



REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter No: 2017-4234-AP-2294

May 16, 2018

I BACKGROUND

1. My investigation as Integrity Commissioner is carried out in accordance with section 73(1) of the *Right to Information and Protection of Privacy Act*, SNB., c. R-10.6 (the "Act"). It is further to the complaint submitted by the Applicant in which the Commissioner was asked to conduct an investigation, as set out in section 67(1)(a)(i) of the Act.
2. On November 6, 2017, the Applicant submitted an access-to-information request to the Executive Council Office with a view to obtaining information on severance payments made to nine former senior officials of the Province of New Brunswick.
3. On November 24, 2017, the Executive Council Office refused the access request for the following reason:

17(1) The head of a public body shall refuse to disclose to an Applicant information that would reveal the substance of deliberations of the Executive Council, including but not limited to:
(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council;
4. In light of this negative response, the Applicant filed a complaint with the Office of the Integrity Commissioner on December 7, 2017 claiming that the requested information should be made public because the agreement represents significant sums of money paid out of the public purse, and expressing his opposition to the Executive Council Office's interpretation of section 17. The Applicant indicated that he was not interested in the Executive Council's deliberations; rather, he sought to obtain information on the final outcome, i.e. the agreements concluded at the end of the respective mandates for each of the former senior officials, in particular the exAct severance payments.
5. The Applicant based his argument on a recent decision by Justice Dionne of the Court of Queen's Bench on May 25, 2017, according to which the [New Brunswick] Department of Health was required to disclose the severance payment to the Province's Chief Medical Officer at the end of her employment, in accordance with Commissioner Bertrand's recommendation. We will revisit this topic later in this Report.
6. During the informal resolution process for the matter at hand, the Executive Council Office had disclosed to the Applicant the agreements concluded with six former senior officials, but had refused to disclose the exAct severance amounts; instead, it provided the respective amounts in brackets (i.e. the same information published in the provincial public accounts each year).

7. Consequently, the only point that I am required to rule on in this Report is whether the exact severance amounts should be disclosed.

II PRIOR DECISIONS

8. The question of disclosing severance payments to employees of public bodies was raised in two reports issued by Commissioner Bertrand (in this regard, please refer to Reports 2014-1810-AP-983 and 2016-3149-AP-1695 posted on our website).
9. In both of those Reports, the Commissioner ruled that, notwithstanding the fact that information touching on severance payments is "personal information" within the meaning of section 21(2) of the *Act* and, on the face of it, its disclosure is an "unreasonable invasion of a third party's privacy", the disclosure of such information is permitted within the meaning of section 21(3), which states: "Despite section 21(2), disclosure of personal information is not an unreasonable invasion of a third party's privacy" if "the information is about the third party's (...) benefits (...) as an officer or employee of a public body" (section 21(3)(f)(i)) or if "the disclosure reveals information about a discretionary benefit of a financial nature granted by a public body to the third party" (section 21(3)(h)). Since it may be claimed that the applicability of section 21(3)(h) has never been specifically ruled on by the Office of the Integrity Commissioner in the case of severance payments following dismissal or termination, I intend to focus on that point in this Report.
10. Both of the above-mentioned cases were appealed to the Court of Queen's Bench and two contradictory decisions were subsequently handed down. In *Hans v. STU*, (2016) NBQB 49, Justice Morrison ruled that the disclosure of information concerning severance payments was protected within the meaning of section 21(2)(e) of the *Act* and was deemed to be an invasion of a third party's privacy because the personal information pertained to the third party's professional background. Justice Morrison thus refused to ratify the Commissioner's decision to the effect that severance payments constitute a "benefit" for the purposes of the above-mentioned provisions of the *Act*. In his opinion, a broad interpretation of the term "benefit" in these provisions [TRANSLATION] "does not strike a fair balance between privacy protection and the transparency required by the objectives" of the enabling law.
11. However, in the case *Société Radio-Canada v. Department of Health* (unpublished oral decision whose formal judgment was handed down by Court Order on May 29, 2017, file number MM-40-17), Justice Dionne refused to adopt the reasoning of his colleague Justice Morrison; instead, he decided to adopt the reasoning of Commissioner Bertrand in line with the disclosure of severance payments to the Chief Medical Officer following the termination of her employment and an agreement that was

subsequently negotiated. Justice Dionne ordered the Department of Health to disclose [TRANSLATION] “the total amount of severance payments made to the senior official in her agreement concluded in January 2016, including the amount of all monies and benefits paid to, or to the benefit of, the senior official in question”. All of that information was disclosed in accordance with Justice Dionne's Order.

III MY CONCLUSIONS AND RECOMMENDATIONS

12. In the matter at hand, this is the third request by a member of the general public aimed at obtaining information on the exact amounts of severance payments made to former employees of a public body, in addition to the third refusal to disclose by the Province, along with two contradictory Court decisions.
13. As mentioned in all decisions touching on the matter at hand, the two main objectives of the *Act* are to ensure transparency by public bodies in line with managing taxpayers' money and to protect personal information in the public sector; these objectives are often difficult to reconcile. On the one hand, public-sector employees are justified in seeking to protect their privacy; they have reason to believe that their employer will *Act* appropriately in response to requests for personal information concerning them. However, public bodies are answerable to New Brunswickers when it comes to accounting for how taxpayers' money is managed.
14. I have carefully read the contradictory decisions, as well as Commissioner Bertrand's Reports. When all is said and done, I cannot accept Justice Morrison's decision to the effect that severance payments must be protected from disclosure to protect the privacy of employees of public bodies.
15. In my opinion, that argument does not give enough weight to the notions of transparency and accountability that should guide public bodies when disclosing severance payments to their employees. With all due respect, I prefer and, for the purposes of this Report, I accept Commissioner Bertrand's interpretation, validated by Justice Dionne, to the effect that the exact severance payments must be disclosed. In my opinion, in the event that the employment contract deals with severance payments or if an internal policy dictates the severance terms and conditions, the amounts paid are a “benefits (...) as an officer or employee of a public body” (section 21(3)(f)(i)). Once again, in the event of dismissal or termination followed by a negotiated agreement touching on severance payments, in my view the amounts paid are “a discretionary benefit of a financial nature granted by a public body to the third party” within the meaning of section 21(3)(h) of the *Act*. In accordance with this legislative provision, disclosing this information is not an unreasonable invasion of a third party's privacy.

16. In summary, I conclude that the Province's severance payments to these senior officials are benefits within the meaning of sections 21(3)(f)(i) or 21(3)(h), as applicable, regardless of why the employer/employee relationship came to an end. I also conclude that this information is not protected from disclosure pursuant to section 21 of the *Act*.

IV RECOMMENDATION

17. Pursuant to section 73(1)(a) of the *Act*, I recommend that the Executive Council Office provide the Applicant with the total severance amounts paid to the former senior officials named in the access-to-information request, with the exception of those amounts for which the access-to-information request was settled informally.

18. Pursuant to section 74(2) of the *Act*, the Executive Council Office must notify the Applicant of its decision (with a copy to the Integrity Commissioner) concerning this recommendation. If the Executive Council Office decides to accept this recommendation, section 74(3) stipulates that it must take follow-up Action or make the appropriate decision within 15 days of receipt of this report. If the Executive Council Office decides not to accept the recommendation or fails to notify the Applicant of its decision, the Applicant will be entitled to appeal the matter before a Justice of the Court of Queen's Bench pursuant to section 75 of the *Act*.

19. This report was issued in Fredericton, New Brunswick on May 16, 2018.

Original signed by
Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner