NBRIOR- 2007 – 11

IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1) (b) OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3

Between: **Heather MacLaughlin, for the Daily Gleaner**
The petitioner

And:

Michael Murphy,
Minster of Health
The Minister

RECOMMENDATION

1. This referral, dated April 11, 2007 arises from a *Right to Information Act* request by Heather MacLaughlin, who was then a reporter with the Daily Gleaner, Fredericton's daily newspaper, dated February 9, 2007. The petitioner's access request was framed as follows:

> Please provide all correspondence, letters, memos, reports, diary notations, ministerial notes, e-mails and minutes of conversations between the Province of New Brunswick and Nashwaak Keswick Ambulance Inc. between 2003 and the end of 2006.
>
> Also, please include the ambulance service's quarterly reports on patient care and all financial reports on financial statements – audited and otherwise.
>
> Additionally, please provide phone records and phone bills for 2005 and 2006 for all mobile phones, cellular phones, pagers, Blackerrys or other personal communication devices used by members of Nashwaak Keswick Ambulance Inc.'s board of directors.

2. The petitioner received a letter of reply, dated February 9, 2007, containing the Minister's reply to her request which can be set out in full as follows:

> I am writing in response to your request under the *Right to Information Act* for information regarding Nashwaak Keswick Ambulance Service Inc. received by my office on January 11, 2007.

Under the *Right to Information Act*, there is no right to information where its release would:

- reveal personal information concerning another person (paragraph 6(b))
- reveal financial, commercial, technical or scientific information given in or pursuant to an agreement entered into under the authority of a statute or regulation, if the information relates to the internal management or operations of a corporation that is a going concern (paragraph 6 (c.1)(ii))
- reveal information gathered by police, including the Royal Canadian Mounted Policy, in the course of investigating any illegal activity or suspected illegal activity or the source of such information (paragraph 6 (h.1))
- disclose any information reported to the Attorney General or his agent with respect to any illegal activity or suspected illegal activity or the source of such information (paragraph 6(h.2))

The information you requested falls into one or more of the above categories. For this reason, I am unable to provide you with this information.

Attached are the appropriate forms should you wish to challenge my decision.

3. The petitioner filed her referral with our office on April 11, 2007 and we had an opportunity to view *in camera* the entire file related to the request and referral on May 30, 2007, pursuant to subsection 7(4) of the *Right to Information Act*.

4. Upon review of the file, the Department has invoked exemptions 6(b), 6(c) 6(c.1)(ii), 6(g), 6 (h.1), and 6 (h.2) under the *Act* to deny the petitioner access to seventy-six identified documents. In fairness, the Department's file also contains documents that they have withheld from the petitioner because they are internal non-responsive documents and not exchanges between the Department and Nashwaak Keswick Ambulance Inc. as per her request. To assist with our review, the Department grouped the withheld documents based on the exemption claimed. A detailed list of the documents reviewed and exemptions claimed by the department can be found in *Appendix A.* While this was no doubt of assistance to our office, I would like to take this opportunity to remind all Departments of their obligation to make similar efforts when replying to petitioners seeking access to documents under the *Act* as well.

5. As was recently pointed out in another recommendation arising from a referral under the *Act* (See *Hagerman v. Minister of Education*, NBRIOR-2006-03), responses to right to information requests must provide sufficient reasons to the petitioner (See also, *Weir v. New Brunswick* (1992) 130 N.B.R. (2d) 202 (Q.B.) Russell, J.). As a result, when responding to a request under the *Act* we insist that all Ministers list for petitioners all relevant documents in their

department's possession, as well as identifying the exemption the Department is claiming with respect to each specific document to which they deny the petitioner access. By listing all the documents in the Department's possession, accompanied by the grounds for the exemption, the Minister allows the petitioner to reasonably assess whether the Department has identified all the documents they believe to be relevant. As evidenced by this case, such grouping also facilitates the Ombudsman's review by detailing specific documents against specific exemptions. More importantly though, 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 to access conferred by law.

6. The abovementioned procedure for responding to petitioners is, in my view, the type of response that Ministers must provide under statute in every case (See *Weir v. New Brunswick* (1992) 130 N.B.R. (2d) 202 (Q.B.) Russell, J.). As Mr. Justice Russell points out in *Weir*, "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". In larger files such as this one, blanket denials to documents based on one or more of the exemptions under the *Act* will rarely escape challenge entirely. We acknowledge that with highly sensitive files Ministers and their officials may be reluctant to list the documents in their possession and the grounds for non-disclosure out of fear that they might consequently reveal confidential, personal, and/or private information. Regardless of these legitimate concerns, however, this unforthcoming and restrictive administration of the law is inconsistent with the legislative intent of open government and this office strongly discourages such practices (See *Kingston v. Minister of Family and Community Services*, NBRIOR-2006-04).

