NBPPIA- 2006-01

IN THE MATTER OF A COMPLAINT UNDER SECTION 3 OF THE *PROTECTION OF PERSONAL INFORMATION ACT*, R.S.N.B. 1973, c. P-19.1

BETWEEN:

Shawn Graham and Edgar Vienneau,
Complainants

AND:

The Minister of Transportation (the Honorable Paul Robichaud), the Office of the Premier (the Honorable Bernard Lord, and Chisholm Pothier),
Respondents

INVESTIGATION REPORT AND RECOMMENDATIONS

September 15, 2006

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Introduction

1. On April 26, 2006 Chisholm Pothier, Premier Bernard Lord's Press Secretary released a letter to the media which the Premier had referred to during debate in the Legislature.

2. The letter, a request from Carmel Robichaud, MLA for Miramichi Bay to the Honorable Paul Robichaud, Minister of Transportation, contained personal information identifying the name of one of her constituents and the fact that he had been sentenced for an alcohol related driving offence. The story was reported and the individual's earlier driving record was made public. Within twenty-four hours of these events, on April 27, 2006 the complainant Graham filed a privacy complaint with my Office and Mr. Pothier resigned.

3. There is no question that this complaint arose in a highly politically charged atmosphere. I paused several days before deciding to accept jurisdiction and investigate the matter. I hope that by investigating and in reporting upon this matter, that the parties involved will gain a sense of closure and that the public and the civil service will gain some practical insight into how the *Protection of Personal Information Act* (*POPIA*) works and what are its purposes and limitations. Overall, I have a strong sense of the need to de-politicize the *POPIA* compliance process and to restore a measure of common sense to the manner in which the privacy of New Brunswickers is protected by the Province and its officials.

4. In the following pages I set out both complaints received in respect of this matter; I then set out the facts of the case, including the few factual determinations that I have made where the parties allegations appeared to be somewhat at odds, the issues, my analysis, recommendations and conclusions.

The complaints

5. When I announced on May 1st of this year, my intention to investigate Mr. Graham's complaint, one question which deserved attention, and which the deputy Attorney General in response to the complaint against the Premier, has addressed is the issue of Mr. Graham's standing to initiate a complaint under *POPIA*. While that matter will be addressed below, the decision to accept jurisdiction and investigate was in large part confirmed later the same day by receipt of a faxed copy of a complaint by Mr. Edgar Vienneau, the individual whose personal information had been disclosed.

6. Mr. Vienneau's complaint is succinct. He states that the letter which his MLA sent to Minister Robichaud was confidential and that the Minister should have blotted out his name before handing the letter to the Premier. In describing the impact the disclosure had on him, Mr. Vienneau stated as follows:

> My privacy has been violated as a result of this breach of confidence. Since this information was released, I have received numerous phone calls from journalists and people in my community concerning my record. My private life has been laid bare for all to see. I find myself today in a situation that I find deeply disturbing. I am caught up in a media storm and I'm having difficulty coping. These are after all events that took place over a year ago. Now with my privacy violated by government I feel as though I stand accused again. I accept my faults but I paid my debt to society and I would have liked to have been left in peace. Every one around town is now talking to me about these events. Because of government's indiscretion I have to pay my debt to society twice. Government has to represent us and has no business doing us harm. I didn't ask for anything that could explain all that has now happened to me. I honestly don't see what purpose could have been served for government to come forward at this time with my letter and expose my name to everyone.

7. Mr. Vienneau's letter confirms that the individual affected by the disclosure does consider himself a person aggrieved and is seeking some type of remedy.

8. In his April 27, 2006 complaint letter, the complainant Graham alleges violations of the *POPIA* by the Minister of Transportation, the Honorable Paul Robichaud, by the Premier, Bernard Lord and by the Premier's Press Secretary Chisholm Pothier. The material allegations against each respondent are as follows:

> It is our view that the Minister of Transportation, by not protecting the personal and private information of the constituent referred to in the letter, has violated the provisions of the Act, including, but not limited to Principle 1: Accountability, Principle 3: Consent, Principle 5: Limiting Use, Disclosure and Retention, and Principle 7: Safeguards under Schedule A of the Act.
>
> It is our view that Premier Bernard Lord violated the Act by taking receipt of the letter containing the personal and private information of a constituent for the purpose of using this letter in a political debate, a clear violation of Principle 2: Identifying Purposes, Principle 4 Limiting Collection and Principle 5 Limiting Use, Disclosure and Retention under Schedule A of the Act. Specifically the latter principle in the Act states:
>
> > *Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual."*
>
> The Minister of Transportation and the Premier are in clear violation of this section of the Act. There is no definable public purpose in the Premier holding that information in the Legislature for use in debate or for the Minister providing it to the Premier for that purpose.
>
> While the Premier's Press Secretary, Chisholm Pothier, violated Principle 3: Consent, Principle 5: Limiting Use, Disclosure and Retention, and Principle 7: Safeguards under Schedule A of the Act by distributing the letter to members of

> the Press Gallery, his actions cannot be seen as anything but actions on behalf of the Premier.

9. Mr. Graham's complaint was supported by further submissions in his April 27th letter and by his formal submissions of July 6th, 2006. I decided to combine Mr. Graham's and Mr. Vienneau's complaints into one investigation. Before considering these submissions further, along with those of the respondents, the facts of the present case must be set out more fully.

The Facts

10. The complaint originates in a letter from Mr. Vienneau's MLA, Carmel Robichaud to the Minister of Transportation, the Honorable Paul Robichaud, dated January 11, 2005 and received in the Minister's office on January 17, 2005. The MLA for Miramichi Bay explained that her constituent had lost his license for driving with a high level of alcohol in his blood. According to the MLA, the 18 month suspension handed her constituent was stricter than the 1 year suspension normally imposed, although the individual had allegedly been driving for thirty years without incident. She asked the Minister if it would be possible to obtain permission for her constituent to drive his car during the day to get to work, noting that in rural regions it is impossible to get by without a car.

