Privacy Report

by

Hon. Stuart G. Stratton, Q.C.

Delegate of the Ombudsman for the
Province of New Brunswick

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Introduction

Mr. Bernard Richard is the Ombudsman for the province of New Brunswick. Mr. Shawn Graham is the Leader of the Official Opposition in the New Brunswick Legislature. In this proceeding Mr. Graham is acting as agent for Mr. Stuart Jamieson, the MLA for Saint John Fundy.

Mr. Graham filed two complaints with Mr. Richard. The first complaint was brought against the Honourable Brenda Fowlie, the Minister of the Environment and Local Government. The complaint alleges that on Tuesday, April 26, 2005, both inside and outside of the Legislative Chamber, Minister Fowlie disclosed private and confidential information concerning Mr. Jamieson, contrary to the provisions of the ***Protection of Personal Information Act***.

The second and later complaint that Mr. Graham requested I include in my review is made against the Honourable Bernard Lord, the Premier of the province of New Brunswick. The complainant alleges that by repeating statements previously made by Minister Fowlie, Premier Lord too violated the provisions of the ***Protection of Personal Information Act***.

More specifically, in his letters of complaint to the Ombudsman, Mr. Graham contends that Minister Fowlie has violated the various provisions of the Act, including but not limited to Principles 5, 6 and 7 of the ***Statutory Code of Practice*** which accompanies the ***Protection of Personal Information Act*** as schedule "A", as well as Principle 4(1) of Schedule "B" to the Code. These principles are as follows:

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 6: **Accuracy**

> Personal information shall be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.

Principle 7: **Safeguards**

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

Principle 4(1): **Limiting Collection**

> 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

In addition to those principles referred to by Mr. Graham, Principles 1, 3 and 4 of the ***Statutory Code of Practice*** may also be relevant. These principles are as follows:

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 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.

The first complaint was received by the Ombudsman on April 29, 2005. The second complaint was received on May 4, 2005. On May 3, 2005, Mr. Richard wrote Mr. Graham advising him that because his impartiality in this matter might be questioned, he had delegated me "to determine if [his] Office has jurisdiction, and, if so, to investigate the complaint and report [my] findings".

The right of delegation is given to the Ombudsman by subsection 9(1) of the ***Ombudsman Act*** which provided as follows:

> **9**(1) The Ombudsman may, in writing under his signature, delegate to any person any of his powers under this Act except the power of delegation and the power to make a report under this Act.

The factual background

Briefly, in response to an enquiry directed to her in the Legislative Assembly by Mr. Stuart Jamieson, the MLA for Fundy Royal, and the official critic of her department, Minister Fowlie made certain statements in the Legislative Assembly. Later, in response to questions put to her by members of the news media outside of the Legislative Chamber, Minister Fowlie substantially repeated these statements. Mr. Graham, as agent for Mr. Jamieson, claims that these statements breached the provisions of the ***Protection of Personal Information Act***. The Minister, through legal counsel on her behalf, denies, *inter alia*, that I have the proper jurisdiction to enquire into Mr. Graham's complaints.

Jurisdiction

The first consideration in these proceedings is therefore to determine whether the Ombudsman has the necessary jurisdiction to enquire into the allegations that Minister Fowlie wrongfully revealed information in the possession or control of the Department of the Environment and Local Government. To answer this question requires an examination of the empowering provisions of three Acts: ***the Protection of Personal Information Act***, ***the Right to Information Act*** and *the* ***Ombudsman Act***

The Protection of Personal Information Act

This Act provides that every public body is subject to the provisions of a ***Statutory Code of Practice*** which enumerates ten Principles. The Act defines "public bodies" as those "to which the ***Right to Information Act*** applies and any other body designated by regulation… established…by a public Act of New Brunswick". In addition, by virtue of subsection 3(1), the ***Protection of Personal Information Act*** incorporates the ***Ombudsman Act,*** while subsection 3(2) mandates that any complaint of a violation "shall be made to the Ombudsman". The Act also contains a penalty clause for those who willfully disclose personal information in contravention of certain of the principles set out in the ***Statutory Code of Practice***.

The Right to Information Act

This Act and ***Regulation O.C. 35-309*** made pursuant to it provide that the Act and all regulations made under it apply to those departments set out in Schedule "A". One such department is the Department of Environment and Local Government. It is interesting to note that this Act also defines "an identifiable individual" in the same terms as does the ***Protection of Personal Information Act***. Moreover, this Act specifically refers to a "Minister". Indeed, Section 12 provides: "in any proceedings under this Act, the onus shall be on the minister to show that there is no Right to Information that is the subject of the proceeding".

The Ombudsman Act

This Act authorizes the Ombudsman to investigate…an act done with respect to a matter of administration by an authority, or any official thereof whereby any person is aggrieved or in the opinion of the Ombudsman, may be aggrieved.

The term "authority" includes "Departments of the Government of the province". In addition, the notion of "administrative authority" is defined to include "a person…appointed by the Lieutenant-Governor in Council".

