A DISCUSSION PAPER

ON THE

RIGHT TO INFORMATION ACT

PROVINCE OF NEW BRUNSWICK
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1. INTRODUCTION

The Honourable Gilbert Finn, O.C., Lieutenant-Governor, in his Speech from the Throne delivered on March 13, 1990 at the opening of the Third Session of the Fifty-first Legislative Assembly of New Brunswick, expressed his Government's wish to determine if amendments to the Right to Information Act are needed. He stated that a discussion paper would be introduced for referral to the Law Amendments Committee for public hearings.

This Paper will provide some background to the enactment of the Right to Information Act, a review of the operation and administration of the Act and some comparison with similar legislation in other Canadian jurisdictions. It will also make recommendations for amendments to the legislation and for changes in the administrative practices associated with the legislation. The Paper will touch, in a limited fashion, on some of the broader issues relating to information in the "information age" and on the issue of privacy.

2. BACKGROUND AND UNDERLYING POLICY

The issue of access by the public to government information was the subject of considerable academic and political debate in Canada in the sixties and seventies.

At the federal level, a number of private member's bills were introduced by Opposition M.P.'s in the late 1960's and the early 1970's. In 1973, the Liberal Government tabled a Cabinet directive entitled **Notices of Motion for the Production of Papers**, providing that government papers would be produced to members of Parliament unless they fell in one or more of specified exemptions. The following year the Cabinet directive was referred to a Parliamentary committee together with a private member's bill, Bill C-225, introduced by Conservative Member Gerald Baldwin, Q.C., a leading campaigner on the issue.

The Parliamentary committee recommended in 1975 the enactment of freedom of information legislation. The Government responded in June 1977 with a Green Paper which called for further public and parliamentary debate.

Nova Scotia enacted in 1977 the first, although somewhat limited, freedom of information legislation in Canada.[1]

There was general acceptance in Canada of the public's right to have information related to the public business of governments. That right was viewed as a basic element in a democratic system of government, ranking with the right to vote and the secret ballot.

However, many argued against a legislated right claiming that information was already available through inquiries by individuals, through the media and through Parliament or the legislatures. Others argued that a legislated right to information, while perhaps appropriate under systems of government such as those operating in Sweden and the United States, where freedom of information legislation had been enacted, was not appropriate in parliamentary systems of government such as those existing in Canada. There was much concern that, in a parliamentary system, a legislated right to government information would erode the fundamental principles of public service neutrality and ministerial responsibility, which in themselves served the public interest:

> "It is the consciousness of the public interest which has led to the parliamentary traditions of ministerial responsibility and public service neutrality. No civil servant can offer advice freely and frankly if he knows that his views, perhaps out of context, can be distorted by the prism of partisanship into controversy and political attack. If, indeed that were to occur, it is inevitable that the public service would itself soon become politicized, engaged in the arena of political attack and defence, rather than insulated from the alarums and pressures of the political battle.

> The public interest requires that a government receive advice which is confidential, in order to protect the neutrality of the civil service, and to ensure that its counsel is frank, not fearful, full not partial, disinterested not partisan. Without the confidence of that kind of expert advice, the quality of decisions would be lowered.
>
> The corollary to this privacy of decision has been the insistence on ministerial responsibility. If advisers are to remain anonymous and protected, those who take decisions must bear the brunt of public scrutiny and public responsibility. Since a major function of democratic political institutions is to ensure accountability, the focal point for exercising control is through the ministerial function. To open up the decision-making process to public scrutiny in such a way as to diffuse responsibility risks diminishing the power of Parliament and the public to hold to account the powers of government. Responsibility which is considerably dispersed becomes no responsibility at all, just as everyone's business is no person's business.
>
> In considering alterations to parliamentary government we must maintain our overriding concern for the public interest; our task is to balance the need for some confidentiality in government decision-making with the necessary access to information held by the government so that the public benefit is maximized."[2]

There was also concern that the exercise of ministerial responsibility would be eroded if a decision by a minister not to release information could be reversed by an official or by a judge.

On June 16, 1977, a White Paper entitled **Freedom of Information: Outline of Government Policy Pertaining to a Legislated Right of Access by the Public to Government Documents** was tabled in the New Brunswick Legislative Assembly. The Paper was referred to the Standing

Committee on Law Amendments. Public hearings were held and submissions received. The following proposal was contained in the Paper:

> "It is therefore proposed that:
>
> (a) a bill be introduced into the Legislature entitled the Right of Information Act;
>
> (b) the Act will contain as its basic principle, the right of access to government documents by any person, but will set out certain specific kinds of documents that are exempt from this principle, and will also provide
>
> (i) that a person be identified in each department or agency who shall be responsible for receiving and assessing all requests from the public under the Act,
>
> (ii) that this person must respond within a specified period of time to each request, either approving, or disallowing it, if refused, specific reasons for refusal must be stated,
>
> (iii) that if his application is refused, a person may appeal this decision to the Minister of Justice who shall, within a certain specified period of time, inform him whether or not, upon deliberation, the appeal has been upheld, or over-turned, there shall be no appeal beyond the Minister of Justice,
>
> (iv) for a committee of senior officials to be established to assist the departmental officials responsible for responding in the first instance to requests,
>
> (v) for a report annually to the Legislature by an Information Auditor on the administration and enforcement of the Act,
>
> (vi) regulations concerning fees, forms, and other administrative matters;
>
> (c) the Ombudsman Act be amended, appointing the Ombudsman as Information Auditor for purposes of the Right of Information Act."[3]

The proposal appeared to be an attempt to balance the right of the public to know and the need for confidentiality in certain circumstances.

3. ENACTMENT OF THE RIGHT TO INFORMATION ACT AND THE REGULATIONS

On June 16, 1978, the Honourable Richard Hatfield introduced in the Legislative Assembly Bill 78, entitled Right of Information Act. Upon introduction of the Bill Mr. Hatfield said:

> "Mr. Speaker, the purpose of this Bill is self-explanatory and straightforward. We would like to have, again, as many views as possible on this matter, particularly the section with regard to limitation."[4]

Bill 78, as introduced, amended in the House and subsequently enacted, differed somewhat from the proposal contained in the 1977 White Paper. It did set out the basic right of access to government documents by any person, subject to specific exceptions; it did identify the person (the Minister) in each department or agency who would be responsible for receiving and responding to requests; it did require the Minister to respond within a specified period of time and to give reasons for any denial of information; and it did provide for regulations concerning fees, forms and other administrative matters.

However, Bill 78 did not provide for an appeal to the Minister of Justice; it did not provide for a committee of officials to assist ministers in responding to requests, and it did not formally establish the Ombudsman as an Information Auditor who would report annually to the Legislature on the administration and enforcement of the Act.

With respect to appeals, Bill 78 took a two-pronged approach that offered a choice between a referral to the Ombudsman (an Office established under section 2 of the Ombudsman Act[5]), and an appeal to a judge of the Supreme Court (now The Court of Queen's Bench of New Brunswick). While a judge could order a minister to release information, the Ombudsman could only recommend a release. However, the Bill did provide for a further appeal to a judge of the Court of Queen's Bench if a minister did not comply with a recommendation of the Ombudsman. The judge on this further appeal could order the release of the information. In effect, an independent review of a minister's decision not to release information was established.

During discussions on Bill 78 in the Committee of the Whole House on June 27, 1978, Mr. Hatfield explained, in relation to the role of the Ombudsman, that:

> "This is a way of providing an inexpensive appeal, and a convenient quick way of improving the chances of getting a more favorable decision . . . and if that doesn't succeed, there is still the judicial appeal."[6]

No doubt the lack of authority in the Ombudsman to order a minister to release information resulted from a desire to maintain the principle of ministerial responsibility and to not allow an appointed official to remove from a minister the requirement that the minister be accountable to the Legislature and to the voters. The Bill did, however, give to judges of the Court an authority to order a minister to grant a request.

Bill 78 did not provide for a committee of officials to assist the ministers in responding to requests. Mr. Hatfield, however, during discussions in the Committee of the Whole House, stated it was the Government's intention to set up an advisory committee.[7]

While Bill 78 did not expressly establish the Ombudsman as an Information Auditor who would report annually to the Legislature, the Ombudsman has, in his annual reports to the Legislative Assembly under the Ombudsman Act[8], reported on his activities in relation to the Right to Information Act. In addition, what is now section 15 of the Right to Information Act, which was added to Bill 78 as a floor amendment during discussions in the Committee of the Whole House, made the Act subject to review by the Legislative Assembly after thirty months following the coming-into-force of the Act.

During discussions in the Committee of the Whole House a number of floor amendments were made to Bill 78 in sections 1, 4, 6 and 8, in what is now section 14, and in the title of the Act. In addition, what are now sections 12, 13 and 15 were added to the Bill by floor amendments.

On June 27, 1978, Bill 78 was reported to the House with amendments and the Bill was given Royal Assent on June 28, 1978. The Right to Information Act[9] came into force on January 1, 1980.

The Right to Information Act has been amended a number of times.[10] In 1979 the Act was amended to reflect the merger of the Supreme and County Courts. In 1986 the Act was amended in conjunction with amendments made to the Archives Act to bring the Archives Act into line with the access right provided in the Right to Information Act.[11] The remaining amendments in 1982, 1985, and 1986 altered in a number of respects, which will be discussed later in this Paper, the exceptions established in section 6 of the Act to the right of access.

In 1981, a private member's public bill, Bill 28, An Act to Amend the Right to Information Act, was introduced in the Legislative Assembly. It was not enacted. It would have required a minister to comply with a judge's order to release information within seventy-two hours after receiving the judge's decision.

New Brunswick Regulation 79-152 under the Right to Information Act was filed on October 17, 1979, to come into force on January 1, 1980. The regulation listed the departments and agencies to which the Right to Information Act would apply, and it prescribed various forms, fees and procedures for the purposes of the Act. That regulation was amended by New Brunswick Regulations 79-202, 80-128 and 82-194. All of these amendments altered the list of departments and agencies to which the Act applied.

In 1985, the entire New Brunswick Regulation 79-152 was repealed and replaced by New Brunswick Regulation 85-68 as part of the New Brunswick Regulations Project. No substantial changes were made at that time. New Brunswick Regulations 88-17, 88-30 and 88-36 made minor adjustments to the list of departments and agencies, and New Brunswick Regulation 88-141 repealed and replaced in its entirety the list of departments and agencies to which the Right to Information Act applied. Again no major changes were made. Further minor amendments to the list of departments and agencies have been made by New Brunswick Regulations 89-72 and 90-73.

4. ACCESS TO INFORMATION IN 1990

That the public should have access to government information seems now, in Canada, to be beyond dispute. The federal government has enacted access legislation which came

into force on July 1, 1983.[12] Newfoundland brought access to information legislation into force on January 1, 1982[13]; Quebec on October 1, 1982[14]; Ontario on January 1, 1988[15]; and Manitoba on September 30, 1988.[16] New access legislation was introduced in Nova Scotia in May of 1990 which will, if brought into force, differ in a number of significant ways from the legislation enacted in 1977.[17]

The judicial decisions and the recommendations of the Ombudsman as a result of referrals and appeals under New Brunswick's Right to Information Act have affirmed the policy underlying the Act: that the public has a right to information respecting the public business of the Province, subject to specified and limited exceptions.

Referrals to judges of The Court of Queen's Bench of New Brunswick and to the Ombudsman have been relatively few. There are ten reported and three unreported judicial decisions under the Act. The Ombudsman had received a total of fifty referrals up until the end of 1989. One might conclude that access has been readily granted, without a need for referrals or appeals. One could also conclude that the small number of referrals has resulted from a lack of public awareness of the rights conferred by the legislation.

No statistics are kept of the number of requests received by ministers under the Right to Information Act. Some requests for information may be informal requests in the sense

that the applicant does not formally submit the request under the Right to Information Act.

While the purpose of the Right to Information Act might appear to have been achieved, there is no doubt a need to re-examine the provisions of the Act and the regulations, particularly the provisions governing the determination of which government departments and agencies are covered by the Act, and the provisions excepting certain information from the general right of access. There is also a need to review the administrative practices associated with the Right to Information Act.

Any substantial consideration of the broad implications of the "information age" is beyond the scope of this Paper, but some brief acknowledgement of larger issues must be given.

Access to information legislation had its genesis in a belief that it would promote the informed participation of the public in the democratic system of government and that it would promote the accountability of government. However, the public is now beginning to look at government as an information generator on a wider scale - even as a generator of information that has commercial value. The question arises, as yet not fully answered, as to whether government should be a more

active provider of information. Is it enough for government to provide information on request, or should government be engaged in a broader function of gathering and disseminating information as an essential service? These questions, while not addressed in this Paper, will surely have to be addressed by government in the coming years.

Coupled with the dramatic technological developments in relation to information is an ever growing concern about personal privacy. Privacy, in the government context, will be addressed to a limited degree later in this Paper. However, privacy issues extend beyond the acquisition and use of personal information by government. They are demanding greater attention in the private sector. This Paper does not deal with privacy in the private sector, but there will undoubtedly be demands on government to intervene with regulatory legislation.

5. REVIEW OF PROVISIONS OF THE RIGHT TO INFORMATION ACT

(a) Section 1

Section 1 of the Right to Information Act defines certain terms used within the Act. Some of the definitions in effect have a significant impact on the scope of the Act.

For example, the definition "department" determines to which departments and agencies the Act applies. The definition first describes the departments and agencies in broad and general terms and then limits them to those set out in the regulations. The definition, coupled with the regulation-making power given to the Lieutenant-Governor in Council by section 14 of the Act, provides the mechanism by which government departments and agencies are made subject to the Act.

Furthermore, it is by virtue of the definitions "information" and "document" that the application of the Act is effectively limited to existing and recorded information.

Each definition requires specific examination.

(i) "Appropriate Minister"

In the Right to Information Act, "appropriate Minister" is defined as follows:

> " "appropriate Minister" means the Minister responsible for the administration of the department in which the information is kept or filed, and in the case where a minister is not responsible for the administration of a department, means the person responsible for such department in the Legislative Assembly;"

Consistent with the tradition of ministerial responsibility, requests for information under the Right to Information Act are made to ministers. However, there are some bodies that fall within the definition "department" for which no minister has direct responsibility for administration. The Office of the Auditor General would be an example. In the case of the Office of the Auditor General, the Auditor General Act[18] makes the Auditor General an officer of the Legislative Assembly. It is unclear whether the Auditor General is then the "appropriate Minister" for the purposes of the Office of the Auditor General, or whether a responsibility for the Office must be assigned to a member of the Legislative Assembly.

If the application of the Act is to be extended to, for example, school boards, hospital boards and municipal bodies, an application to a minister for information will not be appropriate. The use of a more general term will be required.

The federal, Manitoba, Ontario, Quebec and Newfoundland legislation all use a more general term. The Ontario legislation uses the term "head" and defines it as the minister in the case of ministries and as the person designated by the regulations in case of other institutions.[19] The federal legislation[20], the Newfoundland legislation[21] and the Manitoba legislation[22] all use a similar approach. The Quebec legislation uses a term equivalent to "responsible person" and

provides that the most senior ranking officer in the institution, or that officer's designate, will be the "responsible person" for the purposes of the Act.[23] The existing Nova Scotia legislation uses the term "Deputy Head" which is defined to mean the deputy minister or the senior administrative officer.[24] The proposed new Nova Scotia legislation would use "minister", but defines "minister" to include the chief executive officer of a body that does not report directly to a minister in respect of its day-to-day operations.[25]

1. It is recommended that the Right to Information Act be amended to replace the definition "appropriate Minister" with a definition that would more readily accommodate the various kinds of bodies to which the Act applies and to which it might be extended.

(ii) "Department"

As mentioned earlier, the definition "department" determines that the departments and agencies set out in the regulations are the bodies to which the Right to Information Act applies. In effect, if a department or agency is not set out in the regulations, the Act in all probability does not apply to it. The definition is as follows:

" "department" means

(a) any department of the Government of the Province;

(b) any Crown Agency or Crown Corporation;

(c) any other branch of the public service;

(d) any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund,

as set out in the regulations;"

There are two issues involved here: one is the determination of which bodies the Act applies to and the other is the mechanism used to identify those bodies.

The application of access legislation in other Canadian jurisdictions varies and the jurisdictions take various approaches in identifying the government institutions to which the access to information legislation applies.

The federal legislation lists in Schedule I of the Act the departments, ministries of state and other government institutions to which the Act applies. The schedule can be amended by order of the Governor in Council.[26]

The Quebec legislation undoubtedly has the widest application, covering the Government, Executive Council, Treasury Board, all Government departments or agencies, municipal and school bodies, and health services and social

services establishments. It also applies to bodies whose members are appointed by the Assembly, every person designated by the Assembly to an office under its jurisdiction and the personnel under its supervision. In addition, it covers agencies to which the Government or a minister appoints the majority of members, agencies to which by law the personnel are appointed and remunerated in accordance with their Civil Service Act, and to agencies whose capital stock forms part of the public domain.[27]

The Ontario legislation applies to all ministries of the Government of Ontario and to any agency, board, commission, corporation or other body designated in the regulations as an institution under the Act.[28] The Ontario legislation does not cover hospital boards, but it does cover the Workers' Compensation Board and the Royal Ontario Museum. Separate legislation will come into force in Ontario on January 1, 1991, to govern access to information held by municipal bodies, including school boards.[29]

The Manitoba legislation applies to all departments or branches of the Executive Government of Manitoba and to all Crown agencies. Crown agency is defined to mean any board, commission, association or other body, whether incorporated or unincorporated, all the members of which or of the board of management or board of directors of which are appointed by an Act of the Legislature or by order of the Lieutenant-Governor

in Council, or any corporation, the election of the board of directors of which is controlled by the Crown, directly or indirectly, through ownership of the shares of the capital stock of the corporation by the Crown or by a board, commission, association, or other body which is a Crown agency. The Provincial Auditor, the Chief Electoral Officer and the Ombudsman are expressly excluded. School and hospital boards and municipalities do not appear to be covered by the Act.[30]

The Newfoundland legislation applies to all departments of the Government of Newfoundland and to the boards, commissions and other bodies listed in the Schedule of the Act, which can be added to by order of the Lieutenant-Governor in Council. School boards and municipalities are not covered but hospital boards, the Workers' Compensation Board and the Public Libraries Board are covered.[31]

The existing Nova Scotia legislation takes a more general approach and applies the Act to any department, board, commission, foundation, agency, association or other body of persons, whether incorporated or unincorporated, all the members of which or all of the members of the board of management or board of directors of which are appointed by an Act of the Legislature or by order of the Governor in Council, or, if not so appointed, in the discharge of their duties are public officers or servants of the Crown, or for the proper

discharge of their duties are, directly or indirectly, responsible to the Crown.[32] The unproclaimed 1990 legislation is essentially the same in this regard as the existing legislation.[33]

The Ombudsman in his annual reports has for several years recommended that the Right to Information Act should be extended to all public bodies including schools and school boards, municipalities and public hospitals.[34] The Standing Committee of the Legislative Assembly on the Ombudsman has made similar recommendations.[35]

With respect to the extension of coverage of the Act to schools and school boards, municipalities, public hospitals and other public bodies, there would appear to be no significant reason not to include these bodies under the Right to Information Act. Because of substantial if not full funding by the Province, it seems appropriate that the public should have access to the information relating to the public business of these institutions. While the existing exceptions to the right to information would appear to adequately address most if not all needs for confidentiality in these bodies, some adjustments may be required. For example, it may be necessary to protect from disclosure exams set for students in the school system. In addition, as mentioned earlier, the existing application process to a minister would require adjustment.

2. **It is recommended that the Right to Information Act be extended to schools and school boards, public hospitals and municipalities. Consideration should be given to the need to amend the exceptions listed in section 6 of the Act to accommodate the particular activities or organizations of the added bodies.**

3. **It is recommended that all Crown agencies not already covered by the Act, including the Workers' Compensation Board and the New Brunswick Museum, be identified and that consideration be given to including them under the Right to Information Act.**

The Standing Committee on Justice and the Solicitor General, after a review of the federal legislation in 1986-1987, effectively recommended at page 9 of its report that the schedule of departments and agencies be removed from the federal legislation and that the legislation be extended to cover all federal government institutions unless Parliament expressly chooses to exclude an institution.[36] The Federal Government expressed concern with this recommendation for removal of the schedule.[37] The Government's concern was that the administration of the legislation would be complicated by the absence of a list of the institutions covered by the Act.

The Ombudsman's Office has recommended that the Right to Information Act be amended so as to include in the Act a schedule that would identify, in a general way, the departments and agencies covered by the Act (see Appendix H). This is the same approach as was taken in amendments to the Ombudsman Act in 1985.[38] While this approach does not appear to have resulted in any problems under that Act, the same final result could be accomplished under the existing scheme in the Right to Information Act with a list in the regulations of all the public bodies that are to be covered.

The list of departments and agencies covered by the Right to Information Act that appears in the N.B. Reg. 85-68 without question adds a certainty to the application of the Right to Information Act that may not be offered by the more general approach taken in the Ombudsman Act. In addition, in the absence of a legislated requirement that the Province prepare and publish some form of access guide that lists Government bodies, their functions and the information held by them, the list is the only tool offered in terms of identifying and locating information. For these reasons, it would seem to be appropriate to retain the existing approach.

Such a list, however, does require constant scrutiny and updating as government organization changes. An examination of the existing list reveals that a number of the bodies listed are no longer in existence.

4. **It is recommended that the list of departments and agencies covered by the Right to Information Act be scrutinized on a regular basis to ensure that appropriate changes are made as Government organization changes.**

When the Ombudsman Act was amended in 1985 to bring under that Act municipalities, schools and school boards, public hospitals and all other agencies of the Crown,[39] the Act was also amended to use the term "authority" when referring to any of the bodies to which the Act applied. The use of a similar term or perhaps "government institution" in the Right to Information Act in place of "department" would no doubt provide a better description of the diverse bodies that might be covered by the Act.

5. **It is recommended that the Right to Information Act be amended to substitute for the term "department" a term that would better describe the diverse bodies to which the Act does apply and to which application may be extended.**

(iii) "Document" and "Information"

With the rapid proliferation of computerized information systems, one of the major issues related to access to information is access to information recorded or stored by

electronic means. The New Brunswick definitions "document" and "information" are as follow:

> " "document" includes any record of information, however recorded or stored, whether in printed form, on film, by electronic means or otherwise;"
>
> " "information" means information contained in a document;"

These definitions would clearly extend to information recorded or stored by electronic means, and there appears to be no need to modify them.

It is of interest to note the consideration of these definitions in Re Lahey and Minister of Finance of New Brunswick.[40] The applicant had requested the names and addresses of all persons in Northumberland County who had received loan or grant assistance from the New Brunswick Housing Corporation between January 1, 1983 and the date of the application. Mr. Justice Kelly remarked:

> "The whole tenor of the Act in my opinion is based on the premise that the requested information is already in existence in some recognizable form . . . I am satisfied that the information requested could possibly be extracted from the many applications filed with the corporation. Admittedly, it would necessitate a long and costly search. As a result, however, the desired information could be brought into existence. However, the information requested does not exist and under the Act the Minister in such circumstances may deny the request as he has done."[41]

This decision was cited in Re Jathaul.[42] In the Jathaul case, the applicant was seeking a response to questions relating to the applicant's participation in a competition for employment. The Minister of Labour had responded that "it was not incumbent upon the government to prepare new material in response to questions". Mr. Justice Jones commented:

> "Now while the Act refers to information, this is very clear under the definition of the Act, that information is defined as meaning information contained in a document. There is case law to that effect, and I simply refer to Re Lahey."[43]

Legislation in other jurisdictions, except perhaps in Newfoundland and Nova Scotia, also generally refers to recorded information. The policy underlying the Right to Information Act appears not to contemplate the compilation of information by the government for the purposes of such legislation, and the right under the Act appears to be to information that is in fact in existence in documentary form either in paper or electronic format.

However, some jurisdictions, notably Canada[44] and Ontario[45], have gone one step further. Because much information is now in computerized form, it can be manipulated by appropriate computer programs to produce different

information. In other words, while requested information may not exist in documentary form, on paper or otherwise, it could be relatively easily created by the application of computer hardware and software and the appropriate technical expertise to existing machine-readable information. The federal and Ontario legislation both require the "creation" of such information, but restrictions under the legislation limit the requirement.

(iv) "Personal Information"

"Personal information" is defined in the Right to Information Act for purposes of the exception to the right of access set out in paragraph 6(b) of the Act. The term is used nowhere else in the Act. The definition is as follows:

> " "personal information" means information respecting a person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income, assets and liabilities, credit worthiness, education, character, reputation, health, physical or personal characteristics or mode of living;"

More will be said later in this Paper in relation to the exception in paragraph 6(b). At this point, it is sufficient to note that the definition has posed no significant problem in

the operation of the Act. The definition was considered in Re Daigle.[46] In that case, there was an attempt to use the personal information exception for information about a corporation. Mr. Justice Stevenson said:

> "The definition of that expression in the Act sets out 16 categories of information. Most of them are categories that can relate only to natural, as opposed to artificial persons . . . I am unable to read paragraph 6(b) as relating to other than natural persons."[47]

In some jurisdictions the definition is expressly confined to information about an individual. However, it seems clear in New Brunswick that the definition, although not expressly so, is similarly confined. The other exceptions in the Right to Information Act deal with any corporate information that should be protected. There would appear to be no need to amend the definition "personal information" in this regard.

(v) "Public Business"

Public business is defined in the Right to Information Act as follows:

> " "public business" means any activity or function carried on or performed by a department."

The term appears only in the definition section and in section 2 of the Act. Section 2 of the Right to Information Act establishes the right of every person to request and receive, subject to any restrictions contained in the Act, information relating to the public business of the Province.

The definition does not appear to have presented any problems in the operation of the Act and is consistent with the policy underlying the Act. There would appear to be no need to modify the definition, other than to accommodate any amendment that results in the use of a term other than "department" to describe the various bodies to which the Act is to apply.

(b) Section 2

Section 2 of the Right to Information Act establishes the right of access to information. Section 2 is as follows:

> "2 Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province."

Section 2 effectively affirms the right of every person to obtain information about the activities and functions of the government. The policy underlying the Act, that the public

should have access to all information relating to government activity, subject to limited restrictions, is embodied in section 2.

The Ombudsman's Office has recommended the addition of a legislative purposes provision to the Act (see Appendix H). However, it is unlikely that such a provision would add anything in light of judicial interpretation that has been given to the Act.

In the first judicial consideration of the legislation, Mr. Justice Stevenson in Re Daigle commented:

> "The basic philosophy of the Act is directed to disclosure, not secrecy. Disclosure may be denied if the information falls clearly within one or more of the excepting paragraphs of section 6."[48]

The same view was expressed by Mr. Justice Barry in Gillis v. Chairman of the New Brunswick Electric Power Commission:

> "The whole purpose of the statute is to enable applicants to find out about details of public business, subject only to limited exceptions . . . "[49]

This very short section, however, does give rise to a number of issues. While the coming-into-force of the Right to Information Act established a clear and legislated right to most government information, it must be remembered that, prior to the commencement of the Act, much government information was already available to the public. Guidelines for implementation of the Act (see Appendix G), developed when the Act came into force, clearly stated that the Act was not to be the only means by which the public could obtain information about government activities and functions. It stated that the Act was to be resorted to only when a simple request had been denied.

No statistics have been kept that would indicate how often information is released without resorting to the Act. Other jurisdictions have included within their legislation a provision stating that such "informal" access is not to be replaced by the formal procedures established by the legislation. Subsection 2(2) of the federal Access to Information Act[50] is an example of such a provision:

> "(2) This Act is intended to complement and not to replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public."

Such a provision makes it clear to public officials and to the public that it is not always necessary to use the Act to obtain access to government information.

6. It is recommended that a provision such as subsection 2(2) of the federal Access to Information Act be added to the Right to Information Act to give legislative confirmation to the traditional and informal procedures available to the public for obtaining information about the activities of the various departments covered by the Act.

In addition, there are other formal systems in place for obtaining information from the government. For example, land registry offices provide, for a fee, access to land transfer documents. It is not intended that a person might circumvent such systems by using the Right to Information Act. In other jurisdictions, this issue is dealt with in different fashions. For example, the federal legislation says the Act does not apply to material made available for purchase by the public.[51] The proposed new Nova Scotia legislation states that the legislation does not alter procedures, fees or charges provided in other legislation for access to or copies of information.[52]

7. It is recommended that the Right to Information Act be amended to make it clear that the Act does not alter or replace procedures and fees in other legislation for access to or copies of information.

Another issue inherent in section 2 of the Right to Information Act is the fact that "every person" is entitled to request and to receive information under the Act. The provision effectively provides a universal right of access. There is no requirement to be a Canadian citizen or to be resident or present in Canada. In other jurisdictions, where such a limitation has existed, it has been avoided by the use of an agent.

Nor is the right of access limited to natural persons. "Person" would be given the broad meaning established in section 38 of the Interpretation Act[53] and would thus include corporations, partnerships and societies.

In Re McKay[54], Mr. Justice Dickson commented:

> "Any person, not just a citizen of New Brunswick, but anybody in the world . . . a corporation even, which is a person under the Interpretation Act . . . can come to a court and apply for that information . . ."[55]

In the McKay case, a member of the Legislative Assembly had applied under the Right to Information Act. Mr. Justice Dickson also commented:

> "He is not, of course, by virtue of such offices, any more entitled to provision of the information sought than would be any other citizen of the province . . . "[56]

Since the broad scope of the right of access does not appear to have created difficulties, there would appear to be no need to restrict the scope of the right.

The following comment of Mr. Justice Dickson in the McKay case is also of interest:

> "With the passage of the Right to Information Act it may even be easier perhaps for members of the Opposition to get information under the Right to Information Act than it would be in the Legislature."[57]

However, in 1988, the Premier of New Brunswick distributed guidelines for the procedures to be followed in replying to tabling motions and written questions in the Legislative Assembly. He indicated that the Right to Information Act was to be used as the sole guide in determining the kind of documents that can be made public.

Section 2 potentially limits the scope of the Right to Information Act in that the right extended is only to information about the public business of the Province. In principle, it would seem that such a limitation is appropriate. The limitation has not been considered in any of the judicial decisions rendered under the Act nor in the Ombudsman's annual reports in relation to the Act. Some jurisdictions expressly exclude such things as library or museum materials from the application of their access legislation. The New Brunswick legislation contains no such limitation, but the limitation of the access right to "information relating to the public business of the Province" might well serve to exclude library and museum materials from the application of the legislation. In addition, Recommendation 6, if accepted, might also serve to exclude such materials from the application of the legislation. Nevertheless, some clarification might be useful.

8. It is recommended that the Right to Information Act be amended to exclude from the application of the Act library and museum materials that are held solely for public reference or exhibition purposes.

With respect to the term "the public business of the Province", there may be some need to adjust this term if the Act is extended to such bodies as municipalities, schools and

school boards and public hospitals. The term might unnecessarily restrict the scope of the application of the Act to those bodies.

9. It is recommended that the term "public business of the Province" in section 2 of the Right to Information Act be amended or clarified as necessary to ensure that the right of access under the Act to information relating to the activities and functions carried on or performed by all bodies covered by the Right to Information Act, subject only to the exceptions set out in section 6, is clearly expressed in the legislation.

A final issue inherent in section 2 of the Right to Information Act is that, while the section effectively grants the right to request and receive information relating to the public business of the Province, it does make the right subject to the other provisions of the Act. Those other provisions, which will be dealt with in more detail later in this Paper, effectively restrict the right to access under the Act. For example, an application procedure is established, a fee structure is established, and exceptions to the right of access are set out. However, it seems appropriate that section 2

should caution the reader that the right granted is subject to limitations. There appears to be no reason to change section 2 in this regard.

(c) Section 3

Section 3 of the Right to Information Act describes the manner in which information is to be requested under the Act and, together with sections 4 and 5, the manner in which a minister will deal with requests. Section 3 is as follows:

> "3(1) Any person may request information by applying to the minister of the department where the information is likely to be kept or filed, and the appropriate Minister shall in writing within thirty days of the receipt of the application grant or deny the request.
>
> 3(2) 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.
>
> 3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.
>
> 3(4) Where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.

> 3(5) Subject to subsection (6), where a request is received for information that previously was kept or filed in the department but that has been transferred to the Provincial Archives, the Minister shall, in writing, notify the applicant of the transfer.
>
> 3(6) Subsection (5) applies to information that has been transferred to the Provincial Archives and is in the possession, care, custody and control of the Provincial Archivist, but does not apply to information that, for the purpose of temporary storage, has been placed in storage facilities provided by the Provincial Archivist.
>
> 3(7) Where an applicant has been notified in writing by a minister that information requested by the applicant has been transferred to the Provincial Archives, this Act no longer applies to the request for information, and any further request by the applicant for that information shall be made under the Archives Act."

Subsection 3(1) provides that the request is to be made to the minister of the department "where the information is likely to be kept or filed". Similar wording is used in the definition "appropriate Minister".

However, it is possible that the same information is kept or filed in more than one department.

For example, the Office of the Comptroller may hold information that could also be found in another department. The Office of the Comptroller holds the information for specific accounting purposes, but the other department in fact may have a "greater interest" in the information.

This issue also arises in relation to police reports submitted to both the Department of the Solicitor General and the Office of the Attorney General.

The Right to Information Act does not deal with the situation where the same information is held by more than one department. Other jurisdictions have expressly dealt with the issue. The federal[58], Manitoba[59] and Ontario[60] and Quebec[61] statutes all provide for a transfer of a request to another department or institution if it is felt that the other department or institution has a "greater interest" in the information or, in the case of Quebec, the request relates more to a matter within the jurisdiction of the other department or institution. The federal legislation provides that a government institution has a greater interest if the record was originally produced in or for the institution or, if the record was not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy of it.[62]

While an informal mechanism could be worked out as a matter of policy, it would be desirable to have the matter governed by legislation. This would avoid the possible duplication of requests. It would also avoid potential "department shopping" should different approaches to disclosure develop in different departments.

10. It is recommended that the Right to Information Act be amended to allow a request to be referred to another department when the information is also found in the other department and it is believed that the other department has a greater interest in the requested information. The amendments should provide that a department has a greater interest if the information was prepared by it or for it or, if the information was not prepared by it or for it, the department was the first to receive the information or a copy of it. The amendments should also provide for an appropriate adjustment of the time limitations for a reply when a request is so referred.

Subsection 3(1) of the Right to Information Act establishes a thirty-day time period within which a minister must either grant or deny a request for information. The minister's response, either granting or denying the request, is to be in writing. The written response is essential, at least in the case of a denial, for purposes of a referral to the Ombudsman or a judge of the Court of Queen's Bench. By virtue of the regulations, which will be discussed later, the referral must be accompanied by a copy of the denial of the request.

The thirty-day response period, as a general rule, appears to be appropriate. However, it must not be used as a delaying tactic. In many cases, a shorter period is all that is required to respond, and the response should be made as quickly as possible. In some cases, however, the thirty-day period is insufficient. There is no provision in the Act for any extension of the thirty-day period. In fact, failure of a minister to reply within the thirty-day period is ground for referral to the Ombudsman or a judge of the Court. Presumably such a ground would be resorted to only if the applicant felt that the delay was not justifiable. There would appear to be no need to modify this time period.

Subsection 3(2) of the Right to Information Act requires an applicant for information to specify the documents in which the information requested is contained, or to at least specify the subject-matter of the requested information in some detail.

A difficulty identified by administrators of the legislation has been that lack of specificity in requests. Subsection 3(3) allows a minister to seek additional information from the applicant, but the difficulties seem to remain. Some requests seem so broad as to be properly characterized as "fishing expeditions". Such requests consume a great deal of public servants' time.

A request of this nature was described in Secord v. New Brunswick Electric Power Commission.[63] In that case, the applicant had requested the minutes of meetings of Commissioners over a period of several years, and the background material provided to the Commissioners for these meetings. Mr. Justice Stevenson commented as follows:

> "Mr. Secord's request with respect to background material is not specific and he did not respond to the Chairman's request that he be more specific. I have not examined the background material . . . nor do I see any need to do so."[64]

Mr. Justice Stevenson implies that, if a minister requests additional information and that information is not provided, the minister will be not be ordered on a referral to provide the information. It is not unreasonable to expect an applicant to be reasonably specific in his or her request, and the Act appropriately gives a minister authority to require additional information to assist in identifying the relevant documents.

