

**Report of Findings: 19/20-AP-148**  
***Right to Information and Protection of Privacy Act***  
**Department of Social Development**

**October 6, 2020**

**Note:** 2019 amendments to New Brunswick legislation transferred the responsibility for the access and privacy mandates from the Office of the Integrity Commissioner to the Office of the Ombud for New Brunswick.

**Summary:** The Applicant made an access request to the Department of Social Development (“the Department”) for “records about the decision to appoint a trustee to oversee operations of the Campbellton Nursing Home, including all reports, memos, briefing notes and presentations that detail problems with the facility.” The Department provided the Applicant with partial access but refused access to the remainder of the relevant information. The Applicant asked the Department asking why the external consultant’s review and a financial review by the Comptroller’s Office were refused. The Department stated that both were refused under s. 17. The Applicant was not satisfied with the Department’s response and filed a complaint with this Office.

The Ombud found that the Department was lawfully required to refuse access to these two records as they fall within the scope of s. 17(1)(b) of the Act (Executive Council confidences). In making this finding, the Ombud noted that New Brunswick has one of the most stringent protections for Cabinet confidences under access to information legislation in the country and recommended that the Province review the provisions from other Canadian jurisdictions and consider possible amendments to ss. 17(1) and 17(2).

**Statutes Considered:** [Right to Information and Protection of Privacy Act](#), SNB, c. R-10.6 , ss. 7(3), 17(1), 17(2), 33.1(1); [Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, s. 27; [Freedom of Information and Protection of Privacy Act](#), R.S.P.E.I. 1988, c. F-15.01, s. 20; [Freedom of Information and Protection of Privacy Act](#), S.N.S 1993, c. 5, s. 13; [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31, s. 12; [Freedom of information and Protection of Privacy Act](#), C.C.S.M c. F175, s. 19; [Freedom of Information and Protection of Privacy Act](#), S.S. 1990-91, c. F-22.01, s. 16; [Freedom of Information and Protection of Privacy Act](#), R.S.A.2000, c.F-25, s. 22; [Freedom of Information and Protection of Privacy Act](#), R.S.B.C. 1996, c. 165, s. 12; [Access to Information and Protection of Privacy Act](#), R.S.Y. 2002, c. 1, s. 15; [Access to Information and Protection of Privacy Act](#), S.N.W.T. 1994, c. 20, s. 13; [Access to Information and Protection of Privacy Act](#), S.N.W.T. (Nu) 1994, c. 20, s. 13; [Access to Information Act](#), R.S.C., 1985, c. A-1, s. 69.

**Cases considered:** [Charleson v. Executive Council Office](#), 2014 NBQB 115 (CanLII), [O’Connor v. Nova Scotia](#), 2001 NSCA 132 (CanLII), Order No. FI-19-011, [Re: Department of Education and Lifelong Learning](#), 2019 CanLII 71190 (PE IPC), Order PO-3973, [Re: Cabinet Office](#), 2019 CanLII 76037 (ON IPC), Order PO-3977, [Re: Ministry of the Environment, Conservation and Parks](#), 2019 CanLII 75679 (ON IPC).



## I BACKGROUND

1. On August 28, 2019, the Applicant submitted the following request to the Department of Social Development (“the Department”) for the following information between January 1 and August 28, 2019:

All records about the decision to appoint a trustee to oversee operations of the Campbellton Nursing Home, including all reports, memos, briefing notes and presentations that detail problems with the facility.

