

- 3 The Minister provided a response dated October 18, 2009, granting partial access to a number of responsive records. Some of the released documents were redacted to sever personal information under paragraph 6(b) of the *Right to Information Act* (“the Act”). The Minister withheld the requested report in its entirety under section 6(g).
4. As the Minister indicated that some information had been withheld under the 6(a), 6(b), and 6(g) exemptions of the Act, the Petitioner referred the Minister’s response to the Ombudsman.
- 5 The Petitioner referred the Minister’s decision to withhold the requested report in its entirety on the grounds that significant portions of the report could be factual in nature and that the report was already nearly a year old.

II. APPLICABLE LEGISLATION

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

In this Act

“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;

4(2) 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.

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

III. ANALYSIS

7. In July 2008, the Minister of Energy appointed an Independent Panel (“the Panel”) consisting of William Thompson and William Marshall to review the current electricity market.
8. On August 15, 2008, the Minister of Energy announced that the Panel would be advising government on options regarding the New Brunswick electricity market and preparing a report “regarding the structure of the electricity market and its impact on the structure and governance of the NB Power group of companies.”¹
9. In the conduct of its mandate, the Panel conducted background research on the development of the electricity market in the province as well as current regional and international energy markets, and consulted with stakeholder groups for feedback on current challenges and concerns in the provincial market.
10. The Panel submitted the report to the Minister of Energy in December 2008.
11. The documentation released to the Petitioner included information relating to the requested report, including the terms of reference, the interview list for consultations with stakeholders in the energy sector, and an Interview Backgrounder that included the questions to be asked of stakeholders.
12. Some of these documents were severed to remove personal information in accordance with paragraph 6(b). The severed information contained the names of individual civil servants and employees of private companies, and I am satisfied that this information was properly severed in accordance with paragraph 6(b).
13. Thus, the sole issue is whether the Minister, was justified in withholding the requested report in its entirety in accordance with paragraphs 6(a) and/or 6(g) of the Act.

INFORMATION PROTECTED BY LAW

14. In the response to the Petitioner, the Minister referenced paragraph 6(a) that certain information is not subject to disclosure as the confidentiality of this information is protected by law, but did not identify a statutory or contractual confidentiality provision or which records were being withheld under this exemption.

¹ “Experts to advise government on structure of electricity market,” Communications New Brunswick News Release, August 15, 2008.

- 5 In response to my requests for clarification on this point, departmental staff reviewed the application of paragraph 6(a) in this matter and determined that it did not apply to any of the responsive records to the Petitioner's request. I am in agreement that the 6(a) exemption has no application to this matter.
16. I would take this opportunity to reiterate that when departments invoke the 6(a) exemption, they should, where appropriate, specify in their responses to requestors the basis for a claim of confidentiality (statutory, contractual, or privilege) as well as the responsive records being withheld under the claimed exemption.²

ADVICE TO MINISTER

7. The Minister withheld the requested report and related documents including covering e-mails and a PowerPoint presentation based on the report under the paragraph 6(g) exemption as advice to the Minister.
- 18 In the response to the Petitioner, the Minister provided the following explanation as to why the report is being withheld in its entirety:
- Please note in particular that the report submitted by Mssrs. William Marshall and William Thompson has been reviewed to determine what, if any, information contained therein is releasable under the Act. We have concluded that the report in its entirety is not releasable at this time, pursuant to section 6(g), noted above.
- 9 It has been well established in previous recommendations as well as case law that the advice to Minister exemption was designed to protect public servants and others "so they can provide advice and opinion to the government of the day without fear of being targeted as being the authors or creators of perhaps unpopular policies."³
20. The scope of the exemption has been given a narrow interpretation in previous recommendations from this Office and it only protects those documents or portions of documents that set out opinions or recommendations for the Minister or cabinet to consider. In contrasting the provisions of our statute with those in Ontario in *Kingston v. Minister of Family and Community Services*, I found that:

The provision under the New Brunswick *Right to Information Act* however is a narrower exemption. It relates to opinions or recommendations, and not advice generally. Moreover it deals with opinions or recommendations for a Minister or Executive Council and not advice provided by any consultant or public servant to any decision-maker. In my view the narrow formulation of the exemption in

² See previous recommendation on this point: *Brosseau v. New Brunswick (Minister of Finance)*, NBRIOR-2009-07, at para. 22.

