NBRIOR- 2006-16

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: **Daniel McHardie,**
the petitioner

And:

Brad Green,
Minister of Health
The Minister

RECOMMENDATION

1. This referral, dated May 23, 2006 arises out of an access to information request by the petitioner dated February 21, 2006. The petitioner, Daniel McHardie is the Legislative Bureau Chief for the Times Transcript, the daily newspaper in the Greater Moncton region. The February 21, 2006 access request is succinct and states in full as follows:

> I request the following information under the Right to Information Act. I request a copy of the Dr. Isser Dubinsky, of Hay Health Care Consulting, report into a northern New Brunswick man who was injured in a car crash and his subsequent treatment.

2. The Minister's response, dated May 11, 2006, is also succinct. A copy of the report was provided, but significant portions of it were blanked out. The Minister's response provides in part as follows:

> A copy of the report is enclosed. As stipulated in section 4(2) of the *Right to Information Act*, where a portion of a document contains some information that is information referred to in section 6, and that portion is severable, that portion of the document shall be deleted and the request with respect to the remaining portion of the document shall be granted.

3. I met, on June 1, 2006, with departmental officials and obtained from them an unredacted copy of the Dubinsky report. The Minister's officials also submitted at that time that the redacted portions of the report had been withheld largely on the basis of the personal information exemption in paragraph 6(b) of the *Right to Information Act* and the confidentiality provisions of section 65 of the *Regional Health Authorities Act*. However, it was indicated that the Minister also exempted some passages as opinions or recommendations for a Minister under the paragraph 6g) exemption.

4. Having compared the redacted and unredacted portions of the report, I note that there has been significant disclosure in this matter, as required under the Act. The report consists of 19 pages of material entitled "Advice to the Minister of Health and Wellness, Province of New Brunswick: Final Report" and is dated January 24, 2006. It offers the factual findings of the reviewer, his observations and 29 numbered recommendations. All the recommendations have been forwarded unredacted, save for the opening sentence of recommendation 10.

5. The personal information exempted is generally of two types. There is the personal information of the individual who was in the car accident and whose treatment in hospital was the object of investigation. Secondly, most all of the identifying information related to physicians or health care personnel involved in the victim's treatment has been also removed from the version forwarded to the petitioner.

6. The Minister has not indicated which specific exemption is invoked with respect to each redacted portion. However, the grounds are largely self-evident and passages which clearly do not contain personal information I have reviewed against the paragraph 6g) exemption also relied upon by the Minister. It is largely with respect to some of these latter redacted portions that I respectfully believe the Minister may have erred and would recommend, for the reasons set out below, further disclosure.

7. For the purpose of analysis, I find it helpful to group the outstanding issues of disclosure in this petition under three broad issues:

    i) Do the personal information exemption under paragraph 6(b) of the *Right to Information Act* or the obligation of secrecy under subsection 65(1) of the *Regional Health Authorities Act* require more than the deletion of the name of the patient

whose file was under review?

ii) Do the personal information exemption under paragraph 6(b) of the *Right to Information Act* or the obligation of secrecy under subsection 65(1) of the *Regional Health Authorities Act* require that the names of treating physicians involved in the care of the patient in question, or any other information concerning the quality of the care they provided, be withheld?

iii) Do the exempted passages that contain findings or observations of the reviewer, that ostensibly underpin his recommendations constitute "opinions or recommendations for a Minister or the Executive Council" within the meaning of the paragraph 6(g) exemption?

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

> 1 In this Act
> …
> "identifiable individual" means an individual who can be identified by the contents of information because the information
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> *(a)* includes the individual's name,
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> *(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;
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> "information" means information contained in a document;
>
> "personal information" means information about an identifiable individual
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> …
>
> 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.
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> …
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> 6. There is no right to information under this Act where its release:
> …
> *(b)* would reveal personal information concerning another person;

…

(g) would disclose opinions or recommendations for a Minister or the Executive Council;

9. The provisions of the *Regional Health Authorities Act*, which are in fact almost identical to confidentiality provisions under section 8 of the *Health Services Act*, state as follows:

> **Confidentiality of information**
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> **65** No person shall disclose information relating to the health services provided to, or the medical condition of, an individual, without the consent of the individual, except
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> *(a)* for the purposes of the administration and enforcement of this Act and the regulations,
>
> *(b)* as required by law, or
>
> *(c)* as authorized by the regulations.

