy), 22 (disclosure harmful to a third party's business or financial interests), 26 (advice to a public body), and 30 (disclosure harmful to economic and other public body interests).

The Ombud found that Forest Protection Ltd. does not meet the definition of a public body under the *Act*, that the Department has custody and control of the records in question, that the Department failed to meet its duty to assist in responding to the request, and that the Department did not meet the burden of proof to demonstrate that it properly refused access to all the withheld information. The Ombud recommended that the Department provide further disclosure of some of the information at issue, as set out in the appendix to the report.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, sections 16(1.1), 21(1), 22(1)(b), 22(1)(c), 22.1, 26(1)(a), 26(1)(e), 29(1)(o), 30(1)(b), 30(1)(c), 33(2)(a).

Authorities Considered: [R. v. Forest Protection Ltd.](#), 1978 CanLII 2794 (NBKB); [Forest Protection Ltd. v. Guerin](#), 1979 CanLII 2758 (NB KB); [New Brunswick Government Employees Union Local 7 v. Forest Protection Ltd.](#), 1996 CanLII 4752 (NB KB); [Public Service Labour Relations Act](#), RSNB 1973, c P-25; [Canadian Broadcasting Corporation v. Municipality of Caraquet](#), 2017 NBKB 230 [Caraquet], aff'g [Caraquet \(Town\) \(Re\)](#), 2016 NBOMB 12 (CanLII); [Saint John Board of Police Commissioners \(Re\)](#), 2018 NBOMB 15 (CanLII); [Accountability and Continuous Improvement Act](#), SNB 2013, c 27; [Canada \(Information Commissioner\) v. Canada \(Minister of National Defence\)](#), 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

INTRODUCTION

[1] The Applicant made an access request under the *Right to Information and Protection of Privacy Act* (“the *Act*”) to the Department of Natural Resources and Energy Development (“the Department”) for the following information over a two-month period:

- all correspondence between Forest Protection Ltd. and/or its CEO and the Assistant Deputy Minister, Deputy Minister, and/or the Minister of the Department;
- all documents, notes, minutes, emails, or other records regarding Forest Protection Ltd. held by the Assistant Deputy Minister, the Deputy Minister, and/or the Minister;
- all correspondence regarding Forest Protection Ltd. between the Premier’s Office/Executive Council Office and the Assistant Deputy Minister, Deputy Minister, and/or the Minister.

[2] The Department provided partial access to the requested information and disclosed 99 pages of records, nearly all of which were partially redacted. The Department cited the following provisions of the *Act* as reasons for refusing access:

- subsection 16(1.1) (not relevant to the request);
- subsection 21(1) (unreasonable invasion of third party privacy);
- paragraphs 22(1)(b) and (c) (disclosure harmful to third party business or financial interests);
- section 22.1 (third party solicitor-client privilege);
- paragraphs 26(1)(a) and (e) (advice to a public body);
- paragraphs 30(1)(b) and (c) (disclosure harmful to economic and other public body interests); and
- paragraph 33(2)(a) (information that is available to the public).

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

[4] Informal resolution was unsuccessful, which led me to conduct a formal investigation under subsection 68(3) of the *Act*.

APPLICANT'S REPRESENTATIONS

[5] The Applicant was dissatisfied with the Department's response overall, submitting that the Department applied the claimed exceptions in a way that made it impossible to understand the nature of the withheld information and whether the claimed exceptions were fairly applied.

[6] The Applicant also questioned the Department's reliance on the third-party business information exceptions in relation to Forest Protection Ltd. ("FPL"), stating that FPL manages a fleet of planes that combats forest fires in the province and, according to its website at the time, is a "New Brunswick Crown entity."

[7] Further, the Applicant noted that four of the 11 members of FPL's Board of Directors are provincial government officials who sit on the Board by virtue of their departmental functions. This includes senior Departmental officials such as the Minister and the Deputy Minister, which the Applicant suggested was a significant overlap between senior management's departmental role and participation in FPL matters.

[8] The Applicant also submitted that FPL is the only entity of its kind in New Brunswick and thus appears to be a monopoly, suggesting that there could be no harm to competitive positions. Even if the third-party business exceptions were to apply, the Applicant questioned whether information shared with Department senior management by virtue of their membership and participation in FPL's Board of Directors could be considered as confidential and whether the Department had established a reasonable and probable expectation of harm should further information be disclosed.

[9] Finally, the Applicant raised the question of public interest and whether the Department had exercised its discretion to withhold as little information as possible.

DEPARTMENT'S REPRESENTATIONS

[10] The Department's position is that it disclosed all the information the Applicant is entitled to receive under the *Act* and that it properly relied on the claimed exceptions to disclosure. The Department's objections to disclosure are largely based on its position that FPL is an independent third-party corporation that is not subject to the *Act*.

[11] The Department submitted that the single issue to decide is whether FPL is a "public body" as defined in section 1 of the *Act*, which the Department submits it is not. The Department also requested that I engage FPL directly on this point, as it "would have firsthand information, which is not within the knowledge of the department" that may shed more light on this issue.

[12] I note that the Department did not notify or consult with FPL senior management or staff when it processed the request, although it advised that the Assistant Deputy Minister and the Deputy Minister (both of whom are on FPL's Board of Directors) reviewed and approved the response to this request.

FOREST PROTECTION LTD.'S REPRESENTATIONS

[13] While I am not obligated under the *Act* to do so, I decided that it would be appropriate in this case to notify FPL of this investigation and invite submissions on its relationship with the Department and Province and any concerns it may have about the potential disclosure of the information at issue.

[14] We received representations through FPL's external counsel about why FPL was of the view that it cannot be considered a public body under the *Act*.

[15] As for the question of the Applicant's access rights, counsel for FPL agreed with the Department's position on disclosure. FPL's representations provided additional context about FPL's concerns with further disclosure and raised additional exceptions for my consideration (including section 22.1 (third party solicitor-client privilege), subparagraph 22(1)(c)(iv) (disclosure harmful to third party business or financial interests), and 29(1)(o) (disclosure harmful to law enforcement or legal proceedings)).

ISSUES

[16] The issues to be addressed are:

- Issue 1: whether FPL is a public body, or part of another public body, for the purposes of the *Act*;
- Issue 2: whether the information at issue is under the custody or control of a public body, such as the Department; and
- Issue 3: whether the Applicant has a right of further access to any of the withheld information and whether the exceptions to disclosure claimed by the Department or the Third Party should apply.

[17] The Department has the burden of proof to show that the Applicant has no right of access to the withheld information under subsection 84(1) of the *Act*.

ANALYSIS AND FINDINGS

[18] One of the founding principles of the *Act* is to create statutory obligations on public sector entities to be open and transparent in the conduct of public business on behalf of the public they serve. By design, the *Act* was intended to be broad in scope and inclusive of public sector entities at the Provincial and municipal levels, including Crown corporations and other public offices, as well as the public education and health care systems.

[19] As the Applicant, the Department, and FPL have all raised concerns about where FPL falls in relation to the *Act*, I will address this question first.

Issue 1: Is FPL a “public body” subject to the *Act*?

[20] I received submissions from the Applicant, the Department and FPL on this point that provided insight which informed my assessment of the Applicant’s access rights in this case. I will begin my analysis of this question by providing an overview of FPL’s history, operations, and relationship with the Department and the Province, which I believe to be useful in understanding the evolution of FPL’s ties to the Province, before addressing the question of whether or not FPL is a public body subject to the *Act* as it is currently worded.