2. The Department responded on October 10, 2019, granting partial access to two records, which consist of letters from the Department to the nursing home about ongoing compliance issues at the facility. The Department refused access to the remainder of the requested information, relying on ss. 17(1)(a), (b), and (e) (Executive Council confidences), s. 26(1)(a) (Advice to a public body), and ss. 27(a), (b), and (c) (Legal privilege).
3. After reviewing the Department’s response, the Applicant asked the Department to ask why two documents mentioned in the records provided with the Department’s response had been withheld, specifically, an external consultant’s review of the nursing home’s human resources issues and a financial review conducted by the Office of the Comptroller. The Department initially informed the Applicant that the financial review was withheld under s. 22(1)(b) (Third party business interests) and the external consultant’s report was part of the submission to Executive Council (s. 17(1)(b)) and was also used to brief and advise the Minister (s. 26(1)(a)).
4. The Applicant indicated to the Department that an appeal was under consideration, at which time the Department offered to reconsider its position in relation to these two reports. The Department subsequently informed the Applicant that both reports were specifically commissioned to advise Cabinet and that s. 17 applies to both documents. The Department also offered, as further explanation, that s. 10 of the *Nursing Homes Act* refers to the appointment of a trustee, a decision that must be made on reasonable grounds. The Department indicated that the reports were commissioned in this context.
5. The Applicant was not satisfied with the Department’s decision and filed a complaint with this Office on November 27, 2019. In making this complaint, the Applicant asked this Office to review all the cited exceptions to disclosure by the Department in refusing access to these two reports. The Applicant also raised the question of whether the public interest override clause under the *Act* applies in this case, as the Applicant believed that it is a matter of public interest, given the long-standing issues at the facility

include staffing concerns, issues with the Office of the Fire Marshall, proper food safety procedures, medication administration and major incident reporting.

6. The matter was not resolved informally and the Ombud conducted a formal investigation pursuant to s. 68(3) of the Act.

## II RECORDS AT ISSUE

7. The records at issue are two reports commissioned by the Department in March 2019:
- the report of an external consultant who was retained to assess and provide recommendations on human resource issues facing the nursing home, particularly recruitment and retention; and
  - the report of the Office of the Comptroller, which was retained to assess and provide recommendations on the nursing home's financial operations and cash flow management.
8. These two reports were finalized and submitted to the Department in June 2019.
9. At that time, the Department determined that further action was required to address the ongoing concerns at the nursing home and the matter became the subject of a Memorandum to the Executive Council, to which these two reports were appended.
10. On August 1, 2019, the Department announced that a trustee had been appointed to oversee the nursing home's operations effective immediately for a period of up to 12 months.<sup>1</sup> The press release states that the nursing home "has been struggling with issues such as staffing ratios, recruitment, occupancy rates and budget pressures for several years."
11. Under s. 84(1) of the Act, the burden of proof is on the Department to show that the Applicant has no right of access to the records at issue.

## III DEPARTMENT'S POSITION

12. During the formal investigation, the Department stated that it was relying on the Executive Council confidences exception under s. 17(1) of the Act, specifically ss. 17(1)(b), (c), and (e). In support of its position, the Department provided following explanations:

---

<sup>1</sup> Province of New Brunswick, "Trustee appointed for Campbellton Nursing Home," August 1, 2019:  
[https://www2.gnb.ca/content/gnb/en/departments/social\\_development/news/news\\_release.2019.08.0446.html](https://www2.gnb.ca/content/gnb/en/departments/social_development/news/news_release.2019.08.0446.html).

- the reports were specifically commissioned to determine the issues impacting the safe and legal operation of the nursing home;
- specifically, the Office of the Comptroller was retained to complete a financial and operational review of the nursing home to determine whether it had appropriate governance, financial, and operational controls, and the findings of this review would impact the Executive Council's decision; and
- disclosing any part of the reports, including the project scope, objectives, criteria, or findings, would disclose information that assisted the Executive Council in making its decision.

13. Section 10(1) of the *Nursing Homes Act* allows for a trustee to be appointed as follows:

10(1) The Lieutenant-Governor in Council may appoint a trustee, for a term not exceeding 12 months, in any of the following circumstances:

- (a) in the opinion of the Minister based on reasonable grounds,
  - (i) a nursing home is not functioning effectively,
  - (ii) the operator or the nursing home fails to meet the requirements of this Act and the regulations,
  - (iii) the operator violates a provision of this Act or the regulations, or
  - (iv) the operator fails to comply with the terms and conditions to which the operator's license is subject; or
- (b) the license of a nursing home has been revoked, a renewal of a license is refused or a license expires and is not renewed.

14. In support of its position, the Department referred to a 2014 New Brunswick Court of Queen's Bench decision, in which the Executive Council Office defended its decision on appeal to not follow a recommendation from my predecessor, the former Access to Information and Privacy Commissioner, to provide the applicant with a list of the relevant records that it had refused in full under various exceptions to disclosure, including s. 17 of the *Act*.<sup>2</sup>

15. The Department's position is that the two reports were commissioned to assist in the determination of whether there were reasonable grounds to appoint a trustee under the circumstances.

