



## Report of Findings: 23/24-AP-110 and 23/24-AP-112 Department of Justice and Public Safety

November 14, 2024

**Citation:** New Brunswick (Justice and Public Safety) (Re), 2024 NBOMBUD 8

**Summary:** The Applicant asked the Department of Justice and Public Safety for records related to a Crown Prosecutor shortage and an internal report on the Public Prosecution Service. The Department said that it had no records on the first point and withheld the report under sections 4 (the *Act* does not apply), 17 (Executive Council confidences) and 26 (advice to a public body).

The Ombud did not agree that section 4 applies but found that the report was protected as Cabinet confidences as the Department demonstrated a clear link between the purpose of the report and subsequent budget decisions. The Ombud also found that the Department did not fully meet its duty to assist given the discrepancy between the information requested by the Applicant and the Department's interpretation of the request. The Ombud recommended that the Department review how it communicates with applicants to ensure a common understanding at the outset of the information being requested.

**Statutes Considered:** [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, sections 4(b), 9, 17(1)(b), 17(1)(c), 26(1)(a).

**Authorities Considered:**

[New Brunswick \(Attorney General\) \(Re\)](#), 2018 NBOMB 6 (CanLII); *Charleson v. New Brunswick (Attorney General)*, (2014) N.B.J. 91, cited in [New Brunswick \(Attorney General\) \(Re\)](#), 2018 NBOMB 6; [Bray v. Attorney General of New Brunswick et al](#), 2016 NBQB 203 (CanLII); [Karl Wilson v. Attorney General of New Brunswick](#), 2024 NBKB 27 (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 Justice and Public Safety (“the Department”) for records about a Crown Prosecutor shortage, specifically records relating to “stays of proceedings as a result of a Crown Prosecutor shortage; and/or the reporting of or assessment of consequences of the shortage” since September 1, 2022. The Applicant also asked for a copy of an internal report about the Public Prosecution Service from January 2023.

[2] In response, the Department said that it searched its records and found there were no stays of proceedings because of a Crown Prosecutor shortage during the stated timeframe, so it did not have any records to provide.

[3] The Department also did not provide a copy of the requested report, as it considered it associated to the legal affairs that relate to the performance of the duties and functions of the Attorney General and falls outside the scope of the *Act* under para. 4(b). The Department also relied on para. 26(1)(a) (advice to a public body) as it considered the report to be advice.

[4] Unhappy with the Department’s response, the Applicant made a complaint to this office.

[5] While informal resolution efforts made by my office were partly successful, I decided to conduct a formal investigation under subsection 68(3) of the *Act* to examine the remaining issues.

## APPLICANT’S REPRESENTATIONS

[6] In relation to the Department’s claim that it had no records relating to stays of proceedings as a result of a Crown Prosecutor shortage, the Applicant noted that the Crown Prosecutors Association had publicly said that criminal proceedings before the courts had been stayed because of a shortage of Crown prosecutors. While the Department acknowledged that there was shortage of Crown prosecutors, it stated that no proceedings were stayed for this specific reason.

[7] The Applicant also said that even if this were the case, the Department did not say if it had records about the reporting of or assessment of the consequences of the shortage. The Applicant suggested that some records on this point should exist.

[8] As for the report, the Applicant disagreed that it fell outside the scope of the *Act* under para. 4(b). The Applicant referred to a decision from one of my predecessors that

discussed the vagueness of this provision and uncertainty on what it was intended to protect.

[9] The Applicant also questioned whether the report was advice under para. 26(1)(a), suggesting that it might be a final report or final audit that would not be protected for this reason (see para. 26(2)(i)). Finally, the Applicant questioned whether the report needed to be withheld in full and whether there were some portions that could be shared.

## **DEPARTMENT'S REPRESENTATIONS**

[10] The Department maintained its position throughout this office's review.

[11] On the first part of the request, the Department undertook searches and provided records for our review but maintained that it did not have any directly relevant records.

[12] While the Department may have records about how it addressed retention and recruitment challenges, the Department's view was that these kinds of details were not directly relevant to the request and had the Applicant specifically asked for this, it would have responded differently.

[13] As for the report, the Department explained that a lawyer with the Public Prosecutions Service undertook an internal analysis and wrote the resulting report at the request of senior management. The Department stated that the report's purpose was to provide specific proposals about the performance of the legal affairs, duties, and functions of the Attorney General. The Department maintained that the report was not subject to the *Act* under para. 4(b), meaning that the Applicant had no right to see it.