11. The Minister responded to the MLA on February 10, 2005. He indicated to her that motor vehicle licensing fell under the responsibility of the Department of Public Safety and that the request should therefore have been addressed to them. The Minister then went on to comment that while reported alcohol related accidents had greatly diminished since 1990 continued vigilance and punishment of offenders was required. He concluded as follows:

> It is for these reasons that encouraging and approving the renewal of a driver's license to a person who drove while impaired is socially reprehensible, but also unacceptable. I have great difficulty understanding your request because, as elected officials, we have an obligation not only to represent the interests of a particular individual, but also to represent all persons who together form the society in which we live.

12. The Minister copied his response to the complainant Graham. He further indicated during his interview the he had alerted the Premier of the request, of his concerns and the nature of his response.

13. Minister Robichaud's response to the MLA for Miramichi Bay indicates that the letter was carbon copied to Mr. Graham but not to the Premier as media reports have suggested. The Premier and officials in his office maintain that the letter was never filed in his office. The Correspondence manager in the Premier's Office, Ms. Linda Landry Guimond offered that there is no record of the January 2005 letters between Carmel Robichaud and Minister Robichaud filed with the

Premier's Office, noting that the practice in the Premier's office is to not log correspondence to which the Premier is merely copied.

14. The Premier's formal submission filed by the deputy attorney general states in part as follows:

    - At some point prior to April 26, 2006, the Minister of Transportation did bring to the Honorable Premier's attention the fact that a questionable request had been made by Carmel Robichaud.

    - At no time prior to April 26, 2006, did the Honorable Premier have personal possession of Carmel Robichaud's letter dated January 11, 2005.

15. In his formal submission in response to the complaint, the Honorable Paul Robichaud states in part as follows:

> Where the request was rather unusual and not within my authority, I did bring the letter and my proposed response to the attention of the Premier and a few other members of cabinet. A response was finalized on my behalf and sent to Carmel Robichaud on or about February 9, 2005. Because of the inappropriate nature of the request and the fact that it was written on Legislative Assembly letterhead, I did send a carbon copy of my reply to Shawn Graham, leader of the opposition.

16. The complaint implies that the Premier had earlier received the letter from Minister Robichaud and retained it improperly presumably based on the media reports. However, a detailed review of the facts and the written record as it remains suggests otherwise. Minister Robichaud has corrected his earlier statement to the press and the corrected statement of fact is corroborated by the deputy attorney general's submissions on behalf of the Premier and members of the Premier's staff. Mr. Pothier, who I found to be very forthright and credible in his interview, had no knowledge as to how the Premier came into possession of the letter. Beyond Minister Robichaud's earlier statements to the Press there is no evidence whatsoever that the Premier had personal possession of the letter prior to April 2006 and this is expressly denied and there is no proof either of the letter being sent to the Premier's office. To admit the allegation that the Premier's Office had possession of the letter would in the circumstances of this case be tantamount to a finding of bad faith on the part of the Minister and the Premier which requires a high standard of proof and I refuse to so find.

17. In the weeks following the exchange of letters with the MLA for Miramichi Bay Minister Robichaud was called upon to act as interim House leader. He indicated that during this time he had frequent opportunity to meet and exchange with the Opposition House Leader, Mr. Kelly Lamrock. During one of these exchanges on the floor of the House in the area reserved for the Press Gallery, Minister Robichaud recalls that he had mentioned in conversation with Mr. Lamrock that he was in possession of Carmel Robichaud's letter, that he was very concerned about the nature of her request and that if she wasn't more careful in the future,

she might embarrass the opposition.

18. Following the exchanges between Mr. Robichaud and Mr. Lamrock which, by all reports, occurred at some point between January and June of 2005, there was no further mention, use or reference to the letter until it surfaced in the Legislature during the April 26, 2006 debates.

19. On the whole, I find as a fact that if there was any retention of personal information within the meaning of the *Act*, that retention occurred in the office of the Minister of Transportation and not in the Office of the Premier.

20. During the April 26, 2006 sitting of the house the Premier alluded to a letter from an opposition MLA to a cabinet Minister asking him to interfere with the penalty imposed upon an individual for an alcohol related driving offense. Later in response to a question from another MLA the Premier referred to the letter again and offered to table it.

21. In interview the Premier explained that during the questioning by the Opposition he turned to his cabinet colleague Minister Robichaud to ask if he still had the letter from the MLA for Miramichi Bay. Minister Robichaud offered to obtain it by having his office fax it over to the Legislature. Minister Robichaud also confirmed that he obtained the fax and passed it up to the Premier during the course of question period, when it came in.

22. The Premier then alluded to the letter as described above and offered to but did not table the letter in the House. Instead, following question period and statements by members, Mr. Pothier, the Premier's Press Secretary was asked for a copy of the letter by a member of the press gallery. Mr. Pothier immediately undertook to obtain it.

23. Mr. Pothier explains that, following his meeting with members of the Press, he returned to the government's ante-room in the legislature and obtained from the Premier, as he normally did, the briefing books and materials referred to or prepared for use in the house that day, to return them to the Premier's Office. The Premier was meeting with other members at the time. Mr. Pothier quickly flipped through the materials, identified the letter from Carmel Robichaud and made copies of it and proceeded to distribute it to the members of the press gallery that had requested it.