7. Having said that, the following is an analysis of the documents withheld by the Department and the exemptions claimed over each of the documents, which I have organized based on the headings provided to this office by the Department to assist with our review.

INTERNAL EMAILS

8. The Department labeled the first group of documents withheld from the petitioner as, "Internal Emails". This heading applies to documents 1 through 21 contained in *Appendix A* and does not reflect any enumerated exemption in the *Act*. Presumably, the Department labeled the documents as such to indicate their internal nature, as well as to reflect the fact that the documents were not exchanges between the Department and Nashwaak Keswick Ambulance Inc. as per the petitioner's request. As such, all the documents contained under the grouping "Internal Emails", documents 1 through 21, were properly withheld from the petitioner as they were not what was requested from the Department.

PERSONAL INFORMATION EXEMPTION

9. The Department labeled the second group of documents withheld from the petitioner as, "Personal Information". This heading applies to documents 22 through 28 contained in the attached appendix and reflects the exemption contained in subsection 6(b) of the *Act*, which states, "There is no right to information under this Act where its release would reveal personal information concerning another person".

10. By withholding documents based on subsection 6(b), the protection of personal information exemption, the Department relies also on the following definitions under the *Act* :

> "personal information" means information about an identifiable individual;
>
> **…**
> "identifiable individual" means an individual who can be identified by the contents of information because the information includes the individual's name, makes the individual's identity obvious, or is likely in the circumstances to be combined with other information that includes the individual's name or makes the individual's identity obvious;

11. In recent recommendations from this office, I have had opportunity to comment upon the need to balance the public interest in disclosure against the private interests in protecting the confidentiality of personal information, when paragraph 6 (b) or (b.1) exemptions are invoked. It is unnecessary to repeat that analysis here in full; however, it is important to reiterate that it is sometimes appropriate where privacy interests and access to information interests are in conflict to balance those interests one against another. Further, I wish to emphasize that a blind application of the exemption typically leads to incongruous results that would defeat the provisions and the purpose of the *Act*. For a more detailed analysis of the personal information exemption than will be provided here, please refer to recommendation *Daniel McHardie v. Minister of Health*, NBRIOR-2006-16.

12. Personal information is broadly defined so as to extend the scope and application of the *Protection of Personal Information Act*. As was found in *Daniel McHardie v. Minister of Health* NBRIOR-2006-16, the government's current practice of confidentiality and diligent protection of personal information is helpful in underscoring the importance of these foundational norms in every aspect of public administration. Such practices, however, should not be interpreted so as to displace the careful balancing of informational rights and privacy rights set out under the *Right to Information Act* and the *Protection of Personal Information Act*. Indeed any conflict

between these statutes and such provisions, although it may be a rare occurrence since the provisions are largely complementary, must be resolved in favour of a purposive and organic interpretation of the quasi-constitutional legislative texts themselves. These two statutes must be considered paramount, and indeed, as the Supreme Court of Canada has consistently held with respect to comparable federal legislation, they must be read and applied together "as a seamless code" (See *Daniel McHardie v. Minister of Health* NBRIOR-2006-16).

13. Following my recommendation in NBRIOR-2006-16, I have had the opportunity to consider the recent decisions of Mr. Justice Riordon in *Barnett*[1] and Mr. Justice Grant in *Hayes*[2]. These binding precedents require government agencies to adopt an expansive view of the personal information exemption under our statute. I do not view these recent decisions of our Court of Queen's Bench as being opposed in principle to the approach laid out in the Supreme Court of Canada in *pari materia*. In other words, some balancing of the public interests in transparency and the private interests favouring protection of privacy will always be required. As a matter of legislative choice, however, the wording of the New Brunswick statute is decidedly more pro-privacy than certain other legislative provisions and any doubt in balancing the interests should be resolved in favour of the protection of privacy. This is also consistent with recent case-law from the Supreme Court of Canada[3].

14. In any event, any claim for exempting records from disclosure is always subject to the rule respecting severability, set out in section 4 of the *Act*. In this matter, the Minister may not have adequately considered the possibility of disclosing non-exempt portions of the records in question.

