

3. The Minister provided a response dated June 10, 2009, granting partial access to a number of responsive records. As payments are processed to and from government departments through the Office of the Comptroller, which falls under the jurisdiction of the Minister, responsive records from six departments were identified. As the Petitioner had sent the same request to Business New Brunswick and the Department of Natural Resources for separate responses, the Minister undertook to contact the Departments of Justice, Environment, and Post-Secondary Education, Training, and Labour to coordinate responses to the Petitioner's request.
4. As some information was withheld under the 6(a) and 6(b) exemptions of the *Right to Information Act* ("the Act"), the Petitioner appealed the Minister's response.

II. APPLICABLE LEGISLATION

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

1 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;

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;

6. The relevant provisions of the *Protection of Personal Information Act* are as follows:

1(1) In this Act

"personal information" means information about an identifiable information, in any recorded form...

III. ANALYSIS

7. First, I would like to take the opportunity to discuss the duty to assist. While the duty to assist is not a current requirement under the Act, I have been promoting it as a best practice in previous recommendations as it has been codified in other jurisdictions' access to information schemes.¹ The duty to assist will be legislatively mandated in the newly minted *Right to Information and Protection of Privacy Act* ("the new Act"), which is expected to come into force by early 2010. The duty to assist as set out in the new Act provides that "the head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner."²
8. In the present case, I was pleased to discover the level of diligence undertaken by the Minister in responding to the Petitioner's request.
9. The responsive records in the Petitioner's request were a series of coded payment details that did not provide any decipherable information in its original form in the Department's electronic database to anyone unfamiliar with the coding system. In order to provide a meaningful response to the Petitioner's request, departmental staff undertook to "decode" the coded payments to confirm the nature and purpose of each payment and to then determine whether the individual payment records were disclosable in accordance with the Act. The Department's efforts to provide a meaningful response in this context are commendable.
10. Further, the Minister undertook to gather information from and coordinate a collective response with three other departments in responding to the Petitioner's request. As the responsive records included payments processed by the Office of the Comptroller on behalf of other departments, the Minister could have forwarded the request on to the other departments for individual response, but took the step of gathering all the relevant information to provide the Petitioner with one comprehensive response.
11. While there may well be situations where departments should not be providing responses on behalf of other departments,³ this does not prove problematic in the current situation as the responsive records fall under the jurisdiction of multiple departments. While the individual departments are responsible for the context and authority to issue payments, payments are processed through the Office of the Comptroller. Thus, different pieces of information relating to the responsive records are held between the Office of the Comptroller and the departments with payment authority for the responsive records.

¹ *McHardie v. New Brunswick (Office of Human Resources)*, NBRIOR 2007-04 at para. 6.

² *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6, s. 9.

³ See for example *Poitras v. New Brunswick (Minister of Health)*, NB RIOR- 2009-11.

12. This particular case suggests that where it is feasible to do so, departments may respond to requests for information in conjunction with other departments where responsive records are held by departments concurrently. While the context of this request deals with financial information held by both the Comptroller and other departments, the government currently has a number of inter-departmental programs and initiatives within its mandate, and this level of cooperation may be required to respond to certain requests for information under the Act.
13. Further, in our review, we were able to meet with officials of the other departments to review their respective responses, and thus have no issue with this process being followed to streamline and simplify responses to right to information requests, where appropriate to do so.
14. I also note that in regards to conducting historical searches for records beyond the financial documentation retention schedule of six years, which will be discussed in greater detail below, departmental staff went above and beyond the required parameters of the request with the aim to provide a more complete response to the Petitioner's request.
15. While the specific parameters of the duty to assist will need to be fleshed out on a case-by-case basis once in the new Act is in force, it is my opinion at this time that departmental staff took all reasonable steps to provide a meaningful and comprehensive response to the Petitioner's request.
16. Finally, I note that it is also commendable that this was accomplished within the 30-day response timeframe.

IV. INFORMATION PROTECTED BY LAW

17. Both the Departments of Finance and Justice claimed that the responsive records under their care could not be released as the confidentiality of the information in question is protected by law for the purposes of paragraph 6(a) of the Act. In the response to the Petitioner, neither department indicated the nature of the responsive records or the statutory authority under which the confidentiality of the information was protected, and both provided the following response:

...your request was denied on the basis that there is no right to such information, as its release would disclose information the confidentiality of which is protected by law for the purposes of section 6(a) of the *Right to Information Act*.