24. Mr. Pothier advised that he acted very quickly throughout this process, affirming that the journalists were given the letter within five minutes of their request. He acknowledges that he did read the letter before releasing it, but failed to black out the personal information it contained. He readily admits that the mistake was his, that he acted on his own initiative in releasing the letter and he had not received any directions or comments whatsoever from the Premier in this respect. He states that his belief at the time and in the immediate aftermath of the letter's release

was that no personal information was disclosed since the information in question was already a matter of public record as a result of the related court proceedings.

25. However, the next day Mr. Pothier was advised by the Premier's Chief of staff, Rodney Weston and the Premier, that upon advice from the Attorney General's office his release of the letter constituted a violation of the *POPIA*. Mr. Pothier immediately offered to resign. He indicated that the Premier was reluctant to accept his resignation but it was eventually accepted and he stated that the conversation quickly turned to other matters including the personal implications of this decision for Mr. Pothier.

26. Mr. Pothier publicly apologized for his mistake and his resignation was confirmed by the Premier in response to questions in the Legislature on April 27, that is, the day after the incident. Mr. Pothier remains of the view that his decision to resign was correct, that it was the honorable and right thing to do, given the mistake he had made and the nature of his office as a political staff member. He submits that it should not have a chilling effect on the civil service's commitment to open government, since he was not a civil servant like any other and, if anything, the incident and resignation is a cautionary tale and a reminder to all of the need to be doubly careful with respect to the trust citizens place in government in relation to their personal information.

27. The Premier and Mr. Weston corroborated Mr. Pothier's account in every respect, and I have no doubt that it is a complete and accurate account of the events.

28. Overall therefore, this is not a complaint where there is any significant dispute as to the facts. As stated above, the allegation that the Premier had earlier received the letter from Minister Robichaud and retained it improperly is rejected. I am satisfied on the basis of the evidence gathered during the investigation that, as early as February 2005 the Minister of Transportation, although improperly seized of the matter regarding the MLA's constituent, referred her in that respect to the appropriate government department. I find also that the only use or retention of information contemplated by the Minister from that point forward concerned the nature and propriety of Carmel Robichaud's request and that the specific content of her letter regarding her constituent's identity, driver record and circumstance was entirely immaterial to the Minister's or the Premier's alleged retention or future use of the letter.

29. While the complaint is straightforward it has been helpful to have a very detailed factual account of all the events leading to the alleged violation of the Act. I wish to thank all parties for their fulsome cooperation and candid responses which greatly facilitated my investigation.

30. During the investigation I was also able to meet with Mr. Dale Cogswell and Linda MacAdams with the Central Records office and Public Archives, with Linda Landry Guimond and Heather Thomas the Manager and Clerk of

Correspondence and Records in the Office of the Premier and with Ken Fitzpatrick and Bernita Cogswell, Director of Information Management and Technology and Manager of Records Management in the Department of Transportation. The cooperation and professionalism of all these officials was also very informative and helpful.

Law

31. The *Protection of Personal Information Act* is a relatively new statute. It was adopted in 1998 and came into force in 2001. Enforcement is by way of complaint to the Ombudsman Office although there exists also a provincial offense enforcement mechanism. POPIA provides a Statutory Code of Practice which governs the obligations which public bodies have to persons whose personal information is held by government. The Code of Practice establishes ten principles to be followed. A separate schedule to the Act provides some interpretive clauses to guide the application of each of the ten principles. The relevant passages from the Act, the Statutory Code of Practice and the schedule of interpretation guidelines for the purpose of these complaints are included in Appendix "A"

The Issues

32. The complainant, Mr. Vienneau, was plainly distressed by the commotion created. Legal scholars have described the right to privacy as encompassing a "right to be left alone", and that is very much what Mr. Vienneau would have liked to have had protected.

33. The complaint raises complex questions regarding the interpretation of *POPIA*, its purpose and scope and jurisdictional questions regarding its application to complaints involving Ministers, issues of standing and defenses of Parliamentary Privilege. Some of these questions have been helpfully considered by the Honorable Stuart Stratton in his recent report into a *POPIA* complaint involving Minister Fowlie, other aspects of the question raise novel issues of interpretation regarding the Act. For the sake of clarity and completeness, I have found it helpful to frame the issues at stake in the complaint as follows:

    i) Does the complainant, Mr. Graham, have standing to proceed in this matter?
    ii) Should the complaint proceed or is it vitiated, even in part, as being frivolous vexatious or forwarded for political gain?
    iii) Is the complaint moot by reason that the personal information disclosed was part of a public court record?

iv) Is the jurisdiction to proceed with an investigation into this complaint foreclosed by virtue of the fact that the Legislative Assembly is not a "public body" within the meaning of the Act?

v) Is the jurisdiction to investigate the complaint foreclosed, in whole or in part, as a result of the Premier's or Minister Robichaud's assertion of Parliamentary Privilege?

vi) Was there a collection of personal information by a public body within the meaning of the Act? Was there any use, retention or disclosure of personal information by a public body that would constitute a violation of the Act?

vii) Were there appropriate safeguards in place?

viii) Was there an infringement of the accountability principle set out under the Statutory Code of Practice?

Analysis

The Legislative history and interpretive principles

34. Any detailed analysis of the issues identified in this case must be centered on a search for legislative intent and a purposeful interpretation of *POPIA*. Only a few formal complaints are received in my office each year, and very few of these have resulted in a full formal investigation with public reasons for decision and recommendations being released. In this context it is difficult for officials, who must apply the law and observe its strictures in practice day to day, to know, in every situation, how to handle the personal information to which they have access.

35. A natural concern that has arisen is whether the high profile resignations of ministers during the past year have somehow distorted the application of the law and the serious resolve which all officials display in adherence to it.

