

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2014-1739-AP-948

Date: March 13, 2015

"Case about access to one's own personal information at a special care home held by the Department of Health, through a family member with an Enduring Power of Attorney"

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into this matter.
2. The Applicant made a request to the Department of Social Development ("the Department") on September 22, 2013 for access to the following information:

My aunt [Name], my aunt's file from the Jordan Lifecare Centre/Homecare Services, 747 Sanatorium Road, River Glade, NB E4J 1W6. As I am not aware of how files are kept by such facilities, I am specifying all documentation from the timeframe stated on Page 2.

[Page 2] It is my understanding that my aunt [Name] became a client of the Glades Outreach Program May 12, 2008. She was a client until June 2013. I am requesting all records from May 12, 2008 to June 2013.

(the "Request")

3. In support of her Request, the Applicant attached a copy of an Enduring Power of Attorney signed by her aunt. The Power of Attorney appointed the Applicant as the aunt's attorney in relation to her estate, real and personal matters, including decision-making authority on personal care matters of the aunt.
4. The Jordan Lifecare Centre is a licensed nursing home in New Brunswick that houses residents who are medically stable and who need nursing care. The Jordan Lifecare Centre also offers homemaker services provided in client's homes that enable clients to stay as independent as possible within their own homes.
5. As we understand, the Applicant's aunt was not a resident of the Jordan Lifecare Centre, but rather, she was receiving homemaker services, which included cleaning, meal preparation, laundry, personal care and errands. We understand this is what the Applicant was referring to as the "Glades Outreach Program" in the Request.
6. The Department did not provide a response within the 30-day period, instead self-extending the time pursuant to paragraph 11(3)(c) of the Act due to the fact that a large number of records was requested or needed to be searched, or responding within the time period set out in the Act would interfere unreasonably with the operations of the

public body. The Department then issued a response on November 26, 2013 by refusing most of the requested information:

This is a follow-up to my October 22, 2013 correspondence wherein the time limit for your request was extended from an additional 30 days. Your original request was for the following:

[the Request]

Please find attached the relevant records in response to your request for information. Please note that specific information has been withheld as per the following legislation:

Right to Information and Protection of Privacy Act

5(1) The head of a public body shall refuse to give access or disclose information to an applicant under this Act if the access or disclosure is prohibited or restricted by another Act of the Legislature.

Family Services Act

11(1) All information acquired by the Minister or any other person in relation to any person or matter under this Act, whether of a documentary nature or otherwise, is confidential to the extent that its release would tend to reveal personal information about a person identifiable from the release of information.

11(2) The Minister shall not permit the release of confidential information to any person without the consent of the person from whom the information was obtained and to whom the information relates.

If you are not satisfied with this decision, you may file a complaint with the Access to Information and Privacy Commissioner as per section 67(1)(a)(i) within 60 days of receiving this response, or refer the matter to a judge of the Court of Queen's Bench as per section 65(1)(a) within 30 days of receiving this response. For your convenience, please find enclosed copies of the relevant forms.

(the "Response")

7. In essence, the Applicant only received information pertaining to herself (the Applicant's own communications with the Department) but not about the aunt. The Applicant did not receive information pertaining to her aunt as she had requested on the aunt's behalf pursuant to the Power of Attorney. Some records released were also redacted.
8. No further explanations were provided to the Applicant, apart from the Department's reliance on subsection 5(1) of the *Act* and subsections 11(1) and (2) of the *Family*

Services Act to withhold the information. Not being satisfied with the Department's Response, the Applicant filed a complaint with our Office on January 27, 2014.