---

<sup>2</sup> [Charleson v., Executive Council Office](#), 2014 NBQB 115 (CanLII).

**IV DECISION**

16. The sole issue for me to determine is whether the Applicant has the right of access to any of the relevant information contained in these two reports, which requires an analysis of the s. 17 exception claimed by the Department as grounds for refusing access.
17. During the formal investigation process, the Department maintained that the information at issue falls within ss. 17(1)(b), (c), and/or (e) of the *Act*.

**Section 17: Executive Council confidences**

18. Section 17 of the *Act* states:

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 records of the deliberations or decisions of the Executive Council,
- (b) discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council,
- (c) a proposal or recommendation prepared for, or reviewed and approved by, a Minister of the Crown for submission to the Executive Council,
- (d) a record that reflects communications among Ministers of the Crown relating directly to the making of a government decision or the formulation of government policy, and
- (e) a record prepared to brief a Minister of the Crown about a matter that is before, or is proposed to be brought before, the Executive Council or that is the subject of communications referred to in paragraph (d).

17(2) With the approval of the Executive Council, the Clerk of the Executive Council may disclose information referred to in subsection (1) if a record is more than 15 years old.

19. This is a mandatory exception, which means that where the information in question falls within its scope, the *Act* does not permit disclosure, unless the criteria under s. 17(2) is met and otherwise permits disclosure.
20. The purpose of this exception is to protect the substance of deliberations of the Executive Council (commonly referred to as "Cabinet"), by striking a balance between accountability in government



decision-making processes and allowing Cabinet to deliberate in private. This was set out by the Nova Scotia Court of Appeal in a 2001 case about the applicability of the Cabinet confidences exception under s. 13 of the Nova Scotia *Freedom of Information and Protection of Privacy Act*.<sup>3</sup>

This case is about striking a balance: a balance between a citizen's right to know what government is doing and government's right to consider what it *might* do behind closed doors. It pits the citizen's right to access information relating to the workings of government against the ability of Cabinet to carry out its deliberations in confidence and in private. It calls for an interpretation of an Act that attempts to balance two public rights of perhaps equal importance, the right of the public to be informed and its right to be governed by elected representatives free to frankly express perhaps unpopular views protected by traditional cabinet confidentiality from captious criticism.<sup>4</sup>

21. In this decision, the Nova Scotia Court of Appeal established that the test for establishing whether information is protected from disclosure as Cabinet confidences is as follows:

Thus the question to be asked is this: Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption under s. 13(1).<sup>5</sup>

22. The above test has been adopted by the Prince Edward Island Information and Privacy Commissioner, as well as the Ontario Information and Privacy Commissioner, in recent 2019 decisions.<sup>6</sup> I agree with and adopt this same approach.

23. To meet the requirements of the s. 17(1) exception to disclosure, a public body must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.<sup>7</sup> This can be accomplished by demonstrating that the information at issue is included in the types of information specifically listed in ss. 17(1)(a), (b), (c), (d), and (e). If the information in question is not specifically captured under ss. 17(1)(a) to (e), it may nevertheless still merit protection under s. 17(1) where its disclosure would reveal the substance of Cabinet deliberations or permit the reader to make accurate inferences about the substance of such deliberations.

<sup>3</sup> Nova Scotia *Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5.

<sup>4</sup> *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII), at para. 1.

<sup>5</sup> *Ibid.*, at para. 92.

<sup>6</sup> Order No. FI-19-011, *Re: Department of Education and Lifelong Learning*, 2019 CanLII 71190 (PE IPC), at para. 24 and Order PO-3973, *Re: Cabinet Office*, 2019 CanLII 76037 (ON IPC), at para. 97.

<sup>7</sup> Order PO-3977, *Re: Ministry of the Environment, Conservation and Parks*, 2019 CanLII 75679 (ON IPC), at para. 32.