36. From the outset, I find it important to distinguish this complaint from the incidents involving Minister Fowlie and Minister Huntjens. In the *Fowlie Report* former Chief Justice Stratton found that there was a violation of *POPIA* where the Minister had disclosed personal information regarding a private citizen, albeit a member of the legislature, that had come to her knowledge as a result of her ministerial duties and since she had herself disclosed the personal information in a deliberate attempt to cast doubts upon the integrity of the opposition member in question. Willful conduct of this nature will invariably raise serious concerns.

37. On the other hand, last fall Minister Huntjens tendered his resignation immediately after inadvertently mentioning the name of one of the clients to whom his department was providing services and thereby disclosing personal information which had until then remained confidential. The Premier's response in accepting the resignation signaled the strong emphasis the government places

upon the protection of privacy.

38. Like the disclosure by Minister Huntjens, the disclosure in this case can be described as purely accidental; however, it did not involve information which, as a matter of administration, was normally under the care and control of Minister Robichaud's department or the Premier's Office and the disclosure was made by a member of staff rather than the Minister or the Premier himself. In my view these are relevant considerations to keep in mind in analyzing the issues below. They are not entirely exculpatory but they help assess the propriety of Mr. Pothier's actions and the Premier's response to the situation.

39. I have no doubt that New Brunswickers welcomed with relief the proclamation of the *Protection of Personal Information Act*. In the mid to late 1990s New Brunswickers were concerned about increasing encroachments upon their privacy by government in an information age. POPIA has now set the guidelines, and this has been accomplished in a manner consistent with the practice of industry and legislative measures in place in democratic governments across the globe. These added protections however were not intended to hinder the exchange of information and ideas and were certainly not meant to diminish the progress achieved in promoting transparency, accountability and open government. Nor was it expected that heads would roll every time a citizen's name and personal circumstance was mentioned by a public official.

40. One of the main drivers in enacting POPIA was so that the Government of New Brunswick and Canada in general could satisfy its trading partners, primarily in Europe, that transborder data flow could be allowed in commercial exchanges without diminishing the level of privacy protection enjoyed by citizens there[1]. As a result of European trade policy, many governments in Canada and elsewhere were encouraged to develop more stringent privacy protection regimes. Various models were used to meet this objective.

41. In Canada, the public and private sector privacy legislation differs in varying degrees but the ten principles set out in our Statutory Code of Practice are widely recognized. The approach taken by the New Brunswick legislature has been described by some authors as the "shell statute" approach[2]. Governments differed over how interventionist they should be in achieving the goals of privacy protection. New Brunswick's approach was less interventionist and more voluntarist than some. The Legislature basically adopted the *Model Code for the Protection of Personal Information* that had been adopted by the Canadian Standards Association in 1996 and gave it a statutory framework. This statute was

[1] McNairn and Scott, A Guide to the Personal Information Protection and Electronic Documents Act, Butterworths 2006, p. 4 where the authors discuss the impact of the E.U. Data Protection Directive adopted in 1995 and which came into force in 1998.
[2] Industry Canada *Privacy and the Information Highway Regulatory Options for Canada* http: // strategis.ic.gc.ca/SSG/ca00257e.html, cited in McIsaacs Shields and Klein, The Law of Privacy in Canada Thomson Carswell , 2000 p. 1-28 to 1-30

made to apply to the public sector only, with the view that government would lead the way in data protection and that private sector organizations would adopt similar Codes of practice on a voluntary basis. Eventually, the federal government determined that this was inadequate and federal legislation was brought in occupying the field of privacy protection in provincially regulated sectors of commerce and activity.

42. POPIA is therefore not remedial legislation in the sense that there were gross inadequacies in the manner in which government handled personal information or that existing laws in place were now deemed morally repugnant. Rather there was growing concern with respect to the ease with which technology now allowed information to be stored, shared, accessed and disclosed and a recognition that new legal safeguards, commensurate with the new technologies and the growing body of law in other jurisdictions, had to be developed. In essence we did not seek to change the law, we sought to preserve the law and ensure it kept pace with the times. This legislative and social context is also important to keep in mind in interpreting and applying the statute and the Code of Practice.

43. Finally, I approach the analysis of the issues in this complaint recognizing the important value that the Supreme Court of Canada has placed upon privacy protection legislation. While the privacy protection clauses in the *Canadian Charter of Rights and Freedoms* are much less explicit than those found in Human Rights treaties and instruments generally, our courts have given them a robust interpretation and have found also that statutes like POPIA help protect privacy, which is a foundational human rights norm, closely linked to our fundamental freedoms of conscience and expression and our rights to liberty and security. As such these laws are recognized as having quasi-constitutional status, protecting foundational Canadian values[3].

44. Professor Ruth Sullivan, a foremost authority on the rules of statutory interpretation in Canada, has summarised the implications of the court's recognition of a statute's quasi-constitutional status as follows:

> (1) Human rights [and other quasi-constitutional legislation] is given a liberal and purposive interpretation. Protected rights receive a broad interpretation, while exceptions and defences are narrowly construed.
> (2) In responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation are adapted not only to changing social conditions but also to evolving concepts of human rights.
> (3) In cases of conflict or inconsistency with other types of legislation, the human rights legislation prevails regardless of which was enacted first.[4]

[3] *Lavigne v. Canada (Office of the Commissioner of Official Languages)* 2002 SCC 53 at para. 25.
[4] Sullivan Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Butterworths, Toronto, 2002, p. 373.

45. With these interpretive principles and the legislative history in mind I turn to the issues identified above.

i) Mr. Graham's standing to proceed

46. Both Minister Robichaud and the submission on behalf of the Premier contend that Mr. Graham has no standing to proceed. I am asked by the respondents to infer from the very general provisions of the statute that only the person whose privacy rights are affected may complain.

