



If the documents provided are unsatisfactory, you may refer the matter as provided for in Section 7 of the *Right to Information Act* (forms attached).

3. Enclosed with the Minister's response was a four page summary of comparative data comparing aggregate performance measurements for First Nations students (off reserve) to the performance of students of the province as a whole. The data is broken down by grade level and measures performance in Math and English. The documents appear to have been prepared by the Assessment and Evaluation Branch of the Department of Education, in October 2005.
4. The petitioner filed her referral with our office on January 12, 2006 and I had an opportunity to view, in camera, the entire file related to the request and referral, pursuant to subsection 7(4) of the Act, on January 25, 2006.
5. In addition to the four page document disclosed the file contained a copy of the "Draft Action Plan" requested and minutes of the meetings of the Provincial Aboriginal Education Committee dated January 25, 2005, August 23, 2005 and October 4, 2005.
6. I wish to state at the outset how helpful it has been to have such a detailed response to the access request. Although this is not a complex case, the Department's response was prepared with care. It identifies the documents in its possession and stipulates the detailed exemptions which apply to each of the documents in question. This helps the petitioner know whether all the documents they believe to be relevant have been identified by the department and it facilitates the Ombudsman's review in appropriate cases by reading specific documents against specific exemptions. This in my view is the type of response which must be provided under statute in every case (See *Weir v. New Brunswick* (1992) 130 N.B.R. (2d) 202 (Q.B.) Russell, J.), regrettably, in my experience not all government departments prepare their responses with this requisite degree of care.
7. Having said that, I find it difficult to uphold the exemption invoked by the Department in respect of these documents. The Committee minutes themselves are clearly not opinions or recommendations to the Minister or to the Executive Council. The claim in respect of these documents is tenuous but appears to lie in the fact that a portion of the minutes make reference to a plan which is in development and under consideration, and from which the reader might infer that a final action plan will eventually be prepared and submitted to the Minister for approval.
8. As for the "draft action plan" itself, in my view it is just that. It is an internal working document of the department of education which is not finalized and which, when finalized, may or may not be approved or become government policy. However the record does not show, that the document at this stage was

prepared as an opinion or recommendation for the Minister. The record is certainly not in the form of a Memorandum for Executive Council, nor does it appear to have been prepared for submission to cabinet. In my view it is not clear either what Ministerial approval or input would be required to approve or put the action plan into effect. I assume that some decision-making of this nature is at times delegated to departmental officials or to the Provincial Aboriginal Education Committee itself.

9. In any event, I understand full well the Department's interest in not making public its draft plans until they have been finalized and until some form of announcement or public consultation process is ready. However, I believe the *Right to Information Act* requires a greater degree of transparency and openness in this circumstance. The New Brunswick *Right to Information Act* provides an exemption where release would "disclose opinions or recommendations" for a Minister.
10. This exemption, like all exemptions under right to information laws, has been strictly construed by the courts. Opinions or recommendations for a Minister or the Executive Council pertain to documents or those portions of documents that "relate to a suggested course of action which will ultimately be accepted or rejected by [Cabinet or the Minister] during a deliberative process". (*Ministry of Transportation v. Consulting Engineers of Ontario*, September 26, 2005, Ontario Court of Appeal, Docket C42061 Juriansz, J.A (the *MOT case*).; *Cimon v. New Brunswick* (1984), 51 NBR (2d) 148 (Q. B.) Stevenson J.; *Stadium Corporation of Ontario Limited* Order P-632 Anita Fineberg, Ontario FOI Inquiry Officer, February 22, 1994)
11. The Ontario statute has a broader exempting provision which, until the recent *MOT case* had been fairly liberally interpreted to protect the policy development function within government. The Ontario exemption provides as follows:

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.
12. Notwithstanding this broad formulation of the exemption, access to information decisions in Ontario have been careful not to throw the mantle of the exemption too wide. In Order PO-1690, the Ontario Privacy and Access to Information Commissioner ordered disclosure of a draft report prepared for the Ontario Ministry of the Environment. The Report, on the topic of "Environmental Risks of Municipal Waste Landfilling and Incineration", was 600 pages in length and contained six main sections, authored by twelve individuals. The project coordinator was responsible to draw together the various parts of the report and prepare a final draft report. The Government intended on publishing a final report for public consultation at a later stage. It argued against disclosure of the draft since it had become aware of

significant errors in the Health Risks section of the report which it wished to correct before publication. In dismissing the Government's reliance on the exemption the Inquiry Officer stated in part as follows:

A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under section 13, the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section 13(1) does not apply.

13. The proper course of action for a government department faced with this kind of access request is to divulge the information with the caveats it deems appropriate having regard to the use or reliability of the record given the stage of policy development that has been reached. The public debate which may result from the early disclosure of this kind of information may be helpful or not, but the interests of transparency and open government must take precedence, in this case, over the department's desire to manage its public communications and policy development functions.
14. I hold in this case that the exemptions invoked by the Government Department do not apply and recommend that the draft action plan requested and the portions of the minutes of the Provincial Aboriginal Education Committee dated January 25, August 23 and October 4, 2005, that are relevant to this request be disclosed to the petitioner.

Dated at Fredericton, this 14<sup>th</sup> day of February, 2006.

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**Bernard Richard, Ombudsman**