INFORMAL RESOLUTION PROCESS

9. As in all complaint investigations, our Office first seeks to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations set out in the *Act*. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner's work remains the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the *Act*.
10. When the complaint cannot be informally resolved, the Commissioner concludes her work with a formal investigation and publishes her Report of Findings.
11. In this matter, we investigated and submitted our preliminary findings to the Department, explaining the reasons why the Department should have granted the Applicant access in full to the requested information. We invited the Department to consider our recommended course of action and provide a revised response with additional information to the Applicant, in accordance with our approach to resolve this Complaint. The Department, however, was not amenable to releasing the redacted information because it maintained that such disclosure was prohibited under the *Family Services Act*.
12. There were additional discussions with the Department and review of reasons why the Department maintained its refusal. We again had a thorough examination and analysis of the Department's beliefs vis-à-vis the application of the *Family Services Act* in conjunction with the applicability of an individual's right to his or her own personal information. Regrettably, we could not accept the Department's view.
13. We advised the Department and concluded our investigation to proceed with the present Report of Findings that addresses the errors in the processing of the Request, but more importantly, also provides our legal analysis as to whether the *Family Services Act* does in fact prohibit the disclosure of one's own personal information in this case.

INVESTIGATION

14. All steps normally undertaken during an investigation process were followed in this matter, including meeting with the Department's officials and obtaining facts about how

the Request was processed. Our work included a review of records in determining whether all relevant information had been properly identified and whether access rights had been respected in conformity with the Act.

Adequacy of search of records

15. The Department informed our Office that home support services are contracted from authorized agencies through agreements with the Department's Regional Offices. As such, the Department's role regarding the home support services, and nursing homes generally, is limited – it is the Long-Term Care Services branch of the Department that is mandated to assess a client in order to determine if he or she is eligible for homecare services. The assessment is conducted by a Case Manager (being a social worker authorized by the Department). When a client is deemed eligible, the client's Case Manager then determines the amount of services (hours) required based on the client's needs, informal support, etc.
16. Once the client is informed of the results and agrees to the payment agreement, the client or the Case Manager then selects a home support agency and confirms the amount of services in terms of hours the client will receive. If the agency is able to provide the hours, then the services are put into place. In short, the Department assesses needs, and then approves the number of hours for services that will in turn be delivered by an external home support agency.
17. In this case, the aunt was assessed and the agency selected was the Jordan Lifecare Centre, from which she received services at home. This meant that the Department's records would be relevant in so far as her assessment and approval for services.
18. In processing the Request, therefore, the Department recognized that it did not have any records pertaining directly to the aunt except for those regarding her assessment and approval of services. In other words, the Department would not have other records that might have been created at the Jordan Lifecare Centre. For this reason, the Department did not have the actual aunt's files held at the Jordan Lifecare Centre, but only records pertaining to her eligibility for homemaker services, as well as the Case Manager's assessment information found in a file called the Events Profile records.
19. For this reason, we accept that the Department does not have the aunt's actual client files that are in the custody or control of the Jordan Lifecare Centre and as these documents are held by the Jordan Lifecare Centre.

20. We add that the Department could have had some records in relation to its oversight role on home support agencies. The Department, therefore, contacted its Moncton Branch to search and locate records pertaining to the aunt while she had been receiving homecare services from the Jordan Lifecare Centre. The Moncton Branch located several records, including 12 pages of Events Profile dating from May 5, 2008 to July 30, 2013, an undated one-page handwritten note, two pages of email correspondence between the Applicant and the Department, and two pages of a Service Requisition form.
21. The Jordan Lifecare Centre is not a public body under the *Act*, and on this basis, the Department could not transfer that part of the Request to the Jordan Lifecare Centre; however, we informed the Applicant that if she wished to obtain her aunt's records (personal health information) in the custody or control of the Jordan Lifecare Centre, she could make an access request under the *Personal Health Information Privacy and Access Act* to the Jordan Lifecare Centre (a *custodian* under that statute) to obtain her aunt's records.
22. Given these explanations, we are satisfied that the Department performed an adequate search and identified all of the records relevant to the Request. We now proceed with our analysis of the Department's Response in this case.