Personal health information of the patient

10. Turning to the first issue regarding the personal information of the patient that was the subject of the case review by Dr. Dubinsky. I note that the patient's name has been withheld throughout. In a sense the patient's health information helps inform the recommendations and the report, however, I agree that the information is easily severable and that the remaining passages can stand alone and should be disclosed. Once the patient's name is removed however the text contains no other identifying information and a question arises as to whether, anything but the patient's name need be omitted.

11. We are dealing here with a private report in to the quality of care in a given case in the administration of health services in the province. The Minister commissioned this report and it was tendered to him by the consultant as a private report. The petitioner, a member of the Legislative Press Gallery, has requested a copy of the report under the rights set out in section 2 of the Act.

12. Section 2 clearly applies in this situation and makes it clear that inquiries of this nature in a mature democracy are not conducted in private. If the Minister has determined that an incident regarding the provision of services within his department warrants investigation, then the public interest will only the better be served by ensuring that the investigation process is open and transparent and that its outcome is publicly available. However, due consideration must also be given to the protection of personal information pursuant to the provisions of the *Right to Information Act* and health sector laws.

13. In the Supreme Court of Canada's most recent pronouncement on the interplay between access to information laws and privacy laws, Madame

Justice Deschamps, speaking for the majority, had this to say:

> This Court has stated on numerous occasions that the *Privacy Act* and the *Access Act* must be read together as a "seamless code": *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8 (CanLII), [2003] 1 S.C.R. 66, 2003 SCC 8, at para. 22 ("*RCMP*"). The right of access to government information, while an important principle of our democratic system, cannot be read in isolation from an individual's right to privacy. By including a mandatory privacy exemption in the *Access Act* itself, Parliament ensured that both statutes recognize that the protection of the privacy of individuals is paramount over the right of access, except as prescribed by law[1].

14. Madam Justice Deschamps was of course interpreting the federal laws in question, but the court's comments in this respect apply also to the relationship between the *Right to Information Act* and the *Protection of Personal Information Act* in New Brunswick.

15. In many cases, privacy interests in a case such as this will be sufficiently protected by removing names and any identifying information. The diagnostic information or case history at that point would no longer be considered personal information since it would have been anonymised. The diagnostic information and case history would still be available however, in that context to support and inform the recommendations tendered.

16. In the not too distant past social conventions rather than laws would have governed this process. Much less information would have been rendered public. Still, in egregious matters where an instance of maladministration required investigation and comment, a report may have been rendered public, perhaps without emendation, and public authorities would have relied upon the good judgment of the media not to pry into the personal lives of individuals involved. Experience has shown that legal guarantees are helpful in codifying existing conventions and privacy practices and improving the measure of autonomy and personal freedom that persons enjoy by living in a society that is respectful of privacy.

17. The *Right to Information Act* was adopted nearly thirty years ago in response to demands for accountability and more democratic governance. More recently, privacy legislation has been developed, in part to balance principles of open government against privacy interests, but in large part to satisfy New Brunswickers and Canadians generally (and indeed their trading partners) that recent advances in technology and data gathering will not too greatly diminish the measure of privacy they have customarily enjoyed and come to cherish. Madam Justice Deschamps' reasons in *Heinz* cited above should not be interpreted as a direction from the court that any possible infringement of a

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[1] *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 (CanLII)

person's privacy will trump democratic governance in every case. Clearly, the court's ratio offers yet another affirmation of the need for balance and a reasoned and measured approach to the interpretation of both legislative frameworks.

18. Some may argue that in adopting section 65 of the *Regional Health Authorities Act*, or section 8 of the *Health Services Act*, the Legislature intended to shut tight the door against the possibility of disclosure of patient health care records in any circumstance. The Supreme Court's Charter analysis of privacy rights under sections 7 and 8 of the Charter, interpret these sections purposively to protect every human being's reasonable expectation of privacy, rather than merely a negative right to not be subject to unreasonable search and seizure by the State. The Charter cases divide privacy interests between informational privacy, spatial and temporal privacy and personal privacy[2]. The most egregious violations, being those which are an affront to personal privacy, as in the case of strip searches.[3] The closer one's personal information comes to infringe upon what the court has described as the "biographical core of personal information" that individuals would wish to keep private[4], the more difficult it will be to prove that the privacy interests in play could be trumped. Health records are of primary importance to all persons when it comes to defining privacy.