FPL’s history, structure, and ties with the Department and the Province

[21] FPL was incorporated under the former *New Brunswick Companies Act* in 1952 as the result of a joint decision of the Province and representatives of the forest industry to “incorporate a private company to undertake the organization and management of a program of aerial spraying of insecticide to protect the forests of New Brunswick.”¹ The letters patent state that the capital stock was \$5,000 divided into 500 common shares of the par value of ten dollars each. Two hundred shares have been issued to the Province and forest industry companies operating in New Brunswick. The Province was the majority shareholder in the late 1970s, holding between 180 and 182 shares with the balance held by other entities.² The Province remains the majority shareholder of FPL, currently holding a slightly higher proportion of the issued shares.

[22] While FPL’s Board of Directors and business operations have shifted and evolved over the decades since FPL’s inception, there is a long history showing that

¹ *R. v. Forest Protection Ltd.*, 1978 CanLII 2794 (NBKB), at para. 6.

² *Ibid.*, at para. 7.

FPL has always been strongly connected to the Province, and at many times treated as though it were a Crown corporation by the Province.

[23] In *Forest Protection Ltd. v. Guerin*, a decision issued in the late 1970s, Chief Justice Hughes held that FPL was a servant of the Crown and immune from prosecution under the *Pest Control Products Act* by virtue of its Crown immunity.³

[24] In 1996, Justice Clendening upheld a decision of the New Brunswick Labour and Employment Board refusing to certify the NB Government Employees Union as a bargaining agent for the employees of FPL.⁴ As FPL was not listed in the groups covered by the *Public Service Labour Relations Act*, the Union sought certification as a bargaining agent under the *Industrial Relations Act*.⁵ Both the Court and Labour Board below concluded that FPL was an agent of the Crown and therefore the *Industrial Relations Act* had no application to it. In upholding the Board's decision, Justice Clendening stated:

The Board examined the provisions of the Act and decided that it did not have the jurisdiction to hear the application for certification. It made its finding that FPL is a Crown agent after carefully considering evidence of the unique relationship that exists between FPL and the government. In my opinion, the Board methodically examined the nature of the corporation, including the fact that it functions under the de facto control of the Minister of Natural Resources. **FPL functions primarily for the provincial government and it operates as a non-profit making organization, and all operational loss is assumed by the government.** The current situation at FPL is similar to that which existed in 1979 and there is no basis to bring it under the provisions of the Act.

[Emphasis added]

[25] The facts before me with respect to FPL's current situation do not show any substantial change to what Justice Clendening described in the above-quoted decision, despite the arguments raised in the Department's and FPL's representations.

[26] While counsel for FPL submitted that it is not subject to the *Financial Administration Act*, the Department confirmed that FPL submits audited financial statements to the Province's Office of the Comptroller on an annual basis.

[27] This prompted me to review the Province's published public accounts information to see what information about FPL is included.

³ *Forest Protection Ltd. v. Guerin*, 1979 CanLII 2758 (NB KB).

⁴ *New Brunswick Government Employees Union Local 7 v. Forest Protection Ltd.*, 1996 CanLII 4752 (NB KB), at p. 3-4.

⁵ *Industrial Relations Act*, RSNB 1973, c. I-4.

[28] The Province's historical public accounts information included FPL's audited financial statements between 1996 and 2010. Between 1996 and 2007, FPL's financial statements were published under the heading of "Financial Statements of Crown Corporations, Boards, Commissions" and between 2008 and 2010 as "Financial statements of certain government organizations, not available elsewhere".

[29] The Province's consolidated financial statements, which the Provincial Comptroller is required to publish annually under s. 14 of the *Financial Administration Act*, also include FPL as part of the Provincial Reporting Entity. This has been the case since at least 1995.

[30] The Consolidated Financial Statements for the fiscal year ended March 31, 2023 state:

These Consolidated Financial Statements include the accounts of organizations that are controlled by the Province. A complete listing of the organizations within the Province's government reporting entity is provided in Schedule 26.⁶

[31] Schedule 26 states that the "Provincial Reporting Entity is comprised of certain organizations that are controlled by the Province."⁷ FPL is included in this Schedule, along with 52 other organizations including public school districts, regional health authorities, Crown corporations, commissions, and the like.

[32] While nursing homes are included as part of the Provincial reporting entity, the notes to the Consolidated Financial Statements for 2023 recognized that not-for-profit nursing homes are individual corporations operated by their own boards of directors and that the "nature of the relationship between the Province and not-for-profit nursing homes is such that control has been determined to exist for accounting purposes only and not for legal purposes."⁸ No such distinction is made for FPL.

[33] According to the Province's Public Accounts for 2023, FPL's actual revenue for the fiscal year that ended on March 31, 2023 was \$30,386,300 and its expenditures were \$31,150,400.⁹

[34] As we were trying to understand whether FPL's inclusion in the Province's consolidated financial statements meant that FPL's revenues and losses are attributed to the Province, we asked the Department what would happen if FPL were to sustain a financial loss and whether this would be assumed by the Province. The Department's

⁶ Province of New Brunswick Public Accounts 2023, Volume 1: Financial Statements at p. 38: <https://www2.gnb.ca/content/dam/gnb/Departments/tb-ct/pdf/OC/public-accounts-vol-1-2023.pdf>

⁷ *Ibid.*, at p. 97.

⁸ *Ibid.*, at p. 38.

⁹ Province of New Brunswick Public Accounts 2023, Volume 2: Supplementary Information: <https://www2.gnb.ca/content/dam/gnb/Departments/tb-ct/pdf/OC/2023-public-accounts-vol-2-comptes-publics-vol-2.pdf>

reply to this question was “[i]f FPL sustained an operational loss, there would be no additional grant provided to FPL.”

[35] While the Department did not provide a clear answer to this question, it did confirm that FPL is operating as a non-profit entity. Pairing this with the fact that FPL’s revenues and expenditures are included in the Province’s consolidated financial statements, along with the fact that the Province is the majority shareholder, strongly suggests that New Brunswick taxpayers either benefit from FPL’s profits or assume at least some if not all its losses.

[36] Further, the unaudited supplementary employee lists published annually as part of the Province’s public accounts since 2000 includes salary disclosure for FPL employees who earn above the reportable threshold amount (currently \$80,000).

[37] The Department confirmed that it provides annual funding to FPL through shareholder contributions to cover a portion of its operating expenses, although there are no written shareholder or funding agreements between the Province and FPL. FPL’s counsel advised that the other shareholders also provide shareholder contributions to FPL.

[38] The Department also pays FPL for services under existing contracts and professional services agreements, including for approved forest pest control treatments and aerial firefighting services. Both the Department and FPL noted that FPL has concluded contracts and conducted operations in several jurisdictions outside the Province and that a significant portion of FPL’s revenues can be generated elsewhere, depending on the contracts it negotiates in any particular year.

[39] According to the Province’s Public Accounts for 2023, FPL received a total of \$6,903,040 in payments and grants from the Department during the fiscal year that ended on March 31, 2023.

[40] There are currently 11 members of FPL’s Board of Directors, including four senior Departmental staff. The remaining seven members are representatives from each of the five shareholder forest industry companies, a representative from Forest NB (a non-profit industry association representing the forest products sector), and the CEO/Managing Director of FPL.

[41] The current President of FPL’s Board of Directors is the Deputy Minister of the Department and the Chair of the Board of Directors is the Minister. The Department’s Assistant Deputy Minister and the Department’s Executive Director of the Regional Operations and Forest Fire Management branch also sit on the Board as members. It is clear from my review of the information at issue that they sit on the Board in their professional capacity as senior Departmental officials, using their GNB-issued emails to

conduct Board business and signing correspondence and communications in their professional capacity.

Definition of a public body under the Act

[42] The historical context provided above confirms that FPL has always had an ambiguous relationship to the Crown, having been established as a separate legal entity seeking to operate autonomously and independently as a private entity might, but that the care and control of the corporation, when challenged, have always been found to lie substantially with the Province. There is nothing in the record before me that persuades me to take any different view of the matter.