Meaningfulness of Response

23. As the Department is already aware, subsection 14(1) requires that an applicant be informed as to which requested records exist and those that do not or cannot be located or disclosed.
24. In this case, the records provided to the Applicant contained redactions without explanations as to what the redactions were, or explanations as to why the Applicant was not entitled to receive that information.
25. We find that the Response issued by the Department did not meet the requirements of a properly constituted response in conformity with subsection 14(1) of the *Act*, as it failed to:
- identify the relevant records that were found;
 - explain to the Applicant that the Department did not have records pertaining to the aunt's client file that would be with the Jordan Lifecare Centre;

- properly apply subsection 5(1) of the *Act* and subsections 11(1) and (2) of the *Family Services Act*;
 - provide access to personal information where consent of the aunt was provided through her Enduring Power of Attorney; and,
 - provide the contact information of the person who could answer the Applicant's questions about the refusal.
26. At a minimum, a more meaningful response should have included explanations so that the Applicant understood why access was being refused, especially in respect to the Request for access to the aunt's file from the Jordan Lifecare Centre, and that the Department was considering the Applicant as the one whose personal information was at play, not realizing that the Applicant was making the Request on behalf of the aunt with authority under the Power of Attorney.
27. Additionally, the duty to assist statutory obligation established by section 9 of the *Act* requires the Department to go further and make every reasonable effort to assist an applicant. In this case, this meant that the Department should have informed the Applicant of the reasons why the Department did not have her aunt's file from the Jordan Lifecare Centre and explain why that was so.
28. We add that, during the processing of the Request, the Department's Right to Information Coordinator did inform the Applicant that the Department did not have the requested records kept by the Jordan Lifecare Centre and that the Applicant would have to contact them directly to get this information. Despite this communication, however, the Department should have further assisted the Applicant by indicating these facts and ensuring that the Response provided a complete answer the Applicant's Request to ensure the Applicant fully understood.

LEGAL ANALYSIS

29. During our investigation of this Complaint, we found three issues regarding how redactions to the requested information were made:
- 1) The Department's reliance on subsection 5(1) of the *Act* and section 11 of the *Family Services Act* to prohibit its disclosure;
 - 2) Whether there exist a conflict or inconsistency between the *Family Services Act* and the *Right to Information and Protection of Privacy Act* that permitted section 11 to be applied; and,

3) Whether the Department was lawful in refusing access to the requested personal information as per the rules set out in the *Right to Information and Protection of Privacy Act*.

30. We now address these issues and provide our findings.

Department's reliance on section 5(1) of the Act and the Family Services Act

31. The Department relied on section 5(1) of the *Right to Information and Protection of Privacy Act* (the "Act") to refuse to grant access to the aunt's personal information because the Department believed the provisions of the *Family Services Act* prohibited its disclosure.

32. The Act recognizes that other statutes may place restrictions on the public's access to information; that being said, however, it is incumbent upon public bodies to ensure that refusal of requested information is examined carefully to ensure that rights of access provided by the Act are not interfered with. This is more imperative when dealing with a request for one's personal information.

Section 5 of the Act

33. When the Act was enacted in September 2010, section 5 provided the necessary vehicle and transition period for government bodies to revisit their governing statutes in conjunction with the rules established under the Act, i.e., rules regarding disclosure of government information through access to information requests (Part 2) and rules regarding how government bodies would protect personal information of citizens that they collect and retain in their records (Part 3).

34. In that regard, subsection 5(1) indicated clearly that where another piece of legislation restricted or prohibited the disclosure of information, that legislation would prevail over the disclosure provisions found in the Act.

35. Subsection 5(1) presumed a right of access, but recognized that other pieces of legislation might restrict that right and allowed this to continue. Where another statute clearly prohibited or restricted the release of information, the otherwise right of access afforded under the Act could nevertheless be curtailed, but this was only for a period of time. Legislators agreed that the Act should be the prevailing statute in matters of access to information and privacy for public body records.

