IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)(*b*) OF THE *RIGHT TO INFORMATION ACT*

Between:

D.M., **applicant**

And:

The Department of Training and Employment Development, hereinafter referred to as **the Department**

RECOMMENDATION

Relevant Facts

1. The applicant has been an employee of the Department for several years. On April 26, 2005, she filed a complaint against her director under the *Harassment in the Workplace Policy*. The Department engaged the services of an independent Public Service investigator to determine whether a formal investigation should be conducted. The investigator met with the complainant, after which he interviewed two co-workers as witnesses in the investigation and received e-mail submissions from three other employees of the Branch. On July 12, 2005, the investigator submitted to the Branch a final report on his preliminary appraisal of the workplace harassment complaint. He concluded that the complaint was unfounded and did not warrant further investigation.

2. On July 21, 2005, the Department responded to the complaint by informing the complainant that, following an investigation, the harassment complaint against her director was unfounded and that on the contrary the director had to have the right to manage the workplace. However, the Department did indicate that it had concluded that improvements needed to be made and that the roles and responsibilities of the employee and management required clarification.

3. On September 12, 2005, the complainant formally asked the Minister to disclose the investigation report, under the *Right to Information Act*, after her union representative had tried in vain to obtain a copy of the document. After the 30-day period required under the Act had elapsed with no response to her request, the complainant telephoned the Department to follow up on the matter. She was

advised that a reply was ready and that she would be receiving it in the days that followed. Twelve days later, i.e., on October 26, 2005, still not having received a reply, the complainant telephoned the Department again. She was told that the reply was ready and that she would be receiving it the following week. On November 2, still not having received a reply, the complainant referred the matter to the Office of the Ombudsman. The Minister's initial response, dated October 28, 2005, had inadvertently been sent to the wrong address. On November 14, 2005, the reply in question was sent to her again. The Minister denied the request, indicating her reasons and providing a summary of the main points of the investigation. On November 23, 2005, the complainant confirmed her intention to proceed with her request seeking disclosure of the investigation report. On November 25, 2005, we conducted a review of documents pursuant to subsection 7(4) of the Act, and we obtained a copy of the Minister's grounds for refusing to disclose the investigation report.

4. The Minister objected in principle to disclosing the investigation report, noting that it was a confidential document, prepared solely for the Deputy Minister, and based her refusal on paragraph 6(b) and subparagraph 6(b.1)(i) of the Act. She also referred to the provisions of the *Harassment in the Workplace Policy* indicating that the Deputy Minister's disclosure obligation is limited to ensuring the parties are informed of the outcome of any harassment investigation in a timely fashion.

5. During our review of the request, we asked the Department to specify the reasons for its decision by: (1) indicating the onus on the Minister when she responds to an application; (2) specifying the proof required to respond to the application; and (3) indicating whether the privacy interests protected by the exemption invoked by the Minister must be justified or balanced against the interests of the applicant in exercising her right to access public or personal information.

6. The Department submitted that proof must be established on the balance of probabilities, that the onus is on the applicant to prove that the request falls within the scope of the Act, and that the Department must demonstrate the applicability of the exemption invoked, although in certain instances the onus may be reversed. The Department also submitted that the proof required is normally limited to a review of the documents being sought and the admitted circumstances of their writing and rarely necessitates formal proof by way of affidavit. It further maintained that the Act does not provide for any mechanism to balance interests on either side between the applicant and third parties benefiting from the protection of the exemption. Lastly, the Department indicated that the purpose of the Act is to facilitate democracy by ensuring that citizens have access to public records.[1] Consequently, it concluded that the investigation report being sought by the applicant is not subject to disclosure under the Act. The Department also submitted that not only is the report not subject to the Act,

[1] *Dagg v. Minister of Finance* [1997] 2 S.C.R. 403.

but that it is a confidential document according to the applicable principles of common law[2].

Applicable Law

7. The relevant provisions of the *Right to Information Act* are as follows:

> **2**. Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any department to which this Act applies.
>
> **2.1** Without limiting section 2, subject to this Act, every individual is entitled to request and receive information about himself or herself.
>
> …
>
> **6**. There is no right to information under this Act where its release
>
> *(a)* would disclose information the confidentiality of which is protected by law;
>
> *(b)* would reveal personal information concerning another person;
>
> (*b.1*) would reveal personal information concerning the applicant that
>
> (i) was provided by another person in confidence, or is confidential in nature, or
>
> (ii) could reasonably be expected to threaten the safety or mental or physical health of the applicant or another person;
>
> …
>
> (i) would impede an investigation, inquiry or the administration of justice.

8. The Act also defines the phrase "personal information," giving it the same meaning as does the *Protection of Personal Information Act*. Section 1 of the Act stipulates in part as follows:

> "identifiable individual" means an individual who can be identified by the contents of information because the information
>
> *(a)* includes the individual's name,
>
> *(b)* makes the individual's identity obvious, or
>
> *(c)* is likely in the circumstances to be combined with other information that includes the individual's name or makes the individual's identity obvious;
>
> …
>
> "personal information" means information about an identifiable individual.

---

[2] *Slavutych v. University of Alberta* [1976] 1 S.C.R. 254.