[43] However, in making a determination on the applicability of the *Act* in this matter, I am also confronted with examining the finite definition of what constitutes a public body under the *Act*. In doing so, and despite the context provided in the previous section, I cannot conclude that FPL meets the definition of a public body under the *Act* as it stands. I will explain my reasons in the sections that follow.

[44] The *Act* applies to public bodies as defined in section 1. While departments, government bodies, and entities designated in Schedule A are subject to the *Act*, the law does not include a definitive list of which entities are captured within its scope. When there is a question as to whether an entity is subject to the *Act*, a careful examination of the relevant definitions and context is required.

[45] The relevant definitions under section 1 of the *Act* are:

“public body”

(a) means

(i) a department, secretariat or office of the Province of New Brunswick, including but not limited to those portions of the public service specified in Part I of the First Schedule of the *Public Service Labour Relations Act*,

...

(iii) a government body...

“government body” means

(a) any board, Crown corporation, commission, association, agency or similar body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors or governing board of which, are appointed by an Act of the Legislature or by the Lieutenant-Governor in Council, and

(b) any other body that is designated in Schedule A as a government body.

Department's arguments that FPL is not a public body

[46] The Department's position is that FPL is not a public body as defined in the *Act*. The Department's submissions on this point are summarized as follows:

- FPL was removed as a "Crown body" from the *Accountability and Continuous Improvement Act* by an amendment that came into force on January 1, 2023. "This was done in recognition of FPL being listed in error in that Act";
- FPL is not listed in the First Schedule to the *Public Service Labour Relations Act*;
- There is no Act relating directly to FPL, nor has that ever been the case, other than the *Accountability and Continuous Improvement Act*;
- FPL's board members are not appointed by an Act or the Lieutenant-Governor in Council;
- Throughout the history of FPL, its managing directors have not been Government of New Brunswick employees at any time;
- FPL has conducted operations outside of the Province of New Brunswick throughout its history. In the past and presently, FPL has conducted operations in Quebec, Ontario, Newfoundland, Nova Scotia, British Columbia, Idaho, Washington State, Florida, and Maine;
- The Department does not issue a mandate letter to FPL; and
- The inability to determine who would be the "head" of the public body as defined in the *Act*, which suggests that FPL is not an entity that is contemplated by the *Act*.

[47] The Department further submitted that there is no evidence to suggest that it has any real ties to FPL and its corporate business, other than as members of the board of directors. The Department also stated that it is the duty of all directors to meet their fiduciary duties to the corporation and not the representative shareholders, and that, to the Department's knowledge, there has never been an allegation of a breach of fiduciary duty by a director of FPL.

FPL's arguments that it is not a public body

[48] FPL is also of the position that it is not a public body for the purposes of the *Act*. FPL's submissions on this point are summarized as follows:

- FPL is not an extension of the Province of New Brunswick;

- FPL operates separately from the Province as an independent corporation;
- The Province is one of many shareholders of FPL, which include several privately owned corporations;
- FPL provides certain services to the Province, and the Province is a shareholder, but FPL is independently operated and provides services to many other governments and private entities, with the vast majority of its revenue being generated from entities other than the Province of New Brunswick;
- Other shareholders of FPL from private industry provide shareholder contributions to FPL, in addition to those provided by the Province;
- FPL is federally regulated and the Canadian Industrial Relations Board has held that it has jurisdiction over employment matters at FPL;
- FPL's management team is responsible for running FPL's operations, none of whom are appointed by an Act of the Legislature;
- FPL's management team and employees have no ties to the Province of New Brunswick and there is no control exercised by the Province over FPL employees;
- FPL performs its own payroll separate from the Province, its employees are not subject to any of the Province's human resources programs, and FPL is registered with WorkSafeNB separately from the Province;
- FPL is not subject to the *Financial Administration Act*;
- FPL produces its own financial statements and hires its own auditor;
- In 2023, the Province's contribution to FPL's revenue was approximately 20%, with the "vast majority" of its revenue coming from other sources; and
- The Legislature could have easily captured FPL under the *Act* but it did not, noting that other Canadian jurisdictions' similar legislation includes entities that are majority owned by the Crown as being subject to the *Act*, which is not the case under this statute.

Analysis and findings on FPL's status under the Act

[49] I have carefully reviewed the relevant provisions of the *Act*, the Department's and FPL's submissions, and publicly available information about FPL and its relationship with the Department and the Province.

[50] I recognize that FPL is an independent legal entity and that there are also significant connections between FPL and the Department as well as the Province that suggest that FPL is not a completely independent corporation as submitted by the Department and FPL.

[51] On a plain reading of para. (a)(i) of the definition of “public body”, I am satisfied that FPL is not a department or secretariat of the Province, nor is it part of the public service specified in the [Public Service Labour Relations Act](#).¹⁰

[52] This leaves the question of whether FPL is a public body by virtue of being “an office of the Province of New Brunswick” under para. (a)(i) or a “government body” under para. (a)(iii) of the definition of public body. I will start by examining the latter.

Interpretation and scope of “government body”

[53] As explained above, FPL has largely functioned and been treated as a Crown corporation since its inception in the 1950s, despite having been incorporated as a private entity, with the Province being the majority, but not sole, shareholder.

[54] While there is no question that FPL has significant ties and common goals with the Department, and by extension, the Province, which call for a level of transparency and accountability about FPL’s corporate structure and operations, I cannot find that FPL meets the current definition of a government body under the *Act*.

[55] The definition of what constitutes a government body is specific:

government body” means

- (a) any board, Crown corporation, commission, association, agency or similar body, whether incorporated or unincorporated, all the members of which, or **all the members of the** board of management or **board of directors** or governing board of which, **are appointed by an Act of the Legislature or by the Lieutenant-Governor in Council**, and
- (b) any other body that is **designated in Schedule A** as a government body.

[Emphasis added]

[56] In this case, though four of the eleven FPL board members are high-ranking government officials, all of the members of FPL’s board of directors have not been appointed by a provincial law or by the Lieutenant Governor-in-Council, as contemplated by the definition above. Also, the government has not designated FPL as a government body in Schedule A of the *Act*.

¹⁰ [Public Service Labour Relations Act](#), RSNB 1973, c P-25.

[57] While the Province has in many ways over the years treated FPL as a Crown corporation and the Province appears to have been FPL's majority shareholder at all times since its creation, these factors are not sufficient to bring FPL within the definition of a government body under s. 1 of the *Act*.

[58] Though I make this finding within the confines of the *Act's* current wording, given the historical context provided above, I am of the view that the Province should consider expanding the definition of a government body under the *Act* to include organizations where the Province is a majority shareholder, as is the case in at least one other Canadian jurisdiction.¹¹ Alternatively, the Province should consider designating FPL as a government body in Schedule A of the *Act*. Where the Province's interests (and by extension those of its citizens and taxpayers) are so intricately linked to the proper operations of this entity, it would seem fitting for it to be subject to the same obligations under the *Act* as other Crown corporations in this province.

Interpretation and scope of "office of the Province of New Brunswick"

[59] The *Act* does not define the term "office"; however, my predecessors and the Court of King's Bench have considered its interpretation and scope in a municipal context, as the definition of "local government body" includes "any office of a municipality".¹²

[60] In addition to its submissions summarized above, counsel for FPL took the position that an "office of the Province of New Brunswick" should be interpreted more narrowly than an "office of a municipality" due to the French words used for "office" in each of these definitions ("bureau du gouvernement de la province" and "une municipalité et... ses institutions"). Counsel pointed to my predecessor's *Caraquet* decision as supporting an interpretation that the use of the French word "institution" instead of "bureau" with respect to municipalities meant that the legislators intended to create a much broader application for municipal-related entities, as opposed to Provincial government-related entities, with the word "bureau" having a narrower meaning of the physical space used by the Province.

