Office of the INTEGRITY COMMISSIONER

Bureau du COMMISSAIRE À L'INTÉGRITÉ

REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter No: 2018-4295-AP-2331

June 18, 2018

I BACKGROUND

1. This Report of the Commissioner's Findings is made pursuant to the *Right to Information and Protection of Privacy Act*[1].

2. The Applicant filed an access request with the Department of Social Development to obtain access to an investigation report about the Applicant, as well as to explanations regarding a letter she had received from her case manager, which informed the Applicant that her benefits under the *Family Income Security Act* had been terminated.

3. The Department replied to the Applicant's request by refusing to provide her with a copy of the requested investigation report by relying on s. 29(1)(c) of the *Act*, but did provide written explanations regarding the letter she had received from her case manager.

4. Not happy with this latest response, the Applicant filed a complaint with our Office on January 16, 2018.

5. Pursuant to s. 68(1) of the *Act*, the Office of the Integrity Commissioner conducted an investigation into this complaint matter.

II INVESTIGATION

6. As part of our investigation into this matter, we enquired with the Department to find out the reasons why it was relying on s. 29(1)(c) to refuse access to the requested investigation report. We were also provided a copy of the investigation report for our review.

7. As for the reason why it relied on s. 29(1)(c) to refuse access to the investigation report, the Department initially informed us that the investigation report shows what is involved in an investigation and contains its "blue print." Releasing the information would therefore harm the Department's effectiveness of its investigative techniques. When asked how this harm would result, the Department stated that it was its long standing practice to refuse access to investigation reports for the reason that if clients knew the type of investigations the case workers were conducting to verify the clients' continued eligibility to receive benefits, they would attempt to "scam" the Department in providing inaccurate information so as to receive and continue to receive benefits, which would negatively impact the resources available to help clients in genuine need.

[1] S.N.B., c. R-10.6 (the "*Act*")

III ANALYSIS AND FINDINGS

8. It should be noted here that pursuant to s. 84(1) of *Act*, the Department bears the burden of establishing that the Applicant had no right of access to the records requested. It is in that context that the refusal to provide access must be analyzed. S. 29(1) is a discretionary exception to disclosure that contains a reasonable harm test:

> 29(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to
>
> ...
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement.

9. At this point, a brief summary of the applicable principles pertaining to the standard of proof imposed on the Department would be useful. As pointed out by the Supreme Court in *Ontario (CSCS) v. Ontario (IPC)*[2] in para. 52:

> "this formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the mere possible or speculative but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm." (underlying is mine)

10. As well, the Court stated that it is this formulation that should be used wherever "*could reasonably be expected to*" language is used in access to information statutes (see para. 54). In our case, the words used in the relevant sections of the *Act* relied upon by the Department deal with a "reasonable expectation" of harm (i.e. harm to investigative techniques and procedures). Therefore, we find that the burden of proof the Department must meet is as follows: *would disclosure of the investigation report result in a risk of harm that is well beyond the mere possible or speculative*?

11. Based on my review of the investigation report at issue, it appears that the investigative techniques and procedures used by case managers consist of verifying other provincial government department's databases containing information relating to residences to determine whether the Applicant's current listed address matched the one listed in her benefits application.

[2] *[2014] 1 S.C.R. 674*

12. In support of its position, the Department relied on a recent New Brunswick Court of Queen's Bench decision in *Joseph Worden v. Head of the Saint John Police Force* (2018 NBQB 30). In that matter, the applicant made an access request to the Saint John Police Force, which was refused pursuant to s. 29(1)(a) of the *Act*. Although the circumstances in that case are different than this one, the Department stated that the resulting principle is the same, where the Saint John Police Force police argued that disclosure of the requested information would interfere with the recognized investigative technique of withholding certain information, which would provide an unfair advantage to a suspect/person of interest. Justice Grant concluded that the police were correct in withholding the recording as it could reasonably be expected to harm their investigation. The Department therefore argues that the same rationale applies here in that, for the reasons noted above, releasing the investigative report could reasonably be expected to harm the effectiveness of the Department's investigative techniques.

