NBRIOR- 2006-10

IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)b)
OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3

Between: **T. N.,**
the petitioner

And:

Madeleine Dubé,
Minister of Family and Community Services
The Minister

RECOMMENDATION

1. This referral was filed with the Ombudsman's office on November 18, 2005. By consent of the parties the timeline for responding to the petition was extended to allow for a detailed review of the file and consideration of submissions from the parties. The Department submitted additional submissions by e-mail dated December 14, 2005. The petitioner, by e-mail dated January 20, 2006 declined to make additional submissions and asked for the Ombudsman's recommendation.

2. The matter raises novel issues of interpretation of the *Right to Information Act* under New Brunswick law and is for that reason somewhat complex. Like other recent recommendations from this Office, this petition raises issues which call for a balancing of the complainant's right to obtain his own personal information as recorded by government against a public body's duty to protect the confidentiality of all personal information entrusted to it.

3. The petitioner is the father of a young man with a disability. The son resided at Southampton House, a level 4 special care home licensed by the Province and located in Hanwell, New Brunwick The petitioner's son was evicted from Southampton House on July 12, 2004 due, according to the service provider's lawyer, to the "extremely disruptive, abusive nature of his father's visits". Consequently, on November 1, 2005 the petitioner sought, through his lawyer to obtain copies of any and all correspondence and documentation in the possession of the Department with respect to complaints regarding his own conduct at Southampton House.

4. On November 3, the department responded to the petitioner's solicitor that it was treating her request as a *Right to Information Act* request, but that since the information requested "is not subject to release under the *Right to Information Act* the request is denied". The petitioner was further directed to the review process under section 7 for further recourse.

5. On December 15, 2005, I delegated Christian Whalen, from my office to attend and review in camera the documents related to this file. The documents identified by the department as relevant to this matter but not subject to release comprise the following:

- Notes prepared June 11, 1996 by Peter McCormack for a Southampton House staff meeting to share information relevant to the care of the petitioner's son.
- Letter dated November 23, 1997 from R. P., President of Southampton House Board of Directors to F. O'Donnell (FCS) re concerns about the petitioner and complaints from staff regarding his alleged conduct.
- Notes dated November 26, 1997 from FCS staff to supervisor F. O'Donnell regarding the November 23 letter from Southampton Board's president.
- June 21, 1998 resignation letter of R.P. as president of Board of Southampton House.
- June 22, 1998 letter of R.P., president of Southampton House to Board members advising them of her resignation and recounting her efforts in the past week to deal with issues arising from the petitioner's alleged conduct towards staff.
- Letter dated August 27, 1998 from Paul Lebreton, deputy-minister of Health and Community Services to the Board of Directors of Southampton House dealing in part with the petitioner's conduct and its impact on his son and other residents.
- October 23, 1998 – Briefing Note prepared for the Minister in advance of the Minister's meeting with the petitioner.
- Southampton House case-log excerpts from Monday, August 28 and Tuesday, August 29th, 2000.
- Summary of August 28th visit by petitioner and conversation with his son's case-worker who subsequently resigned.
- Letter dated October 11, 2000 from M.R., Southampton House Board of Director's president, to F. O'Donnell (FCS) regarding staff complaints about petitioner and his conduct on August 28, 2000.
- Case-log regarding the petitioner's son entered by FCS case workers in an events profile at various dates between April 29, 1996 and July 14, 2004.

6. The Department's initial response refusing disclosure did not provide any grounds for refusal. Subsequently a letter was sent to the petitioner's solicitor advising that the Department was relying on section 6. The Department's e-

mail of December 14th refers expressly to paragraphs 6(a), b), b.1)(i) and g) of the Act, which provide as follows:

> **6.** There is no right to information under this Act where its release
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> 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 was
> (i) provided by another person in confidence, or is confidential in nature, or
> …
> g) would disclose opinions or recommendations for a Minister or the Executive Council;

7. The Department relies also on section 11 of the *Family Services Act*, which requires the Minister to treat as confidential all personal information it receives and not to disclose it without the consent of both the informant and the person to whom it relates. Section 11 of the Act also imposes confidentiality requirements on the staff of community placement resources such as Southampton House and their owners and operators.