[61] For this reason, counsel for FPL suggested that there is no need for me to engage in an analysis of whether there is a sufficient connection between FPL and the Province as FPL is not an office of the Province, as per my predecessor's decision.

[62] With respect, I do not agree that this definitively concludes this question.

¹¹ See [Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, s. 2(x)(ii), which includes "a corporation, the ownership of which, **or a majority of the shares of which is vested in the Crown**" in the definition of "public body". [Emphasis added]

¹² *Canadian Broadcasting Corporation v. Municipality of Caraquet*, 2017 NBKB 230 [*Caraquet*], aff'g [Caraquet \(Town\) \(Re\)](#), 2016 NBOMB 12 (CanLII); [Saint John Board of Police Commissioners \(Re\)](#), 2018 NBOMB 15 (CanLII).

[63] There is no evidence before me to suggest that the use of the term “bureau” as opposed to “institution” in the French version of the definition of public body was a deliberate intention on the part of the legislators to limit or restrict the application of the *Act* in the manner suggested in FPL’s submissions. I do not find merit in the argument that the French term “bureau” is limited to a physical space or more restrictive than the term “institutions” in such a way as to permit a reading down of the term “office” used in the English text and need not consider this point further.

[64] In *Caraquet*, the Court of King’s Bench upheld my predecessor’s finding that an incorporated entity was an office of the Municipality of Caraquet and subject to the *Act* because of its “close and significant ties to the Municipality.”¹³ In considering what “office of a municipality” means, the Court held:

[41] The legislator’s intention in its use of the expression “or any office of a municipality” covers all entities in which municipalities have a proximate connection based on common goals, such as AcadieNor Inc., and it must ensure that these entities remain open and transparent to the public eye.¹⁴

[65] In this decision, the court did not set out a definitive test for determining what qualifies as an “office” for the purposes of the *Act*, but rather found that this must be determined on a case-by-case basis by looking at the nature of the entity in question and its relationship to the corresponding municipality. Where there are significant and close ties between the two or a proximate connection based on common goals, the entity should be considered as an “office” of a municipality for the purposes of the *Act* to ensure that it is subject to the same transparency and accountability as other public bodies.

[66] For these reasons, I adopt the court’s approach in *Caraquet* and find that the legislator’s intention in its use of “an office of the Province of New Brunswick” covers all entities in which the Province has a proximate connection based on common goals.

[67] Thus, the question is whether the specific facts of this case support a finding that FPL can be captured by the definition of an “office the Province”. While the historical context provided above demonstrates a proximate connection between the Province and FPL, there are several factors that distinguish this situation from the one described in the *Caraquet* decision cited above.

[68] In summary, the facts in *Caraquet* involved a corporation (AcadieNor Inc.) created at the initiative of the municipality under the *Companies Act* and whose express purpose was to promote the economic development of the Caraquet region. The corporation was funded exclusively by the municipality, managed an industrial mall

¹³ *Caraquet*, at 40.

¹⁴ *Ibid.*, at 41.

located in a building owned by the municipality, and had its offices located free of charge in a building owned by the municipality. Moreover, the municipality's executive director looked after the day-to-day operations and management of the corporation and the municipality paid the costs of a full-time development officer for the corporation.

[69] The composition of the corporation's board of directors was set out by a municipal by-law that established a minimum and a maximum number of board members, appointed by a motion of the municipal council. The by-law required that the mayor, the municipal councillor responsible for economic development and the municipality's executive director sit on the board as ex-officio members and the rest of the board be composed of members with a marked interest in the area's economic development.

[70] FPL's situation is markedly different. Since its creation in 1952, FPL's purpose does not fall within an aspiration realm such as economic development promotion, but rather it has a very defined purpose to preserve and protect New Brunswick's forests. While there is no doubt that this serves the public interest, FPL has also functioned as a commercial enterprise, both in its organization, as well as in its involvement in offering services to other jurisdictions outside of New Brunswick, for the benefit of its shareholders, including the Province.

[71] Contrary to the situation in *Caraquet*, FPL's day-to-day operations are not provided by provincial employees and the composition of the board is not entirely appointed by the Province. Though the Province is FPL's majority shareholder, its remaining shares are attributed to private sector forestry companies. And while the Province currently provides FPL with a source of funds, another part of its funding stems from other sources and nothing would prevent FPL's board from seeking to diversify its funding sources by exploring other revenue streams if it so chose.

[72] There is no denying that as its majority shareholder, the Province has a proximate connection to FPL based on common goals. However, I am hesitant to find that FPL is a public body by virtue of being "an office of the Province of New Brunswick", as its purpose and function is substantially different from core government departments, secretariats, and other Provincial offices. To do so, I would have to ignore a long history of it being treated by the Province essentially as though it were a Crown corporation. As stated above, given the substantial connections between FPL and the Department, as well as the Province, the Province should consider designating it as a government body to bring it under the scope of the *Act*; however, as it currently stands, I am not prepared to make a finding that FPL is subject to the *Act* of its own accord.

[73] Despite all the above, I do not find that the question of the Applicant's access rights turns on the question of whether FPL is a public body, as submitted by the

Department; however, the above analysis was helpful context to ground my understanding of FPL and inform my analysis on the substantive issues.

[74] This finding also does not mean that the public has no right of access to information about FPL under the *Act* on principle. As I will explain further below, the Department has custody and control of records relating to FPL given that a number of its senior officials sit on FPL's Board of Directors in their professional capacity and thus are representatives of FPL's majority shareholder – the Province. Records generated in this context are in the custody and control of the Department and access rights to this information are governed by the *Act*.

Issue 2: Does the Department have custody or control of the requested records?

[75] Section 3.1 of the *Act* states that it “applies to all records in the custody of or under the control of a public body”, except for records that are excluded under s. 4.

[76] Regardless of whether FPL is a public body under the *Act*, some of its records may nevertheless be subject to disclosure if they are in the custody or under the control of a public body, such as the Department.

[77] The Supreme Court addressed this question of whether a government institution has custody and control of records in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, establishing the following two-part test:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?¹⁵

[78] The Department did not present any representations directly on this point, although it submitted that it did not have any real ties to FPL and its corporate business other than as members of its board of directors. I note that the Department did not object to the Applicant's request on this ground and did not dispute that it had the records at issue in its custody or control, which were created or received by the senior Department officials who sit on FPL's board of directors through their GNB email accounts.

[79] FPL's submissions stated that it operates as a separate corporation from the Province and to this end, its management team and employees are independent from

¹⁵ [Canada \(Information Commissioner\) v. Canada \(Minister of National Defence\)](#), 2011 SCC 25 (CanLII), [2011] 2 SCR 306, at para. 6.

the Province, as is FPL's payroll, insurance, office space and equipment, and record keeping.

[80] Having reviewed the records in dispute in this case, I find that they were either created by the Department or for the review of departmental officials, or records which came into the possession and control of departmental officials or the Minister in their role as FPL Board members and representing FPL's majority shareholder, the Province.

[81] I can readily infer from the record that the Department and the Province fully expects reporting from FPL managers and that the responsive records identified are ones which the Department would reasonably expect to obtain upon request, if they did not already have them in their possession.

[82] The Department has submitted that Departmental officials serving as FPL board members are being or will be issued separate emails so as to create a firewall between FPL board business and Departmental matters. In my view, this would do nothing to advance the Province's case but rather reinforces the view that in the current arrangement, FPL's and the Department's business are intricately aligned. Even if separate email accounts were created for Department officials to conduct their duties with respect to FPL, this would not change the fact that the Department nevertheless has custody and control of records generated in this context.

