



Process” as firstly, this document is deemed to be an “internal” government document, and secondly, its specific recommendations have not been presented to government for consideration.

3. I met, on June 14, 2006, with departmental officials and received some clarification of the Minister’s position. The document in question is a draft report following a comprehensive internal review by the department of the eight provincial parks in the province. The study was initiated in August 2004 with a mandate to assess each park individually and make overall recommendations for the financial viability of the Park system as a whole. A draft report was finalized in November 2005. However, before this process could be completed, government initiatives were underway implementing some of the recommendations and changing the premises upon which other recommendations had been advanced. The report was therefore never finalized or approved for submission to government for consideration. The Deputy Minister also confirmed that there are no plans at the present time to reactivate the review process.
4. Upon request, the department officials agreed to review which portions of the draft report contained factual background as opposed to opinions or recommendations as it was conceded that these portions of the report could be released, in any event. Subsequently, on June 19, 2006, I received two copies of the report. One being the integral draft report of November 30, 2005 and a second abridged version containing only the factual information without any opinions or recommendations.
5. The draft report appears to be 42 pages long and contains 58 recommendations of which 27 pertain to the parks system as a whole and the remainder are specific to one of the parks within the system. The redacted portion of the report identified for release consists of 16 pages comprised of the executive summary and a general introduction and analysis of the parks system as a whole, which were provided virtually without emendation, save two paragraphs from the conclusion of the executive summary, along with bullet form descriptions on each of the provincial parks.
6. The redacted portions consist entirely of headings setting out each recommendation for the Minister, followed by a few paragraphs outlining the rationale for the recommendation. Other than this the only other portions of the report redacted consist of a one or two page S.W.O.T. analysis completed for each park.
7. The issues arising from this petition may be summarized as follows: 1) Does the paragraph 6g) exemption apply to the whole report or can the factual background be severed and disclosed; 2) does the S.W.O.T. analysis constitute an opinion or recommendation for the Minister; 3) does the paragraph 6(g) exemption apply with respect to a draft report which has not and will not be presented to government for consideration?

8. Paragraph 6 g) of the Act provides as follows:
  6. There is no right to information under this Act where its release:  
...  
(g) would disclose opinions or recommendations for a Minister or the Executive Council;
9. The first two issues are fairly straightforward. The constant practice in New Brunswick has been to sever portions of reports or government documents intended as opinions or recommendations for a Minister or the Executive Council, where the information contains merely factual background and can be severed from the remaining portions without disclosing or revealing the opinions or recommendations tendered<sup>1</sup>. The Minister, in this case, has identified significant portions of the draft report which can be disclosed on this basis. I would recommend that these portions of the report, as contained in the version dated June 16, 2006, be disclosed to the petitioner.
10. For the same reason, I would also recommend that the S.W.O.T. analysis conducted for each park also be released to the petitioner. Like the factual background itself the S.W.O.T. analysis may help underpin the recommendations made. Moreover the S.W.O.T. analysis is by its very nature an opinion based assessment tool rather than a purely factual one. Nonetheless, I do not hesitate to categorize this information as part of the factual background which supports the recommendations made rather than information which can or should be exempted as an opinion or recommendation for the Minister or Executive Council. Revealing the S.W.O.T. analysis discloses information about the situation on the ground, it does not disclose anything about the recommendations or the opinions shared with the Minister as to what the Province's Parks policy should be.
11. The third issue is somewhat more complex. The Minister claims that the report is exempted on the basis that it would, if revealed, "disclose opinions or recommendations for a Minister or the Executive Council". At the same time the Minister admits in its response to the petitioner that the document is considered an "internal" document and that its specific recommendations have not been presented to government for consideration. Moreover the Deputy Minister confirmed to me that there are no plans to finalize the document or to give it further consideration by government.
12. The question thus arises as to whether a draft report of this nature can fall within the paragraph 6(g) exemption. I recognize that the general purpose of the Act is to codify the right of access to information held by government and

---

<sup>1</sup> *Cimon v. New Brunswick (Minister of Municipal Affairs)* (1984), 51 NBR (2d) 148 (Q.B.), Stevenson, J. ; *Weir v. New Brunswick (Minister of Health and Community Services)* (1993), 131 NBR (2d) 422, (Q.B.) Russell, J.; *Joan Kingston v. Minister of Health* NBRIOR-06-13, May 18, 2006.

not to codify the government's right to refuse access.<sup>2</sup> My own view is that policy development and public administration of provincial parks would benefit greatly from broad dissemination and public discussion of the many recommendations identified by departmental officials as possible means of improving the Provincial Parks system. John Stuart Mill in his classic treatise On Liberty, which I have quoted elsewhere, defends a strong view of freedom of expression as a foundational principle of liberal democracy<sup>3</sup>. In Mill's view society must encourage public discussion and debate and the free flow of information and opinion on every matter of public importance as it is the surest means of discerning the truth and of arriving at the best decision possible. Right to information laws in Canada are premised on the same principles.