9. It was also the intent of New Brunswick legislators that the *Right to Information Act* be interpreted in the light of the provisions of the *Protection of Personal Information Act*. These two statutes are correlative and complementary: the former strives for the disclosure of public information in order to safeguard democratic principles, whereas the latter strives for the non-disclosure of personal information in order to prevent authoritarianism from taking hold. The statutory duty of, and the challenge facing, the courts and authorized administrative bodies is to ensure the balanced application of both pieces of legislation in each case at bar. The relevant provisions of the *Protection of Personal Information Act* are as follows:

> 5(1) Nothing in this Act displaces any duty of confidentiality that exists in relation to personal information under any other Act or law.
>
> 5(2) Where another Act confers on a public body, or an officer or employee of a public body, a discretion that may be exercised in relation to personal information, that body or person shall have regard to this Act in the exercise of that discretion, to the extent that the other Act allows.

10. This Act also sets forth the following principles in its Statutory Code of Practice and in its provisions for the interpretation and application of this Code:

> **Principle 9: Individual Access**
>
> Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information and shall be given access to that information, except where inappropriate. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
>
> …
>
> **Principle 9: Individual Access**
>
> **9.1** a public body to which the *Right to Information Act* applies may only refuse to provide an individual with personal information relating to himself or herself if the individual would have no right to that information under the *Right to Information Act*.
>
> **9.2** a public body to which the *Right to Information Act* does not apply shall establish a procedure comparable to the procedure in that Act for the purpose of ensuring that the individual can obtain access to information about himself or herself.
>
> **9.3** The procedure established under paragraph 9.2 may include exceptions to access comparable to those in the *Right to Information Act*.
>
> **9.4** When an individual has made a challenge to the accuracy or completeness of personal information relating to himself or herself but has not satisfied the public body that an amendment is appropriate, the public body shall note that the individual disputes the information in its possession.

11. Lastly, the matter must also be examined in the light of the provisions of the *Harassment in the Workplace Policy*. That policy stipulates in part as follows:

> **5.2.8**
> The CEO or the investigator may upon reviewing the written complaint and interviewing the complainant determine whether or not the complainant has a prima facie complaint under this policy which merits further investigation. The CEO or investigator shall inform the complainant whether or not the investigation will be pursued and may take action to resolve the issue.
>
> **5.2.9**
> The respondent shall be informed of the complaint, presented with a written statement of allegations and afforded an opportunity to respond.
>
> **5.2.10**
> Unless directed otherwise the investigator shall gather and analyze the information, summarize the findings and may propose corrective action or make recommendations.
>
> **5.2.11**
> The investigator shall report the findings and recommendations to the CEO who shall determine whether the respondent has committed an act or acts constituting harassment.
>
> …
>
> **5.2.15**
> The parties to the complaint must be informed in writing of the outcome.
>
> **7.2**
> **Chief Executive Officers or designate**
>
> Chief Executive Officers are responsible for the implementation and administration of this policy. They shall:
>
> - Appoint an investigator or investigators as soon as possible;
> - Consult with the investigator or investigators to set a reasonable time frame for the completion of the investigation;
> - Review the findings and recommendations;
> - Determine the outcome and the appropriate action to be taken, and
> - Ensure the parties are informed of the outcome in a timely fashion.
>
> **7.3**
> **Managers**
> …
>
> Managers are also responsible for ensuring that the rights of both the respondent and the complainant involved in a harassment incident are protected. Fair and equitable procedures must be ensured for all parties.
>
> **7.4 Complainants**
> Complainants have the right:
> (a) to make a complaint and to obtain a review of the complaint
> (b) to be accompanied by a person of their choice during the interview; and
> (c) not to be subject to retaliation for the reason of having made a complaint under this policy.

It is the responsibility of the complainants:
(a) to immediately make known, if possible, their disapproval or unease to the individual;
(b) to follow all procedures under this policy;
(c) to cooperate with all those responsible for dealing with the investigation of the complaint; and
(d) to maintain confidentiality.

7.5 Respondents
Respondents have the right:
(a) to be informed that a complaint has been filed;
(b) to be presented with a written statement of allegations and to be afforded an opportunity to respond to them; and
(c) to be accompanied by a person of their choice during their interview.

It is the responsibility of the respondents:
(a) to follow all procedures under the policy;
(b) to cooperate with all those responsible for dealing with the investigation of the complaint; and
(c) to maintain confidentiality.

7.6 Witnesses
Witnesses have the right:

(a) not to be subject to retaliation because he or she has participated as a witness.

It is the responsibility of the witness:
(a) to meet with the investigator and to cooperate with all those responsible for the investigation of the complaint; and
(b) to maintain confidentiality with respect to the investigation.

7.7 Investigator(s)
The investigator shall:

- Ensure the respondent has received a written statement of the allegations;
- Ensure all parties involved have been informed of their rights and responsibilities;
- Interview the parties concerned and any witnesses;
- Collect all pertinent evidence;
- Use a mediation process where appropriate;
- Prepare a report; and
- Ensure the investigation is completed in a timely fashion taking into account particular circumstances --(usually up to 3 months).

Legal Analysis

12. It is relevant to cite all these procedural provisions of the *Harassment in the Workplace Policy* in order to put into context the specific provisions underlying the Minister's refusal to disclose the report. An analysis of the legislative and administrative provisions cited reveals the following principles:

(1) The right to information includes both a general right on the part of citizens to be informed about the actions of public bodies and a specific right to have access to all information concerning them held by a public body, unless otherwise indicated.

(2) This second, more specific right is bolstered by the Statutory Code of Practice enacted by the *Protection of Personal Information Act*, which enshrines the principle of individual access.

(3) The *Protection of Personal Information Act* also stipulates that there may be no departure from a person's specific right of access to information concerning him or her, save by way of one of the exemptions expressly provided for under the *Right to Information Act*.

