

Right to Information and Protection of Personal Information Review Task Force

Objective The objective of this document is to respond to the questions outlined in the “Access to Information and Privacy Review – A Discussion Paper”. This document includes responses only to those sections that are applicable to the NB Power Group.

NB Power Group The NB Power Group consists of a holding company and four operating companies

- New Brunswick Power Holding Corporation, which provides strategic direction, governance and support to the subsidiaries for communications, finance, human resources, legal and governance. It also provides shared services on a cost recovery basis
- New Brunswick Power Generation Corporation, which is responsible for the operation and maintenance of the oil, hydro, coal, and diesel-powered generating stations
- New Brunswick Power Nuclear Corporation, which is responsible for the operation of Point Lepreau Generating Station
- New Brunswick Power Transmission Corporation, which is responsible for operating and maintaining the transmission system
- New Brunswick Power Distribution and Customer Service Corporation, which is responsible for operating and maintaining the distribution system. Disco is designated as the standard service supplier for the Province of New Brunswick and is obligated to provide standard services to residential, commercial, wholesale and industrial customers located throughout the province

New Brunswick Power Generation Corporation wholly owns two subsidiaries

- New Brunswick Power Coleson Cove Corporation, which owns and operates Coleson Cove Generating Station
- NB Coal Limited, which mines coal to supply to Grand Lake Generating Station

This submission represents the views of all corporations within the NB Power Group (NB Power).

Introduction NB Power has been subject to the New Brunswick *Right to Information Act* since it was introduced in 1980 and the *Protection of Personal Information Act* since 1998. In 2001, when NB Power was restructured into a holding company and four operating companies, the individual corporations became party to these acts.

The utility receives approximately 15 to 20 formal requests for information each year under the *Right to Information Act*. Requests submitted to NB Power come almost exclusively from opposition parties, the media and lawyers. NB Power rarely receives formal requests for specific documents or subject matters and responding to requests often involves extensive searches.

In addition to the formal requests received through the *Right to Information Act*, NB Power receives many more requests annually for routine information that are not processed through the *Act*.

Continued on next page

Right to Information and Protection of Personal Information Review Task Force, Continued

Approach

NB Power welcomes the opportunity to participate in the access to information and privacy review process. NB Power believes in open and transparent operations, balanced with the need to preserve confidentiality to operate in a competitive business environment where decisions are made for business reasons.

Recommendations contained within this document reflect a combination of NB Power's experience with the *Act* and research conducted relating to legislation in the rest of the country. During its review of provincial, territorial and federal legislation, NB Power observed the consistent approach used in many jurisdictions. In addition, NB Power observed that the New Brunswick legislation was out of step with that of most of the rest of the country.

In order to facilitate easier review of this document, whenever possible, references are cited from the Prince Edward Island *Freedom of Information Act*, which is the most recently introduced *Act*.

Attachments

NB Power has provided its views and recommendations in response to the discussion paper in the following attachments

- Attachment A** – Access Process
 - Attachment B** – Review Process
 - Attachment C** – Administration
 - Attachment D** – Privacy
 - Attachment E** – Limitations on Access
 - Attachment F** – Protection of Personal Information
-

End of document

Attachment A – Access Process

Designated 'head'

Background

Subsection 1(d) of the New Brunswick *Right to Information Act* states that "appropriate Minister" means *if a Minister is not responsible for the administration of the department in which the requested information is kept or filed, the person responsible for the department in the Legislative Assembly.*

Current situation

Under the existing *Act*, all information requests for NB Power are processed through the Department of Energy. NB Power and the applicant do not communicate directly with one another, which often makes it difficult to reach common understanding. This added step often results in short time frames for completing the requests and/or the requestor receiving the information after the prescribed 30-day deadline. As well, the Department of Energy is often put in the unenviable position of having to communicate decisions made by the utility to applicants and/or representatives from the Ombudsman's office.

Other jurisdictions

Many of the provincial Acts allow the applicant to submit information requests directly to the public body. For example, subsection 1(d) of the Prince Edward Island *Freedom of Information Act* states

1 (d) "head", in relation to a public body, means

- (i) if the public body is a department, branch or office of the Government of Prince Edward Island, the member of the Executive Council who presides over it,
- (ii) if the public body is an agency, board, commission, corporation, office or other body designated as a public body in the regulations,
 - (A) the person designated under subsection 77(2) as the head of that body, or
 - (B) where a head is not so designated, the person who acts as the chief officer for, and is charged with the administration and operation of, that body, or
- (iii) in any other case, the chief officer of the public body;

Recommendation

NB Power is of the view that the *Act* should designate NB Power's Chief Executive Officer as the 'head'.

Continued on next page

Attachment A – Access Process, Continued

Independent commissioner

Background

The New Brunswick *Right to Information Act* does not contain references to an independent access commissioner.