47. However, to do so would give a narrow construction to the words used in the statute and I refuse to so find. A comparative analysis of the section 3 provision with most other complaints-based enforcement mechanisms suggests the legislature intended to create a broad right of complaint, enabling the Ombudsman to inquire into an alleged violation on the basis of credible information brought by any person. The statute avoids language such as "a person aggrieved or a person claiming to be aggrieved may complain"; it uses the passive voice suggesting a broad right of standing; the compliance mechanism is entrusted to the Ombudsman, an officer of the Legislature who enjoys, under the *Ombudsman Act*, the broadest jurisdiction possible on issues of standing. For these several reasons and in keeping with the broad remedial interpretation which the Act must receive, I find that Mr. Graham has standing to proceed with a complaint in this matter.

48. A subsidiary issue may arise as to whether a complaint, which interests only the privacy interests of a particular individual, should be able to proceed if the person aggrieved was opposed to the proceedings. However, I find it is not necessary to determine that issue in the circumstances of the present case, as both Mr. Vienneau and Mr. Graham have brought complaints and asked me to review the same essential matter. Moreover there are many cases where the proper application of the statute may be advanced by permitting a broad right of standing and it is unnecessary and unwise to foreclose that possibility at this time.

ii) frivolous, vexatious, or politically motivated

49. It is also submitted on behalf of the Premier that the complaint of Mr. Graham is politically motivated, frivolous and vexatious. One of the advantages of a narrow interpretation of section 3 on the issue of standing would be to prevent complaints from being brought by members of the opposition, or of any political faction, for political gain. As indicated at the outset, I am concerned about the politicization of the *POPIA* compliance process. However for the reasons set out above, I do not believe the correct interpretation of the statute permits a restrictive reading of section 3. Many complaints may yet be brought before the Ombudsman under this legislation in the public interest, by members of the opposition, individuals, unions, civil rights associations or privacy watchdogs, and they must be allowed to come forward.

50. I will be careful in every complaint under *POPIA*, particularly those brought by elected officials or their political rank and file to jealously guard against an abuse of the compliance process. This complaint, following within several months upon an earlier complaint by the leader of the opposition raises serious concerns in that respect. However, in all the circumstances of the case, I decided shortly after the complaint was received to accept jurisdiction and investigate it. I was confirmed in that decision almost immediately when the second complaint, from Mr. Vienneau, was received. I find no basis in the submissions of the deputy attorney general upon which to reconsider my decision to proceed.

iii) personal information on the public record

51. Minister Robichaud and the Premier have also submitted that as the personal information in question was a matter of court record, that there is no longer a privacy interest at stake. While that may be true with respect to the public's access to the record, commentary and analysis upon it, government officials entrusted with access to such information are subject to a higher obligation. *POPIA* is not limited by any kind of defense that would exculpate officials with respect to disclosures of this type of information. Mr. Vienneau's sentence, as a matter of court record and the publicity it had attracted was a matter of historical record last April. He was entitled to expect that public officials in receipt of such information would not unfairly broadcast it to his detriment or loss of reputation. The case of *Evelyn Gigantes* is instructive in this respect[5].

iv) Legislative Assembly is not a "public body"

52. I agree with the submissions on behalf of the Premier that the Legislative Assembly is not a public body within the meaning of the *Protection of Personal Information Act.* Indeed, as was recently determined by Mr. Stratton in the *Fowlie report* "no regulation made under the *Protection of Personal Information Act* has yet designated the Legislative Assembly as a targeted public body, and by virtue of the *Legislative Assembly Act*, the Assembly and all members thereof enjoy privileges and immunities identical to those attached to the House of Commons of Canada."

53. Mr. Stratton, in the *Fowlie report*, went on to find that Ministers of the Crown come within the scope of the *POPIA* as the persons responsible for their ministries or departments and are themselves personally subject to the requirements of the Act. I agree with these findings.

54. In light of my findings of fact above, the Premier's liability in this case, if any, has only to do with the conduct of his officials and his ultimate responsibility as

[5] *Report on the Disclosure of Information in the Legislative Assembly of Ontario on April 18, 1991 by the former Minister of Health Evelyn Gigantes, M.P.P.* June 20, 1991 OIPC, http://www.ipc.on.ca/scripts/index_.asp?action=31&P_ID=11495&N_ID=1&PT_ID=11457&U_ID=0#exec

the head of the Premier's Office, which is a "public body" within the meaning of the Act. There is no question that Mr. Pothier's conduct in this matter is being scrutinized entirely as an official in the employ of the Premier's Office. The fact that the conduct in question occurred within the Legislative Assembly does not make it into a complaint against the Assembly, nor does it cloak the Premier's official with any privilege or immunity which a member himself would not enjoy outside the Assembly. Similarly, the complaint against Minister Robichaud is interested only in his dealings as the head of the Department of Transportation, another "public body" to which *POPIA* applies.

55. Thus while the Legislative Assembly as a public authority is not itself made subject to the *POPIA*, the allegations made in the complaints are not defeated on the basis of this legal argument. The related and more significant argument is the defense asserted on the basis of Parliamentary Privilege.

v) Parliamentary Privilege

56. Minister Robichaud's response and the Premier's are both premised principally upon the view that all their personal dealings and involvement in this matter arose entirely within the Legislative Assembly and that as a consequence the privilege of their parliamentary office extends to prevent any inquiry into their compliance with statutory obligations under *POPIA*.