13. I respectfully disagree with the Department's interpretation of that Court decision as being applicable to the circumstances of this matter. For starters, the *Worden* decision does not apply the harm test required under that exception. Secondly, the relevant information in that matter consisted of information contained in an ongoing police investigation by the Saint John Police Force. Thirdly, the applicant in the *Worden* decision was not asking for his own personal information; rather, he was asking for information relating to third parties.

14. A decision that is more on point, I find, is one from the Alberta Information and Privacy Commissioner's Office in Order 99-010[3], in which the Commissioner had to determine whether an Applicant was entitled to receive access to records resulting from the Workers' Compensation Board ("WCB")'s private investigator's surveillance. The WCB refused to disclose some information on the basis that disclosure could harm the effectiveness of investigative techniques and procedures based upon a legislated exception provision that reads exactly as s. 29(1)(c) of our *Act*.

15. The Alberta Commissioner found that the harm test in this provision precludes the refusal of basic information about well-known investigative techniques, and that the focus is on the refusal of information on investigative techniques and procedures that relate directly to their continued effectiveness. In that matter, the information at issue consisted of timesheets from the Private Investigator, where on the bottom of each record, there was a list of areas or searches commonly used by Creditors to verify individuals' address, phone numbers, real property, etc. According to WCB, disclosure of this information would compromise the "investigative tool" and harm would result because people may start giving wrong addresses to mislead others.

[3] 1999 CanLII 19665 (AB OIPC)

16. The Alberta Commissioner, however, disagreed with the WCB as it did not believe that disclosure of the information would harm the effectiveness of the investigation technique employed by the private investigator, given the ubiquitous nature of these searches and that the searches were standard methods used by everyone.

17. In New Brunswick, to continue to receive benefits under s. 6 of the *Family income Security Act's Regulations*, clients are required to reside in the residence listed on their benefits application. The Department claims that if the investigation reports were disclosed to clients, they may then try to defraud the system by providing false addresses to other provincial agencies. However, I do not find this to be convincing evidence that is well beyond the mere possible or speculative.

18. In my view, clients would be generally aware that if there is any question as to whether they are still residing at the address linked to their benefits, the Department will investigate and try to determine whether the clients do in fact reside at that address by verifying databases that keep their current address information. Furthermore, the information used by the Department to verify the clients' current address is information already provided by the clients to other Province's governmental agencies. I find it highly unlikely that clients would be able to effectively change their current address in all of these databases in order to perpetrate a fraud upon the Department.

19. Therefore, I agree with the Alberta Commissioner's decision above, and reiterate that clients are generally aware that the Department would check several provincial databases where their address may be stored in order to determine whether they reside at the same residence listed in their benefits application. Thus, the disclosure of such information would not harm the effectiveness of the Department's investigation techniques *in this case*.

IV RECOMMENDATION

20. Based on my findings above, I find that the Applicant was entitled to receive access in full to the requested investigation report. As a result, and pursuant to s. 73(1)(a)(i)(A) of the *Act*, I recommend that the Department of Social Development disclose the investigation report to the Applicant, in full.

21. As set out in s. 74(2) of the former *Act* (given that the complaint was filed with our Office before the *Act* was amended on April 1, 2018), the Department of Social Development is to notify the Applicant of its decision with respect to this recommendation.

22. If the Department of Social Development decides to accept the recommendation, s. 74(3) requires the Department of Social Development to comply or make the decision it deems appropriate within 15 days of receipt of this Report. If the Department of Social Development decides not to accept the recommendation or fails to notify the Applicant of its decision, the Applicant will have right to appeal the matter to the Court of Queen's Bench in accordance with section 75 of the *Act*.

This Report issued in Fredericton, New Brunswick this ____ day of June 2018.

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