A. DEPARTMENT OF JUSTICE'S RELIANCE ON 6(A)

18. The Department of Justice claimed a statutory-based privilege that precludes the release of any information relating to the responsive records, including the nature of the record and also the statutory provision on which the Department

relied as the disclosure of this information would violate the confidentiality provision in question.

19. While recognizing that this constitutes a somewhat frustrating response for the Petitioner, my review of this matter included an examination of the responsive records as well as the claimed statutory-based confidentiality provision.
20. As I am also precluded from releasing confidential information under my mandate, I can only confirm that I am satisfied that the Department of Justice has properly claimed statutory privilege in relation to the responsive records under its control.

B. DEPARTMENT OF FINANCE'S RELIANCE ON 6(A)

21. The Department of Finance did not claim statutory privilege, but rather relied on its established practice of not releasing certain kinds of information contained in payment records based on confidentiality concerns in invoking the 6(a) exemption.
22. In reviewing this exemption claim with Department of Finance officials, it was agreed that when departments invoke the exemption provision under 6(a) that they also provide as much information as possible to explain why the confidentiality of the requested information is protected by law. Ideally, departments relying on this exemption would be able to provide a substantiating statutory basis.
23. In this case, the Minister relied on the *Protection of Personal Information Act* ("POPIA") as in its opinion, the responsive records contained personal information and thus the information is protected by the provisions of POPIA. This information was not included in the Minister's response to the Petitioner.
24. I find the Minister's combination of the 6(a) exemption and POPIA to be somewhat unusual as the 6(b) exemption specifically protects the confidentiality of personal information. In any event, I am not certain that either exemption would cover this situation as the information in question is not personal information, for reasons which I will now address.
25. The Petitioner's request was for any payment information about a number of business corporations. The definition of "personal information" in both the Act and POPIA state that it means "information about an identifiable individual." Can a business entity be considered an "identifiable individual" for the purposes of the Act and POPIA?
26. While there are no precedents directly on point either from my Office or the Court of Queen's Bench, this issue has been considered by the Federal Court

in relation to the federal *Access to Information Act*⁴ (“ATIA”) and *Privacy Act*.⁵ In its 1996 *Tridel* decision,⁶ the Court held that Tridel, as a corporation, does not qualify as an “identifiable individual” for the purposes of ATIA based on the definition provided in the section 3 of the *Privacy Act*, providing:

Thus, for Tridel Corporation to take advantage of s.19 it must somehow qualify as an "identifiable individual" and to do so has argued that his [sic] term may include anything, including a corporation with the rights, powers and privileges of a natural person, so long as it has sufficient distinctive characteristics which separate it from a general pool. CMHC argues that corporations do not have a race, colour, religion, personal records and opinions, and therefore, the provisions concern information about people.

I have no doubt that “an identifiable individual” is a human being that can possess all the very personal characteristics and experiences enumerated in the subsections quoted.⁷

27. The Court revisited this issue in its 2003 *Geophysical Service* decision, and relying on the previous *Tridel* decision, found that corporations or unincorporated bodies are not “identifiable individuals” as per the definition in section 3 of the *Privacy Act*.⁸
28. Given the similarity in intent and spirit behind both the federal and provincial access and privacy regimes, I find no reason not to adopt the Federal Court’s analysis on this issue and to find that a business entity is not an identifiable individual for the purposes of the Act and POPIA. I therefore find that the Minister’s reliance on the 6(a) exemption based on the confidentiality provisions of POPIA in this context must fail. Similarly, the 6(b) exemption would also fail in relation to information about a business entity.
29. As the Minister’s reliance on the 6(a) exemption based on POPIA fails, I must now consider whether the information is disclosable or if it is exempt from disclosure under a different rationale.
30. In order to determine whether the responsive records are exempt from release under a different rationale, the nature of the responsive records in question is relevant. The responsive records in this case relate to taxpayer information relating to the valuation of real property, which as I understand is governed by the *Assessment Act*.⁹

⁴ *Access to Information Act*, R.S.C. 1985, c. A-1.

⁵ *Privacy Act*, R.S.C. 1985, c. P-21.

⁶ *Tridel Corporation v. Canada Mortgage and Housing Corporation*, (1996), 115 F.T.R. 185 (Fed T.D.).

⁷ *Ibid.*, at para. 23, in reference to the section 19 personal information exemption provision of ATIA and the definition of “identifiable individual” as provided in section 3 of the *Privacy Act*.

⁸ *Geophysical Service Inc. v. Canada-Newfoundland Offshore Petroleum Board*, 2003 F.C.T. 207, at para. 86.

⁹ *Assessment Act*, R.S.N.B. 1973, c. A-14.