36. Subsection 5(3) stated that after 3 years of coming into force of the *Act*, the special provision would no longer be in effect. As of September 1, 2013, subsection 5(1) was repealed, and subsection 5(2) came into force and stipulated that where public bodies believed information in their workplace required special consideration for access and disclosure, there were required to pass new laws that would expressly prevail over that of the *Act*.
37. Accordingly, where it was believed that some information should be subject to more restrictions relative to access, officials were to consider adding to those statutes an express clause that would state the statute prevailed over the *Act*.
38. We note, however an important qualifier: this could only be triggered in the event of inconsistency or conflict with any of the provisions of the *Act*:

5(2) If a provision of this Act is inconsistent with or in conflict with a provision of another Act of the Legislature, the provision of this Act prevails unless the other Act of the Legislature expressly provides that it, or a provision of it, prevails despite this Act.

39. Subsection 5(2) was referred to as the *sunset clause*, which gave public bodies until September 1, 2013 to add a prevailing clause in their respective legislation where it was believed necessary to do so. After September 1, 2013, the *Act* prevailed in cases of inconsistency or conflict with the other statute's provisions unless the other statute had an express clause indicating to the contrary.

Timing of the present Request

40. At the time the Department received the Request in September 2013, the Department could no longer rely on subsection 5(1) of the *Act* to refuse to disclose information because it believed that another statute (ex. the *Family Services Act*) prohibited its disclosure.
41. By that time, however, the Department had passed a new provision in the form of a prevailing clause (section 11.3 of the *Family Services Act*) that would enable the Department to refuse access to requested information despite the provisions of the *Right to Information and Protection of Privacy Act*:

11.3 If a provision of this Act is inconsistent with or in conflict with a provision of the *Right to Information and Protection of Privacy Act*, this Act prevails.

42. We draw particular attention to section 11.3's use of similar words as those found in subsection 5(2): *if provision is inconsistent with or in conflict with* that of the *Right to Information and Protection of Privacy Act*.
43. Accordingly, at the time of the Request, the Department had to rely on subsection 5(2) of the *Right to Information and Protection of Privacy Act* and then the Department had to determine whether there existed a conflict or inconsistency between provisions of the *Right to Information and Protection of Privacy Act* and subsections 11(1) and (2) of the *Family Services Act* before the Department could decide to refuse access to the Applicant.
44. And, the Department would only be entitled to refuse access where there in fact existed a conflict or an inconsistency between the two statutes (in order to apply the prevailing clause found in section 11.3 of the *Family Services Act*).
45. We note that where there was no conflict or inconsistency, however, the *Right to Information and Protection of Privacy Act* would continue to operate and govern the disclosure of the requested information to the Applicant on behalf of the aunt.

Is there a conflict or inconsistency between the *Family Services Act* and the *Right to Information and Protection of Privacy Act* when requesting personal information?

46. The words "conflict or inconsistency" are not defined in either statute but the Merriam-Webster Dictionary defines *conflict* as "*a difference that prevents agreement; competitive or opposing action of incompatibles*" and *inconsistence* as "*having parts that disagree with each other; not compatible with another fact or claim; incoherent or illogical in thought or actions*".
47. For a conflict or inconsistency to exist between provisions of the *Family Services Act* and of the *Right to Information and Protection of Privacy Act*, the respective provisions must differ or disagree with each other such that they are incompatible with each other.
48. The question then becomes: is section 11 incompatible with the provisions of the *Right to Information and Protection of Privacy Act* such that a person can be barred access to his or her own personal information?
49. We examine section 11 of the *Family Services Act* that states as follows:

<p>11(1) All information acquired by the Minister or another person in relation to any person or matter under this Act, whether of a documentary nature or otherwise, is confidential to the extent that its release would tend to reveal personal information about a person identifiable from the release of the information.</p>	<p>11(1) Tout renseignement, de nature documentaire ou autre, que le Ministre ou une autre personne obtient au sujet d'une personne ou d'une question que vise la présente loi est confidentiel dans la mesure où sa communication tendrait à dévoiler l'identité d'une personne et à révéler sur elle des renseignements personnels.</p>
<p>11(2) The Minister shall not permit the release of confidential information to any person without the written consent of the person from whom the information was obtained and the person to whom the information relates.</p>	<p>11(2) Le Ministre ne peut permettre la communication de renseignements confidentiels à quiconque sans le consentement écrit de la personne qui les a fournis et de celle qu'ils concernent.</p>

