

Office of the  
**INTEGRITY**  
**COMMISSIONER**



Bureau du  
**COMMISSAIRE**  
**À L'INTÉGRITÉ**

## REPORT OF FINDINGS

*Right to Information and Protection of Privacy Act*

Matter: 2018-4714-AP-2561

November 23, 2018

## I INTRODUCTION

1. My investigation as Integrity Commissioner is established in conformity with s. 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6 (“the Act”). This Report of Findings is in conclusion of a complaint filed by the Applicant asking the Commissioner to investigate the matter pursuant to s. 67(1)(a)(i) of the Act.
2. On August 1, 2018, the Applicant submitted an access to information request to Opportunities New Brunswick (“ONB”), seeking details about the funding that ONB had provided to companies since April 2015, specifically “approval and payment information, along with the company name, type of investment, \$ amount of investment and date”. The Applicant requested that this be provided in electronic format.
3. ONB replied on September 17, 2018, directing the Applicant to its website for the requested information for the 2017-18 fiscal year as this had been published on its website on August 7, 2018. As for the two remaining fiscal years (2015-16 and 2016-17), ONB indicated that it was not able to provide the requested information at that time “as the information is not readily available in the requested format and ONB does not have adequate software to automatically produce such records.” ONB relied on s. 10(1) of the Act in refusing access. ONB indicated that its plan was to have the information for the 2015-16 and 2017-18 fiscal years ready for publication on its website by January 31, 2019 and that it would inform the Applicant when this occurs.
4. The Applicant was not satisfied with ONB’s response and filed a complaint with this Office. In making this complaint, the Applicant questioned why the information could not be provided in the format in which it currently exists if it is not currently available in the format as requested. The Applicant also found it unacceptable that ONB indicated that it would make the information available to the public in the future when it has this in its records now. The Applicant was not amenable to accepting the target publish date of January 31, 2019 as there was no guarantee that this timeline would be met.
5. As with all complaints filed with this Office, this complaint was initially assigned to an investigator to undertake the informal resolution process. During discussions with ONB officials, this Office was advised that ONB had allocated further resources to this matter and revised its target date to publish the information in question to December 3, 2018. While we were pleased that ONB had committed to taking steps to make the information publicly available sooner, the matter was referred to me for final disposition with a view to ensure that there are no further delays in the requested information being provided to the Applicant (and by extension, the general public). I am thus concluding this investigation with the issuance of this Report of Findings under s. 73 of the Act.

## II ISSUE

6. The sole issue in this case is when ONB will provide the requested information for the remaining two fiscal years in question (2015-16 and 2017-18) to the Applicant.

## III ANALYSIS

7. One of the founding principles of the *Act* is to create statutory obligations on public sector entities to be open and transparent in the conduct of public business on behalf of the public they serve.
8. There is no question that the Applicant, and the general public, has the right to know which companies have been granted financial assistance by ONB since its inception in April 2015. As a best practice, this information should be made publicly available by ONB as a matter of routine disclosure on an on-going basis.
9. ONB recognizes its obligation to be transparent and accountable to the public on this aspect of its operations; however, compliance with this obligation with respect to the information in question is currently a work in progress. While it is unfortunate that this information has not been made publicly available since ONB's inception in April 2015, ONB has made commitments to rectify this situation and has committed to publishing this kind of information on its website on an on-going basis from now on.
10. While this is the current situation, the question of access rights under the *Act* must be addressed, given that the Applicant has not yet received the requested information for the two remaining fiscal years (2015-16 and 2016-17) and none of the exceptions to disclosure found in ss. 17 to 33 of the *Act* apply so as to prevent or prohibit its disclosure.
11. In refusing access in this case, ONB relied on s. 10(1) of the *Act*. Section 10 addresses the question of information held by public bodies in electronic, rather than paper, format.

10(1) If requested information is in the custody or control of a public body in electronic form, the head of the public body shall produce a record for the applicant if

- (a) it can be produced using the normal computer hardware and software and technical expertise of the public body, and
- (b) producing it would not interfere unreasonably with the operations of the public body.