³ *Weir v. New Brunswick (Health and Community Services)*, (1993) 131 N.B.R. (2d) 422.

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New Brunswick suggests a stronger commitment of the legislator to a concept of open government that brooks few exceptions.⁴

21. The narrow interpretation of the provision was again considered in *McHardie v. Green*, in which I found that Ministers could not rely on the 6(g) exemption with respect to factual determinations.⁵
22. The scope of the exemption was also considered by the Court of Queen's Bench in *New Brunswick Crown Counsel Association v. Minister of the Office of Human Resources*.⁶ In this case, the government had engaged a consulting firm to conduct a market compensation review for lawyers working in the public sector, and the resulting report contained facts and observations, but no recommendations.⁷ The Court found that the entirety of the information contained in the report was of a factual or statistical nature and that the report did not fall within the confines of the 6(g) exemption.⁸
23. The Crown Counsel case is somewhat distinguishable from the current request as the report in question in the Petitioner's case was commissioned by the Minister of Energy with the purpose of reviewing options available to government in structuring the electricity market in the province. The resulting report was submitted directly to the Minister of Energy with the purpose of advising the government on options regarding the electricity market. Thus, the report's purpose was to provide options and recommendations to the Minister, and is not exclusively factual in nature.
24. Thus, the question is whether there are portions of the report that are statistical or factual in nature that can be severed for disclosure to the Petitioner.

The question of what constitutes 'opinions' or 'recommendations' for a Minister is not an exact science. I turn again for guidance on this point to the rich jurisprudence in Ontario where the *Freedom of Information and Protection of Privacy Act*⁹ contains a similarly worded provision as follows:

13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In determining whether a responsive record containing a discussion of options constituted 'advice' or 'recommendations' for the purposes of subsection 13(1), the Assistant Commissioner provided the following approach:

⁴ *Kingston v. Minister of Family and Community Services*, NBRIOR 2006-04 at para. 14.

⁵ *McHardie v. Green*, NBRIOR – 2006-16 at para. 39.

⁶ *New Brunswick Crown Counsel Association v. Minister of the Office of Human Resources*, 2006 NBQB 320.

⁷ *Ibid.*, at para. 20.

⁸ *Ibid.*, at para. 21.

⁹ *Freedom of Information and Protection of Privacy Act*. R.S.O. 1990. c. F.31.

What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains “advice” for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain “mere information” and what, if any, contain information that actually “advises” the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing “mere information”, then section 13(1) applies.¹⁰

27. This passage was quoted in a subsequent Order¹¹ where the record in question was the “Options and Recommendations” portion of a consultant’s report submitted to a Crown agency regarding automobile insurance related issues.

28. In determining whether the four options presented in the report constituted ‘advice’ or ‘recommendations,’ the Commission considered previous Orders on point and found that options, if provided without a discussion of a suggested course of action may not fall within the scope of subsection 13(1). The Adjudicator found that:

...what is important is whether the information actually “advises” the decision-maker on a suggested course of action, or allows one to accurately infer such advice, and determining this requires a careful review of the content of the information and an assessment of the content in light of the context.¹²

29. The Commission’s interpretations in this regard have been upheld and adopted in two separate decisions of the Ontario Court of Appeal.¹³

30. Having examined the report, I am not satisfied that the scope of paragraph 6(g) covers the report in its entirety. Several sections of the report outline the history of the energy market in New Brunswick, the current state of the energy market in the province, and an overview of energy developments and trends in other Canadian and international jurisdictions. Much of this information is readily available to the public and has been published online, as indicated in the reference materials cited in Appendix D. These sections, in my opinion, provide factual background information which frame and inform the options and recommendations later presented in the report.