It has been suggested that applicants for information be required to disclose such things as the reasons for their requests, the purposes for which the information will be used and the persons on behalf of whom they are applying. However, if the information does not fall within the exceptions

listed in section 6 of the Right to Information Act, and if it is to be available to anyone, the reasons for the request, the use to be made of the information and the name of the person on behalf of whom the request is made would not seem to be relevant.

On the other hand, if the information does fall within the exceptions listed in section 6 of the Act, the reasons for the request, an indication of the purposes for which the information would be used or the name of the person on behalf of whom the request is made might result in a release of information, perhaps subject to conditions, that would not normally be available to the public. (See Recommendation 21)

11. It is recommended that consideration be given to amending the Right to Information Act to include a requirement that an applicant for information that might fall within the exceptions listed in section 6 specify the reasons for the request, the purposes for which the information is to be used and the name of the person on behalf of whom the request is made.

The question of frivolous or vexatious requests has also been raised. The difficulty, of course, lies in determining which requests are of such a nature as to justify a denial of the request on this basis. The legislation would not, as it presently exists, allow a denial of a request on the basis that

the request is being viewed as being frivolous or vexatious (trifling, not serious or not indicating sufficient grounds for action). However, such requests can consume a great deal of time and, consequently, a significant expenditure of the taxpayers' money, which is not under the existing Act recoverable from applicants. The problem was identified at the federal level and the federal Government indicated in **Access and Privacy - The Steps Ahead** that consideration would be given to amending the legislation to deal with the issue.[65] No amendments have as yet been tabled.

The Quebec access to information legislation authorizes an application to the information commission by the government for approval to deny such a request.[66]

12. It is recommended that the Right to Information Act be amended to allow an application to the Ombudsman, with a further appeal to a judge of The Court of Queen's Bench of New Brunswick, for approval to deny a request for information on the basis that it is frivolous or vexatious.

Subsection 3(4) of the Right to Information Act contemplates a situation where the information requested is not kept or filed in the department for which the receiving minister is appointed. In that case, the minister is to so advise the applicant and is also required to advise the

applicant where the information is kept. The provision appears to have created no difficulty. However, it would not be an onerous task for a minister in such circumstances to actually forward the request to the appropriate minister.

A transfer of this nature could be of considerable assistance to applicants.

13. It is recommended that the Right to Information Act be amended to require a minister to transfer a request for information to the appropriate body, with appropriate notification of the transfer to the applicant, when the information is to be found elsewhere. The amendments should provide for an appropriate adjustment of the time limitations for a reply when such a transfer occurs.

Subsections 3(5), 3(6) and 3(7) of the Right to Information Act deal with information that has been transferred to the Provincial Archives. The provisions were added in 1986.[67] The Right to Information Act does not apply to such information, except where the information has been transferred only for the purpose of temporary storage.

Once information is permanently transferred to the Provincial Archives, section 10 of the Archives Act[68] governs

access to it. A minister who receives a request under the Right to Information Act is required to so advise an applicant if information has been permanently transferred to the Archives.

In 1986, the Archives Act was amended to establish, for public records held in the Provincial Archives, access and protection from disclosure provisions similar to those in the Right to Information Act.[69] However, the Archives Act provides, in relation to some information, limitation periods for the protection from disclosure which do not exist in the Right to Information Act. These time periods will be considered later in this Paper in relation to section 6 of the Right to Information Act. In addition, the Archives Act contemplates disclosure of some otherwise protected information with consent, or for research purposes, or if the information is available elsewhere. These provisions will also be considered later in this Paper in relation to section 6 of the Right to Information Act, and in a general discussion of the public access provisions in the Archives Act.

Subsections 3(5), 3(6) and 3(7) of the Right to Information Act appear to have created no difficulties, and therefore require no modification.

(d) Section 4

Section 4 of the Right to Information Act deals for the most part with the granting of a request for information, whether by a minister or by a judge. The section is as follows:

> "4(1) Where a request for information is granted by an appropriate Minister or a judge of The Court of Queen's Bench of New Brunswick, the appropriate Minister shall
>
> > (a) upon payment of the fee prescribed by regulation, allow the information to be inspected, and, at the discretion of the appropriate minister having regard to cost to be reproduced in whole or in part;
> >
> > (b) where the information requested is published, refer the applicant to the publication, or
> >
> > (c) if the information is to be published or is required to be published at a future date, inform the applicant of such fact and the approximate date of such publishing.
>
> 4(2) Where a portion of a document contains some information that is information referred to in section 6, and that portion is severable, that portion of the document shall be deleted and the request with respect to the remaining portion of the document shall be granted.
>
> 4(3) Where a request for information is granted, the information shall only be provided in the language or languages in which it was made.
>
> 4(4) When the document containing the information that is the subject-matter of an application has been destroyed or does not exist, the appropriate Minister shall advise the applicant of such fact."

Paragraph 4(1)(a) of the Act contemplates that initially the applicant, having paid the prescribed fee, will be allowed to inspect the information and, subsequently, at the discretion of the minister having regard to the cost, to reproduce (in most cases by photocopying) the information. The initial fee that must be paid is established in paragraph 4(a) of N.B. Reg. 85-68 under the Right to Information Act as five dollars.

There is no provision in the Act or the regulations authorizing a waiver of this fee, but it appears that it is often not collected. In some cases it is simply a matter of not having the administrative procedures in place to collect and account for a fee. In addition, the effort required to collect it perhaps seems inordinate in comparison to the level of the fee. There is a charge prescribed in paragraphs 4(b) and (c) of the Regulation for the reproduction of information, depending on whether or not the information can be reproduced on conventional photocopying equipment. If conventional equipment is used, the charge is ten cents per page. If other means of reproduction are required, the actual cost of reproduction is charged. Again, there is no complete information available on whether these costs are in fact recovered.

It would seem that a minister would be able to say that information could not be reproduced if the minister felt the cost would be too high. This may not seem entirely reasonable if it is the applicant who will pay the cost of reproduction. However, there may also be costs involved in terms of human resources that might weigh in a decision not to allow the information to be reproduced.

There has been some debate in the country as to whether the full cost of providing information under access legislation, including the cost of searching for the information, should be recovered from the users. Certainly in these days of expenditure restraint an argument could be made for such recovery. On the other hand, many view the right to information as something that should not be subject to a charge.

14. It is recommended that the fee structure provided in the Right to Information Act and the regulations be reviewed to determine its appropriateness and that the Act and regulations be amended as necessary.

15. It is recommended that departments be assisted in establishing simple mechanisms for collecting and accounting for the fees paid under the Right to Information Act.

16. It is recommended that a provision be added to the Right to Information Act authorizing a waiver of any requirement to pay a fee if the waiver is considered appropriate in the circumstances.

17. It is recommended that guidelines be prepared for use in determining whether in any case a waiver of fees is appropriate in the circumstances.

Paragraphs 4(1)(b) and (c) of the Right to Information Act deal with the situation where a request is being granted but the information has been, or is to be, published. In the first of these cases a minister is to inform the applicant of the publication and, in the second case, to inform the applicant of the impending publication and the approximate date of publication. Presumably, if the information is either published or to be published, the applicant may choose to use or await the published information and thus avoid both the initial fee and the reproduction costs. However, unlike in some jurisdictions, the fact that the information is published or will be published does not expressly relieve a minister of the duty to allow the information to be inspected and reproduced. At least in the case where the information has been published and is available and accessible in published form, it seems unnecessary for the Province to dedicate human resources to the inspection or reproduction of the

information. However, if the information has not yet been published, an applicant who does not wish to await publication should be able to inspect and reproduce the information, subject to the applicable fees.

18. It is recommended that the Right to Information Act be amended to allow a denial of a request if the information has been published and is available and accessible in published form.

Subsection 4(2) of the Right to Information Act is a much-used provision. It enables a minister to release a document to which there would otherwise be no right because it contains, in part, protected information. By virtue of subsection 4(2), information referred to in section 6, which is information to which there is no right under the Act, can simply be deleted from the document. The document, so purged, can then be released. The provision has posed no particular problem, although it does require some time to examine each document that is the subject of a request and to determine which, if any, portions must be deleted. However, the provision does support the policy underlying the Act: that all information relating to the public business of the Province is available to the public, subject to limited exceptions. There would appear to be no need to change the provision.

Subsection 4(3) of the Right to Information Act limits the provision of information to the language or languages in which it was made. In other words, a minister is not required to translate information that was "made" in only one language. If the information exists, for example, in German only, there is no requirement for the minister to provide an English or French translation of the information. Obviously, much information in New Brunswick will exist in both English and French, the two official languages. However, if the information exists in only one official language, the Right to Information Act does not require that it be translated and provided in the other official language as well.

One might question this provision in light of the Official Languages of New Brunswick Act[70] and subsection 20(2) of the Canadian Charter of Rights and Freedoms.[71] Section 10 of the Official Languages of New Brunswick Act is as follows:

> "10 Subject to section 15, where requested to do so by any person, every public officer or employee of the Province, any agency thereof or any Crown corporation shall provide or make provision for such person
>
> (a) to obtain the available services for which such public officer or employee is responsible, and
>
> (b) to communicate regarding those services, in either official language requested."

Section 15 of that Act authorizes the Lieutenant-Governor in Council to make regulations determining the application of section 10. However, there are no such regulations presently in existence.

Subsection 20(2) of the Canadian Charter of Rights and Freedoms is as follows:

> "(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French."[72]

It is clear that any member of the public is entitled to communicate, in requesting and receiving information, in either official language. The question is whether the Official Languages of New Brunswick Act or the Charter requires that requested information that exists in only one official language be translated into the other official language if the applicant so wishes. The legal question turns on whether the provision of information under the Right to Information Act is an "available service". The answer to the question is not certain.

Only the federal jurisdiction in Canada is in a similar "bilingual" situation with a Charter-imposed requirement to

communicate and provide services in both official languages.[73] However, the Charter requirement at the federal level is subject to "significant demand" and "reasonable cost" tests.

Subsection 12(2) of the federal Access to Information Act[74] is as follows:

> "(2) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language
>
> (a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or
>
> (b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared."

Under the federal legislation a translation will be prepared if the head of the government institution considers it to be in the public interest to cause a translation to be prepared.

A requirement in the Right to Information Act to translate requested information could mean a need to commit considerable human and financial resources to filling the

requirement. Such a requirement could be particularly onerous for municipalities, schools and school boards and public hospitals if the Act is extended to them.

Nevertheless, where information does exist in New Brunswick in both official languages, it should be made available in both languages, if so requested, or in the language requested.

19. It is recommended that subsection 4(3) of the Right to Information Act be amended to make it clear that information that exists in both official languages will be provided in either or both of the official languages at the option of the applicant.

Subsection 4(4) requires that an applicant be so advised if information requested has been destroyed or does not exist. This provision would not be applicable in a situation where the information is simply not found in the department to which the application is made. The appropriate minister has an implicit responsibility under subsection 3(4) of the Act to determine if the information exists in another department. However, if it is determined, after appropriate inquiries, that the information has been destroyed and exists nowhere in the government, it is appropriate that an applicant be so advised.

It is possible that being informed that information does not exist is in itself information that in some circumstances would, for example, jeopardize negotiations leading to an agreement or contract. Furthermore, disclosure of the existence of information notwithstanding that it might fall within one of the exemptions in section 6 of the Right to Information Act could conceivably, if it related to information gathered by police, impede an investigation. The federal,[75] the Quebec[76] and the Ontario[77] legislation provide, in limited circumstances, for a response to a request that neither confirms nor denies the existence of information.

The only way to deal with such a situation under the Right to Information Act would be to simply fail to reply. Such a failure, however, would establish the right to refer the matter to the Ombudsman or to a judge of The Court of Queen's Bench of New Brunswick. The Ombudsman's authority in the case of a minister who has failed to reply to a request is limited, by subsection 10(2) of the Right to Information Act, to recommending that the minister grant or deny the request. A judge of the Court is given a further power by subsection 8(1) of the Act to make any other order that is appropriate, but such a power would not seem to deal adequately with this particular situation. In other words, on a referral the question of whether or not the information exists will undoubtedly be answered, and perhaps with detrimental effects.

The mere disclosure of the existence or non-existence of information in some circumstances might well have one of the results that by virtue of section 6 are to be avoided in the public interest.

It would seem that, at least where the information could be refused if it did exist, there should be authority to reply by neither confirming or denying the existence of the information.

20. It is recommended that the Right to Information Act be amended to allow a reply to a request for information referred in section 6 that neither confirms nor denies the existence of the information, and to require, with such a reply, the provision of reasons why the information would be denied if it did exist. The Act should also be amended to preserve, on a referral or appeal, the silence as to the existence or non-existence of the information, but with provision for the Ombudsman and the Court to examine the information if it exists.

(e) Section 5

Section 5 of the Right to Information Act establishes the limited circumstances in which a minister may deny a

"6 There is no right to information under this Act where its release

(a) would disclose information the confidentiality of which is protected by law;

(b) would reveal personal information concerning another person;

(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;

(d) would violate the confidentiality of information obtained from another government;

(e) would be detrimental to the proper custody, control or supervision of persons under sentence;

(f) would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

(g) would disclose opinions or recommendations by public servants for a Minister or the Executive Council;

> (h) would disclose the substance of proposed legislation or regulations;
>
> (h.1) 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;
>
> (h.2) would disclose any information reported to the Attorney General or his agent with respect to any illegal activity or suspected illegal activity, or the source of such information; or
>
> (i) would impede an investigation, inquiry or the administration of justice."

The approach taken in the New Brunswick legislation to excepting certain kinds of information from the general right of access is somewhat different from the approach used in other jurisdictions. The New Brunswick legislation does not exactly exclude the excepted information from the application of the Act. While the Act states there is no right under the Act to specified information, a minister is not expressly precluded or prohibited from disclosing it. In some circumstances, such as where another Act prohibits the disclosure of information, a minister would not be in a position to disclose the information. In other circumstances, however, such as in the case of the substance of proposed legislation or regulations, there would be no legal restrictions on the disclosure of the information and a minister could choose to disclose it. In addition, if the information had already been made public, there would be no reason to apply the exception.

In general, this approach has not posed a problem. However, some clarification of what is implicit in the Act would be beneficial.

21. It is recommended that consideration be given to amending the Right to Information Act to expressly authorize the release of information referred to in section 6 of the Act if the release is not restricted by any other Act or regulation and if it is determined by the appropriate Minister that the release would be in the public interest. Consideration should be given to providing indemnity, or protection from suit, for release of information in good faith under such a provision. Consideration should also be given to including authority to impose conditions in connection with such a release and to impose penalties for breach of the conditions.

Each of the exceptions will be considered separately.

(i) Paragraph 6(a)

Paragraph 6(a) of the Right to Information Act provides that there is no right to information under the Act where its release would disclose information the confidentiality of which is protected by law. The scope of this exception is potentially very broad.

reviewed the provisions recommended that section 24 of the Federal Act and the schedule be repealed and that only the prohibitions against disclosure contained in the Income Tax Act, the Statistics Act and the Corporations and Labour Unions Returns Act be retained.[81]

The Federal Government's response was cautious.[82] Its concern was that, to continue to ensure the provision to the Government of necessary information, the Government must be able to ensure confidentiality. The Government did, however, undertake to explore other options for preserving such confidentiality.

With respect to the New Brunswick provision, it does seem desirable that the New Brunswick statutes and regulations be carefully examined to identify the various confidentiality provisions, and that provisions identified should be assessed to determine if the information continues to be deserving of protection.

If it is determined that there is no adequate justification for an existing protection of the information from disclosure, the provision should be repealed.

If it is determined that the information should remain confidential, and if it is also determined that the information

would be protected by existing exceptions in paragraphs 6(b) to (i) of the Right to Information Act, the provision in the other statute or regulation should be repealed.

22. It is recommended that all New Brunswick public statutes and regulations be reviewed by a committee established by the Legislative Assembly or the Executive Council to identify all provisions establishing and protecting the confidentiality of information; that the provisions identified be carefully examined to determine if there is a continued need to protect confidentiality; and that the provisions identified as no longer requiring protection, or as being covered by existing exceptions in paragraphs 6(b) to (i) of the Right to Information Act, be repealed.

If it is determined that protection of the information from disclosure is justified, and that paragraphs 6(b) to (i) of the Right to Information Act do not protect it from disclosure, the method of protection becomes an issue. There are four options.

The first option would be to retain the status quo and allow paragraph 6(a) of the Right to Information Act to operate in conjunction with the specific confidentiality provision.

A second option would be to repeal the provision and to add a paragraph to section 6 of the Right to Information Act establishing that there is no right to the information.

A third option would be to identify all such confidentiality provisions in a schedule to the Right to Information Act as is done at the federal level. This option, while providing some certainty, runs the risk of inaccuracy if, as the various statutes are amended, the schedule is not also amended accordingly.

There are also some statutes which expressly override the access right given in the Right to Information Act. The 1990 amendments to the Historic Sites Protection Act are an example.[83] The relevant provision is as follows:

> "7.2 Notwithstanding any provision of the Right to Information Act, there is no right under that Act to information which would disclose the location of a site that, in the opinion of the Minister, is or may be of historical or anthropological significance."

Such an approach provides a fourth option for confidentiality. In preparing such a provision, a direct assessment of the subject information is required to determine if it would fall within one of the exceptions in section 6 of

the Right to Information Act. If it does not, a deliberate assessment of the need to establish an exception to the general right of access to government information is required. However, this approach is probably not sufficiently different from the present approach to justify changing all existing confidentiality provisions to accommodate it.

The first option, the retention of the status quo, would appear to be a satisfactory approach, and would require no changes to the existing Act.

Paragraph 6(a) of the Right to Information Act, at least in the English version, would appear to except from the right of access not only information the confidentiality of which is protected by another statute or regulation, but also information the confidentiality of which is protected by established principles of the common law. For example, the protection which is given at common law to Cabinet documents, the "public interest immunity", sometimes referred to as Crown privilege, would no doubt be covered by paragraph 6(a).

The "public interest immunity" in relation to Cabinet documents is well accepted. While the extent of the privilege has been restricted somewhat in recent years,[84] it remains in principle. The access to information legislation in other Canadian provincial jurisdictions expressly exempts this kind of information from disclosure under the access legislation.

The federal legislation goes further, and entirely excludes such information from the application of the federal Act. The federal provision is as follows:

> "69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,
>
> (a) memoranda the purpose of which is to present proposals or recommendations to Council;
>
> (b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
>
> (c) agenda of Council or records recording deliberations or decisions of Council;
>
> (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
>
> (f) draft legislation; and
>
> (g) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).
>
> (2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

> (3) Subsection (1) does not apply to
>
> (a) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or
>
> (b) discussion papers described in paragraph (1)(b)
>
> (i) if the decisions to which the discussion papers relate have been made public, or
>
> (ii) where the decisions have not been made public, if four years have passed since the decisions were made."

From a New Brunswick perspective, it is interesting to note that the federal provision excludes, among other things, the information excepted from the right of access by paragraphs 6(g) and 6(h) of the Right to Information Act (advice or recommendations for ministers or the Executive Council and the substance of proposed legislation or regulations).

It is also interesting to note that the federal exclusion does not apply if the documents are more than twenty years old. The New Brunswick Archives Act places a similar twenty-year limitation on information referred to in paragraph 6(g) of the Right to Information Act.[85]

The protection of this kind of information from disclosure is based on what has been described as a public interest in ensuring that Cabinet members can engage in a full

and frank discussion in their deliberations and decision-making processes, and that the principle of collective ministerial responsibility is preserved.

It is generally accepted that the protection of this information is desirable in our system of government. To clarify its protection in New Brunswick, the information should be cited expressly in section 6 as being excepted from the general right of access.

It is not recommended that Cabinet confidences be completely excluded from the application of the Act as is done at the federal level. By including them in section 6, a denial on the basis of such an exception could be referred to the Ombudsman or to a judge of the Court. While the Ombudsman's authority is limited by section 19 of the Ombudsman Act[86] in that the Attorney General, by certificate, could prevent the Ombudsman from having access to such information, a judge by virtue of the combined effect of section 10 of the Proceedings Against the Crown Act[87], section 68 of the Evidence Act[88] and Rule 31 of the Rules of Court[89] would be able to examine the documents and either confirm a denial or, in the appropriate case, order that the request be granted. Such a process would avoid the criticism levelled at the federal provisions that a denial of such information could not be reviewed. The process would also be more consistent with the approach being taken in

the common law to the disclosure of documents by the Crown in litigation.[90]

23. It is recommended that section 6 of the Right to Information Act be amended to expressly except Executive Council confidences from the general right of access under the Right to Information Act. The nature of the information excepted should be similar to that described in section 69 of the federal Act, and the term "Executive Council" should include Executive Council committees, Cabinet and Cabinet committees.

Paragraphs 6(g) and 6(h) of the Right to Information Act may require modification with the addition of this new provision as the subject-matters may overlap.

The Ombudsman's Office has recommended that paragraph 6(a) should be restricted to information the confidentiality of which is protected by another statute or regulation (see Appendix H). Obviously, one of the primary purposes of paragraph 6(a) is to except such information. And if Executive Council confidences are to be covered in a specific exception (see Recommendation 23), it is likely that any other information that might be excepted under paragraph 6(a) could be excepted, if the exception is justified, under one of the other paragraphs.

24. If Recommendation 23 is accepted, it is recommended that the exception in paragraph 6(a) of the Right to Information Act be restricted to information the confidentiality of which is protected by another statute or regulation.

(ii) Paragraph 6(b)

Paragraph 6(b) of the Right to Information Act protects the personal privacy of individuals. The definition "personal information", as previously discussed, describes the nature of the information to which there is no right of access under the Right to Information Act. It should be noted, however, that the information excepted from the right of access is that concerning another person. The provision does not preclude an individual from obtaining information about himself or herself.

The paragraph was amended in 1986 to remove the phrase "given on a confidential basis".[91] Obviously, the phrase unnecessarily limited the protection given to personal information.

From the point of view of access to personal information about other persons, paragraph 6(b) of the Right to Information Act appears to provide an appropriate restriction, and there would appear to be no need for change.

It is interesting to note, however, that this same information, which is generally withheld from public inspection under the Archives Act, is available if the person consents to the inspection or if the Public Records Committee or a judge of the Court of Queen's Bench authorizes inspection for research or statistical purposes.[92] In addition, the information is available for public inspection one hundred years after the date of birth of the person to whom the personal information relates.[93] However, because of the discretionary nature of the exception in the Right to Information Act, the same result, without express provision, could no doubt be achieved under the Right to Information Act in appropriate cases. In addition, such information is not likely to be in a department if it relates to a person who is over one hundred years old.

The issue of comprehensive privacy legislation will be dealt with later in this Paper.

(iii) Paragraph 6(c)

Paragraph 6(c) of the Right to Information Act excepts from the general right of access information the release of which would cause financial loss or gain to a person or department or would jeopardize negotiations leading to an agreement or contract. The exception clearly covers not only "government" information, but also information relating to a

third party. In relation to third parties, however, it is not limited to information supplied by third parties, as is the case in paragraph 6(c.1). The provision, with paragraph 6(c.1), also addresses, at least in part, the "commercial information" exceptions that exist in other jurisdictions.

Paragraph 6(c) has been considered a number of times in referrals to a judge of the Court of Queen's Bench. The very first reported decision, Re Daigle,[94] dealt with a request to The New Brunswick Electric Power Commission for a consultant's report (a work sampling study) in relation to work at the Point Lepreau Nuclear Generating Station construction site. The Chairman of the Commission denied the request. He relied in part on paragraph 6(c). However, Mr. Justice Stevenson commented as follows:

> "In my opinion, to successfully rely on that exclusion, it must be established that the loss or gain would result directly from disclosure of the information. Here the Minister relies on what can only be characterized as speculative future gain or loss to the contractors."[95]

Paragraph 6(c) was also considered by Mr. Justice Russell in Re Robinson.[96] In that case a reporter-broadcaster sought a Police Commission report dealing with a charge of a cover-up involving a police force. Mr. Justice Russell said:

> "I conclude as well that the loss is only speculative and depends on many factors which take the requested information outside the ambit of the words 'release of which would cause financial loss or gain.' "[97]

It is of interest to note in Re Daigle[98] the contention by The New Brunswick Electric Power Commission that the likelihood of loss or gain should be determined by experts. Mr. Justice Stevenson commented:

> "The opinions of experts are not conclusive - if they were, the Legislature would have provided for determination of the issue by an expert or a panel of experts rather than by a judge."[99]

It therefore seems clear that any financial loss or gain, to be relied upon for the exception, must be a direct result of the disclosure. Anything that is speculative of a future loss or gain will not be sufficient grounds for a denial of the request.

Paragraph 6(c) of the Right to Information Act is in fact a two-fold exception. In addition to the "financial loss or gain" exception, the paragraph excepts information the disclosure of which would jeopardize negotiations leading to an agreement or contract. This latter part of the exception has

also received judicial consideration. It would seem that the requirement for a direct as opposed to a speculative future effect applies also to this part of the exception. In Re Daigle, Mr. Justice Stevenson commented:

> ". . . the assessments of work performance made some three years ago are now so remote in time that it is inconceivable to me that their disclosure could jeopardize or prejudice current negotiations."[100] (emphasis added)

Another denial of disclosure on the basis of this latter part of paragraph 6(c) was upheld in Robert G. Hurst v. The Minister of Health.[101] In that case, the Minister of Health had denied access to various consultant, accounting and inspection reports in relation to a nursing home, and affidavits submitted by a representative of the Canadian Union of Public Employees. The negotiations in question were on-going at the time of the application and subsequent referral.

Both aspects of the exception contained in paragraph 6(c) of the Right to Information Act seem to be appropriate and without significant difficulty. While one might argue that access should not be denied if the relevant financial loss or gain would not be significant, to include in the statute a requirement to determine "degree" would perhaps unnecessarily complicate the provision. It must be borne in mind that there

is no prohibition against disclosure. While section 6 of the Right to Information Act says there is no right to the kinds of information identified in the section, it does not preclude the release of the information. Presumably, if the loss or gain would be insignificant, the information could be released if it was determined that the information should be released.

The Right to Information Act does not make specific reference to information that might prejudice the economic interests of the Province. Such information might, among other things, take the form of trade secrets and other commercial information. It is probable that access to such information could be denied on the basis of paragraph 6(c) if its release would cause a financial loss or gain or would jeopardize negotiations leading to an agreement or contract. If the information related, for example, to proposed new taxes or changes to existing taxes, a request for the information could probably be denied on the basis of paragraph 6(h), which excepts from the general right of access information the release of which would disclose the substance of proposed legislation or regulations. There would appear to be no pressing need for the addition of a specific exception in relation to the economic interests of the Province.

Other jurisdictions give specific protection to trade secrets. The exception of trade secrets from the general right of access in New Brunswick could fall under paragraph 6(a), 6(c) or 6(c.1), depending on the nature of the information and the circumstances under which it was acquired. There would appear to be no pressing need for the addition of a specific exception for trade secrets.

Given that no significant problems have been identified in relation to paragraph 6(c), there would appear to be no need for change. The question of involvement of third parties in decisions relating to the release of third-party information will be dealt with later in this Paper.

(iv) Paragraph 6(c.1)

Paragraph 6(c.1) of the Right to Information Act was added to the Act in 1982.[102] It excepts from the general right of access certain financial, commercial, technical or scientific information. The exception, however, is limited. It is designed to apply to information given by an individual or an active corporation in connection with an application for financial assistance under a provincial statute or regulation, and to information given in or pursuant to an agreement entered into under a statute or regulation, if the information relates to the internal management or operations of an active

corporation. The legislators obviously had specific circumstances in mind and felt that, for example, paragraph 6(c) would not provide adequate protection. One could speculate that the first part would be applicable to applications under, for example, the Commerce and Technology Act[103] and the Fisheries Development Act[104] for financial assistance.

The words "that is a going concern" were added to paragraph 6(c.1) by floor amendment. There was considerable concern that the public would not have access to information, for example, in relation to financial assistance given to a corporation that subsequently failed. The addition of the words was presumably an attempt to allow as much access as possible without jeopardizing the on-going viability of an active company, and an attempt to balance the public right of access and privacy rights by providing a limited and specific exception.

The then Premier Hatfield, during consideration of the amendments in the Committee of the Whole House, spoke of the importance of the government being able to get such information in some circumstances and of the inability, under the existing provisions, to deny access to information given on a confidential basis.[105]

The second part of paragraph 6(c.1) no doubt had in mind the agreements such as the forest management agreements referred to in section 23 of the Crown Lands and Forests Act.[106] However, in relation to the Crown Land and Forests Act, a specific amendment was made to that Act in 1983 to establish the confidential nature of specified information obtained under the Crown Lands and Forests Act.[107] As a result of the 1983 amendment, the information described in the amendment would be excepted from the right of access under the Right to Information Act by virtue of paragraph 6(a) of the Right to Information Act.

One potential difficulty with paragraph 6(c.1) of the Right to Information Act is the uncertainty of the term "commercial". The word has not received judicial consideration in New Brunswick, but it has been considered in Ontario and Quebec in relation to their legislation. The position taken has been that it relates to the buying and selling of goods.[108]

Of significance in relation to paragraph 6(c.1) is that it relates only to information "given" by the third party. It would not apply to information collected, for example, as a result of observations of inspectors during inspections. Nevertheless, the inspector's information might well be excepted under one of the other paragraphs in section 6.

It has been suggested that paragraph 6(c.1) should also cover "production" information. It is likely that such information, as some of the other information referred to in paragraph 6(c.1), would be covered in some circumstances by paragraph 6(c). However, it is also likely that "production" information is not "financial, commercial, technical or scientific" information. In the circumstances described in paragraph 6(c.1), an exception to the right to access to production information would be justifiable. There may, however, be circumstances in which such information should not be excepted. Such a circumstance might be one in which natural resources from Crown lands are involved.

25. It is recommended that the Right to Information Act be amended to include in paragraph 6(c.1) a reference to production information and that consideration be given to any need to restrict the limitation in specified circumstances.

Apart from an addition of reference to production information, there seems to be no need to modify paragraph 6(c.1) unless it is found to require modification as a result of the review of confidentiality provisions recommended in Recommendation 22.

(v) Paragraph 6(d)

Paragraph 6(d) of the Right to Information Act excepts from the general right of access information that would violate the confidentiality of information obtained from another government. This kind of exception is common to all Canadian jurisdictions, although its nature and scope does vary from jurisdiction to jurisdiction.

Some jurisdictions refer specifically to the "kinds" of governments from which information is received. For example, foreign governments, the federal government, other provincial governments and municipal governments may be specified. The New Brunswick provision contains no such specification and thus can be assumed to be general in its application.

It is interesting to note that, in relation to the corresponding exception in paragraph 10(3)(e) of the Archives Act,[109] subsection 10(6) of that Act makes the records available for public inspection if the government from which the information was obtained consents in writing to the inspection or makes the information public. The Ombudsman's Office has recommended the addition of a similar provision to the Right to Information Act (see Appendix H). However, such a provision would appear to be unnecessary in the Right to

Information Act given the formulation of the exception. If consent or publication occurs, the confidential aspect is no doubt lost and the exception would no longer apply.

A potential difficulty with the exception in paragraph 6(d) of the Right to Information Act is that an indiscriminate or "blanket" application of a confidentiality requirement may be imposed by other governments supplying information to New Brunswick. The federal Parliamentary committee, in reviewing a similar but mandatory exemption in the federal legislation, recommended that the exemption be discretionary.[110] In New Brunswick the exception is discretionary. Nevertheless, the exception, while it is undoubtedly justifiable, does present the possibility of excluding a wide range of information from the right of access.

26. It is recommended that the Province of New Brunswick, in relation to information it provides to other governments, and that other governments, in relation to information they provide to New Brunswick, be encouraged to assign a confidential status to information so provided only when the status can be reasonably justified. A confidential status should be assigned only if the information is information to which there would not normally be a right under access to information legislation.

Another potential difficulty with the exception in paragraph 6(d) was identified in Coon v. New Brunswick Electric Power Commission (Chairman).[111] In that case, copies of correspondence between the Commission and Atomic Energy of Canada Limited were sought. Mr. Justice Stevenson remarked:

> "The information identified below, in my opinion, is not information obtained from another government or from AECL and I leave open the question of whether s.6(d) of the Act protects information obtained from a Crown Corporation that is an agent of the Crown in right of Canada."[112]

One could argue that "government" would include any agency of a government, but the outcome of such an argument is uncertain. It would seem reasonable to cover in the exception agencies of government.

27. It is recommended that paragraph 6(d) of the Right to Information Act be amended to include a reference to agencies of other governments.

New Brunswick is the only Canadian jurisdiction that does not contain an exception in relation to information the release of which would prejudice or jeopardize relations with another government. No doubt in some situations the exception in paragraph 6(d) of the Right to Information Act would protect

the information from disclosure, but it is not clear that it, or any of the other exceptions, would protect all information for which protection is justified.

28. It is recommended that the Right to Information Act be amended to include, as an exception to the general right of access, information the release of which would jeopardize relations with another government or an agency of another government.

The Right to Information Act does not make specific reference to information relating to national defence and security. In fact, the only provincial legislation that does is that of Ontario. There seems to be no pressing need for the inclusion in the Right to Information Act of an exception for this kind of information. In so far as that kind of information would exist in government departments or agencies, it would probably be protected from disclosure, if such protection is necessary, under one of the existing exceptions.

(vi) Paragraph 6(e)

Paragraph 6(e) of the Right to Information Act deals with information relating to the custody, control and supervision of persons serving sentences. This kind of information is part of a more general category which is usually

described as law enforcement information. Paragraphs 6(h.1), (h.2) and (i) are further "law enforcement" provisions and they will be discussed separately. Paragraph 6(e) appears to adequately cover the kind of information it purports to cover and no difficulties have been identified in relation to it. There is, therefore, no apparent reason to change it unless a more general "law enforcement" exception is added to the Act.

(vii) Paragraph 6(f)

The exception provided in paragraph 6(f) of the Right to Information Act to the general right of access, while it expressly refers to the solicitor-client privilege normally related to litigation, also extends generally to legal opinions or advice provided to a person or department by a law officer of the Crown. The privilege, and the exception generally, are aimed at facilitating "full and frank consideration and discussion of the circumstances on which legal advice is sought so that the advice may be informed and effectual".[113] The exception is general across Canadian jurisdictions.

The inclusion of this exception, particularly in relation to the solicitor-client privilege, seems entirely reasonable. It would certainly be unreasonable to make available under the Act information that would not be available within the context of litigation.

It has been suggested that the application of the Right to Information Act should be suspended during the course of litigation because of the possible duplication of requests for information: discovery of documents in the course of litigation and simultaneous requests for the same information under the Right to Information Act. The duplication would be an inconvenience for the government, but it would not likely occur frequently. The person seeking the information would, no doubt, also want to avoid a duplication of procedures. If information would normally be available under the Act, there would seem to be no substantial reason to deny a person access to it simply because the person happened to be a litigant. Such a denial might be viewed as being discriminatory, and no doubt might be circumvented by having the application made by someone else. Without substantial evidence of abusive duplication, it would seem inappropriate to suspend the application of the Act during litigation.

It is interesting to note that the portion of paragraph 6(f) dealing with legal opinions or advice relates only to opinions or advice provided by a law officer of the Crown. Presumably, if the opinions or advice were received from a lawyer who was not a public servant, there might be some question as to whether the exception would apply. There would be no apparent reason for making such a distinction.

29. It is recommended that paragraph 6(f) of the Right to Information Act be amended to remove the reference to a law officer of the Crown.

The application of the exception in the Archives Act similar to paragraph 6(f) of the Right to Information Act has been limited by subsection 10(7) of the Archives Act to fifty years following the date of the creation of the documents.[114] The Ombudsman's Office has recommended the addition of a similar provision to the Right to Information Act (see Appendix H). However, under the Right to Information Act a minister is not prohibited from disclosing the information and would be able to do so in the appropriate cases. In addition, it is not likely that the information would still be in a department after fifty years.

(viii) Paragraph 6(g)

Paragraph 6(g) of the Right to Information Act excepts from the general right of access under the Act opinions or recommendations by public servants for a minister or the Executive Council. In other jurisdictions, this kind of information is generally included in what is referred to as the Cabinet confidences exception, which works in conjunction with exceptions applied to government operations.

The purpose of a government operations exception is to ensure full and candid discussions of matters for decision by the government below the Executive Council or Cabinet level. While paragraph 6(g) was no doubt drafted to make the exception as specific and limited as possible, it may well not cover all information that should be covered to ensure full and candid discussion of matters for decision below the Executive Council or Cabinet level.

First of all, the exception is limited to opinions or recommendations by public servants. Clearly, an opinion or recommendation from an external consultant would not be protected by the provision. Admittedly, one of the major concerns raised in relation to freedom of information legislation in the first instance was that the position of public servants might be jeopardized if their opinions and recommendations were disclosed. Public servants might be subject to attack and held accountable in the public arena, in contradiction to the principle of ministerial responsibility. There was also concern that disclosure of such information might attach a political bias to an ideally politically neutral public service. Given only these considerations, it may not be necessary to protect from disclosure the opinions or advice of external consultants.

On the other hand, if government is to have clear and full advice for decision-making purposes and then is to be responsible for its decisions regardless of specific advice, it is perhaps the decision, rather than the opinions and recommendations leading to the decision, to which the public must have access. It then falls to the government (ministers) to be accountable for and to justify its decisions.

Both the federal[115] and Manitoba[116] statutes exclude reports prepared by consultants from their government operations exemption.

Section 37 of the Quebec legislation[117] allows a refusal to disclose the advice or recommendations of a consultant.

Section 13 of the Ontario legislation[118] authorizes a head to refuse to disclose a record that would reveal the advice or recommendations of a consultant. The Ontario provision, however, includes many 'exceptions'. The provision is as follows:

> "13. (1) **Advice to government.** - A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

(2) **Exception.-** Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(1) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

(3) **Idem.-** Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy."

30. It is recommended that paragraph 6(g) of the Right to Information Act be amended to include the opinions and recommendations of consultants.

Paragraph 6(g) of the Right to Information Act is also limited by the fact that only those opinions and recommendations prepared for ministers or the Executive Council are covered. If Recommendation 23 in relation to Executive Council confidences is accepted, the exception covered by paragraph 6(g) will be covered by the Cabinet confidences exception. Paragraph 6(g) could then be converted into the "government operations" exception previously referred to.

Some concern has been expressed that the implementation of a government operations exception may constitute an unwarranted restriction on the right of access. However, a limited restriction is consistent with legislation in other jurisdictions and with the principles of ministerial accountability and public service neutrality.

31. It is recommended that paragraph 6(g) of the Right to Information Act be amended to except from the general right of access certain information in relation to government operations. The provision could be modelled on subsections 13(1) and 13(2) of the Freedom of Information and Protection of Privacy Act, 1987, chapter 25 of the Statutes of Ontario, 1987.

The provision in the Archives Act similar to paragraph 6(g) of the Right to Information Act protects the information for only twenty years after its creation.[119] The Ombudsman's Office has recommended the addition of a similar limitation to the Right to Information Act (see Appendix H). However, because section 6 of the Right to Information Act does not preclude disclosure, the information could be disclosed in appropriate cases. Furthermore, it is not likely that the information would still be in a department after twenty years.

(ix) Paragraph 6(h)

Paragraph 6(h) of the Right to Information Act excepts from the general right of access information that would disclose the substance of proposed legislation or regulations. No problems have been identified in relation to the exception and it could remain as it is. However, if Recommendation 23 is accepted in relation to Executive Council confidences, the substance of paragraph 6(h) would in all probability be incorporated into that exception.

If municipalities are to be covered by the Right to Information Act, it may be necessary to include an exception for information that would disclose the substance of proposed by-laws or of proposed private legislation.

(x) Paragraphs 6(h.1) and (h.2)

Paragraphs 6(h.1) and (h.2) of the Right to Information Act were added to the Act in 1985.[120] The addition appears to have been prompted by an overruled denial of a request for information. The request for information had been denied both on the basis of paragraph 6(a) (the release would disclose information the confidentiality of which is protected by law) and of paragraph 6(i) (the release would impede an

investigation, inquiry or the administration of justice). In Dixon v. Minister of Justice,[121] Mr. Justice Stevenson ordered the Minister of Justice to release certain police reports. Mr. Justice Stevenson commented:

> "All of the information contained in the four documents became public knowledge at that trial. While the identity of the police informant is confidential information protected by law, as soon as the informant testifies as a victim or complainant, his identity is no longer confidential and para. 6(a) of the Act ceases to apply to it.
>
> Paragraph 6(i) does not apply as there is nothing to be impeded - the investigation was completed, charges were laid and a trial was held. The matter was finally disposed of long since."[122]

The amendment would appear to have arisen out of a belief that the kind of information referred to in paragraphs 6(h.1) and (h.2) should be excepted from the general right of access not only during on-going investigations, but also after the conclusion of investigations and even after the completion of related court proceedings.

A review of law enforcement exemptions in other jurisdictions indicates that these provisions in some cases are much more detailed than the New Brunswick provisions. Generally, the provisions cover any information relating to law enforcement and to investigations. They also cover information

relating to correctional institutions, including information of the kind covered by paragraph 6(e) of the Right to Information Act. In Quebec the exemption is mandatory whereas elsewhere it is discretionary.

The Ontario law enforcement provision is quite detailed. While it would no doubt cover the kinds of information covered by paragraphs 6(e), 6(h.1), 6(h.2), and much of what is covered by paragraph 6(i), it would probably not be so broad as, for example, to cover a police report that had become public knowledge during a trial. The Ontario provision is as follows:

> "14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

(4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections."[123]

"Law enforcement" is defined in the Ontario legislation as follows:

" "law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or would lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b);"[124]

Provisions such as these would no doubt cover much of the information that would fall under the existing paragraphs 6(e), (h.1), (h.2) and (i). They would, as well, instead of establishing a general and broad exception to the general right

of access, be more specific in identifying the kinds of information which can be justifiably excepted from the right of access in a fair and open system of government.

However, there may well be additional information not described in the Ontario provisions which would be covered by paragraph 6(i) of the Right to Information Act.

32. It is recommended that paragraphs 6(h.1) and (h.2) of the Right to Information Act be replaced by provisions that would more precisely identify the kinds of law enforcement information that are excepted from the general right of access to information. Consideration should also be given to the need to modify paragraphs 6(e) and 6(i) of the Right to Information Act in light of the provisions that are to replace the existing paragraphs 6(h.1) and (h.2).

(xi) Paragraph 6(i)

As mentioned previously, it was the restricted interpretation of paragraph 6(i) of the Right to Information Act that led to the addition of paragraphs 6(h.1) and 6(h.2) to the Act.

Paragraph 6(i) was also referred to in Re Robinson.[125] In that case the Minister of Justice relied on paragraph 6(i) (would impede . . . the administration of justice) in refusing to disclose a report prepared by the Police Commission. The concern was twofold: that disclosure would subject the Commission to undue public pressure and thus render Commission reports and recommendations meaningless, or that a possible appeal and order for a new trial might be adversely affected. Mr. Justice Russell commented:

> "I conclude the respondent has not met the test that there is a 'real and substantial risk' that the administration of justice will be impeded."[126]

The actual scope of the exception provided by paragraph 6(i) is thus not entirely clear. It seems likely that, for example, much of the kind of information described in paragraphs 6(h.1) and 6(h.2) would be covered in the case of an on-going investigation. It also seems likely that the provision would cover information the disclosure of which would prejudice a fair trial or impartial hearing. This latter type of information is expressly exempted from disclosure in Ontario[127] and in Quebec.[128] If Recommendation 32 is accepted, it will be necessary to reconsider the need for the exception contained in paragraph 6(i). It may be that there will not be

a continued need for a broad exception in relation to investigations such as is contained in paragraph 6(i) if specific types of information associated with law enforcement are enumerated.

(g) Sections 7 to 11

Sections 7 to 11 of the Right to Information Act govern the procedures by which a person may challenge a denial of a request for information or a failure to reply to a request. The provisions are as follow:

> "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.
>
> 7(2) Where the applicant refers the matter to a judge of The Court of Queen's Bench of New Brunswick under subsection (1),
>
> (a) the applicant may not thereafter refer the matter to the Ombudsman under paragraph (1)(b) or under the Ombudsman Act, and
>
> (b) the Ombudsman, in such case, may not act under the authority of this Act or the Ombudsman Act with respect to that matter.

7(3) Where the applicant refers the matter to the Ombudsman under subsection (1), the applicant may not, subject to subsection 11(1), refer the matter to a judge of The Court of Queen's Bench of New Brunswick.

7(4) The Ombudsman, subject to section 19 of the Ombudsman Act, and The Court of Queen's Bench of New Brunswick judge may, with respect to any matter referred to them, inspect the information that is the subject matter of the referral, if such information exists, in order to determine the referral, but such inspection shall be made in camera without the presence of any person.

8(1) The Court of Queen's Bench of New Brunswick judge shall upon the applicant's request hold a hearing, and

(a) in the case where a minister denied the request for information or a part thereof, may order the minister to grant the request in whole or in part;

(b) in the case where the minister failed to reply to a request, shall order that the appropriate Minister,

(i) grant the request, or

(ii) deny the request;

(c) may make any other order that is appropriate.

8(2) A copy of the decision of The Court of Queen's Bench of New Brunswick judge shall be sent to the applicant and the appropriate Minister.

8(3) No appeal lies from the decision of The Court of Queen's Bench of New Brunswick judge under subsection (1).

9 The Ombudsman shall in accordance with this act and the power, authority, privileges, rights and duties vested in him under the Ombudsman Act review the matter referred to him within thirty days of having received the referral.

10(1) Upon having reviewed the matter referred to him, the Ombudsman shall forthwith, in writing, advise the appropriate Minister of his recommendation and shall forward a copy of such recommendation to the person making the referral.

10(2) The Ombudsman may in such recommendation

(a) recommend to the appropriate Minister to grant the request in whole or in part;

(b) in the case where the appropriate Minister failed to reply to a request, recommend to the appropriate Minister

(i) to grant the request, or

(ii) to deny the request.

10(3) The appropriate Minister referred to in subsection (2) shall, upon reviewing the recommendation of the Ombudsman, carry out the recommendations of the Ombudsman or make such other decision as he thinks fit and upon making his decision, that Minister shall notify, in writing, the person making the referral and shall forward to the Ombudsman a copy of such decision.

11(1) Where the person making the referral is not satisfied with the decision of the appropriate Minister under subsection 10(3), that person may appeal the matter to a judge of The Court of Queen's Bench of New Brunswick.

11(2) Subsection 7(4) and section 8 apply mutatis mutandis to an appeal made under subsection (1)."

Alternative means of challenging a refusal are available: one to a judge of The Court of Queen's Bench of New Brunswick and one to the Ombudsman. The alternatives recognize that an appeal to the courts would be relatively costly and time consuming. The appeal to the Ombudsman, although the Ombudsman has only powers of recommendation, provides an

inexpensive and more timely independent review of a minister's denial of a request or failure to respond. The system seems to have worked well. No significant problems with the procedures have been identified. However, most jurisdictions with access to information legislation impose a time limitation for challenging a denial of a request for information or a failure to respond. Such a limitation ensures that such matters are dealt with expeditiously, but would not preclude a person from bringing a new request for information if the period had expired.

33. It is recommended that consideration be given to amending the Right to Information Act to establish time periods after which a denial of a request for information, or a failure to respond to a request, could not be referred to the Ombudsman or to a judge of the Court, or appealed to a judge of the Court.

Counsel to the Ombudsman has recommended that the Ombudsman be authorized to act as a party to judicial reviews of refusals to disclose information.[129] The federal legislation authorizes the Information Commissioner to apply to the Court for a review of a refusal, to assist a person who has applied for a review or to appear as a party to a review for which a person has applied. While there may be no need to

allow the Ombudsman to initiate judicial reviews of refusals to disclose, the Ombudsman's expertise gained in reviewing refusals could be useful to a court.

34. It is recommended that consideration be given to authorizing the Ombudsman, or counsel on behalf of the Ombudsman, to intervene on a referral or appeal to a judge of the Court under the Right to Information Act.

It has also been suggested that a time limit be imposed by statute for response to an order by a judge that a request for information be granted. A private member's public bill was introduced in the Legislative Assembly in 1981 to impose such a limitation, but it was not enacted.[130] However, by virtue of paragraph 8(1)(c) of the Right to Information Act, a judge is authorized, in addition to ordering the granting of a request for information, to make any other appropriate order. In Re MacKay, a minister was effectively given forty-eight hours to deliver the documents.[131] It is, therefore, possible under the existing legislation for a judge to in fact impose such a time limitation. As a result, it would seem to be unnecessary to add a statutory limitation.

(h) Section 12

Section 12 of the Right to Information Act is self-explanatory and is as follows:

> "12 In any proceeding under this Act, the onus shall be on the Minister to show that there is no right to the information that is the subject of the proceeding."

The provision has been referred to in a number of the judicial decisions under the Act, and those decisions have firmly enforced the onus placed on ministers. The onus seems to be appropriate to the statutory scheme and consistent with the policy underlying the Act. Since no problems have been identified with the provision, there would appear to be no need to modify it in any way.

(i) Section 13

Section 13 of the Right to Information Act is as follows:

> "13 Where a matter is referred or appealed to a judge of The Court of Queen's Bench of New Brunswick, the judge shall award costs in favour of the applicant
>
> (a) where the applicant is successful, or
>
> (b) where the applicant is not successful, if the judge considers it to be in the public interest."

The provision is self-explanatory and seems to be consistent with the policy underlying the Act. It is of interest to note, however, that not all judicial decisions, under which applicants for information were successful, make reference to an award of costs. Apart from this, no problems have been identified with the provision and there would therefore appear to be no need to modify the provision.

(j) Section 14

Section 14 of the Right to Information Act is as follows:

"14 The Lieutenant-Governor in Council may make regulations

(a) prescribing the form and manner of referrals under this Act;

(b) prescribing forms;

(c) prescribing the departments for the purposes of this Act;

(d) prescribing fees for the purposes of this Act;

(e) prescribing such other procedures as may be necessary to carry out the intent and purposes of this Act."

These regulation-making powers are straight-forward and enable the enactment of the subsidiary legislation that is necessary to complete the legislative scheme. The substance of the regulations will be considered later in this Paper.

No problems have been identified in relation to the provision. There would, therefore, appear to be no need to modify it in any way. However, if amendments are made to the Act which will require additional subsidiary legislation, appropriate changes will be required.

(k) Section 15

Section 15 of the Right to Information Act is as follows:

> "15 This Act is subject to review by the Legislative Assembly after thirty months following the coming into force of this Act."

During consideration of this provision in the Committee of the Whole House in 1978, the then Premier Hatfield commented:

> "Mr. Chairman, the purpose of this section is to express that it is the intention of the Legislature at this point, on the introduction of this bill, that it be reviewed in a subsequent Legislature, after there has been some experience with it and to see whether or not the bill has been too restrictive and also to consider amendments' which would have come about as a result of decisions of the court . . ."[132]

To date, a full and formal review of the legislation in the Legislative Assembly has not taken place.

35. It is recommended that a full and formal review of the Right to Information Act be undertaken by the Legislative Assembly. It is also recommended that the Act be amended to require regular periodic reviews in the future by the Legislative Assembly.

6. REVIEW OF THE REGULATIONS UNDER THE RIGHT TO INFORMATION ACT

New Brunswick Regulation 85-68 under the Right to Information Act may be generally divided into four different subject matters.

Firstly, the regulation sets out in a schedule all of the departments and agencies to which the Right to Information Act applies. As noted earlier in this Paper, it is essential that the schedule be continuously scrutinized to ensure that it reflects changes in government organization as those changes occur. Again, as noted earlier in this Paper, this method of setting out the departments and agencies to which the Act applies adds certainty to the legislative scheme.

New Brunswick Regulation 85-68 also establishes the fees payable under the Act for each request for information and for the reproduction of the information. As recommended earlier in this Paper, the fees should be reviewed to determine their appropriateness.

The forms prescribed in New Brunswick Regulation 85-68 appear to serve their purpose and to have posed no problems. The forms are required for referrals to the Ombudsman and to a judge of the Court of Queen's Bench, and for appeals to a judge of the Court of Queen's Bench. While nothing in the Act expressly requires that a request for information be in a prescribed form or be in writing, the referral forms to both the Court and the Ombudsman and the appeal to the Court require a copy of the request to be attached. There would appear to be no need to prescribe a form to be used in requesting information and no need to change the existing forms that are to be used for referrals and appeals.

The remainder of the regulation provides simple procedural instructions relating to referrals and appeals. No problems have been identified with the provisions and there would thus appear to be no need for change. However, if the Ombudsman is given authority to initiate or intervene in referrals and appeals, the forms and procedural rules will require some adjustment.

7. ADMINISTRATION OF THE RIGHT TO INFORMATION ACT AND THE REGULATIONS

The Right to Information Act establishes a legislated right to request and receive information relating to the public business of the Province, subject to certain expressed

limitations. The legislation is viewed as a major element in the effective functioning of a democratic society. It is not certain, however, that the spirit of openness expressed in the legislation is always found in all Government departments and agencies.

Furthermore, one would not be surprised to find that many members of the public are unaware of the legislation and of the right granted by the legislation.

Prior to the coming-into-force of the Right to Information Act, an Advisory Committee was established within Government to assist ministers in responding to requests under the Act. The Committee, it was hoped, would assist in achieving some consistency in the responses and in co-ordinating responses where the information requested was spread among different departments. The Committee functioned for a period of time, but is no longer operating.

Brief guidelines for the implementation of the Right to Information Act were prepared and distributed for the use of ministers and departmental officials in conjunction with the coming-into-force of the Right to Information Act (see Appendix G). Those guidelines, while still applicable and useful in large measure, do not appear to currently be in use. In addition, they require updating to reflect amendments made to the Act and regulations.

36. It is recommended that the guidelines prepared for the implementation of the Right to Information Act be updated and redistributed. The updating and redistribution could be done in conjunction with the implementation of amendments to the Act and the regulations arising out of the current review of the Act.

The guidelines should confirm the continuing existence of traditional and informal procedures for gaining access to information and should confirm the application to those procedures of the principle of openness, subject to the same limited exceptions as are applicable under the Right to Information Act.

It was also intended in the early days of the legislation that each department would designate an individual who would be responsible for assisting the minister in co-ordinating and in dealing with requests. It was intended that these individuals would participate in information sessions to assist them in understanding the legislation and to assist in achieving consistency across the Government in the operation of the Act. These designations do not appear to have continued and information sessions have not continued to the present day.

It was also intended at the time the Right to Information Act was enacted that an information pamphlet would be prepared to inform the public of the legislation. A pamphlet has not been published.

To ensure both full public awareness of the legislation and full understanding of the legislation within the Government, new educational initiatives are required.

37. It is recommended that each department and agency to which the Act applies designate an individual to assist in co-ordinating requests for information under the Right to Information Act.

38. It is recommended that information sessions be held on an on-going basis for public servants to acquaint them with the provisions of the Right to Information Act and the regulations under it.

39. It is recommended that an information pamphlet be prepared for public distribution to remind the public of the existence of the Right to Information Act and of their rights under it. This pamphlet could be prepared and distributed in conjunction with the implementation of any amendments to the Act and the regulations arising out of the recommended review of the Act.

While the Ombudsman in each annual report prepared under the Ombudsman Act[133] reports on petitions reviewed and handled by him under the Right to Information Act, and while judicial decisions on referrals and appeals under the Act are generally reported, it would greatly assist departments in responding to requests to have for reference a compilation of the Ombudsman's recommendations and of judicial decisions under the Act. Such a document would assist greatly in achieving consistency in relation to responses under the Act and in making readily available precedents upon which to base decisions.

40. It is recommended that the minister responsible for the administration of the Right to Information Act publish and distribute a compilation of judicial decisions and of recommendations of the Ombudsman under the Right to Information Act. The compilation should be updated on a regular basis.

It would also be of assistance to have a record of requests made under the Right to Information Act, a record of the instances where requests were granted, including a description of the information released, and a record of the instances where requests were denied, including the grounds for denying the requests.

41. It is recommended that consideration be given to maintaining, on an on-going basis, in relation to the Right to Information Act, records of requests received, requests granted and requests denied, including the nature of the information provided or denied and the basis for the denials. These records could be maintained by the individuals referred to in Recommendation 37.

All of these "administrative" matters are addressed either in the legislation or in practice in most other jurisdictions where access legislation is in place. They are viewed as being essential in giving full substance to the public's right to have information relating to government's public business, and in assisting public servants to effectively administer the legislation.

Some departments in New Brunswick have implemented or are attempting to implement policies relating to the release of information. It is important that consistency be achieved across all departments and that all policies be consistent with the policy of disclosure established in the Right to Information Act and with the exceptions to the right of access that are established in the Act.

Implementation of Recommendations 36 to 41 would assist in ensuring that the public right of access, subject to the limited and specific exceptions set out in the Right to Information Act, is supported in a consistent fashion across the Government.

8. THIRD PARTIES

In the context of access to information, third-party information is information relating to a person other than the government or the person making the request. This Paper has already considered third-party information to some extent in the context of paragraphs 6(a), (b), (c) and (c.1). However, it must be noted that the Right to Information Act does not contain provisions either requiring or enabling the involvement of such third parties when decisions are being made in relation to information relating to them.

Under most access legislation (all Canadian jurisdictions other than Nova Scotia and New Brunswick), third parties are entitled in most circumstances to notice of a request for information relating to them if release of the information is contemplated. The purpose of the third-party notice is of course to advise the third party of the request for information and to give the third party an opportunity to make representations as to why the information should not be released.

The third-party notice is the first step in what are commonly referred to as third-party proceedings. These proceedings have caused a number of difficulties in jurisdictions where they are available. It is not always entirely clear just when a third-party notice is required. Consultation with the third party is inevitably necessary on an informal basis even before a notice is issued to assist in determining whether or not the information is to be disclosed.

Third-party proceedings are time-consuming for all concerned. Requesters have to be notified of the third-party proceedings, and the time period for response to a request for information often must be extended to allow for the proceedings.

If a decision is made to disclose third-party information, legislation in the jurisdictions providing for notices to third parties requires that disclosure be delayed for a stated period of time. The delay is required to give the third party an opportunity to have the decision reviewed. If disclosure is refused, the third party will have standing to participate in any review of a decision not to disclose.

Third-party information has in fact been the subject of some of the referrals to judges of The Court of Queen's Bench in New Brunswick. While it would appear to be open to the relevant minister under the existing legislation to submit affidavit evidence from a third party, or to call the third

party as a witness in support of the denial of the request, it is clear that the third party does not have independent standing. Mr. Justice Barry made this clear in Gillis v. Chairman of the New Brunswick Electric Power Commission.[134] However, in Coon v. New Brunswick Electric Power Commission (Chairman),[135] an affidavit of the general counsel of the third party was submitted, together with an affidavit of the Vice-President and Chief Financial Officer of the Commission. The third-party affidavit was submitted in support of the Chairman's denial of the request and was no doubt instrumental in Mr. Justice Stevenson's upholding of the denial, at least with respect to some of the information.

The Ombudsman's Office has recommended that consideration be given to the enactment of explicit third-party procedures under the Right to Information Act (see Appendix H).

Arguably, third-party information can be and is adequately protected in New Brunswick in the absence of legislated third-party procedures. Clearly, if the information falls within one of the exceptions set out in section 6 of the Right to Information Act, a request can be denied. Whether a minister is in a position, without consultation with the third party, to determine if the release of information in relation to the third party would, for example, cause financial loss or jeopardize negotiations leading to an agreement or contract, is

not always clear. However, it does seem that in fact third parties are being consulted and their input is being used in determining whether information should be released.

Because no significant problems have arisen from the absence of legislated third-party proceedings, there may be no need for the inclusion of such provisions in the Right to Information Act if appropriate administrative guidelines are in place.

9. ACCESS GUIDES AND INFORMATION MANAGEMENT

New Brunswick and Nova Scotia are the only Canadian jurisdictions with access legislation that do not require the preparation and publication of some kind of listing of the information held by governments. The requirements in other jurisdictions vary but generally require a listing of government departments and agencies and a listing of the kinds of information or records held by each department and agency. The purpose of such listings is simply to assist applicants in identifying and locating the information they are seeking. The listings are generally viewed as being an essential adjunct to access to information legislation.

The ability of a government department or agency to effectively list the kinds of information it holds will necessarily depend on the nature of its records or information management system. Records that are not accurately identified, described, classified, indexed and stored will be extremely difficult to access, not only for the purposes of public access under access legislation but also for the management of the government's business.

The Ombudsman, in connection with his role under the Right to Information Act, has identified problems with records management systems in the New Brunswick Government. In his 1986 report he recommended, in relation to the Right to Information Act, "the establishment of information banks or, at a minimum, a uniform government records management system".[136]

Under the Archives Act, the Provincial Archivist is assigned a records management function in relation to government records in New Brunswick, including those of municipalities.[137]

The Ombudsman's Office has recommended "that the records management regime established under the Archives Act and Public Records Act confer a comprehensive records management authority on the Provincial Archivist, establish a uniform governmental filing system, and require the establishment and publication of 'banks' of information and standardized information policies

for each governmental authority" (see Appendix H). The Office has further recommended that the Province incorporate its records management, information access and privacy protection functions in a single enactment (see Appendix H).

It is clear that a comprehensive records management authority is required, whether established administratively or legislatively, both for efficient government operation and for public access purposes. The basis for such authority exists in present legislation. While it might add convenience, there is no necessity to combine any such legislative provisions with legislated access and privacy provisions.

The New Brunswick Government has recently adopted an information management policy. At this point the policy is directed primarily at electronically-stored information and the technology used in the collection, storage, retrieval and safeguarding of this information, and is driven by the need to effectively support decision-making at the operational, tactical and strategic levels throughout the Government. In connection with its information management policy the Government has established the Corporate Information Resource Office within the department of the Board of Management. It is interesting to note that similar projects in other jurisdictions are closely related to the statutory requirements under access legislation to provide listings of government information.

To date, interaction between the Provincial Archivist and the Corporate Information Resource Office has not been extensive. Without question, the duties assigned to the Provincial Archivist by the Archives Act in relation to the management of public records would seem to require that the Provincial Archivist be actively involved in any information management policy established by the Government in relation to public records. The Archives Act defines "public records" as follows:

> " "public records" means the books, papers and records vested in Her Majesty under the Public Records Act, and includes records
>
> (a) prepared or received by any department pursuant to an Act of the Legislature or in connection with the transaction of public business,
>
> (b) preserved or appropriate for preservation by a department,
>
> (c) containing information on the organization, functions, procedures, policies or activities of a department, or other information of past, present or potential value to the Province,
>
> but does not include
>
> (d) library or museum objects made or acquired and preserved solely for reference or exhibition purposes,
>
> (e) extra copies of records created only for convenience of reference,
>
> (f) working papers, or
>
> (g) stocks of publications or printed documents;"[138]

By virtue of the Public Records Act, all books, papers and records kept by or in the custody of any provincial or municipal officer in pursuance of his duty as such officer are vested in Her Majesty the Queen and her successors.[139]

The Archives Act defines "records" as follows:

" "records" means

(a) correspondence, memoranda, forms and other papers and books;

(b) maps, plans and charts;

(c) photographs, prints and drawings;

(d) motion picture films, microfilms and video tapes;

(e) sound recordings, magnetic tapes, computer cards and other machine readable records; and

(f) all other documentary materials regardless of physical form or characteristics;"[140]

It seems clear that the statutory role of the Provincial Archivist extends to computerized records.

42. It is recommended that information management initiatives within the Government cover both paper and computerized records.

43. It is recommended that information management initiatives within the Government take into account the statutory duties assigned to the Provincial Archivist under the Archives Act.

It is indisputable that information is a valuable resource for Government and that effective information management is of utmost importance to the effective operation of the Government. In addition, while it may not be necessary to legislate a requirement that the Government prepare lists of the information it holds for purposes of the Right to Information Act, it is also clear that any public right to information suffers if members of the public are not able to determine the kind of information the Government holds.

44. It is recommended that information management initiatives within the Government designed to create and maintain inventories of Government information for Government purposes take into account the desirability of creating and maintaining, for the benefit of the public, access guides which would contain inventories or lists of the kinds of information held by various Government departments and agencies.

Whenever personal information is collected and maintained, the question of privacy arises. Because the Government, as a result of its information management policy, has embarked on a process of improving its information management techniques, particularly as they relate to the collection, storage, retrieval and sharing of information, the time is right to incorporate in new information systems the elements necessary to protect personal privacy. It becomes very expensive to deal with the privacy issue in information management systems after the design stage. This Paper elsewhere deals more generally with the issue of privacy of individuals.

45. It is recommended that, further to Recommendation 47 in relation to the implementation of the O.E.C.D. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Government information management systems include provisions for the protection of personal privacy.

10. PUBLIC INSPECTION OF RECORDS UNDER THE ARCHIVES ACT

As mentioned previously in this Paper, the Archives Act contains access provisions that to a large extent mirror those contained in the Right to Information Act. The Archives Act makes available for public inspection all public records

transferred on a permanent basis to the Archives with the exception of those that would disclose the same kinds of information as are listed in section 6 of the Right to Information Act.[141]

However, the access schemes in the two Acts are not entirely the same. In the Right to Information Act, the exceptions to the general right of access might be described as discretionary. While there is no right to the information described in those exceptions, there is no express prohibition against releasing the information.

The Archives Act, in relation to the excepted information, provides that the excepted information is simply not available for public inspection.[142] It must be noted however, as discussed in earlier portions of this Paper, that some of the exceptions in the Archives Act are subject to time limitations. Once the stated periods of time have elapsed, the information is available under the Archives Act for public inspection without limitation.[143] Other exceptions in the Archives Act do not apply if consent is given by the person or government to whom the information relates.[144] There are also provisions in the Archives Act for an application to the Public Records Committee for authorization to inspect records for research or statistical work.[145]

In the event that information to which there is no right, by virtue of section 10 of the Archives Act, is by whatever means made public, it will also be available for public inspection under the Archives Act.[146]

The time limitations, consent provisions, research provisions and "otherwise public" provisions in the Archives Act are appropriate given the nature of the Archives. They are also appropriate given the lack of discretion to make the excepted information available for public inspection -- a restriction that does not exist in the Right to Information Act.

However, any changes that are considered for the Right to Information Act in terms of the information that is or is not available to the public will also have to be considered for the Archives Act if the existing level of consistency is to be maintained.

46. It is recommended that any changes made to the Right to Information Act in terms of information that is or is not available to the public be considered for the Archives Act as well.

11. PRIVACY

While some other Canadian jurisdictions have specific and extensive statutory provisions governing the collection, use, retention, correction, disclosure and destruction of personal information, New Brunswick has no such comprehensive provisions. At the federal level the Privacy Act covers these matters.[147] In Ontario[148] and Quebec[149] the provisions are included in the access to information legislation. The Manitoba[150] and Nova Scotia[151] access to information statutes provide more limited privacy provisions which, in addition to restrictions on disclosure, authorize an individual to limit the uses to which personal information is put and to request corrections.

Comprehensive privacy legislation has a number of objectives. It is intended to

- limit the extent to which government institutions can collect personal information,
- limit the means by which institutions can collect personal information,
- limit the uses to which institutions can put personal information,
- limit the extent to which institutions can disclose personal information,
- allow individuals a right of access to personal information about them held by institutions, and
- give individuals a means to correct errors in personal information about them held by institutions.[152]

New Brunswick to date has not enacted such legislation. It has, however, been involved in a federal-provincial task force in relation to the implementation of the O.E.C.D. (Organization for Economic Co-operation and Development) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Canada has acceded to these Guidelines and established the task force to implement internally Canada's international commitments.

Modern information technology, while providing tremendous opportunities for easy communication, presents the danger of making personal information too readily available to too many people. The O.E.C.D. Guidelines establish a framework for privacy protection. While implementation of the Guidelines does not necessarily involve legislation, the comprehensive privacy legislation that does exist in Canada is generally in compliance with the Guidelines.

The Guidelines are essentially as follow:

- There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.
- Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

- The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

- Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with the previous paragraph except:

    a) with the consent of the data subject, or

    b) by the authority of law.

- Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

- There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

- An individual should have the right:

    a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;

    b) to have communicated to him, data relating to him

        i) within a reasonable time;

        ii) at a charge, if any, that is not excessive;

        iii) in a reasonable manner; and

        iv) in a form that is readily intelligible to him;

    c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and

d) to challenge data relating to him and, if the challenge is successful, to have the data erased, rectified, completed or amended.

- A data controller should be accountable for complying with measures which give effect to the principles stated above.

47. It is recommended that the Province of New Brunswick, as an administrative practice, implement within the Government the O.E.C.D. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. It is further recommended that consideration be given to the enactment of comprehensive privacy legislation.

The use of social insurance numbers and the matching of personal data by electronic means are also important issues in the context of personal privacy.

48. It is recommended that guidelines be established in relation to the use of social insurance numbers and in relation to personal information data matching within the Government of the Province.

12. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canadian Charter of Rights and Freedoms has come into force since the implementation of the Right to Information Act. While there would appear to be no obvious conflict

between the Act and the Charter, the possibility that the Charter-guaranteed freedom of expression may be found to include a "right to know" could result in a finding that exceptions to the general right of access to information violate the freedom of expression as guaranteed by the Charter.

A full examination of the legal arguments favoring or opposing such an interpretation of the freedom of expression as guaranteed by the Charter is beyond the scope of this Paper. However, any consideration of either the existing exceptions set out in section 6 of the Right to Information Act or of any changes or additions to those exceptions (or to similar provisions in the Archives Act) should be accompanied by an assessment of whether the exceptions are reasonable and can be "demonstrably justified in a free and democratic society".[153]

In the context of any such assessment, consideration should also be given to the issue of "class" as opposed to "content" exceptions as discussed in the Carey case.[154]

13. FINANCIAL IMPLICATIONS

Consideration of the financial implications of any of the recommendations contained in this Paper is beyond the scope of the Paper. Full consideration of those implications should be undertaken before implementation of the recommendations.

14. CONCLUSION

This Paper has attempted to provide some background to the enactment of the Right to Information Act, to review the operation and administration of the Act and to provide some comparison of the Act with similar legislation in other Canadian jurisdictions. It has also made some recommendations for both legislative and administrative changes. It has touched on the issues of privacy and of the "information age".

However, the consultation undertaken in support of the Paper has been internal. Public consultation has not yet been undertaken.

49. It is recommended that this Paper be referred to the Law Amendments Committee of the Legislative Assembly for consideration and for public consultation.

15. LIST OF RECOMMENDATIONS

1. It is recommended that the Right to Information Act be amended to replace the definition "appropriate Minister" with a definition that would more readily accommodate the various kinds of bodies to which the Act applies and to which it might be extended.

2. It is recommended that the Right to Information Act be extended to schools and school boards, public hospitals and municipalities. Consideration should be given to the need to amend the exceptions listed in section 6 of the Act to accommodate the particular activities or organizations of the added bodies.

3. It is recommended that all Crown agencies not already covered by the Act, including the Workers' Compensation Board and the New Brunswick Museum, be identified and that consideration be given to including them under the Right to Information Act.

4. It is recommended that the list of departments and agencies covered by the Right to Information Act be scrutinized on a regular basis to ensure that appropriate changes are made as Government organization changes.

5. It is recommended that the Right to Information Act be amended to substitute for the term "department" a term that would better describe the diverse bodies to which the Act does apply and to which application may be extended.

6. It is recommended that a provision such as subsection 2(2) of the federal Access to Information Act be added to the Right to Information Act to give legislative confirmation to the traditional and informal procedures available to the public for obtaining information about the activities of the various departments covered by the Act.

7. It is recommended that the Right to Information Act be amended to make it clear that the Act does not alter or replace procedures and fees in other legislation for access to or copies of information.

8. It is recommended that the Right to Information Act be amended to exclude from the application of the Act library and museum materials that are held solely for public reference or exhibition purposes.

9. It is recommended that the term "public business of the Province" in section 2 of the Right to Information Act be amended or clarified as necessary to ensure that the right of access under the Act to information relating to the activities and functions carried on or performed by all bodies covered by the Right to Information Act, subject only to the exceptions set out in section 6, is clearly expressed in the legislation.