Current situation

Currently, there is not an independent access commissioner in New Brunswick.

Other jurisdictions

Most provinces have a designated Commissioner or Ombudsman who oversees the administration of the *Act* providing support to applicants, public bodies and interested third parties. Of particular interest to NB Power is the role the Commissioner plays in providing advice and recommendations. For example, subsection 51(1) of the Prince Edward Island *Freedom of Information Act* states *the head of public body can ask the Commissioner to give advice and recommendations on any matter respecting any rights or duties under the Act.*

Recommendation

NB Power is of the view that an independent access commissioner could help facilitate a more efficient and streamlined process.

Continued on next page

Attachment A – Access Process, Continued

Specificity and particularity

Background

Subsection 3(2) of the New Brunswick *Right to Information Act* states that *the application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.*

Current situation

Under the existing *Act*, there is no mechanism to address requests lacking in specificity and particularity. Frequently, requests submitted to NB Power often ask for “any and all documents” relating to multiple subject matters. It has been the utility’s practice to ask the applicant, through the Department of Energy, to provide further specificity and particularity. Usually, the clarification provided does little to narrow the request, which results in resources being redirected to complete the requests. The applicant has to wait longer than the prescribed 30 days because the volume of documents processed make it impossible to meet the deadline.

Other jurisdictions

Many of the provincial Acts contain a mechanism for addressing requests, which do not contain sufficient specificity and particularity. For example, section 52 of the Prince Edward Island *Freedom of Information Act* states
52. If the head of a public body asks, the Commissioner may authorize the public body to disregard any request made under subsection 7(1), if the request (a) would unreasonably interfere with the operations of the public body or amount to an abuse of the right to access, because of the repetitious or systematic nature of the request; or (b) is frivolous or vexatious.

Recommendations

NB Power is of the view that frivolous and vexatious requests ought not be allowed under the *Act* and that abusive use of the *Act* ought to be prevented.

NB Power is of the view that requesters who have adversarial positions to that of public bodies as a result of threatened, pending or ongoing proceedings before quasi-judicial or judicial bodies ought not to have recourse to the *Act* as a tool to obtain information that can otherwise be obtained through the discovery process before the quasi-judicial or judicial bodies before which proceedings are threatened, pending or ongoing.

Continued on next page

Attachment A – Access Process, Continued

Fees

Background

Section 4 of the New Brunswick *Right to Information Act* regulations specifies that *4 Subject to paragraph 4(1)(a) of the Act, the fees payable for each request for information and for the reproduction of information shall be*

- (a) for each request for information the sum of five dollars,*
- (b) in the case where the information is stored or recorded in printed form and can be copied on conventional photocopying equipment, ten cents a page, and*
- (c) in the case where the information is stored or recorded in a manner other than that referred to in paragraph (b) or cannot be reproduced on conventional photocopying equipment, the actual cost of reproduction.*

Current situation

Under the existing *Act*, the application processing fee is submitted to the Department of Energy and it has been a long-standing departmental practice not to charge reproduction fees. As a publicly-owned utility with a break-even mandate, NB Power's responsibility to its Shareholder and customers is to operate its business by responsibly managing costs. As indicated, most information requests received by NB Power ask for "any and all documents" relating to one or more subject areas. These requests are time consuming, often resulting in boxes of documents being copied and reviewed before release and the reassignment of resources. A recent request required more than 50 hours of copying time alone.

Other jurisdictions

Most provincial Acts contain detailed fee structures to ensure processing costs are passed on to the applicant. For example, sections 8, 9, 10, 11 and 12 of the Prince Edward Island *Freedom of Information Act* regulations provide details on the application fee structure.

Most provincial Acts also contain a mechanism, which allows the public body to waive all or part of the fee. For example, section 4 of the Prince Edward Island *Freedom of Information Act* regulations states

(4) The head of a public body may excuse an applicant from paying all or part of a fee if, in the opinion of the head,

(a) the applicant cannot afford the payment or for any other reason it is appropriate to excuse payment; or

(b) the record relates to a matter of public interest, including the environment or public health or safety.

(4.1) If an applicant has requested, under subsection (3.1), the head of a public body to excuse the applicant from paying all or part of a fee and the head of the public body has refused the applicant's request, the head of the public body shall notify the applicant that the applicant may ask for a review under Part IV of this Act.

(5) The fees referred to in subsection (1) shall not exceed the actual costs of the services.

Recommendations

NB Power is of the view that the *Act* should contain a fee structure, which balances the need for the applicant to have reasonable access to documents and the need for the public body to recover its costs. NB Power is also of the view that the *Act* should allow the public body to waive all or part of the fee.