50. Section 11 places two restrictions on disclosure: on the basis of identity (for purposes of privacy), and on the basis of confidentiality of the information obtained by the Minister. These restrictions can be removed with: the consent of the person to whom the information was obtained and the consent of the person to whom the information relates.
51. Under the *Right to Information and Protection of Privacy Act*, paragraph 21(2)(c) states that “disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of the third party’s privacy if disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body...”. Both identifiable information and confidentiality specifically frame this exception to disclosure.
52. Therefore, paragraph 21(2)(c) intends to protect the identity of a person who gave information in confidence, and we emphasize that this is the same protective measure adopted in section 11 for information obtained by the Department in the course of its work. Moreover, paragraph 21(3)(a) permits the person to consent to the release of such information, again establishing the same principles found in section 11.
53. Put together, where information can identify a person who gave information in confidence, consent of that person will be required before it can be considered for release; and, to protect privacy, consent must be obtained from the individual to whom the information relates.

54. In other words, section 11 and paragraph 21(2)(c) are not inconsistent or incompatible with each other.
55. Where we are concerned is the Department's approach to apply section 11 to all types of disclosure of information acquired under the *Family Services Act*.
56. If we adopt the Department's explanations for its application of section 11, those who provide information can be identified once the information is released and release can only take place if their consent is provided. Following that approach, the aunt's personal information in this case could only be released if the Department obtained the consent of everyone involved:
- the consent of the aunt because the information is about her, but also
 - the consent of:
 - the doctor who provided who provided information to the Minister about the aunt;
 - the occupational therapist who provided information to the Minister about the aunt;
 - the Case Manager at the Department who provided information to the Minister about the aunt; and
 - the staff at the Jordan Lifecare Centre who provided information to the Minister about the aunt.
57. This in our view would lead to an absurd result and could not have been intended by the *Family Services Act*. Consequently, we asked ourselves what was section 11 of the *Family Services Act* truly meant to do and did it intend to prevent the disclosure to personal information in this manner?

True purpose of section 11 of the Family Services Act

58. When reviewing the *Family Services Act* in its entirety, we observe that specific sections expressly set forth rules to protect the identity of individuals who file complaints or make referrals to the Department regarding the neglect or abuse of children or adults. In other words, these rules set out to protect the name of a person who makes a referral about a child (s. 30) or about an adult (s. 35.1), and so on, as this type of information is collected as part of the investigation by the Department that will ensue.

59. The *Family Services Act* protects that information under those defined and specific circumstances and it follows that section 11 could not have been intended to also protect that same information in an overarching manner.
60. To better understand the real purpose of section 11 of the *Family Services Act*, we turned to decisions issued by the New Brunswick Office of the Ombudsman that referenced earlier court decisions.
61. Prior to the creation of the Access to Information and Privacy Commissioner's Office in September 2010, the Office of the Ombudsman was tasked with overseeing the application of the then *Right to Information Act*, and that work included receiving complaints from individuals who were refused access to their personal information.
62. In 2006, an applicant made a request for access to information held by the Department of Family and Community Services as it was then known. The applicant was the father of a disabled son evicted from a special care home. The father sought to obtain copies of records held by the Department with respect to why his son had been evicted. The request was made pursuant to section 2.1 of the *Right to Information Act* ((identical to the current section 7(2)):
- 2.1 Without limiting section 2, subject to this Act, every individual is entitled to request and receive information about himself or herself.
63. The Department treated the request as one being made under the *Right to Information Act* and refused access based on section 6 of the *Right to Information Act*:
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;
 - b.1) would reveal personal information concerning the applicant that was
 - (i) provided by another person in confidence, or is confidential in nature or
 - ...
 - g) would disclose opinions or recommendations for a Minister or the Executive Council.
64. The Department then relied on section 11 of the *Family Services Act*, which the Department stated required the Minister to treat confidential all personal information it received and not to disclose it without the consent of both the informant and the person to whom it relates.