19. However, upon analysis, I do not believe that the confidentiality provisions in New Brunswick health legislation set out above can be, nor should they be, interpreted categorically. Section 65 uses mandatory language imposing an obligation to not disclose health record information without consent from the individual concerned. However it adds three broad exceptions, the second being except where disclosure "is required by law". In my view, section 65 does not override section 2 of the *Right to Information Act*, and the issue of whether the personal information in question should be disclosed can only be determined through a careful balancing of the informational rights and privacy exemptions in play.

20. It is helpful to recall that the law under review here is the *Right to Information Act* and its purpose as Mr. Justice Russell, of our Court of Queen's Bench has stated "is to codify the right of access to information held by government. It is not to codify the government's right to refusal."[5] Statutes guaranteeing informational rights and privacy have been recognized by the Supreme Court of Canada as quasi-constitutional legislation, protecting foundational Canadian values[6]. The conferral of this status by the court upon such

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[2] *R. v. Dyment* (1988) N.R. 249 (S.C.C.)
[3] Ibid. following *R. v. Pohoretsky* [1987] 1 S.C.R. 945.
[4] *R. v. Plant* [1993] 3 S.C.R. 281
[5] *Weir v. New Brunswick (Min. of Health & Community Services)* (1993), 131 N.B.R. (2d) 422 (Q.B.) (Russell, J.)
[6] *Lavigne v. Canada (Office of the Commissioner of Official Languages)* 2002 SCC 53 at para. 25.

legislation has a significant impact upon the statute's interpretation and application, particularly in cases of possible conflict with legislative provisions in other statutes, as is the case here. Professor Ruth Sullivan, a foremost authority on the rules of statutory interpretation in Canada, summarises the implications of the court's recognition of a statute's quasi-constitutional status as follows:

> (1) Human rights [and other quasi-constitutional legislation] is given a liberal and purposive interpretation. Protected rights receive a broad interpretation, while exceptions and defences are narrowly construed.
> (2) In responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation are adapted not only to changing social conditions but also to evolving concepts of human rights.
> (3) In cases of conflict or inconsistency with other types of legislation, the human rights legislation prevails regardless of which was enacted first.[7]

21. Having considered these authorities, I am confirmed in the view that the increased reference to confidentiality provisions in various legislative pronouncements, such as section 65 of the *Regional Health Authorities Act*, while helpful in underscoring the importance of these foundational norms in every aspect of public administration, should not be interpreted so as to displace the careful balancing of informational rights and privacy rights set out under the *Right to Information* Act and the *Protection of Personal Information Act*. Indeed any conflict between these statutes and such provisions, although it may be a rare occurrence, since the provisions are largely complementary, must be resolved in favour of a purposive and organic interpretation of the quasi-constitutional legislative texts themselves. These two statutes must be considered paramount, and indeed, as the Supreme Court of Canada has consistently held with respect to comparable federal legislation, they must be read and applied together "as a seamless code".

22. In the context of the current petition therefore, the section 65 confidentiality provision under the *Regional Health Authorities Act* is subject to the disclosure requirements "required by law" under section 2 of the *Right to Information Act*. These in turn are subject to the exemption in paragraph 6(b) of that same Act. Unfortunately, in this case, the consultant retained sought to shield his entire report by entitling it advice to Minister. This occasioned a *Right to Information Act* request and a fairly fulsome disclosure of the report's findings by the Minister, leading to this petition.

23. In time public administrators will learn to couch terms of reference to outside consultants clearly so it is understood that such reports must be made public and should therefore be drafted in a manner respectful of the privacy interests at stake. Had the consultant been asked, or had he taken the pains to do so, a

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[7] Sullivan Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Butterworths, Toronto, 2002, p. 373.

report could have been drafted for public dissemination which carefully avoided any significant infringement upon privacy. It is hoped that in reporting petitions to this Office such as this one and these recommendations, that proactive approaches that demonstrate a day to day commitment to the twin goals of transparency and protection of privacy will be nurtured and reinforced throughout the public service.