8. Upon review of all the documents and the applicable statutory provisions, it appears that some of the exemptions relied upon by the Minister have no application to this case. In the first place, I have no hesitation in concluding that all of the documents reviewed are relevant to the access request and contain in part personal information of the petitioner sufficient to found his request for information under section 2.1 of the Act. That section provides as follows:

> **2.1** Without limiting section 2, subject to this Act, every individual is entitled to request and receive information about himself or herself.

9. Section 2.1 of the Act was added in 1998 and is as much a privacy protection clause itself as a right to information provision. The amendment was made as a consequential amendment to the adoption of the *Protection of Personal Information Act*. It codifies the ninth principle of the Statutory Code of Practice set out under that Act, dealing with individual access. The principle of individual access ensures that "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".

10. The provisions set out above provide some direction as to when disclosure of personal information may be inappropriate. Sub-paragraph 6(b.1)(i) is the most specific in this respect and has the most bearing on this petition. I will

deal first with the other grounds enumerated by the Minister.

11. Paragraph 6(g) has little or no bearing on the outcome of this petition. There is only one document enumerated that bears scrutiny under this exemption and that is the October 23, 1998 briefing note prepared for the Minister of the day, in advance of his meeting with the petitioner. Several recommendations from this office have followed the recent decision of Mr. Justice Jurianzs of the Ontario Court of Appeal on this point. In dealing with a similar exempting provision under the Ontario Freedom of Information Act the Court concluded that the exemption should only apply where the records or documents "relate to a suggested course of action which will ultimately be accepted or rejected by the decision-maker during a deliberative process"[1].

12. Thus, only those documents or portions of documents which set out opinions or recommendations for the Minister's or cabinet's consideration are protected by the 6(g) exemption. There is nothing, however, in the October 23, 1998 briefing note which constitutes opinions or recommendations for the Minister, or Executive Council. The Briefing note merely provides background information that would allow the Minister to meet with a client of the department, based on all the relevant information in the department's possession. The 6(g) exemption has no application in this case.

13. In NBRIOR-2006-04 I recommended to the Minister disclosure of certain documents where an exemption based on paragraph 6(g) had been claimed. The Minister accepted the recommendation in part but commented that my interpretation of 6(g) ignored applicable case-law on this point, in particular the case of *Maritime Highway Corp. v. New Brunswick (Minister of Transportation)* [1998] N.B.J. No. 299 where Turnbull, J states:

> The Applicants wants to see all documents in relation to the evaluation process. Its counsel argued that section 6(g) only excludes opinions when at the Ministerial level. I do not agree with this argument. The Minister acts on the input of many public servants. In this case there is a ladder through various committees and in my opinion the legislation was intended to cover all work product in the process leading to the Minister's desk or the section would be meaningless. If all discussions and recommendations could become public there could be reticence to express honest firmly held convictions on the suitability of proposals and proponents thereof.
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> If the Minister wanted to review the whole evaluation process, all information and recommendations should all be available in writing for him or her. In my opinion this should not be revealed to the public and the subsection should be interpreted broadly.

[1] See *Ministry of Tranportation v. Consulting Engineers of Ontario,* September 26, 2005, Ontario Court of Appeal, Docket C42061 Juriansz, J.A.; *Kingston v. Minister of Family and Community Services* NBRIOR-2006-04, February 14, 2006

14. This case has been followed once, in *Gillis v. New Brunswick* 2005 NBQB 191, and has not received any other comment or treatment. To the extent that it is inconsistent with the earlier referenced case of the Ontario Court of Appeal, it is the applicable law in New Brunswick and is binding upon me. To the extent that *Maritime Highway Corp.* is precedent for the proposition that the 6(g) exemption should be interpreted broadly whenever possible, it would be contrary to my earlier recommendations and to the general rule of interpretation which holds that statutory exemptions should be narrowly construed. It would to the same extent be inconsistent with the recent decision of Mr. Justice Juriansz of the Ontario Court of Appeal.