13. Furthermore I also recognize that the *Right to Information Act* must be given a large and liberal interpretation consistent with its purpose and that exemptions under the Act should be narrowly construed. However, the exemption here is an important one which governs and protects the unfettered flow of information within government in the legislative and rule-making function. Paragraph 6(g) protects the free and frank exchange between Ministers and the civil service in matters which a Minister or cabinet may be called upon to decide. By shielding these exchanges from disclosure, the public is ensured that Minister's will receive the straight goods from their departmental staff and that all aspects of a given policy proposal can be freely debated, scrutinized and analysed, without the self-serving caution, propriety, or narrow political interest that might otherwise prevail if this deliberative process were subject to disclosure.
14. Admittedly the exemption owes more to Machiavelli than it does to Mill. In a perfect world made up of perfect human beings, Mill's view may be perfectly admissible. Ministers and departmental officials would publicly state their views, even where they disagree, they would defend them to the best of their abilities, the press would report and comment upon them, public debate would ensue and the truth would emerge. In practice however, departmental officials report to deputies who are appointed by Cabinet to serve at pleasure, Cabinet Ministers are in turn elected by their constituents. Each player in the chain might daily check himself or herself for a great number of reasons rather than put forth an honest opinion.
15. In practice therefore the Legislature has opted for a balanced approach which promotes public transparency and open government to the greatest extent possible while reserving to Ministers the right to not disclose records which

---

<sup>2</sup> *Weir*, supra quoting with approval *The Information Commissioner v. Minister of Employment and Immigration* 11 C.P.R. (3d) 81 at 86.

<sup>3</sup> John Stuart Mill, On Liberty, first published 1859, reprinted, Elizabeth Rapaport, editor, Indianapolis, Hackett Publishing Co. Inc. 1982, pp.15-20; cited in *McHardie v. Minister of Health*, NBRIOR-06-16, June 20, 2006

inform their own deliberative decision-making process. Government policy and opinions are broadly disseminated. Records created up and down the line of decision-making which inform the Minister's or Cabinet's decision-making process, through opinion or recommendations, may be disclosed, if the opinions and recommendations they contain can be severed.

16. My view is that 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<sup>4</sup>. 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<sup>5</sup>.
17. By extension, the better view regarding the application of the exemption is that it should cover work product destined for the Minister's desk or cabinet's consideration but which was not eventually sent there, due to intervening policy direction from Cabinet or for other such reasons. I can see no compelling reason why the Minister would not exercise her discretion in favour of the release of this specific report, I believe however that there are compelling public policy reasons, and a statutory exemption, which provide that she should not be compelled to do so. I therefore cannot recommend further disclosure in this case.
18. One final note in this respect, is that unlike other access to information legislation in Canada, the *Right to Information Act* does not provide any specific time-limit on the validity of the "advice from officials" exemption in paragraph 6(g). Similar exemptions in other statutes sometimes provide for a five year or ten year exemption. In my view, the absence of a time-limit does not mean that the New Brunswick exemption is unlimited in time, since indeed under subsection 10(8) of the *Archives Act* such records are available for public inspection following 20 years from the date of their creation. While it remains an open question as to whether paragraph 6g) remains valid for 20 years, the present case involves an access request in February 2006 for a draft document that was created in November 2005 and the exemption obviously applies in the context of so short a time-frame.
19. **To summarize therefore I recommend that the redacted portions of the report dated June 16, 2006 be disclosed to the petitioner. I recommend**

---

<sup>4</sup> *Ministry of Transportation v. Consulting Engineers of Ontario*, September 26, 2005, Ontario Court of Appeal, Docket C42061 Juriansz, J.A.

<sup>5</sup> *Maritime Highway Corp. v. New Brunswick (Minister of Transportation)* [1998] N.B.J. No. 299, Turnbull, J. (N.B.Q.B.)

**also that the S.W.O.T. analysis reported for each park also be disclosed. While the Minister always has a discretion to release the remainder or any remaining portion of the report, there is no basis upon which I can recommend against her reliance upon the paragraph 6 g) exemption with respect to the remaining portions of the report.**

**Dated at Fredericton, New Brunswick this                      day of June, 2006.**

---

**Bernard Richard, Ombudsman**