10. It is recommended that the Right to Information Act be amended to allow a request to be referred to another department when the information is also found in the other department and when it is believed that the other department has a greater interest in the requested information. The amendments should provide that a department has a greater interest if the information was prepared by it or for it or, if the information was not prepared by it or for it, the department was the first to receive the information or a copy of it. The amendments should also provide for an appropriate adjustment of the time limitations for a reply when a request is so referred.

11. It is recommended that consideration be given to amending the Right to Information Act to include a requirement that an applicant for information that might fall within the exceptions listed in section 6 specify the reasons for the request, the purposes for which the information is to be used and the name of the person on behalf of whom the request is made.

12. It is recommended that the Right to Information Act be amended to allow an application to the Ombudsman, with a further appeal to a judge of The Court of Queen's Bench of New Brunswick, for approval to deny a request for information on the basis that it is frivolous or vexatious.

13. It is recommended that the Right to Information Act be amended to require a minister to transfer a request for information to the appropriate body, with appropriate notification of the transfer to the applicant, when the information is to be found elsewhere. The amendments should provide for an appropriate adjustment of the time limitations for a reply when such a transfer occurs.

14. It is recommended that the fee structure provided in the Right to Information Act and the regulations be reviewed to determine its appropriateness and that the Act and regulations be amended as necessary.

15. It is recommended that departments be assisted in establishing simple mechanisms for collecting and accounting for the fees paid under the Right to Information Act.

16. It is recommended that a provision be added to the Right to Information Act authorizing a waiver of any requirement to pay a fee if the waiver is considered appropriate in the circumstances.

17. It is recommended that guidelines be prepared for use in determining whether in any case a waiver of fees is appropriate in the circumstances.

18. It is recommended that the Right to Information Act be amended to allow a denial of a request if the information has been published and is available and accessible in published form.

19. It is recommended that subsection 4(3) of the Right to Information Act be amended to make it clear that information that exists in both official languages will be provided in either or both of the official languages, at the option of the applicant.

20. It is recommended that the Right to Information Act be amended to allow a reply to a request for information referred in section 6 that neither confirms nor denies the existence of the information, and to require, with such a reply, the provision of reasons why the information would be

denied if it did exist. The Act should also be amended to preserve, on a referral or appeal, the silence as to the existence or non-existence of the information, but with provision for the Ombudsman and the Court to examine the information if it exists.

21. It is recommended that consideration be given to amending the Right to Information Act to expressly authorize the release of information referred to in section 6 of the Act if the the release is not restricted by any other Act or regulation and if it is determined by the appropriate Minister that the release would be in the public interest. Consideration should be given to providing indemnity, or protection from suit, for release of information in good faith under such a provision. Consideration should also be given to including authority to impose conditions in connection with such a release and to impose penalties for breach of the conditions.

22. It is recommended that all New Brunswick public statutes and regulations be reviewed by a committee established by the Legislative Assembly or the Executive Council to identify all provisions establishing and protecting the confidentiality of

information; that the provisions identified be carefully examined to determine if there is a continued need to protect confidentiality; and that the provisions identified as no longer requiring protection, or as being covered by existing exceptions in paragraphs 6(b) to (i) of the Right to Information Act, be repealed.

23. It is recommended that section 6 of the Right to Information Act be amended to expressly except Executive Council confidences from the general right of access under the Right to Information Act. The nature of the information excepted should be similar to that described in section 69 of the federal Act, and the term "Executive Council" should include Executive Council committees, Cabinet and Cabinet committees.

24. If Recommendation 23 is accepted, it is recommended that the exception in paragraph 6(a) of the Right to Information Act be restricted to information the confidentiality of which is protected by another statute or regulation.

25. It is recommended that the Right to Information Act be amended to include in paragraph 6(c.1) a reference to production information and that consideration be given to any need to restrict the limitation in specified circumstances.

26. It is recommended that the Province of New Brunswick, in relation to information it provides to other governments, and that other governments, in relation to information they provide to New Brunswick, be encouraged to assign a confidential status to information so provided only when the status can be reasonably justified. A confidential status should be assigned only if the information is information to which there would not normally be a right under access to information legislation.

27. It is recommended that paragraph 6(d) of the Right to Information Act be amended to include a reference to agencies of other governments.

28. It is recommended that the Right to Information Act be amended to include, as an exception to the general right of access, information the release of which would jeopardize relations with another government or an agency of another government.

29. It is recommended that paragraph 6(f) of the Right to Information Act be amended to remove the reference to a law officer of the Crown.

30. It is recommended that paragraph 6(g) of the Right to Information Act be amended to include the opinions and recommendations of consultants.

31. It is recommended that paragraph 6(g) of the Right to Information Act be amended to except from the general right of access certain information in relation to government operations. The provision could be modelled on subsections 13(1) and 13(2) of the Freedom of Information and Protection of Privacy Act, 1987, chapter 25 of the Statutes of Ontario, 1987.

32. It is recommended that paragraphs 6(h.1) and (h.2) of the Right to Information Act be replaced by provisions that would more precisely identify the kinds of law enforcement information that are excepted from the general right of access to information. Consideration should also be given to the need to modify paragraphs 6(e) and 6(i) of the Right to Information Act in light of the provisions that are to replace the existing paragraphs 6(h.1) and (h.2).

33. It is recommended that consideration be given to amending the Right to Information Act to establish time periods after which a denial of a request for information, or a failure to respond to a request, could not be referred to the Ombudsman or to a judge of the Court, or appealed to a judge of the Court.

34. It is recommended that consideration be given to authorizing the Ombudsman, or counsel on behalf of the Ombudsman, to intervene on a referral or appeal to a judge of the Court under the Right to Information Act.

35. It is recommended that a full and formal review of the Right to Information Act be undertaken by the Legislative Assembly. It is also recommended that the Act be amended to require regular periodic reviews in the future by the Legislative Assembly.

36. It is recommended that the guidelines prepared for the implementation of the Right to Information Act be updated and redistributed. The updating and redistribution could be done in conjunction with the implementation of amendments to the Act and the regulations arising out of the current review of the Act.

37. It is recommended that each department and agency to which the Act applies designate an individual to assist in co-ordinating requests for information under the Right to Information Act.

38. It is recommended that information sessions be held on an on-going basis for public servants to acquaint them with the provisions of the Right to Information Act and the regulations under it.

39. It is recommended that an information pamphlet be prepared for public distribution to remind the public of the existence of the Right to Information Act and of their rights under it. This pamphlet could be prepared and distributed in conjunction with the implementation of any amendments to the Act and the regulations arising out of the recommended review of the Act.

40. It is recommended that the minister responsible for the administration of the Right to Information Act publish and distribute a compilation of judicial decisions and of recommendations of the Ombudsman under the Right to Information Act. The compilation should be updated on a regular basis.

41. It is recommended that consideration be given to maintaining, on an on-going basis, in relation to the Right to Information Act, records of requests received, requests granted and requests denied, including the nature of the information provided or denied and the basis for the denials. These records could be maintained by the individuals referred to in Recommendation 37.

42. It is recommended that information management initiatives within the Government cover both paper and computerized records.

43. It is recommended that information management initiatives within the Government take into account the statutory duties assigned to the Provincial Archivist under the Archives Act.

44. It is recommended that information management initiatives within the Government designed to create and maintain inventories of Government information for Government purposes take into account the desirability of creating and maintaining, for the benefit of the public, access guides which would contain inventories or lists of the kinds of information held by various Government departments and agencies.

45. It is recommended that, further to Recommendation 47 in relation to the implementation of the O.E.C.D. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Government information management systems include provisions for the protection of personal privacy.

46. It is recommended that any changes made to the Right to Information Act in terms of information that is or is not available to the public be considered for the Archives Act as well.

47. It is recommended that the Province of New Brunswick, as an administrative practice, implement within the Government the O.E.C.D. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. It is further recommended that consideration be given to the enactment of comprehensive privacy legislation.

48. It is recommended that guidelines be established in relation to the use of social insurance numbers and in relation to personal information data matching within the Government of the Province.

49. It is recommended that this Paper be referred to the Law Amendments Committee of the Legislative Assembly for consideration and for public consultation.

END NOTES

1. Freedom of Information Act, chapter 10 of the Statutes of Nova Scotia, 1977 (now chapter 180 of the Revised Statutes of Nova Scotia, 1989).

2. Legislation on Public Access to Government Documents, a Green Paper tabled in the House of Commons in June of 1977 by the Honourable John Roberts, Secretary of State, page 2.

3. Freedom of Information: Outline of Government Policy Pertaining to a Legislated Right of Access by the Public to Government Documents, a White Paper tabled in the Legislative Assembly of New Brunswick on June 16, 1977, pages 33, 34 and 35.

4. Synoptic Report of the Proceedings of the Legislative Assembly of the Province of New Brunswick, Session of 1978, Volume XIII, page 5530.

5. Ombudsman Act, chapter O-5 of the Revised Statutes of New Brunswick, 1973.

6. Supra, Note 4, pages 6289, 6290.

7. Supra, Note 4, page 6265.

8. Supra, Note 5, subsection 25(1).

9. Right to Information Act, chapter R-10.3 of the Acts of New Brunswick, 1978.

10. An Act to Provide for the Merger of the Supreme and County Courts of New Brunswick, chapter 41 of the Acts of New Brunswick, 1979, s.111; An Act to Amend the Right to Information Act, chapter 58 of the Acts of New Brunswick, 1982; An Act to Amend the Right to Information Act, chapter 67 of the Acts of New Brunswick, 1985; An Act to Amend the Right to Information Act, chapter 72 of the Acts of New Brunswick, 1986.

11. An Act to Amend the Archives Act, chapter 11 of the Acts of New Brunswick, 1986.

12. Access to Information Act, chapter A-1 of the Revised Statutes of Canada, 1985.

13. The Freedom of Information Act, chapter 5 of the Statutes of Newfoundland, 1981.

14. An Act Respecting Access to Documents held by Public Bodies and the Protection of Personal Information, chapter A-2.1 of the Revised Statutes of Quebec, 1982.

15. Freedom of Information and Protection of Privacy Act, 1987, chapter 25 of the Statutes of Ontario, 1987.

16. The Freedom of Information Act, chapter 6 of the Statutes of Manitoba, 1985-86.

17. An Act Respecting Freedom of Information, chapter 11 of the Acts of Nova Scotia, 1990.

18. Auditor General Act, chapter A-17.1 of the Acts of New Brunswick, 1981, subsection 3(2).

19. Supra, Note 15, section 2.

20. Supra, Note 12, section 3.

21. Supra, Note 13, section 2.

22. Supra, Note 16, section 1.

23. Supra, Note 14, section 8.

24. Freedom of Information Act, chapter 180 of the Revised Statutes of Nova Scotia, 1989, section 2.

25. Supra, Note 17, section 3.

26. Supra, Note 12, section 77.

27. Supra, Note 14, sections 3 to 7.

28. Supra, Note 15, section 2.

29. Municipal Freedom of Information and Protection of Privacy Act, 1989, chapter 63 of the Statutes of Ontario 1989.

30. Supra, Note 16, sections 1 and 3.

31. Supra, Note 13, sections 2, 3 and 4.

32. Supra, Note 24, sections 2 and 3.

33. Supra, Note 17, sections 3 and 4.

34. Fifteenth Report of the Ombudsman, Province of New Brunswick, 1981; Sixteenth Report of the Ombudsman, Province of New Brunswick, 1982; Twentieth Report of the Ombudsman, Province of New Brunswick, 1986.

35. Twenty-first Report of the Ombudsman, Province of New Brunswick, 1987.

36. Open and Shut: Enhancing the Right to Know and the Right to Privacy, Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, 1987.

37. Access and Privacy - The Steps Ahead, Government of Canada, 1987, p.36.

38. An Act to Amend the Ombudsman Act, chapter 65 of the Acts of New Brunswick, 1985.

39. Supra, Note 38.

40. Re Lahey and Minister of Finance of New Brunswick (1984) 10 D.L.R. (4th) 759, 56 N.B.R. (2d) 1 (N.B.Q.B.).

41. Supra, Note 40, page 761.

42. Re Jathaul, an unreported oral decision delivered by Mr. Justice Jones on September 2, 1988 (N.B.Q.B.).

43. Supra, Note 42, page 3.

44. Supra, Note 12, subsection 4(3).

45. Supra, Note 15, subsection 2(1).

46. Re Daigle (1980), 30 N.B.R. (2d) 209 (N.B.Q.B.).

47. Supra, Note 46, page 213.

48. Supra, Note 46, page 215.

49. Gillis v. Chairman of the New Brunswick Electric Power Commission (1981), 37 N.B.R. (2d) 66 (N.B.Q.B.), page 71.

50. Supra, Note 12.

51. Supra, Note 12, section 18.

52. Supra, Note 17, section 13.

53. Interpretation Act, chapter I-13 of the Revised Statutes of New Brunswick, 1973.

54. Re McKay (1981), 35 N.B.R. (2d) 405 (N.B.Q.B.).

55. Supra, Note 54, page 412.

56. Supra, Note 54, page 407.

57. Supra, Note 54, page 413.

58. Supra, Note 12, section 8.

59. Supra, Note 16, section 9.

60. Supra, Note 15, section 25.

61. Supra, Note 14, section 48.

62. Supra, Note 12, subsection 8(3).

63. Secord v. New Brunswick Electric Power Commission (1989), 97 N.B.R. (2d) 323 (N.B.Q.B.).

64. Supra, Note 63, page 331.

65. Supra, Note 37, pages 44 and 45.

66. Supra, Note 14, section 126.

67. An Act to Amend the Right to Information Act, chapter 72 of the Acts of New Brunswick, 1986.

68. Archives Act, chapter A-11.1 of the Acts of New Brunswick, 1977.

69. Supra, Note 11.

70. Official Languages of New Brunswick Act, chapter O-1 of the Revised Statutes of New Brunswick, 1973.

71. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part 1.

72. Supra, Note 71, subsection 20(2).

73. Supra, Note 71, subsection 20(1).

74. Supra, Note 12.

75. Supra, Note 12, sections 10 and 64.

76. Supra, Note 14, sections 28, 30, 41 and 47.

77. Supra, Note 15, sections 14, 21 and 29.

78. Crown Lands and Forests Act, chapter C-38.1 of the Acts of New Brunswick, 1980.

79. Coon v. New Brunswick (Minister of Natural Resources and Energy) (1989), 94 N.B.R. (2d) 346 (N.B.Q.B.).

80. Supra, Note 12.

81. Supra, Note 38, page xiii.

82. Supra, Note 39, pages 41 and 42.

83. An Act to Amend the Historic Sites Protection Act, chapter 6 of the Acts of New Brunswick, 1990.

84. Carey v. Ontario (1987), 72 N.R. 81 (SCC).

85. Supra, Note 68, subsection 10(8).

86. Supra, Note 5.

87. Proceedings Against the Crown Act, chapter P-18 of the Revised Statutes of New Brunswick, 1973.

88. Evidence Act, chapter E-11 of the Revised Act of New Brunswick, 1973.

89. Rules of Court of New Brunswick, New Brunswick Regulation 82-73 under the Judicature Act.

90. Supra, Note 84.

91. Supra, Note 67, section 2.

92. Supra, Note 68, subsection 10(4).

93. Supra, Note 68, subsection 10(4).

94. Supra, Note 46.

95. Supra, Note 46, page 216.

96. Re Robinson, an unreported oral decision delivered by Mr. Justice Russell on April 28, 1988 (N.B.Q.B.).

97. Supra, Note 96, page 7.

98. Supra, Note 46.

99. Supra, Note 46, page 215.

100. Supra, Note 46, page 216.

101. Robert G. Hurst v. The Minister of Health, an unreported decision delivered by Mr. Justice Stevenson on November 23, 1981 (N.B.Q.B.).

102. An Act to Amend the Right to Information Act, chapter 58 of the Acts of New Brunswick, 1982, section 1.

103. Commerce and Technology Act, chapter C-8.1 of the Acts of New Brunswick, 1975.

104. Fisheries Development Act, chapter F-15.1 of the Acts of New Brunswick, 1977.

105. Journal of Debates of the Legislative Assembly of the Province of New Brunswick, Session of 1982, Volume IX, page 3946.

106. Supra, Note 78.

107. An Act to Amend the Crown Lands and Forests Act, chapter 24 of the Acts of New Brunswick, 1983.

108 Colin H. H. McNairn and Christopher D. Woodbury, Government Information, Access and Privacy, Richard DeBoo Publishers (Don Mills, Ontario, 1989), page 4-3.

109. Supra, Note 68.

110. Supra, Note 36, page 21.

111. Coon v. New Brunswick Electric Power Commission (Chairman) (1989), 98 N.B.R. (2d) 65 (N.B.Q.B.).

112. Supra, Note 111, page 70.

113. Supra, Note 108, page 3-29.

114. Supra, Note 68.

115. Supra, Note 12, section 21.

116. Supra, Note 16, section 39.

117. Supra, Note 14.

118. Supra, Note 15.

119. Supra, Note 68, subsection 10(8).

120. An Act to Amend the Right to Information Act, chapter 67 of the Acts of New Brunswick, 1985, section 1.

121. Dixon v. Minister of Justice (1985), 62 N.B.R. (2d) 137 (N.B.Q.B.).

122. Supra, Note 121, page 141.

123. Supra, Note 15, section 14.

124. Supra, Note 15, section 2.

125. Supra, Note 96.

126. Supra, Note 96, page 9.

127. Supra, Note 15, section 14.

128. Supra, Note 14, section 28.

129. Charles Ferris, "Freedom of Information in Canada - The Ombudsman-Judicial Review Model", Journal of Media Law and Practice, Volume 5, Number 3, November 1984, page 208.

130. Bill 28, An Act to Amend the Right to Information Act, New Brunswick Legislative Assembly, 1981.

131. Supra, Note 54, pages 411 and 412.

132. Supra, Note 4, page 6294.

133. Supra, Note 5, section 25.

134. Gillis v. Chairman of the New Brunswick Electric Power Commission (1981), 37 N.B.R. (2d) 66 (N.B.Q.B.), page 71.

135. Supra, Note 111.

136. Twentieth Report of the Ombudsman, Province of New Brunswick, 1986.

137. Supra, Note 68, section 5.

138. Supra, Note 68, section 1.

139. Public Records Act, chapter P-24 of the Revised Statutes of New Brunswick, 1973, section 1.

140. Supra, Note 68, section 1.

141. Supra, Note 68, section 10.

142. Supra, Note 68, subsection 10(3).

143. Supra, Note 68, subsections 10(4), 10(7) and 10(8).

144. Supra, Note 68, subsections 10(4) and 10(6).

145. Supra, Note 68, subsection 10.1(5).

146. Supra, Note 68, subsection 10(10).

147. Privacy Act, chapter P-21 of the Revised Statutes of Canada, 1985.

148. Supra, Note 15, sections 37 to 49.

149. Supra, Note 14, sections 53 to 102.

150. Supra, Note 16, section 13.

151. Supra, Note 24, section 6.

152. Supra, Note 108, page 7-2.

153. Supra, Note 71, section 1.

154. Supra, Note 84.

APPENDIX A

CHAPTER R-10.3

Right to Information Act

Assented to June 28, 1978

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1 In this Act

"appropriate Minister" means the Minister responsible for the administration of the department in which the information is kept or filed, and in the case where a minister is not responsible for the administration of a department, means the person responsible for such department in the Legislative Assembly;

"department" means

(a) any department of the Government of the Province;

(b) any Crown Agency or Crown Corporation;

(c) any other branch of the public service;

(d) any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund,

as set out in the regulations;

"document" includes any record of information, however recorded or stored, whether in printed form, on film, by electronic means or otherwise;

CHAPITRE R-10.3

Loi sur le droit à l'information

Sanctionnée le 28 juin 1978

Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick décrète:

1 Dans la présente loi

«affaires publiques» désigne toute activité ou fonction exercée ou accomplie par un ministère;

«document» comprend toute information, quelle que soit la manière dont elle est consignée ou conservée, que ce soit sous une forme imprimée, sur film, au moyen de système électronique ou autrement;

«information» désigne une information contenue dans un document;

«ministère» désigne

a) tout ministère du gouvernement de la province;

b) tout organisme ou corporation de la Couronne;

c) toute autre direction des services publics; et

d) tout organisme ou bureau qui ne fait pas partie des services publics mais dont le fonctionnement est assuré par des crédits votés à cet effet et imputés sur le Fonds consolidé,

dont le nom figure dans les règlements;

"information" means information contained in a document;

"personal information" means information respecting a person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income, assets and liabilities, credit worthiness, education, character, reputation, health, physical or personal characteristics or mode of living;

"public business" means any activity or function carried on or performed by a department.

«ministre compétent» désigne le ministre responsable de la direction du ministère qui garde ou qui est dépositaire de l'information, et, lorsque la direction d'un ministère n'est sous la responsabilité d'aucun ministre, désigne la personne qui en est responsable devant l'Assemblée législative;

«renseignement personnel» désigne toute information concernant l'identité d'une personne, son adresse, sa famille, son état matrimonial, son emploi, un rapport sur les emprunts et remboursements qu'elle a faits, son revenu, ses avoirs et dettes, sa solvabilité, sa formation, son caractère, sa moralité, sa santé, ses particularités physiques ou personnelles ou son mode de vie.

2 Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province.

2 Sous réserve de la présente loi, toute personne a le droit de demander et de recevoir toute information concernant les affaires publiques de la province.

3(1) Any person may request information by applying to the minister of the department where the information is likely to be kept or filed, and the appropriate Minister shall in writing within thirty days of the receipt of the application grant or deny the request.

3(1) Toute personne peut demander une information en en faisant la demande au ministre dont le ministère est susceptible d'en avoir la garde ou d'en être le dépositaire et le ministre compétent accepte ou rejette cette demande dans les trente jours à compter de sa réception.

3(2) 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.

3(2) Le demandeur doit préciser dans sa demande les documents contenant l'information sollicitée ou, s'il ne connaît pas le document qui peut la contenir, y indique le sujet de l'information sollicitée avec des détails tels que la date, le lieu et les circonstances, qui permettront à une personne connaissant ce sujet de trouver le document correspondant.

3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

3(3) Lorsqu'il est impossible de déterminer quel document contient l'information sollicitée, le ministre compétent en informe par écrit le demandeur et l'invite à fournir de plus amples renseignements qui pourraient permettre de trouver ce document.

3(4) Where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.

3(4) Tout ministre qui reçoit une demande au sujet d'une information non déposée au ministère pour lequel il a été nommé ni gardée par celui-ci, en avise par écrit le demandeur et lui indique le ministère qui peut en être le dépositaire ou en avoir la garde.

3(5) Subject to subsection (6), where a request is received for information that previously was kept or filed in the department but that has been transferred to the Provincial Archives, the Minister shall, in writing, notify the applicant of the transfer.

3(6) Subsection (5) applies to information that has been transferred to the Provincial Archives and is in the possession, care, custody and control of the Provincial Archivist, but does not apply to information that, for the purpose of temporary storage, has been placed in storage facilities provided by the Provincial Archivist.

3(7) Where an applicant has been notified in writing by a minister that information requested by the applicant has been transferred to the Provincial Archives, this Act no longer applies to the request for information, and any further request by the applicant for that information shall be made under the *Archives Act*.
1986, c.72, s.1.

3(5) Sous réserve du paragraphe (6), lorsqu'une demande est reçue au sujet d'une information antérieurement gardée ou déposée au ministère mais qui a été transférée aux archives provinciales, le Ministre doit en aviser le demandeur par écrit.

3(6) Le paragraphe (5) s'applique à l'information transférée aux archives provinciales et qui se trouve en la possession, sous la protection, la garde et la surveillance de l'archiviste provincial, mais il ne s'applique pas à l'information entreposée temporairement dans des installations d'entreposage fournies par l'archiviste provincial.

3(7) Lorsqu'un demandeur a reçu un avis écrit d'un ministre l'avisant que l'information demandée a été transférée aux archives provinciales, les dispositions de la présente loi ne s'appliquent plus à la demande d'information et, toute autre demande du demandeur au sujet de cette information doit s'effectuer conformément à la *Loi sur les archives*.
1986, c.72, art.1.

4(1) Where a request for information is granted by an appropriate Minister or a judge of The Court of Queen's Bench of New Brunswick, the appropriate Minister shall

(a) upon payment of the fee prescribed by regulation, allow the information to be inspected, and, at the discretion of the appropriate minister having regard to cost to be reproduced in whole or in part;

(b) where the information requested is published, refer the applicant to the publication, or

(c) if the information is to be published or is required to be published at a future date, inform the applicant of such fact and the approximate date of such publishing. 1979, c.41, s.111.

4(2) Where a portion of a document contains some information that is information referred to in section 6, and that portion is severable, that portion of the document shall be deleted and the request with respect to the remaining portion of the document shall be granted.

4(3) Where a request for information is granted, the information shall only be provided in the language or languages in which it was made.

4(4) When the document containing the information that is the subject matter of an application has been destroyed or does not exist, the appropriate Minister shall advise the applicant of such fact.

5(1) An appropriate Minister may only deny a request for information or a part thereof in accordance with subsection 4(4) and section 6 and where that Minister denies a request for information he shall, in writing, advise the applicant of the denial stating the reasons for such denial and shall provide the applicant with the necessary forms for a review under this Act.

6 There is no right to information under this Act where its release

4(1) Lorsqu'une demande d'information est acceptée par un ministre compétent ou par un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, le ministre compétent doit

a) permettre, contre paiement d'un droit fixé par règlement, que les documents contenant l'information soient consultés et à sa discrétion, compte tenu des frais, soient reproduits totalement ou partiellement;

b) lorsque l'information sollicitée est publiée, renvoyer le demandeur à la publication, ou

c) si elle va être publiée ou doit être publiée à une date ultérieure, en informer le demandeur et lui indiquer la date approximative de cette publication. 1979, c.41, art.111.

4(2) Lorsqu'une partie d'un document contient des informations correspondant à celles citées à l'article 6, et que cette partie est séparable, elle doit être supprimée et la demande concernant la partie restante du document doit être acceptée.

4(3) Une information n'est communiquée, lorsqu'une demande à son sujet est acceptée, que dans la langue ou les langues dans lesquelles elle a été émise.

4(4) Lorsque le document contenant l'information faisant l'objet d'une demande a été détruit ou n'existe pas, le ministre compétent en avise le demandeur.

5(1) Le ministre compétent ne peut rejetter totalement ou partiellement une demande d'information qu'en vertu du paragraphe 4(4) et de l'article 6, et lorsqu'il rejette une telle demande, il en avise par écrit le demandeur, lui indique les raisons de ce refus et lui fournit les formules nécessaires pour exercer un recours en vertu de la présente loi.

6 Le droit à l'information conféré par la présente loi est suspendu lorsque la communication d'informations

7(2) Where the applicant refers the matter to a judge of The Court of Queen's Bench of New Brunswick under subsection (1),

(a) the applicant may not thereafter refer the matter to the Ombudsman under paragraph (1)*(b)* or under the *Ombudsman Act,* and

(b) the Ombudsman, in such case, may not act under the authority of this Act or the *Ombudsman Act* with respect to that matter.

7(2) Lorsque le demandeur soumet l'affaire à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick en vertu du paragraphe (1),

a) il ne peut, par la suite, la soumettre à l'Ombudsman en vertu de l'alinéa (1)*b)* ou en vertu de la *Loi sur l'Ombudsman,* et

b) ce dernier, dans ce cas, ne peut intervenir sous le régime de la présente loi ou de la *Loi sur l'Ombudsman* au sujet de cette affaire.

7(3) Where the applicant refers the matter to the Ombudsman under subsection (1), the applicant may not, subject to subsection 11(1), refer the matter to a judge of The Court of Queen's Bench of New Brunswick.

7(3) Le demandeur qui soumet l'affaire à l'Ombudsman en vertu du paragraphe (1), ne peut, sous réserve du paragraphe 11(1), la soumettre à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick.

7(4) The Ombudsman, subject to section 19 of the *Ombudsman Act,* and The Court of Queen's Bench of New Brunswick judge may, with respect to any matter referred to them, inspect the information that is the subject matter of the referral, if such information exists, in order to determine the referral, but such inspection shall be made *in camera* without the presence of any person. 1979, c.41, s.111.

7(4) L'Ombudsman, sous réserve de l'article 19 de la *Loi sur l'Ombudsman,* et le juge de la Cour du Banc de la Reine du Nouveau-Brunswick peuvent, au sujet de toute affaire qui leur est soumise, consulter les documents contenant l'information, objet du recours, si celle-ci existe, afin de délimiter le recours, mais cette consultation doit se faire à huis clos sans qu'aucune personne ne soit présente. 1979, c.41, art.111.

8(1) The Court of Queen's Bench of New Brunswick judge shall upon the applicant's request hold a hearing, and

(a) in the case where a minister denied the request for information or a part thereof, may order the minister to grant the request in whole or in part;

(b) in the case where the minister failed to reply to a request, shall order that the appropriate Minister,

(i) grant the request, or

(ii) deny the request;

(c) may make any other order that is appropriate.

8(1) Le juge de la Cour du Banc de la Reine du Nouveau-Brunswick doit, sur la demande du demandeur, convoquer une audience, et

a) dans le cas où un ministre a rejetté totalement ou partiellement la demande d'information, peut lui ordonner de l'accepter totalement ou partiellement;

b) dans le cas où le ministre a omis de répondre à une demande, doit ordonner au ministre compétent

(i) d'accepter la demande, ou

(ii) de rejetter celle-ci;

c) peut rendre tout autre ordonnance qui est nécessaire.

8(2) A copy of the decision of The Court of Queen's Bench of New Brunswick judge shall be sent to the applicant and the appropriate Minister.

8(2) Une copie de la décision du juge de la Cour du Banc de la Reine du Nouveau-Brunswick est adressée au demandeur et au ministre compétent.

8(3) No appeal lies from the decision of The Court of Queen's Bench of New Brunswick judge under subsection (1). 1979, c.41, s.111.

8(3) La décision prise par un juge de la Cour du Banc de la Reine du Nouveau-Brunswick en vertu du paragraphe (1) est sans appel. 1979, c.41, art.111.

9 The Ombudsman shall in accordance with this Act and the power, authority, privileges, rights and duties vested in him under the *Ombudsman Act* review the matter referred to him within thirty days of having received the referral.

9 L'Ombudsman, conformément à la présente loi et aux pouvoirs, attributions, prérogatives, droits et devoirs que lui a conférés la *Loi sur l'Ombudsman,* examine l'affaire qui lui a été soumise dans les trente jours de la réception de la demande de recours.

10(1) Upon having reviewed the matter referred to him, the Ombudsman shall forthwith, in writing, advise the appropriate Minister of his recommendation and shall forward a copy of such recommendation to the person making the referral.

10(1) Après avoir examiné l'affaire qui lui a été soumise, l'Ombudsman doit aussitôt faire connaître, par écrit, sa recommandation au ministre compétent et en envoyer une copie à l'auteur du recours.

10(2) The Ombudsman may in such recommendation

10(2) L'Ombudsman peut par cette recommandation

(a) recommend to the appropriate Minister to grant the request in whole or in part;

a) recommander au ministre compétent d'accepter totalement ou partiellement une demande;

(b) in the case where the appropriate Minister failed to reply to a request, recommend to the appropriate Minister

b) dans le cas où le ministre compétent a omis de répondre à une demande, recommander au ministre compétent

(i) to grant the request, or

(i) d'accepter la demande, ou

(ii) to deny the request.

(ii) de la rejeter.

10(3) The appropriate Minister referred to in subsection (2) shall, upon reviewing the recommendation of the Ombudsman, carry out the recommendations of the Ombudsman or make such other decision as he thinks fit and upon making his decision, that Minister shall notify, in writing, the person making the referral and shall forward to the Ombudsman a copy of such decision.

10(3) Le ministre compétent visé au paragraphe (2) doit, après examen de la recommandation de l'Ombudsman, la mettre à exécution ou prendre toute autre décision qu'il juge convenable et, après avoir pris sa décision, il la notifie, par écrit, à l'auteur du recours et en envoie une copie à l'Ombudsman.

11(1) Where the person making the referral is not satisfied with the decision of the appropriate Minister under subsection 10(3), that person may appeal the matter to a judge of The Court of Queen's Bench of New Brunswick.

11(1) Tout auteur d'un recours, qui n'est pas satisfait de la décision que le ministre compétent a prise en vertu du paragraphe 10(3), peut en appeler à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick.

11(2) Subsection 7(4) and section 8 apply *mutatis mutandis* to an appeal made under subsection (1).
1979, c.41, s.111.

12 In any proceeding under this Act, the onus shall be on the Minister to show that there is no right to the information that is the subject of the proceeding.

13 Where a matter is referred or appealed to a judge of The Court of Queen's Bench of New Brunswick, the judge shall award costs in favour of the applicant

(a) where the applicant is successful, or

(b) where the applicant is not successful, if the judge considers it to be in the public interest. 1979, c.41, s.111.

14 The Lieutenant-Governor in Council may make regulations

(a) prescribing the form and manner of referrals under this Act;

(b) prescribing forms;

(c) prescribing the departments for the purposes of this Act;

(d) prescribing fees for the purposes of this Act;

(e) prescribing such other procedures as may be necessary to carry out the intent and purposes of this Act.

15 This Act is subject to review by the Legislative Assembly after thirty months following the coming into force of this Act.

N.B. This Act comes into force on January 1, 1980.

N.B. This Act is consolidated to September 30, 1988.

11(2) Le paragraphe 7(4) et l'article 8 s'appliquent *mutatis mutandis* à un appel interjeté en vertu du paragraphe (1).
1979, c.41, art.111.

12 Dans toute procédure en vertu de la présente loi, il appartient au Ministre d'établir que le droit à l'information est suspendu.

13 À la suite d'un recours ou d'un appel devant un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, ce dernier doit statuer sur les frais en faveur du demandeur qui

a) a gain de cause;

b) n'a pas gain de cause lorsque, de l'avis du juge, il y va de l'intérêt public. 1979, c.41, art.111.

14 Le lieutenant-gouverneur en conseil peut, par voie de règlements,

a) prescrire les modalités de l'exercice du recours prévu par la présente loi;

b) établir des formules;

c) énoncer les ministères concernés par l'application de la présente loi;

d) fixer les droits payables en vertu de la présente loi.

e) établir toutes les autres procédures qui peuvent être nécessaires à l'application de l'objet de la présente loi.

15 L'Assemblée législative pourra réexaminer la présente loi trente mois après son entrée en vigueur.

N.B. La présente loi entre en vigueur le 1er janvier 1980.

N.B. La présente loi est refondue au 30 septembre 1988.

APPENDIX B

NEW BRUNSWICK REGULATION 85-68

under the

RIGHT TO INFORMATION ACT (O.C. 85-309)

Filed April 25, 1985

Under section 14 of the *Right to Information Act*, the Lieutenant-Governor in Council makes the following Regulation:

1 This Regulation may be cited as the *Right to Information Regulation - Right to Information Act.*

2 In this Regulation

"Act" means the *Right to Information Act.*

3 The Act and all Regulations made thereunder apply to those departments set out in Schedule A.

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,

RÈGLEMENT DU NOUVEAU-BRUNSWICK 85-68

établi en vertu de la

LOI SUR LE DROIT À L'INFORMATION (D.C. 85-309)

Déposé le 25 avril 1985

En vertu de l'article 14 de la *Loi sur le droit à l'information*, le lieutenant-gouverneur en conseil établit le règlement suivant:

1 Le présent règlement peut être cité sous le titre: *Règlement sur le droit à l'information - Loi sur le droit à l'information.*

2 Dans le présent règlement

«loi» désigne la *Loi sur le droit à l'information.*

3 La loi et tous les règlements établis sous son régime s'appliquent aux ministères et organismes indiqués à l'annexe A.

4 Sous réserve de l'alinéa 4(1)a) de la loi, chaque demande d'information et la reproduction d'une information sont assorties des droits suivants:

a) pour chaque demande d'information, cinq 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.

5(1) A referral under paragraph 7(1)(a) of the Act shall be in Form 1.