15. In my view however, *Maritime Highway Corp*. is not authority for so sweeping a proposition and is not opposite to the recent decisions of the Ontario Court of Appeal in pari materia. In fact, I see no great difficulty in reconciling these two lines of authority. Turnbull, J. favoured a broad interpretation of 6(g) so as to capture all records created which informed and called for a deliberative process that would ultimately be determined by the minister or Cabinet. This is consistent with the with the view of Mr. Justice Juriansz quoted above, that provides a broad mantle of protection to all records "that relate to a suggested course of action that will ultimately be accepted or rejected by the decision-maker".

16. The purpose of the paragraph 6(g) exemption is to protect the confidential nature of ministerial and Cabinet deliberations and similarly the policy development functions which support such deliberations. To the extent that records have been produced to inform the deliberative decision-making process of Cabinet or the Minister they may fall within the exemption. In such cases, it is appropriate to carefully review the documents to determine whether they may be released in whole or in part without offending the exemption or risking the reticence alluded to by Mr. Justice Turnbull that might damage the full and frank exchange of views on policy proposals within government. Factual accounts of existing services and analytical background research papers will rarely cause such harm if released.

17. Conversely, *Maritime Highway Corp*. is no authority for the view that every document destined for the Minister's desk is exempt for disclosure under the *Right to Information Act*. The documents reviewed in this petition originate largely outside of government and were not produced for the Minister's advice or consideration. The only document produced for the Minister was a briefing note that summarized the facts of the case prior to the Minister's meeting with the petitioner. In my respectful view the Minister erred in relying on the paragraph 6(g) exemption in refusing disclosure in this case.

18. Paragraph 6(a) in turn, is also of limited assistance in addressing this petition. Paragraph 6(a) provides an exemption where the release of information would disclose information the confidentiality of which is protected by law. In *D.M.*

v. Minister of Training and Employment Development[2] it was pointed out that courts favour a narrow interpretation of exempting provisions. As Mr. Justice Russell pointed out in *Weir*[3] "the purpose of the…Act is to codify the right to access to information held by government. It is not to codify the government's right to refusal."

19. It is clear that the provisions of the *Family Services Act* state that personal information gathered by the Minister responsible under that Act must be treated confidentially. In fact section 11 of the *Family Services Act* was enacted in tandem with the adoption of the *Protection of Personal Information Act* (POPIA) during the same session of the Legislature in 1998. Both provisions should be read together, with section 11 supporting the broader aims of POPIA. In my view section 11 is not a stand alone provision which removes the Minister under the *Family Services Act* from the privacy guarantees established under POPIA, or from the related provisions of the *Right to Information Act*.

20. Indeed section 11 reinforces the importance of confidentiality and privacy guarantees such as access to personal information, in respect of services provided under the *Family Services Act*. It would be false to argue that section 11 raises the application of the paragraph 6(a) exemption as a form of confidentiality protected by law. The privacy interests protected by section 11 are the same as those set out in the paragraph 6(b) and (b.1) exemptions and in my view should be analysed under that rubric. Thus where statutory provisions protect the confidentiality of personal information, access requests should be governed by the exempting provisions of 6(b) and (b.1) of the *Right to Information Act* so as to consolidate the approach of government in such matters. In fact, the 6(a) exemption is a broad exemption directed primarily at the preservation of Cabinet secrecy, official secrets and common law privileges.

21. As for the 6(b) exemption, it is true that some information contained in the documents might be considered personal information of persons other than the petitioner, to the extent for instance that it relates decisions or actions others took in response to the petitioner's conduct. On the whole, however, as this information is intertwined with information concerning the petitioner's conduct as the father of a resident of Southhampton House, it is, in my view, better characterized as personal information of the petitioner.

22. The crux of the matter in this petition therefore turns on the application of the exemptions under paragraphs 6(b.1). As stated in other recommendations a blind application of the exemption is sure to lead to incongruous results that would defeat the provisions and the purpose of the Act. Personal information is broadly defined so as to extend the scope and application of the *Protection*

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[2] NBRIOR-2006-01

[3] *Weir v. New Brunswick* (1992) 130 N.B.R. (2d) 202 (Q.B.) Russell, J.

of Personal Information Act. Here however, as in many other cases raised on appeal, claimants are seeking to know what government knows about them and whether the personal information held by government affecting the services delivered to them is accurate[4]. Openness and transparency in government demands that such information be made public. Privacy demands it as well. These exemptions therefore should be applied sensibly and should be narrowly construed.

23. As was found in NBRIOR-06-01 the twin goals of accessing one's own personal information held by government to ensure accuracy and exempting personal information from disclosure are both aimed at protecting privacy. Where these two goals clash, the legislative provisions should, in my view, be applied reasonably balancing one set of interests against the other and ensuring that in every case the balance of convenience or inconvenience to all parties be considered before determining whether documents should be withheld or disclosed.

24. This is the best means of achieving the legislation's dominant purpose of providing access to information while protecting privacy interests. The approach is also entirely consistent with the legal approach in other provinces. The Ontario Freedom of Information legislation also has much more detailed provisions in this respect[5]. While the legislative provisions under review here are much less detailed, I find no reason to refuse to give them the same purposive interpretation. Any more literal interpretation would defeat the legislative purpose in too many cases and void the provisions of their remedial effect. Worse yet, it would provide less scrupulous government officials a broad cloak under which they could exempt important public records from release or review.

25. As was stated in NBRIOR-06-01, the 6(b.1)i) exemption requires a flexible interpretation. Sub-paragraph 6(b.i) i) provides that there is no right to information where its release "would reveal personal information concerning the applicant (i) that was provided by another person in confidence, or is confidential in nature". I have previously determined that:

> Personal information is "confidential in nature" within the meaning of this exemption, not because somebody said so, or because it is the kind of information that is normally whispered from ear to ear, but because a contextual analysis allows one to conclude irrefutably that: 1) the parties have shared this information with an expectation of privacy and 2) that the

[4] NBRIOR -2006-01, supra.

[5] Subparagraph 14(1)(f) of Ontario's *Municipal Freedom of Information Act* provides: 'A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, **except, if the disclosure does not constitute an unjustified invasion of personal privacy'**. Subsection 14(2) and (3) provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. In particular, 14(3) lists the type of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy and 14(2) outlines what criteria should be considered.

protection of the privacy interests of the person who shared the information must be given precedence and have paramount public value over both the State's democratic duty of openness and transparency and over the petitioner's own right to access his personal information held by the State.

26. Applying these same principles to the case at hand, I find it difficult to balance the interests at stake or decide whether the personal information in this case is "confidential in nature" within the meaning of the 6(b.1) exemption. All of the records listed above, relate in some manner to the petitioner's conduct as the father of a resident. I do not hesitate to conclude that they constitute personal information of the petitioner. Almost all of the documents however were developed as internal documents of Southampton House or its Board and were not intended to be shared with the petitioner. They were communicated to the Minister in furtherance of the reporting relationship between Southampton House and the Minister as a service provider and residential care facility under the *Family Services Act*. I hesitate to conclude that they were drafted and forwarded to the Minister with an expectation of privacy. I believe however that, in the absence of any other proof, that may be the fairest inference I could draw from the documents themselves.

27. While the petitioner may have some greater claim to disclosure should he proceed with some civil action or if he had brought some other judicial review of the service provider's decisions regarding the care of his son, I am inclined to agree with the Minister that balancing his own privacy rights and right to access his personal information against the Minister's duty not to breach the confidence of others who have reported to the Minister personal information regarding the petitioner, in this case the balance of convenience favours non-disclosure. I am persuaded to this conclusion in view of the fact the petitioner has had ample opportunity over the years to obtain clarification of why his conduct eventually contributed to his son's removal from Southampton House. His informational rights and access rights are substantially satisfied and do not justify in this case, as a matter of privacy law, or right to information law, an abridgement of the confidence of others.

28. In conclusion, I find that while the Minister's reliance on the various other exemptions should fail, the sub-paragraph 6(b.1)i) exemption is applicable in this case and sufficient reason to refuse to disclose the records listed above.

Dated at Fredericton, this 24th day of April, 2006.

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Bernard Richard, Ombudsman