(4) The exemptions provided for under the *Right to Information Act* include exemptions protecting personal information concerning other individuals and an exemption relating to personal information concerning the applicant, where it was provided by another person in confidence or is confidential in nature. There is also a general provision exempting the disclosure of any information that would impede an investigation, inquiry, or the administration of justice.

(5) The *Harassment in the Workplace Policy* does not indicate that an investigator's report is confidential or may not be shared with the parties in question. However, the Policy does indicate that the report and any recommendations are to be provided to the CEO, who determines whether or not harassment occurred and what action is required. The Policy also states that the parties to the complaint must be informed in writing of the outcome.

13. It appears, however, that the general practice in the departments is to maintain confidentiality with respect to any investigation under the *Harassment in the Workplace Policy*. Most often, investigation reports are not shared with the parties; the parties and witnesses are enjoined to maintain confidentiality with respect to the investigation; the CEO decides, in the light of the facts gathered, to which only he or she has access, whether the complaint is founded and what action is appropriate; investigation reports are stored separately from personnel records, and access to those records is strictly controlled; no one has access to them other than for administrative or legal reasons, and even then, the investigation report or any other document on file may often be consulted only on site, and no copies may be made. This practice has the advantage of allowing departmental employees or clients to step forward as witnesses in an investigation and to share their evidence without fear of retribution or recriminations whatsoever. By enjoining all the participants in the investigation to maintain confidentiality with respect to the investigation, the Department, as employer or service provider, limits any opprobrium that could be attached to the investigation and the possibility of malicious gossip on the part of co-workers who might speculate on the allegations, thereby encouraging hearsay and interfering with the investigation and/or the maintenance of a healthy work environment.

14. However, while the practice does have certain advantages, any exemptions must be founded not on departmental practices but rather on the law and the wording of the Act. The passages in the Minister's response referring to the provisions of

the Policy may therefore not serve as a basis for refusing to disclose the investigation report. They may serve only to support the interpretation of exemptions 6(b) and 6(b.1) as invoked by the Minister. To my mind, an accurate interpretation of those sections must take into consideration the overarching purpose of the Act and the principles of natural justice that underpin it. A review of those principles will therefore enable us to establish certain criteria for application, which can in turn be corroborated by past case law in Canada.

Scope of the Exemption: Statutory Guarantees and Natural Justice

15. With regard to exemption 6(b), if the report contains personal information about another person, that information is exempt and should not be disclosed unless it is no longer confidential in nature. If those parts of the report are severable from the remainder, they may be struck and the other parts of the report disclosed. However, if they are not severable, the report in its entirety should be exempted from the duty of disclosure.

16. The same approach prevails with regard to exemption 6(b.1). Here, it is also necessary to determine which personal information is "confidential in nature" and whiich was "provided by another person in confidence". What scope must be given to the interpretation of these legislative provisions, taking into account the nature of the investigation and legislative intent? Is an investigation report under the *Harassment in the Workplace Policy* confidential in nature, thus exempting it from the right of access and perusal normally afforded an individual, given that it contains personal information concerning him or her? May parts of the report that contain information concerning the same individual provided by another person in confidence be exempted from the right of access, in accordance with the Act?

17. There is another complicating factor: these questions cannot be answered without considering the principles of procedural fairness and natural justice that apply in this context. For example, the duty of disclosure that would be incumbent upon a Department when its human resources office is apprised of employee complaints about a poisoned work environment is not the same as it would be during a civil trial or in the case of a grievance under a collective agreement. Where the employer relies on the testimony of certain employees to base its decision to take disciplinary action against a particular employee, the employer is obligated to share its evidence with that employee so as to afford him or her the opportunity to respond to the evidence against him or her. When these issues are raised in the context of a judicial or quasi-judicial proceeding, it is not appropriate for any of the parties to obtain disclosure of the requisite documentary evidence through an access to information request. The court or the adjudicator hearing the case is normally acknowledged to be in charge of his or her own proceeding. He or she must enforce the procedural rules that apply to the case at bar. However, when one of the parties in question is an agency of the Crown subject to the *Right to Information Act*, the provisions of that Act must inform the interpretation of the procedural rules established by the tribunal. Barring gross negligence by a tribunal in such a matter, it would be inappropriate for the Office of the Ombudsman or another tribunal to interfere with the conduct

of the hearing in question by ordering the disclosure or non-disclosure of a piece of evidence. Any error in law by an administrative tribunal in such matters should be rectified, if applicable, by way of an application for judicial review.

18. That said, which recourse should be available under the *Right to Information Act* in the case of purely administrative investigations? An investigation under the *Harassment in the Workplace Policy* is not a judicial proceeding. Nonetheless, as in the case of any administrative proceeding, certain rules of procedural fairness apply. Moreover, the Supreme Court of Canada recently confirmed that the scope of an obligation to act fairly no longer depends on the judicial or administrative nature of the body in question. In each case, the Court maintains that a contextual analysis is necessary. The onerous nature of the procedural guarantees required will therefore vary taking into account the costs or benefits of the procedural guarantee being sought and considering such factors as the nature of the matter to be decided, the impact of the decision on the individual, the number of complaints of a similar nature, and the identity and structure of the administrative body in question.[3]

19. The context of a request for access to the investigation report of a public body on a harassment complaint filed by one of its employees places a heavy burden of transparency on the government and the parties in question. At issue are serious allegations that have a significant impact on all the parties in question. It would also be exceptional for the duty of disclosure in those circumstances to be lesser than that demanded by the strict application of the principles of procedural fairness. The notion of procedural fairness in common law derives its rationale from two premises: (1) it serves to optimize the quality of the decisions made; and (2) it makes the outcome of these decisions more acceptable. Contrary to these advantages, when common law limits the extension of principles of fairness, it does so most often on the grounds that it would result in unjustifiable expense for the government or overjudicialization of proceedings with its attendant delays.[4]

20. The applicability of exemption 6(*b*) or (*b.1*) in the context of this request remains in essence a question of legislative interpretation and thus a matter of determining legislative intent. However, it is difficult to find in the *Right to Information Act* a manifest intent to diminish or take away from any of the parties a procedural right afforded by common law. It seems to me that if the legislator had wanted to interfere thusly with the acquired rights of taxpayers transacting with government, it would have done so much more explicitly. It is therefore prudent to conclude that if the legislation supports one interpretation that is consistent with the guarantees of procedural fairness in common law and a second one that could thwart them, the courts must favour the first interpretation.

---

[3] *Indian Head School Division No. 19 (Saskatchewan Board of Education) v. Knight* [1990] 1 S.C.R. 653; see also the analysis by Brown and Evans, *Judicial Review of Administrative Action in Canada*, Canvasback Publishing, Toronto. 2001, Vol. II, chapter VII, pages 7-1 to 1-11.

[4] Brown and Evans, *supra*, pp. 7-3 and 7-4.

21. Several factors argue in favour of this: (1) I note first of all paragraph 6(i) of the Act, which grants an exemption from the Act where disclosure could impede the course of an investigation or the administration of justice. That exemption, rather than denying or supplanting the system of procedural fairness under common law, appears in fact to preserve it. A contextual reading of paragraphs 6(b.1*)* and 6(i) seems therefore to favour disclosure where required by the principles of procedural fairness.[5] (2) Since the legislation in question guarantees constitutional standards, an interpretation that gives effect to the overarching purpose of the Act and interprets the exemptions specified in the Act in a restrictive manner is called for.[6] Accordingly, in the application of this Act, a legislative interpretation that favours disclosure is, until otherwise established, preferable to an interpretation that gives broad scope to exemptions thereby favouring non-disclosure. (3) Lastly, as indicated above, it is a matter of reconciling two major principles of administrative law, namely, protection of personal information and transparency in government services, more particularly in the context of rules of procedural fairness. The interpretive approach must ultimately favour the interpretation that best reconciles those two principles. An approach that makes it possible to gives effect to access to personal information, when consistent with the principles of procedural fairness is, to my mind, preferable to a contrary interpretation, since the overarching purpose and the wording of both the *Protection of Personal Information Act* and the *Right to Information Act* require it.

22. In other words, this is not a case where the principles of access to information run counter to respect for privacy, such as when a media representative or a third party seeks to obtain information concerning the private life of an individual. Basically, what is at issue is a request by an individual affected by the findings of an administrative investigation who is seeking disclosure of the investigation report to ensure that the procedure followed was fair and who is also insisting that all personal information in the report concerning her be disclosed so that she can verify its accuracy. In this case, the aims of both pieces of legislation complement, not oppose, each other.

Information Provided in Confidence

23. The exemption issue is raised because certain personal information may have been provided by third parties in confidence or is confidential in nature. A restrictive interpretation of these provisions is preferable. An overly zealous interpretation would infringe upon the remedial scope of the two pieces of legislation in question and would be inconsistent with the legislative intent. The wording of subparagraph 6(b.1)(ii*)*, which deals with the duty of non-disclosure

---

[5] Jurists who are experts in legislative interpretation hold that any legislative provision must be interpreted in the context of the entire Act. They also point to the interpretive principle that raises a presumption against interference with the rights of the individual, regardless of whether they are statutory rights or rights under common law. Sullivan, R., *Driedger on the Construction of Statutes*, 3rd ed., Butterworths, Toronto, pp. 247 ff and 370.

[6] Sullivan, R., *Driedger on the Construction of Statutes*, *supra*, pp. 383-39.

when the safety or physical or mental health of the applicant or another person requires it, gives the context. This more specific provision would not be necessary if subparagraph 6(b.1)(i) were broad or comprehensive in scope. Here, the limited scope of 6(b.1)(ii) qualifies and clarifies the correct interpretation of the preceding subparagraph.

24. Lastly, I note that New Brunswick legislators opted for an approach much more respectful of established law than many other jurisdictions in Canada. The provisions of the federal legislation and comparable legislation in Ontario, Quebec, and Western Canada are often more declaratory and specific, stipulating the scope and limitations of the right to information and the right to privacy in this or that situation. The law in New Brunswick is exceptionally concise, however, and merely decrees a statutory code of practice with attendant interpretive principles. Even the provisions of section 2.1 and paragraph 6(b.1) of the *Right to Information Act* were added to the latter by way of consequential amendments when the *Protection of Personal Information Act* was enacted. Principle 9 concerning individual access merely proclaims the right of the applicant to access his or her personal information "except where inappropriate". The interpretive principles stipulate that any exceptions must be only those invoked under the *Right to Information Act*. Should those exceptions be imprecise, one must presume an intent respectful of the principles of law established under common law.

Criteria for Applying the Exemptions Invoked

25. I conclude from this that, in order to be exempt from the obligation to disclose personal information provided by a third person in confidence, the government agency must furnish conclusive and irrevocable proof, either in the form of documentary evidence or testimony by the parties, establishing the expectation of confidentiality in good faith on the part of the person having provided the information, given the context of the request for access under the *Right to Information Act*. In other words, the government must be able to show that this information was provided in confidence and that the person providing it explicitly indicated that it was not to be disclosed under any circumstances, not even in the context of a request under the *Right to Information Act*. Failing conclusive proof to that effect, we must assume that both the person providing the information and the government agency receiving it are aware of the obligation of transparency and disclosure incumbent upon a democratic government and that they were prepared to submit to that obligation. Unless there is written or equally reliable proof of the confidential nature of the information provided, the exemption under subparagraph 6(b.1)(i) will not apply unless the "confidential nature" of the information requires it. This part of the provision is also subject to a limiting interpretation, given the context and the remedial scope of the rights in question.

26. In my opinion, the legislative intent is best translated by a flexible and reasoned interpretation of this part of the provision. In other words, personal information is "confidential in nature" within the meaning of this exemption, not because

someone expressly said so, or because that type of remark is normally made by word of mouth, but rather because a contextual analysis makes it possible to conclude irrevocably that: (1) the parties had shared the information in question with an expectation of confidentiality, and (2) protection of the privacy of the individual providing the information must take precedence and has a preponderant public value, not only over the democratic obligation on the part of the government to ensure transparency, but also over the right of the applicant to access his or her personal information held by government. It goes without saying that, while it is essential for the establishment of a state of law to recognize such exemptions in appropriate instances, exemptions should remain exceptional cases that serve only to confirm the rule of transparency and right of access which gives citizens the right to find out what the government knows about them.

Overview of Case Law

27. The application of this second part of the test, as in all matters involving rights disputes, can best be determined through an assessment of the balance of convenience. Past case law confirms this. In Ontario, the wording of the legislation is somewhat more specific in that regard. Section 49 of the *Freedom of Information and Protection of Privacy Act* states: "A head may refuse to disclose to the individual to whom the information relates personal information, … (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy." The courts in Ontario have ruled that the onus is on the government agency refusing to disclose the information to show that there would be an unjustified invasion of privacy.[7] Also, this proof must be established by balancing the interests of the applicant against those of the injured party. The Information and Privacy Commissioner of Ontario put it this way:

> The head must look at the information and weigh the requester's right of access to his own personal information against another individual's right to the protection of their privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then subsection 49(b) gives him the discretion to deny access to the personal information of the requester.

28. A major ruling by the Supreme Court of Canada takes the same approach. At issue in the case at bar was a conflict between the right of an accused to have access to a fair trial, and therefore the right to cross-examine witnesses and test their credibility in the light of previous statements given in the context of counselling sessions, and the right of those same witnesses to privacy and their right to equality. The Court begins by stating the fundamental nature of the right to privacy and the importance of confidentiality between counsellor and patient in a therapeutic relationship, noting that a breach of confidentiality could result in severance of the professional relationship and refusal by the patient to confide in the therapist or to take part in therapy, even sometimes where it is a matter of

[7] Mclsaacs, Shields, Klein, *The Law of Privacy in Canada*, Toronto: Thomson Carswell, para. 3.7.2. 17; *Reconsideration Order R-980027*, Ministry of the Solicitor General and Correctional Services, August 19, 1998.

disclosing criminal behaviour. However, the Court concludes that, many times, a citizen's right to his or her privacy must give way to other interests, for example in cases when it is necessary to defend the public interest in the application of legislation. Justices McLachlin and Iacobucci, speaking for a unanimous court on this point, conclude as follows:

> 89 From our preceding discussion of the right to make full answer and defence, it is clear that the accused will have no right to the records in question insofar as they contain information that is either irrelevant or would serve to distort the search for truth, as access to such information is not included within the ambit of the accused's right. In this regard, it is important to note that several interveners before this Court stressed the importance of understanding the context in which therapeutic records are made and their potential unreliability as a factual account of an event. However, the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice. However, between these extremes lies a spectrum of possibilities regarding where to strike a balance between these competing rights in any particular context. The values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one's individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like, relationship[8].

29. Lastly, a few New Brunswick and Canadian decisions inform the approach favoured by the courts when it comes to balancing the rights in question in a context such as the instant case. In *Goodwin,*[9] Russell J., in an oral decision, concluded that an investigation report under the *Harassment in the Workplace Policy* could not be disclosed even in part since it contained personal information, and as the report was very short, those parts could not be separated from the rest of the text nor privacy protected by striking out the names. More recently, the same judge, in *Munn,*[10] ordered the disclosure of the concluding paragraphs of an investigation report in relation to the Department of Education's *Positive Learning Policy*, on the ground that they could be separated from the rest of the text and disclosed by striking out the names of identified individuals without interfering with anyone's personal information. I also note the decision by Landry J. in the case of Dr. *Gosselin*,[11] who had been the respondent in a workplace harassment complaint filed by his co-workers. The employer gave him a copy of the report after the investigation with a disciplinary letter. The judge set aside the investigation report, and the disciplinary letter accompanying it, on the ground that the complainant had not had the opportunity to respond to the witnesses' depositions gathered during the investigation or to respond to the investigation report before decisions were made on the basis of that report.

---

[8] R. v. Mills [1999] 3 S.C.R. 668, para. 89.
[9] *Goodwin v. New Brunswick (Min. of Finance)* [1999], N.B.J. No. 455 (N.B.Q.B.).
[10] *Keith Munn v. New Brunswick (Min. of Education)*, October 7, 2005, Russell J. (N.B.Q.B.) F/M/56/05.
[11] *Gosselin v. Regional Health Authority 1 (South-East) and The Moncton Hospital*, 2003 N.B.Q.B. 57.

30. Under the federal statute, the courts decided in favour of partial disclosure of an investigation report into a harassment complaint in *Mislan* while concluding that there was no basis, in that case, to interfere with the exercise of discretion by the head of the federal institution in preferring protection of third-party personal information to protection of the respondent's right to access his personal information.[12]

31. Lastly, a decision by the Ontario Information and Privacy Commissioner, followed on several occasions and affirmed by the Ontario Divisional Court during an application for judicial review, maintains that investigation reports in harassment investigations must be subject to partial disclosure in order to ensure a level of disclosure consistent with procedural fairness:

> In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature, as the affected persons have indicated here. Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant. …
>
> In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace.[13]

Application of the Act to the Facts at Issue

32. In the instant case, there is no doubt that the entire investigation report is a response to a workplace harassment complaint filed by the applicant and thereby constitutes personal information subject to the individual's right of access conferred by section 2.1 of the *Right to Information Act* and by Principle 9 of the Statutory Code of Practice of the *Protection of Personal Information Act*. The above-cited cases analyzed similar questions according to the same approach.[14] It would be possible to submit that only certain parts of the report contain personal information on the applicant and would thus be subject to the duty of

---

[12] *Mislan v. Canada (Min. of Revenue)* [1998], F.C.J. No. 704.

[13] Ontario Information and Privacy Commissioner Order M-82, Holly Big Canoe, Inquiry Officer; affirmed Corporation of the City of Hamilton v. Tom Wright, Information and Privacy Commissioner et al. (February 9, 1995), Hamilton Doc D246/93 (Ont. Div. Ct.), followed: Toronto Board of Education , Ontario Information and Privacy Commissioner Order M-673, Dec. 19, 1995 and City of Welland Order MO-1351, Oct 19, 2000.

[14] See in particular *Goodwin* and *City of Welland*, *supra*.

disclosure. A strict and literal interpretation of the provisions in question would favour such an approach.

33. None of the parties to the proceedings insisted on such an interpretation, however. These two pieces of legislation guarantee rights of fundamental value in a democratic society and must be given a large and liberal interpretation likely to give effect to their remedial scope. A government employee who files a formal complaint of harassment in his or her workplace is personally affected by an unsettling situation that disrupts his or her workplace, and any investigation report on the matter concerns the general public but concerns much more closely and personally the employee who filed the complaint. The investigation report in fact constitutes the very foundation of the employer's official response to the complaint. **In this case, I have no hesitation in concluding that the entire investigation report therefore constitutes, within the meaning of section 2.1 of the Act, personal information about the applicant and is thereby subject to a general duty of disclosure.**

34. The Department's recent submission based on *Dagg*, to the effect that the entire report is not a public document within the meaning of the Act, has no application since this case involves a request for access pursuant to section 2.1 of our Act that enshrines the principle of individual access to personal information, an essential principle of this Act that was not relevant to the decision of Laforest J. in *Dagg*. Moreover, I find that there is a public interest of transparency in the application of principles aimed at eliminating harassment in public workplaces, although it is not necessary in this case to decide whether that interest is sufficient to found a request under section 2 of the Act, since the request is clearly founded within the meaning of section 2.1.

35. The question raised by this request is that of determining whether the reasons given for refusing disclosure are consistent with the Act. Two exemptions listed in the Act are given. The Minister maintains that the entire report is exempt in accordance with exemptions 6(b) and (b.1)(i) of the Act.

36. Application of the exemption must be done in context. The context of this request is access to an investigation report following a formal complaint process carried out under a public employer's policy prohibiting harassment. Given the criteria listed above in *Indian Head,*[15] an approach respectful of the right to procedural fairness is called for. There is no need here to analyze the limitations of that right in connection with the investigator's administrative approach. I find nonetheless that the nature of the question is as much legal as administrative, since it concerns the right of a public employee to enjoy a healthy work environment, free from harassment. As to the impact of the decision on the applicant, there is no doubt that, on the complainant's side, the fair resolution of her harassment complaint is not without impact on her state of health and is an essential

[15] *Indian Head, supra*, note 1.

condition to her return to work. However, the volume of complaints of this type in the New Brunswick civil service remains relatively manageable, and the structure of the administrative authority in question, i.e., the framework of a formal harassment investigation within a department in Part I of the Public Service, argues for an approach strictly respectful of procedural fairness. Other authorities will determine in the final analysis what is required by procedural fairness in this specific context. However, for the purpose of interpretation of the applicant's right and of the exemption opposed by the Minister pursuant to the *Right to Information Act*, it should be noted that this context, from the standpoint of the common law, argues ostensibly in favour of the applicant.

37. I also note the Department's submission that the confidentiality analysis ordered by the Supreme Court in 1976 in *Slavutych* confers a confidential character on the investigation report. I am not convinced of the validity of that submission. The *Slavutych* decision sets out a four-part test governing the circumstances in which common law courts should recognize new circumstances justifying a claim of privilege other than the predetermined categories of privilege, such as the solicitor-client relationship. The test provides for the following:

> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

38. In my opinion, the Minister did not provide any evidence to justify her submission on the basis of the criteria listed. If the investigator had set out to gather the evidence provided in the confidence that it would not be disclosed, it would have been easy for the Department to provide evidence of that. But no conclusive evidence was put forward in that regard. Neither do I believe that the confidentiality of the relation is essential to the full and satisfactory maintenance of the relation between the parties, as for example in the context of a solicitor-client or physician-patient relation. To the contrary, healthy employer-employee relations and healthy relations between co-workers are favoured by honesty and transparency. The same applies, and even more, to the investigator-witness relation; it is in the interest of that relation to proceed in a transparent manner in its search for truth. Moreover, it is not a matter here of a specific work relation that must be "sedulously fostered" within the meaning of *Slavutych*. And lastly, the injury caused by disclosure in this case is generally less considerable than the benefit that would result from disclosure. In conclusion, if *Slavutych* is applicable to the case, its application favours disclosure. I prefer to conclude, however, that the principles of *Slavutych* have been outstripped by the adoption

of the *Protection of Personal Information Act* and that this system of common law merely informs the correct interpretation of the provisions of that Act and of the *Right to Information Act*.

39. With regard, therefore, to the application of exemption 6(b) concerning the communication of information that would reveal personal information concerning another person, I maintain that only non-disclosed personal information is sufficient to suspend the operation of the duty of disclosure. Quite obviously, there would be no reason to oppose an individual's right of access to personal information on the basis of respect of a third party's privacy when aspects of that third party's privacy have already been revealed. That important distinction is accentuated by the wording of the Act, which refers in paragraphs (b) and (b.1) to communication that "would reveal personal information" rather than communication that "would disclose information ..." as in the case of paragraphs (a) or (f). I believe that the distinction is intentional; disclosure of information can occur at any time, regardless of the confidential nature of the information disclosed. Personal information, however, can be revealed only once.

40. The investigation report consists of about a dozen pages and can be divided into several parts. The first part describes the process and deals with the allegations raised in the complaint and the testimony gathered during the interview of the applicant. The report then reviews the testimony of two employees at the office who support the applicant's complaint and comments more briefly on the written depositions of three other employees at the office, one of which is anonymous, before reaching its conclusions.

41. The first part of the report containing the depositions of the applicant herself cannot be exempted from the duty of disclosure pursuant to paragraph 6(b) or (b.1). Paragraph 6(b.1) simply does not apply. This information comes from the applicant herself and not from another person, and thus (b.1) has no application in this case. As for paragraph (b), two problems arise: do the applicant's allegations constitute personal information within the meaning of the exemption? If so, is this personal information revealed if it is re-communicated?

42. I do not believe that the *Protection of Personal Information Act* or the *Right to Information Act* are intended to distort the results of an investigation or prevent the disclosure of allegations on either side put forward with a view to the search for truth. The applicant's allegations against her boss were allegedly communicated to the respondent. The report concluded that the allegations were not founded. Can it then be claimed that the respondent's personal information is at issue, or can the refusal to disclose the report be based on that ground?

43. I do not think so. The definition of the term "personal information" is very broad, but not so broad as to include an allegation put forward by a witness in connection with an investigation process. Even if it were, when it comes to the depositions of an applicant in connection with an investigation, no one would be

justified in refusing that person the summary of his or her deposition on the ground that his or her allegations contained personal information about another person. The law instead insists on the disclosure of such summaries of facts gathered so that all parties can ensure the reliability of the investigation. Protesting against that principle of procedural fairness on the basis of a desire to protect the privacy of third parties, when nothing has yet been proven and all that weighs against them is an allegation, or worse yet an allegation rejected as being unfounded, would be throwing the baby out with the bathwater.

44. I commend the Department's efforts to preserve the confidential nature of the personal information that it gathers. But it must be acknowledged that refusing the applicant the summary of her own deposition, brought in by the investigation, on the ground that in it she alleged some things affecting the privacy of third parties is nonsense. Nothing is revealed within the meaning of exemption 6(b) by allowing the applicant to check whether her own testimony was gathered properly. Neither do I presume that the Minister expressly tried to avail herself of such an artificial argument. But knowing the great importance that the public authority must attach to respect for citizens' confidential information, there is a real danger that this right may sometimes frustrate, in an undue manner, the right of access to information. That is what seems to be the case here.

45. It is useful to remind the Minister of the duty to maintain not only respect for privacy but also the duty of transparency in public administration. It would be too easy, in many cases, for a Minister to needlessly refuse the disclosure of some document on the ground that an individual's personal information would be revealed, thus frustrating the purpose of the Act. That is why the application of this exemption must be subject to a limited, reasoned interpretation.

46. We now turn to the second part of the report, paragraphs 12 to 26 concerning the facts gathered by the investigator during the deposition of the second witness met with. That witness is a co-worker of the applicant who gave an interview to the investigator in order to support the harassment complaint made by the applicant. A large part of the facts gathered concern the personal information of this witness. The harassment complaint alleges that the applicant was working in a poisoned work environment where her boss and her co-worker, one of the branch's senior employees, were involved in a workplace conflict into which she was dragged despite herself. After comparing the allegations in the complaint to the summary of facts testified to by this second witness, I find it difficult to conclude that none of the facts related in the report would be revealed by communicating them to the applicant pursuant to section 2.1. It is also clear that the applicant and her co-worker shared, confided in each another, and supported each other in their actions with regard to all these matters related to the job and the alleged treatment by their director. The investigator summarized the facts gathered from the deposition of the second witness and drew a conclusion unfavourable to the applicant's complaint. However, the Minister has the burden of demonstrating that the protection of this employee's privacy requires her to

make an exception to her duty of disclosure in order to prevent that information from being revealed. It appears, however, that, in the relevant circumstances of the case, those facts have already been revealed and that the Minister was unable to demonstrate the need for an exemption.

47. Paragraphs 27 to 34 of the report relate the deposition of a third employee of the Branch whom the investigator interviewed. The investigator noted also that this witness had provided him with a written statement, while indicating that she did not want the statement to be shared with anyone without her express permission. The statement is referred to in the report but is not appended to it along with the other documentary evidence gathered. It is difficult to determine which of the facts gathered come from the witness's deposition and which from the written statement. There is also no evidence presented by the Minister as to which facts contain personal information not revealed by this employee and which ones constitute facts related to the work situation that are already in the public domain. The burden of proof falls on the Minister, and unless that burden is discharged, it seems to me that the exemption should not be maintained. However, given in this particular instance that the case concerns relatively new law, it seems prudent to me to take a few precautions in order to keep confidential any personal information that this witness may have wanted to provide on a confidential basis. I therefore recommend that paragraphs 27, 28, 30, and 31 be held exempt in full and that only paragraphs 29, 32, 33, and 34 relating to this testimony be disclosed.

48. Paragraphs 35 to 37 deal respectively with three written statements received from co-workers of the applicant, with the third statement being anonymous. Those statements contain no personal information concerning another person. They contain only allegations concerning the activities of other witnesses in the investigation and the assessment of those behaviours by their co-workers. Furthermore, neither do they contain any new facts that would be revealed, within the meaning of the Act, by communicating them to the applicant.

49. To the extent that the allegations shared in paragraphs 35 to 37 of the report or the allegations of the third witness heard by the investigator contain personal information about the applicant, it is also necessary to consider the possible application of paragraph 6(b.1)(i) of the Act. An exemption applies when personal information concerning the applicant is provided by another person in confidence or is confidential in nature. As indicated above, the burden of proof rests with the Minister in order to show that personal information about an applicant are exempted on that ground. In this case, there is no evidence that the written statements were made in confidence. Nothing shows that the witnesses insisted on the confidentiality of their statement, or that the investigator promised to keep their statement confidential. One statement was made anonymously, supposedly because the person making the statement believed that the statement would be communicated to others and wished to preserve anonymity. Again it must be

asked how the evidence gathered by the investigation could be relevant or reliable if it had been gathered in such a way.

50. I feel it is preferable to conclude that the testimonies were gathered properly and that their veracity is guaranteed by the fact that the witnesses knew they were participating in a formal workplace harassment investigation and that any statement considered relevant by the investigator would be included in his report and could be contradicted by the complainant or the respondent, as the law requires.[16] It has therefore not been established that these statements were communicated in confidence within the meaning of the exemption provision. Would they then be confidential in nature?

51. As indicated above, this analysis must proceed in two stages and include a phase where privacy interests are weighed against the other rights at issue. The testimonies gathered, to the extent that they are liable to be exempt under this paragraph, concern words that the employee said during an interview or that the authors of the three written statements wrote regarding the applicant but which are confidential in nature.

52. I do not believe that these statements meet the confidentiality criteria outlined above. First, there is no conclusive evidence that the parties shared this information in the expectation of confidentiality. Second, even if that were the case, the privacy interests of the witnesses, given the content of their depositions, are not enough to displace the applicant's right to know what was said about her in the circumstances of this complaint.

53. Going back to the decision of the Supreme Court in *Mills*, it is true that the issue there was defending the right of an accused person to gather evidence relevant to his proceeding. As the Court pointed out, the threat of convicting an innocent person strikes at the heart of the principles of fundamental justice. But the disclosure that the Court ordered in his favour did not concern his personal information but instead the personal information of the Crown witnesses who would have testified against him. That information was deeply personal, being the account of therapeutic consultations between counsellors and female sexual assault victims. And the disclosure of documents ordered by the Court was for the purpose of facilitating the cross-examination of those witnesses by defence counsel at a public trial by raising doubts about their reliability with the help of personal information contained in those records.

54. The applicant is not an accused. But the personal information that others are attempting to conceal from her is hers. Also, the privacy interests of the witnesses in the harassment investigation, in the statements that they made, are far less than those of the Crown witnesses in *Mills*. The statements provided by the witnesses in no way concern aspects of their identity, and the maintenance of

[16] *Gosselin*, *supra.*

their confidentiality is not crucial to a therapeutic or other trust-like relationship. Relatively speaking, I find that the applicant's right to have access to the testimony gathered against her is comparably preponderant over the privacy interests of the witnesses in this case.

55. Lastly, paragraphs 39 to 53 of the report contain the investigator's analysis and findings. They contain no personal information and are not exempted from the duty of disclosure pursuant to paragraphs 6(b) or (b.1) or any other exemption under the Act.

56. It is true that the analysis in question is frank and direct and was no doubt written by the investigator for the eyes of the Deputy Minister alone. Nonetheless, I find, respectfully, that not having given the complainant any opportunity to review her deposition or the evidence gathered from the other witnesses, the investigator ought to have expected, at the very least, that a copy of the investigation report would be communicated to the complainant before the Deputy Minister decided on the validity of the complaint. If that was not the case, he could also have expected the applicant to avail herself of her right of access under the *Right to Information Act*. In either case, it would perhaps have been preferable to do a more probative and less blunt analysis. Regardless, however, that is not a valid basis for the Department's refusal of disclosure.

57. In conclusion, the request pursuant to paragraph 7(1)(b) of the *Right to Information Act* is largely granted. I recommend that the Department release the investigation report to the applicant with the exception of paragraphs 27, 28 30, and 31, to which exemption 6(b) invoked by the Minister applies. This decision is without prejudice to the applicant's right to obtain a more complete disclosure of the report through a grievance procedure or any other civil or administrative procedure under the applicable principles of procedural fairness and those cited above in *Indian Head School Division No. 19.*[17]

Bernard Richard, Ombudsman
January 24, 2006

[17] *Indian Head, supra.*