15. In sum, in matters involving scrutiny and review of public health services in the province, it should generally be possible to disclose some information, while not revealing names or personal information, so that both the interests of transparency and respect for privacy can be reconciled. Indeed on the basis of the evidentiary record before me, there is very little to suggest that documents 22 through 28 could not be resolved in part on this basis. The onus of establishing the validity of an exemption lies with the Minister, and I find very little in the Minister's response to the petitioner, or in the oral explanations of his officials during our *in camera* review of the documents, or in the documents themselves, that puts forward a compelling case to uphold the paragraph 6(b) exemption. As a result, I recommend disclosure of documents 22, 23, 24, and 26 after the government has severed all personal information within the documents to protect the privacy of identifiable individuals. As it pertains to documents 25, 27, and 28, I find that in effect severing personal

[1] *Barnett v. New Brunswick* 2006 NBQB 411, November 30, 2006 Riordon, J.
[2] *Hayes v. New Brunswick* 2007 NBQB 047, February 5, 2007, Grant, J.
[3] *H.J. Heinz Co. of Canada Ltd. v. Canada* , 2006 SCC 13, April 21, 2006.

information will render the documents meaningless as there will be no remaining material in the documents; thus, based upon the broad interpretation of the 6 (b) exemption required by our courts, the Minister acted appropriately by withholding those documents from the petitioner and I find no corresponding duty to sever the information and release them.

ADVICE TO MINISTER EXEMPTION

16. The title given to the third group of exempted documents was, "Advice to Minister". This heading applies to documents 29 through 35 contained in *Appendix A* and reflects exemption 6 (g) in the *Act*, which states, "there is no right to information under this Act where its release would disclose opinions or recommendations for a Minister or the Executive Council".

17. As I have found in past recommendations, the subsection 6(g) exemption only protects those documents or portions of documents that set out opinions or recommendations for the Minister or cabinet to consider. Below I will briefly canvas the precedent established in past recommendations for exemptions based on subsection 6(g). For a more expansive analysis of the exemption, please see *Joan Kingston v. Minister of Family and Community Services* NBRIOR-2006-04, *Shannon Hagerman v. Minister of Education*, NBRIOR-2006-03, *Joan Kingston v. Minister of Health* NBRIOR-2006-13, and *T.N. v. Minister of Family and Community Services* NBRIOR-2006-10.

18. Under the New Brunswick *Right to Information Act*, the provision allowing for an exemption based on advice to the Minister is a narrow 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 addition, 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 *Weir, supra*; *Cimon v. New Brunswick* (1984), 51 NBR (2d) 148 (Q. B.) Stevenson J.; *Joan Kingston v. Minister of Family and Community Services* NBRIOR-2006-04).

19. Several recommendations from this office have followed the recent decision of Mr. Justice Jurianzs of the Ontario Court of Appeal on this point. In dealing with a similar exempting provision under the Ontario *Freedom of Information Act*, the Court concluded that the exemption should only apply 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"[4]. Thus, only those documents or portions of documents that set out

[4] See *Ministry of Tranportation v. Consulting Engineers of Ontario,* September 26, 2005, Ontario Court of Appeal, Docket C42061 Juriansz, J.A.; *Kingston v. Minister of Family and Community Services* NBRIOR-2006-04, February 14, 2006

opinions or recommendations for the Minister or cabinet to consider are protected by the 6(g) exemption. Further, 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.

20. In this review, the Department has identified documents 29 through 35 as being relevant to the petition but exempt for containing advice to the Minister. Although it was our observation that these documents may in fact constitute background information from which opinions and recommendations have been prepared for the Minister and Executive Council, I am not required to make a formal recommendation about whether they constitute advice because the documents are non-responsive to the petitioner's request. None of the documents shielded from the petitioner are communications between the Department and Nashwaak Keswick Ambulance Inc. as per her request; rather, the documents are either internal communications or communications between the Department and some other third party. As such, the Department did not unlawfully withhold documents 29 through 35 from the petitioner, albeit for reasons other than the exemption claimed, and I do not recommend their release to the petitioner.

CONFIDENTIAL BUSINESS INFORMATION EXEMPTION

21. The Department labeled the fourth group of documents as, "Confidential Business Information". This heading applies to documents 36 through 65 contained in *Appendix A*. Presumably, this reflects subsection 6 (c) in the *Act* refusing access if it, "would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract".

22. As was recently pointed out in another recommendation, *Shannon Hagerman v. Minister of Energy and New Brunswick Power Holding Corp.* NBRIOR-2006-18, the leading case in New Brunswick on the interpretation of paragraph 6 (c) is an early one that arose in Mr. Justice Stevenson's court. In rejecting a claim for exemption based on paragraph 6(c), Stevenson, J. held as follows:

> It is my view, however, that the application of paragraph 6(c) of the Act - so far as the question of financial loss or gain is concerned - must be determined on a narrower ground. In my opinion, to successfully rely on that exclusion, it must be established that the loss or gain would result directly from disclosure of the information. Here the Minister relies on what can only be characterized as a speculative future gain or loss to the contractors.

