

**Submission to the Task Force on Right to Information
and Protection of Personal Information**

**Department of Justice and Consumer Affairs
June 2007**

1) Introduction

The Discussion Paper prepared by the Task Force sets out the difficulties in balancing competing interests with respect to access to information and privacy. Open and transparent government is clearly in the public interest and is an important principle of accountability that that needs to be respected.

However, it is also in the public interest to ensure that government is able to operate effectively. This may at times require it to protect sensitive information.

More clear and concise limits on what information can be accessed under the *Right to Information Act* are needed, so that officials can advise, deliberate and make decisions in a frank and forthright manner. Refinements to the legislation are needed so that requests under the RTIA do not hamper the ability of government regulators to carry out their statutory duties and responsibilities in an effective manner. In addition, privacy legislation needs to be amended to overcome barriers to sharing information with partners in the criminal justice system on a routine basis.

2) Specific concerns of the Department of Justice and Consumer Affairs

Court records

The Judicial Branch of government operates independently of the other branches of government and does not report to Ministers or to the Legislature. As such, the Courts are not and should not be subject to the *Right to Information Act* (RTIA) or the *Protection of Personal Information Act* (POPIA).

While the Department of Justice and Consumer Affairs is responsible for the administration of the justice system through its Court Services Division, the courts themselves are responsible for the maintenance of their records and the information they generate. The courts use due diligence in responding to requests for access to documents contained in court files. It should be stated in the RTIA that its provisions do not apply to the Courts and court records, in the interests of making this distinction clear to the public.

Department's role as a regulator

The Department of Justice and Consumer Affairs acts as a regulator in a number of areas:

- The Credit Unions Branch is responsible for the supervision of credit unions and *caisses populaires* in New Brunswick. It administers the *Credit Unions Act* and Regulations and carries out the duties and responsibilities of the Superintendent of Credit Unions. Along with providing incorporation services for credit unions and *caisses populaires*, the Branch oversees the financial stability and solvency of credit unions for the protection of depositors as well as recommending policy and legislative changes concerning credit unions.

- The Co-operatives Branch administers the *Co-operative Associations Act* and Regulations. The Branch provides incorporation and related services and recommends policy and legislative changes concerning co-operatives.
- The Loan and Trust Companies Branch administers the *Loan and Trust Companies Act*. The activities involve incorporation and licensing of provincial loan and trust companies as well as licensing of extra-provincial loan and trust companies.
- The Insurance Branch of the Justice Services Division supervises and regulates the business of insurance in New Brunswick. The goal is to protect the public by regulating insurers who carry on business in the Province and by requiring individuals who sell insurance products on behalf of these insurers to meet identified proficiency standards. The Branch is responsible for the administration of the *Insurance Act*, the *Premium Tax Act*, the *Surety Bonds Act*, and the *Special Insurance Companies Act*.
- The Examinations Branch of the Justice Services Division is responsible for examining financial institutions, corporations and individuals licensed by other branches of the Department. The Branch operates a comprehensive examination framework in order to provide regulators of financial institutions and licensees with assessments of whether those being regulated are financially healthy, observing sound business practices, and meeting compliance requirements under the following statutes: *Insurance Act*, *Credit Unions Act*, *Pre-arranged Funeral Services Act*, *Loan and Trust Companies Act* and the *Collection Agencies Act*. The Branch is also responsible for providing advisory services and recommending policy changes affecting the regulation of financial institutions and licensees for solvency, stability, and sound financial management practices.
- The Office of the Superintendent of Pensions is responsible for administering the *Pensions Benefits Act* and its *General Regulation*. This legislation provides pension plan members with safeguards concerning entitlement to pension benefits. The Office also registers private sector pension plans and plan amendments in an effort to reduce the risk of plans being under-funded. It also investigates alleged violations of any provision of the *Act* or its *Regulation* and is responsible for the pre-authorization of all pensions plan wind-up, partial wind-ups, transfers and surplus payments.

In the course of undertaking their duties, regulators in these branches receive confidential financial and commercial information from third parties pursuant to statutory filing obligations, which should not be subject to release under the RTIA. While it is in the public interest to advise if a regulated body is or is not meeting its statutory obligations, the public interest is not served by releasing information provided in confidence to enable that determination to be made.

Government regulators are moving toward a more cost effective way of carrying out reporting, through self-assessments. In these cases, regulators rely on the willingness of third parties to voluntarily provide confidential, commercial information. Without an assurance that such information will not be subject to release under the RTIA, third parties might be less willing to undertake self-assessments because they would fear that their sensitive commercial information may be released. In some cases, the lack of protection in the RTIA for this type of

confidential information has deterred other regulatory bodies from sharing information in their possession with our regulators in the course of investigations.

Another area of concern is with respect to sensitive information received or prepared in the course of negotiations. As part of its mandate to oversee the financial stability and solvency of credit unions for the protection of depositors, the Credit Union Branch has been engaged in negotiations with a financial institution in the Province to ensure the solvency of the institution. In the course of these negotiations, the Branch has received or generated a great deal of highly sensitive, confidential, commercial information, the release of which could cause irreparable damage to the negotiations.

In our experience, the exemptions in section 6 of the Act are not broad enough to protect the type of confidential information described above from release under the RTIA. While the legislation for which the Department is responsible could be amended to include broad confidentiality provisions, similar to the one in the *Pension Benefits Act*, which prohibits the disclosure of any information related to a pension plan registered with the Superintendent of Pensions, it would be more consistent and transparent to amend the exemptions in the RTIA to clearly set out the limits on disclosure of this confidential commercial information.

Section 6(c) exempts from disclosure information that “**would** cause financial loss or gain to a person or department, or **would** jeopardize negotiations leading to an agreement or contract”. This is problematic in that the “would” test is a very high standard to meet. One cannot know if the release of information would cause financial loss or gain, until it actually happens. The Department of Justice and Consumer Affairs submits that the wording of this section be amended to replace “would” with “could” or “could likely”. (This would also address the inconsistency between the English version and the French version of section 6(c), where the French version which uses the term “pourrait”.)

Section 6(c.1), exempts from disclosure information that:

“would reveal financial, commercial, technical or scientific information

- (i) given by an individual or a corporation that is a going concern in connection with financial assistance applied for or given under the authority of a statute or regulation of the Province, or
- (ii) given in or pursuant to an agreement entered into under the authority of a statute or regulation, if the information relates to the internal management or operations of a corporation that is a going concern;”

In some cases, such as negotiations with a financial institution in the Province discussed above, the Department receives information in connection with contemplated financial assistance. However the sharing of the information does not stem from an application by a third party for financial assistance, as would be the case with an entity like Business New Brunswick or Regional Development Corporation. This exemption is too specific to protect the confidential financial, commercial or technical information that may be received in such a case. This makes the case for amending section 6 (c) even more compelling.

Section 6(d) provides an exemption where the release would violate the confidentiality of information obtained from another government. The section should be expanded to cover information provided by regulatory bodies.

Similar to section 6(h.1), which exempts from release that which “would reveal information gathered by police, including the Royal Canadian Mounted Police, in the course of investigating any illegal activity or suspected illegal activity, or the source of such information”, consideration should also be given to amending section 6 to provide an exemption for information generated or gathered in the course of an investigation carried out by a regulator or regulatory body into a contravention or suspected contravention of an Act.

Another gap in the exemptions relates to databases. As a regulator, the Justice Services Division of the Department maintains several internal databases of licenses issued under legislation or regulation. The Department has received requests in the past for entire databases and has released them to comply with the RTIA. While the Department should and does confirm the fact that a certain individual was issued a license to carry out a certain activity, or conversely that their license was suspended (without providing the licensee’s home phone number, home address or age, etc.), the databases themselves should be exempt from release under the RTIA.

Privacy issues:

JISNB

Department records that have been generated from the court record are handled differently than the court records itself. The Justice Information System of New Brunswick (JISNB), which contains a summary of information contained in court files, is administered by the Department and is therefore subject to the RTIA and POPIA.

POPIA limits our ability to share information on JISNB database with our partners in the criminal justice system on a routine basis. Similarly, the Department has had difficulty in gaining access to similar databases of other criminal justice partners.

Although the exemption for public health, safety and security would appear to be relevant, it is not clear enough as it has been interpreted as requiring an immediate threat to public health, safety or security. The 9/11 experience highlighted the risks of a breakdown in communications among the government departments and agencies responsible for public safety and justice systems, and we need to be able to share information on a routine basis for purpose of criminal checks in order to prevent a threat to security or safety from occurring later on. Information in the database would only be disclosed for the purpose of law enforcement; ensuring that partners in the criminal justice system are communicating with each other.

Office of Public Trustee

The new Office of the Public Trustee will act for persons who do not have the capacity to make decisions either for the management of their personal assets or their personal care and who do not have a family member or other individual who is capable and willing to act on their behalf. The Office will be responsible for certain individuals under the *Infirm Persons Act* and

the *Mental Health Act*. The Office will also administer the estates of certain deceased persons.