57. The concept of Parliamentary privilege is a cornerstone principle of the Westminster Parliamentary system and has been recently defended by the Supreme Court of Canada in a decision involving the House of Commons Speaker's immunity from suit in the case of a complaint by a member of his staff to the Canadian Human Rights Commission. In *Canada (House of Commons) v. Vaid* [2005] S.C.J. 28, the court found that the Speaker's alleged discriminatory dismissal of his chauffeur was an employment matter which did not fit into one of the pre-determined categories of parliamentary privilege and failed to meet the test of necessity required to recognize a new category of privilege.

58. Essentially, parliamentary privilege grants members of a legislature the legal protection necessary to do what they have to do and say what they have to say in the exercise of parliamentary functions. McLaughlin J. has defined it as follows:

> It has long been accepted that in order to perform their functions, legislative bodies require certain privilege relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at para. 117.

59. The privilege does not provide members a blanket immunity that renders them unaccountable. It asserts instead the principle, as stated by Binnie J., in *Vaid*, that Parliament has "*exclusive* jurisdiction to deal with complaints within its privileged sphere of activity." This raises an important issue with respect to the validity of a defense of parliamentary privilege when raised in response to an investigation by an officer of the Legislature, an issue not considered in *Vaid* or in the *Fowlie Report*. There is Canadian authority for the view that an assertion of parliamentary privilege does not lie in that circumstance[6]. In practice, Ministers have been subject to review by privacy commissioners in Canada without such defences being raised or considered.[7]

60. In this case, however, as in *Fowlie*, my office was seized of the matter on the basis of a private complaint raised by the individual affected and by complaint of the Leader of the Opposition, rather than on the basis of a legislative motion. The Assembly is required in cases where parliamentary privilege is asserted to assume its own jurisdiction and to deal in the Assembly, or through its Speakers' office or through inquiry by the appropriate legislative officer with the alleged misconduct. There is no question that issues related to a member's obligation under the *Protection of Personal Information Act* could appropriately be referred to the Ombudsman for advice and recommendation. If seized with such a matter by way of legislative motion by the Assembly or one of its committees the defense of *Parliamentary Privilege* would in all probability not apply.

61. Regarding the Premier's alleged use of Mr. Vienneau's personal information in legislative debates, or Minister's Robichaud's alleged communication to the Premier of such information within the Assembly, I find, in this case, that the defense of privilege applies and consequently find that I cannot comment upon the matter, in the absence of any direction from the Assembly to do so.

62. However, I agree also with Mr. Stratton's view that a member's privilege does not extend to comments or conduct made outside the Assembly, nor does it provide a defense to Ministers regarding their duty as heads of public bodies under the Act. Upon this basis then, I turn now to consider the substantive issues of an alleged violation of *POPIA*.

vi.) The alleged breaches of collection, retention or use of personal information – Principles 4 and 5

63. The parties' submissions in this respect are substantially the same. Minister Robichaud and the Premier argue that the *Act* was meant to govern the collection of personal information by public bodies. In their view it would not apply or create any obligation for public bodies with respect to information received from the public on an unsolicited basis or with respect to functions unrelated to

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[6] *Tafler* v. *British Columbia (Commissioner of Conflict of Interest*) (1998) 161 D.L.R. (4th) 511 (B.C.C.A.).
[7] See *Gigantes* report supra, note 5.

departmental business, as was the case here. I disagree.

64. The fact that the second principle in the Statutory Code of Practice insists that when government collects our personal information, it must state the purpose of its collection in order for the citizen to provide an informed consent to its use, does not imply that public bodies have no obligation whatsoever with respect to personal information which comes into their possession through any other means. This interpretation distorts the object of the second principle and applies the Code in a way which defeats the legislative intent. The preferable view is that the second principle, which deals with identifying purposes, simply has no application in the context of unsolicited information unrelated to departmental business. The appropriate response in such matter is to limit collection.

65. The record shows that this is precisely what occurred in the present case. The Minister's office sent the letter from Carmel Robichaud to records management for filing. However, records management indicated that the document was unrelated to departmental business and should not be archived in their records. The documents were sent back up to the Minister's office.

66. Here, as submitted in the Premier's response, the principle of limiting collection clashes with other legal obligations which Ministers have under the *Archives Act*. Public records, such as this type of correspondence with a Minister, even though it may have limited archival value and may ultimately be disposed of in accordance with the *Archives Act*, cannot simply be put through a shredder. Even the limited suppression of parts of correspondence containing personal information would defeat the purpose of the *Archives Act* and would administratively be entirely impractical and unnecessarily burdensome.

67. Returning the file to the Minister's Office for filing with the Minister's correspondence, separate from departmental records, is therefore appropriate in the normal case and does not unduly offend the principle of limiting collection or retention. However, the investigation has revealed that this was not a normal case. As attested by the nature of the Minister's reply and his comments to Mr. Lamrock at the time and confirmed during interview, Minister Robichaud initiated, in my view, a subsidiary collection when he decided to retain the letter for use in parliamentary or political debate. As outlined above this occurred almost contemporaneously with the initial collection.

68. Now Mr. Graham contends that this collection or retention of the personal information for political purposes was contrary to the Act and a violation of principles 2, 3 and 5 of the Statutory Code of Practice. Again, I disagree.

69. It is true that the fifth principle requires that personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required or expressly authorized by law. One needs to separate the personal information contained in the letter from the

letter itself. It is clear in this case however that the personal information was disclosed inadvertently and that its use was not required or indeed relevant to the subsidiary collection by Minister Robichaud to which I have referred. In my view, however, the retention and use of Carmel Robichaud's letter was for a legitimate, albeit political, purpose.

vii) safeguards – Principle 7

70. In my view, while the use of the information was non-consensual, this is not a circumstance where consent was required *if adequate safeguards were taken to prevent the release of the personal information*.