> 18 … The general reference in Mr. Ganong's affidavit to "the settlement of contractual claims or in potential litigation of contractual claims" is of little evidentiary value. There is no clear evidence that there are in fact outstanding claims which would be affected. More specific evidence is necessary to support exclusion from disclosure on that ground.

23. Similarly, Mr. Justice Turnbull in his oral reasons in *Maritime Highway Corp.* rejected a paragraph 6 (c) exemption on the same basis. In that case, the Court held that: "that subsection must have reference to immediate gain or loss and be connected with the scheme and does not protect some future potential of loss".

24. In keeping with my decision in *Shannon Hagerman v. Minister of Energy and New Brunswick Power Holding Corp.* NBRIOR-2006-18, I will again state that Canadian court decisions and decisions of Information and Privacy Commissioners elsewhere interpret comparable provisions in the very same manner. For instance, a recent decision of a Nova Scotia Review Officer summarized the law in Canada as follows:

> According to s. 481(1)(c)(i), the Third Party must show that disclosure of the Contract would "harm significantly" the competitive position of or "interfere significantly" with the negotiating position of the Third Party. This harm must be proven and a standard is required as evidenced in several court cases:
>
> > "… the legislators, in requiring a 'reasonable expectation of harm' must have intended that there be more than a possibility of harm to warrant refusal to disclose a record." [*Chesal v. Attorney General of Nova Scotia*(2003) NSCA 124 at para. 38]
> >
> > There must be "a clear and direct connection between the disclosure of specific information and the injury that is alleged." [*Lavigne v. Canada (Office of the Commission of Official Languages)* (2002) S.C.C. 53 at para. 58]
>
> The Federal Court believes evidence of harm
>
> > "must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever." [*Canada (Information Commissioner of Canada) v. Canada (Prime Minister)* (T.D.), [1993] 1 F.C. 427, 1992 CanLII 2414(F.C.)]

25. Another helpful reference in this matter is the recent decision of Mr. Justice Edmond Blanchard of the Federal Court of Canada in *C.I.B.C. v. Canada (Canadian Human Rights Commission)* 2006 FC 443, April 24, 2006. In that case, a bank objected to disclosure based on an exemption in paragraph 20(1)(c) of the *Federal Access to Information Act*, which is virtually the same as paragraph 6 (c) of our *Act*. In rejecting the claim for exemption on this basis Blanchard, J. affirmed as follows:

> The jurisprudence establishes that a party relying on paragraph 20(1)(*c*) to resist disclosure of information must adduce evidence of harm that could reasonably be expected to be caused by the disclosure. The Federal Court of Appeal in *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services*), (1990), 67 D.L.R. (4th) 315, set the threshold at "probable harm" and also held that the burden of proof, on a balance of probabilities, rests with the Applicant. The Court of Appeal further stated that speculation or mere possibility does not meet the required standard. That is, the Applicant cannot meet its burden of proof by simply affirming by affidavit that disclosure would cause the requisite harm for the purposes of a paragraph 20(1)(*c*) exemption. Additional evidence is needed to establish probable harm: see *SNC-Lavelin Inc. v. Canada(Minister of Public Works)*(1994), 79 F.T.R. 113 (T.D.); and *Canadian Broadcasting Corp. v. National Capital Commission*, [1998] F.C.J. No. 676 (QL) (T.D.).[5]

26. Having regard to the submissions provided by the Department of Health, and having regard to the documents in respect of which the exemption is claimed, I find that there is nothing to distinguish this case from other cases where the exemption has not been upheld. The Department of Health has not satisfied their burden of proof; rather, the department is merely claiming an exemption based on speculative future potential losses by government, or its service provider, as to which it is not clear, without any support or evidence of their allegation. In addition, the Minister of Health failed to notify Nashwaak Keswick Ambulance Service Inc. or request their submissions as to future losses, which further prevents the department's ability to mount a credible defence on its own behalf or on behalf of the service provider based upon the subsection 6(c) exemption. Consequently, I am respectfully of the view that the Minister has not discharged the burden of proof placed upon him by section 12 of the Act to maintain any claim for exemption based on paragraph 6(c) in relation to documents 36 through 65. Consequently, I recommend release of documents 36 through 65, with the exception of documents 38, 46 and 48 that need not be released, as they are not within the scope of the petitioner's request.

FINANCIAL, COMMERCIAL, TECHNICAL, SCIENTIFIC EXEMPTION

27. The Department labeled the fifth group of documents as, "Financial, commercial, technical, or scientific". This heading applies to documents 66 through 69 contained in the attached appendix. This group of documents reflects subsection 6 (c.1)(ii) in the *Act*, which exempts the release of information if it "… would reveal financial, commercial, technical or

[5] *CIBC v. Canada*, supra at para. 110. See also Janssen-Ortho Inc. v. Canada (Minister of Health) [2005] FC 1633 following *Air Atonabee v. Minister of Transport* (1989) 27 C.P.R. (3d) 180 (FCTD), Mackay, J.; see also *Ontario First Nations Limited Partnership v. Information and Privacy Commissioner* Court File no.571/04, February 16, 2006 Ont. Superior Ct., Divisional Court, Swinton, J. and the OIPC decision requiring disclosure of contracts in the Sky-Dome construction project: *Stadium Corporation of Ontario Limited Case* Order P-263, January 24, 1992, Tom Wright, Commissioner, (OIPC).

scientific information given in or pursuant to an agreement entered into under the authority of a statute or regulation, if the information relates to the internal management or operations of a corporation that is a going concern".

28. As it pertains to the exemption claimed over documents that are financial, commercial, technical, or scientific, I have not had much of an opportunity in past decisions to comment on the application of this exemption.

29. Looking only to the words of the statute and the general economy of the Act, it seems clear to me that the Legislator was concerned here to allow some exemption for active business corporations that are placed under some reporting obligation either by express agreement, by statute or regulation. In other words the entrepreneurs whose interests are protected may not have sought to profit by doing business with government and yet government has stepped in to regulate some aspect of their business and has required disclosure. This is relevant insofar as the case-law has established that those who wish to keep their private business absolutely private would do well to not tender work on public contracts. Thus when in comes to transparency and democratic oversight of significant public undertakings the public interest may way more in the balance than say a private interest in maintaining a competitive advantage based upon price point in an open-market. On the other hand if for some pressing public health or emergency preparedness reason, private sector research into certain sectors of activity is subject to some form of public reporting, the private interest in maintaining competitive advantage based upon the science under review may be more important than the public interest in transparency beyond reporting to the appropriate regulating agency or authority. In this way one might expect that exemptions claimed under paragraph 6 (c) will often be more difficult to prove than exemptions under paragraph 6(c.1) ii).

30. I find only limited guidance from the courts, Madam Justice Garnett having given in *Metz Farms* a fairly narrow interpretation of subsection 6(c.1)(i) of the *Act* and holding the Minister to its strict proof. I find there only further confirmation of the rule that exemptions under the Act are to be narrowly construed. Any attempt at statutory interpretation must begin with the words of the statute and a search for legislative intent. All legislation should be given such fair, large and liberal interpretation as will best attain its objects and purpose.

31. The dominant purpose of the *Right to Information Act* is to protect accountability and transparency in the management of the public affairs of this Province. The Act achieves that purpose by setting out a broadly framed right to information in section 2, subject to a number of specific exemptions. The Act was the second such statute in adopted Canada and its framework has remained relatively unchanged since 1978.Unlike *Access* statutes in several other provinces adopted subsequently, the New Brunswick statute does not

make explicit reference anywhere in its exempting provisions to any harm principle. Does this mean that the exemptions under our Act are to be applied without any reference or consideration of the harm they are intended to avoid or remedy? I think not. In my view a reasonable and intelligent interpretation of the legislative scheme under review here requires the complaints officer to look to the right being invoked, to consider also the exemption being claimed and to determine fairly whether the balance of convenience or the balance of harm, as it is sometimes called, favours, in the case before him, the general rule of disclosure or the exemption, narrowly defined. In other words a balancing of harm is inherent in the disposition of every case. To claim otherwise is to suggest that the terms of the statute can be applied blindly without any consideration of their purpose and would lead to a great many unfair results.

32. In order to establish a claim under paragraph 6 c.1) ii) I believe that the Minister must advance proof of the following elements:

1) the records in question must contain financial, commercial, technical or scientific information that is considered proprietary or confidential in that it has not previously been disclosed;
2) the records must have been disclosed to the Minister under the requirement of some statutory or regulatory provision or pursuant to the terms of a contractual agreement;
3) the information must relate to the internal management or operations of a private corporation
4) the private corporation must be a going concern such that disclosure of the information is likely to harm its operations to such an extent that disclosure in the public interest of the information sought is unjustified.

33. In reviewing the circumstances of this case, I have grave reservations in allowing any exemption on the basis of the exemptions claimed in respect of records 66 through 69. I have no specific submissions on this point to explain what aspect of the records are considered either scientific, technical, commercial or financial. There is nothing to indicate that the documents were disclosed under the compulsion of any particular statutory, regulatory or contractual provision. The Nashwaak Keswick Valley Ambulance Inc. has not made any submissions, nor been asked to do so and there are no particulars available to me as what aspect of these records may, in their view, relate to their internal management or operations, nor what the nature of their business is, as a going-concern, nor how the disclosure of these records, or any other records sought may affect them.