[83] It is clear from my review of the records at issue that the Departmental officials who sit on FPL's board of directors do so in their official capacity and as representatives of the Province. When information is shared with the Departmental officials who sit on the board of directors in this capacity, it will fall under the custody and control of the Department and thus is subject to disclosure as required or permitted under the *Act*.

[84] In arriving at this finding in this case, I note that this does not necessarily mean that the same reasoning would apply to all public body officials who sit on boards. The question to be determined is whether the public body that employs the officials who sit on a board of directors has custody or control of such records, which must be determined on case-by-case basis.

Issue 3: The Department's response to the access request

[85] One of the foundational purposes of the *Act* is to promote transparency, openness, and accountability of public bodies by creating a right of access to information relating to the public business of public bodies, including "any activity or function carried on or performed by any public body to which this Act applies" (subsection 7(1)). The default is disclosure and public bodies can only refuse access in keeping with the limited and specific exceptions set out in the *Act* (paragraph 2(a)).

Duty to assist: Meaningful responses

[86] The duty to assist under section 9 requires public bodies to “make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.”

[87] Part of the obligation to be open and accurate in treating access requests is ensuring that applicants receive meaningful responses, particularly where access is being refused. Providing meaningful explanations to applicants is a key component of the duty to assist applicants to better understand why they are not receiving the requested information.

[88] Where a public body has relevant records but is refusing access, the response should provide a brief description of the record(s) in question (without disclosing any protected information), the specific exception of the *Act* that the public body is relying on to refuse access, and a brief explanation as to why or how the exception applies to the withheld information.

[89] This is in keeping with the contents of response obligations under section 14, which require public bodies to inform the applicant “of the reasons for refusal and the specific provision of this Act on which the refusal is based” (subpara. 14(1)(c)(ii)).

[90] It is not helpful for applicants, nor in keeping with the requirements of s. 14 of the *Act*, for public bodies to merely recite the provision(s) of the *Act* that the public body is relying on to refuse access without further explanation.

[91] If applicants know the reasons why information is not being provided by the public body, they may be satisfied with the explanation, even if they would have preferred a different outcome.

[92] This also helps applicants assess whether to challenge the public body’s response by either filing a complaint with this office, or referring it to the court, and can assist in helping them focus their main points of concern. When applicants cannot readily understand the public body’s response, it is more likely they will file a complaint that will require a full review of the entire matter, which will inevitably require the public body to invest a substantial amount of time and resources to address.

[93] In this case, the Department issued a response to the Applicant stating that partial access was being granted and cited ten different provisions of the *Act* as grounds for protecting some of the requested information. The Department disclosed 99 pages of records, many of which were heavily redacted. While not indicated in its response, the Department also withheld 179 pages in full.

[94] In making this complaint, the Applicant raised concerns with the overall content of the Department’s response and that it applied exceptions in a way that made it

impossible to understand the nature of the records provided, and as a result, to assess whether the Department's reasons for refusing were appropriate.

[95] I find that the Applicant's concerns on this point have merit. The Department cited the claimed exceptions to disclosure that it was relying on in its response to the request and made notations as to where these exceptions were applied in the records that were disclosed to the Applicant. However, the Department's response provided no explanations about what information the exceptions were intended to protect or the reasons why the Department found they applied.

[96] The Department redacted the disclosed records in a way that left the reader with very little meaningful information. In several records, the Department redacted the subject matter of emails and names of attachments, as well as the details of the matters discussed in the body of the email. While the Applicant could see that an email or meeting request had been sent to and from certain individuals on a particular date, there was no context to understand what the information may be or to assess why the withheld information may be sensitive in nature.

[97] Further complicating the matter, the Department applied multiple exceptions to the same information, including both mandatory third-party business information exceptions as well as discretionary exceptions about the Province's or the public body's interests.

[98] In another instance, the Department refused access to two pages of information under para. 33(2)(a) as information "that is free of charge to the public or is available for purchase by the public" but did not provide any explanation as to what this information was or where the Applicant could find it.

[99] For these reasons, I find that the Department did not meet its duty to assist the Applicant as it did not provide a meaningful response in keeping with section 14 of the *Act*.

Reasons for refusing access

[100] Given the volume of records at issue and the multiple claimed exceptions to disclosure to the same information, I will address each of the claimed grounds to refuse access below, with my specific recommendations for further disclosure set out in the Appendix to this report.

[101] As many of the details about what kind of information was discussed in the records at issue were withheld from the Applicant and were provided for my office's confidential review as part of this investigation, I will only disclose the details I consider necessary to establish grounds for my findings and recommendations below.

Subsection 16(1.1): Information not relevant to the request

[102] While the Department's response to the Applicant stated that some information was withheld under this provision, there is no indication in the records received by the Applicant or the Department's notations in the full copy of the records at issue provided for my review that any information was actually withheld on this ground.

[103] As I see no evidence that the Department withheld any information on this ground, there is no need for me to consider this point further.

Subsection 21(1): Unreasonable invasion of third-party privacy

[104] This is a mandatory exception to disclosure, which means that public bodies are prohibited from disclosing information where doing so would unreasonably invade a third party's privacy. Subsection 21(2) of the *Act* sets out certain circumstances where disclosure is deemed to be an unreasonable invasion of privacy. Subsection 21(3) also must be considered, as it deems the disclosure of certain kinds of personal information to not be an unreasonable invasion of privacy, in which case the personal information in question cannot be protected on the grounds of privacy.

[105] To meet the requirements of this exception, a public body must demonstrate that the information in question is personal information about a third party and that disclosure would be an unreasonable invasion of their privacy.

[106] In this case, the Department withheld various kinds of information under this exception, including the email addresses and cell phone numbers of third parties, including FPL employees and the FPL board members who were not Departmental officials. While I do not necessarily agree that some of the professional contact information for these individuals would be an unreasonable invasion of privacy as contemplated by this provision, disclosure would not provide the Applicant with any additional meaningful information and thus I do not require the Department to take any further action on this point.

[107] The Department also withheld information about employment-related matters involving specific individuals employed by FPL, as well as the professional credentials and biographies of several individuals whose information was circulated amongst certain board members for possible consulting work.

[108] I find that this information is the personal information of the individuals involved and that disclosure in this context would be an unreasonable invasion of their privacy.

[109] I do not find that disclosure would otherwise be required under the provisions of ss. 21(3).

[110] The specific details of where I have found the Department properly relied on s. 21(1) to refuse access are set out in the Appendix to this report.

Section 22: Disclosure harmful to third party business or financial interests

[111] The majority of the information that the Department withheld was on the basis of harm to third party business interests under paras. 22(1)(b) and 22(1)(c). In many cases, the Department also relied on other discretionary exceptions to disclosure to refuse access to this same information, particularly ss. 26(1) (advice to a public body) and para. 30(1)(c) (disclosure harmful to economic and other interests of a public body).

[112] Given the significant overlap between the Department's and Province's interests and those of FPL with respect to the information at issue, the analysis regarding the exceptions remains substantively the same whether I view the records as departmental records or as the records of FPL in the Department's control. The tests under both the ss. 22(1) and 30(1)(c) exceptions are based on a reasonable expectation of harm and the burden of proof is on the Department to show that the Applicant has no right of access under para. 84(1) of the *Act*.

[113] I will not address the application of this exception in detail as I am of the view that any concerns about harm to FPL's interests from disclosure of the information at issue can be appropriately addressed under the equivalent provision for public bodies under para. 30(1)(c).

[114] That being said, even if I were to find that s. 22 applied to some of information at issue, while I agree that much of it would constitute commercial or financial information, I do not agree that para. 22(1)(b) applies for the following reasons.

[115] In this case, the question of whether FPL supplied the information at issue to the Department is answered by the fact that the four senior Department officials sit on FPL's Board of Directors in their professional capacity as representatives of the Department. The information in question was exchanged with some of or all these Department officials in this capacity, and in this sense, I do not find that this can be considered as FPL supplying information to the Department. The Departmental officials who sit on FPL's Board of Directors in this capacity were not supplied with information by FPL but rather were entitled and required to be part of these exchanges as part of its governing board. As I found above, in the particular circumstances of FPL's unique relationship with the Department and the Province, the Department has custody and control of records that are generated by virtue of its senior officials being on FPL's Board of Directors.

[116] As for the Department's and FPL's submissions that disclosure could reasonably be expected to harm FPL's interests as per para. 22(1)(c), I will consider these submissions in the discussion on the applicability of para. 30(1)(c) (disclosure harmful to economic and other public body interests) below.

[117] I do wish to briefly address FPL's submissions that raised the potential applicability of subpara. 22(1)(c)(iv) to some of the information at issue. This provision requires information to be protected where its disclosure could reasonably be expected to "result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied".

[118] As explained above, I do not agree that the information shared by FPL employees with FPL board members, including the Department officials who sit on the board, in this capacity can be considered as information that was supplied by a third party to the Department for the purposes of para. 22(1)(b). For the same reasons, I find that FPL's submissions on this point similarly do not have merit, as the information was not supplied to the Department as the Departmental officials who sit on FPL's Board of Directors were entitled to be privy to it in any event as part of their role on the Board of Directors.

Section 22.1: Third party solicitor-client privilege

[119] Section 22.1 states:

22.1 The head of a public body shall refuse to disclose to an applicant information that is subject to a solicitor-client privilege claim of a third party.

[120] This is a mandatory exception to disclosure, which means that a public body is not permitted to disclose information that falls within its scope. While the solicitor-client privilege exception under s. 27 is discretionary, as the client in those cases would be the public body, this exception does not allow a public body to disclose information that consists of solicitor-client privileged information of a third party. A public body cannot waive another person or entity's solicitor-client privileged information.

[121] The information the Department withheld under this provision includes details of conversations with FPL's external counsel on various matters and copies of FPL corporate records that were provided from FPL's external counsel; however, I do not find that all the information withheld as solicitor-client privileged information falls within its scope.

[122] As an example, the Department withheld the finalized versions of FPL's corporate by-laws, FPL board meeting minutes from 2019, and other information about FPL's corporate structure under this exception. As many of these details appear to be

factual information about FPL's corporate structure, I do not see how it can be considered as solicitor-client privileged information or how it relates to the seeking or receiving of legal advice.

[123] To the extent that the records at issue detail specific issues that were the subject of legal advice being sought and/or received, I find that this would fall within the scope of solicitor-client privileged information and could be properly protected for this reason.

[124] The specific details of where I have found the Department properly invoked solicitor-client privilege to refuse access are set out in the Appendix to this report.

Paragraph 26(1): Advice to a public body

[125] In several instances, the Department relied, in part, on paras. 26(1)(a) and (e) to refuse access to some of the information at issue:

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,

...

(e) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

Paragraph 26(1)(a): advice, opinions, proposals or recommendations

[126] Paragraph 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.

[127] As these are discretionary exceptions to disclosure, a public body must show that the information in question falls within the scope of the exception and that it appropriately exercised its discretion in deciding to refuse access.

[128] 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.

[129] In this case, I find that the record shows that the Department properly refused access to some of the information at issue on this ground. This includes portions of email discussions between FPL employees and FPL Board members (including

Department officials), where opinions and advice were exchanged about various topics, including internal discussions about operational and governance matters.

[130] I also find that the Department was lawfully authorized to withhold some of the attached documents to emails, including records that set out various options and financial information for FPL's board of directors' consideration, as well as draft versions of documents that were circulated for discussion and approval prior to being finalized.

[131] I note that in nearly all instances, the Department claimed this exception in conjunction with other exceptions to disclosure. In some instances, I found that the Department properly relied on other exceptions to disclosure to refuse access to some of the information that it withheld on this ground, rather than para. 26(1)(a).

[132] The specific details of where I have found the Department properly invoked para. 26(1)(a) to refuse access are set out in the Appendix to this report.

Paragraph 26(1)(e): proposed plans, policies, or projects

[133] Paragraph 26(1)(e) is a discretionary exception to disclosure that allows public bodies the option to protect information where disclosure could reasonably be expected to divulge details about pending policy or budgetary decisions, including a public body's proposed plans, policies, or projects.

[134] Again in this case, the Department relied on this exception to refuse access to some of the information at issue in conjunction with several other exceptions to disclosure, and in every place the Department invoked this exception, it also invoked para. 30(1)(c) of the *Act*. As I find that the concerns with disclosure of this information are better addressed by para. 30(1)(c), which speaks to harm to the Province's and/or a public body's economic or other interests, I will instead address this information under that exception.

Paragraph 29(1)(o): Disclosure harmful to law enforcement or legal proceedings

[135] While not indicated in the response letter, the Department relied on this provision to refuse access to information on portions of two pages of the records at issue.

[136] This is a discretionary exception to disclosure that allows a public body to refuse access to information if disclosure could reasonably be expected to "be injurious to the conduct of existing legal proceedings to which the Province of New Brunswick or the public body is a party or anticipated legal proceedings to which the Province of New Brunswick or the public body may become a party."

[137] I note that the Department also refused access to this information in conjunction with several other exceptions to disclosure. As I find that this information was properly protected under a different discretionary exception to disclosure (as set out in the Appendix), I will not consider the Department's reliance on this provision further.

[138] I also note that counsel for FPL raised this exception of its own accord in its submissions in relation to some of the information at issue, providing the following explanations:

FPL has not been provided the name of the applicant. However, if the applicant is or may be involved in legal proceedings against FPL or DNRED we would note s.29(1)(o) as a ground to refuse to disclose any privileged information to the applicant. That is, it would be injurious to the conduct of those legal proceedings since the applicant would not be entitled to solicitor-client privileged materials in that litigation (see *McCrea v. Moncton Industrial Development Ltd.*, 2019 CarswellNB 240).

[139] Similar to the Department, this exception was raised in conjunction with other exceptions to disclosure for the same information, including paras. 22(1)(b) and 22(1)(c) and section 22.1 of the *Act*.

[140] Counsel for FPL did not provide any further submissions to link the information it was objecting to disclosure on this ground with evidence of a related existing or anticipated legal proceeding, thus I do not find that this exception applies.

[141] That being said, I found that one record where this concern was raised by counsel for FPL was properly protected from disclosure as solicitor-client privileged information and thus it is moot as to whether para. 29(1)(o) also applies. This provision was also raised in relation to a portion of another record at issue and I did not agree that the information in question constituted solicitor-client privileged information or otherwise protected information and thus am recommending disclosure, as set out in the Appendix to this report.

Paragraph 30(1)(b): Disclosure harmful to economic and other interests of a public body

[142] This is a discretionary exception to disclosure that allows a public body to refuse access to "financial, commercial, scientific, technical or other information in which a public body or the Province of New Brunswick has a proprietary interest or right of use."

[143] In this case, the Department relied on this provision to withhold log-in and call-in details for virtual meetings. I do not agree that details of this nature are proprietary or have monetary value as contemplated by this exception, nor did the Department provide specific submissions on how disclosure could reasonably be expected to harm its or the

Province's interests. I do not find that the Department's reliance on the s. 30(1)(b) exception has merit with respect to these details; however, I am also cognizant of the fact that disclosure would not provide the Applicant with any further meaningful context.