[14] The Department also stated that the report was intended to provide data to support a recommendation to Cabinet about its budget. For this reason, the Department maintained that it was also protected under the mandatory exception to disclosure for Executive Council confidences, specifically, paras. 17(1)(b) and 17(1)(c).

[15] Finally, the Department stated that the report was also advice to the public body under para. 26(1)(a) as it was created to advise the Attorney General and then Cabinet. According to the Department, the employee who drafted the report provided expert analysis that included advice, opinions, and recommendations to support future decision-making by the Attorney General and Cabinet.

[16] The Department told us that it considered the arguments put forward by the Applicant and this office and that it decided to maintain its decision to withhold the report in full due to its nature, purpose, and use.

## ISSUES

[17] The issues before me are:

- Does the Department have any records in its custody or control about stays of proceedings because of a Crown prosecutor shortage and/or about the reporting or assessment of consequences of the shortage?
- Could the Department legally deny access to the requested report?

[18] The Department has the burden of proof to show why it could lawfully deny access to the requested information under ss. 84(1) of the *Act*.

## ANALYSIS AND FINDINGS

### **Does the Department have records about stays of proceedings because of a Crown prosecutor shortage or about consequences of the shortage?**

[19] The Department stated it had no records on this part of the request.

[20] When facing a complaint where there are no records, the public body must show that it met its duty to assist under section 9.

#### ***Section 9: Duty to assist***

[21] The duty to assist that applies to all public bodies is set out in section 9:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

[22] The duty to assist requires public bodies to be helpful to applicants seeking information under the *Act*. This includes having discussions with applicants to make sure the public body understands what information the applicant is looking for, taking appropriate steps to search for relevant records, and giving clear and helpful responses to access requests.

#### **Duty to assist: interpretation of the request and reasonable search**

[23] As part of this office's review, the Department provided details of how it handled the request.

[24] Senior staff with the Public Prosecution Services reviewed the Applicant's request, had internal discussions, and confirmed amongst themselves based on their own knowledge and recollections that there had been no stays of proceedings specifically because of a Crown prosecutor shortage. The Department decided it did not need to search its files because it believed no records existed.

[25] The Department took this approach as it had not been actively tracking cases where stays of proceedings occurred in its record systems. The Department explained that historically there were not many stays of proceedings and it had not seen a need to track these cases.

[26] Further complicating matters was the fact that stays of proceedings can occur for a variety of reasons that are not necessarily documented in court orders or written decisions.

[27] I can appreciate why the Department relied on staff knowledge and memory to address this question under the circumstances. However, it would have been preferable had the Department attempted a search, or at the very least explained how it arrived at this conclusion to the Applicant in its response.

[28] The Department cooperated with our efforts to try to confirm that there were no stays of proceedings because of the Crown prosecutor shortage by providing us with lists of cases and other records. While there were several cases where criminal matters were delayed for various reasons, including on the Crown's part, from my review of the information provided, there do not appear to be any cases where a stay was granted specifically because of a Crown prosecutor shortage.

[29] I am satisfied that the Department does not have any records on this part of the request.

[30] As for records about the reporting or assessment of consequences of the Crown prosecutor shortage, the Department confirmed that it did not initially search for records on this point because it read the request as being only for records about stays of proceedings.

[31] We initially asked the Department to consider whether it had records on this point, for example, records about managing absences and recruitment efforts, which the Applicant stated should have been considered as relevant on this point. The Department stated that this information was not part of the original request and it would have given a different answer if the Applicant had specifically asked for these details.

[32] During the formal investigation, I explained why it seemed that the Department may or should have records about the consequences of the Crown prosecutor shortage and asked that it provide these records for my review.

[33] While the Department agreed to do a record search and provided many records for our review, this search focused on stays of proceedings unrelated to the Crown prosecutor shortage, rather than the consequences of the shortage.

[34] After a meeting to discuss our continued concerns on this point, the Department agreed to search for records about the consequences of the shortage. The Department simply advised that it had done a further search but did not find any additional records.

[35] The root of the problem here seems to be the difference between what the Applicant was looking for and how the Department interpreted the request.

[36] The Applicant explained why they expected that the Department would have records on the consequences of the Crown Prosecutor shortage. On the other hand, the Department was of the view that it correctly understood the request and the way it was worded was not specific enough to include these details.

[37] While the Department claims it correctly understood the request, it did not show that it reached out to the applicant when it received the request to discuss what they were looking for or what they were hoping to receive in response. This is unfortunate as better communication at the outset may have prevented this disconnect.