***Do ss. 17(1)(b), (c) or (e) apply to the information at issue?***

24. The Department maintained that the report in question falls within ss. 17(1)(b), (c), and (e) of the *Act*. The Department submitted that if it were to disclose the information at issue, it would allow accurate inferences to be made about the substance of the Cabinet deliberations, given that the report sets out a number of options and assesses the viability of each, which would have informed Cabinet's decision-making process.
25. In support of its position, the Department cited *Charleson v. Executive Council Office*, in which the Executive Council Office defended its decision on appeal to not follow a recommendation from the former Commissioner to provide the applicant with a list of the relevant records that it had refused in full under various exceptions to disclosure, including s. 17 of the *Act*.<sup>8</sup>
26. In assessing that matter, the Court discussed the role of the Executive Council Office, noting that its role and function are different than that of other Provincial departments and agencies:

[3] The ECO is in a more unique position than some other government departments. As indicated by counsel for the ECO, "it is the repository and custodian of every document submitted to Cabinet for a decision and every document that reflects the decisions of Cabinet".<sup>9</sup>

27. The Court allowed the appeal of the former Commissioner's decision, but also ordered the Executive Council Office to prepare a detailed list of records and submit it to the Court so that the Court could render a further decision on whether the information at issue should continue to be withheld from the Applicant (para. 13).
28. The Department submitted that since the Court's decision did not require the Executive Council Office to disclose the list of relevant records in its possession in that case, that the records at issue in this case should also be protected under the same provision.
29. I note that the Court in that case did not render a final decision on access rights, either to the records at issue or the list of records as recommended be disclosed by the former Commissioner, as per para. 13:

In my opinion, and because I agree that the ECO is in a unique position, I allow the appeal of the decision of the Privacy Commissioner, order that a complete list of the records which were

---

<sup>8</sup> *Supra*, note 2.

<sup>9</sup> *Ibid.*, at para. 3.

identified by the ECO be compiled, with sufficient detail indicating what the record is, and an explanation as to why any access to a list of the records, or access to the records continue to be denied to the Applicant. This detailed list of all records will be filed solely with this Court, so that I can determine whether the information should continue to be exempted from any disclosure pursuant to sections of the Act including, but not limited to, sections 17, 26, 27 and 29. This ruling is in keeping with paragraph 66(1)(a)(i) in that I order the ECO to grant the request "in part".

30. I do not find that this decision is helpful in assessing whether the information at issue is prohibited from disclosure under s. 17.
31. As explained above, the items listed in paragraphs (a) to (e) of s. 17(1) are examples of the kinds of records that contain Cabinet confidences.
32. In this case, the two reports at issue were initially prepared to assist the Department in arriving at a decision on how to proceed, once this decision was made at the Department level, the next step in the approval process was to remit the matter to Cabinet. These reports were appended to the resulting Memorandum to the Executive Council and are directly relevant to the decision subsequently made by Cabinet.
33. As the records in question were appended to a Memorandum to the Executive Council seeking a decision from Cabinet, I find that they form part of a memorandum that was submitted to the Executive Council and thus is protected from disclosure under s. 17(1)(b) of the Act. If I were to find that an appendix to a Memorandum to Executive Council did not form part of the memorandum itself, I would find in the alternative that it would be "similar briefing material" for the purposes of s. 17(1)(b) and thus protected from disclosure.
34. As I find that the records are protected from disclosure under s. 17(1)(b), I need not consider the applicability of ss. 17(1)(c) or 17(1)(e) of the Act.

***Does the s. 17(1)(b) exception protect the entire record from disclosure?***

35. Section 7(3) of the Act states:

7(3) The right to request and receive information under subsection (1) does not extend to information that is excepted from disclosure under Division B or C of this Part, but if that information can reasonably be severed from the record, an applicant has a right to request and receive information from the remainder of the record.