In addition, subsection 17(6) of this Act authorizes the Ombudsman to consult "any minister who is concerned in the matter of the investigation".

With respect to the appropriate interpretation of these three Acts, the decision of the Supreme Court in ***Dagg v. Canada (Minister of Finance)*** **[1997] 2 SCR 403** is instructive. That case involved the interpretation to be given to the federal ***Privacy Act*** and the federal ***Access to Information Act.*** In coming to its decision, the Supreme Court ruled that the ***Access to Information Act*** and the ***Privacy Act*** must be interpreted together and given equal effect. The court further ruled that the purposes of both Acts must be considered in arriving at a decision on the issues.

I believe that a similar situation prevails in New Brunswick. As I read the New Brunswick ***Protection of Personal Information Act*** and the ***Right to Information Act***, they function together to balance individual privacy rights with the public's right to access the information that is generated, collected and held by government institutions.

Moreover, it is to be noted that both the ***Protection of Personal Information Act*** and the ***Right to Information Act*** refer specifically to the ***Ombudsman Act*** and, in effect, incorporate that Act by reference. It is therefore my view that the provisions of all three acts must be considered together when determining the issue of jurisdiction.

Analysis

I would put the jurisdictional question in straightforward terms: does the Ombudsman have the jurisdiction necessary to investigate complaints brought on behalf of a member of the Legislative Assembly against a Minister of the Crown under the provisions of the ***Protection of Personal Information Act***? And if so, are statements made by a Minister inside or outside of the Legislative Assembly privileged or otherwise shielded from the Ombudsman's powers of inquiry?

Subsections 3(1) and 3(2) of the ***Protection of Personal Information Act*** establish the Ombudsman's general jurisdiction to receive complaints brought under the Act. By ss. 2(1) of the Act, every public body is subject to the personal privacy provisions set out in Schedule "A" to the Act, i.e. the "***Statutory Code of Practice***". Within the meaning of the Act, a "public body" is a body subject to the ***Right to Information Act*** and any other body established by a public Act of New Brunswick. Hence, all government departments, including the Department of Environment and Local Government, come within the ambit of the ***Protection of Personal Information Act*** by virtue of Regulation 85-68 under section 14 of the ***Right to Information Act***.

I turn next to the provisions of the ***Ombudsman Act*** itself. As noted above, complaints brought against public bodies pursuant to provincial privacy legislation are directed to the Ombudsman. By subsection 3(1) of the ***Protection of Personal Information Act*****,** the ***Ombudsman Act*** applies to the former and to the activities of any public bodies identified therein, whether or not that public body is otherwise subject to the provisions of the ***Ombudsman Act***. Thus, the Ombudsman is competent to investigate any grievance relating an act, omission, recommendation or decision with respect to a matter of administration by an authority or an officer thereof whereby any person is aggrieved or, in the opinion of the Ombudsman, may be aggrieved.

Minister Fowlie has engaged Mr. Gordon Gregory, Q.C. as her solicitor to represent her with respect to Mr. Graham's complaint. I have corresponded with Mr. Gregory and have met with him, as well as with Mr. Graham, to discuss my jurisdiction to proceed with an inquiry under the Act.

Mr. Gregory has made a number of submissions to me on this issue. First, he submits on Minister Fowlie's behalf that subsection 3(2) of the above noted Act, which confers jurisdiction on the Ombudsman to deal with complaints, is subject to Section 6 of the Act. That section provides as follows:

> **6**(1) A public body, or an officer, employee or agent of a public body, who collects, uses or discloses personal information in wilful contravention of Principles 3, 4 or 5 of the Statutory Code of Practice

> commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category F offence.
>
> **6**(2) A person to whom a public body discloses personal information on terms that limit the further use or disclosure of the information, and who wilfully contravenes those terms, commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category F offence.

Section 6 of the Act, Mr. Gregory argues, excludes the Ombudsman's jurisdiction "if the circumstances could constitute a prosecutable offence." Because the complaint initiating this inquiry refers explicitly to principles of the *Statutory Code of Practice* the violation of which would constitute a prosecutable offence, Mr. Gregory submits that the complaint falls within the ambit of Section 6. He also contends that the Ombudsman's jurisdiction automatically fails whenever such acts are alleged, since the Ombudsman is not competent to enforce a penal sanction.

I am unable to agree with this submission. While only a court can sanction a provincial offence, the Ombudsman is enabled under the provisions of the ***Protection of Personal Information Act*** to investigate allegations that the Act has been violated. In my view, the potential for a prosecution does not nullify the jurisdiction of the Ombudsman to carry out an inquiry under the ***Protection of Personal Information Act***. Rather, it is my opinion that subsections 6(1) and 6(2) of this statute merely expand the range of remedies available in the event that the Ombudsman should find that a violation of the Act has occurred. This conclusion, in my view, best satisfies the object of the Act, which in broad terms is to assure citizens that personal information held by government will not become public.