24. Therefore generally in matters involving scrutiny and review of public health services in the province, it should be possible to disclose case history, while not revealing names so that both the interests of transparency and respect for privacy can be reconciled. Indeed on the basis of the evidentiary record before me, there is very little to suggest that the petition should not be disposed of on this basis. The onus of establishing the validity of an exemption lies with the Minister, and I find very little in the Minister's response to the petitioner, or in the oral explanations of his officials during my *in camera* review of the documents, or in the documents themselves, that puts forward a compelling case to uphold the paragraph 6(b) exemption. I have therefore carefully considered recommending further disclosure of the case history while severing only the name of the patient to whom the health care services under review were provided. However, for the reasons which follow, I have decided not to do so.

25. The definitions of "personal information" and "identifiable individual" under the Act make it clear that personal information is disclosed even though a name may be withheld and is not otherwise obvious from the information disclosed if it "is likely in the circumstances to be combined with other information that includes the individual's name or makes the individual's identity obvious". As, I have just stated, the Minister bears the burden of proving an exemption under the Act. I have no information on the record before me to suggest that the strictures of the exemption would not be amply served by severing only the name of the patient in this case.

26. I am also under an obligation to review the matter before me within thirty days of the filing of the petition and report forthwith my recommendations to the Minister. I understand the strictures of sections 9 and 10 of the *Right to Information Act* as an attempt by the Legislature to provide an expeditious and informal complaint resolution process in right to information matters. I view these procedural safeguards as very important ones and am therefore very reluctant to delay, extend or further judicialise this process.

27. In the future, I would welcome and would urge the Minister to provide more detailed reasons when an access request is denied in whole, or in part as is the case here. In *Re Lahey*[8], the Court of Queen's Bench affirmed the Respondent Minister's obligation to give reasons when denying an access request, and I find, respectfully, that it is insufficient for a Minister to refuse full disclosure

[8] *Re Lahey* (1984), 56 N.B.R. (2d) (Q.B.) Kelly, J.

with only a scant reference to section 6 of the Act without particularizing the specific exemption which may apply and any necessary particulars as to why the exemption should apply. Additionally, when a petition is filed with this Office regarding an access request denied in whole or in part, the review process would be greatly enhanced if only the Minister would share with me more formally the legal advice, if any, already tendered and received in the matter.

28. For the purposes of this case however, I do recall and do take notice of the fact that at the time that the patient's accident and at the time of the subsequent investigation into the health care services received, there was significant public attention and media coverage given and the patient's name was clearly identified. I have no hesitation therefore in concluding that personal information would be disclosed in this case if the case history and diagnostic information contained in the Dubinski report were disclosed at this time.

29. As I have stated, there is a better way of reconciling the goals of open government and privacy in cases like this one. However, I can add that, in my view, the goals of transparency are largely met by the disclosure granted and that while release of the information provided with the exempted portions may make for difficult reading, the absence of specific case history and details does not, in this case, unduly detract from the coherence or cogency of the recommendations advanced. I have therefore, in this case, decided not to recommend disclosure of any further information severed under the personal information exemption related to the patient's case history and personal health information.

Personal information of the attending physicians

30. The Minister has also severed the names of all physicians referred to in the report, any references to the specialization or capacity of the physicians involved and has suppressed some pronouns where disclosure of such might reveal a physician's gender. The investigator's findings concerning the quality of professional health care services provided have also been suppressed. For the reasons which follow I recommend that the passages exempting this information be disclosed to the petitioner.

31. In arriving at this conclusion I have considered the fact that this is a report about the quality of health care provided to an individual patient. There is a compelling public interest in disclosing the findings of a professional impartial and publicly commissioned inquiry into the quality of health care in the Province. The primary privacy interests at stake in this matter are those of the patient, and several of the redacted portions under this rubric have no bearing on the patient's personal information.

32. Moreover, the findings of the review officer are merely that, they are factual determinations by an impartial reviewing officer based on his investigation

and professional experience, dealing in this instance with the professional services rendered by other individuals. They address the provision of services by the health care system rather than the personal information of any employee or professional associated in the provision of those services. The findings and recommendations expressed are not oriented in any way towards professional discipline, nor are they the view of hospital administrators or the Minister, nor are they necessarily representative of those views, indeed in some respects the Minister's officials have confirmed to me that they are not.