36. This provision places an obligation on public bodies to take steps to ensure that only information that is lawfully protected from disclosure is withheld from applicants. Where only part of the information in a record merits protection from disclosure, a public body should take steps to redact or sever the information at issue and provide the remainder of the record to the applicant wherever it is reasonable to do so.
37. In assessing this complaint, I considered whether some of the information in the records at issue, such as factual or background information, could be disclosed to allow the Applicant a right of access to at least some of the details about the steps taken by the Province to address this situation. The question is whether information in these two records could reasonably be severed to allow for some access while protecting the substance of Cabinet deliberations, as required by s. 17(1) of the Act.
38. Throughout the course of this investigation, the Department maintained that the records in their entirety are protected from disclosure under ss. 17(1)(b), (c), and/or (e) of the Act.
39. To assist in this determination, I looked to the provisions in other Canadian jurisdictions' access to information legislation that govern access rights to Cabinet confidences. I noted that while all Canadian jurisdictions at the provincial, territorial, and federal levels have strong protections for Cabinet confidences in their respective statutes, there is significant variance in terms of how long such information is protected and the circumstances in which some information of this nature may be disclosed.
40. The Ontario, Manitoba, and Saskatchewan legislation allow for the disclosure of otherwise protected Cabinet confidence information with Cabinet consent, regardless of the age of the information.<sup>10</sup> As an example, section 19 of the Manitoba *Freedom of Information and Protection of Privacy Act* states:

19(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including

- (a) an agenda, minute or other record of the deliberations or decisions of Cabinet;
- (b) discussion papers, policy analyses, proposals, advice or similar briefing material submitted or prepared for submission to Cabinet;
- (c) a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet;

<sup>10</sup> [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31, s. 12; [Freedom of information and Protection of Privacy Act](#), C.C.S.M c. F175, s. 19; [Freedom of Information and Protection of Privacy Act](#), S.S. 1990-91, c. F-22.01, s. 16.

- (d) a record that reflects communications among ministers relating directly to the making of a government decision or the formulation of government policy; and
- (e) a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, Cabinet or that is the subject of communications among ministers relating directly to government decisions or the formulation of government policy.

19(2) Subsection (1) does not apply if

- (a) the record is more than 20 years old;
- (b) consent to disclosure is given
  - (i) in the case of a record prepared for or in respect of the current government, by the Executive Council, and
  - (ii) in the case of a record prepared for or in respect of a previous government, by the President of the Executive Council of that government or, if he or she is absent or unable to act, by the next senior member of that government's Executive Council who is present and able to act.

41. I also note that several other jurisdictions treat background and factual information, explanations, and analysis information differently and do not protect information of this nature from disclosure as Cabinet confidences in certain circumstances.
42. For example, both Newfoundland and Labrador and Nunavut's respective statutes define the term "cabinet record" and specifically exclude factual and background material.<sup>11</sup> Section 27(1) of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015* provides:

27.(1) In this section, "cabinet record" means

...

(d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;

[Emphasis added]

43. Nunavut's statute contains wording to the same effect at s. 13(1)(c). In both jurisdictions, background and factual information is deemed not to constitute Cabinet confidences and are not protected from disclosure under their respective exceptions to disclosure on this basis.

<sup>11</sup> [Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, s. 27(1)(d); [Access to Information and Protection of Privacy Act](#), S.N.W.T. (Nu) 1994, c. 20, s. 13(1)(c).

44. While these two jurisdictions are the only ones in the country that specifically exclude background and factual information from protection as Cabinet confidences, several other jurisdictions link the protection of background information to the status of the decision-making process to which it relates.
45. For example, s. 13 of Nova Scotia's *Freedom of Information and Protection of Privacy Act*,<sup>12</sup> which is the least restrictive Cabinet confidences exception in the country, creates a discretionary rather than mandatory exception to disclosure and only protects historical information for a period of 10 years:

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to

- (a) information in a record that has been in existence for ten or more years;
- (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal pursuant to an Act; or
- (c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
  - (i) the decision has been made public,
  - (ii) the decision has been implemented, or
  - (iii) five or more years have passed since the decision was made or considered.

[Emphasis added]

46. Under the Nova Scotia statute, background information that was presented to Cabinet in relation to a decision that has been made public, a decision that has been implemented, or for decisions that were not made public or implemented, where five or more years have passed since a decision was made or considered, is not protected as Cabinet confidences. The public would have a right of access to information of that nature in Nova Scotia.
47. I note that the Alberta, British Columbia, Yukon, and federal access legislation contain provisions with substantially similar wording and largely to the same effect.<sup>13</sup>

<sup>12</sup> *Freedom of Information and Protection of Privacy Act*, S.N.S 1993, c. 5, s. 13(2)(c).