End of document

Attachment B – Review Process

Third party review

Background

Subsection 7(1) of the New Brunswick *Right to Information Act* states that

7(1) Where an applicant is not satisfied with the decision of an appropriate Minister or where an appropriate Minister fails to reply to a request within the time prescribed, the applicant may in the prescribed form and manner either

(a) refer the matter to a judge of The Court of Queen’s Bench of New Brunswick, or

(b) refer the matter to the Ombudsman.

Current situation

Under the existing legislation, the applicant has right of review but there is no legislated mechanism for a third-party to seek review of a decision to release information.

Other jurisdictions

Most provinces allow third parties to request a review of information before it is released. For example, subsection 60(2) of the Prince Edward Island *Freedom of Information Act* states that

(2) A third party notified under section 29 of a decision by the head of a public body to give access may ask the Commissioner to review that decision.

Recommendation

NB Power is of the view that the *Act* should contain a review mechanism for interested third parties.

Resolution of disputes

Background

In cases where responses to requests result in a dispute, the New Brunswick *Right to Information Act* offers little opportunity for dialogue between the applicant and the public body and there is no legislated mediation.

Current situation

In most cases, applicants who disagree with NB Power’s interpretation of the *Act* seek a review by the provincial Ombudsman. Representatives from the Ombudsman’s office review the documentation and provide a decision.

Other jurisdictions

Many of the provincial Acts encourage a collaborative, non-litigious resolution of disputes. For example, section 63 of the Prince Edward Island *Freedom of Information Act* states

63. The Commissioner may authorize a mediator to investigate and try to settle any matter that is the subject of a request for a review.

Recommendation

NB Power favours any amendments to the *Act* that allow for an open and collaborative approach to dispute resolution.

End of document

Attachment C – Administration

Extensions

Background

The New Brunswick *Right to Information Act* contains no flexibility to extend deadlines beyond 30 days.

Current situation

Requests submitted to NB Power often ask for “any and all documents” relating to multiple subject matters. Retrieving, reviewing and producing these documents is impossible to do within 30 days without interfering with daily operations.

Other jurisdictions

Most provincial Acts contain mechanisms for extending the deadline because of a lack of detail provided by the applicant, because third party consultation is required or because multiple concurrent requests have been received from the same applicant. For example, section 12 of the Prince Edward Island *Freedom of Information Act* states

12. (1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if

(a) the applicant does not give enough detail to enable the public body to identify a requested record;

(b) a large number of records is requested or must be searched, and responding within the period set out in section 9 would unreasonably interfere with the operations of the public body;

(c) more time is needed to consult with a third party or another public body before deciding whether or not to grant access to a record; or

(d) a third party asks for a review under subsection 60(2).

(2) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by two or more applicants who work for the same organization or who work in association with each other.

Recommendation

NB Power is of the view that the *Act* should allow for an additional 30-day extension because of a lack of detail provided by the applicant, because third party consultation is required or because multiple concurrent requests have been received from the same applicant. In addition, the *Act* should contain a mechanism for the public body to request a longer extension if the request warrants.

Continued on next page

Attachment D – Privacy

Third-party notification

Background

The New Brunswick *Right to Information Act* contains no requirement that a third party be informed when the public body releases information concerning the third party.

Current situation

NB Power routinely receives requests for information concerning third parties. The utility has a practice of notifying third parties of relevant requests for information to solicit opinions on the release of their information. This often results in a delay in the response time to the applicant because there is no third-party notification contemplated in the existing legislation.

Other jurisdictions

Many of the provincial Acts allow for third-party notification. For example, section 28 of the Prince Edward Island *Freedom of Information Act* states

- 28.** (1) When the head of a public body is considering giving access to a record that may contain information
- (a) that affects the interests of a third party under section 14; or
 - (b) the disclosure of which would be an unreasonable invasion of a third party's personal privacy under section 15, the head shall, subject to section 27, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (3).

Recommendation

NB Power is of the view that the *Act* should include a mechanism for third-party notification.

Continued on next page

Attachment D – Privacy, Continued

Third-party privacy

Background

Subsection 6(c) of the New Brunswick *Right to Information Act* states that there is no right to information under this *Act* where its release

6 (c) would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract;

(c.1)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;

Current situation

NB Power routinely receives requests for information concerning third parties. The utility has business dealings with many third parties, which operate in highly competitive industries. Existing legislation is not conducive to the maintenance of third party privacy that allows proper commercial relationships with private sector parties with whom NB Power is required to conduct business.

Other jurisdictions

Many of the provincial Acts allow for third party notification to provide a reasonable balance between the expectation of confidentiality by business and the need for public bodies to remain open and transparent about business dealings. For example, section 14 of the Prince Edward Island *Freedom of Information Act* states

14. (1) *Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant information*

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, explicitly or implicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Recommendation

NB Power is of the view that the *Act* should contain an exception to disclosure of information harmful to business interests of third parties. The exemption should ensure a reasonable balance between the expectation of confidentiality by business and the need for public bodies to remain transparent about its business dealings.