33. Previous decisions of our Courts and recent decisions of this Office have confirmed that the names of public servants performing public duties do not constitute personal information within the meaning of the paragraph 6 (a) or 6(b) exemptions. Thus in one case recently I recommended that the name of an official which had been withheld, be disclosed citing an Ontario Inquiry Officer decision as follows:

> I adopt the reasons of John Higgins, Ontario Inquiry Officer, when he stated in the 1995 *Town of Pickering* Case: "Many past orders have held that information relating to individuals in their professional, as opposed to personal, capacity, is not personal information."[9]

34. I note also the decision of Madam Justice Paulette Garnett in *Metz Farms Ltd. v. New Brunswick* [2002] N.B.J. No. 443 where she held that the business records provided by Metz and which it sought to prevent the Minister from disclosing under the personal information exemption could not fairly be described as personal information such as religious or political affiliations or health status.

35. Principally, I do not believe that the health care professionals in question in fact have a reasonable expectation of privacy with respect to the information redacted from several portions of the report. These physicians work in traumatic care services and provide care in exacting circumstances to the very best of their abilities. These professionals would not reasonably expect that their right to the protection of their own personal information could be raised as a shield to trump public scrutiny of their own professional services in a public hospital setting when such service delivery is made the subject of review.

36. The following passage from John Stuart Mill's treatise On Liberty reinforces this view:

> In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said

[9] See *Vaughn Barnett v. Min. of Family and Community Services* NBRIOR-2006-06, March 24, 2006: following *The Corporation of the Town of Pickering* OIPC M-477 John Higgins Inquiry Officer, February 28, 1995.

> against him; to profit by as much of it as was just, and to expound to himself, and upon occasion to others, the fallacy of what was fallacious. Because he has felt that the only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.

37. On balance, there is, in my view, is a far greater public interest in disclosing these portions of the report that there is in prohibiting disclosure of passages which in fact are not personal information, that is to say they are not "information ***about*** an identifiable individual" within the meaning of the *Right to Information Act.* I therefore recommend that the redacted portions of the report seeking to exempt the "personal information" of attending physicians be disclosed to the petitioner.

Opinions for a Minister

38. Finally the Minister has redacted several passages of the report which constitute factual findings of the reviewer and which underpin the disclosed recommendations. These are ostensibly exempted on the basis that they constitute opinions for the Minister and are exempt under paragraph 6g) of the Act. I recommend that these passages also be disclosed to the petitioner.

39. As I have stated in several recent recommendations, the paragraph 6 g) exemption is aimed at protecting cabinet confidentiality and the legislative and policy development function. Canadian appellate courts have given similar provisions under right to information legislation a narrow interpretation, limiting the exemption's application to work product prepared in support of Cabinet's deliberative process or the Minister's decision-making function[10]. This is not inconsistent with the earlier interpretive approach of New Brunswick courts which have interpreted the exemption broadly to extend to background reports and work product which may not have been addressed specifically to cabinet or a Minister, but which still informs and supports the decision–making process[11]. It is not open however, in my view, for the Minister to rely on the 6g) exemption with respect to factual determinations made by the reviewer. This is especially true in a case where the actual recommendations forwarded to the Minister's attention have all been disclosed.

40. It may be that departmental officials dispute the conclusions reached by the Reviewer and some of the conclusions might be perceived by some as critical of the department, but these are not valid reasons for refusing disclosure. Indeed on the Millian view we should, to be wise, welcome this type of

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[10] *Ministry of Tranportation v. Consulting Engineers of Ontario,* September 26, 2005, Ontario Court of Appeal, Docket C42061 Juriansz, J.A.

[11] *Maritime Highway Corp. v. New Brunswick (Minister of Transportation)* [1998] N.B.J. No. 299, Turnbull, J. (N.B.Q.B.)

critical review and disseminate it broadly in our search for better feedback and better service delivery.

41. I recommend that the Minister disclose the first sentence of the paragraph immediately following recommendation 29 and other similar passages for which the paragraph 6(g) exemption has been claimed in this matter.

Dated at Fredericton, this 20th day of June, 2006.

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Bernard Richard, Ombudsman