[38] While the Department was invited to resolve this issue during this investigation, it was not inclined to provide any further information to the Applicant.

[39] I find that the Department did not fully meet its duty to assist the Applicant.

[40] To reduce the risk of a similar situation in the future, I recommend that the Department review how it communicates with applicants. As a matter of routine, Department staff should talk to applicants as soon as possible after receiving an access request to make sure everyone has the same understanding of what information is being requested. If any changes to the wording of the request are needed after these discussions, the Department can then send written confirmation to the applicant. This would help the Department better respond to questions about how it understood and acted on the request.

[41] Under the circumstances, I am satisfied that the Department has no records, based on a strict reading of the request.

### **Could the Department legally deny access to the requested report?**

[42] The Department relied on various sections of the *Act* to refuse access to the report. I will address each in turn below.

***Paragraph 4(b): The Act does not apply to certain records involving the Attorney General***

[43] Paragraph 4(b) excludes records that pertain to “legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General” from the scope of the *Act*. This means that there is no right of access to records about “legal affairs” related to the Attorney General’s Office under the *Act*.

[44] New Brunswick is the only jurisdiction in Canada where these kinds of records have special protection beyond solicitor-client privilege, which is a separate ground to refuse access under section 27. Moreover, the term “legal affairs” is not defined in the *Act*.

[45] My predecessors and the courts have considered the intended scope and application of “legal affairs”, with the general consensus being that the term is “exceptionally vague”<sup>1</sup> and does not automatically exclude all records held by the Attorney General’s Office from possible disclosure under the *Act*.<sup>2</sup> Further, a recent court decision that considered what “legal affairs” should include suggested that they would not extend to subject matters that are “political or broadly policy-related.”<sup>3</sup>

[46] The report was an internal review and analysis of the overall functioning and challenges facing the Public Prosecution Service, which in my view appeared to be a management or operational review. As it was not clear to me why an internal review report relating to the Attorney General’s Office should be treated differently than reports on operational or program reviews undertaken by other government departments, I invited the Department to explain its interpretation of the term “legal affairs”.

[47] The Department pointed to specific provisions of section 2 of [An Act Respecting the Role of the Attorney General](#) that it found applied to the report, but it declined to provide submissions on its interpretation of “legal affairs”.

[48] As what “legal affairs” means remains unclear, and the Department did not make a convincing case as to why this report should be treated differently to similar information held by other public bodies, I find that the Department has not met its burden of proof and para. 4(b) does not apply.

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<sup>1</sup> *Charleston v. New Brunswick (Attorney General)*, (2014) N.B.J. 91, at para. 13, cited in [New Brunswick \(Attorney General\) \(Re\)](#), 2018 NBOMB 6 (CanLII), at para. 29.

<sup>2</sup> *Bray v. Attorney General of New Brunswick et al*, 2016 NBQB 203 (CanLII), at para. 24.

<sup>3</sup> *Karl Wilson v. Attorney General of New Brunswick*, 2024 NBKB 27 (CanLII), at para. 34.

[49] The report seems to be similar in nature to information that would be held by any other public body that has conducted an internal review of its programs or operations, and access rights need to be considered in accordance with the *Act*.

[50] As I find that the *Act* applies to the report, I will now consider whether it can be protected under the other exceptions raised by the Department.

### ***Section 17: Executive Council confidences***

[51] The Department relied on the following exceptions to withhold the report:

17(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council, including but not limited to,

(...)

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

(c) a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council,

[52] The purpose of these provisions 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.

[53] Records showing what Cabinet discussed cannot be shared with the public. This includes all records listed in section 17(1)(a) to (e) of the *Act*.

[54] This is a mandatory exception to disclosure, which means that where it applies, the information in question cannot be disclosed. The public body cannot disclose the information unless it is more than 15 years old and Cabinet gives approval (subsection 17(2)).

[55] Information not listed in subsection 17(1) may still need protection if sharing it would reveal what Cabinet considered or allow someone to figure out what was discussed.

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



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...

[57] A public body must prove that the record's content is directly connected to Cabinet discussions. It can do this by showing the information fits into the categories listed in subsection 17(1).

[58] In this case, the Department provided me with a heavily redacted copy of the report for my review, along with its written submissions.

[59] While I cannot share what is in the report, I can confirm that it was a review of the Public Prosecutions Service with recommendations for senior management's consideration.