<sup>13</sup> *Freedom of Information and Protection of Privacy Act*, R.S.A.2000, c.F-25, s. 22(2)(c); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 12(2)(c); *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, s. 15(2)(c); *Access to Information Act*, R.S.C., 1985, c. A-1, s. 69(3)(b).

48. Ontario’s legislation has a similar provision:

12(1) A head shall refuse to disclose a record where disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

...

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;<sup>14</sup>

[Emphasis added]

49. Under the Ontario statute, background explanations or analyses of problems are only protected under the Cabinet confidences exception while the decision to which they relate is under consideration. The protection from disclosure under the Cabinet confidences exception no longer applies to this kind of information once the corresponding decision has been made and implemented.

50. In this case, I find that the two records at issue contain some factual and background information and that a final decision was made, publicly announced, and subsequently implemented. If the Cabinet confidences found in s. 17 of the *Act* included language similar to or having the same effect were included in this provision, I would be able to recommend disclosure of at least some of the information in these two reports.

51. In the absence of clear language to this effect in s. 17 of the *Act*, I cannot recommend that these two records be disclosed, even in a redacted form, to provide factual or background information to the Applicant. Had the legislature intended to allow for the disclosure of this kind of information, language to this effect would have been included in the exception.

52. The disclosure of some information to the Applicant would assist in the understanding of the steps taken by the Department on this issue, particularly where final decisions have been made and implemented. However, s.17 must be interpreted based on its present wording.

53. I cannot recommend disclosure of information that is protected by a mandatory exception.

<sup>14</sup> [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31, s. 12(1)(c).

54. I recommend that the Province review the Cabinet confidence exceptions under s.17 with a view to consider implementing similar provisions to those found in other Canadian jurisdictions.

***Application of Section 17(2)***

55. I find that s. 17(2) of the *Act* does not apply to otherwise permit disclosure of these records, as they are less than 15 years old. As such, neither Cabinet nor the Clerk of the Executive Council has the authority to otherwise allow disclosure.
56. In conducting my review of other Canadian jurisdictions' Cabinet confidences exceptions in their respective access to information legislation, I note that the timeframe for which information of this nature is protected ranges between 10 and 25 years.
57. I also note that, in every other Canadian jurisdiction, once information that is protected as a Cabinet confidence passes the specified timeframe in the equivalent provisions to s. 17 of the *Act*, it is no longer protected under the Cabinet confidences exception to disclosure and presumably can be disclosed, unless it is otherwise protected under a different exception.<sup>15</sup>
58. This means that New Brunswick is the only jurisdiction in Canada that places restrictions on the disclosure of historical Cabinet records, requiring Cabinet approval and allowing the Clerk of the Executive Council the discretionary power to grant access.
59. While s. 17(2) has bearing on access rights in the present case due to the age of the records at issue, I recommend that the Province consider amendments to s. 17(2) to remove the conditions for the disclosure for historical records that contain Cabinet confidences, i.e., requiring Cabinet approval and providing the Clerk of the Executive Council with discretion to grant access.

---

<sup>15</sup> [Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, s. 27(4(a)); [Freedom of Information and Protection of Privacy Act](#), R.S.P.E.I. 1988, c. F-15.01, s. 20(2)(a); [Freedom of Information and Protection of Privacy Act](#), S.N.S. 1993, c. 5, s. 13(2)(a); [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31, s. 12(2)(a); [Freedom of Information and Protection of Privacy Act](#), C.C.S.M c. F175, s. 19(2)(a); [Freedom of Information and Protection of Privacy Act](#), S.S. 1990-91, c. F-22.01, s. 16(2)(a); [Freedom of Information and Protection of Privacy Act](#), R.S.A.2000, c.F-25, s. 22(2)(a); [Freedom of Information and Protection of Privacy Act](#), R.S.B.C. 1996, c. 165, s. 12(2)(a); [Access to Information and Protection of Privacy Act](#), R.S.Y. 2002, c. 1, s. 15(2)(a); [Access to Information and Protection of Privacy Act](#), S.N.W.T. 1994, c. 20, s. 13(2); [Access to Information and Protection of Privacy Act](#), S.N.W.T. (Nu) 1994, c. 20, s. 13(3); [Access to Information Act](#), R.S.C., 1985, c. A-1, s. 69(3)(a).