12. This provision is not an exception to disclosure *per se*, but may be relied on by a public body as grounds to refuse access in certain limited circumstances where a public body encounters difficulties in making the electronic information available to an applicant due to some kind of technical issue. While many records in electronic form can be readily produced and shared with an applicant in either paper or electronic format (for example: emails, electronic versions of reports and spreadsheets), information may also be held by public bodies in a specialized database or in a file format that may not be so easy to produce.
13. If a copy of requested information that is held by a public body in electronic format cannot readily be produced by the public body for the purposes of responding to an access request without additional computer hardware, software, or technical expertise (for example, specialized information technology services), s. 10(1) of the *Act* does not require a public body to incur significant additional costs to produce the information.
14. That being said, if the information can be produced, albeit in a different format, and the public body is of the opinion that the alternate format would be easier and cheaper to produce, the public body can provide access to the information in the alternative format. This is in keeping with s. 10(2) of the *Act*:

10(2) If a record exists but is not in the form requested by the applicant, the head of the public body may create a record in the form requested if the head of the public body is of the opinion that it would be simpler and less costly for the public body to do so.
15. In this case, the issue not that ONB is unable to produce the requested information due to a technical issue as contemplated by s. 10(1) of the *Act*, but rather ONB wanting to compile the requested information into a comprehensive electronic list and to verify its accuracy before making it available to the general public on its website. In my view, s. 10(1) of the *Act* cannot be relied on as grounds to refuse access for this reason, although I can understand why ONB looked to this provision in light of the circumstances.
16. The other option available to ONB at the time was to consider whether the requested information could be provided to the Applicant in the format in which it existed in ONB's records at the time of the request. ONB indicated to this Office that it did consider this in deciding how best to respond to the Applicant's request. I understand from the information provided by ONB that the information at issue is contained in both paper records (in the form of signed agreements and loan documents) and in its internal accounting and tracking systems. ONB explained that the information in question is

not compiled in a readily accessible database or system, but is rather stored in various formats, including paper records (such as signed agreements and loan documents) and electronic records (payment information in its internal accounting system, client account and projects/opportunities information in a separate internal system, as well as tracking lists that are manually maintained by ONB staff). ONB submitted that providing the requested information in this format would not provide the Applicant (or the general public) with useful or meaningful information and in some cases, some information contained in these records may no longer be accurate.

17. Given the amount of work and additional time that would be involved if ONB were to begin processing these records at this point, and in light of ONB's indication that it anticipates having the information for the 2015-16 and 2016-17 fiscal years available for the Applicant and the general public by December 3, 2018, I will not recommend that ONB take this step at this time to remedy this situation.
18. As a point of general guidance, should a public body find itself in a similar situation, perhaps a better response to an applicant would be to acknowledge the applicant's access rights to the information in question, that the public body is not yet in a position to comply at the time, and to provide helpful explanations of the steps needed to be taken to comply, and when the Applicant can expect to receive the information. While this may not be satisfactory to the applicant and may nevertheless result in a complaint to this Office, at that point we would become involved and work with the public body to ensure that appropriate steps are being taken to ensure that the public body remedies the situation in a timely fashion.
19. To ONB's credit, in its response to the Applicant, it did provide the Applicant with some explanations to this effect; however, the Applicant did not find it acceptable to have to wait for a lengthy period of additional time (the anticipated publication date in ONB's response was January 31, 2019, which is nearly six months after the Applicant's access request) to get access to information dating back to April 2015 that ONB itself recognizes needs to be made publicly available.
20. As I indicated above, this situation and resulting complaint could have been avoided had this information been made available to the public in a timelier fashion, given ONB's requirements under the Act to be open and transparent in the conduct of public business and spending from the public purse. That being said, ONB is well aware of its obligations on this point and has committed to making the information for the two remaining fiscal years publicly available within a relatively short timeframe, which I trust will alleviate the need for future access requests or complaints to this Office on this question.

21. For these reasons, I find that the Applicant's complaint has merit and am issuing a recommendation to ONB with a view to ensure that this is rectified within a reasonable timeframe.

## RECOMMENDATION

22. In light of the above, I recommend pursuant to s. 73(1)(a)(i)(A) of the Act that ONB disclose the remaining information for the 2015-16 and 2016-17 fiscal years to the Applicant on or before 20 business days from the date of this Report of Findings.
23. As set out in s. 74(2) of the Act, ONB is to notify the Applicant of its decision with respect to this recommendation within 20 business days after receiving this report and forward a copy of its decision to this Office.
24. If the recommendation is accepted, the Act requires that ONB also comply with it during this same timeframe.
25. If the recommendation is not accepted, ONB is to include reasons for its decision in its notice to the Applicant and inform of the right to appeal the matter to the Court of Queen's Bench in accordance with section 75 of the Act.
26. This Report issued in Fredericton, New Brunswick this 23<sup>rd</sup> day of November 2018.



The Hon. Alexandre Deschênes, Q.C.  
Integrity Commissioner of New Brunswick