71. The error of Minister Robichaud in my view was in not taking adequate safeguards to use the letter in a way that would ensure that Mr. Vienneau's confidential information would not or could not be disclosed. The preservation of an un-redacted copy of the letter in the Minister's office was not inappropriate, nor was it inappropriate even when the retention was made with the object of a future intended political use. The error was in retaining it for a non-consensual use without appropriate safeguards to protect the confidential information it contained. Minister Robichaud contends that it was never released to the public and that he was entitled to assume that it would not be publicly released in an un-redacted form. Given the sensitive nature of the information, given the Minister's intended use and given the lack of consent, I respectfully disagree.

72. I might have been persuaded by that argument had Minister Robichaud been able to produce for me, policies, guidelines or some other proof of established office management practices that showed that safeguards were in place in his office, with respect to Ministerial correspondence to adequately safeguard personal information from disclosure in circumstances such as this. It is one thing to assert that adequate safeguards are in place but that they failed in this one instance. It is quite another to argue that the safeguards are the responsibility of those to whom the information is disclosed within government. Immediately as he determined the future use of the document the Minister, or his staff should have prepared a redacted version of the document consistent with that use, or in the alternative been able to establish proof of some records management practice in accordance with which the record could not leave the Minister's possession without some control over the non-consensual release of the personal information it contained.

73. In my view such safeguards should be developed with respect to Ministerial correspondence in every case, as much personal information is contained in such records. The pre-determined non-consensual use of the record for a political purpose only heightens the duty of care to which the Minister was subject.

74. None of the foregoing however exculpates Mr. Pothier. Having received an un-redacted copy of the letter, via the Premier, and being the official primarily responsible for the letter's release to the public, he also had an obligation under

POPIA to protect any personal information which the document contained. Mr. Pothier readily admits this and has apologized for his mistake.

viii) The first principle – accountability

75. The deputy attorney general and Minister Robichaud have made no submissions with respect to Minister Robichaud or the Premier's accountability as head of their departments for the violations of the Act alleged in this complaint. In interview, they, and I, proceeded upon the basis that deputy heads of departments are the chief executive officers contemplated in principle 1 of the Statutory Code of Practice. Mr. Stratton, in the *Fowlie Report*, took a different view as it was necessary to found Minister Fowlie's personal conduct as subject to the Act upon her position as the titular head of the public body that supplied her with the information she revealed. I concur fully with Stratton's views in that matter.

76. However the violations which I have determined to have been founded in this case, i.e. the failure of ministerial staff to develop or enforce adequate safeguards to protect the accidental disclosure of personal information, do not involve the personal responsibility or conduct outside the Legislative Assembly of Premier Lord or Minister Robichaud. Consequently, I find that there was a failure at the senior administrative level of both departments in this case to ensure that the safeguards required under *POPIA* were fully implemented, particularly as regards the collection, use and disclosure of records in Ministerial correspondence. It may seem counter-intuitive to task the deputy head of a public body with this task as it concerns his own superior, but that seems to be what the statute requires and I submit that in fact no other official within a public body is better able to hold their minister accountable in this respect.

Recommendations

77. I would recommend that a committee of deputy ministers be delegated the task, in consultation with an external consultant who could confer with the Public Archives and my Office, of developing appropriate guidelines, retention schedules and practice directives with respect to the application of the *Protection of Personal Information Act* to Minister's offices and Ministerial correspondence.

78. I would further recommend that this group be required to report also upon the need, if any, to differentiate in any required degree between a Minister's political staff and other employees within the civil service. I say this because, in some degree, I am concerned that errors such as those of Mr. Pothier in this case, are more likely to occur when decision-making over such matters is left to political staff rather than being entrusted to career civil servants. I believe the issue warrants careful study and recommendation.

79. Finally, I want to comment briefly upon Mr. Pothier's decision to resign. I recognize as set out above that the decision was primarily Mr. Pothier's and was submitted in the honest and forthright belief that it was the right thing to do. I accept that it was accepted on those terms and for those reasons. However I respectfully submit that Mr. Pothier's unintended breach need not have led to an offer to resign and the Premier need not have accepted it.

80. Mr. Pothier maintains that his decision was the correct one and may serve as a cautionary tale. The immediate result which I have had confirmed in several instances already, in the frank opinion of senior civil servants, is that Mr. Pothier's resignation has indeed had a disturbing ripple effect within the civil service. The chilling effect to which I have earlier referred is that public servants will be much less likely to give effect to the demands of accountability and open government if they know that inadvertent breaches of the *Protection of Personal Information Act* may have significant job consequences.

81. It is true that the Parliamentary tradition in Canada has been to hold Ministers strictly accountable for breaches of privacy, often through the resignation of their portfolio or Ministerial responsibilities. This is a very high standard, but the insistence upon that standard for Ministers in any case is a matter strictly for determination of government and the Assembly, and ultimately for the electorate. I make no comment in that regard for the purpose of this case. What I can say is that it is inappropriate to transpose that standard to any employee of the civil service even a political staffer. The effect of such a rule would, in my opinion, be highly detrimental to the aims of open government and all the progress made in recent years since the adoption of the *Right to Information Act.*

Conclusion

82. I have therefore determined in this case that there have been violations of the safeguards principle under the Statutory Code of Practice of the *Protection of Personal Information Act.* I have found also that there were further breaches of the code by Mr. Pothier which have been admitted, and that the deputy heads in both departments have failed to satisfy the requirements of the accountability principle. I have made recommendations to address these issues.