34. For these reasons alone, I feel compelled to find that the Minister has failed to meet the onus of proof placed upon him by section 12 of the Act and that the claim for exemption must fail. However, there is more. On the basis of this limited and unassisted review of the records themselves, I find that there

would be greater harm to the public interest in refusing disclosure of the records sought than there could be in protecting any private interest NKAS Inc. may have in relation to any financial, commercial, technical or scientific information they may contain. It seems clear enough to me from the records themselves that there is no scientific information at stake here. The technical information such as it is does not appear at first blush to be proprietary or confidential as it relates primarily to the coverage area NKAS is required to disserve. The claim appears to be based largely upon financial or commercial information as it relates to the contract to provide services and these claims should more properly be addressed under exemption 6 (c) above rather than as a matter of protecting NKAS trade or intellectual property interests.

35. Finally, I am not convinced that NKAS Inc. is a going concern within the meaning of the statute such that the Minister could rely on an exemption under paragraph 6(c)i) or ii) on their behalf in any event. To put it plainly this case raises the problem of contracting out. Ambulance services are essentially public services insofar as they relate primarily to the transportation of patients with critically acute needs to public hospitals around the province for emergency medical treatment. Government has found it expedient over the years to purchase these services in many regions from private service providers. The contracts in respect of these purchases of services remain however significant public expenditures for an essential public service that is of great concern to New Brunswickers. The law should guard against any interpretation of the statute that would allow the Minister to shield matters of public expenditure from greater scrutiny merely by contracting services out to the private sector. The section 6(c)ii) exemption is aimed at encouraging private sector investment in research and development and reserving to players in the private market the spoils of such investments by protecting the competitive advantage they may derive from them. There is virtually nothing in the records before me that relates to any such interests on the part of NKAS Inc., nor indeed any claim of such protection by NKAS Inc. Suffice to say that in my view the 6(c)ii) exemption cannot be claimed in respect of a private corporation whose sole or principal object or operation is to provide services under contract to the Minister. A recent decision from Ontario, *Re Niagara (Regional Municipality)*[6], while distinguishable in many respects, takes very much the same view.

36. Consequently I find that documents 66 through 69 are not exempt under paragraph 6(c)ii) and, subject to what follows, would recommend their release to the petitioner.

POLICE/RCMP INVESTIGATION EXEMPTION

[6] 2007 CanLII 14909 (ON I.P.C.)

37. There was a sixth group of documents specifically placed in a piled labeled by the Department as, "Police/RCMP Investigation". This heading applies to documents 70 through 73 contained in *Appendix A*. This heading reflects exemption 6 (h.1) in the *Act*, which states, "there is no right to information under this Act where its release would reveal information gathered by police, including the Royal Canadian Mounted Police, in the course of investigating any illegal activity or suspected illegal activity, or the source of such information".

38. The final remaining bundle of documents reviewed were contained in an individual employee's work file and the Department did not label them with a specific exemption; rather, they told us that all the documents in the file were copies of the other documents grouped under the exemptions. The documents we found in the employee's file that were not duplicates are labeled in the appendix as documents 74 through 76. The individual employee, at the time of presenting the file, expressed to us that the documents contained therein were exempted from the request based on paragraph 6 (h.1) as well.

39. Despite the analysis provided so far concerning this request, the principal issue to be resolved is the application of the exemption in paragraph 6(h.1) of the *Act*. To my knowledge, the paragraph 6(h.1) exemption has not yet been considered in any New Brunswick case. This exemption is essential to my finding as it is the crux of the Department's argument as to why they should not release any documents to the petitioner. During the *in camera* review, it became clear that while the Minister's official written response to the petitioner relied generally upon paragraphs 6(b), 6 (c.1)(ii), 6(h.1), and 6(h.2)of the *Act* as the grounds for refusing disclosure, in fact the Department was of the view that the paragraph 6(h.1) exemption applied to every document requested by the petitioner. In effect, the Department claimed exemptions 6(b), 6 (c.1)(ii), 6(h.1), and 6(h.2) in their written response to the petitioner, grouped documents for our review that reflected exemptions 6(b), 6(c), 6(c.1)(ii), 6(g), and 6 (h.1), as well as stating to us during our review that they believed all the documents were exempt based on paragraph 6(h.1) of the *Act*.

40. In order to clarify this matter my office communicated with the respondent authority on July 24, 2007 and sought further particulars regarding the Minister's position in this matter. I request a response by August 10, 2007, In mid-September, having received no response, I pressed the Minister further and received the clarifications sought. My questions and Minister's responses are reproduced below:

> 1. Attached you will find a list of the records reviewed. Exemption 6(h.1) was claimed in respect to documents 70 through 76 specifically. Do you maintain any claim of exemption based on paragraph 6(h.1) on any other records as well? If so, which ones? Please clarify. To date, documents 70-76 are the only documents on the list of records provided to the RCMP for purposes of the police

investigation being conducted into the affairs of Nashwaak / Keswick Ambulance Services Inc. This said, the Department cannot know what, if any, other documents on the list the RCMP may request for purposes of the investigation.

2. Can you confirm that there is an active police investigation on-going in respect of this matter and that the records exempted on this basis have "gathered" as part of the investigation? The RCMP confirmed as recently as August 20 that the police investigation it is conducting into the affairs of Nashwaak / Keswick Ambulance Services Inc. is ongoing.

3. In our view the paragraph 6 h.1 exemption may be subject to an implicit harms test. Do you have any submissions on this point and do you have any evidence of any harm to the police investigation that would arise from the disclosure of any of the records under review? The Department is not in a position to respond to this question. It is best responded to by the RCMP who is conducting the investigation.

4. Do you have any other submissions in respect of any other aspect of this petition? No.

41. Following these responses received on September 18, 2007, the Minister's official followed up on September 19th and further detailed the responses to questions 1 and 3 by indicating that: "The RCMP have indicated that any and all documents relating to the NKAS Board activities are potential information that they would like to see kept private until their investigation is concluded." I turn now to an analysis of the exemption claimed.

42. Information and Privacy Commissioners across the country have decisions regarding law enforcement exemptions, which while worded slightly differently all serve the same general purpose as the exemption found in our paragraph 6(h.1). While in some jurisdictions there is much more explicit reference in the statutory provisions to the need to balance the interests of disclosure against the harm that may likely result to a police investigation, I find it helpful to consider how the law is applied in other parts of Canada with respect to this exemption, as they may be of assistance to our interpretation of exemption 6(h.1).

43. To begin, I would like to highlight a decision from the Alberta Information and Privacy Commissioner, Order F2005-009, involving a request for access to information regarding complaints under the *Protection of Persons in Care Act* in relation to three nursing home facilities owned by Qualicare Health Services Corporation. When applying the law enforcement exemption under their *Act*, the Commissioner placed time limits on the Corporation narrowing the circumstances under which they can claim the exemption. At paragraph 36, he stated:

[para 36] The harm alleged by both the Public Body and Qualicare is general in nature and not specific to any of the information contained

> in the Record. Other than argument and the face of the Record that does include files that are identified as "ongoing" or "referred to police services", there is no further evidence on how release of the Record or information could compromise those files. The record is over one year old, and there is no evidence that those files are still ongoing or whether the files referred to police are ongoing or if they have resulted in a charge being laid under the *Criminal Code*.

44. From the Office of the Information and Privacy Commissioner of Ontario, precedents exist that support a similar finding to that of the Information and Privacy Commissioner of Alberta. Decision-makers in Ontario have also held that the law enforcement exemption requires that an investigation be ongoing for the exemption to apply. See for example Order PO-2533, where the adjudicator states,

> This office has stated on numerous occasions that the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085]. To accept the Ministry's argument would mean that the records generated in the context of many investigations the ORC conducts and completes would forever fall under the section 14(1)(b) exemption, because the subject of the investigation may reapply for a licence. That cannot be the case.

45. While the report predates the amendments which added 6 (h.1) to our statute, I find it helpful also to cite the following excerpt from the *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980,* vol. 2 (Toronto: Queen's Printer, 1980) (the "Williams Commission") (at p. 294):

> The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality. Neither is it surprising that none of these schemes simply exempts all information relating to law enforcement. The broad rationale of public accountability underlying freedom of information schemes also requires some degree of openness with respect to the conduct of law enforcement activity. Indeed, if law enforcement is construed broadly to include the enforcement of many regulatory schemes administered by the provincial government, an exemption of all information pertaining to law enforcement from the general right to access would severely

undermine the fundamental objectives of a freedom of information law.

46. Based on the wording of our *Act*, the cases canvassed above, and what I have previously stated regarding a purposive interpretation of the statute and the overriding consideration of balancing the harm to public or private interests in ordering disclosure or not, I find that in New Brunswick the law enforcement exemption contained in subsection 6(h.1) requires proof of the following elements:

1) the information sought must not be a matter of public knowledge in the sense that it must not have been previously revealed by any source;
2) the records must be clearly identified as a responsive records to a police investigation, one which police officials have gathered and retained for such purposes;
3) the investigation must relate to an illegal activity or suspected illegal activity; and
4) the investigation must be on-going such that revealing the record sought would harm the investigation or its intended outcome and the harm to law enforcement must be such as to justify the refusal to disclose.