65. Not being satisfied with the Department's response, the applicant filed a complaint with the Office of the Ombudsman and the Ombudsman found that all of the documents relevant to the request contained in part personal information of the applicant sufficient to establish the right to make his request for information under section 2.1 of the *Right to Information Act*, even where the applicant was requesting information relating to his son, and not relating to himself personally.
66. The Ombudsman stated that section 2.1 had been added in 1998 to the *Right to Information Act* as much a privacy protection as a right to information provision, a consequential amendment to the *Protection of Personal Information Act*. It establishes the principle of individual access to ensure that "upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information and shall be given access to that information, except where inappropriate."
67. A few years later, the New Brunswick Office of the Ombudsman received another complaint where the applicant was seeking information from the Minister of Social Development relating to the Long Term Care Assessment carried out in respect to her brother's death and other documents relating to her brother. The Department treated the request as one made under the *Right to Information Act* and refused to disclose the records on the grounds that the requested information was protected by law under section 6(a) of the *Right to Information Act*, as well as under section 11 of the *Family Services Act*. The Ombudsman reiterated its findings in its earlier decision cited above and stated that:

It is my interpretation that the 6(a) exemption is a broad exemption directed primarily at the preservation of Cabinet secrecy, official secrets and common law privileges. To invoke this exemption in conjunction with section 11 of the FSA is to create an overly broad exclusionary process that could favour blanket refusals of requests and does not strike the proper balance between protecting personal information and facilitating disclosure¹.

68. In these two complaint cases, the Ombudsman was required to answer similar questions to that which concerns us: whether a person could request information from the Department of Social Development to obtain access to a loved one's personal information held by the Department². And, in these cases, the Department had relied on section 6 of the *Right to Information Act* as well as section 11 of the *Family Services Act* (section 11 is worded the same as the current version). In particular, reliance was

¹ In *W.X. and Minister of Social Development*, NBRIOR-2008-03 [2008 CanLII 71603], at paragraph 9.

² See *T.N. v. Minister of Family and Community Services*, NBRIOR -2006-10 [2006 CanLII 57274] and *W.X. supra*.

placed on paragraph 6(a) of the *Right to Information Act* that stated “there was no right to information under this Act where its release: a) would disclose information the confidentiality of which is protected by law...”

69. The Ombudsman had to consider whether section 11 of the *Family Services Act* fell within the scope of paragraph 6(a) of the *Right to Information Act* as an exemption to prevent access on the basis of confidentiality protected by law.
70. We note that paragraph 6(a) of the *Right to Information Act* is the equivalent to the current subsection 5(1) referred above and which informed the Department’s decision to refuse access in in this case.
71. The Ombudsman also found the following:

Section 11 is not a stand alone (*sic*) provision, which removes the Minister under the *Family Services Act* from the privacy guarantees established under the *Protection of Personal Information Act*, or from the related provisions of the *Right to Information Act*.

(...)

Section 11 reinforces the importance of confidentiality and privacy guarantees such as access to personal information, in respect of services provided under the *Family Services Act*. It would be false to argue that section 11 raises the application of the paragraph 6(a) exemption as a form of confidentiality protected by law. The privacy interests protected by section 11 are the same as those set out in paragraph 6(b) and (b.1) exemptions and should be analyzed under that rubric. Thus, where statutory provisions protect the confidentiality of personal information, access requests should be governed by the exempting provisions of ...the *Right to Information Act*, so as to consolidate the approach of government in such matters.”³

[Underlining is ours]

72. The Ombudsman found that the privacy protection for personal information in both statutes (section 11 of the *Family Services Act* and section 6 of the *Right to Information Act*) were similar but had been enacted for different purposes. On that basis, it was not proper for the Department to apply only the *Family Services Act* at the expense of the access legislation to refuse access where clearly access rights were governed by the latter.
73. In confirming these findings, the Ombudsman added:

The rules of statutory interpretation require that I consider the context of the whole *Act* so as to give effect to its purpose. The *Interpretation Act* requires also

