



REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter No: 2018-4465-AP-2431

September 19, 2018

I BACKGROUND

1. This report on the conclusions of the Integrity Commissioner's investigation is issued pursuant to section 73(1) of the *Right to Information and Protection of Privacy Act*¹ ("the Act") and is further to the investigation of a complaint filed under section 68(1).
2. The applicant submitted a complaint on May 14, 2018, expressing dissatisfaction with the response issued by the Collège communautaire du Nouveau-Brunswick ("CCNB") to his access-to-information request dated March 21, 2018 through which he sought to obtain the minutes of all meetings held by the CCNB's Board of Governors (Conseil des gouverneurs) in 2018.
3. In its response to the request on April 24, 2018, the CCNB refused to grant access to the minutes of a regular meeting held on March 23-24, 2018 pursuant to section 25(1)(b) and to the minutes of the following special closed-door meetings pursuant to section 20(1)(b):
 - February 10, 2018
 - March 8, 2018
 - March 14, 2018
 - March 24, 2018

II INVESTIGATION

4. Following amendments to the *Act* made on April 1, 2018, the timeframe for the informal resolution of complaints is now 45 business days and can only be extended with the parties' consent. If it proves impossible to resolve the complaint within that timeframe, the matter is referred to the Commissioner for review and conclusion.
5. In view of the fact that the complaint was not resolved via the informal resolution process, it was referred to me for conclusion prior to the issuance of this Report.

III ANALYSIS AND FINDINGS

6. As indicated above, the CCNB refused to disclose the requested information pursuant to sections 20(1)(b) and 25(1)(b) of the *Act*. Following my investigation into this matter, I find that the CCNB should have granted partial access to the relevant information, and in this regard, I would like to share the following comments.

Section 25(1)(b) – Local public body confidences

¹ SNB, c. R-10.6

7. Let us begin with an analysis of the applicability of section 25(1)(b), i.e. a discretionary exception to disclosure enabling the head of a local public body to refuse to disclose to an applicant any information whose disclosure could reasonably be expected to reveal the substance of deliberations during a meeting of the elected officials of a local public body, during a meeting of its governing body or during a meeting of a committee of its elected officials or governing body if the public was excluded from the meeting.
8. It is important to note that under section 25(2), this exception does not apply if the substance of deliberations was considered during a meeting open to the public, or if the information is found in a document dating back more than 20 years.
9. Before proceeding with an applicability analysis, it is important, in my view, to examine the objective of the provision. As we know, the *Act* grants individuals the right to access information relating to the public business of public bodies, subject to certain limited and specific exceptions.
10. In protecting the content/substance of deliberations during closed-door meetings, section 25 enables the attendees to engage in frank and honest discussions and to weigh various options. That is the case, provided that the information is not publicly disclosed; if the information is publicly disclosed, section 25 does not apply.
11. According to the relevant jurisprudence, this provision is designed to protect the content or "substance" of the deliberations. The term "substance" refers to the essential or crucial part of the deliberations.² In general, the list of attendees and the agenda of the meeting will not be covered by this section because the disclosure thereof would not be likely to reveal the content/substance of the deliberations.³ In short, the fact that the Board of Governors, by way of a by-law, or again the fact that the College's Governance Charter advocate and adopt a policy of strict confidentiality in connection with the Board of Governors' closed door meetings does not necessarily mean that all recorded minute information are immune to the provisions of the *Act*.
12. Since s. 25 is a discretionary exception, the public body must first determine whether the information is covered by the exception; if it is, the public body must exercise its discretion in deciding whether or not to grant access to it.

² IPC Guide to Exemptions for FOIP and LA FOIP, Office of the Information and Privacy Commissioner of Saskatchewan

³ 2018 BCIPC 27 (CanLII)

13. When a complaint is filed regarding the applicability of a discretionary exception, it is analyzed during a two-step process. First, I must determine whether the information is covered by the exception cited, and second, determine whether the public body properly exercised its discretion. In this regard, my role is to solely examine the public body's exercise of discretion to ensure that it was properly exercised, by relying on relevant factors.