47. In my view any interpretation of the statutory exemption that leaves the matter entirely open such as to exempt any record ever obtained by the police for the purpose of an investigation overreaches the scope of the exemption which is clearly meant to protect police activities. Once the activity has ceased or if the record could in no way harm the investigation or its outcome, denying disclosure of the record would be to misapply the exemption.

48. As stated above these implicit elements of the h.i) exemption are consistent with the case-law and with constitutional theory. In the recent case of *Criminal Lawyer's Association v. Ontario*[7] the Ontario Court of Appeal read into the provisions of the Ontario *Freedom of Information and Protection of Privacy Act* a public interest override clause to the section 14 exemption for law enforcement.

49. In that case a judge had made comments from the Bench expressing serious reservations about a failure to prosecute certain charges. The Ontario Provincial Police investigated and determined nevertheless not to prosecute. The Criminal Lawyer's Association for Ontario sought access to OPP records for the purpose of commenting upon the OPP's determination. OPP refused disclosure of a number of records on the basis solicitor client privilege and law enforcement exemptions under Ontario's Freedom of Information laws. The CLA objected that the laws infringed the Charter by failing to provide that these exemptions were subject, like most other exemption under the Act,

[7] 2007 ONCA 392, May 25, 2007

to a public interest override clause similar to that provided in section 23 of the Act. Section 23 of the Ontario Act provides:

> An exemption from disclosure of a record under section 13, 15, 17. 18. 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

50. The Ontario Court of Appeal agreed that by failing to subject the law enforcement and solicitor client exemption to a public interest override the statute infringed the CLA's freedom of expression rights under the Charter and therefore read-in the statutory rider on the exemptions in question. I don't mean to question here the constitutionality of existing provisions under our legislation, but it seems to me that if the comparable provisions in Ontario have been modified by the courts in order to be made charter compliant by allowing for a public interest override, it makes sense, to resolve any doubt in the matter to interpret our provisions as being equally charter compliant.

51. Applying these criteria to the records before me I find once again that the Minister has failed to satisfactorily meet his duty under section 12 of the Act. I find that the exemption is applicable, while the investigation is on-going, to the records for which it was specifically claimed and which have been gathered by the police, ie records 70 through 76. I find however that the exemption is not applicable to the other responsive records, as they have not been "gathered" by the police within the meaning of the provision. Moreover, the Minister has an obligation to satisfy himself in invoking paragraph 6 h.1) that revealing the information would harm the police investigation. However in this case the Minister admits that he has no knowledge that any such harm would arise, and that he has made no effort to ascertain whether any harm would flow. Finally, there is nothing in the records themselves to suggest on balance that any such harm would flow from the disclosure of records 1 through 69. For this reason also, the broader 6 h.1) exemption must fail.

RECOMMENDATION

52. Based on the interpretation of paragraph 6(h.1), I find that the Minister of Health has failed to meet the onus placed upon him by section 12 of the *Right to Information Act.* The Minister's claim of exemption under paragraph 6 (h.1) applies to records 70 to 76, but not to any of the other records. Furthermore, this exemption remains in effect only so long as the police investigation is outstanding. I recommend disclosure of the remaining records in keeping with my disposition of the alternative claims for exemption as follows.

53. In light of the above, I recommend in this case that the Minister disclose to the petitioner in their entirety documents 36, 37, 39 - 45, 47 and 49- 69 listed in *Appendix A*, subject to the severance of any personal information therein. In addition, I recommend that the Minister disclose to the petitioner in part documents 22, 23, 24, and 26 listed in *Appendix A*, after the government has severed all personal information within the documents to protect the privacy of identifiable individuals.

54. As it pertains to documents 1 through 21, 29 through 35, 38, 46, and 48, I find that the department appropriately withheld the documents based on the fact that they are non-responsive to the petitioner's request. Further, the Department may retain documents 25, 27, and 28, as the personal information contained therein cannot be severed effectively to facilitate their release.

55. I would further recommend, that in the future when responding to requests under the *Act* that the Minister list for petitioners all relevant documents in their department's possession, as well as identifying the exemption the Department is claiming against each specific document to which they deny the petitioner access and also that the Minister take due note of the onus of proof he bears under section 12 of the Act to justify any exemption invoked. In my view where the exemption claimed is premised upon the interests of third parties themselves, the Minister can only satisfy the burden of proof placed upon him by obtaining and advancing credible proof of the third party's interests from the third parties themselves and detailing the impact of disclosure upon them.

Dated at Fredericton, this 23rd day of July, 2007

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Bernard Richard, Ombudsman