³ In *T.N.*, *supra* at paragraphs 19 and 20

that every legislative provision be given “such fair, large and liberal construction and interpretation as best ensures the attainment of [its] objects.” Courts have been careful also to avoid interpretation that leads to absurdity including results that are self-evidently irrational or unjust. **(Taken from: *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada Inc., 2008), at p. 300: “Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.”)**

The difficulty in that case is that the literal interpretation adopted by the Minister refuses disclosure of a document which may help a grieving family reach closure regarding a loved one who died in the Minister’s care, thereby defeating the dominant legislative purpose of holding public authorities publicly accountable, and it does so for the ostensible reason of protecting the privacy of the deceased person. In my view, this is an absurd result which the Legislature cannot have intended. It plays too well into the hand of those who may want to shield certain matters of public administration from review and it would set a precedent that would easily erode public confidence in Government administration.

...In my view, the Minister’s reliance of the confidentiality provisions of the *Family Services Act* is inequitable and inconsistent with the provisions of the *Right to Information Act*⁴.

[Underlining is ours]

74. In further support of its decision, the Ombudsman pointed out that courts favor narrow interpretation of exempting provisions as was pointed out by Justice Russell in a New Brunswick Court of Queen’s Bench decision in *Weir v. New Brunswick* in 1992:

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 refusal⁵.

75. We agree and adopt the Ombudsman’s findings that section 11 of the *Family Services Act* was never meant to trump rights of access to personal information and should not be viewed as a provision in isolation to prevent access on the basis of confidentiality. To interpret section 11 as a vehicle to refuse access in all cases, and barring a person’s access to his or her own personal information would lead to an absurd result and was not intended by legislators.
76. As a result, we find that an incompatibility does not exist with section 11 of the *Family Services Act* that permits the Department to invoke subsection 5(2) and to remove the applicability of the *Right to Information and Protection of Privacy Act* when responding

⁴ In *W.X., supra*, at paragraphs 13 and 14

⁵ (1992) 130 N.B.R. (2d) 202 (Q.B.)

to an access to information request filed under that *Act*. Section 11 must be applied in the correct circumstances, but it cannot be used as an automatic bar to access right under the governing *Right to Information and Protection of Privacy Act*.

77. The Department's application of section 11 is inconsistent with the dominant purpose of the *Family Services Act* when the Department processed access to information requests filed under the *Right to Information and Protection of Privacy Act*. The Department ought not to have refused access on the basis of subsection 5(1) of the *Act* and section 11 of the *Family Services Act* in this case.
78. Consequently, the *Right to Information and Protection of Privacy Act* prevails in determining whether the Applicant, by Power of Attorney on behalf of her aunt, was entitled to receive access to her aunt's personal information.

Was the Department's refused access to the aunt's personal information lawful in this case in accordance with rules set out in the *Right to Information and Protection of Privacy Act*?

Request by way of Power of Attorney

79. Subsection 7(2) of the *Act* affords a right to individuals to request and obtain their own personal information in the custody and/or under the control of a public body, subject to the exception provisions of the *Act*. In addition, paragraph 79(1)(c) of the *Right to Information and Protection of Privacy Act* allows for an applicant, as Attorney, to exercise any of the rights afforded to an individual by the *Act*.
80. The aunt, through her Attorney the Applicant, requested access to her own personal information found in the records identified by the Department, i.e., notes and assessments prepared by a doctor, an occupational therapist, and Case Manager about her care, thus that constituted her own personal information. She was requesting access pursuant to her statutory right to her personal information by virtue of subsection 7(2) of the *Right to Information and Protection of Privacy Act*.
81. It is clear that the aunt provided her consent in writing to the Department when requesting access to her own personal information, as evidenced by the Power of Attorney she filed with the access request. We reviewed the Enduring Power of Attorney and it stipulates that the Applicant had the power over the handling of real and personal matters of her aunt, including the power to make decisions regarding her

aunt's personal care. With this Power of Attorney, the Applicant stood in the shoes of the aunt and was at liberty to make a request, in effect, to receive the aunt's own personal information. Or, the Power of Attorney can be viewed as granting to the Applicant the aunt's express consent to make the same request.

