

4. The petitioner received this letter on January 3, 2006 and faxed it to our office. The Response denies the access request entirely in the following terms:

I must deny your request based on section 6(g) of the *Right to Information Act* which states:

6. There is no right to information under this act where its release:
(g) would disclose opinions or recommendations for a Minister or Executive Council;
5. An appointment was scheduled January 31, 2006 with the Departmental Officials to review the files pertaining to this access request. The Minister insisted however on a new referral being filed and the petitioner did so on January 25, 2006.
6. The petitioner has also attached to her petition an excerpt from the proceedings of the Legislative Assembly for December 15, 2005. On that day the member for Campbellton, Roy Boudreau, the opposition Critic for Family and Community Services, filed a motion seeking the same documents and disclosure as those requested by the petitioner. The record of proceedings provided submits that the Minister's reply to Motion #12, also dated December 15th, was as follows:

No material is being released at this time as the material would disclose opinions or recommendations for a Minister or Executive Council. This is an application of the provisions of section 6(g) of the *Right to Information Act*.
7. Further to the petition, my office received e-mail correspondence from Lila Barry, president of the Autism Society of New Brunswick supporting the opposition's efforts to gain disclosure of information pertaining to the government's plans and enclosing a copy of her January 2nd, 2006, correspondence to the premier requesting disclosure of the same information to ASNB. While it is not necessary to refer to either document to properly assess the merit of the Minister's reliance on the 6(g) exemption, and I decline to do so, both of these additional requests underscore the public's interest in disclosure in this matter.
8. As was recently pointed out in another recommendation in a referral under the *Right to Information Act* (See *Hagerman v. Minister of Education*, NBRIOR-2006-03), responses to right to information requests must provide sufficient reasons. (See *Weir v. New Brunswick* (1992) 130 N.B.R. (2d) 202 (Q.B.) Russell, J.) It is helpful in invoking an exemption that the Minister appropriately identify the document or portion of the document to which the exemption applies. By listing the documents in the Minister's possession and the grounds for the exemption, the Minister allows the petitioner to reasonably assess 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. Furthermore this practice ensures due diligence at the departmental level and allows the Minister to fairly assess which documents or portions of documents should be exempted from the right of access conferred by law.

9. As Mr. Justice Russell points out in *Weir*, supra, “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.” Blanket denials on the basis of the 6 g) exemption in larger files such as this one will rarely escape challenge entirely. In highly sensitive files such as this one, Ministers or their officials may in fact fear revealing certain information merely by stating which documents are in their possession and the grounds for their non-disclosure, but such a tight-lipped administration of the law is inconsistent with the legislative intent of open government and should be discouraged.
10. It is regrettable also that while the Act requires a Minister to respond to an access request in thirty days, that in this case it took two months to issue a blanket refusal. The fact that the request came from the Office of the Opposition well before the opening of the fall session and that the response was only received by the petitioner after the close of the sitting will also do little to improve public perception in the administration of this Act, which is meant to be a cornerstone of our democratic tradition. While some delay may always be expected when government ministries must respond to such requests at the end of the calendar year, or at the close of the legislature’s sitting, it is important that access to information requests be dealt with in a timely fashion. Public faith in the rule of law and the administration’s commitment to open government can only be maintained through diligent and demonstrable efforts in weighing and invoking exemptions fairly and avoiding blatantly lax practices.
11. Having reviewed the Department’s file in camera pursuant to subsection 7(4) of the Act, it appears that the Department has invoked the 6(g) exemption in respect of the following records in its possession:
 - a. Memorandum to Executive Council (M.E.C.)– entitled “A Framework for an integrated service delivery System for persons with Autism in NB”
 - b. Draft budget with supporting documents: “Spurwink” website information; and a “draft audit” re Southhampton House Inc.
 - c. Letter from Fredericton Community Living Association with proposal “to operate a home for one gentleman who needs assistance and housing” dated August 26, 2003
 - d. Research paper entitled “Supportive Environments and Occupational Performance for Adults with Autism” by Allison Fennell of Dalhousie University
 - e. Position paper of the Community Advisory Committee on Autism for Region 2 dated February 9, 2004

- f. “Ad Hoc Committee Proposal” by Nora Gallagher, Regional Manager for Centracare, April 2, 2003
 - g. Briefing Note on Autism, community residence, marked “Advice to Minister Huntjens”
 - h. Draft Memorandum to Executive Council, various dates
 - i. Bundle of emails, from 2003 dealing largely with personal information of one client
 - j. Bundle of e-mails from 2004, most relating to preparation of the M.E.C. while others are exchanges with officials from other provinces in an attempt to obtain information on similar services available in those provinces.
 - k. Bundle of emails from 2005 relating to preparation of M.E.C.
12. In my view, some of these documents should be released to the petitioner. While all the documents have been retrieved as being relevant to the petition and do in fact constitute the background information from which opinions and recommendations have been prepared for the Minister and Executive Council, as set out in the M.E.C., 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.
13. The Ontario Court of Appeal recently gave judgment on the proper interpretation of a similar provision under the Ontario *Freedom of Information Act*. The Ontario statute has a more broadly worded exemption which exempts advice from public servants generally. However, Ontario’s highest court confirmed the approach of the Freedom of Information Commissioner which has been to apply the exemption only 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”. (*Ministry of Transportation v. Consulting Engineers of Ontario*, September 26, 2005, Ontario Court of Appeal, Docket C42061 Juriansz, J.A.)
14. The provision under the New Brunswick *Right to Information Act* however is a narrower exemption. It relates to opinions or recommendations, 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 New Brunswick suggests a stronger commitment of the legislator to a concept of open government that brooks few exceptions. (See also *Weir, supra*; *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)
15. Where the records in the Minister’s possession do not reveal opinions or recommendations which cabinet or the Minister are required to weigh and consider in a decision-making function; where the records constitute factual

background to a given option or recommendation, that portion of the document can and should be disclosed without offending the exemption.

- 16. In light of the above, I recommend in the instant case that the documents listed above in items b, c, d, e, and f be disclosed to the petitioner in their entirety and that in item j, those e-mails relating to information requested from other provinces and the information provided concerning existing facilities, costs and other services for persons with autism in those jurisdictions also be disclosed.**

Dated at Fredericton, this 14th day of February, 2006.

Bernard Richard, Ombudsman