Clearly there will be issues regarding access to information and protection of personal information. A more thorough examination of these issues will be provided in the Department's submission to the Task Force on Personal Health Information. However, there will need to be enough flexibility either in new personal health information legislation or in POPIA to allow for the free flow of information between health professionals and the Public Trustee in order to ensure the Trustee's ability to perform his/her duties.

Circumventing of fees:

The Department of Justice and Consumer Affairs was involved with a situation that arose as a result of a request for the transcript of a coroner's inquest. Under the *Coroner's Act*, all transcripts from a coroner's inquiry must be submitted to the Chief Coroner. A request was made to the Minister of Public Safety under the RTIA for a copy of the transcript which was being prepared by a court reporter.

The issue in this case was not whether or not the applicant had the right to the information requested, but rather the source from which the information should be obtained and difference in the applicable fees. Section 7 of the *Court Reporter's Act* states that a court reporter must provide a copy of a transcript to any party who requests it and who has paid the fee prescribed in the regulation. The applicable fees under the *Fees Regulations - Court Reporter's Act* were significantly higher than those payable if the information were to be accessed under the RTIA.

Section 3(8) of the RTIA states the following:

If information has been published and is available to the applicant in published form

- (a) the appropriate Minister shall notify the applicant in writing, referring the applicant to the publication, and
- (b) this Act no longer applies to the request for information.

In this case, as the transcript was not considered "published", section 3(8) did not apply. The requester could access the transcript under the RTIA and avoid paying the substantially higher fee under the *Court Reporter's Act*.

In our view, it is inappropriate that a person seeking a copy of a transcript should be able to circumvent required fees under another Act, by requesting information under the RTIA, when the information requested is available to the applicant in another context. The Act should be amended to prevent this from happening. Section 3(8) could be amended to read: "If information has been published **or is currently available to the public...**", similar to section 22 of the Ontario *Freedom of Information Act and Protection of Privacy Act*. This would address the above noted situation in that the Minister could have referred the applicant to the court reporter as the transcript was available to the public, although it was not published.

3) General comments:

In addition to the specific departmental concerns outlined above, we would make the following general comments, based on the areas of questions set out in the discussion paper:

Context

Records Management

As a general comment, the issue of access to information needs to be examined in the context of records creation, management and retention by government. In many cases, a great deal of time and effort goes into locating and assembling all the relevant documents in response to a request. Despite the fact that records management guidelines exist, they do not appear to be universally understood or followed in a consistent manner within departments or across government.

Even if amendments are made to the RTIA that improve the ability to respond to requests, some requests will continue to be time-consuming if departments and agencies do not manage their records in a way that makes it relatively easy to assemble all relevant documents and avoid having to sort through duplicate copies of documents from various sources.

Routine access

The types of information that should be considered subject to routine access would include things such as statistics, easily generated data in aggregate form and routine reports. In many cases these types of information are publicly available, but having a routine access policy that clearly sets out what is and is not available without having to submit a request under the *Right to Information Act* and ensuring that the routine access policy is widely disseminated among staff and to the public, could save time and effort for government and the public.

A routine access policy should be developed for government as a whole, with input from departments and agencies, so that information is treated in a consistent manner.

Scope

A review of the list of institutions currently subject to the RTIA highlights the inconsistent treatment of agencies, boards and commissions. The New Brunswick Securities Commission is covered, while the New Brunswick Legal Aid Services Commission is not. The Labour and Employment Board is covered, while the WHSCC is not. There may be valid reasons to exclude some agencies, boards or commissions from the application of the RTIA, but a test or guideline for inclusion is needed. The simplest test would be whether the agency, board or commission receives the majority of its funding through taxpayer dollars. Under this test, the New Brunswick Insurance Board, which is currently not subject to the RTIA, would remain outside its scope as its operations are funded by the insurance industry.

A legislative process to add agencies, board or commissions under the RTIA would be more transparent and open, albeit less expedient.

Access Process

Establishment of RTI/Privacy Commission or Office

A Right to Information and Privacy Commission or Office should be established within government. It could carry out much of the work that Executive Council currently does with respect to right to information and privacy matters but would be in a position to focus solely on these areas and take a more active role in helping government manage the process. Such an Office or Commission could ensure that new agencies boards and commissions are brought under the RTIA if appropriate; establish guidelines for departments and agencies to follow when gathering and reviewing information in response to RTIA requests, organize training sessions; maintain statistics and prepare reports; and maintain a summary of the jurisprudence. In addition, any discretion under the RTIA (for example discretion to waive fees or extend the timeline to respond to a request) could be vested in the head of this body rather than in individual Ministers.