82. In other words, the Applicant made a request on behalf of her aunt, with her aunt's consent, to access the aunt's own personal information pursuant to the *Act*. We are satisfied that the Request in this case was in keeping with the exercise of powers granted by the aunt in her Power of Attorney in favour of the Applicant.

Responding to the Request for own personal information

83. With such a Request, it was then incumbent upon the Department to identify the aunt's personal information and to determine whether it could be released in accordance with the rules for disclosure of personal information set out in Part 2 of the *Act*.
84. We point out that the Applicant was requesting the aunt's personal information, not the personal information belonging to others, i.e., third parties.
85. A *third party* is defined under the *Act* to mean a person other than the applicant or the public body. In this case, the aunt is the applicant and the Department (and its staff) is the public body.
86. Then, the *Act* defines *personal information* broadly to include personal health information, which in turn, includes names of health care providers, as well as treatment and care provided to the person, and, personal opinions or views expressed about an individual, even where expressed by third parties.
87. We find that the Department incorrectly applied the governing rules for disclosure of personal information when it responded to the Request, as we explain below.
88. First, the Department believed that the information about the aunt belonged to third parties, i.e., that it constituted *third party personal information*. In other words, the Department believed that the information about the aunt belonged to the doctor, occupational therapist, Case Manager, and staff of the Jordan Lifecare Centre who had provided it to the Department. Secondly, the Department then withheld this information because releasing third party personal information would identify them and

- would be an unreasonable invasion of their privacy in doing so, i.e., the privacy of the doctor, occupational therapist, Case Manager, and staff of the Jordan Lifecare Centre.
89. We point out that the information in question, however, did not belong to third parties, it belonged to the aunt, and the issue of third party privacy should not have been raised.
90. The information was the aunt's own personal information as per the definition of *personal information* under the *Act* and included views or opinions expressed by others such as those expressed by the third party doctor, third party occupational therapist, and others. Just because third parties provided the information did not render the information to be theirs and thereby excluded from the definition of the aunt's personal information.
91. As a consequence, while views and opinions about the aunt had been provided by third parties, that information did not belong to third parties to bring section 21 into play, and their privacy was an irrelevant consideration.
92. The issue of privacy was the aunt's privacy, and she had provided consent for the release of her own information, thereby resolving that question.
93. We point out the same applied in regards to that part of the Request where the Applicant sought access to her own personal information.
94. We therefore find that the Department unlawfully refused access to requested information that consisted of the aunt's own personal information and the Applicant's own information when the Department refused to release the requested information on the basis that it was identifiable third party information protected under section 11 of the *Family Services Act*.

FINDINGS AND RECOMMENDATION

95. Based on our investigation into this Complaint, and our legal analysis above, we find as follows:
- a) The Department performed an adequate search for relevant records in its possession, but did not provide a meaningful Response to the Applicant, although it did assist the Applicant in part;

- b) The Department could not rely on subsection 5(1) of the *Act* and section 11 of the *Family Services Act* to refuse access to the aunt's own personal information and the Applicant's own personal information found in the relevant records identified;
- c) There does not exist a conflict or an inconsistency between section 11 of the *Family Services Act* or section 7(2) of the *Right to Information and Protection of Privacy Act* that triggers the application of section 5(2) and thereby remove the prevailing *Right to Information and Protection of Privacy Act* for determining access rights. In that regard, the Department ought not to have relied upon section 11 to refuse to disclose to the aunt and the Applicant their own personal information in this case;
- d) In accordance with the rules governing a person's right of access under the *Right to Information and Protection of Privacy Act*, the Applicant was entitled to receive the requested information as identified by the Department without redactions, as we found no exception applied to restrict its disclosure.
96. As a result of these findings, and pursuant to subparagraph 73(1)(a)(i) of the *Act*, the Commissioner recommends that the Department of Social Development grant to the Applicant the requested information in full.

Dated at Fredericton, New Brunswick, this 13th day of March, 2015.

Anne E. Bertrand, Q.C.
Commissioner