Mr. Gregory further notes that sections 1 and 2 of the ***Protection of Personal Information Act*** limit the Act's application to public bodies to which the ***Right to Information Act*** applies, or to bodies identified by regulation pursuant to the provisions of ss. 1(1). Under the ***Right to Information Act***, the relevant "Public Body" is the Department of Environment and Local Government.

Mr. Gregory submits that Principle 1 of the ***Statutory Code of Practice***, which designates the Chief Executive Officer of the department as the individual responsible for the department's compliance, effectively refers to the Deputy Minister. Further, Mr. Gregory points out that unlike the Deputy Minister, the Minister of the Department of Environment and Local Government occupies her role as a result of her appointment under the ***Executive Council Act***. He then contends that the terms of the Minister's appointment do not make her a part of the department. Rather, she is appointed to "preside" over the department, in the language of subsection 3(1) of the ***Executive Council Act***.

I cannot agree with the argument that the Deputy Minister and not the Minister is the Chief Executive Officer of the Department of Environment and Local Government. The role of ministers in the financial administration of their departments and their discretionary powers indicate to me that the Minister in this case is the Chief Executive Officer. While the Deputy Minister may be the Chief Administrative Officer, constitutional principles and practice as I understand them declare that Ministers are responsible for their ministries. Moreover, even if I were to accept the argument that Minister Fowlie was not the CEO of her department, which I do

not, this would not void the Minister's responsibility to maintain the confidentiality of private information held by her department.

Mr. Gregory also argues that the common intent of the ***Protection of Personal Information Act***, the ***Right to Information Act*** and the ***Ombudsman Act*** is to control administrative aspects of government. In this line of reasoning, it would be inappropriate to apply these Acts to the elected members of the Executive Council, whose role goes far beyond matters of administration.

In response to these submissions, I note that historically, New Brunswick inherited the Westminster model of parliamentary government. Under this model, a Minister of the Crown is, in the common understanding, "the head" of a government department under his or her stewardship. Moreover, convention establishes that a Minister of the Crown may act through a person in his or her department or service without any formal authorizing instrument.

As noted above, counsel for Minister Fowlie contends that the ***Protection of Personal Information Act*** is directed uniquely at the subordinate administration and was never intended to capture ministers. If this were the case, the parliamentary conventions referred to above would be compromised; Ministers of the Crown would enjoy the discretion to violate citizens' privacy rights whenever it should prove politically opportune to do so. I am therefore satisfied that my jurisdiction to investigate Mr. Graham's complaints cannot be impugned purely on the basis that the alleged violations of the ***Protection of Personal Information Act*** were committed personally by a Minister of the Crown. To take up an old phrase, had the Legislature wished to exclude ministers from the ambit of the Act, statutory immunity would have been explicit. Moreover, I

would adopt what was said by Mr. David Mullan in his text *Administrative Law*, 3rd Edition, 1996, namely that the term "a matter of administration" as used in the Ombudsman Acts of various provinces of Canada should receive "an expansive interpretation consistent with the broad remedial purposes underlying the office". "Administration", he writes, "encompasses everything done by government authorities in implementing government policy, with only the Legislature and the courts excluded from its ambit".

Mr. Gregory further argues that any statements made by Minister Fowlie inside the Legislative Assembly would not be subject to the provisions of the ***Protection of Personal Information Act*****,** unless the Legislature had subjected itself to that Act by a statute or by amendment to its Standing Rules, or had otherwise limited the customary parliamentary privileges of its members. In short, he argues that what was said by Minister Fowlie inside the Legislative Assembly is protected by parliamentary privilege and is therefore not subject to the provisions of the ***Protection of Personal Information Act***.

The complainant makes a contrary argument. Mr. Graham submits that the Legislative Assembly is established under the ***Legislative Assembly Act***, a public Act of New Brunswick, and that therefore the ***Protection of Personal Information Act*** applies to the Legislative Assembly, pursuant to the provisions of its first section. I cannot agree with this submission. Rather, section 1(1) of the ***Protection of Personal Information Act*** indicates that public bodies other than those to which the ***Right to Information Act*** applies must be explicitly designated by regulation if they are to be subject to the ***Protection of Personal Information Act.*** If this is not clear in the English formulation of the section, it is certainly so in the French.

Indeed, 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.

Mr. Bernard J. Shapiro, the Federal Ethics Commissioner, had this to say in describing "parliamentary privilege" in his decision in the ***Sgro Inquiry***:

> "Parliamentary privilege" refers simply to the rights and immunities necessary for a Legislature as a distinct body (such the House of Commons of Canada), and its Members, who are representatives of the people, to function and carry out their duties and responsibilities. It also refers to the powers that legislatures possess to protect themselves and their Members from undue interference in the fulfillment of their functions. However, "privileges" are not for personal gain or advantage. As stated, in 1967, by a Select Committee of the British House of Commons, parliamentary privileges "are not the prerogative of Members in their personal capacities, (…) they are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent." Electors have indeed the right to expect that the representatives they have chosen be protected from any kind of improper pressure.

The issue of parliamentary privilege was recently examined exhaustively by the Supreme Court of Canada in a case cited as ***Canada (House of Commons) v. Vaid*** **[2005], SCC 30**. In this case the question for decision was whether the Human Rights Commission had jurisdiction to investigate complaints made by a member of the staff of the House of Commons to the Canadian Human Rights Commission.

At least two principles emerge from the Court's ruling, namely that the party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing that the category and scope of the claimed privilege have been authoritatively established in the Canadian Parliament or in the House of Commons at Westminster; and that once a claim of privilege is made out, the Court will not enquire into the merits of its exercise in any particular instance.

In the case before me, Minister Fowlie is invoking a well-established parliamentary privilege- that of free speech – and in such circumstances, I am guided by Supreme Court authority in declining to inquire into the merits of the defense *per se.*

This notwithstanding, I find that the defense of privilege must fail insofar as the Minister's statements about Mr. Jamieson continued outside of the forum where the privilege of free speech can reasonably be said to exist. The Minister's comments outside of the Legislative Assembly only take on their full meaning when viewed in the light of the exchange which took place within the Assembly. Under these circumstances, I do not think it a violation of parliamentary privilege to take account of Hansard records in evaluating the intent and effect of the Minister's latter statements. As Commissioner Shapiro notes in the *Sgro Inquiry*, privileges exist for the Assembly in its corporate capacity, and cannot be claimed by members in their personal roles.

Conclusions as to jurisdiction

Upon consideration of all three acts and the submissions made to me by or on behalf of the parties, I have come to the following conclusions as to jurisdiction.

1. All government departments, including the Department of Environment and Local Government, come within the ambit of the ***Protection of Personal Information Act*** by virtue of Regulation 85-68 under Section 14 of the ***Right to Information Act.***

2. By virtue of subsection 3(1) and 3(2) of the ***Protection of Personal Information Act***, the ***Ombudsman Act*** applies to the activities of all public bodies and any claims of its breach must be made to the Ombudsman.

3. The provisions of the ***Protection of Personal Information Act*** and the ***Ombudsman Act*** make it clear that the Ombudsman has the authority to investigate any complaints relating to an act, omission or recommendation with respect to a matter of administration by an authority or officer thereof whereby any person is aggrieved, or, in the opinion of the Ombudsman, may be aggrieved.

4. In keeping with the broad remedial powers given to the Ombudsman under the New Brunswick ***Ombudsman Act***, the terms “administration” and “administrative authority”

should be given a broad interpretation sufficient to encompass the issues to be resolved in the present proceeding.

5. The Department of Environment and Local Government is a public body and comes within the ambit of the ***Protection of Personal Information Act*** by virtue of Regulation 85-68 under section 16 of the ***Right to Information Act***.

6. Ministers of the Crown come within the scope of the ***Protection of Personal Information Act*** as the persons responsible for their ministries or departments.

7. Although the Legislative Assembly is not included in the list of bodies subject to the ***Right to Information Act***, a Minister of the Crown personally can commit a breach of the ***Protection of Personal Information Act***.

8. The principal purposes or objects of the ***Protection of Personal Information Act*** and the ***Right to Information Act*** are to ensure access to public information and to protect the privacy of individuals with respect to personal information about themselves held by government departments. These Acts must be interpreted together and given equal effect.

9. Both of the above named acts refer specifically to the ***Ombudsman Act*** and, in effect, incorporate that Act by reference. In is my opinion that all three Acts must accordingly be considered and interpreted together.

I therefore conclude from all of the afore going that the purposes and objectives of the ***Protection of Personal Information Act***, the ***Right to Information Act*** and the ***Ombudsman Act*** are remedial in their scope and should be given a broad interpretation. This conclusion, in my view, best satisfies the requirements of Section 17 of the ***Interpretation Act*** which states that "every Act and regulation and every provision thereof shall be deemed, and should receive such fair, large and liberal construction and interpretation as best ensures the attainment of the objects of the Act, regulation or provision".

It is also my conclusion that all three Acts, when interpreted together, disclose a legislative intention that gives to the Ombudsman the jurisdiction necessary to decide and report when the issues that have arisen in this present case.

Issues

Having decided that I have the jurisdiction necessary to deal with the issues raised by Mr. Graham's complaints and having heard and considered the submissions by or on behalf of the parties I find the established facts to be as follows:

1. On April 25, 2005 Mr. Jamieson attended a meeting with several of his constituents who express their concern that a gravel pit operation in his constituency was continuing to operate despite a stop-work order that had been issued by a Planning Commission under Minister Fowlie's

jurisdiction. Mr. Jamieson informed his constituents that he would bring the matter to the Minister's attention the following day.