Treatment of Requests

With respect to differential treatment depending on who the requester is, it would at first glance appear appropriate to treat commercial use applications differently than others. However, it may be difficult to make a determination if a request is for a commercial purpose. For example, is information sought by a newspaper going to be used in the public interest (informing the public) or for a commercial purpose (selling newspapers)?

The RTIA should clearly limit to one the number of requests from an individual or organization to be processed at a time.

Consideration should also be given to prohibiting “frivolous or vexatious” requests. Such a prohibition could help prevent problematic multiple requests from a single requester. However, such a provision would have to be treated carefully. An objective definition of what constitutes a frivolous and vexatious request would have to be developed. There may also be a need for a right of appeal to an independent review if a requester is denied information on the basis that the request is frivolous or vexatious.

Fees

As section 4(1)(a) of the *Right to Information Act* is currently worded, there is in effect no “application” fee. The \$5.00 charge is a fee for accessing information, as it is due only at the end of the process if the Minister or a judge of the Court of Queen’s Bench grants the request. A Department cannot refuse to process a request until payment of the fee is received. If the intent of an application fee is to discourage frivolous requests, the fee must be a true application fee that must accompany a request before the Department or agency starts to process it.

The current “application” fee of \$5.00 and charge of ten cents a page for photocopying are insufficient to act as deterrents to frivolous requests or fishing expeditions. A reasonable, higher fee along the lines of \$25.00 should be considered. As well, the Act should follow the Manitoba model and provide that where requests will take more than a minimum number of hours (2 or 3) to assemble the documentation in response, an hourly assembly fee is charged. The requester should be advised of the estimated time it will take to assemble the information and be given a “without prejudice” quote on the cost (recognizing that it could be higher or lower). At that point the requester could withdraw or modify the request.

This approach would help prevent “fishing expeditions” without requiring differential treatment to be developed for different types of requests.

There should be discretion to waive or reduce the assembly costs. However, in the interests of consistent treatment, consideration should be given to establishing a Right to Information and Privacy Commission and giving the head of this body the discretion to waive fees when requested by a Minister.

Review Process

The Discussion Paper indicates that the experience to date has been that a small percentage of responses to requests result in complaints. However, if the RTIA is amended to do things like increase the fees, limit requests or prohibit frivolous and vexatious requests, or further limit information that can be accessed, it is foreseeable that more complaints will be made. It may become more important to continue to have a means for complaints to be heard and resolved in a cost effective and timely manner, other than going to Court.

Administration

Application form

A request under the RTIA should be made on a standard form developed by government. This form would specify that the fee must accompany the request and provide guidance on how to make the request. Such an application form should be publicized and made readily available online and at Departmental and SNB offices.

Time to respond

Departments and agencies need to have the ability to seek an extension to respond to certain requests. It takes a great deal of time to assemble information from various divisions/branches especially where requests are broad or cover a long time period. Also where the information is highly sensitive, it takes time to do a proper review to ensure compliance with the RTIA and POPIA.

We suggest that the RTIA provide for an extension in range of 30 to 45 days. The requester would have to be informed of the extension within 10 days from the receipt of request for an extension. Oversight of such requests could be with a Right to Information/Privacy Commission or Office.

The RTIA should be amended to allow for a suspension of time to respond to requests in the event that a request is sent to the wrong department. A Right to Information/Privacy Commission or Office could handle requests that come to the wrong department, forward them on to the appropriate department and instruct the appropriate department to contact the requester to advise that the response will be provided but that there is an extension (for example ten days) to account for the transfer to the appropriate department.

Privacy

If a third party does business with government they should be aware they are not dealing with another private entity, and that the RTIA applies to much of the transaction. However, as discussed above, the RTIA should be modified to clarify treatment of third party financial/commercial information.

Limitations On Access

As noted above, the Department of Justice and Consumer Affairs feels that the exemptions under section 6 of the Act should be amended to clearly exclude access to confidential commercial information provided to or obtained by a regulatory body. We would make these additional comments:

- The RTIA should more clearly define whether information regarding an individual in his or her business capacity (for example, business address, phone number, partnership name, professional qualifications) is “personal information” for the purposes of section 6(b). (This clarification should also be made in POPIA).
- Currently, it is unclear whether draft reports and related working papers are exempt from disclosure. Drafts of documents that are later published in final form should not be considered records for the purpose of the RTIA. Unfinished draft reports could be disclosed within a certain time period, if no final report is delivered.