**V PUBLIC INTEREST OVERRIDE**

60. In making this complaint, the Applicant raised the question of whether the public interest override in the *Act* applies in this case. The Applicant submitted that the situation is a matter of public interest, given the reported long-standing issues at the facility, including staffing concerns, issues with the Office of the Fire Marshall, proper food safety procedures, medication administration and major incident reporting, some of which relate to public safety.
61. The provision that governs disclosure in the public interest is found in s 33.1 of the *Act*:
- 33.1(1) Despite any provision of this Act, whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.
- 33.1(2) Before disclosing information under subsection (1), the head of a public body shall, if practicable, notify any person to whom the information relates.
- 33.1(3) If it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the form determined by the Minister to the latest known address of the person.
62. I note that this provision requires public bodies to disclose information in certain circumstances, regardless of whether an access request has been made. Where it is in the public interest to disclose information under s. 33.1(1), this will override any other provisions of the *Act* that may protect or prohibit that same information from otherwise being disclosed.
63. This mandatory obligation is triggered where one of the following circumstances exist:
- there is a risk of significant harm to the environment; or
  - there is a risk of significant harm to the health or safety of the public or a group of people.
64. Where either of these circumstances exist, the head of the public body must consider whether disclosure of information about the risk of significant harm is clearly in the public interest, and if so, to disclose such information to the general public, to an affected group of people, and/or to an applicant who has made an access request, depending on the circumstances at play.



65. The circumstances that lead to the decision to appoint a trustee to temporarily take over the facility's operations in August 2019 give rise to concerns about the safety, and possibly the health, of residents of the facility. Details about the nature of these concerns have already been publicly disclosed through the publication of the facility's inspection reports on the Department's website<sup>16</sup> and the public announcement of the trustee's appointment. The decision to appoint a trustee demonstrates that the Department was aware of ongoing issues at the facility and that it took measures to address them.
66. The Applicant is seeking information, beyond what was publicly disclosed by the Department, about the decision to appoint the trustee, including records that detail problems with the facility.
67. While the two records that are the subject of this complaint do contain some information about potential risks to the facility's residents' health and/or safety, the majority of the information in these two reports speak to the financial circumstances of the facility and human resource issues. The reports also contain some personal information about the facility's Board members and staff. Had I not found that these records were protected from disclosure under the Cabinet confidences exception under s. 17(1), I would likely have found that they were largely protected from disclosure under other exceptions to disclosure, including s. 21(1) (unreasonable invasion of privacy), s. 22(1) (disclosure harmful to third party business interests), and s. 26(1)(a) (advice to a public body).
68. While the information contained in these reports further detail the specific nature of the concerns with the facility that ultimately lead to the decision to appoint a trustee to oversee its operations in August 2019, I do not find that the disclosure of this information would speak to any other potential risks to the health and safety of residents of the facility. Further, given the level of detail about the facility's internal operations and financial situation contained in these two reports and the potential negative impact it could have on the facility if such information were to be publicly disclosed, I do not find that disclosure is clearly in the public interest.
69. As such, I do not find that the public interest provisions of s. 33.1(1) of the Act apply so as to require the disclosure of these two reports.

---

<sup>16</sup> Department of Social Development, Inspection of Nursing Homes:  
[https://www2.gnb.ca/content/gnb/en/departments/social\\_development/nursinghomes/content/inspection\\_nursing\\_homes.html](https://www2.gnb.ca/content/gnb/en/departments/social_development/nursinghomes/content/inspection_nursing_homes.html).

## VI RECOMMENDATION

70. Based on the above findings, under s. 73(1)(a)(ii)(A), I confirm the Department's decision to refuse access to these two records, as disclosure is prohibited under s. 17(1)(b) and is not otherwise subject to disclosure by virtue of s. 17(2) or s. 33.1(1) of the Act.
71. Under s. 64.1(1)(h), I recommend the Minister of Finance and Treasury Board, the Minister responsible for the administration of this Act review the provisions from other Canadian jurisdictions and consider possible amendments to ss. 17(1) and 17(2), to consider expanding access rights to information of this nature and to remove the conditions for disclosure for historical records.

This Report issued in Fredericton, New Brunswick this 6th day of October 2020.



Charles Murray  
Acting Ombud for the Province of New Brunswick