2. On April 26, 2005, in keeping with his promise to his constituents, Mr. Jamieson brought up the issue of the continuing operation of the gravel pit, despite the stop-work order, during question period in the Legislative Assembly. The following exchange took place between Mr. Jamieson and Minister Fowlie:

Mr. Jamieson: I have a question for the Minister of the Environment and Local Government. At a meeting held last night in the riding of Saint John Fundy, over 65 residents from the Taylor Lake Road area, from Willow Grove, expressed their frustration with the start of a gravel pit operation in their area. This operation was served a stop-work order in the beginning of April, but it continues to operate. This residential area has totally subjected to the assault of a full-blown gravel pit operation, with excavators, loaders, dozers, and a fleet of trucks. They start at seven in the morning and they go until dark, three weeks after they were issued a stop-work order.

Imagine having that type of operation beside your own house when they have been offered a stop-work order. Departmental officials brought documentation to the minister to allow a court order to be served. I would ask the minister to please allow the request from her officials to go forward to the courts.

Hon. Ms. Fowlie: I am fully aware of the situation that has developed in the Taylor Lake road area in the member's riding. The stop-work order was issued by the planning commission. It was not issued by the department. That was not clear in the member's comments.

The planning commission then submitted a request to the department late last week in order to be given the authority to proceed further with this. The department has compiled documents. I am in the process of reviewing the documents, which is quite difficult to do when I am required to sit in the Legislature at this time; however, my staff is working diligently in this regard.

Mr. Jamieson: I want to make the point that this is not the first time a stop-work order has been ignored in New Brunswick. I know the minister will agree that stop-work orders are not always implied, but with this example, would it not be in the interest of the Department of the Environment and Local Government that, when a stop-work order is issued in this province, it means to stop work? The consequences of disobeying such an order should have severe penalties, which would encourage companies and individuals to obey these orders. I would suggest that the legislation might need to be changed in an effort to enforce these orders.
At present, could the minister not ask for a court injunction to stop an operation of this kind, when a stop-work order is put in place, until a formal court hearing is held? Could a court injunction not be put in place prior to that?

Hon. Ms. Fowlie: With regard to stop-work orders, there is a process that is in place to help planning commissions deal with these things. They have within their authority the ability to put

a stop-work order in place. If they wish to proceed further, they must have permission from the department—from the minister, from me—in order to take this situation to court. What I have stated is that I am in the process of reviewing the documents. I have a couple of questions regarding the documents, but I will be addressing the situation.

I am very pleased to see the member for Saint John-Fundy so involved in the community and with regard to zoning and appropriate zoning. As we know, there have been difficulties in which the member opposite has not necessarily complied with zoning issues.

Mr. Jamieson: Bringing this down to a personal attack is not what is meant for the forum of this Legislature.

(Interjection.)

Mr. Speaker: Order, order, order. Question.

Mr. Jamieson: I am not going to repeat that.

That is not a concern that has been brought forward. If the minister has had problems with anything that I was involved in, she never made those issues known to me through her department.

I will tell you that this is a serious situation that the people of New Brunswick are forced to face.

Stop-work orders are not being made to work in this province. All I am asking the minister to do is this. If a stop-work order is put in place, bring in enforcement to ensure that it is followed. It is an easy process for the minister to follow.

If she wants to get personal, we will get down and get personal, but I do not think that is acceptable in this Legislature.

Hon. Ms. Fowlie: There is one conclusion I have drawn regarding much of the legislation we deal with, and that is, if it were implemented or in any way amended by the party opposite, I would probably need to readdress the whole thing. **I find I am quite in agreement that this is a day of hypocrisy in this Legislature in that we have a member who does not adhere to the rules and regulations of the province, but at the same time, demands instant gratification if somebody else is not adhering to them.**

3. The comments highlighted above, along with Minister Fowlie's statements to the media outside of the Assembly chamber, are at the root of the complaint brought by Mr. Graham.

4. Following the sitting of the House on the date recorded above, Minister Fowlie was questioned by members of the media outside the Legislative Chamber. These questions and the Minister's response were reported verbatim in the issue of the Telegraph Journal for Wednesday, June 15, 2005, as follows:

KATHY KAUFIELD. (TELEGRAPH-JOURNAL): "(What was) your reference to Mr. Jamieson (about)?"

BRENDA FOWLIE: "Again, as I said, I find it very hypocritical because the member himself proceeded with a home-based business without proper zoning and had to be, I guess, had to go in front of the planning commission and at this point in time has asked for a re-zoning of the property. So for an individual who touts that they follow the laws of the land so to speak, I find that one difficult to deal with."

K.K.: "When did this happen?"

B.F.: "That was last year."

K.K.: "What was his home-based business?"

B.F.: "Cottages."

K.K.: "And his land wasn't zoned properly?"

B.F.: "That's correct."

CARL DAVIES (TJ): "Did he not have a business there and want to change it to cottages and didn't have the correct zoning and shut down the business?"

B.F.: "He had gone to the planning commission. My understanding is, to ask for a variance to then go through a proper zoning but again, as I said, it's just the fact that you do know, a person in his position would know that he's not living within the zoning issue."

C.D.: "He shut it down when he found that he was in non-compliance."

B.F.: "He had gone to the planning commission to . . . It could be shut down at this point in time. I can check on that but it also is an off-season for cottages."

K.K.: "He said that's a personal attack (your comments in the House)".

B.F.: "Well, it's hypocrisy. I find it hypocritical. And, I mean, even in the own local newspaper in the fall of 2003, there were issues in regards to on-site septics that had nothing to do with this department. But it's hypocritical for a person in that position to be condemning other individuals and at the same time not paying attention to the laws that exist."

K.K.: "So, he shouldn't be raising these issues (other zoning issues) on behalf of constituents?"

B.F.: "I feel that if he wishes to address them without, I guess, making it in a public place, he has every right to sit down and speak to me. I would speak to him on an individual basis as I do

many of the members opposite, but if you want to stand up and make a public, I guess, scene of it, then be prepared."

JACQUES POITRAS (CBC RADIO): "What is your department's privacy policy on raising an individual case in public?"

B.F.: "Well, again, there's lots of individual cases that get raised on the floor of the legislature and I guess no one can be exempt from the same rules."

J.P.: "But you raised his case."

B.F.: "That individual was raising another individual's case so I guess you can't, in my opinion, you can't have it both ways."

J.P.: "Is that what the law says, though, that he's exempt from the privacy rules if he raises another thing?"

B.F.: "I say that on the floor of the legislature, we deal with a lot of issues. Sometimes many names are brought into play and I guess we all should be very cautious in regards to whose names we bring forth and you know the situations we bring forth."

C.D.: "But he's no longer not complying with the law though."

B.F.: "Again, that is something that can be looked at and I know the . . . "

C.D.: "Why bring it up if you didn't know the answer to that?"

B.F.: "Again it is the same as an individual in a position of authority needs to know under what laws that they are operating."

K.K.: "So, it's okay for him to discuss it (his constituents' zoning issues) with you privately, but if he puts it on the floor of the legislature, look out."

B.F.: "Then I would say then it is fair game."

Not all of the facts brought forward in these proceedings were as clearly established as were those referred to above.

For instance, it was alleged by Mr. Graham on Mr. Jamieson's behalf that Minister Fowlie had been kept fully advised of Mr. Jamieson's property issues even in the time preceding the critical meeting of the Royal District Planning Commission of August 10, 2004. This meeting was convened to determine, *inter alia*, if Mr. Jamieson should be issued a temporary permit to continue in his operations pending receipt of a formal request for rezoning. In my interview with Minister Fowlie and her solicitor of July 6, 2005, the Minister denied having any knowledge of Mr. Jamieson's property issues prior to the meeting.

The minutes of the Commission meeting of August 10, 2004 insofar as they dealt with Mr. Jamieson's cottage property record the following:

> "Item 01 – request for temporary permit to operate and rent three cottages while a rezoning request is in process, Route 825, Gardner Creek, Saint John County – moved by Lee Fraser, seconded by Lloyd Marshall to approve the issuance of a temporary permit as requested provided no further modification will be made to the site by the applicant; that the applicant receive approval from the Department of Health for his project; and that RDPC receive a request for rezoning from the applicant. Motion carried".

Mr. John Baird, the director of the Royal District Planning Commission, informs me that although meetings of the Royal District Planning Commission are private, its minutes are made available to the public on request. Mr. Baird also states that during his tenure, only one such request had ever been received by the Commission prior to the series of requests from government and media occasioned by Minister Fowlie's comments of April 26, 2005.

As an aside, it is admitted by all parties that Mr. Jamieson never submitted a request to the RDPC to rezone his cottage property and that he has either discontinued the project or is in the process of selling his cottages.

In addition to Mr. John Baird, I have interviewed in the course of my investigation two senior, long-serving members of the Department of Environment and Local Government whose names had been raised in connection with the present matter. These gentlemen impressed me as knowledgeable of their duties and responsibilities and were honest in recounting their best recollection of what had occurred concerning this matter. While there were some minor variations in what they told me, I conclude that neither of the two government employees had any knowledge of Mr. Jamieson's property issues until they were brought to their attention as a result of Minister Fowlie's remarks of April 26, 2005. While the matter was no doubt known to and discussed within the Department of Environment and Local Government at an earlier time, there was no evidence before me to substantiate any concerted plan to use the situation for any improper purpose.

The records of the Department of Environment and Local Government which I have reviewed indicate that the Minister's office received a letter dated August 24, 2004 from a constituent objecting to the potential rezoning of Mr. Jamieson's property. This letter was processed through various divisions of the department, and a letter of response drafted by department employees was signed by the Minister on October 5, 2004.

Subsequent to April 26, 2005, Minister Fowlie is reported to have stated that the information concerning Mr. Jamieson cottages had first been brought to her attention by a report in a local newspaper. This, she later admitted, was an error on her part. As an aside, I would infer that the Minister had confused in her remarks Mr. Jamieson's zoning issues with an earlier septic system problem, which had indeed attracted minor media attention.

On the basis of the information available to me, I would conclude that Minister Fowlie learned of Mr. Jamieson's most current property issues from the letter of complaint dated August 26, 2004 to which she signed and dispatched a reply on October 5, 2004. In any case, there can be no doubt that Minister Fowlie was aware of Mr. Jamieson's difficulties with his cottage property when she made her comments, both inside and outside the Legislative Chamber, on April 26, 2005.

Public, Private, and Personal Information

In his arguments to me, Mr. Gregory has maintained that the information allegedly disclosed by Minister Fowlie was or should have been publicly known prior to the time of disclosure pursuant to the *Community Planning Act* and related regulations. At our meeting of July 6, 2005, Mr. Gregory argued that the Royal District Planning Commission should have followed its written policy, which was in effect at the relevant time, with respect to the procedure applicable to variance requests. In particular, Mr. Gregory pointed out that Commission guidelines provide that "the Commission may give notice and the right to make representation to the neighbours of the land in question". It is Mr. Gregory's submission that I should interpret this direction to be imperative or mandatory and that the Commission erred in granting Mr. Jamieson a temporary permit to operate his cottages without first having given notice to his neighbors.

Mr. Gregory is correct that courts will sometimes construe the word "may" as "shall" when interpreting documents such as statutes, deeds, contracts and the like. However, as a general

rule, the word "may" will not be treated as a word of command unless there is something in the context in which it is used or in the subject matter itself to indicate that it was used in such sense. In this present proceeding, I am satisfied that in view of the context in which the world "may" is used, i.e. simply as a permissive guideline, the general rule should be applied; the word "may" should be construed not as a command but merely as permissive or directory. Accordingly, the Royal District Planning Commission was not required to give notice concerning the granting of a temporary permit to Mr. Jamieson to continue the operation of his cottages.

In his final written submission, which was received by me on July 14, 2005, Mr. Gregory addresses the issue of "public information." In this submission he writes, in part:

> It is the Minister's position that the information which is the subject of Mr. Stuart Jamieson's complaint has been available to the public and released prior to the Minister's April 26th comments. The public availability of the information arose from Mr. Jamieson's own actions in initiating his zoning variance application".

Mr. Gregory bases his client's position on several considerations, including references to the ***Community Planning Act***, the policies of the Royal District Planning Commission and community knowledge. He ends his submission by stating as follows:

> "the public knowledge of the complainant's situation is a direct result of his business activities, his failure to observe the zoning requirements of the ***Community Planning Act***, the building and accommodation requirements of the provincial health legislation, the public information and community rights provisions of the ***Community Planning Act***, and the implementation of those provisions in the policies and procedures of the Royal District Planning Commission.

> "Finally," Mr. Gregory maintains, "I reiterate the Minister's advice to you that the questions put to her by the media on April 26, 2005 outside the legislative chamber disclosed ample public knowledge. This is as it should be given the public nature of the process Mr. Jamieson initiated under the ***Community Planning Act***".

In an earlier written submission on this topic, Mr. Graham asserted that the ***Protection of Personal Information Act*** does not differentiate between public and private information, but rather is directed only to personal information. Mr. Graham contends that government has an obligation to protect the personal information of individuals whether or not that information is publicly known. The only exceptions to this obligation, he argues, arise when an individual consents to the dissemination of personal information or when its dissemination is expressly authorized by law.

Mr. Graham further submits that the purpose of the ***Protection of Personal Information Act*** is to safeguard personal information and that the burden is on the government to clearly establish any exceptions. In this regard, Mr. Graham cites the Ontario Information and Privacy Commissioner's ***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.*** as authority for the proposition that prior public knowledge of personal information does not in and of itself permit a department or a minister to release such information.

In the Gigantes matter, former Ontario Health Minister Gigantes disclosed in the Legislative Assembly, without the concerned individuals' consent, personal information which the news media had previously reported with the consent of the individual. It was the Information and

Privacy Commissioner's view that irrespective of whether the identified individual's personal information was released to the media, the disclosure of the name of the individual by the former Minister in the House contravened Ontario's ***Freedom of Information and Protection of Privacy Act, 1987***. In that case Minister Gigantes resigned her portfolio.

Having set out the submissions of counsel, all of which have been taken into consideration, I must consider first whether or not the information here in issue qualifies as personal information within the meaning of the ***Protection of Personal Information Act.*** Subsection 1 (1) of that Act defines personal information to mean "information about an identifiable individual, recorded in any form".

There is no question that Minister Fowlie's comments of April 26 relate to an identifiable individual, that is, Mr. Stuart Jamieson.

In the present proceedings, the meetings between Mr. Jamieson and officials of the Royal District Planning Commission did not, so far as I am aware, give rise to printed records. These meetings did, however, culminate in the granting of a temporary permit by the Commission in favor of Mr. Jamieson's lands which was recorded in the Commission's minutes of August 20, 2004. Moreover, I am persuaded that the information contained in the Commission's minutes of August 10, 2004 was communicated to Minister Fowlie either in her capacity as the Minister responsible under the ***Community Planning Act*** or as Minister of the Department of Environment and Local Government. I would also add that the detailed letter of complaint dated

August 26, 2004 to which the Minister signed and dispatched a reply on October 5, 2004, is itself a printed record in the control of the Department of Environment and Local Government.