5(2) The applicant shall complete Part A of Form 1 and may deliver it to a Judge of The Court of Queen's Bench of New Brunswick or to a clerk of The Court of Queen's Bench of New Brunswick.

5(3) When a Judge has completed Part B of Form 1 the applicant shall within fourteen days serve a copy of the completed Form 1 on the Minister referred to therein.

5(4) A written referral to the Judge shall be heard in accordance with the Act and the Rules of Court apply *mutatis mutandis.*

6(1) A referral under paragraph 7(1)(b) of the Act shall be by petition in Form 2.

6(2) The applicant shall complete Form 2 and may deliver it to the Ombudsman.

6(3) A copy of the petition in Form 2 as delivered to the Ombudsman shall be served on the Minister referred to therein, and the referral shall be deemed not to have been made until the Minister has been so served.

7(1) An appeal under subsection 11(1) of the Act shall be in Form 3.

b) dans le cas où l'information est conservée ou consignée sous forme imprimée et peut être reproduite à l'aide d'un photocopieur ordinaire, dix cents la page; et

c) dans le cas où l'information est conservée ou consignée d'une manière autre que celle mentionnée à l'alinéa b), ou ne peut être reproduite à l'aide d'un photocopieur ordinaire, les frais réels de reproduction.

5(1) Les demandes de recours prévues à l'alinéa 7(1)a) de la loi doivent être établies au moyen de la formule 1.

5(2) Le demandeur doit remplir la partie A de la formule 1 et peut la remettre soit à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, soit à un greffier de cette Cour.

5(3) Une fois la partie B de la formule 1 remplie par un juge, le demandeur doit, dans les quatorze jours, signifier copie de la formule entière au ministre y désigné.

5(4) Le recours soumis au juge par écrit est entendu conformément à la loi et les Règles de procédure s'appliquent *mutatis mutandis.*

6(1) Les demandes de recours prévues à l'alinéa 7(1)b) de la loi doivent être établies au moyen de la formule 2.

6(2) Le demandeur doit remplir la formule 2 et peut la remettre à l'Ombudsman.

6(3) Copie de la requête présentée au moyen de la formule 2 et remise à l'Ombudsman doit être signifiée au Ministre y désigné et la demande de recours est réputée ne pas avoir été faite tant que celui-ci n'a pas reçu signification de cette copie.

7(1) L'appel prévu au paragraphe 11(1) de la loi est interjeté au moyen de la formule 3.

7(2) The applicant shall complete Part A of Form 3 and may deliver it to a Judge of The Court of Queen's Bench of New Brunswick or to a clerk of The Court of Queen's Bench of New Brunswick.

7(3) When a Judge has completed Part B of Form 3 the applicant shall within fourteen days serve a copy of the completed Form 3 on the Minister referred to therein.

7(4) An appeal shall be heard in accordance with the Act and the Rules of Court apply *mutatis mutandis.*

8 ***Regulation 79-152 under the Right to Information Act is repealed.***

7(2) Le demandeur doit remplir la partie A de la formule 3 et peut la remettre soit à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, soit à un greffier de cette Cour.

7(3) Une fois la partie B de la formule 3 remplie par un juge, le demandeur doit, dans les quatorze jours, signifier copie de la formule entière au ministre y désigné.

7(4) Tout appel est entendu conformément à la loi et les Règles de procédure s'appliquent *mutatis mutandis.*

8 ***Est abrogé le règlement 79-152 établi en vertu de la Loi sur le droit à l'information.***

SCHEDULE A

Advisory Council on the Status of Women

Alcoholism and Drug Dependency Commission of New Brunswick

The Artificial Insemination Advisory Board

Bon Accord Farm Management Committee

Le Centre Communautaire Sainte-Anne

Civil Service Commission

Department of Advanced Education and Training

Department of Agriculture

Department of the Board of Management

Department of Commerce and Technology

Department of Education

Department of Finance

Department of Fisheries and Aquaculture

Department of Health and Community Services

Department of Income Assistance

Department of Intergovernmental Affairs

Department of Justice

Department of Labour

Department of Municipal Affairs and Environment, except the Local Government Services Division

Local Government Services Division of the Department of Municipal Affairs and Environment

Department of Natural Resources and Energy

Department of the Solicitor General

ANNEXE A

Bibliothèque de l'Assemblée législative

Bureau de cote des films du Nouveau-Brunswick

Bureau d'enregistrement des concessionnaires de véhicules à moteur

Bureau du Conseil exécutif

Bureau du développement économique

Bureau du Premier ministre

Bureau du vérificateur général

Cabinet du Procureur général

Centre de formation linguistique

Le Centre communautaire Sainte-Anne

Comité consultatif pour l'insémination artificielle

Comité de gestion de la ferme Bon Accord

Commission de l'alcoolisme et de la pharmacodépendance du Nouveau-Brunswick

Commission d'appel en matière de développement industriel du Nouveau-Brunswick

Commission de l'assèchement des marais

Commission de l'assurance-récolte du Nouveau-Brunswick

Commission du bien-être social

Commission consultative des pesticides

Commission consultative sur les machines agricoles

Commission de la Fonction publique

Commission d'énergie électrique du Nouveau-Brunswick

Department of Supply and Services

Department of Tourism, Recreation and Heritage

Department of Transportation

Executive Council Office

Farm Machinery Advisory Board

Fort LaTour Development Authority

Grand Lake Development Corporation

Kings Landing Corporation

Language Training Centre

Legislative Library

Lotteries Commission of New Brunswick

Marshland Reclamation Commission

Military Compound Board

Motor Vehicle Dealer Registration Board

New Brunswick Crop Insurance Commission

The New Brunswick Electric Power Commission

New Brunswick Emergency Measures Organization

New Brunswick Film Classification Board

New Brunswick Fisheries Development Board

New Brunswick Forest Authority

New Brunswick Housing Corporation

New Brunswick Industrial Development Appeal Board

New Brunswick Industrial Development Board

New Brunswick Industrial Safety (Corporation) Council

Commission de l'hygiène et de la sécurité au travail

Commission des loteries du Nouveau-Brunswick

Commission du Quartier militaire

Conseil consultatif sur la condition de la femme

Conseil de développement des pêches du Nouveau-Brunswick

Conseil de développement industriel du Nouveau-Brunswick

Conseil du Premier ministre sur la condition des personnes handicapées

Conseil de la recherche et de la productivité du Nouveau-Brunswick

Conseil (société) de sécurité industrielle du Nouveau-Brunswick

Direction générale de la condition féminine

Ministère des Affaires intergouvernementales

Ministère des Affaires municipales et de l'Environnement, à l'exception de la Division des services aux administrations locales

Division des services aux administrations locales du ministère des Affaires municipales et de l'Environnement

Ministère de l'Agriculture

Ministère de l'Aide au revenu

Ministère de l'Approvisionnement et des Services

Ministère du Commerce et de la Technologie

Ministère du Conseil de gestion

Ministère de l'Éducation

Ministère de l'Enseignement supérieur et de la Formation

New Brunswick Information Service

New Brunswick Liquor Corporation

New Brunswick Occupational Health and Safety Commission

New Brunswick Research and Productivity Council

New Brunswick Transportation Authority

Office of the Attorney General

Office of the Auditor General

Office of Economic Development

Office of the Premier

Pesticides Advisory Board

Policy Secretariat

Premier's Council on the Status of Disabled Persons

Regional Development Corporation

Social Welfare Board

Women's Directorate

88-17; 88-30; 88-36; 88-141; 89-72

Ministère des Finances

Ministère de la Justice

Ministère des Pêches et de l'Aquaculture

Ministère des Ressources naturelles et de l'Énergie

Ministère de la Santé et des Services communautaires

Ministère du solliciteur général

Ministère du Tourisme, des Loisirs et du Patrimoine

Ministère des Transports

Ministère du Travail

Organisation des mesures d'urgence du Nouveau-Brunswick

Régie de développement de Fort LaTour

Régie des forêts du Nouveau-Brunswick

Régie des transports du Nouveau-Brunswick

Secrétariat des politiques

Service d'information du Nouveau-Brunswick

Société des alcools du Nouveau-Brunswick

Société d'aménagement régional

Société de développement de la région du Grand Lac

Société d'habitation du Nouveau-Brunswick

Société de Kings Landing

88-17; 88-30; 88-36; 88-141; 89-72

FORM 1

REFERRAL

(Right to Information Act,
S.N.B. 1978, c.R-10.3, s.7(1)(a))

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF _____

IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)(a) OF THE *RIGHT TO INFORMATION ACT,* S.N.B. 1978, chapter R-10.3.

PART A

Statement of Facts

1. The Applicant's name and address is _____.

2. This referral arises out of a request for information submitted to the Minister of _____ on the _____ day of _____, 19____, a copy of which is attached hereto as Appendix 1.

3. The decision of the Minister is attached hereto as Appendix 2.

or

There was no reply to the request for information.

The Applicant hereby requests that the Minister be ordered to grant the request as contained in Appendix 1.

DATED this _____ of _____, 19____.

_____
Applicant

FORMULE 1

RECOURS

(Loi sur le droit à l'information,
L.N.-B. 1978, chap. R-10.3, al.7(1)*a*))

COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK
DIVISION DE PREMIÈRE INSTANCE
CIRCONSCRIPTION JUDICIAIRE D _____

DANS L'AFFAIRE D'UN RECOURS EN VERTU DE L'ALINÉA 7(1)a) DE LA *LOI SUR LE DROIT A L'INFORMATION,* CHAPITRE R-10.3 DES LOIS DU NOUVEAU-BRUNSWICK DE 1978.

PARTIE A

Exposé des faits

1. Nom et adresse du demandeur: _____.

2. Le présent recours fait suite à la demande d'information présentée au ministre de _____ le _____ 19____, dont une copie figure à l'annexe 1 ci-jointe.

3. La décision du ministre figure à l'annexe 2 ci-jointe.

ou

Aucune réponse n'a été donnée à la demande d'information.

Le demandeur requiert, par les présentes, qu'il soit ordonné au ministre d'accéder à la demande figurant à l'annexe 1.

FAIT le _____ 19____.

Le demandeur,

_____

PART B

Let the Applicant and the Minister of _____ attend before me at _____ on the _____ day of _____, 19_____, at the hour of _____ o'clock in the _____ noon, on the hearing of the above Referral.

DATED THIS _____ day of _____, 19_____.

_____
J.C.Q.B.

PARTIE B

Nous prions le demandeur et le ministre de _____ de bien vouloir comparaître devant moi à _____, le _____ 19_____, à _____ (heure), pour procéder à l'audition du recours susmentionné.

FAIT le _____ 19_____.

_____
J.C.B.R.

FORM 2

PETITION

(Right to Information Act,
S.N.B. 1978, c.R-10.3, s.7(1)(b))

TO THE OMBUDSMAN OF THE PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)(b) OF THE *RIGHT TO INFORMATION ACT,* S.N.B. 1978, chapter R-10.3.

Statement of Facts

1. The Applicant's name and address is _____.

2. This referral arises out of a request for information submitted to the Minister of _____ on the _____ day of _____ , 19____, a copy of which is attached hereto as Appendix 1.

3. The decision of the Minister is attached hereto as Appendix 2.

or

There was no reply to the request for information.

The Applicant hereby requests that the Ombudsman carry out an investigation into the above matter and make a recommendation in accordance with the *Right to Information Act.*

Dated this _____ day of _____ , 19____.

_____
Applicant

FORMULE 2

REQUÊTE

(Loi sur le droit à l'information,
L.N.-B. 1978, chap. R-10.3, al.7(1)*b))*

À L'OMBUDSMAN DE LA PROVINCE DU NOUVEAU-BRUNSWICK

DANS L'AFFAIRE D'UN RECOURS EN VERTU DE L'ALINÉA 7(1)b) DE LA *LOI SUR LE DROIT A L'INFORMATION,* CHAPITRE R-10.3 DES LOIS DU NOUVEAU-BRUNSWICK DE 1978.

Exposé des faits

1. Nom et adresse du demandeur: _____

2. Le présent recours fait suite à la demande d'information présentée au ministre d_____ le _____ 19____, dont une copie figure à l'annexe 1 ci-jointe.

3. La décision du ministre figure à l'annexe 2 ci-jointe.

ou

Aucune réponse n'a été donnée à la demande d'information.

Le demandeur prie, par les présentes, l'Ombudsman d'effectuer une enquête sur l'affaire susmentionnée et d'émettre une recommandation conformément à la *Loi sur le droit à l'information.*

FAIT le _____ 19____.

Le demandeur,

_____

FORM 3

APPEAL

(Right to Information Act,
S.N.B. 1978, c.R-10.3, s.11(1))

IN THE COURT OF QUEEN'S BENCH
OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF _____

IN THE MATTER OF AN APPEAL UNDER SUBSECTION 11(1) OF THE *RIGHT TO INFORMATION ACT,* S.N.B. 1978, chapter R-10.3.

PART A

Statement of Facts

1. The Applicant's name and address is _____.

2. This referral arises out of a request for information submitted to the Minister of _____ on the _____ day of _____, 19____ , a copy of which is attached hereto as Appendix 1.

3. The decision of the Minister is attached hereto as Appendix 2.

or

There was no reply to the request for information.

4. The decision of the Minister was referred to the Ombudsman on the _____ day of _____, 19____, a copy of which is attached hereto as Appendix 3.

5. The recommendation of the Ombudsman is attached hereto as Appendix 4.

FORMULE 3

APPEL

(Loi sur le droit à l'information,
L.N.-B. 1978, chap. R-10.3, para.11(1))

COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK
DIVISION DE PREMIÈRE INSTANCE
CIRCONSCRIPTION JUDICIAIRE D _____

DANS L'AFFAIRE D'UN APPEL INTERJETÉ EN VERTU DU PARAGRAPHE 11(1) DE LA *LOI SUR LE DROIT A L'INFORMATION,* CHAPITRE R-10.3 DES LOIS DU NOUVEAU-BRUNSWICK DE 1978.

PARTIE A

Exposé des faits

1. Nom et adresse du demandeur: _____

2. Le présent recours fait suite à la demande d'information présentée au ministre de _____, le _____ 19____, dont une copie figure à l'annexe 1 ci-jointe.

3. La décision du ministre figure à l'annexe 2 ci-jointe.

ou

Aucune réponse n'a été donnée à la demande d'information.

4. La décision du ministre, dont une copie figure à l'annexe 3 ci-jointe, a été renvoyée devant l'Ombudsman le _____ 19_____.

5. La recommandation de l'Ombudsman figure à l'annexe 4 ci-jointe.

6. La décision du ministre faisant l'objet de l'appel figure à l'annexe 5 ci-jointe.

6. The decision of the Minister being appealed is attached hereto as Appendix 5.

The Applicant hereby requests that the Minister be ordered to grant the request as contained in Appendix 1.

Dated this _____ day of _____, 19____.

_____

Applicant

PART B

Let the Applicant and the Minister of _____ attend before me at _____ on the _____ day of _____, 19_____, at the hour of _____ o'clock in the _____ noon, on the hearing of the above Appeal.

DATED THIS _____ day of _____, 19____.

_____

J.C.Q.B.

Le demandeur requiert, par les présentes, qu'il soit ordonné au ministre d'accéder à la demande figurant à l'annexe 1.

FAIT le _____ 19____.

Le demandeur,

_____

PARTIE B

Nous prions le demandeur et le ministre de _____ de bien vouloir comparaître devant moi à _____, le 19____, à _____ (heure), pour procéder à l'audition de l'appel susmentionné.

FAIT le _____ 19____.

_____

J.C.B.R.

N.B. This Regulation is consolidated to June 30, 1989.

N.B. Le présent règlement est refondu au 30 juin 1989.

APPENDIX C

CHAPTER O-5

Ombudsman Act

Chapter Outline

Definitions 1
department or agency — service ou organisme
Minister — ministre
officer — fonctionnaire
Appointment of Ombudsman ..... 2(1)
Tenure and reappointment of Ombudsman ..... 2(2)
Resignation of Ombudsman ..... 2(3)
Suspension or removal of Ombudsman 3
Interim Ombudsman 4
Conflict of interests respecting Ombudsman 5
Oath of Ombudsman 6
Report of Ombudsman 7
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Ombudsman deemed commissioner under Inquiries Act 10
Application of Act 11
Jurisdiction of Ombudsman 12
Petition to Ombudsman 13
Statutory right of appeal 14
Power of Ombudsman to refuse to investigate 15
Ombudsman to inform department or agency of investigation 16
Investigation 17
Witnesses and evidence 18
Information withheld by Minister or agency 19
Investigation of agency or department 20
Report of Ombudsman to administrative head 21
Duty of Ombudsman to inform petitioner of recommendation 22
Effect of lack of form 23
Right of the Ombudsman not to give evidence 24
Annual report of Ombudsman 25
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CHAPITRE 0-5

Loi sur l'Ombudsman

Sommaire

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fonctionnaire — officer
ministre — Minister
service ou organisme — department or agency
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Destitution ou suspension d'un Ombudsman 3
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Serment que doit prêter l'Ombudsman 6
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1 In this Part

"authority" means an authority set out in Schedule A;

"Minister" means a member of the Executive Council;

"officer" means an official, employee or member of an authority.
1967, c.18, s.1; 1976, c.43, s.1; 1985, c.65, s.1.

1.1 Repealed. 1985, c.65, s.2.
1976, c.43, s.2.

2(1) There shall be an Ombudsman appointed by the Lieutenant-Governor in Council on the recommendation of the Legislative Assembly.

2(2) Unless his office sooner becomes vacant, the Ombudsman holds office for ten years

(*a*) from the date of his appointment under subsection (1), or

(*b*) from the date of his appointment under section 4,

and if otherwise qualified, is eligible to be reappointed.

2(3) The Ombudsman may resign his office by notice in writing addressed to the Speaker of the Legislative Assembly or, if there is no Speaker or the Speaker is absent from New Brunswick, to the Clerk of the Legislative Assembly.

2(4) An Ombudsman whose first appointment takes effect on or after the commencement of this subsection receives the same salary as a judge of the Provincial Court.

2(5) An Ombudsman whose first appointment takes effect on or after the commencement of this subsection is entitled to receive,

1 Dans la présente Partie

«autorité» désigne une autorité définie à l'Annexe A;

«Ministre» désigne un membre du Conseil exécutif;

«fonctionnaire» désigne un cadre, un employé ou un membre d'une autorité.
1967, c.18, art.1; 1976, c.43, art.1; 1985, c.65, art.1.

1.1 Abrogé. 1985, c.65, art.2.
1976, c.43, art.2.

2(1) Un Ombudsman est nommé par le lieutenant-gouverneur en conseil sur la recommandation de l'Assemblée législative.

2(2) À moins que son poste ne devienne vacant plus tôt, l'Ombudsman reste en fonctions pendant dix ans

a) à compter de la date de sa nomination en application du paragraphe (1), ou

b) à compter de la date de sa nomination en application de l'article 4,

et il peut être nommé de nouveau s'il réunit les conditions voulues.

2(3) L'Ombudsman peut démissionner en adressant un avis écrit à l'Orateur de l'Assemblée législative ou, s'il n'y a pas d'Orateur ou si l'Orateur s'est absenté du Nouveau-Brunswick, au greffier de l'Assemblée législative.

2(4) L'Ombudsman dont la première nomination prend effet à l'entrée en vigueur du présent paragraphe ou après cette date reçoit le même traitement qu'un juge de la Cour provinciale.

2(5) L'Ombudsman dont la première nomination prend effet à l'entrée en vigueur du présent paragraphe ou après cette date a le droit de recevoir la pension et les prestations d'un juge de la Cour provinciale,

(a) if the Ombudsman holds office for at least two years and becomes afflicted with some permanent infirmity disabling the Ombudsman from the due execution of the Ombudsman's office and resigns or by reason of such infirmity is removed from office,

(b) at the age of sixty-five, if the Ombudsman holds office for at least ten years but ceases to hold office before or upon reaching the age of sixty-five, or

(c) at the time the Ombudsman ceases to hold office, if the Ombudsman holds office for at least ten years but does not cease to hold office until after the Ombudsman reaches the age of sixty-five,

the pension and benefits of a judge of the Provincial Court.

2(6) Where an Ombudsman whose first appointment takes effect on or after the commencement of this subsection

(a) held office for at least two years immediately before the Ombudsman's death, or

(b) immediately before the Ombudsman's death was entitled to receive or was receiving a pension and benefits, or would have been entitled to receive upon reaching the age of sixty-five a pension and benefits under paragraph (5)(b),

the surviving spouse is entitled to receive the same pension and benefits as the surviving spouse of a judge of the Provincial Court, but where an Ombudsman dies before commencing to receive the pension and benefits which the Ombudsman would have been entitled to receive under paragraph 5(b) upon reaching the age of sixty-five, the surviving spouse is not entitled to commence receiving such pension and benefits until the time at which the Ombudsman would have received the pension and benefits had the Ombudsman lived.

a) si l'Ombudsman exerce ses fonctions pendant deux ans au moins avant d'être affligé de quelque infirmité permanente le rendant incapable d'exercer ses fonctions d'Ombudsman et démissionne ou est destitué à cause de cette infirmité,

b) à l'âge de soixante-cinq, si l'Ombudsman exerce ses fonctions pendant au moins dix ans mais cesse de les exercer avant ou au moment d'atteindre l'âge de soixante-cinq, ou

c) au moment où l'Ombudsman cesse d'exercer ses fonctions, si l'Ombudsman exerce ses fonctions pendant au moins dix ans et ne cesse de les exercer qu'après avoir atteint l'âge de soixante-cinq.

2(6) Lorsqu'un Ombudsman dont la première nomination prend effet à l'entrée en vigueur du présent paragraphe ou après cette date

a) a exercé ses fonctions pendant au moins deux ans immédiatement avant son décès, ou

b) immédiatement avant son décès avait droit à recevoir ou recevait une pension et des prestations ou aurait eu droit à recevoir, au moment d'atteindre soixante-cinq ans, une pension et des prestations en vertu de l'alinéa (5)b),

le conjoint survivant a le droit de recevoir la même pension et les mêmes prestations que le conjoint survivant d'un juge de la Cour provinciale, toutefois lorsqu'un Ombudsman décède avant de commencer à recevoir la pension et les prestations qu'un Ombudsman aurait eu droit à recevoir en vertu de l'alinéa (5)b) au moment d'atteindre l'âge de soixante-cinq, le conjoint survivant n'a le droit de commencer à recevoir une telle pension et de telles prestations qu'au moment où l'Ombudsman aurait reçu la pension et les prestations s'il avait vécu.

2(7) Where an Ombudsman whose first appointment takes effect on or after the commencement of this subsection dies

(a) leaving a child or children under the age of eighteen years and no surviving spouse, or

(b) leaving a child or children under the age of eighteen years and a surviving spouse who dies before such child or children have reached the age of eighteen years,

and the surviving spouse would have been entitled to receive a pension and benefits if the surviving spouse were alive, the guardian of the child or children is entitled to receive, at such time as the surviving spouse would have been so entitled, for the maintenance and education of the child or children, until the child or children reach the age of eighteen years, the same pension and benefits to which the guardian of a child or children of a judge of the Provincial Court would have been entitled to receive.

2(8) An Ombudsman whose first appointment takes effect on or after the commencement of this subsection shall, for the purposes of the pension and benefits referred to in subsections (5), (6) and (7), pay, into the same fund into which a judge of the Provincial Court is required to pay, the same amount that is required to be paid into that fund by a judge of the Provincial Court.

2(9) Except where they are inconsistent with the provisions of this Act, sections 15 to 17 of the *Provincial Court Act* apply, with the necessary modifications, to all matters related to the pension and benefits to which an Ombudsman or the surviving spouse or child or children are entitled, including, without limiting the generality of the foregoing, the amount of the contributions to be made by an Ombudsman, the pension and benefits to which an Ombudsman or the surviving spouse or child or children of an Ombudsman are entitled and the amount, time and manner of payment of such pension and benefits, the circumstances in which an Ombudsman or the surviving spouse or

2(7) Lorsqu'un Ombudsman dont la première nomination prend effet à l'entrée en vigueur du présent paragraphe ou après cette date décède

a) laissant un ou plusieurs enfants de moins de dix-huit ans mais ne laissant pas de conjoint survivant, ou

b) laissant un ou plusieurs enfants de moins de dix-huit ans et un conjoint survivant qui décède avant que cet enfant ou ces enfants aient atteint l'âge de dix-huit ans,

et que le conjoint survivant aurait eu droit à recevoir une pension et des prestations si le conjoint survivant avait vécu, le tuteur de l'enfant ou des enfants a le droit de recevoir, à la date que le conjoint survivant y aurait eu ainsi droit, pour le soutien et l'éducation de l'enfant ou des enfants jusqu'à leur dix-huit ans, la même pension et les mêmes prestations qu'un tuteur de l'enfant ou des enfants d'un juge de la Cour provinciale aurait eu droit à recevoir.

2(8) Un Ombudsman dont la première nomination prend effet à l'entrée en vigueur du présent paragraphe ou après cette date doit, aux fins de la pension et des prestations visées aux paragraphes (5), (6) et (7) verser dans le même fonds dans lequel un juge de la Cour provinciale est tenu de le faire, le même montant qu'un juge de la Cour provinciale est tenu de verser dans ce fonds.

2(9) Sauf s'ils sont incompatibles avec les dispositions de la présente loi, les articles 15 à 17 de la *Loi sur la Cour provinciale* s'appliquent, avec les modifications nécessaires, à toutes matières portant sur la pension et les prestations auxquelles un Ombudsman, son conjoint survivant ou son ou ses enfants ont droit, y compris, sans limiter la généralité de ce qui précède, le montant des cotisations à faire par un Ombudsman, la pension et les prestations auxquelles un Ombudsman ou son conjoint survivant ou son ou ses enfants ont droit, et le montant, la date de paiement et la manière de payer une telle pension et de telles prestations, les circonstances dans lesquelles un Ombudsman ou son conjoint

child or children of the Ombudsman are entitled to receive such pension and benefits and the circumstances in which an Ombudsman is entitled to a return of contributions made and the amount to be returned.
1967, c.18, s.2; 1979, c.41, s.90; 1988, c.31, s.1.

survivant ou son ou ses enfants ont droit à recevoir une telle pension et de telles prestations, ainsi que les circonstances dans lesquelles un Ombudsman a droit à un remboursement des cotisations versées et le montant à rembourser.
1967, c.18, art.2; 1979, c.41, art.90; 1988, c.31, art.1.

3(1) On the recommendation of the Legislative Assembly, the Lieutenant-Governor in Council may remove or suspend the Ombudsman from office for cause or incapacity due to illness or any other cause.

3(1) Sur la recommandation de l'Assemblée législative, le lieutenant-gouverneur en conseil peut destituer ou suspendre l'Ombudsman pour un motif valable, une incapacité due à la maladie ou pour toute autre raison.

3(2) When the Legislature is not in session, a judge of The Court of Queen's Bench of New Brunswick may, upon an application by the Lieutenant-Governor in Council, suspend the Ombudsman from office for cause or incapacity due to illness or any other cause. 1979, c.41, s.90.

3(2) Lorsque la Législature ne siège pas, un juge de la Cour du Banc de la Reine du Nouveau-Brunswick peut suspendre l'Ombudsman pour un motif valable, une incapacité due à la maladie ou pour toute autre raison, à la demande du lieutenant-gouverneur en conseil. 1979, c.41, art.90.

3(3) Where the Lieutenant-Governor in Council makes an application under subsection (2) the practice and procedure of The Court of Queen's Bench of New Brunswick respecting applications applies. 1979, c.41, s.90.

3(3) Lorsque le lieutenant-gouverneur en conseil fait une demande en application du paragraphe (2), la pratique et la procédure de la Cour du Banc de la Reine du Nouveau-Brunswick relatives aux demandes sont applicables. 1979, c.41, art.90.

3(4) Where a judge of The Court of Queen's Bench of New Brunswick suspends the Ombudsman under subsection (2) that judge

(*a*) shall appoint an acting Ombudsman to hold office until the suspension has been dealt with by the Legislative Assembly, and

(*b*) shall table a report of the suspension within ten days following the commencement of the next ensuing session of the Legislature. 1979, c.41, s.90.

3(4) Lorsqu'un juge de la Cour du Banc de la Reine du Nouveau-Brunswick suspend l'Ombudsman en vertu du paragraphe (2), ce juge

a) doit nommer un Ombudsman intérimaire qui doit rester en fonctions jusqu'à ce que l'Assemblée législative ait statué sur la suspension, et

b) doit présenter un rapport de la suspension dans les dix jours de l'ouverture de la session suivante de la Législature. 1979, c.41, art.90.

3(5) No suspension under subsection (2) shall continue beyond the end of the next ensuing session of the Legislature. 1967, c.18, s.3.

3(5) Aucune suspension en vertu du paragraphe (2) n'est valable après la clôture de la session suivante de la Législature. 1967, c.18, art.3.

4(1) Where the Ombudsman dies, retires, resigns or is removed from office, the vacancy shall be filled in accordance with subsections (2) and (3).

4(1) Lorsque l'Ombudsman décède, prend sa retraite, démissionne ou est destitué, il est suppléé à la vacance conformément aux dispositions des paragraphes (2) et (3).

4(2) Where

(*a*) the office of Ombudsman becomes vacant when the Legislature is in session but no recommendation is made by the Legislative Assembly before the close of that session, or

(*b*) the office of Ombudsman becomes vacant when the Legislature is not in session,

the Lieutenant-Governor in Council may appoint an Ombudsman to hold office until his appointment is confirmed by the Legislative Assembly in accordance with subsection (3).

4(2) Lorsque

a) le poste d'ombudsman devient vacant pendant une session de la Législature mais que l'Assemblée législative ne fait pas de recommandation avant la clôture de la session, ou

b) que le poste d'ombudsman devient vacant alors que la Législature ne siège pas,

le lieutenant-gouverneur en conseil peut nommer un Ombudsman qui reste en fonctions jusqu'à ce que l'Assemblée législative approuve sa nomination conformément aux dispositions du paragraphe (3).

4(3) Where an appointment under subsection (2) is not confirmed within 30 days of the next ensuing session of the Legislature, the appointment terminates and the office of Ombudsman is vacant. 1967, c.18, s.4.

4(3) Lorsqu'une nomination faite en vertu du paragraphe (2) n'a pas été approuvée dans les trente jours du début de la session suivante de la Législature, la nomination prend fin et le poste d'ombudsman devient vacant. 1967, c.18, art.4.

4.1(1) Where the office of Ombudsman is vacant or the Ombudsman has been suspended under subsection 3(1), the Lieutenant-Governor in Council may appoint an acting Ombudsman to hold office until a person is appointed as Ombudsman or until the suspension has elapsed.

4.1(1) Lorsque le poste d'Ombudsman est vacant ou lorsque ce dernier a été suspendu en vertu du paragraphe 3(1), le lieutenant-gouverneur en conseil peut nommer un Ombudsman suppléant pour remplir le poste jusqu'à la nomination d'un Ombudsman ou la fin de la suspension.

4.1(2) An acting Ombudsman, while in office, has the powers and duties and shall perform the functions of the Ombudsman and shall be paid such salary or other remuneration and expenses as the Lieutenant-Governor in Council may fix. 1981, c. 57, s. 1.

4.1(2) Un Ombudsman suppléant en fonction a les pouvoirs et les attributions de l'Ombudsman et il doit en remplir les fonctions et il reçoit le traitement ou autres rémunérations et indemnités que peut fixer le lieutenant-gouverneur en conseil. 1981, c. 57, art. 1.

5 The Ombudsman may not be a member of the Legislative Assembly and shall not hold any office of trust or profit, other than his office as Ombudsman, or engage in any occupation for reward outside the duties of his office without prior approval in each particular case by the Legislative Assembly or the Lieutenant-Governor in Council when the Legislature is not in session. 1967, c.18, s.5.

6(1) Before entering upon the exercise of the duties of his office the Ombudsman shall take an oath that he will faithfully and impartially perform the duties of his office and will not divulge any information received by him under this Act except for the purpose of giving effect to this Act.

6(2) The Speaker or the Clerk of the Legislative Assembly shall administer the oath referred to in subsection (1). 1967, c.18, s.6.

7 Notwithstanding section 6, the Ombudsman may disclose in a report made by him under this Act any matters that in his opinion are necessary to disclose in order to establish grounds for his conclusions and recommendations. 1967, c.18, s.7.

8(1) The Ombudsman may appoint such assistants and employees as he deems necessary for the efficient carrying out of his functions under this Act.

8(2) Before performing any official duty under this Act a person appointed under subsection (1) shall take an oath, administered by the Ombudsman, that he will not divulge any information received by him under this Act, except for the purpose of giving effect to this Act. 1967, c.18, s.8.

9(1) The Ombudsman may, in writing under his signature, delegate to any person any of his powers under this Act except the power of delegation and the power to make a report under this Act.

5 L'Ombudsman ne peut pas être député de l'Assemblée législative et ne doit pas détenir un poste de confiance ou un emploi rémunéré autre que son poste d'ombudsman, ni remplir des fonctions rémunérées autres que les fonctions de son poste sans avoir obtenu, pour chaque cas particulier, le consentement préalable de l'Assemblée législative ou du lieutenant-gouverneur en conseil lorsque la Législature ne siège pas. 1967, c.18, art.5.

6(1) Avant de commencer à exercer ses fonctions, l'Ombudsman doit prêter le serment de remplir les fonctions de son poste avec loyauté et impartialité et de ne divulguer aucun renseignement qu'il a reçu en vertu de la présente loi, si ce n'est en vue de l'application de celle-ci.

6(2) L'Orateur ou le greffier de l'Assemblée législative doit déférer le serment visé au paragraphe (1). 1967, c.18, art.6.

7 Nonobstant l'article 6, l'Ombudsman peut divulguer, dans un rapport qu'il présente en application de la présente loi, toute affaire dont la divulgation est à son avis nécessaire afin de fonder ses conclusions et ses recommandations. 1967, c.18, art.7.

8(1) L'Ombudsman peut nommer les adjoints et employés qu'il juge nécessaires pour assurer l'exercie efficace des fonctions que lui confère la présente loi.

8(2) Avant d'exercer toute fonction officielle que lui confère la présente loi, une personne nommée en application du paragraphe (1) doit prêter devant l'Ombudsman le serment de ne divulguer aucun renseignement qu'il a reçu en vertu de la présente loi, si ce n'est en vue de l'application de celle-ci.
1967, c.18, art.8; 1987, c.6, art.77(1).

9(1) L'Ombudsman peut, au moyen d'un document revêtu de sa signature, déléguer à toute personne tout pouvoir que lui confère la présente loi, à l'exclusion du pouvoir de délégation et de celui de présenter un rapport en application de la présente loi.

9(2) A person purporting to exercise power of the Ombudsman by virtue of a delegation under subsection (1) shall produce evidence of his authority to exercise that power when required to do so. 1967, c.18, s.9.

10 For the purposes of this Act, the Ombudsman is a commissioner under the *Inquiries Act*. 1967, c.18, s.10.

11 This Act does not apply

(*a*) to judges and functions of any court of New Brunswick, and

(*b*) to deliberations and proceedings of the Executive Council or any committee thereof. 1967, c.18, s.11.

9(2) Quiconque prétend exercer tout pouvoir de l'Ombudsman en vertu d'une délégation prévue au paragraphe (1) doit fournir la preuve qu'il est autorisé à exercer ces pouvoirs lorsqu'il en est requis. 1967, c.18, art.9.

10 Pour l'application de la présente loi, l'Ombudsman a la qualité d'un commissaire selon la *Loi sur les enquêtes*. 1967, c.18, art.10.

11 La présente loi ne s'applique pas

a) aux juges ni aux fonctions de toute cour du Nouveau-Brunswick, ni

b) aux délibérations et aux travaux du Conseil exécutif ou de tout comité de ce Conseil. 1967, c.18, art.11.

12(1) Subject to subsection (2), the Ombudsman may, either on a written petition made to him or on his own motion, investigate a decision or recommendation made, an act done or omitted or a procedure used with respect to a matter of administration by an authority or any officer thereof whereby any person is aggrieved or, in the opinion of the Ombudsman, may be aggrieved.

12(2) Notwithstanding subsection (1), the Ombudsman shall not investigate

(*a*) any decision, recommendation, act or omission in respect of which there is under any Act an express right of appeal or objection or an express right to apply for a review on the merits of the case to any court or to any tribunal constituted by or under any Act until that right of appeal or objection or application has been exercised in the particular case or until the time prescribed for the exercise of that right has expired, or

(*b*) any decision, recommendation, act or omission of any person acting as solicitor or counsel for an authority.

12(3) Where a question arises as to the jurisdiction of the Ombudsman to investigate a grievance under this Act, he may apply to The Court of Queen's Bench of New Brunswick for a declaratory order determining the question.
1967, c.18, s.12; 1976, c.43, s.3; 1981, c.57, s.2; 1985, c.65, s.3.

13(1) A person may apply by written petition to the Ombudsman to investigate a grievance.

12(1) Sous réserve du paragraphe (2), l'Ombudsman peut, sur requête écrite à lui adressée ou de sa propre initiative, enquêter sur une décision ou une recommandation, action, omission ou procédure émanant d'une autorité ou d'un de ses fonctionnaires en matière administrative, si elles causent ou peuvent, à son avis, causer un préjudice à une personne.

12(2) Indépendamment du paragraphe (1), l'Ombudsman ne peut enquêter

a) sur une décision, recommandation, action ou omission pour laquelle une loi prévoit expressément un droit d'appel ou d'opposition ou le droit de demander une révision au fond devant toute cour ou tout tribunal constitué sous le régime d'une loi, avant que cette voie de recours n'ait été exercée en l'espèce ou qu'ait expiré le délai imparti pour l'exercer, ou

b) sur une décision, recommandation, action ou omission d'une personne agissant en qualité d'avocat ou de conseil d'une autorité.

12(3) Lorsque la compétence qu'a l'Ombudsman d'enquêter sur un grief en application de la présente loi est remise en question, celui-ci peut demander à la Cour du Banc de la Reine du Nouveau-Brunswick de rendre une ordonnance déclaratoire sur la question.
1967, c.18, art.12; 1976, c.43, art.3; 1981, c.57, art.2; 1985, c.65, art.3.

13(1) Toute personne peut demander à l'Ombudsman d'enquêter sur un grief en lui faisant parvenir une requête par écrit.

13(2) Notwithstanding sections 15, 21 and 22, a committee of the Legislative Assembly may refer any petition that is before the committee for consideration or any matter relating to such a petition to the Ombudsman for investigation and report.

13(3) Notwithstanding sections 15, 21 and 22, where a matter has been referred to the Ombudsman under subsection (2), the Ombudsman, subject to any special directions of the committee, shall investigate the matter as far as it is within his jurisdiction and shall make such report to the committee as he thinks fit.

13(4) Notwithstanding any Act, where a letter written by a person in custody on a charge or after conviction of any offence or by any inmate of any private sanatorium or mental hospital is addressed to the Ombudsman, it shall be immediately forwarded unopened to the Ombudsman by the person in charge of the place or institution where the writer of the letter is detained or of which he is an inmate. 1967, c.18, s.13.

14 Notwithstanding any other Act that provides that a decision, recommendation, act or omission is final or that no appeal lies in respect thereof or that no proceeding, decision, recommendation, act or omission of an authority or officer thereof is to be challenged, reviewed, quashed or called in question, the Ombudsman may exercise the powers of his office.
1967, c.18, s.14; 1985, c.65, s.4.

15(1) The Ombudsman, in his discretion, may refuse to investigate or may cease to investigate a grievance if

(*a*) an adequate remedy or right of appeal already exists whether or not the petitioner has availed himself of the remedy or right of appeal,

(*b*) it is trivial, frivolous, vexatious or not made in good faith,

(*c*) having regard to all the circumstances of the case, further investigation is unnecessary,

13(2) Nonobstant les articles 15, 21 et 22, un comité de l'Assemblée législative peut renvoyer toute requête qui lui est soumise, ou toute question relative à une telle requête, à l'Ombudsman pour qu'il fasse une enquête et présente un rapport.

13(3) Nonobstant les articles 15, 21 et 22, lorsqu'une question a été renvoyée à l'Ombudsman en application du paragraphe (2), celui-ci doit, sous réserve des instructions spéciales qu'il peut recevoir du comité, enquêter sur l'affaire dans les limites de sa compétence et présenter au comité le rapport qu'il juge approprié.

13(4) Nonobstant toute loi, lorsqu'une lettre écrite par une personne sous garde après avoir été accusée ou déclarée coupable d'une infraction ou par une personne qui est placée dans un sanatorium ou un hôpital psychiatrique privés est adressée à l'Ombudsman, elle doit lui être transmise immédiatement, sans avoir été ouverte, par le responsable du lieu ou de l'établisement où l'auteur de la lettre est sous garde ou placé. 1967, c.18, art.13.

14 L'Ombudsman peut exercer les pouvoirs de sa charge nonobstant toute autre loi prévoyant que des décision, recommandation, acte ou omission sont définitifs et ne peuvent faire l'objet d'un appel et que nulle procédure, décision, recommandation, nul acte ou nulle omission d'une autorité ou d'un de ses fonctionnaires ne doit être contesté, révisé, annulé ou mis en question.
1967, c.18, art.14; 1985, c.65, art.4.

15(1) L'Ombudsman peut, à sa discrétion, refuser ou cesser d'enquêter sur un grief

a) s'il existe déjà un recours suffisant ou un droit d'appel, que le requérant s'en soit prévalu ou non,

b) si ce grief est futile, frivole, vexatoire ou est fait de mauvaise foi,

c) si, étant donné les circonstances en l'espèce, il n'est pas nécessaire de pousser l'enquête plus loin,

(*d*) it relates to any decision, recommendation, act or omission that the petitioner has had knowledge of for more than one year before petitioning,

(*e*) the petitioner does not have a sufficient personal interest in the subject matter of the grievance, or

(*f*) upon a balance of convenience between the public interest and the person aggrieved, the Ombudsman is of the opinion that the grievance should not be investigated.

15(2) Where the Ombudsman decides not to investigate or to cease to investigate a grievance he shall inform the petitioner and any other interested person of his decision and may state his reasons therefor. 1967, c.18, s.15.

16 Before investigating a grievance, the Ombudsman shall inform the administrative head of the authority concerned of his intention to investigate. 1967, c.18, s.16; 1976, c.43, s.4; 1985, c.65, s.5.

d) si ce grief a trait à une décision, une recommandation, un acte ou une omission dont le requérant a eu connaissance plus d'un an avant de faire la requête,

e) si le requérant n'a pas un intérêt personnel suffisant dans ce qui fait l'objet du grief, ou

f) si, après avoir mis en balance l'intérêt public et celui de la personne lésée, l'Ombudsman est d'avis qu'il n'y a pas lieu d'enquêter sur le grief.

15(2) Lorsque l'Ombudsman décide de ne pas enquêter ou de cesser d'enquêter sur un grief, il doit en informer le requérant et tout autre intéressé et peut donner les motifs de sa décision. 1967, c.18, art.15.

16 Avant d'enquêter sur un grief, l'Ombudsman doit informer de son intention le chef administratif de l'autorité concernée.
1967, c.18, art.16; 1976, c.43, art.4; 1985, c.65, art.5.

17(1) Every investigation under this Act shall be conducted in private.

17(1) Toute enquête effectuée en application de la présente loi est menée à titre confidentiel.

17(2) Subject to this Act, the Ombudsman may hear or obtain information from any person and may make inquiries.

17(2) Sous réserve de la présente loi, l'Ombudsman peut entendre toute personne ou obtenir d'elle des renseignements et mener des enquêtes.

17(3) The Ombudsman may hold hearings under this Act but, subject to subsection (4), no person is entitled as of right to be heard by the Ombudsman.

17(3) L'Ombudsman peut procéder à des auditions en application de la présente loi, mais, sous réserve du paragraphe (4), nul ne peut exiger de plein droit d'être entendu par l'Ombudsman.

17(4) Where during an investigation the Ombudsman is satisfied that there is *prima facie* proof that a decision or recommendation made, an act done or omitted or a procedure used with respect to a matter of administration by an authority or officer thereof caused a grievance or gave cause for a grievance, he shall so advise the administrative head of the authority or officer thereof and shall give that authority or officer thereof an opportunity to be heard.

17(4) S'il acquiert, au cours d'une enquête, la conviction qu'il existe une preuve, à sa face même, qu'une décision ou une recommandation, action, omission ou procédure émanant d'une autorité ou d'un de ses fonctionnaires en matière administrative, cause ou peut causer un préjudice, l'Ombudsman doit en informer le chef administratif de l'autorité, ou le fonctionnaire en cause et leur donner l'occasion de se faire entendre.

17(5) An authority or officer thereof appearing at a hearing under subsection (4) is entitled to counsel.

17(5) Une autorité ou un de ses fonctionnaires comparaissant à une audition en application du paragraphe (4) a le droit d'être représentée par un conseil.

17(6) The Ombudsman may at any time during or after an investigation consult any Minister who is concerned in the matter of the investigation.

17(6) L'Ombudsman peut, en tout temps pendant ou après une enquête, consulter tout ministre que le sujet de l'enquête concerne.

17(7) On the request of any Minister in relation to an investigation or in any case where an investigation relates to a recommendation made to a Minister, the Ombudsman shall consult that Minister after making the investigation and before forming a final opinion on any matter referred to in subsection 21(1).

17(7) Sur demande d'un ministre à l'occasion d'une enquête ou dans toute affaire où une enquête se rapporte à une recommandation faite à un ministre, l'Ombudsman doit consulter ce ministre après avoir enquêté et avant de se faire une opinion définitive sur toute question visée au paragraphe 21(1).

17(8) Where during or after an investigation the Ombudsman is of the opinion that there is evidence of a breach of duty or misconduct by an authority or officer thereof, he shall refer that matter to the administrative head of that authority.

17(8) Lorsque, pendant ou après une enquête, l'Ombudsman est d'avis qu'il y a des preuves qu'une autorité ou un de ses fonctionnaires a manqué à ses devoirs ou a fait preuve d'inconduite, il doit en référer au chef administratif de cette autorité.

17(9) Subject to this Act and any rules made under section 26, the Ombudsman may regulate his procedure.
1967, c.18, s.17; 1976, c.43, s.5; 1985, c.65, s.6.

18(1) Subject to subsections (2) to (7) and section 19, where the Ombudsman requests a person who in the opinion of the Ombudsman is able to furnish information relating to a matter being investigated by the Ombudsman to furnish such information, that person shall furnish that information and produce any documents or papers that in the opinion of the Ombudsman relate to the matter and that may be in the possession or under the control of that person whether or not that person is an officer of an authority and whether or not the documents and papers are in the custody or under the control of that authority.

18(2) The Ombudsman may summon before him and examine on oath

(a) any officer of an authority who in his opinion is able to give any information referred to in subsection (1),

(*b*) any petitioner, and

(*c*) with the approval of the Attorney General, any other person who in the opinion of the Ombudsman is able to give any information referred to in subsection (1).

18(3) The oath referred to in subsection (2) shall be administered by the Ombudsman.

18(4) Subject to subsection (5), where a person is bound by an Act to maintain secrecy in relation to, or not to disclose any matter, the Ombudsman shall not require that person to supply any information or to answer any question in relation to that matter or to produce any document or paper relating to the matter that would be a breach of the obligation of secrecy or non-disclosure.

18(5) With the prior consent in writing of the petitioner the Ombudsman may require a person to whom subsection (4) applies to supply information or answer questions or produce documents or papers relating only to the petitioner and that person shall do so.

17(9) Sous réserve de la présente loi et de toutes règles établies en application de l'article 26, l'Ombudsman peut fixer les procédures qu'il entend suivre.
1967, c.18, art.17; 1976, c.43, art.5; 1985, c.65, art.6; 1987, c.6, art.77(2).

18(1) Sous réserve des paragraphes (2) à (7) et de l'article 19, lorsque l'Ombudsman demande à une personne qu'il juge capable de fournir des renseignements concernant une affaire sur laquelle il est en train d'enquêter, de fournir ces renseignements, cette personne doit le faire et produire les documents et les pièces qui, selon l'Ombudsman, se rapportent à l'affaire et qui peuvent être en sa possession ou sous son contrôle, que cette personne soit ou non fonctionnaire d'une autorité et que ces documents ou ces pièces soient ou non sous la garde ou le contrôle de cette autorité.

18(2) L'Ombudsman peut sommer de comparaître devant lui et interroger sous serment

a) tout fonctionnaire d'un autorité qu'il juge capable de fournir tout renseignement visé au paragraphe (1),

b) tout requérant, et

c) avec l'approbation du procureur général, toute autre personne qu'il juge capable de fournir tout renseignement visé au paragraphe (1).

18(3) L'Ombudsman fait prêter le serment prévu au paragraphe (2).

18(4) Sous réserve du paragraphe (5), lorsque, en application d'une loi quelconque, une personne est tenue au secret relativement à une question ou est tenue de ne faire aucune divulgation relativement à une question, l'Ombudsman ne doit pas exiger qu'elle fournisse des renseignements ou réponde à une question à propos de cette question ou produise des documents ou pièces ayant trait à cette question, ce qui constituerait un manquement à son obligation de garder le secret ou de ne faire aucune divulgation.

18(5) Après avoir obtenu au préalable le consentement écrit du requérant, l'Ombudsman peut exiger d'une personne à laquelle le paragraphe (4) est applicable qu'elle fournisse des renseignements, réponde à des questions ou produise des documents ou des pièces concernant uniquement le requérant, et cette personne doit obtempérer.

18(6) The rules for taking evidence in The Court of Queen's Bench of New Brunswick apply to evidence given by a person required to give information, answer questions and produce documents or papers under this Act.

18(6) Les règles d'administration de la preuve devant la Cour du Banc de la Reine du Nouveau-Brunswick sont applicables à la preuve fournie par une personne tenue de communiquer des renseignements, de répondre à des questions et de produire des documents ou des pièces en application de la présente loi.

18(7) Any person required to attend a hearing under this Act is entitled to the same fees, allowances and expenses as if he were a witness in The Court of Queen's Bench of New Brunswick.

18(7) Quiconque est tenu de comparaître lors d'une audition en application de la présente loi a droit au paiement des mêmes indemnités et frais que s'il était un témoin devant la Cour du Banc de la Reine du Nouveau-Brunswick.

18(8) Except on the trial of a person for perjury, evidence given by any person in proceedings before the Ombudsman and evidence of any proceeding before the Ombudsman is not admissible against any person in any court or in any proceedings of a judicial nature.

18(8) Sauf dans le cas d'un procès pour parjure, la preuve apportée par une personne dans des procédures devant l'Ombudsman et la preuve recueillie lors de toute procédure devant l'Ombudsman n'est pas admissible à l'encontre d'une personne devant un tribunal ou dans des procédures de nature judiciaire.

18(9) No person is liable for an offence against any Act by reason of his compliance with any requirement of the Ombudsman under this Act.
1967, c.18, s.18; 1979, c.41, s.90; 1981, c.6, s.1; 1985, c.65, s.7.

18(9) Nul ne peut être poursuivi en raison d'une infraction à une loi quelconque parce qu'il s'est conformé à une exigence de l'Ombudsman en application de la présente loi.
1967, c.18, art.18; 1979, c.41, art.90; 1981, c.6, art.1; 1985, c.65, art.7.

19(1) Where the Attorney General certifies that the giving of any information or the answering of any question or the production of any document or paper may disclose

(*a*) deliberations of the Executive Council, or

(*b*) proceedings of the Executive Council or any committee of the Executive Council relating to matters of a secret or confidential nature and would be injurious to the public interest,

the Ombudsman shall not require the information or answer to be given or the document or paper produced, but shall report the giving of such a certificate to the Legislative Assembly.

19(1) Lorsque le procureur général certifie que la communication de renseignements, la réponse à toutes questions ou la production de documents ou de pièces peut divulguer

a) la teneur des délibérations du Conseil exécutif, ou

b) les travaux du Conseil exécutif ou de ses comités concernant des affaires de nature secrète ou confidentielle qui seraient préjudiciables à l'intérêt public,

l'Ombudsman ne doit pas exiger ces renseignements, ces réponses ou ces documents ou pièces, mais doit présenter à l'Assemblée législative un rapport indiquant que ce certificat a été donné.

19(2) Subject to subsection (1), a rule of law that authorizes or requires the withholding of any document, paper or thing, or the refusal to answer any question on the ground that the disclosure of the document, paper or thing, or the answering of the question would be injurious to the public interest, does not apply in respect of any investigation by or proceedings before the Ombudsman.
1967, c.18, s.19; 1968, c.44, s.1; 1981, c.6, s.1.

19(2) Sous réserve du paragraphe (1), une règle de droit qui autorise ou exige la rétention de documents, pièces ou objets, ou le refus de répondre à toutes questions, pour le motif que le fait de divulguer ces documents, pièces ou objets, ou de répondre à ces questions serait préjudiciable à l'intérêt public, ne s'applique pas aux enquêtes de l'Ombudsman ni aux procédures qui ont lieu devant lui.
1967, c.18, art.19; 1968, c.44, art.1; 1981, c.6, art.1.

20(1) For the purposes of this Act the Ombudsman may enter upon any premises occupied by any authority and, subject to sections 18 and 19, carry out any investigation within his jurisdiction.

20(2) Before entering any premises under subsection (1) the Ombudsman shall notify the administrative head of the authority of his intention to do so.
1967, c.18, s.20; 1976, c.43, s.6; 1985, c.65, s.8.

21(1) Where upon investigation the Ombudsman is of the opinion that a grievance exists or may exist because

(a) a decision, recommendation, act or omission or procedure used that was the subject matter of the investigation was

(i) contrary to law,

(ii) unreasonable, unjust, oppressive or improperly discriminatory,

(iii) made, done or omitted pursuant to a statutory provision or other rule of law or practice that is unreasonable, unjust, oppressive or improperly discriminatory,

(iv) based in whole or in part on a mistake of law or fact or on irrelevant grounds or considerations,

(v) related to the application of arbitrary, unreasonable or unfair procedures, or

(vi) otherwise wrong,

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority

(i) did so for an improper purpose,

20(1) Pour l'application de la présente loi, l'Ombudsman peut pénétrer dans tout local occupé par toute autorité et, sous réserve des articles 18 et 19, effectuer une enquête dans les limites de sa compétence.

20(2) Avant de pénétrer dans tout local en vertu du paragraphe (1), l'Ombudsman doit aviser le chef administratif de l'autorité de son intention.
1967, c.18, art.20; 1976, c.43, art.6; 1985, c.65, art.8.

21(1) Lorsque, après une enquête, l'Ombudsman est d'avis qu'un motif de grief existe ou peut exister en raison du fait

a) qu'une décision, recommandation, action, omission ou procédure ayant fait l'objet de l'enquête

(i) était contraire à la loi;

(ii) était injuste, opprimante ou injustement discriminatoire;

(iii) avait lieu ou s'était produite conformément à une disposition légale ou autre règle de droit ou une pratique injuste, opprimante ou injustement discriminatoire;

(iv) était fondée en tout ou en partie sur une erreur de droit ou de fait ou sur des considérations ou motifs non pertinents;

(v) se rapportait à des procédures arbitraires, déraisonnables et injustes; ou

(vi) était fautive par ailleurs;

b) que dans une action ou une omission ou dans une prise de décision ou de suites à donner à une décision ou à une recommandation, une autorité

(i) n'a pas agi dans un but approprié;

(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or

(iii) was negligent or acted improperly, or

(c) there was unreasonable delay in dealing with the subject matter of the investigation,

and the Ombudsman is of the opinion that

(d) the grievance should be referred to the appropriate authority for further consideration,

(e) an act should be remedied,

(f) an omission or delay should be rectified,

(g) a decision or recommendation should be cancelled or varied,

(h) reasons should be given,

(ii) n'a pas donné des raisons suffisantes et appropriées quant à la nature de l'affaire, ou

(iii) était négligente ou n'a pas agi correctement; ou

c) qu'il y a eu un retard indu pour considérer l'objet de l'enquête,

et que l'Ombudsman est en outre d'avis que

d) le grief devrait être renvoyé à l'autorité appropriée pour être examiné à nouveau;

e) qu'une action devrait être réparée;

f) qu'une omission ou un retard devrait être corrigé;

g) qu'une décision ou recommandation devrait être annulée ou changée;

h) que des raisons devraient être données;

(i) a practice, procedure or course of conduct should be altered,

(j) an enactment or other rule of law should be reconsidered, or

(k) any other steps should be taken,

the Ombudsman shall report his opinion, his reasons therefor and any recommendation to the administrative head of the authority concerned.

i) qu'une pratique, une procédure ou une façon de faire devrait être changée;

j) qu'une loi ou autre règle de droit devrait être revisée, ou

k) que d'autres mesures devraient être prises,

l'Ombudsman doit présenter un rapport énonçant son opinion, les motifs sur lesquels elle s'appuie et ses recommandations au chef de l'autorité concernée.

21(2) Where the Ombudsman makes a recommendation under subsection (1) he may request the authority to notify him within a specified time of the steps it proposes to take to give effect to his recommendations.

21(2) Lorsque l'Ombudsman fait une recommandation en application du paragraphe (1), il peut demander à l'autorité de l'aviser, dans un délai déterminé, des mesures envisagées pour donner suite à ses recommandations.

21(3) Where, after the time stated under subsection (2), the authority does not act upon the recommendation of the Ombudsman, refuses to act thereon, or acts in a manner unsatisfactory to the Ombudsman the Ombudsman may send a copy of his report and recommendation to the Lieutenant-Governor in Council and may thereafter make a report to the Legislative Assembly.

21(3) Lorsque, après expiration du délai visé au paragraphe (2), l'autorité ne donne pas suite à la recommandation de l'Ombudsman, refuse d'y donner suite, ou prend des mesures qui ne satisfont pas l'Ombudsman, celui-ci peut transmettre une copie de son rapport et de sa recommandation au lieutenant-gouverneur en conseil et présenter ensuite un rapport à l'Assemblée législative.

21(4) The Ombudsman shall include with any report made under subsection (3) a copy of any comment made by the authority upon his opinion or recommendation.

21(4) L'Ombudsman doit joindre à tout rapport qu'il présente en application du paragraphe (3) une copie des commentaires de l'autorité au sujet de son opinion ou de sa recommandation.

21(5) In any report made by him under this Act the Ombudsman shall not make any finding or comment that is adverse to any person unless he gives that person an opportunity to be heard. 1967, c.18, s.21; 1969, c.62, s.1; 1985, c.65, s.9.

21(5) Dans tout rapport qu'il présente en application de la présente loi, l'Ombudsman ne doit tirer aucune conclusion ni faire de commentaires défavorables à une personne à moins de lui donner l'occasion de se faire entendre.
1967, c.18, art.21; 1969, c.62, art.1; 1985, c.65, art.9; 1987, c.6, art.77(3).

22(1) Where the Ombudsman makes a recommendation under subsection 21(1) and the authority does not act upon such recommendation to his satisfaction, the Ombudsman shall inform

22(1) Lorsque l'Ombudsman fait une recommandation en application du paragraphe 21(1) et que l'autorité n'y donne pas suite de façon satisfaisante, il doit aviser le requérant de sa recommanda-

the petitioner of his recommendation and may add any comment.

22(2) The Ombudsman shall in any case inform the petitioner in the manner and time he deems proper of the result of the investigation. 1967, c.18, s.22; 1985, c.65, s.10.

23 No proceeding of the Ombudsman is void for want of form and, except on the ground of lack of jurisdiction, no proceedings or decisions of the Ombudsman shall be challenged, reviewed, quashed or called in question in any court. 1967, c.18, s.23.

24(1) No proceedings lie against the Ombudsman or against any person holding any office or appointment under the Ombudsman for anything he may do or report or say in the course of the exercise or intended exercise of any of his functions under this Act whether or not that function was within his jurisdiction, unless it is shown he acted in bad faith.

24(2) The Ombudsman or any person holding any office or appointment under the Ombudsman shall not be called to give evidence in any court or in any proceedings of a judicial nature in respect of anything coming to his knowledge in the exercise of any of his functions under this Act whether or not that function was within his jurisdiction. 1967, c.18, s.24; 1976, c.43, s.8.

25(1) The Ombudsman shall report annually to the Legislative Assembly on the exercise of his functions under this Act.

25(2) The Ombudsman, in the public interest or in the interests of a person or an authority, may publish reports relating generally to the exercise of his functions under this Act or to any particular case investigated by him, whether or not the matters to be dealt with in the report have been the subject of a report made to the Legislative Assembly under this Act. 1967, c.18, s.25; 1985, c.65, s.11.

tion et peut ajouter des commentaires.

22(2) Dans tous les cas, l'Ombudsman doit aviser le requérant du résultat de l'enquête de la manière et au moment qu'il juge opportuns. 1967, c.18, art.22; 1985, c.65, art.10.

23 Aucune procédure de l'Ombudsman n'est nulle en raison d'un vice de forme et aucune procédure ou décision de l'Ombudsman ne peut être contestée, révisée, annulée ou mise en question devant une cour, sauf s'il y a eu défaut de compétence. 1967, c.18, art.23.

24(1) L'Ombudsman, et toute personne occupant un poste ou remplissant des fonctions relevant de l'Ombudsman, ne peut faire l'objet de procédures en raison d'actes qu'il peut faire, de rapports qu'il peut présenter ou de choses qu'il peut dire en exerçant ou en voulant exercer l'une de ses fonctions en application de la présente loi même si elle a été exercée hors des limites de sa compétence à moins qu'il ne soit démontré qu'il a agi de mauvaise foi.

24(2) L'Ombudsman, et toute personne qui occupe un poste ou remplit des fonctions relevant de l'Ombudsman, ne peut être appelé à déposer devant une cour ou dans toute procédure de nature judiciaire au sujet de ce qu'il a pu apprendre dans l'exercice de l'une de ses fonctions en application de la présente loi même si elle a été exercée hors des limites de sa compétence. 1967, c.18, art.24; 1976, c.43, art.8.

25(1) L'Ombudsman doit présenter à l'Assemblée législative un rapport annuel sur l'exercice de ses fonctions en application de la présente loi.

25(2) Dans l'intérêt public ou dans l'intérêt d'un particulier, d'un ministère ou d'un organisme, l'Ombudsman peut publier des rapports ayant trait à l'exercice général de ses fonctions en application de la présente loi ou à tout cas particulier qu'il a examiné, que les questions traitées dans le rapport aient ou non fait l'objet d'un rapport à l'Assemblée législative en application de la présente loi. 1967, c.18, art.25.

26 The Legislative Assembly may make general rules for the guidance of the Ombudsman in the exercise of his functions under this Act 1967, c.18, s.26.

27 Every person who

(*a*) without lawful jurisdiction or excuse wilfully obstructs, hinders or resists the Ombudsman or any other person in the exercise of his functions under this Act,

(*b*) without lawful justification or excuse refuses or wilfully fails to comply with any lawful requirements of the Ombudsman or any other person under this Act, or

(*c*) wilfully makes any false statement to or misleads or attempts to mislead the Ombudsman or any other person in the exercise of his functions under this Act,

is guilty of an offence and on summary conviction is liable to a fine not exceeding five hundred dollars and in default of payment thereof to imprisonment in accordance with subsection 31(3) of the *Summary Convictions Act*. 1967, c.18, s.27.

28 This Act does not affect, abrogate, abridge or infringe or authorize the abrogation, abridgment or infringement of any substantive or procedural right or remedy existing elsewhere or otherwise than in this Act. 1967, c.18, s.28.

SCHEDULE A

1 Departments of the Government of the Province

2 A person, corporation, commission, board, bureau or other body that is, or the majority of the members of which are, or the majority of the members of the board of management or board of directors of which are

(a) appointed by an Act, Minister or the Lieutenant-Governor in Council,

26 L'Assemblée législative peut adopter des règles générales pour guider l'Ombudsman dans l'exercice de ses fonctions en application de la présente loi. 1967, c.18, art.26.

27 Quiconque

a) délibérément et sans compétence ni justification légale, empêche l'Ombudsman ou une autre personne dans l'exercice de ses fonctions en application de la présente loi, le gêne ou lui résiste,

b) sans compétence ni justification légale, refuse de se conformer ou ne se conforme pas délibérément à une exigence légitime de l'Ombudsman ou de toute autre personne en application de la présente loi, ou

c) fait délibérément une fausse déclaration à l'Ombudsman ou à toute autre personne dans l'exercice de ses fonctions en application de la présente loi ou l'induit ou tente de l'induire en erreur,

se rend coupable d'une infraction et est passible, sur déclaration sommaire de culpabilité, d'une amende de cinq cents dollars au plus et, à défaut de paiement, de la peine d'emprisonnement prévue au paragraphe 31(3) de la *Loi sur les poursuites sommaires*. 1967, c.18, art.27.

28 La présente loi n'abroge, ne restreint ni ne viole les droits ou recours quant au fond et à la procédure qui existent ailleurs ou autrement que dans la présente loi, ni ne leur porte atteinte, et n'autorise pas leur abrogation, leur restriction ou leur violation. 1967, c.18, art.28.

ANNEXE A

1 Les ministères du gouvernement de la province

2 Un particulier, une corporation, une commission, un conseil, une autorité ou autre qui est, ou dont, soit la majorité des membres, soit la majorité des membres du conseil de gestion ou du conseil d'administration

a) sont nommés par une loi, un Ministre ou le lieutenant-gouverneur en conseil,

(b) in the discharge of their duties, public officers or servants of the Province, or

(c) responsible to the Province

3 Municipalities

4 Schools and school boards as defined in the *Schools Act*

5 Institutions as defined in the *Adult Education and Training Act*.
1988, c.27, s.4.

6 Hospitals as defined in the *Public Hospitals Act*

7 Any other agency of the Crown in right of the Province
1985, c.65, s.12.

N.B. This Act is consolidated to March 31, 1989.

b) sont dans l'exécution de leurs fonctions, fonctionnaires publics ou employés de la province, ou

c) sont responsables devant la province

3 Les municipalités

4 Les écoles et les conseils scolaires selon la définition qu'en donne la *Loi scolaire*

5 Les établissements tels que définis dans la *Loi sur l'enseignement et la formation destinés aux adultes*.
1988 c.27, art.4.

6 Les hôpitaux selon la définition de la *Loi sur les hôpitaux publics*

7 Tout autre organisme de la Couronne du chef de la province.
1985, c.65, art.12.

N.B. La présente loi est refondue au 31 mars 1989.

QUEEN'S PRINTER FOR NEW BRUNSWICK · L'IMPRIMEUR DE LA REINE POUR LE NOUVEAU-BRUNSWICK

APPENDIX D

CHAPTER A-11.1

Archives Act

Assented to May 31, 1977

Chapter Outline

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Minister — Ministre
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CHAPITRE A-11.1

Loi sur les archives

Sanctionnée le 31 mai 1977

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Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1 In this Act

"Committee" means the Public Records Committee constituted under section 6;

Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète:

1 Dans la présente loi

«Comité» désigne le Comité des documents publics constitué en application de l'article 6;

"department" includes

(*a*) the departments as defined under the *Financial Administration Act*,

(*b*) any board, commission, task force, crown corporation or other agency of the Province,

(*c*) the office of the Clerk of the Legislative Assembly, and

(*d*) any court established by the Province;

"Minister" means the Minister of Tourism, Recreation and Heritage;

"personal information" means information respecting a person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income, assets and liabilities, credit worthiness, education, character, reputation, health, physical or personal characteristics or mode of living;

"public records" means the books, papers and records vested in Her Majesty under the *Public Records Act*, and includes records

(*a*) prepared or received by any department pursuant to an Act of the Legislature or in connection with the transaction of public business,

(*b*) preserved or appropriate for preservation by a department,

(*c*) containing information on the organization, functions, procedures, policies or activites of a department, or other information of past, present or potential value to the Province,

but does not include

(*d*) library or museum objects made or acquired and preserved soley for reference or exhibition purposes,

(*e*) extra copies of records created only for convenience of reference,

« documents » désigne

a) la correspondance, les notes, mémoires, formules et autres papiers et livres;

b) les cartes et plans;

c) les photographies, gravures et dessins;

d) les films cinématographiques, microfilms et bandes magnétoscopiques;

e) les enregistrements sonores, bandes magnétiques, cartes perforées et autres documents destinés à la lecture automatique; et

f) toutes autres pièces documentaires, quelles qu'en soient leur forme ou leurs caractéristiques matérielles;

« documents publics» désigne les livres, papiers et documents dévolus à Sa Majesté en application de la *Loi sur les archives publiques* et comprend les documents

a) qu'un ministère établit ou reçoit conformément à une loi de la Législature ou dans le cadre de la conduite des affaires publiques,

b) qu'un ministère conserve ou qu'il convient qu'il conserve,

c) qui contiennent des renseignements sur l'organisation, les fonctions, les méthodes, les politiques ou les activités d'un ministère ou d'autres renseignements ayant eu, ayant présentement ou pouvant avoir une valeur pour la province,

mais ne comprend pas

d) les objets de bibliothèques ou de musées constitués ou acquis et conservés à seule fin de référence ou d'expositions,

e) les exemplaires supplémentaires de documents conservés uniquement pour

(*f*) working papers, or

(*g*) stocks of publications or printed documents;

"records" means

(*a*) correspondence, memoranda, forms and other papers and books;

(*b*) maps, plans and charts;

(*c*) photographs, prints and drawings;

(*d*) motion picture films, microfilms and video tapes;

(*e*) sound recordings, magnetic tapes, computer cards and other machine readable records; and

(*f*) all other documentary materials regardless of physical form or characteristics;

"records schedule" means a timetable that describes the lifespan of a record from the time of its creation through active and dormant stages to its final disposition either as waste or as a record of legal or historical value to be permanently preserved. 1983, c.30, s.3; 1986, c.8, s.10; 1986, c.11, s.1.

faciliter la référence,

f) les documents de travail, ou

g) les stocks de publications ou de documents imprimés;

« ministère» comprend

a) les ministères au sens de la *Loi sur l'administration financière,*

b) les organismes de la province, notamment les comités, offices, commissions, groupes d'étude ou corporations de la Couronne,

c) le bureau du greffier de l'Assemblée législative, et

d) les tribunaux de l'ordre judiciaire institués par la province;

«Ministre» désigne le ministre du Tourisme, des Loisirs et du Patrimoine;

«renseignement personnel» désigne toute information concernant l'identité d'une personne, son adresse, sa famille, son état matrimonial, son emploi, un rapport sur les emprunts et remboursements qu'elle a faits, son revenu, ses avoirs et dettes, sa solvabilité, sa formation, son caractère, sa moralité, sa santé, ses particularités physiques ou personnelles ou son mode de vie;

« tableau de conservation de documents» désigne un tableau indiquant les délais de conservation de documents, à partir de leur

création, en passant par leur stade d'activité et d'inactivité, jusqu'à leur élimination ou leur classement comme documents ayant une valeur juridique ou historique, à conserver à titre permanent.
1983, c.30, art.3; 1986, c.8, art.10; 1986, c.11, art.1.

2 The Minister is responsible for the administration of this Act and may designate persons to act on his behalf.

2 Le Ministre est chargé de l'application de la présente loi et peut désigner des personnes pour le représenter.

3 The Archives are to consist of all the records in the care, custody and control of the Provincial Archivist at the coming into force of this Act, all records that under this or any other Act are placed in the care, custody and control of the Provincial Archivist and books, papers and records vested in Her Majesty under the *Public Records Act*.

3 Les archives se composent de tous les documents confiés aux soins, à la garde et à la surveillance de l'archiviste provincial à la date d'entrée en vigueur de la présente loi, de ceux qui viendront à l'être en application de la présente loi ou de toute autre loi ainsi que des livres, papiers et documents dévolus à Sa Majesté en application de la *Loi sur les archives publiques*.

4 There shall be a Provincial Archivist appointed in accordance with the *Civil Service Act*.

4 Est nommé un archiviste provincial conformément aux dispositions de la *Loi sur la Fonction publique*.

5(1) The duties of the Provincial Archivist are

5(1) L'archiviste provincial est chargé des fonctions suivantes:

(*a*) to have the care, custody and control of the Archives;

a) assurer la protection, la garde et la surveillance des archives;

(*b*) to prepare records schedules governing the retention, destruction and transfer of public records to the Archives;

b) élaborer des tableaux de conservation de documents;

(*c*) to provide economical storage facilities for public records and to encourage the use of such facilities;

c) fournir des installations d'entreposage économique pour les documents publics et en encourager l'utilisation;

(*d*) to encourage the use by departments and municipalities of modern records storage and classification systems in order to ensure that important policies and programs are documented and that public records are protected against deterioration, loss and destruction;

d) encourager les ministères et les municipalités à utiliser les systèmes modernes d'entreposage et de classification afin d'assurer la documentation des politiques et des programmes importants et de protéger les documents publics contre les risques de détérioration, de perte et de destruction;

(*e*) to discover, collect and preserve records having any bearing upon the history of New Brunswick;

e) découvrir, recueillir et conserver les documents qui touchent à l'histoire du Nouveau-Brunswick;

(*f*) to copy and publish copies of records relating to the history of New Brunswick;

(*g*) to classify, index and catalogue all records in his custody; and

(*h*) to perform such other duties as are prescribed by the Lieutenant-Governor in Council.

f) reproduire et publier les documents qui se rapportent à l'histoire du Nouveau-Brunswick;

g) classer, répertorier et cataloguer tous les documents sous sa garde; et

h) assumer toutes autres fonctions que lui assigne le lieutenant-gouverneur en conseil. 1982, c.3, art.3(1).

5(2) The Provincial Archivist may acquire by gift, bequest, loan or purchase and place in the Archives for preservation records having any bearing upon the history of New Brunswick upon such terms and conditions as are stated by the person giving, bequeathing, lending or selling the records.

5(2) L'archiviste provincial peut, par don, legs, emprunt au achat, et aux conditions fixées par le donateur, testateur, prêteur ou vendeur, se procurer tout document qui touche à l'histoire du Nouveau-Brunswick et le déposer aux archives pour le conserver.

6(1) There is hereby established a committee to be known as the Public Records Committee consisting of

(*a*) the Provincial Archivist who shall be Chairman,

(*b*) the Deputy Minister of Justice, or a person designated by him to act on his behalf,

(*c*) the Comptroller or a person designated by him to act on his behalf,

(*d*) the Secretary of the Board of Management or a person designated by him to act on his behalf, and

(*e*) such other persons as are appointed by the Lieutenant-Governor in Council. 1984, c.44, s.11.

6(1) Il est constitué par la présente loi un Comité des documents publics, composé

a) de l'archiviste provincial qui assume la présidence,

b) du sous-ministre de la Justice ou de la personne qu'il désigne pour le représenter,

c) du contrôleur ou de la personne qu'il désigne pour le représenter,

d) du secrétaire du Conseil de gestion ou de la personne qu'il désigne pour le représenter, et

e) des autres personnes que nomme le lieutenant-gouverneur en conseil. 1984, c.44, art.11.

6(2) The Committee shall meet from time to time to advise the Provincial Archivist on matters relating to the retention and disposal of public records.

6(2) Le Comité se réunit en tant que de besoin pour conseiller l'archiviste provincial sur des questions relatives à la conservation et à l'élimination des documents publics.

7(1) Public records referred to in a records schedule approved by the Provincial Archivist shall be disposed of in accordance with that records schedule.

7(1) Les documents publics visés dans un tableau de conservation approuvé par l'archiviste provincial reçoivent la destination qui y est prévue.

7(2) Where any dispute arises between the Provincial Archivist and a department con-

7(2) L'archiviste provincial peut saisir le Comité en cas de litige l'opposant à un

cerning the establishment or implementation of a records schedule, the Provincial Archivist may submit the matter to the Committee and after an investigation the Committee shall make recommendations to the Lieutenant-Governor in Council with respect to that dispute.

ministère relativement à l'élaboration ou à la mise en application d'un tableau de conservation; le Comité ouvre alors une enquête et communique ses recommandations au lieutenant-gouverneur en conseil.

7(3) The Lieutenant-Governor in Council, by order in council, may make directions with respect to the dispute.

7(3) Le lieutenant-gouverneur en conseil peut, par voie de décret en conseil, établir des directives pour régler le litige.

8 Public records shall not be destroyed or removed from the ownership or control of the Province unless such destruction or removal is authorized under this Act.

8 La destruction ou la soustraction de documents publics dont la province a la propriété ou la garde n'est permise que si elle est autorisée sous le régime de la présente loi.

9(1) Upon a summary application of the Minister, supported by affidavit, a Judge of The Court of Queen's Bench of New Brunswick may make an order requiring the person wrongfully withholding public records to deliver them to the proper custodian or to such person as is named in the order. 1979, c.41, s.5; 1982, c.3, s.3(2).

9(1) Sur demande sommaire du Ministre, appuyée d'un affidavit, un juge de la Cour du Banc de la Reine du Nouveau-Brunswick peut rendre une ordonnance prescrivant à la personne retenant illicitement en sa possession des documents publics de les remettre à qui de droit ou à la personne nommément désignée dans l'ordonnance. 1979, c.41, art.5. ; 1982, c.3, art.3(2).

9(2) The Judge may grant an order in the first instance or issue a summons to show cause, and costs shall be in the discretion of the Judge.

9(2) Le juge peut rendre directement une ordonnance ou décerner une sommation invitant la personne à faire valoir ses motifs; les dépens sont laissés à la discrétion du juge.

10(1) Subject to subsections (2) and (3), all public records transferred to the Archives and in the possession, care, custody and control of the Provincial Archivist are available for public inspection.

10(1) Sous réserve des paragraphes (2) et (3), tous les documents publics transférés aux archives et qui se trouvent en la possession, sous la protection, la garde et la surveillance de l'archiviste provincial peuvent être consultés par le public.

10(2) Subsection (1) does not apply to public records that, for the purpose of temporary storage, have been placed in storage facilities provided by the Provincial Archivist.

10(2) Le paragraphe (1) ne s'applique pas aux documents publics qui sont entreposés temporairement dans des installations d'entreposage fournies par l'archiviste provincial.

10(3) Subject to subsections (4), (6), (7) and (8), public records are unavailable for public inspection under this Act where the inspection

10(3) Sous réserve des paragraphes (4), (6), (7) et (8), les documents publics ne peuvent être consultés par le public en vertu de la présente loi lorsque leur consultation

(a) would disclose information the confidentiality of which is protected by law;

a) pourrait entraîner la divulgation d'information dont le caractère confidentiel est garanti par la loi;

(b) would reveal personal information concerning another person;

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

(d) 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;

(e) would violate the confidentiality of information obtained from another government;

(f) would be detrimental to the proper custody, control or supervision of persons under sentence;

(g) would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

(h) would disclose opinions or recommendations by public servants for a Minister or the Executive Council;

(i) would disclose the substance of proposed legislation or regulations;

(j) would reveal information gathered by police, including the Royal Canadian Mounted Po-

b) pourrait dévoiler des renseignements personnels concernant une autre personne;

c) pourrait occasionner des gains ou des pertes financières pour une personne ou un ministère, ou pourrait compromettre des négociations en vue d'aboutir à la conclusion d'un accord ou d'un contrat;

d) pourrait révéler une information financière, commerciale, technique ou scientifique

(i) donnée par un particulier ou une corporation qui est une corporation en activité en relation avec une aide demandée ou fournie en vertu d'une loi ou d'un règlement de la province, ou

(ii) incluse dans une entente ou donnée conformément à une entente conclue sous l'autorité d'une loi ou d'un règlement, si l'information est liée à la gestion ou aux opérations internes d'une corporation qui est une corporation en activité;

e) pourrait porter atteinte au caractère confidentiel d'une information reçue d'un autre gouvernement;

f) pourrait être préjudiciable à la détention, au contrôle ou à la surveillance d'une personne condamnée;

g) pourrait entraîner la divulgation de consultations juridiques données à une personne ou à un ministère par un légiste de la Couronne, ou violer le secret professionnel qui existe entre l'avocat et son client à propos d'une affaire d'ordre ministériel;

h) pourrait entraîner la divulgation d'avis ou de recommandations faites par des fonctionnaires à un ministre ou au Conseil exécutif;

i) pourrait entraîner la divulgation du contenu d'un projet de loi ou de règlement;

j) pourrait dévoiler des renseignements recueillis par la police, y compris par la Gendarme-

lice, in the course of investigating any illegal activity or suspected illegal activity, or the source of such information;

(k) would disclose any information reported to the Attorney General or his agent with respect to any illegal activity or suspected illegal activity, or the source of such information; or

(l) would impede an investigation, inquiry or the administration of justice.

10(4) Public records referred to in paragraph (3)(b) are available for public inspection after

(a) one hundred years following the date of birth of the person to whom the personal information relates,

(b) the person to whom the personal information relates consents in writing to the inspection, or

(c) the Committee or a judge of The Court of Queen's Bench of New Brunswick has granted a request for inspection for research or statistical purposes.

10(5) Where uncertainty exists regarding a date of birth referred to in paragraph (4)(a), the determination of the date by the Provincial Archivist is final.

10(6) Public records referred to in paragraph (3)(e) are available for public inspection if the government from which the information was obtained

(a) consents in writing to the inspection, or

(b) makes the information public.

10(7) Public records referred to in paragraph (3)(g) are available for public inspection after fifty years following the date of their creation.

rie royale du Canada, au cours d'une enquête relative à toute activité illégale ou soupçonnée d'être illégale, ou la provenance de ces renseignements;

k) pourrait entraîner la divulgation de renseignements rapportés au procureur général ou à son représentant concernant toute activité illégale, ou soupçonnée d'être illégale, ou la divulgation de la source de ces renseignements; ou

l) pourrait entraver le cours d'une enquête ou d'une recherche, ou l'exercice de la justice.

10(4) Les documents publics mentionnés à l'alinéa (3)b) peuvent être consultés par le public

a) cent ans après la date de naissance de la personne visée par le renseignement personnel,

b) lorsque la personne visée par le renseignement personnel y consent par écrit, ou

c) lorsque le Comité ou un juge de la Cour du Banc de la Reine du Nouveau-Brunswick accède à une demande de consultation pour travaux de recherches ou de statistiques.

10(5) Lorsque la date de naissance mentionnée à l'alinéa (4)a) ne peut être fixée de façon certaine, la date établie par l'archiviste provincial est définitive.

10(6) Les documents publics mentionnés à l'alinéa (3)e) peuvent être consultés par le public si le gouvernement de qui l'information est obtenue

a) consent par écrit à la consultation, ou

b) la rend publique.

10(7) Les documents publics visés à l'alinéa (3)g) qui existent depuis cinquante ans peuvent être consultés par le public.

10(8) Public records referred to in paragraph (3)(h) are available for public inspection after twenty years following the date of their creation.

10(9) Notwithstanding subsections (3) to (8) and sections 10.1 to 10.9, an authorized representative of the department from which a public record has been transferred, may inspect the public record for any purpose not inconsistent with the purpose for which the public record was obtained or created by the department.

10(10) Subsection (3) does not apply to a public record

(a) that is available for public inspection at a location other than the Archives, or

(b) that was available for public inspection before it was transferred to the Archives.

10(11) Notwithstanding subsection 10.9(8), the onus shall be on a person requesting to inspect a public record to satisfy the Provincial Archivist that the public record is one referred to in subsection (10).
1986, c.11, s.2.

10.1(1) A person wishing to inspect a public record referred to in subsection 10(3) shall submit on a form provided by the Provincial Archivist a request to inspect the public record.

10.1(2) Where in the opinion of the Provincial Archivist a portion of a public record is unavailable for public inspection and that portion is severable, the Provincial Archivist shall delete the unavailable portion and shall grant the request with respect to the available portion.

10.1(3) The Provincial Archivist shall reply to a request made under subsection (1) within thirty days after the submission of the request, indicating whether or not all or part of the public record is available for public inspection.

10(8) Les documents publics visés à l'alinéa (3)h) qui existent depuis vingt ans peuvent être consultés par le public.

10(9) Nonobstant les paragraphes (3) à (8) et les articles 10.1 à 10.9, le représentant autorisé du ministère d'où provient le document public peut consulter le document public pour toutes raisons compatibles avec les raisons pour lesquelles le document public a été obtenu ou créé par le ministère.

10(10) Le paragraphe (3) ne s'applique pas à un document public

a) qui peut être consulté par le public ailleurs qu'aux archives, ou

b) qui pouvait être consulté par le public avant d'être transféré aux archives.

10(11) Nonobstant le paragraphe 10.9(8), il incombe au demandeur qui désire consulter un document public de convaincre l'archiviste provincial que le document public est l'un des documents visés au paragraphe (10).
1986, c.11, art.2.

10.1(1) Quiconque désire consulter un document public visé au paragraphe 10(3) doit soumettre une demande pour la consultation du document public au moyen d'une formule fournie par l'archiviste provincial.

10.1(2) Lorsque de l'avis de l'archiviste provincial une partie du document public ne peut être consultée et que cette partie est séparable, il doit la supprimer et accepter la demande relativement à la partie du document qui peut être consultée.

10.1(3) L'archiviste provincial doit, dans les trente jours suivant la présentation d'une demande en vertu du paragraphe (1), y répondre en indiquant si tout ou partie du document public peut être consulté par le public.

10.1(4) Where the Provincial Archivist denies a request with respect to all or part of a public record, he shall reply in writing to the person making the request, indicating the provisions of this Act under which all or part of the public record is rendered unavailable for public inspection.

10.1(5) Any person who

(a) for the purpose of doing legitimate research or statistical work, wishes to inspect a public record containing personal information concerning another person, and has first submitted a request which has been denied in whole or in part under subsection (4),

(b) believes that all or part of the public record is available for public inspection, and has first submitted a request which has been denied in whole or in part under subsection (4), or

(c) has not received a reply to a request within the time prescribed in subsection (3),

may submit to the Committee on a form provided by the Provincial Archivist an application for review by the Committee.

10.1(6) An application for review submitted under paragraph (5)(a) shall include

(a) a request to inspect the public record, specifying the information requested,

(b) a copy of the reply of the Provincial Archivist under subsection (4),

(c) a summary describing the qualifications of the applicant, the nature of the research being done or the statistics being compiled, and the intent of the work,

(d) the reasons why the purpose of the work cannot reasonably be accomplished without inspection of the public record, and

(e) credentials verifying the identity of the applicant and the information given under paragraphs (c) and (d).

10.1(4) Lorsque l'archiviste provincial rejette totalement ou partiellement une demande pour la consultation d'un document public, il doit indiquer au demandeur, par écrit, les dispositions de la présente loi en vertu desquelles tout ou partie du document ne peut être consulté par le public.

10.1(5) Quiconque

a) aux fins de travaux légitimes de recherches ou de statistiques, désire consulter un document public qui contient des renseignements personnels concernant une autre personne, et a d'abord soumis une demande qui a été rejetée totalement ou partiellement en vertu du paragraphe (4),

b) croit que tout ou partie du document public peut être consulté par le public, et a d'abord soumis une demande qui a été rejetée totalement ou partiellement en vertu du paragraphe (4), ou

c) n'a reçu aucune réponse à sa demande dans le délai prescrit au paragraphe (3),

peut déposer auprès du Comité, au moyen d'une formule fournie par l'archiviste provincial, une demande de révision par le Comité.

10.1(6) Une demande de révision déposée en vertu de l'alinéa (5)a) doit comprendre

a) une demande pour la consultation du document public précisant la nature de l'information requise,

b) un exemplaire de la réponse de l'archiviste provincial en vertu du paragraphe (4),

c) un sommaire décrivant les qualifications du demandeur, le genre de recherches effectuées ou les statistiques compilées et le but des travaux,

d) les raisons pour lesquelles le travail ne peut être raisonnablement accompli sans que le document public ne soit consulté, et

e) des lettres de références permettant d'établir l'identité du demandeur et la véracité de l'information donnée en vertu des alinéas c) et d).

10.1(7) An application for review submitted under paragraph (5)(b) shall include

(a) a request to inspect the public record, specifying the information requested,

(b) a copy of the reply of the Provincial Archivist under subsection (4), and

(c) the reason why the applicant believes that all or part of the public record is available for public inspection.

10.1(8) An application for review submitted under paragraph (5)(c) shall include

(a) a request to inspect the public record, specifying the information requested, and

(b) the date of the submission of the applicant's request to the Provincial Archivist.
1986, c.11, s.3.

10.2(1) Within thirty days after the submission of an application for review, the Committee shall meet to consider the application and shall advise the applicant in writing of its decision.

10.2(2) Neither the Provincial Archivist nor any representative of the department from which the public record being requested was transferred shall be present during any portion of a meeting by the Committee in which an application for review is considered.

10.2(3) Notwithstanding subsection (2), the Provincial Archivist may appear before the committee considering an application for review under paragraph 10.1(5)(c) in order to explain why he has not replied to a request to inspect a public record.

10.2(4) The Committee may inspect the public record in question while considering an application for review.

10.1(7) Une demande de révision soumise en vertu de l'alinéa (5)b) doit comprendre

a) une demande pour la consultation du document public précisant la nature de l'information requise,

b) un exemplaire de la réponse de l'archiviste provincial en vertu du paragraphe (4), et

c) la raison pour laquelle le demandeur croit que tout ou partie du document public peut être consulté.

10.1(8) Une demande de révision soumise en vertu de l'alinéa (5)c) doit comprendre

a) une demande pour la consultation du document public précisant la nature de l'information requise, et

b) la date de la présentation de la demande du demandeur à l'archiviste provincial.
1986, c.11, art.3.

10.2(1) Le Comité doit se réunir pour considérer la demande et aviser par écrit le demandeur de sa décision dans les trente jours suivant la présentation de la demande de révision.

10.2(2) Ni l'archiviste provincial, ni un représentant du ministère d'où provient le document public demandé ne peuvent être présents durant toute partie d'une réunion du Comité où est considérée une demande de révision.

10.2(3) Nonobstant le paragraphe (2), l'archiviste provincial peut se présenter devant le Comité qui considère une demande de révision en vertu de l'alinéa 10.1(5)c) pour expliquer pourquoi il n'a pas répondu à une demande pour la consultation d'un document public.

10.2(4) Le Comité peut consulter le document public en question lorsqu'il considère une demande de révision.

10.2(5) A decision of the majority of the members of the Committee considering an application for review is final.

10.2(6) The Committee shall grant a request made under paragraph 10.1(5)(a) or (c) to inspect a public record where it is satisfied

(a) that the public record is available for public inspection, or

(b) that the applicant intends to do legitimate research or statistical work, and that the purpose of the work cannot reasonably be accomplished without inspection of the public record.

10.2(7) In granting under paragraph (6)(b) a request to inspect a public record the Committee may, at its discretion, grant the request with respect to a portion of the public record.

10.2(8) Where the Committee denies a request to inspect a public record in whole or in part, it shall set out in its written decision the reasons for the denial and shall provide the applicant with the forms prescribed by regulation for a referral of the matter to a judge of The Court of Queen's Bench of New Brunswick or to the Ombudsman under this Act.

10.2(9) The Committee shall grant a request to inspect a public record made under paragraph 10.1(5)(b) where it is satisfied that the public record is available for public inspection.

10.2(10) Where in the opinion of the Committee a portion of a public record is unavailable for public inspection and that portion is severable, the Committee shall delete the unavailable portion and shall grant the request with respect to the available portion.
1986, c.11, s.3.

10.3(1) Where an applicant is not satisfied with the decision of the Committee or where the Com-

10.2(5) Une décision majoritaire des membres du Comité considérant une demande de révision est définitive.

10.2(6) Le Comité doit accepter une demande faite en vertu de l'alinéa 10.1(5)a) ou c) pour la consultation d'un document public lorsqu'il est convaincu

a) que le document public peut être consulté par le public, ou

b) que le demandeur a l'intention d'effectuer des travaux légitimes de recherches ou de statistiques et que le but de ces travaux ne peut être raisonnablement atteint sans que le document ne soit consulté.

10.2(7) Le Comité peut, à son entière discrétion, n'accepter la demande que pour une partie du document public en question lorsqu'il accepte une demande pour la consultation d'un document public en vertu de l'alinéa (6)b).

10.2(8) Lorsque le Comité rejette une demande pour la consultation d'un document public totalement ou partiellement, il doit en donner les raisons dans sa décision écrite et fournir au demandeur les formules prescrites par règlement pour un renvoi devant un juge de la Cour du Banc de la Reine du Nouveau-Brunswick ou devant l'Ombudsman en vertu de la présente loi.

10.2(9) Le Comité doit accepter une demande faite en vertu de l'alinéa 10.1(5)b) pour la consultation d'un document public s'il est convaincu que le document public peut être consulté.

10.2(10) Lorsque le Comité est d'avis qu'une partie du document public ne peut être consultée par le public et que cette partie est séparable, il doit la supprimer et accepter la demande relativement à la partie du document qui peut être consultée.
1986, c.11, art.3.

10.3(1) Lorsqu'une demandeur n'est pas satisfait de la décision du Comité ou lorsque le Comité a

mittee fails to reply to a request within the prescribed time, the applicant may in the form and manner prescribed by regulation 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.

10.3(2) Where the applicant refers the matter to a judge of The Court of Queen's Bench of New Brunswick under subsection (1)

(a) the applicant may not thereafter refer the matter to the Ombudsman under paragraph (1)(b) or under the *Ombudsman Act*, and

(b) the Ombudsman, in such case, may not act under the authority of this Act or the *Ombudsman Act* with respect to that matter.

10.3(3) Where the applicant refers the matter to the Ombudsman under subsection (1), the applicant may not, subject to subsection 10.7(1), refer the matter to a judge of The Court of Queen's Bench of New Brunswick.

10.3(4) The Ombudsman, subject to section 19 of the *Ombudsman Act*, and The Court of Queen's Bench of New Brunswick judge may, with respect to any matter referred to them, inspect the public record that is the subject matter of the referral in order to determine the referral, but such inspection shall be made *in camera* without the presence of any person.
1986, c.11, s.3.

10.4(1) The Court of Queen's Bench of New Brunswick judge shall upon the applicant's request hold a hearing, and

(a) in the case where the Committee denied the applicant's request in whole or in part, may order the Committee to grant the request in whole or in part;

(b) in the case where the Committee failed to reply to a request, shall order that the Committee

omis de répondre à une demande dans le délai prescrit, le demandeur peut selon les modalités prescrites par règlement

a) soumettre l'affaire à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, ou

b) soumettre l'affaire à l'Ombudsman.

10.3(2) Lorsque le demandeur soumet l'affaire à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick en vertu du paragraphe (1)

a) il ne peut, par la suite, la soumettre à l'Ombudsman en vertu de l'alinéa (1)b) ou en vertu de la *Loi sur l'Ombudsman*, et

b) l'Ombudsman, dans ce cas, ne peut intervenir sous le régime de la présente loi ou de la *Loi sur l'Ombudsman*, au sujet de cette affaire.

10.3(3) Le demandeur qui soumet l'affaire à l'Ombudsman en vertu du paragraphe (1), ne peut, sous réserve du paragraphe 10.7(1), la soumettre à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick.

10.3(4) L'Ombudsman, sous réserve de l'article 19 de la *Loi sur l'Ombudsman*, et le juge de la Cour du Banc de la Reine du Nouveau-Brunswick peuvent, au sujet de toute affaire qui leur est soumise, consulter le document public, objet du renvoi, afin de délimiter le renvoi, mais cette consultation doit se faire à huis clos sans qu'aucune personne ne soit présente.
1986, c.11, art.3.

10.4(1) Le juge de la Cour du Banc de la Reine du Nouveau-Brunswick doit, à la demande du demandeur, tenir une audience, et

a) dans le cas où le Comité a rejeté totalement ou partiellement la demande, peut lui ordonner de l'accepter totalement ou partiellement;

b) dans le cas où le Comité a omis de répondre à une demande, il doit ordonner au Comité

(i) grant the request, or

(ii) deny the request;

(c) may make any other order that is appropriate.

10.4(2) A copy of the decision of The Court of Queen's Bench of New Brunswick judge shall be sent to the applicant and to the Committee.

10.4(3) No appeal lies from the decision of The Court of Queen's Bench of New Brunswick judge under subsection (1).
1986, c.11, s.3.

10.5 The Ombudsman shall in accordance with this Act and the power, authority, privileges, rights and duties vested in him under the *Ombudsman Act* review the matter referred to him within thirty days of having received the referral.
1986, c.11, s.3.

10.6(1) Upon having reviewed the matter referred to him, the Ombudsman shall forthwith, in writing, advise the Committee of his recommendation and shall forward a copy of such recommendation to the person making the referral.

10.6(2) The Ombudsman may in such recommendation

(a) recommend that the Committee grant the request in whole or in part;

(b) in the case where the Committee failed to reply to a request, recommend that the Committee

(i) grant the request in whole or in part, or

(ii) deny the request.

10.6(3) The Committee, upon reviewing the recommendation of the Ombudsman, shall carry out the recommendations of the Ombudsman or make such other decision as it thinks fit and upon making

(i) d'accepter la demande, ou

(ii) de rejeter celle-ci;

c) peut rendre toute autre ordonnance qui est nécessaire.

10.4(2) Un exemplaire de la décision du juge de la Cour du Banc de la Reine du Nouveau-Brunswick doit être envoyé au demandeur et au Comité.

10.4(3) La décision prise par un juge de la Cour du Banc de la Reine du Nouveau-Brunswick en vertu du paragraphe (1) est sans appel.
1986, c.11, art.3.

10.5 L'Ombudsman doit, conformément à la présente loi et aux pouvoirs, attributions, prérogatives, droits et devoirs que lui confère la *Loi sur l'Ombudsman*, examiner l'affaire qui lui a été soumise dans les trente jours de la réception du renvoi.
1986, c.11, art.3.

10.6(1) Après avoir examiné l'affaire qui lui a été soumise, l'Ombudsman doit aussitôt faire connaître, par écrit, sa recommandation au Comité et en envoyer une copie à l'auteur du renvoi.

10.6(2) L'Ombudsman peut par cette recommandation

a) recommander au Comité d'accepter totalement ou partiellement la demande;

b) dans le cas où le Comité a omis de répondre à une demande, recommander au Comité

(i) d'accepter totalement ou partiellement la demande, ou

(ii) de la rejeter.

10.6(3) Le Comité, après examen de la recommandation de l'Ombudsman, doit la mettre à exécution ou prendre toute autre décision qu'il juge convenable et, après avoir pris sa décision, il doit la

its decision, shall notify, in writing, the person making the referral and shall forward to the Ombudsman a copy of its decision.
1986, c.11, s.3.

notifier, par écrit, à l'auteur du renvoi et en envoyer un exemplaire à l'Ombudsman.
1986, c.11, art.3.

10.7(1) Where the person making the referral is not satisfied with the decision of the Committee under subsection 10.6(3), that person may appeal the matter to a judge of The Court of Queen's Bench of New Brunswick.

10.7(1) Tout auteur d'un renvoi qui n'est pas satisfait de la décision prise par le Comité en vertu du paragraphe 10.6(3), peut en appeler à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick.

10.7(2) Subsection 10.3(4) and section 10.4 apply with the necessary modifications to an appeal made under subsection (1).
1986, c.11, s.3.

10.7(2) Le paragraphe 10.3(4) et l'article 10.4 s'appliquent, avec les modifications nécessaires, à un appel interjeté en vertu du paragraphe (1).
1986, c.11, art.3.

10.8 Where a matter is referred or appealed to a judge of The Court of Queen's Bench of New Brunswick, the judge shall award costs in favour of the applicant

10.8 A la suite d'un renvoi ou d'un appel devant un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, ce dernier doit statuer sur les frais en faveur du demandeur qui

(a) where the applicant is successful, or

a) a gain de cause, ou

(b) where the applicant is not successful, if the judge considers it to be in the public interest.
1986, c.11, s.3.

b) n'a pas gain de cause lorsque, de l'avis du juge, il y va de l'intérêt public.
1986, c.11, art.3.

10.9(1) Where a request to inspect a public record is granted in whole or in part by the Provincial Archivist, the Committee or a judge of The Court of Queen's Bench of New Brunswick, the Provincial Archivist shall, upon payment of the fee prescribed by regulation, allow the public record or the portion of the public record to be inspected, and to be reproduced in whole or in part.

10.9(1) Lorsque l'archiviste provincial, le Comité ou un juge de la Cour du Banc de la Reine du Nouveau-Brunswick accepte totalement ou partiellement une demande pour la consultation d'un document public, l'archiviste provincial doit, contre paiement d'un droit fixé par règlement, permettre que le document public ou la partie du document public soit consulté et reproduit totalement ou partiellement.

10.9(2) Where a request to inspect a public record is granted, the public record shall only be provided in the language or languages in which it is made.

10.9(2) Lorsqu'une demande pour la consultation d'un document public est acceptée, le document public doit être fourni seulement dans la langue ou dans les langues dans lesquelles il a été rédigé.

10.9(3) A person whose request to inspect personal information concerning another person in a public record has been granted in whole or in part for the purpose of doing legitimate research or statistical work shall not inspect that information

10.9(3) Une personne dont la demande pour consultation de renseignements personnels concernant une autre personne a été acceptée, totalement ou partiellement, aux fins de travaux légitimes de recherches ou de statistiques, ne peut consulter ces

until he has completed and returned to the Provincial Archivist an undertaking in the form prescribed by regulation.

10.9(4) Any person who breaches an undertaking commits an offence and is liable on summary conviction to a fine not exceeding one thousand dollars.

10.9(5) A person whose request to inspect personal information concerning another person in a public record has been granted in whole or in part for the purpose of doing legitimate research or statistical work shall permit the Provincial Archivist upon the Provincial Archivist's request to review any research notes and drafts of planned publications that contain information derived from the personal information inspected.

10.9(6) A person whose request to inspect personal information concerning another person in a public record has been granted in whole or in part for the purpose of doing legitimate research or statistical work may be refused access to a public record at any time by the Provincial Archivist if he is satisfied that that person has breached an undertaking.

10.9(7) Sections 10.3, 10.4, 10.5, 10.6, 10.7 and 10.8 and subsection (8) apply with the necessary modifications to a refusal of access by the Provincial Archivist under subsection (6).

10.9(8) In any proceeding under this Act other than an application for review made under subsection 10.1(5), the onus shall be on the Provincial Archivist to show that there is no right to the information that is the subject of the proceeding.
1986, c.11, s.3.

11 The signature of the Provincial Archivist certifying a copy of a public record to be a true copy is proof of the fact that the Provincial Archivist has in his lawful possession the original public record or a duplication, photocopy, microfilm or other

renseignements que lorsqu'il a rempli et retourné un engagement à l'archiviste provincial, au moyen d'une formule prescrite par règlement.

10.9(4) Quiconque manque à un engagement commet une infraction et est passible sur déclaration sommaire de culpabilité d'une amende de mille dollars au plus.

10.9(5) Une personne dont la demande pour consultation de renseignements personnels concernant une autre personne a été acceptée, totalement ou partiellement, aux fins de travaux légitimes de recherches ou de statistiques doit permettre à l'archiviste provincial lorsque celui-ci en fait la demande, d'examiner les notes de recherche et les ébauches des travaux qui doivent être publiés et qui contiennent de l'information qui provient de la consultation des renseignements personnels.

10.9(6) Une personne dont la demande pour consultation de renseignements personnels concernant une autre personne, a été acceptée, totalement ou partiellement aux fins de travaux légitimes de recherches ou de statistiques peut se voir refuser l'accès à un document public, en tout temps par l'archiviste provincial si celui-ci est convaincu que la personne a manqué à son engagement.

10.9(7) Les articles 10.3, 10.4, 10.5, 10.6, 10.7 et 10.8 et le paragraphe (8) s'appliquent avec les modifications nécessaires au refus de l'archiviste provincial de permettre l'accès en vertu du paragraphe (6).

10.9(8) Dans toute procédure en vertu de la présente loi, autre qu'une demande de révision en vertu du paragraphe 10.1(5), il incombe à l'archiviste provincial de démontrer qu'il est interdit de consulter l'information visée par les procédures.
1986, c.11, art.3.

11 La signature de l'archiviste provincial attestant qu'une copie d'un document public est une copie conforme fait foi du fait que l'archiviste a légalement en sa possession l'original du document public ou un duplicata, une photocopie, un micro-

reproduction of that public record, and any copy so signed and certified is and shall be deemed to be equivalent to the original record.
1986, c.11, s.4.

12 Any person who unlawfully damages, mutilates or destroys any public record or removes or withholds from the possession of the Archives or a department any public record commits an offence and is liable on summary conviction to a fine not exceeding one thousand dollars.
1986, c.11, s.5.

13 The Lieutenant-Governor in Council may make regulations

(*a*) prescribing additional duties of the Provincial Archivist;

(*b*) prescribing a tariff of charges to be made for the use of the facilities and services of the Archives;

(b.1) prescribing the form and manner of applications, referrals and appeals under this Act;

(b.2) prescribing forms;

(*c*) respecting the transfer of public records to the Archives;

(*d*) prescribing the hours and days during which the Archives shall be open to the public; and

(*e*) generally for the better administration of this Act.
1986, c.11, s.6.

14 The Archives Act, chapter A–11 of the Revised Statutes, 1973, is repealed.

15 This Act or any provision thereof comes into force on a day to be fixed by pro-

film ou autre reproduction du document public, et toute autre copie dûment signée et certifiée est réputée être l'équivalent du document original.
1986, c.11, art.4.

12 Commet une infraction et est passible, sur déclaration sommaire de culpabilité, d'une amende de mille dollars au plus, toute personne qui, illégalement, endommage, mutile ou détruit un document public ou soustrait ou refuse de remettre un tel document aux archives ou à un ministère.
1986, c.11, art.5.

13 Le lieutenant-gouverneur en conseil peut, par voie de règlements,

a) assigner des fonctions supplémentaires à l'archiviste provincial;

b) fixer le tarif des droits à acquitter pour l'utilisation des installations et services des archives;

b.1) prescrire les modalités de l'exercice d'une demande, d'un renvoi ou d'un appel en vertu de la présente loi;

b.2) prescrire les formules;

c) régler le transfert de documents publics aux archives;

d) fixer les heures et jours d'ouverture au public des archives; et

e) prendre toutes dispositions visant, en général, à une meilleure application de la présente loi.
1986, c.11, art.6.

14 Est abrogée la Loi sur les archives, chapitre A–11 des Lois révisées de 1973.

15 La présente loi ou l'une quelconque de ses dispositions entrera en vigueur à la date

APPENDIX E

CHAPTER P-24

Public Records Act

Chapter Outline

Public records vest in Crown....1
Action respecting wrongful withholding of public records....2
Order respecting wrongful withholding of public records....3
Discretion of judge....4
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1 The books, papers and records kept by or in the custody of any provincial or municipal officer in pursuance of his duty as such officer are vested in Her Majesty the Queen and her successors. R.S., c.184, s.1.

2 If a person wrongfully takes or withholds possession of any document, book, paper or record, he may be proceeded against for the recovery of the same. R.S., c.184, s.2.

3 Upon a summary application of the Attorney General, supported by affidavit, a judge of The Court of Queen's Bench of New Brunswick may make an order requiring the person wrongfully withholding such books, papers or records to deliver the same to the proper custodian, or to such person as is named in the order. R.S., c.184, s.3; 1967, c.38, s.2; 1979, c.41, s.101;1981, c.6, s.1.

4 It shall be in the discretion of the judge to grant an order in the first instance or a summons to show cause, and costs shall be in the discretion of the judge. R.S., c.184, s.4.

CHAPITRE P-24

Loi sur les archives publiques

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Appel....5
Anciennes archives publiques dévolues à la Couronne....6

1 Les registres, papiers et archives conservés ou gardés par un fonctionnaire municipal ou provincial en exécution de ses fonctions sont dévolus à Sa Majesté la Reine et à ses successeurs. S.R., c.184, art.1.

2 Peut faire l'objet d'une poursuite en restitution quiconque se procure ou retient illicitement en sa possession un document, un registre, un papier ou des archives. S.R., c.184, art.2.

3 Sur simple demande du procureur général, appuyée d'un affidavit, un juge de la Cour du Banc de la Reine du Nouveau-Brunswick peut rendre une ordonnance prescrivant à la personne retenant illcitement en sa possession ces registres, papiers ou archives de les remettre à qui de droit ou à la personne nommément désignée dans l'ordonnance. S.R., c.184, art.3; 1967, c.38, art.2; 1979, c.41, art.101;1981, c.6, art.1.