[144] While there is no need to further address this point, I nevertheless note that it would have been helpful had the Department explained to the Applicant that this was the nature of the information that it was withholding under this exception so they could better understand the response provided and determine whether to challenge the Department's decision to refuse access on this ground in a subsequent complaint.

Paragraph 30(1)(c): Disclosure harmful to economic and other interests of a public body

[145] Much of the information that the Department withheld was refused under para. 30(1)(c) of the *Act*:

30(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Province of New Brunswick, including but not limited to, the following information:

...

(c) information the disclosure of which could reasonably be expected to result in a financial loss to a public body or to the Province of New Brunswick or prejudice the competitive position of or interfere with or prejudice contractual or other negotiations of a public body or the Province of New Brunswick...

[146] The purpose of this exception is to allow public bodies the option of disclosing or withholding information where its disclosure could reasonably be expected to result in economic or financial harm to the public body's or the Province's interests or in harm to negotiating positions.

[147] Specifically, para. 30(1)(c) further contemplates the following types of harm as grounds to refuse access:

- a financial loss to a public body or the Province,
- prejudice to a public body's or the Province's competitive position, or
- interfere with or prejudice a public body's or the Province's contractual or other negotiations.

[148] To properly rely on this exception, a public body must first demonstrate how the disclosure of the information in question could reasonably be expected to result in one of these specified types of harm, and, if this has been established, then it must show how it exercised its discretion in deciding to refuse access, based on relevant factors at play at the time of the access request.

[149] In this case, I find that the record shows that the Department properly refused access to some of the information at issue on this ground. This includes portions of email discussions and related documentation about contractual concerns and negotiations related to the Province's annual aerial herbicide spray program and other contractual matters about FPL equipment. I am satisfied that the disclosure of such details could reasonably be expected to interfere with or prejudice contractual negotiations with respect to these issues and thus can be protected on this ground.

[150] I also find that the Department could lawfully protect some, but not all, of the details of discussions that arose about the strategic direction and governance of FPL. While I am careful not to disclose sensitive information in giving effect to my reasoning, I can say that I am satisfied from my review of these details that their disclosure could reasonably be expected to harm the economic or financial interests of FPL.

[151] I note that in nearly all instances, the Department claimed this exception in conjunction with other exceptions to disclosure. In some instances, I found that the Department properly relied on other exceptions to disclosure to refuse access to some of the information that it withheld on this ground, rather than para. 30(1)(c).

[152] The specific details of where I have found the Department properly invoked para. 30(1)(c) to refuse access are set out in the Appendix to this report.

[153] On a final note, and as stated above, I cannot substitute my own discretion on matters that fall within a discretionary exception to disclosure. Nevertheless, for the information that I find falls under either paras. 26(1)(a) or 30(1)(c) of the *Act*, I encourage the Department to reconsider its position and consider possible further disclosure, taking into account the fact that final decisions had been made on some of the issues involved at the time of the request and the public interest in better understanding FPL's relationship with the Province and its operations.

Paragraph 33(2)(a): Information that is or will be available to the public

[154] This is a discretionary exception that allows public bodies to refuse access where the same information can be obtained through other publicly available means. This exception gives public bodies the option to refuse access in such cases and instead

redirect applicants to where the information can be obtained for free or purchased if they chose not to disclose it.

[155] In this case, the Department withheld a two-page attachment to an email that was partially disclosed to the Applicant; however, the name of the attachment was redacted, leaving the Applicant with no context as to what this information was or where it could otherwise be obtained.

[156] The information withheld was the Corporate Affairs Registry database listing for FPL, which is available to the public through Service New Brunswick.

[157] Given the innocuousness of the information involved, it would have been preferable had the Department simply disclosed this to the Applicant, or in the alternative, explained what the information was and where it could otherwise be obtained. It is unlikely the Applicant would have raised this as an issue in this complaint had the Department taken either of these steps.

CONCLUSION

[158] As this Report of Findings has been extensive, I will not add to the reader's burden by providing a drawn-out review of the issues that have been outlined throughout this report. I will merely observe that this matter has engaged countless efforts on the part of the Applicant, the Department, FPL and this office to examine a rather unique arrangement, the creation of which in 1952 predates the existence of the very first access to information legislation in the province by nearly 25 years, and the adoption of our current legislation by another 30 years.

[159] Preserving the Province's economic and financial interests is a deserving consideration and a legitimate ground to refuse access under the *Act* where the circumstances warrant. On the other hand, given society's modern-day expectations for transparency in matters in the public interest, and specifically in this case, the connection between FPL's operations and resulting implications for the Province and its citizens, I encourage both the Department and the Province to continue to examine their unique relationship with FPL as it relates to rights and transparency requirements under the *Act*.

RECOMMENDATION

[160] Based on the above findings, I recommend under clause 73(1)(a)(i)(A) of the *Act* that the Department disclose to the Applicant the information that I found was not properly protected from disclosure, as set out in the Appendix to this report.

[161] 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 is issued in Fredericton, New Brunswick this 12th day of July, 2024.

Marie-France Pelletier
Ombud for New Brunswick

23/24-AP-050

Appendix: Records, exceptions claimed, and findings

Page no(s).	Description of record	Nature of information withheld	Exception claimed by Department	Exceptions claimed by third party (in addition to those claimed by the Department)	Do the exceptions apply?	Release or withhold
1	Email – meeting request	Subject line of email and log-in information for virtual meeting	21(1), 22(1)(b), 22(1)(c)		No	Release
2-6	Email thread		22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 29(1), 30(1)(c)	22(1)(c)(i), 22(1)(c)(ii), 22(1)(c)(iv)	In part 30(1)(c) applies to the email that begins on page 4 and ends on page 5	Release non-protected details and reconsider exercise of discretion with respect to information found to fall within discretionary exceptions
7-8	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
7-8	Email thread		21(1), 22(1)(b), 22(1)(c), 30(1)(b)		In part 21(1) applies to points 1 and 2 on page 8	Release non-protected details
9-14	Attachments 1-3 to email thread (p. 7-8)		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c)(i), 22(1)(c)(iv)	Yes 26(1)(e), 30(1)(c)	Reconsider exercise of discretion
15-17	Attachment to email thread (p. 7-8)		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 21(2)(g), 21(2)(g.1), 21(2)(h), 22(1)(b), 22(1)(c)	Yes 21(1)	Withhold

18-20	Email thread		22(1)(b), 22(1)(c), 22.1	22(1)(b), 22.1	In part Para. 2 on p. 18 contains solicitor- client privilege information	Release non- protected details
21-56	Attachment to email thread (p.18-20)		22(1)(b), 22(1)(c), 22.1	22(1)(b)	No	Release
57-82	Attachment to email thread (p.18-20)		22(1)(b), 22(1)(c), 22.1	22(1)(b), 22.1, 29(1)(o)	Yes Entire document is subject to solicitor- client privilege	Withhold
83-85	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
83-85	Email thread		22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c)(i), 22(1)(c)(ii), 22(1)(c)(iv)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion
86	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
86	Email thread		21(1), 22(1)(b), 22(1)(c), 22.1, 26(1)(a)	21(1), 21(2)(e), 21(2)(g.1), 21(2)(h), 22(1)(b), 22.1	In part Redactions to first two paragraphs fall within 26(1)(a)	Release non- protected details and reconsider exercise of discretion
87- 122	Attachment to email thread (p.83-85)		22(1)(b), 22(1)(c), 22.1	22(1)(b)	No	Release – same information as p. 21-56
123- 125	Email thread	Subject line of email and name of attachment	22(1)(b), 22(1)(c), 22.1		No	Release
123- 125	Email thread		21(1), 22(1)(b), 22.1, 22(1)(c), 26(1)(a),	22(1)(b), 22.1, 29(1)(o)	In part Second to last para. In first email on p. 123	Release non- protected details and reconsider exercise of discretion