I therefore conclude that the information discussed by Minister Fowlie outside the Provincial Legislature on April 16, 2005, constitutes personal information within the meaning of the ***Protection of Personal Information Act.***

As I read the ***Protection of Personal Information Act*** there are only two circumstances whereby personal information will not be protected by the privacy provisions of the Act and the ***Statutory Code of Practice*** set forth therein. These circumstances occur when an individual consents to the disclosure of his or her personal information or when express statutory authority requires disclosure.

It is Mr. Gregory's submission that the personal information concerning Mr. Jamieson which is at issue here was readily available to the public. In support of this contention he argues that the ***Community Planning Act*** deals, *inter alia*, with zoning issues which affect the community at large, and that the provisions relating to public participation in the Act are antithetical to any notion of privacy. As noted above, Mr. Gregory also relies on "policy papers" of the Royal District Planning Commission, which inform the public of rights to make representations which, Mr. Gregory argues, are inconsistent with any notion of privacy or secrecy.

These "policy papers" are in my opinion merely guidelines to those individuals who wish to make applications to the Royal District Planning Commission for variances. Moreover, insofar

as notice and the right to make representations are concerned, the papers do not set out mandatory conditions. Indeed, the evidence of the Director of the Royal Planning Commission established that it is the Commission's practice not to give notice in cases such as the present one.

Further, Section 36 of the ***Community Planning Act*** indicates to me that even legitimate third party interest in a local issue of zoning or planning is restricted to a namelessly defined circle of individuals i.e. those in the neighbourhood of the laws at issue. That section provided as follows:

> **36.** Where requested to permit a proposed use or variance under section 35, the advisory committee or commission *may* give notice to *owners of land in the neighborhood of the land* (italics added) in respect of which the request is receive (a) describing the land (b) describing the use proposed or variance requested, and (c) giving the right to make representation to the advisory committee or commission in connection therewith within the time limit set out in the notice.

It is to be noted that by the use of the word "may", this section is not mandatory but permissive as are the Commissions guidelines. It is also to be noted that this section does not permit a Commission to divulge the landowner's name to the public at large. As I read it, the section restricts the landowner's right to privacy only to the degree that it conflicts with a bona fide third party interest, i.e. that of the owners of land in the neighbourhood. The effect of Section 36 is therefore, in my view, to set limits on the public availability of the information in question. Accordingly, it is my opinion that Mr. Gregory has not established an exception to the ***Protection of Personal Information Act***.

As already noted herein, the minutes of the meeting of the Royal Planning Commission of August 10, 2004 which record the motion granted in favour of Mr. Jamieson are publicly available. However, these minutes do not identify Mr. Jamieson by name nor do they record that he had requested the rezoning of his property. Although it would likely be possible for a sufficiently inquisitive individual to correlate the address referred to in the minutes with the public Lands Registry in order to discover Mr. Jamieson's identity, nonetheless it is clear to me that the minutes expressly avoid identifying Mr. Jamieson by name. This indicates to me that a land owner enjoys a reasonable expectation of privacy in his affairs with a planning commission.

Indeed, the Supreme Court of Canada has recognized in the ***Dagg*** case that an individual enjoys a reasonable expectation that information that concerns only him and the government will be treated as private information.

Findings

In the present matter, I conclude for the reasons stated herein that Mr. Jamieson had a reasonable expectation that his dealings with the Royal District Planning Commission would not be subject to scrutiny from third parties, let alone province-wide publicity via the Minister responsible for the ***Community Planning Act***. I am also satisfied that the information disclosed was personal information in the sense required by the ***Protection of Personal Information Act***, and that its dissemination by Minister Fowlie was in breach of that Act.

To summarize, I find that Minister Fowlie disclosed personal information concerning Mr. Jamieson which was obtained and held under the ***Community Planning Act*** by the Royal District Planning Commission and made known to the Department of Environment and Local Government. I further find that the Minister's statements to reporters from various news media outside of the Legislative Assembly were not in compliance with Principles 3, 4, and 5 of the ***Statutory Code of Practice***. I also find that the Minister's colouring of the information at the time of disclosure violated Principle 6 (accuracy) of the Code.

The complaint against Premier Lord is dismissed pursuant to section 15(1)(f) of the ***Ombudsman Act*****,** as the Premier's involvement in this matter was at best peripheral and the complainant has not submitted any substantive arguments in support of the complaint. Moreover, any comments made by Premier Lord were made inside the Legislative Chamber and parliamentary privilege would apply to them.

Respectfully submitted this 21st day of July, 2005.

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The Honourable Stuart G. Stratton, Q.C.
Delegate of the Ombudsman for the Province of New Brunswick