31. In *Repap NB v. New Brunswick (Minister of Economic Development and Tourism)*, the Court of Queen's Bench considered whether the Minister properly exempted information from release under 6(a) in accordance with the confidentiality provisions under subsections 12(1) and (4) of the *Assessment Act* in response to a corporation's request for all documents in the Minister's possession regarding real property assessments done of its own property.¹⁰ The Court found that information contained on the tax and assessment roll can be released, and that the Director has the authority to release other information under certain conditions. In both of these circumstances, information would not be exempt from disclosure under paragraph 6(a) of the Act.¹¹
32. My review of the responsive records in question indicated that the information contained in them does not form part of the information contained in the tax and assessment roll, and thus it is up to the Minister to determine if the information is eligible for disclosure in accordance with the disclosure provisions in the *Assessment Act*.
33. As the Minister's reliance on POPIA as substantiating the claimed 6(a) exemption fails, I recommend that the Minister reevaluate the application of the exemption to the responsive records in light of the above discussion of the confidentiality provisions of the *Assessment Act*.
34. Regardless of the content of the rationale behind the application of the 6(a) exemption, the failure to provide reasons as to why the exemption applies to the responsive records leaves room for improvement.
35. The responsive records are governed by a piece of legislation that provides specific guidelines on what information is disclosable under certain specific circumstances. As there is nothing in either act that indicates that the confidentiality provisions of the *Assessment Act* have paramountcy over the Act, I see no reason why the Minister should not provide information about the nature of the information and the statutory rationale as to why the 6(a) exemption applies to responsive records of this kind. As a general rule, departments should provide this information in denying a request for information unless specifically prohibited from doing so, as was the case with the responsive records held by the Department of Justice.
36. Finally, providing reasons that substantiate and clarify departments' reliance on the 6(a) exemption helps ensure accountability and transparency in the application of exemptions and provides requestors with an understanding of why certain information is not being released. Depending on the situation, providing this information may also be helpful to the requestor if he or she

¹⁰ *Repap NB v. New Brunswick (Minister of Economic Development and Tourism)*, 1995 CanLII 4141 (N.B.Q.B.).

¹¹ *Ibid.*, at page 6.

wishes to request further clarification and how to be more precise in framing similar future requests.

V. PERSONAL INFORMATION

37. Some of the documents provided by the Department of Post-Secondary Education, Training and Labour were redacted prior to release to protect personal information under paragraph 6(b) of the Act. The redacted information includes the names of departmental employees and the name of an employee of one of the affiliated companies.
38. While it has been my position that the names of civil servants acting in their professional capacity do not constitute personal information for the purposes of paragraph 6(b),¹² the Court of Queen's Bench has found differently in its 2007 *Hayes* decision.¹³ As the Court has definitively ruled on this issue, I am not in a position to recommend that the redacted names be released.
39. As for the name of the employee of the affiliated company, I am satisfied that this constitutes personal information for the purposes of 6(b) and was appropriately severed from the record in question.

VI. DESTROYED FINANCIAL DOCUMENTS

40. The Petitioner's request covered financial documents over a twenty-nine year span; however, the Department's retention schedule for financial documents is six years plus the current year, meaning that all paper records prior to the 2002-2003 fiscal year have been destroyed in accordance with the retention schedule policy.
41. As mentioned above, departmental staff could have fulfilled the search for responsive records based on the above, but undertook a further search of an old computer system from which information on payments from 1999 to 2001 had not been deleted.
42. As such, I am satisfied that the search for responsive records was comprehensive and that historical payment information was deleted in accordance with the departmental retention schedule.

VII. CONCLUSION

43. **In light of the applicable legislation and the nature of the information involved, I find that the severed portions of the record disclosed to the Petitioner were appropriately severed, and the claims of confidentiality**

¹² *Barnett v. Dubé*, NBRIOR 2006-06; *McHardie v. Green*, NBRIOR 2006-16.

¹³ *Hayes v. New Brunswick (Minister of Intergovernmental Affairs)*, 2007 NBQB 47.

were properly applied by the Ministers of Justice, Environment, and Post-Secondary Education, Training, and Labour respectively.

44. I recommend that the Minister of Finance reconsider its rationale for withholding the requested information in accordance with the confidentiality provisions of the *Assessment Act*.
45. Otherwise, I am satisfied that the disclosure made in this case constitutes a full and frank disclosure of all records in the Minister's possession related to this request.

Dated at Fredericton, this 11th day of December 2009.

Bernard Richard, Ombudsman