¹⁰ *Ontario (Northern Development and Mines) (Re)*, IPC Order PO-2028, June 28, 2002.

¹¹ *Ontario (Financial Services Commission of Ontario) (Re)*, IPC Order PO-2400, June 10, 2005.

¹² *Ibid.*, at p. 7.

¹³ *Ontario (Ministry of Transportation) v. Consulting Engineers of Ontario*, (2005) 202 O.A.C. 379, 2005 CanLII 34228 at paras. 28-30; *Ontario (Ministry of Northern Development and Mines) v. Mitchinson*, 2005 CanLII 34229 at paras. 8-12.

- 31 In keeping with my previous recommendations, I find that the factual portions of the report are not covered under the 6(g) exemption and that these portions are severable from the report as a whole in accordance with subsection 4(2) of the Act.
- 32 The report also contains three sections relating to observations about the New Brunswick electricity market, the NB Power Group of Companies, and about future issues raised by the stakeholders through the Panel's interview process. I note that the Interview Backgrounder which contains the questions asked of stakeholders had been previously released to the Petitioner, and the information contained in these sections of the report is a compilation of their answers to the questions outlined in the Backgrounder. The stakeholders' observations are based on their knowledge and expertise in the energy market and dealings with the NB Power Group of Companies and highlight the challenges facing the current system as well as stakeholders' concerns. Many of the observations also contain factual information.
- 33 Having considered these particular sections of the report in light of the previous decisions and case law regarding the 6(g) exemption, I find that these portions of the report do not present any clearly defined options or recommendations for the Minister and thus do not fall within the scope of the advice to Minister exemption. I also find that these sections are severable from the report in accordance with subsection 4(2) of the Act.
- 34 Further, I note that some portions of the report were previously provided to the Petitioner in the initial response to his request, including the Stakeholder Interview List and Interview Backgrounder Document, which are Appendices A and B of the report respectively. Both of these documents were redacted to exclude personal information in accordance with paragraph 6(b).
- 35 I therefore recommend that the sections of the report that do not fall within the scope of paragraph 6(g) be released to the Petitioner, with the remaining sections being severed in accordance with subsection 4(2).
- 36 Similarly, the Power Point presentation should be redacted accordingly to sever the portions of the presentation that reflect the parts of the report that are exempt from disclosure under paragraph 6(g) and subsequently released to the Petitioner.
- 37 In closing, I would suggest that there is a strong public interest in the full disclosure of the information contained in the report, particularly in light of recent events which saw the proposed sale of NB Power to Hydro-Québec and the deal's subsequent collapse. In this case, the Minister commissioned a report on public policy issues that affect all New Brunswickers. The government needs to abide not only by the letter of the law, but also by the spirit of the law, which favours full disclosure subject to very few exceptions.

IV. CONCLUSION

38. I am satisfied that the Minister appropriately severed personal information in the documents released to the Petitioner in accordance with paragraph 6(b).
39. While substantial parts of the requested report were properly exempted in accordance with paragraph 6(g), I find that the sections of the report that are of a factual nature are not covered within the scope of the exemption and recommend that the following sections of the report be released to the Petitioner:
- | | |
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| Page 2: | Introduction |
| Pages 2-16: | I. Evolution Toward Electric Industry Restructuring in NB |
| | II. Approach Taken by the Panel |
| | III. Situation Analysis Overview |
| | IV. Observations re the New Brunswick Energy Market |
| | V. Observations re NB Power Group of Companies |
| | VI. Observations re Future Issues |
| Page 27: | IX. Closing Commentary |
| Pages 28-34: | Previously released to the Petitioner |
| Pages 36-51: | Appendix C: Situation Analysis |
| | Appendix D: Reference Materials |
40. As for the related Power Point presentation on the report, I recommend that the portions of the presentation that contain information from the report that are exempt from disclosure under paragraph 6(g) be severed and the rest of the presentation be released to the Petitioner.

Dated at Fredericton, this 1st day of April 2010.



Bernard Richard, Ombudsman