End of document

Attachment E – Exemptions/Limitations on Access

Exemptions/ limitations

Background

Section 6 of the New Brunswick *Right to Information Act* outlines the exemptions to disclosures.

Current situation

NB Power agrees with the statement in “*Access to Information and Privacy Review – A Discussion Paper*” (p. 13) that “the current *Act*’s limitations are somewhat vague and often difficult to interpret”. In NB Power’s recent experience, these limitations have been interpreted differently by in-house legal counsel, the Department of Justice and the Ombudsman’s office. The ambiguity of language in the *Act* often leads to time spent researching precedents, which often results in delays in returning information to applicants.

As a crown corporation, NB Power is required to operate and conduct its affairs in a competitive environment where decisions are made for business reasons. NB Power’s experience is that existing limitations specified in the *Act* do not strike the correct balance of openness and confidentiality, as it regards business dealings.

Other jurisdictions

Most provinces provide clarity, more complete descriptions and a better balance of openness and confidentiality with regard to limitations. For example, sections 14-27 of the Prince Edward Island *Freedom of Information Act* provide details of exemptions to disclosures under the following headings.

14. Disclosures harmful to business interests
15. Disclosure harmful to personal privacy
16. Disclosure harmful to individual or public safety
17. Confidential evaluations
18. Disclosure harmful to law enforcement
19. Disclosure harmful to intergovernmental relations
20. Cabinet confidences
21. Public body confidences
22. Advice from officials
23. Disclosure harmful to economic and other interests of a public body
24. Testing procedures, tests and audits
25. Privileged information
26. Disclosure harmful to the conservation of heritage sites
27. Information that is or will be available to the public

Continued on next page

Attachment E – Exemptions/Limitations on Access, Continued

Exemptions/ limitations (continued)

Recommendations

NB Power is of the view that exemptions specified in the *Act* should be revised to provide clarity, more complete descriptions and a better balance of openness and confidentiality. In an effort to strike the correct balance of openness and confidentiality, consideration should be given to adopting the exemptions from the Prince Edward Island *Freedom of Information Act*.

In addition to the above exemptions, NB Power believes exemption 6 (f.1) of the existing New Brunswick *Right to Information Act* should be maintained under the heading Security of Property.

would disclose information respecting the access to or security of particular buildings, other structures or systems, including computer or communication systems, or would disclose information respecting the access to or security of methods employed to protect such buildings, other structures or systems;

Other exemptions/ limitations/

Background

Section 6 of the New Brunswick *Right to Information Act* states that there is no right to information under this *Act* where its release

(f.2) would disclose the subject or substance

(i) of minutes of the meetings of a school board, of a community board, of the board of directors of a regional health authority or of a committee of any such board, that were not open to the public,

(ii) of briefings to members of such a board or committee respecting matters that were, are or are proposed to be brought before such a meeting, or

(iii) of discussions, consultations or deliberations among members of such a board or committee respecting such a meeting;

Current situation

The exemptions to disclosures specified in the existing *Right to Information Act* do not apply equally to all public bodies.

Other jurisdictions

Many of the provincial Acts either implicitly or explicitly specify that board minutes of boards of public bodies be exempt from disclosure. For example, subsection 24 (1) of the Alberta *Freedom of Information Act* states

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(f) the contents of agendas or minutes of meetings

(i) of the governing body of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations, or

(ii) of a committee of a governing body referred to in subclause (i),

Recommendations

NB Power is of the view that subsection 6(f.2) should apply to all public bodies.

End of document

Attachment F – Protection of Personal Information

Release of employee salaries

Background

Subsection 1(3) of the New Brunswick *Protection of Personal Information Act* states 1(3) *An individual is identifiable for the purposes of this Act if*

- (a) *information includes his or her name,*
- (b) *information makes his or her identity obvious, or*
- (c) *information does not itself include the name of the individual or make his or her identity obvious but is likely in the circumstances to be combined with other information that does.*

Current situation

Each year the names and salaries of NB Power employees are published in the provincial public accounts. It is assumed that this is done under subsection 3.5 of Schedule B of the New Brunswick *Protection of Personal Information Act*, which states a public body may disclose personal information under paragraph 3.4(g) in furtherance of the public interest in open government.

Other jurisdictions

Most of the provincial acts meet the requirements of open government as it relates to employee salary information, through the release of classification and salary range. For example, subsection 15(2) of the Prince Edward Island *Freedom of Information Act* states

15(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;

Recommendations

NB Power is of the view that the release of salary information should not include the individual's name as this is an invasion of privacy and offends the spirit and intent of the *Protection of Personal Information Act*. Salaries paid by classification and the number of positions in each category could easily be provided and would not compromise individual privacy. NB Power suggests that the *Act* include a provision similar to that stated above.