83. Ultimately, I am concerned about the politicization of the compliance process under the *Protection of Personal Information Act*. I have formally undertaken to guard against any possible abuse of this process by those who would use it towards political ends. I would also urge the government to give early effect to these recommendations so that a balanced approach to the need to protect privacy while protecting the interests of accountability can be achieved. In this respect I want to assure members of the civil service of my own commitment in defending their employment rights in the context of the many good faith decisions they make on a daily basis to reconcile these competing goals. As for complainants in

Mr. Vienneau's position it is my belief that privacy interests, even such as those that he wanted championed in this case, are deserving of protection. What is needed in this instance, given all the mitigating factors, however is not a scapegoat, but a sincere recognition of the harm done and determined application of effort to ensure that similar harm will not occur to others.

Dated at Fredericton this 15th day of September 2006,

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Bernard Richard, Ombudsman

APPENDIX A

Relevant Sections of the ***Protection of Personal Information Act***

1(1) In this Act

"personal information" means information about an identifiable individual, recorded in any form;

"public body" means

(a) a body to which the *Right to Information Act* applies, and

(b) any other body, designated by regulation, that is established by a body referred to in paragraph (a) or by a public Act of New Brunswick;

1(2) Information that relates to an identifiable individual but is collected, used or disclosed in a form in which the individual is not identifiable is not personal information when so collected, used or disclosed.

1(3) An individual is identifiable for the purposes of this Act if

(a) information includes his or her name,

(b) information makes his or her identity obvious, or

(c) information does not itself include the name of the individual or make his or her identity obvious but is likely in the circumstances to be combined with other information that does.

2(1) Every public body is subject to the Statutory Code of Practice.

2(2) The Statutory Code of Practice shall be interpreted and applied in accordance with Schedule B and with any regulations made under paragraph 7(b).

…

Schedule A

The Statutory Code of Practice

Principle 1: Accountability

A public body is responsible for personal information under its control. The chief executive officer of a public body, and his or her designates, are accountable for the public body’s compliance with the following principles.

Principle 2: Identifying Purposes

The purposes for which personal information is collected shall be identified by the public body at or before the time the information is collected.

Principle 3: Consent

The consent of the individual is required for the collection, use, or disclosure of personal information, except where inappropriate.

Principle 4: Limiting Collection

The collection of personal information shall be limited to that which is necessary for the purposes identified by the public body. Information shall be collected by fair and lawful means.

Principle 5: Limiting Use, Disclosure and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required or expressly authorized by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

…

Principle 7: Safeguards

Personal information shall be protected by safeguards appropriate to the sensitivity of the information.

…

Schedule B

Interpretation and Application of the Statutory Code of Practice

The provisions of the Statutory Code of Practice that are referred to in this Schedule shall be interpreted and applied in accordance with this Schedule.

Principle 2: Identifying Purposes

2.1 The purposes identified by the public body must directly relate to an existing or proposed activity of the public body.

2.2 The public body must document, in relation to any personal records system, the purpose or purposes for which the personal information in the system is held.

2.3 A "personal records system" is a computerized or manual records system which contains information about individuals and which is structured in such a way that information about specified individuals can be easily recovered.

Principle 3: Consent

3.1 Consent may be express or implied.

3.2 The actions for which consent can be implied are those that an individual should reasonably expect the public body to take, and would be unlikely to disapprove of, having regard to

> *(a)* the nature of the personal information in question, including whether it is or is not sensitive or confidential,
>
> *(b)* any benefit or detriment to the individual,
>
> *(c)* any explanation that the public body has given of its intended actions,
>
> *(d)* any indication that the individual has given of his or her actual wishes, and
>
> *(e)* the ease or difficulty with which the actual wishes of the individual might be discovered.

3.3 Consent can be given by a parent, guardian or other representative of the individual in appropriate circumstances.

3.4 Consent is not required when a public body collects, uses or discloses personal information

> *(a)* to protect the health, safety or security of the public or of an individual,
>
> *(b)* for purposes of an investigation related to the enforcement of an enactment,
>
> *(c)* to protect or assert its own lawful rights or those of another public body, including lawful rights against the individual,
>
> *(d)* to verify the individual's eligibility for a government program or benefit for which the individual has applied,
>
> *(e)* for purposes of legitimate research in the interest of science, of learning or of public policy, or for archival purposes,
>
> *(f)* as required or expressly authorized by law, or
>
> *(g)* for some other substantial reason in the public interest, whether or not it is similar in nature to paragraphs (a) to (f).

3.5 A public body may disclose personal information under paragraph 3.4(g) in furtherance of the public interest in open government.

3.6 Before collecting, using or disclosing personal information without consent under paragraph 3.4 or 3.5, a public body shall consider the nature of the information in question and the purpose for which it is acting, and shall satisfy itself that in the circumstances that purpose justifies the action proposed.

3.7 Any collection, use or disclosure of personal information without consent shall be limited to the reasonable requirements of the situation.

Principle 4: Limiting Collection

4.1 A public body may collect personal information

(a) from the individual,

(b) from another person with the individual's consent,

(c) from a source and by means available to the public at large,

(d) from any source if the public body is acting under paragraphs 3.4 to 3.7.

4.2 An individual shall not be refused a service or benefit because he or she declines to provide personal information which is not necessary for a legitimate purpose of the public body.

Principle 5: Limiting Use, Disclosure and Retention

5.1 A public body may discharge its obligation not to retain personal information by converting that information into non-identifying form.

5.2 Personal information that is maintained outside a personal records system and is not readily accessible to a person who has no prior knowledge of the information shall be deemed to be converted into non-identifying form when the use of the information ceases.

Principle 7: Safeguards

7.1 The safeguards to be adopted include training and administrative, technical, physical and other measures, as appropriate in the circumstances, and include safeguards that are to be adopted when a public body discloses personal information to a third party or makes arrangements for a third party to collect personal information on its behalf.