[60] As this is the case, I find that the report is a proposal with recommendations that was prepared for review by senior management, including the Attorney General. It is protected from disclosure under para. 17(1)(c).

[61] I also accept that the report was used to support a budget proposal to Cabinet. While the Department did not provide details about when the report was shared with Cabinet, I am aware that in April 2023, it announced that it would be using part of its budget increase to hire several more Crown prosecutors and support staff.<sup>4</sup>

[62] I find that the report is also protected under para. 17(1)(b) as a proposal, advice, and similar briefing material that was prepared to be submitted to Cabinet as it appears to have been relied on to support a decision to give the Department a budget increase.

[63] As Cabinet confidences are a mandatory exception, I cannot recommend that the Department disclose the report.

### ***Section 26: Advice to a public body***

[64] Section 26(1)(a) is a discretionary exception that allows public bodies to choose not to share information if it could be expected to reveal details about how decisions are made:

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<sup>4</sup> New Brunswick Department of Justice and Public Safety. [Resources being increased to address crime rate](https://www2.gnb.ca/content/gnb/en/news/news_release.2023.04.0167.html) (April 13, 2023) [Press release]: [https://www2.gnb.ca/content/gnb/en/news/news\\_release.2023.04.0167.html](https://www2.gnb.ca/content/gnb/en/news/news_release.2023.04.0167.html).

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...

[65] This exception attempts to balance two competing interests: having a neutral public service that gives honest advice and letting the public know how decisions have been made.<sup>5</sup>

[66] To rely on this exception, a public body must show two things: first, that the information is or could be expected to reveal advice, opinions, proposals or recommendations and second, that the public body made a considered choice in deciding not to share it.

[67] Public bodies can refuse to share information about their decision-making under paragraph 26(1)(a). However, they should not automatically deny all requests for such information. Public bodies must consider each request separately and consider factors, like the public interest in knowing the information, when deciding access rights.

[68] I do not need to discuss this in detail as the report cannot be shared because it is protected as Cabinet secrets under section 17, but I will share the following comments.

[69] As stated previously, the report was prepared to provide advice, opinions, proposals and recommendations for the Attorney General and senior management about the challenges facing Public Prosecutions Service. However, I note that para. 26(2)(i) speaks to final reports and final audits of public body programs and policies. Public bodies cannot use section 26(1) to withhold final reports or audits about how well the organization or its programs and policies are working.

[70] Reports like this one could be seen as a final report or audit on the performance or efficiency of the Public Prosecution Service and this type of information was likely not meant to be kept from the public under the *Act*. If not for the mandatory restrictions to disclosure of Cabinet documents under section 17, such a document would likely have warranted disclosure in other circumstances.

## CONCLUSION

[71] This matter speaks to two ongoing challenges to access to information that I have addressed in previous reports in relation to the legislation as it is current worded.

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<sup>5</sup> [John Doe v. Ontario \(Finance\)](#), 2014 SCC 36 (CanLII), [2014] 2 SCR 3, at paras. 43-46.

[72] The first challenge is para. 4(b), which aims to remove a significant portion of the records held by the Attorney General's Office from the reach of the *Act*. New Brunswick is the only jurisdiction in Canada to adopt additional protections for the "legal affairs" of the Attorney General's Office above and beyond the scope of the legal privilege exception under s. 27 of the *Act*, which I note is a discretionary exception and does not fully bar access to information.

[73] The second challenge is the scope of the protection given to Cabinet confidences under s. 17 of the *Act*. The current wording of this section creates a legal prohibition on access to this kind of information for a minimum of 15 years. Even then, historical records older than 15 years may only be disclosed with Cabinet approval (ss. 17(2)). As this is a mandatory exception, public bodies do not have any discretion to consider giving access to information even where it might find it desirable or beneficial to do so.

## RECOMMENDATION

[74] In light of the above, under the authority of section 64.1(1)(h) of the *Act*, I recommend that:

- The Department should review how it communicates with applicants to ensure that it contacts applicants as soon as possible after receiving an access request to confirm their understanding of what information is being requested.

[75] While recommendations issued under section 64.1 are not subject to the legislated time periods for the Department to inform of its decision on whether it will accept recommendations on access rights as per section 74, I nevertheless ask that the Department inform this office whether it accepts the above recommendations within 20 business days of receipt of this Report of Findings.

This Report is issued in Fredericton, New Brunswick this 14th day of November, 2024.

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**Marie-France Pelletier**  
Ombud for New Brunswick