			26(1)(e), 30(1)(c)		fall within 22.1 Redactions in second email on p. 123 and p. 124 fall within s. 26(1)(a) and 30(1)(c)	
126- 127	Attachment to email thread (p. 123-125)		22(1)(b), 22(1)(c), 22.1	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	No	Release
128	Email		21(1), 30(1)(b)		No	Release
129- 130	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
129- 130	Email thread		22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)		In part Email on p. 130 is the same as at p. 123 and 124, falls within s. 26(1)(a) and 30(1)(c)	Release non- protected details and reconsider exercise of discretion
131- 134	Email thread	Subject line of email and name of third attachment	22(1)(b), 22(1)(c)		No	Release
131- 134	Email thread		21(1), 22(1)(b), 22(1)(c), 22.1, 26(1)(a), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c), 22.1	Yes First full para. on p. 132 falls within 30(1)(c) Second full para. on p. 132 and the first sentence of the second email on p. 133 fall within 21(1)	Release non- protected details and reconsider exercise of discretion

135-136	Attachment to email thread (p. 131-134)		22(1)(b), 22(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	No	Release (Same info as p. 126-127)
137-139	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
137-139	Email thread		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c)	In part The third, fourth and fifth paras. on p. 138 fall within 30(1)(c) The sixth para. on p. 138- 139 falls within 21(1)	Release non-protected details and reconsider exercise of discretion
140-141	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
140-141	Email thread	Names of attachments	22(1)(b), 22(1)(c), 33(2)		No	Release
140-141	Email thread		22(1)(b), 22(1)(c), 22.1		No	Release
142-145	Attachment to email thread (p. 140-141)		22(1)(b), 22(1)(c)	22.1	No	Release
146-147	Attachment to email thread (p. 140-141)		33(2)(a)		Yes	Reconsider exercise of discretion
148	Email	Names of two attachments to email and redacted portion of email text	22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)		No	Release
149-155	Attachment to email (p. 148)		22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion
156-159	Attachment to email (p. 148)		22(1)(b), 22(1)(c),	22(1)(b), 22(1)(c)	Yes 26(1)(a)	Reconsider exercise of discretion

			26(1)(a), 26(1)(e), 30(1)(c)		30(1)(c)	
160-161	Email thread		22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c)	Yes 30(1)(c)	Reconsider exercise of discretion
162-164	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
162-164	Email thread		22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	Yes 30(1)(c)	Reconsider exercise of discretion
165-172	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
165-172	Email thread		22(1)(b), 22(1)(c)	22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion
173	Email	Subject line of email	22(1)(b), 22(1)(c)		No	Release
173	Email		22(1)(b), 22(1)(c)	22(1)(b), 22(1)(c)	In part Redactions fall within 26(1)(a) and/or 30(1)(c) but not first two lines of email	Release and reconsider exercise of discretion
174	Email	Subject line of email	22(1)(b), 22(1)(c)		No	Release
174	Email		21(1) 22(1)(b), 22(1)(c), 26(1)(a)	21(1), 21(2)(e), 22.1	In part Names of email attachments and redactions to last paragraph fall within 21(1)	Release non-protected details
175-186	Attachments to email (p. 174)		21(1) 22(1)(b), 22(1)(c)		Yes 21(1)	Withhold

187	Email	Subject line of email	22(1)(b), 22(1)(c)		No	Release
187	Email		22(1)(b), 22(1)(c)	22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion
188-190	Email	Subject line of email	22(1)(b), 22(1)(c)		No	Release
188-190	Email		21(1), 22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	21(1), 21(2)	In part Page 189: Points 1 and 2: 30(1)(c) Point 3: 21(1) Page 190, para. below signature, 2 nd sentence to end of para.: 30(1)(c)	Release non-protected details and reconsider exercise of discretion
191	Email – meeting request		22(1)(b), 30(1)(b)		No	Release
192	Email – meeting request		22(1)(b), 22(1)(c), 26(1)(a), 30(1)(b), 30(1)(c)		No	Release
193	Email – meeting request	Subject line of email	22(1)(b)		No	Release
193	Email – meeting request		21(1), 22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(b), 30(1)(c)		In part Points 1 and 2 fall within 21(1) Point 5 falls within 30(1)(c)	Release non-protected details and reconsider exercise of discretion
194-198	Attachment to email (p. 193)		22(1)(a), 22(1)(b), 26(1)(a),	22(1)(b), 22(1)(c)(i), 22(1)(c)(iv)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion

			26(1)(e), 30(1)(c)			
199	Email	Subject line of email	22(1)(b), 22(1)(c)		No	Release
199	Email	Name of attachment	21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)		No	Release
199	Email		22(1)(b), 22(1)(c)		No	Release
200-201	Attachment to email (p. 199)		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)(ii)	In part Points 1 and 2 fall within 21(1) Point 5 falls within 30(1)(c)	Release non-protected details and reconsider exercise of discretion
202-203	Email thread	Subject line of email	22(1)(b), 22(1)(c)		No	Release
202-203	Email thread		21(1), 22(1)(b), 22(1)(c)		No	Release
204	Email/meeting request		21(1), 22(1)(b), 22(1)(c), 30(1)(b)		No	Release
205	Email		21(1), 22(1)(b), 22(1)(c)		No	Release
206	Attachment to email (p. 205)		21(1), 22(1)(b), 22(1)(c)		Yes 21(1)	Withhold
207-209	Email and attachments		Released to Applicant		N/A	N/A
210	Email/meeting request		22(1)(b), 22(1)(c), 30(1)(b)		No	Release
211-213	Email	Subject line of email	22(1)(b), 22(1)(c)		No	Release
211-213	Email		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	In part The second paragraph of the second email of p. 212 falls	Release

					within 30(1)(c)	
214-255	Attachments to email (p. 211-213)		22(1)(a), 22(1)(b), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	No	Release
256-257	Email thread		21(1), 22(1)(b), 22(1)(c)		No	Release
258	Email/meeting request	Subject line of email	22(1)(b), 22(1)(c)		No	Release
258	Email/meeting request		22(1)(b), 22(1)(c), 30(1)(b)		In part Point 3 can be protected under 30(1)(c)	Release
259	Email		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 30(1)(c)	Reconsider exercise of discretion
260-262	Email thread		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 30(1)(c)	Reconsider exercise of discretion
263-264	Email thread		21(1), 22(1)(b), 22(1)(c), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 30(1)(c)	Reconsider exercise of discretion
265-267	Email thread		21(1), 22(1)(b), 22(1)(c), 29(1)	21(1) and 21(2)(e)	Yes 21(1), 30(1)(c)	No further disclosure recommended
268-269	Email thread		21(1), 22(1)(b), 22(1)(c), 26(1)(a), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion
270	Attachment to email (p. 268-269)		22(1)(a), 22(1)(b), 26(1)(a), 26(1)(e), 30(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion

271	Email		22(1)(b), 22(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c) (same info as p. 268- 269)	Reconsider exercise of discretion
272	Email/meeting request		22(1)(b), 30(1)(b)		No	Release
273	Email		21(1), 22(1)(b), 22(1)(c)		No	Release
274- 275	Attachment to email (p. 273)		21(1), 22(1)(b), 22(1)(c)	21(1), 21(2)(e), 22(1)(b), 22(1)(c)	Yes 26(1)(a), 30(1)(c)	Reconsider exercise of discretion
276	Email		22(1)(b), 22(1)(c), 26(1)(a)		Yes 26(1)(a)	Reconsider exercise of discretion
277- 278	Attachment to email (p. 276)		22(1)(a), 22(1)(b), 26(1)(a)	22(1)(c), 22.1	Yes 26(1)(a)	Reconsider exercise of discretion