Applicability to the case at hand

14. In order to determine whether section 25(1)(b) applies to the case at hand, we must first determine whether the CCNB is a local public body, as set out in the *Act*; if it is, we must determine whether the disclosure of the minutes of the Board of Governors' regular closed-door meeting could reasonably be expected to reveal the substance of deliberations.
15. Upon reading the definitions set out in the *Act*, I find that the definition of a local public body includes an educational body, and CCNB falling under the definition of an educational body, it is clear that it consists of a local public body within the meaning of the *Act*.
16. a health care body and a local government body. Since the CCNB falls within the definition of an educational body, I am satisfied that it is a local public body within the meaning of the *Act*.
17. That being the case, I must now determine whether the CCNB's decision to refuse access to the minutes of the regular meeting, pursuant to section 25(1)(b), is appropriate under the circumstances.
18. As mentioned previously, section 25 is a discretionary exception to disclosure, which means that the CCNB was required to determine whether the requested information was covered by the exception, i.e. if its disclosure could reasonably be expected to reveal the substance of deliberations during the Board of Governors' regular meeting, and then to exercise its discretion in deciding whether or not to grant access.
19. Having examined the relevant minutes, I am in agreement with the CCNB that, due to its nature, the document reveals the substance of deliberations during the meeting. That being said, some information in the minutes, e.g. the list of attendees and the agenda, that, according to me, cannot benefit from protection under section 25 since its disclosure could not reasonably be expected to reveal the substance of deliberations that took place.

20. Since the agendas and lists of attendees do not fall within the scope of section 25, they should have been disclosed to the applicant.
21. Regarding the other information in the minutes, I am in agreement with the CCNB that it is covered by section 25 because its disclosure could reasonably be expected to reveal the substance of deliberations of the meeting. In addition, I am satisfied that the CCNB properly exercised its discretion regarding access to this information, as its disclosure could likely result in a reluctance to speak honestly and frankly during the deliberations if the Board of Governor members are likely to find their comments displayed in the public domain.
22. In light of the foregoing, I find that the minutes of the Board of Governors' regular meeting held on March 23-24, 2018 can be protected pursuant to section 25, with the exception of the list of attendees and the agenda.
23. With regards to the minutes of the special closed-door meetings, I have reached the same conclusion. Their content can be protected under section 25. However, disclosure of the lists of attendees and the agendas could not reasonably be expected to reveal deliberations of the meetings.
24. I therefore find that the minutes of the special closed-door meetings can be protected in accordance with section 25, with the exception of the lists of attendees and the agendas.

S. 20(1)(b) – Information from a harassment investigation

25. The CCNB also cited section 20(1)(b) of the *Act* to justify its refusal to grant access to the minutes of the special closed-door meetings, indicating that disclosure would reveal the substance of other records relating to a harassment investigation.
26. According to the CCNB, the special closed-door meetings contain information relating a harassment investigation.
27. Further to my review of the special closed-door meeting minutes, I agree with the CCNB that their disclosure would reveal the substance of other records relating to a harassment investigation and therefore, that information must remain protected.
28. As for the lists of attendees and the agendas, however, I am of the opinion that this information may not be protected pursuant to section 20 because their disclosure would not reveal the substance of other records relating to the harassment investigation. The agendas in such cases

reflect the topics to be discussed, but nothing more. Their disclosure would not reveal the substance of records relating to the investigation.

Responsibilities under the Act

29. Despite the above findings, the fact remains that the CCNB is a public body within the meaning of the *Act*, and thus has an obligation to be open and transparent in how it manages its operations and makes its decisions in order to ensure that individuals are able to exercise their access rights. The CCCB's governing body, the Board of Governors, also has the same obligation.
30. A fundamental principle of the *Act* is that information should be disclosed using the "default approach", unless an exception to disclosure applies. In this regard, I would encourage the CCNB, during the processing of access to information requests to take into consideration the ultimate purpose of the *Act*, which is to foster openness and transparency. Since CCNB is a publicly funded body, there is clearly a significant public interest in how the CCNB operates and how it is managed.

IV FINDINGS AND RECOMMENDATIONS

31. Under section 73(1)(a)(i)(A) of the *Act*, I recommend that the head of the CCNB grant in part the access to information request where the disclosure would not be likely to reveal the substance of deliberations during the Board of Governors' meetings, or the content of records relating to a harassment investigation, i.e. the lists of attendees and agendas.
32. In accordance with section 74(2), the head of the CCNB has 20 business days to notify the Applicant and the Office of the Integrity Commissioner whether or not he accepts the above recommendation. If the recommendation is accepted, section 74(3) states that follow-up action must be taken within 20 business days following receipt of this report.
33. It should also be noted that according to section 74(4), "If the head of a public body fails to notify the applicant or the third party (...) within 20 business days after making his or her decision, the failure shall be treated as a decision not to accept the recommendation of the Commissioner."
34. This report was issued in Fredericton, New Brunswick on the 19th day of September 2018.

____ original signed by _____

Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner