

4. The Minister responded to the access request on December 18, 2006 indicating in material part as follows:

The following is in response to your request under the *Right to Information Act* for documents pertaining to the “First Nations Education Initiative Inc.”

I regret to inform you that the documents you seek are not housed within the Department of Education. As per Section 3(4) of the *Right to Information Act*, “where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.”

You may want to touch base with the following departments/agencies:

- Indian and Northern Affairs Canada
- First Nations Education Initiative Incorporated
- St. Mary’s First Nation
- Aboriginal Affairs Secretariat

5. Following meetings and phone conversations with the petitioner and departmental officials it has become clear that the documents which the petitioner is seeking are, in substantial part, the minutes and documents produced by and for the Provincial Aboriginal Education Committee (PAEC). It appears that Mr. Bob Atwin, the Chair of First Nations Education Initiative Inc. is also co-chair of the PAEC and that is where the confusion arose. The petitioner has undertaken to refile her request and the Department has agreed to expedite its consideration of the revised access request.
6. As for the documents requested pertaining to the psychometric testing in Fredericton area schools, the petitioner should address that request to School District 18. Having said that, the review of this matter has shown up certain shortcomings of the current Right to Information process, which deserve comment.
7. It is regrettable that a parent who is earnestly concerned about her child’s education and taking significant pains to better inform herself regarding the educational system can obtain such an unsatisfactory response to her efforts under the *Right to Information Act*. There is a danger present in any large and highly regulated organization that real people with real concerns can all too easily get lost in the shuffle. This is what seems to have happened here.
8. However, by paying close attention to both the letter and the spirit of the law we may obtain better results. It is not appropriate to interpret an access request too narrowly just so that it can be dealt with summarily. The Act requires a more proactive approach by officials tasked with its administration. The *Right to Information Act* seeks to instill a culture of openness and accountability in government. It has to be applied and interpreted with that remedy in mind. Subsection 3(4) of the Act, upon which the Minister relies, follows

immediately subsection 3(3) which deals with clarification of ambiguous access requests. Both sections, when read together, provide as follows:

3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

3(4) Where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.

9. McNairn and Woodbury in their 2005 Annotation to the Ontario Freedom of Information and Protection of Privacy Acts, comment on similar provisions of the Ontario Act. Section 24 of the Ontario Act stipulates the requirements under the Act for filing an access request – the request must be in writing to the appropriate authority, clearly identify the record requested and be accompanied with payment of the applicable fee. Subsection 24(2) then provides that:

If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

10. In their commentary the authors note that “The requester must frame the request in sufficiently precise terms to enable the requested record or records to be identified. For its part, the institution to which the request is made has an obligation to assist in refining an imprecise request.”
11. The Annotation continues with reference to a number of cases which have dealt with the obligation to seek clarification of a request. In Ontario Order PO-1730, *Re Ontario Hydro*, Nov. 17, 1999 and Order 134 *Re Ministry of Financial Institutions*, December 27, 1989: it was noted that an institution has an obligation to seek clarification regarding the scope of a request and, if it fails to discharge this responsibility, it cannot rely on a narrow interpretation of the scope of the request on an appeal to the Commissioner.
12. In Order P-652 *Re Ministry of the Attorney General*, April 6, 1994, it was held that although an institution is not required to create records in response to a request posed in the form of a question, when such a request is received, it is incumbent on the institution to seek clarification of the request under section 24(2). Further, in Order M-493 *Re Board of Education for the City of Hamilton* it was held that when a request in the form of a question is received, an institution is obliged to consider whether records in its possession might, in whole or in part, contain information that would answer the questions asked

and seek clarification of the questions if necessary.

13. In my view subsections 3(3) of our Act and 24(2) of the Ontario Act, while worded differently serve substantially the same purpose. In order to give meaningful effect to the statute, where there is an ambiguity or some doubt as to the access request as framed, it is incumbent upon the department to make inquiries of the requester and seek clarification of the request.
14. Properly understood, it appears that the department is in possession of a number of responsive documents that could satisfy this access request, however by incorrectly naming the committee whose deliberations, minutes and reports were actually being sought the petitioner has hit a wall. Rather than have to file a petition for review with the Ombudsman, these types of issues should be addressed and resolved early in the access to information process.
15. In some respects the Act could place a clearer onus on government authorities, as is the case in other Canadian statutes, but in most cases, better enforcement of the law in this type of situation will not depend upon the wording of the statute. It will depend almost entirely upon the institution's commitment to openness and transparency in its dealings with the public.
16. Right to information coordinators in each public authority play a key role in achieving and protecting the culture of accountability fostered by the statute. By asking questions of clarification, by referring requests on to appropriate authorities in a timely manner, by making a diligent search for information and by insisting that officials involved in preparing responses to specific requests do so thoroughly in accordance with the Act and without questioning the motives of the requester, the public will gain confidence that the authority is respecting the letter and the spirit of the law.
17. The critical element in achieving a culture of accountability however lies with the Minister and his deputies. Without clear direction regarding a new commitment to achieving transparency and openness through diligent administration of the *Right to Information Act*, public authorities may default to a practice of protecting the Minister and observing the exemptions and exceptions to the Act rather than seeking to achieve its dominant purpose. This tendency may be even stronger in a period of change following the appointment of a new minister and a new government.
18. A Minister and his deputies can have great influence on the departmental culture, by giving clear direction on issues affecting good governance such as this one.
19. The latter portion of the petitioner's access request was simply not addressed in the Minister's response. It appears that the documents requested there are in

the possession of District 18. However, rather than direct the petitioner to that office the Minister's letter remains silent.

20. In a recent recommendation to the Chairperson of District Educational Council 14, I found that the Act applied to School Districts and recommended some further disclosure. Currently the School District is awaiting direction from the Department of Education and the Department of Justice before giving effect to that recommendation, as there is, in the Department's view, some question as to whether the Act in fact applies to school districts.
21. Our office routinely directs residents to school district authorities regarding their right to information requests, and school districts have never to my knowledge contested the application of the Act. In one recent decision of Mr. Justice Russell, School District 18 was directed to make further disclosure of certain records to a pupil's parent: *Munn v. Province of New Brunswick*, unreported. More recently, however, the Department has been advised that School Districts are not subject to the Act.
22. In the present case, if the Minister is of the view that the Act applies to school districts, then the petitioner should have been referred there. If the Minister is of the view that the Act does not apply to School Districts, then there arises a legitimate question as to whether the responsive records are in fact in the District's possession for the purpose of the Act, or whether the Minister remains the appropriate Minister with respect to the administration of these records. In either case it would still be appropriate to refer the petitioner on to the District, if the records sought are in fact held there. At the very least the response could indicate that the records are in the possession of a public authority which in the Minister's view is not subject to the *Right to Information Act*.
23. While there may be some difficulty in determining the issue, ignoring this aspect of the petitioner's request is not however, an appropriate response.
24. I hope that despite the delays already incurred, that the petitioner will receive some satisfaction from the department's forthcoming response to her revised access request. I would encourage the petitioner to speak with the departmental Right to Information coordinator to clarify her request.

Dated at Fredericton, this 16th day of April, 2007.

Bernard Richard, Ombudsman