4 Le juge peut, à sa discrétion, rendre directement une ordonnance ou décerner une sommation invitant la personne à faire valoir ses motifs; les dépens sont également laissés à sa discrétion. S.R., c.184, art.4.

5(1) An appeal lies to the Court of Appeal, from any order made by a judge in pursuance of this Act, or from the refusal of a judge to make an order. 1979, c.41, s.101.

5(2) In case of an appeal by a person against whom any such order is made, proceedings on the order shall be stayed upon the applicant filing with the Registrar of the Court of Appeal a bond to Her Majesty, or other security for costs, in such sum as a judge directs. R.S., c.184, s.5; 1979, c.41, s.101; 1980, c.32, s.29.

6 All the papers, documents and record books of the Courts of Sessions, of the Inferior Courts of Common Pleas, all municipal records prior to the establishment of the present system of municipal councils, and other such public documents or records as the Lieutenant-Governor in Council may hereafter declare to be of historical interest and worthy of preservation are hereby vested in Her Majesty the Queen in right of the Province, and the Lieutenant-Governor in Council is empowered to take possession of the same, and also to take proper measures for their permanent preservation and for placing them where they will be available for investigation and to students of history. R.S., c.184, s.6.

N.B. This Act is consolidated to February 28, 1982.

5(1) Toute ordonnance rendue par un juge en vertu de la présente loi ou tout refus de la part d'un juge de rendre une ordonnance est susceptible d'appel à la Cour d'appel. 1979, c.41, art.101.

5(2) Lorsqu'une personne interjette appel d'une ordonnance rendue contre elle, l'exécution de l'ordonnance est suspendue dès que le demandeur dépose entre les mains du registraire de la Cour d'appel un cautionnement au nom de Sa Majesté ou toute autre garantie de remboursement des dépens dont le montant est fixé par le juge. S.R., c.184, art.5; 1979, c.41, art.101; 1980, c.32, art.29.

6 Tous les papiers, documents et registres des *Courts of Sessions* et des *Inferior Courts of Common Pleas*, toutes les archives municipales antérieures à la création du système actuel de conseils municipaux et tous les autres documents ou archives publics que le lieutenant-gouverneur en conseil peut, après l'adoption de la présente loi, déclarer être d'intérêt historique dignes d'être conservés sont dévolus par la présente loi à Sa Majesté la Reine du chef de la province et le lieutenant-gouverneur en conseil a le pouvoir d'en prendre possession et de prendre également les mesures qui conviennent pour assurer leur conservation permanente et les placer là où ils pourront être consultés pour les besoins d'enquête ou pour ceux qui étudient l'histoire. S.R., c.184, art.6.

N.B. La présente loi est refondue au 28 février, 1982.

APPENDIX F

JUDICIAL DECISIONS

RIGHT TO INFORMATION ACT

1. Re Daigle (1980), 30 N.B.R. (2d) 209

2. Re McKay (1981), 35 N.B.R. (2d) 405

*3. Robert G. Hurst v. The Minister of Health (decisions delivered November 17, 26 and 30, 1981)

4. Gillis v. Chairman of The New Brunswick Electric Power Commission (1981), 37 N.B.R. (2d) 66

5. Cimon v. Minister of Municipal Affairs (1983), 51 N.B.R. (2d) 148

6. Re Lahey and the Minister of Finance of New Brunswick (1984), 10 D.L.R. (4d) 759 (also Re Lahey (1984), 56 N.B.R. (2d) 1)

7. Dixon v. New Brunswick (1985), 62 N.B.R. (2d) 137

8. Re Drummie (1986), 77 N.B.R. (2d) 14

*9. Re Robinson (decision delivered April 22, 1988)

*10. Re Jathaul (decision delivered September 2, 1988)

11. Coon v. New Brunswick (Minister of Natural Resources and Energy) (1989), 94 N.B.R. (2d) 346

12. Secord v. New Brunswick Electric Power Commission (1989), 97 N.B.R. (2d) 323

13. Coon v. New Brunswick Electric Power Commission (Chairman) (1989), 98 N.B.R. (2d) 65

*** Unreported Decisions**

APPENDIX G

RIGHT TO INFORMATION
GUIDELINES FOR IMPLEMENTATION OF THE ACT

Purpose of the Act

1. The Right to Information Act is intended to clarify and give effect to the right of a citizen to request and receive information relating to the public business of the Province.

The Act prescribes this right by declaring that information shall be available to any person, with certain exceptions as specified in the Act.

It is not intended, however, that the Act should become the sole vehicle by which information may be obtained. Information should continue to be provided freely and upon simple request where possible.

Operation of the Act

2. The specific procedure for requesting information as prescribed in the Act should be resorted to only when a simple request has been denied.

3. Government departments and agencies should expect to continue to receive, and where possible comply with, normal requests for information. The exceptions specified in the Act should assist in determining whether such requests should be honoured.

4. Where information is supplied in response to a simple request, no charge shall be made for this service unless otherwise provided for by departmental policy or regulation.

5. Where requests for information are misdirected, reasonable effort should be made to refer the applicant to the department or agency most likely to possess the requested information.

6. If, however, it is determined that the information requested should not be supplied, the person making the request should be informed both of this decision and of his/her right to make a formal request in writing, specifically invoking the Act, to the Minister responsible.

7. Once a request for information specifically invoking the Right to Information Act has been made, it shall be dealt with according to the specific terms of the Act. During the first year of operation of the Act, all formal requests shall be referred to the Advisory Committee on the Right to Information Act in order to help ensure consistency in application of the Act.

8. Where a Minister denies a formal request for information under the Act, he is required to advise the applicant in writing stating the reasons for such denial. He shall also inform the applicant of his/her right to appeal to the Ombudsman or to a Judge of the Supreme Court of the Province for a review under the Act, and shall provide the applicant with the forms necessary to make such an appeal.

9. Failure to reply in writing within thirty days of receiving a formal request also means that the applicant may refer the matter to a Judge of the Supreme Court or the Ombudsman.

Exceptions to the Right to Information

10. The thrust of the Act is to assert the right to all information concerning the public business, with certain exceptions as outlined in section 6 of the Act. Even with the described exceptions, the Act places the onus on the Minister to demonstrate why that information should be denied.

It is apparent, therefore, that the interpretation of the exceptions is critical. In cases of uncertainty and where information is requested which it is not the normal practice to provide, reference should be made to the Advisory Committee on the Right to Information Act. The following explanations of certain paragraphs of section 6 may help further in determining whether either a simple request or a formal request invoking the Act should be complied with.

> "(a) would disclose information the confidentiality of which is protected by law;"
>
> Certain Acts provide that information must remain confidential. Such provisions shall take precedence over the Right to Information Act. In addition, there may be other areas where confidentiality is protected by legal precedent.

"(b) would reveal personal information, given on a confidential basis, concerning another person;"

"On a confidential basis" is intended to be interpreted to include all personal information provided to government.

"(d) would violate the confidentiality of information obtained from another government;"

In order to protect the rights of other governments, no information so obtained should be released without obtaining the specific consent of the originating agency of that government, unless the information has already been made public by the other government.

APPENDIX H

THE NEW BRUNSWICK RIGHT TO INFORMATION ACT - A DECENNIAL PERSPECTIVE

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May 1, 1990

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THE NEW BRUNSWICK RIGHT TO INFORMATION ACT - A DECENNIAL PERSPECTIVE

I. INTRODUCTION

New Brunswick's Right to Information Act was enacted in 1978 (and proclaimed effective January 1, 1980) in response to a perceived public demand for a more open and participatory Government. New Brunswick was the first of four Canadian jurisdictions - including the Federal Government, Newfoundland and Manitoba - to confer broad public information access with a right of appeal to an ombudsman or a judge. This legislative structure has reasonably effectively met the stated legislative objective that "every person is entitled to request and receive information relating to the public business of the Province". This assessment is qualified by a number of rather striking deficiencies in both the legislative regime and its delivery. It is thus appropriate that a formal legislative review of the legislation has now been initiated.

The need for such a review was recognized in the formulation of the legislation which, in section 15, provides that:

> 15 This Act is subject to review by the Legislative Assembly after 30 months following the coming into force of this Act.

In explaining the rationale for this provision, the then-Premier of New Brunswick, the Hon. Richard Hatfield, explained that:

> It is the intention of the Legislature at this point ... that it be reviewed in a subsequent Legislature, after there has been some experience with it and to see whether or not the Bill has been too restrictive, and also to consider amendments which would have come about as a result of decisions of the Court ... We are breaking new ground here and I think it expresses the intention of this Legislature that we want the Right to Information Act to be as open as possible, and as open as is good for the Legislature and the Government ... What this does is express the intention of this Legislation that the whole Act should be reviewed on the floor of the Legislature in 30 months, which would be within two sessions.

Although the legislation has been placed on the floor of the legislature in 1979, 1982, 1985 and 1986, these appearances

have been for the purpose of specific restrictive amendments and the contemplated general review has never taken place.

On the other hand, the Right to Information Act has formed part of the deliberations of the Legislature's Standing Committee on the Ombudsman. The recommendations made by the Standing Committee and the Office of the Ombudsman have formed a part of its 1987 and 1988 Reports to the Legislative Assembly. While the specific recommendations of the Committee and this Office will be referred to in greater detail below, it is noted that the Committee has supported an extension of the legislation's remedial purpose.

As for the Office of the Ombudsman, it welcomes the decision to complete a comprehensive examination of the Right to Information Act and, through its Solicitor, to be a formal component in this review process.

This submission assesses the strengths and weaknesses of the New Brunswick Act from the perspective of a formal player under the legislation. Structurally, it is an evaluation which follows the present legislative scheme in New Brunswick. That is, the discussion below addresses the following legislative components: (a) legislative purpose; (b) interpretation and application; (c) scope of public access to information; (d) government information systems; (e) exemptions; (f) information requests; (g) appeal mechanisms; and (h) legislative review. The reason for following such a scheme is, quite frankly, that the New Brunswick Right to Information Act is sound legislation which, while requiring considerable improvement, has a commendable integrity of purpose and structure which ought to remain intact.

The Office of the Ombudsman concludes that both the success and shortcomings of the present legislative information regime require that it be rationalized in a single information statute which would incorporate the Province's records management, information access and privacy protection functions.

II. SUMMARY OF RECOMMENDATIONS

1 It is recommended that the New Brunswick Right to Information Act (hereafter referred to as "the Act") include a legislative purposes clause modelled after that of the federal and Newfoundland statutes.

2 It is recommended that the public right to information established by section 2 of the Act be retained.

3 Should the New Brunswick Government adopt comprehensive human rights legislation, it is recommended that such an enactment incorporate the right established by section 2 of the Act.

4 It is recommended that the application of the Act be extended to municipal corporations, school and hospital boards and other agencies of the Crown as in Schedule A of the Ombudsman Act.

5 It is recommended that the application of the Act be extended by amendments to the definitions of "department" and "appropriate minister".

6 It is recommended that the Government of New Brunswick publicize the citizen's right to information under the Family Services Act, the Archives Act and the Act.

7 It is recommended that any policy drafted by an authority pursuant to the Act contain a reference to the public right of access under section 2 and the definitions of 'information' and 'document' contained in section 1 of the Act.

8 It is recommended that the records management regime established under the Archives Act and the Public Records Act confer a comprehensive records management authority on the Provincial Archivist, establish a uniform governmental filing system, and require the establishment and publication of "banks" of information and standardized information policies for each governmental authority.

9 It is recommended that the provisions of the Public Records Act and the Archives Act be incorporated in the Act.

10 It is recommended that the exception to the right to information contained in section 6(a) of the Act be amended to specifically provide that the exception applies only to a confidentiality provision contained in a statute of New Brunswick.

11 It is recommended that a committee be appointed by the Legislature and/or the Executive Council to complete an ongoing review of freedom of information and privacy protection in New Brunswick. The function of this Committee shall include the review of all present and proposed statutory confidentiality provisions to ensure that they conform with the spirit of the Act.

12 It is recommended that the statutory privacy protection contained in section 6(b) of the Act be replaced and/or supplemented by a new part to the Act entitled "Privacy Protection". This part would provide for the protection of the privacy of individuals and their rights to access to records containing personal information concerning them for any purpose, including the purpose of ensuring accuracy and completeness, i.e., the right of a person to know what personal information is held by the Government, the right to know the uses to which it is put, and the right to challenge its correctness.

13 It is recommended that consideration be given to the enactment of explicit third party procedures under the Act.

14 It is recommended that the exception to the right to information contained in section 6(d) of the Act be narrowed by the incorporation of the terminology of section 10(6) of the Archives Act and by the creation of an administrative process to determine whether the information is available and to facilitate its release.

15 It is recommended that the exception to the right to information contained in section 6(f) of the Act be subject to a time limit of the same (or shorter) duration as that obtained in section 10(7) of the Archives Act.

16 It is recommended that the exception to the right to information contained in sections 6(g) and 6(h) of the Act be subject to a time limit of the same (or shorter) duration as that obtained in section 10(8) of the Archives Act.

17 It is recommended that the exceptions to the right to information contained in sections 6(h.1) and 6 (h.2) of the Act be repealed.

18 It is recommended that the public right to information without recourse to formal mechanisms be explicitly incorporated in the legislative purposes section of the Act and elsewhere in the Act or regulations made under it.

19 It is recommended that the Act provide that the Ombudsman be entitled as of right to be heard in person or by counsel on an application to the Court of Queen's Bench of New Brunswick.

20 It is recommended that the regulation made pursuant to the Archives Act be amended by: a) clarifying the wording of section 3; b) requiring the attaching, as an appendix, the decision of the Provincial Archivist to the referral, petition and appeal forms; c) deleting the title "Part A" from the Form of Petition to the Ombudsman; and d) adding the words "pursuant to subsection 10.1(6)" after the words "Public Records Committee" in Form 4, paragraph (c).

21 It is recommended that the Province of New Brunswick incorporate its records management, information access and privacy protection functions in a single enactment.

III. LEGISLATIVE REVIEW

A. Legislative Purpose

The legislation's draftsman viewed section 2 as a legislative purpose clause. Without doubt, this one simple sentence - "Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province" - struck a blow at the doctrine of Crown privilege and established a citizen's right to access to the "secret law" of Government through the recognition of a fundamental citizen's right to know precisely the factors which led to public decisions affecting her or his life.

Regrettably, it has been found that the very simplicity of section 2 has resulted in its oversight by one or more of the "appropriate ministers" within the New Brunswick administration.

One example of this arose out of the commendable step by a governmental authority to establish a right to information policy and its request that the Ombudsman's Office comment on the draft document. It was dismaying to note that the draft document made no reference to the Right to Information Act nor the very clear statement of Government policy set out in section 2.

In fact, section 2 is probably more properly characterized as a substantive legislative provision and not a legislative purposes clause. It is noted that the legislative purposes clauses contained in the Federal Access to Information Act and the Newfoundland Freedom of Information Act parallel the legislative intent of our Act. Section 2 of the Federal Act provides that its purpose is:

> to provide a right of access to information and records under the control of a Government institution in accordance with the principle that Government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of Government information should be reviewed independently of Government.

And, further, that such legislation is:

> intended to complement and not replace existing procedures for access to Government information and is not intended to limit in any way access to the

> type of Government information that is normally available to the general public.

The Newfoundland Act more succinctly provides that:

> (t)he purpose of this Act is to provide a right of access by the public to information in records of departments and to subject that right only to specific and limited exceptions necessary for the operation of the departments and for the protection of personal privacy.

It appears that the principle of a broad public right of access to information is an appropriate benchmark of governmental responsibility in the much anticipated era of "openness" of the last decade of the Twentieth Century. Furthermore, it is appropriate that such a statement of principle should receive separate consideration within the Right to Information Act as well as in a comprehensive human rights enactment that the Province may adopt. (per, for example, s.44 of the Quebec Charter of Human Rights and Freedoms).

RECOMMENDATIONS:

1 **It is recommended that the New Brunswick Right to Information Act (hereafter referred to as "the Act") include a legislative purposes clause modelled after that of the federal and Newfoundland statutes.**

2 **It is recommended that the public right to information established by section 2 of the Act be retained.**

3 **Should the New Brunswick Government adopt comprehensive human rights legislation, it is recommended that such an enactment incorporate the right established by section 2 of the Act.**

B. <u>Interpretation/Application of Act</u>

The interpretation provisions set out in section 1 of the New Brunswick Act give a remarkably broad scope to the public access right conferred by section 2. Indeed, the definitions assigned to "document", "information", "personal information" and "public business" are arguably superior by any national or international measuring stick.

The definition ascribed to "department" is more problematic. On the one hand, but for its last line, the definition would appear to be as comprehensive as possible. Regrettably, unlike its Canadian counterparts, it provides that the scheduled definition of "department" is to be established by regulation. It is concluded that this legislative formula delegates too much discretion to the ministers whose departments are subject to the legislation. This criticism seemed particularly valid when the first regulations omitted the Department of Transportation and remains valid with respect to the continuing exemption of sensitive public agencies such as municipal corporations, school boards, hospital boards, the Workers' Compensation Board, the New Brunswick Police Commission, the New Brunswick Human Rights Commission and the New Brunswick Museum. This legislative confusion is exacerbated by the inclusion of some boards which are very clearly under the control of a Government Department - such as the Artificial Insemination Advisory Board, the Bonaccord Farm Management Committee and the Farm Machinery Advisory Board (Department of Agriculture) - while omitting others whose relationship to a Department is more distant; e.g. the New Brunswick Human Rights Commission and the Workers' Compensation Board (Department of Labour). These discrepancies, combined with the apparently greater consistency of other Canadian legislative schemes, amount to a very strong argument for a legislative reconsideration of the present definition.

It would appear that such a change could take one of two forms:

a) the word "department" would be replaced by the word "authority" as in the 1985 Ombudsman Act amendments. The words at the end of the definition "the regulations" would be replaced by the words "schedule A" with a schedule identical to that in the Ombudsman Act to be added at the end of and incorporated into the Right to Information Act. Schedule A of the Ombudsman Act is set out as follows:

> Schedule A
>
> 1 Departments of the Government of the Province
>
> 2 A person, corporation, commission, board, bureau or other body that is, or the majority of the members of which are, or the majority of the members of the board of management or board of directors of which are
>
> (a) appointed by an Act, Minister or the Lieutenant-Governor in Council,

(b) in the discharge of their duties, public officers or servants of the Province, or

(c) responsible to the Province

3 Municipalities

4 Schools and school boards as defined in the Schools Act

5 Institutions as defined in the Adult Education and Training Act

6 Hospitals as defined in the Public Hospitals Act

7 Any other agency of the Crown in right of the Province

Such a scheme would provide an integrity to the scheduled definition while enabling the Government to extend the application of the legislation over a period of time;

b) the adoption of the recommendation made by the Office of the Ombudsman in its 1985 Annual Report which would retain the substance of the present definition and extend its practical scope by deleting the words "as set out in the regulations" at the end of it. The Office views this as a desirable step given the lack of any logical distinction between New Brunswick public authorities or the types of information they acquire, retain and dispose of.

The Office has also concluded that:

> (t)his is desirable because the legislation has served to increase the level of public trust and confidence in government; concurrently, the operation of the Act to date has created little or no noticeable administrative upset to that sector of the public service to which it applies.

Such a recommendation would contemplate the replacement of the word "department" by the more universal term "authority" as found in the Ombudsman Act.

Either legislative extension would necessitate new phraseology to underline the participation of the chairs of school and hospital boards and the mayors of municipalities within the legislative scheme, i.e. an amendment to the

definition of "appropriate minister". Looking to the Ombudsman Act for guidance, it is suggested that the term "elected head" would encompass the "appropriate ministers" contemplated in the present legislation, as well as the elected heads of municipalities and school and hospital boards. It is noted that the Ombudsman's Office has found the term "administrative head" equally applicable to deputy ministers, heads of Crown Corporations and the administrative heads of municipalities and school and hospital boards.

This proposed extension of the Right to Information Act was canvassed by the Legislature's Standing Committee on the Ombudsman in its 1986 and 1987 deliberations. The Standing Committee's First Report to the Legislative Assembly of New Brunswick (June, 1987) included the following recommendation:

> 7.1 the Committee recommends that the application of the Right to Information Act be extended to hospital boards, school boards, the Workers' Compensation Board, municipalities, the New Brunswick Museum and other Crown Corporations.

The rationale for this recommendation remains valid and is strongly urged upon the Government of New Brunswick.

RECOMMENDATIONS:

4 It is recommended that the application of the Act be extended to municipal corporations, school and hospital boards and other agencies of the Crown as in Schedule A of the Ombudsman Act.

5 It is recommended that the application of the Act be extended by amendments to the definitions of "department" and "appropriate minister".

C. Scope of Public Access to Information

The seven Canadian jurisdictions that have adopted freedom of information legislation create a public right to Government information that did not exist before. The New Brunswick Act created much more than an extension of a limited right of access: it replaced specific legal rights to specific types of information with a general right to information subject to specific exceptions. The wording of section 2 of the New Brunswick Act is explicit and comprehensive and ought to be retained in its present form. The conferral of such a broad public access power amounted to a clear direction from the

Legislature to the public service to undergo a fundamental attitudinal change regarding openness in Government. It is seriously questioned whether such a change has taken place over the past decade. Certainly, there exist serious concerns about public and public service awareness of the existence of the legislation. It is elementary that, without such knowledge, neither the public service nor the public it serves will exercise or protect the rights created under it.

Recently, one was concerned, but not surprised, to learn that a major review of Government information systems has been undertaken by the Province of New Brunswick without reference to the provisions of the Right to Information Act.

This concern was addressed by the Legislature's Standing Committee on the Ombudsman in its First Report wherein it was recommended that:

> 7.2 the Committee recommends that the Cabinet Secretariat and the Department of Health and Community Services publicize to a greater extent the appeal mechanisms under the Right to Information Act and the Family Services Act.

It is concluded that it remains appropriate that the rights and responsibilities conferred under the Right to Information Act be disseminated to the public service and the public through informational brochures, policy directives and other media.

RECOMMENDATIONS:

6 It is recommended that the Government of New Brunswick publicize the citizen's right to information under the Family Services Act, the Archives Act and the Act.

7 It is recommended that any policy drafted by an authority pursuant to the Act contain a reference to the public right of access under section 2 and the definitions of "information" and "document" contained in section 1 of the Act.

D. Government Information Systems

Unlike its Federal, Manitoba and Newfoundland counterparts, the New Brunswick Right to Information Act contains no requirement for the publication of all Government bodies and the classes of records under the control of each of them. New

Brunswick lacks any statutory requirement for such an information system apart from the records classification requirements under the Archives Act (and the administrative Inquiries New Brunswick service established by Communications New Brunswick).

Apparently, the provincial Government believed it could not afford the expense of a proper records classification system.

Moreover, reference to the Public Records Act and the Archives Act reflects a lack of congruity with the Right to Information Act. While, the term "public records" obtains a full definition in the Archives Act (and, by reference, in the Public Records Act), it is neither defined nor referred to in the Right to Information Act. A similar irrationality exists with respect to the exemptions to the public access to information under the respective statutes.

In addition, the powers of the chief information officer of the Province - the Provincial Archivist - are couched in the relatively unclear "duties" provisions of section 5 of the Archives Act and her status as Chair of the Public Records Committee under section 6 and 7 of the Act. The placement of the Provincial Archivist in the Tourism ministry may arguably be regarded as a slight to the respect paid to the management of the public records of the Province. In short, the Provincial Archivist lacks the legislative authority and resources to ensure a uniform, coordinated provincial records management regime.

A final shortcoming is represented by the failure to rationalize the authority granted under the Archives Act and the Public Records Act by combining the like functions of the two statutes.

Although overlooked at the date of passage of the Right to Information Act, the role of government information systems cannot be underestimated in the "freedom of information" dynamic. The public's right of access is rendered meaningless in a given situation if information has been incorrectly destroyed, lost or is unable to be located because of inadequate filing prerequisites.

Current examples of the dilemma posed are two cases before the Office of the Ombudsman. In one, thousands of pages of documents have apparently been innocently destroyed by a public servant without reference to either the Archives Act or the Public Records Act. In a second case, the whereabouts of sensitive investigative information is unknown to the authority involved, notwithstanding it formed part of a departmental application for a judicial order.

In its 1982 Annual Report, this Office recommended that:

> (a)dministratively ... steps be taken to ensure that public information retrieval systems be evaluated to ensure that all of the subject matter of a given request be scrutinized prior to the issuance of a response to a request for information.

Inherent in this recommendation is an appeal for a clearly defined status and function for the Provincial Archivist or other senior government information manager, the establishment of a uniform governmental filing system, the establishment of published or otherwise readily available lists of "banks" of information as well as relatively standardized information access policies for individual governmental authorities.

As a means to assist in the achievement of such an objective, serious consideration must be given to the rationalization of the Public Records Act, Archives Act and Right to Information Act in a single enactment.

RECOMMENDATIONS:

8 It is recommended that the records management regime established under the Archives Act and the Public Records Act confer a comprehensive records management authority on the Provincial Archivist, establish a uniform governmental filing system, and require the establishment and publication of "banks" of information and standardized information policies for each governmental authority.

9 It is recommended that the provisions of the Public Records Act and the Archives Act be incorporated in the Act.

E. Exemptions

The most obvious barometer of the extent to which a government has adopted the concept of freedom of information is the types of exemptions or exceptions it allows to the general requirement of public access to all public information. The New Brunswick Act contained nine fairly specific exceptions when enacted in 1978. By amendments made in 1982, 1985 and 1986, this number has grown to 13.

As noted by one of the statute's authors, Prof. B.G. Smith, "the categories of exceptions are for the most part quite

specific and restricted in their scope". On the other hand, it is also concluded that shortcomings exist in these exceptions and that some legislative reconsideration is in order. In particular, the following comments are made:

1) With respect to section 6(a) - "information the confidentiality of which is protected by law" - it is noted that an interpretation of the word "law" ought to written and interpreted as "a statute of New Brunswick". Moreover, the myriad of statutory confidentiality provisions passed since the Right to Information Act and future proposed ones should be formally scrutinized by a legislative and/or Cabinet committee to confirm that they are proper and necessary exceptions to the right granted under the Act.

2) With respect to section 6(b) - "personal information ... concerning another person" - this often misinterpreted provision (together with the definition of "personal information" in section 1) is New Brunswick's privacy legislation. While the terminology has been subject to much confusion (see, for example, Re Dixon) it is also hopelessly inadequate as privacy protection legislation.

   This Office has recommended the extension of privacy rights through legislative provisions establishing:

> The protection of the privacy of individuals and their rights to access to records containing personal information concerning them for any purpose, including the purpose of ensuring accuracy and completeness, i.e., the right of a person to know what personal information is held by the Government, the right to know the uses to which it is put, and the right to challenge its correctness.

   It is concluded that s.6(b) ought to be replaced by a separate part of the Right to Information (and Privacy) Act which would incorporate the provisions contemplated by this Office's recommendation.

3) With respect to s.6(c) - information which "would cause financial loss or ... gain or jeopardize negotiations" - it is noted that the strict requirement that such loss or gain must be concrete - not speculative - as set out in the 1980 Re Daigle decision - has recently been confirmed in the 1988 Re Robinson decision.

In the 1989 judicial decision in Coon v. New Brunswick (Minister of Natural Resources and Energy), Mr. Justice Stevenson provided the following indication of the circumstance where the second part of the section 6(c) protection would obtain:

> Document 1-2 contains 57 pages of observations and comments by Dr. G.L. Baskerville on the implementation of the Crown Lands and Forests Act and on the review process. I am not persuaded that the document is protected by any of paras. (a), (c.1) or (g) of s. 6. Dr. Baskerville is not a public servant so para. (g) does not apply. While some of the factual information in the document may be based on information provided by the licensee, it is not apparent on the face of the document that that is so and consequently paras. (a) and (c.1) do not apply. The document is remarkable for its candour and in my opinion the release thereof would jeopardize present negotiations for new agreements between the Minister and the licensees. For that reason, the document should not be released.

A similar finding, with less explicit reasons, was made in the earlier cases of Re Drummie and Hurst v. Minister of Health and the subsequent case of Coon v. N.B. Electric Power Commission.

While the retention of s. 6(c) is defensible, its provisions must be regarded as a very broad protection from disclosure of the business activities of the New Brunswick Government.

4) The exceptions established by section 6(c.1) would appear to represent a limited "third party" protection.

It is recommended that the explicit third party protection provided under the federal and Newfoundland statutes be examined to determine whether such an approach would more properly address this important question.

5) With respect to the exception contained in section 6(d) - "information obtained from another government" - the appropriateness of this blanket exclusion appears to be questionable in light of the existence of freedom of information legislation in seven of Canada's 12

political jurisdictions (including the Federal Government, Ontario, Quebec and the other Maritime Provinces). It would appear logical and proper that a request to the Province of New Brunswick for information it has received from another government should trigger an administrative procedure that would determine whether the information is available from the other Government and facilitate its delivery to the requester. A model for such a procedure is found in respect of intra-provincial information in sections 3(4) - 3(7) of the Act.

It is concluded that the Province of New Brunswick ought to enter negotiations with the six other Canadian jurisdictions which have freedom of information legislation to facilitate the release of "information obtained from another Government". Hopefully, this might culminate in the making of a kind of Order-in-Council 83-590 in reverse!

Any reconsideration of section 6(d) should take cognizance of the legislative treatment of the parallel provision in the Archives Act. It provides that:

> 10(6) Public records referred to in paragraph 3(e) are available for public inspection if the Government from which the information was obtained
>
> (a) consents in writing to the inspection, or
>
> (b) makes the information public.

6) With respect to section 6(e) - information "detrimental to the proper custody, control or supervision of persons under sentence" - it is noted that the Department of Solicitor General has implemented a departmental policy to guide its administration of this provision. Such guidelines may be worthy of consultation in the drafting of a model departmental freedom of information policy.

7) The exceptions contained in section 6(f), (g) and (h) confirm well recognized common law privileges and ought to be retained. The suggestion that these exceptions ought to be extended upon the commencement of litigation would appear to run counter to the principles underlying this legislation and the Rules of Court of New Brunswick.

However, it is recommended that a redrafting of section 6 should note sections 10(7) and 10(8) of the Archives Act. These sections, which refer to the same types of information as - are addressed by sections 6(f) and (g) of the Right to Information Act, provide that:

> 10(7) Public records referred to in paragraph (3)(g) are available for public inspection after 50 years following the date of their creation.
>
> 10(8) Public records referred to in paragraph (3)(h) are available for public inspection after 20 years following the date of their creation.

There appears to be no compelling reason why such a time limitation should not be incorporated in the Right to Information Act.

8) The exceptions contained in section 6(h.1) and (h.2) would appear to be an unnecessary extension of the protection already provided under sections 6(a) and 6(i). These amendments, which arose out of Ombudsman and Court of Queen's Bench proceedings in Re Dixon, must be viewed in the context of that decision. In particular, Mr. Justice Stevenson pointed out that:

> All of the information contained in the four documents became public knowledge at (the) trial. While the identity of police informants is confidential information protected by law, as soon as an informant testifies as a victim or complainant, his identity is no longer confidential and paragraph 6(a) of the Act ceases to apply to it.

It does appear that these two provisions are superfluous to sections 6(a) and (i) of the Act and ought to be reconsidered.

Finally, one notes approvingly that exceptions contained in the New Brunswick Act are permissive. This legislative approach has enabled an 'appropriate minister' to release otherwise exempt information in a given instance and, generally, to discharge this function in a manner consistent with the stature conferred on her/her office.

RECOMMENDATIONS:

10 It is recommended that the exception to the right to information contained in section 6(a) of the Act be amended to provide that the exception applies only to a confidentiality provision contained in a statute of New Brunswick

11 It is recommended that a committee be appointed by the Legislature and/or the Executive Council to complete an ongoing review of freedom of information and privacy protection in New Brunswick. The function of this Committee shall include the review of all present and proposed statutory confidentiality provisions to ensure that they conform with the spirit of the Act.

12 It is recommended that the statutory privacy protection contained in section 6(b) of the Act be replaced and/or supplemented by a new part to the Act entitled "Privacy Protection". This part would provide for the protection of the privacy of individuals and their rights to access to records containing personal information concerning them for any purpose, including the purpose of ensuring accuracy and completeness, i.e., the right of a person to know what personal information is held by the Government, the right to know the uses to which it is put, and the right to challenge its correctness.

13 It is recommended that consideration be given to the enactment of explicit third party procedures under the Act.

14 It is recommended that the exception to the right to information contained in section 6(d) of the Act be narrowed by the incorporation of the terminology of section 10(6) of the Archives Act and by the creation of an administrative process to determine whether the information is available and to facilitate its release to a requester.

15 It is recommended that the exception to the right to information contained in section 6(f) of the Act be subject to a time limit of the same (or shorter) duration as that obtained in section 10(7) of the Archives Act.

16 It is recommended that the exception to the right to information contained in sections 6(g) and 6(h) of the Act be subject to a time limit of the same

(or shorter) duration as that obtained in section 10(8) of the Archives Act.

17 It is recommended that the exceptions to the right to information contained in sections 6(h.1) and 6 (h.2) of the Act be repealed.

F. Information Requests

While the legislation established procedures for the enforcement of the right to information, the initial procedure is a "silent" one - a person's right to obtain Government information without following any formal procedures. The right to request and receive information confirms a citizen's traditional right to receive most types of public information without using formal procedures. This informal process is set in the following New Brunswick Government Guidelines made at the date of proclamation of the Act:

> 2. The specific procedure for requesting information as prescribed in the Act should be resorted to only when a simple request has been made.
>
> 3. Government departments and agencies should expect to continue to receive, and where possible comply with, normal requests for information. The exceptions specified in the Act should assist in determining whether such requests should be honoured.
>
> 4. Where information is supplied in response to a simple request, no charge shall be made for this service unless otherwise provided for by departmental policy or regulation.
>
> 5. Where requests for information are misdirected, reasonable effort should be made to refer the applicant to the department or agency most likely to possess the requested information.

Although these guidelines provide explicit directions for the processing of requests for information by public servants, it should be noted that the notion of a coherent and disciplined government administration of the legislation fell into disuse a few years after the Act's proclamation in 1980. It is not known whether any record of these Guidelines was kept or, if

kept, whether they remain consciously in effect to the present date.

The lack of clarity surrounding these issues leads one to conclude that such guidelines ought to be incorporated in a statutory instrument, i.e. the statute, regulations or a legislative instrument of the Board of Management. This is in addition to a reference to such informal rights in the proposed legislative purposes section.

The "ministerial review" sections of the Act provide for a written application to the "appropriate minister" of a Department and requires that the Minister will respond to the request within 30 days.

This response may take one of several forms, including: 1) a release of the information; 2) an information release subject to payment of a search and/or copying fee; 3) the severance of a portion of the information sought as exempt and the release of the remainder; 4) a request for a more specific description of the information or 5) a refusal of the information on the basis that it: a) is about to be published; b) is destroyed or otherwise does not exist; c) is under the control of another department or the Provincial Archivist (and transfer the request to the appropriate minister or the Provincial Archivist); or d) is exempt under the Act. If a minister fails to respond to a request for information within a specified time, such an omission is deemed to be a refusal. Finally, the Act requires that, where a request is refused, reasons must be given for the refusal and advice provided to the applicant regarding the appeal provisions under the legislation.

Aside from recommended changes arising out of the extension of the legislation to municipalities and school and hospital boards, this Office's experience is that the present provisions are reasonable and ought to be retained.

This view is buttressed by the judicial decisions in Re Lahey (1984) and Re Jathaul (1988), wherein the Court of Queen's Bench has confirmed that an information request must relate to information that has already been created and that the Act may not be interpreted as imposing a burden on the Government to create new information.

RECOMMENDATION:

18 It is recommended that the public right to information without recourse to formal mechanisms be explicitly incorporated in the legislative

purposes section of the Act and elsewhere in the Act or regulations made under it.

G. Appeal Mechanisms

Where there has been a ministerial refusal of a request for information, the Act provides a two-tier appeal system to the Ombudsman and the Court of Queen's Bench of New Brunswick. A person has the option of selecting either mechanism; however, a matter referred to the Court cannot later be referred to the Ombudsman. Moreover, a decision by the Court of Queen's Bench is final and may not be appealed to a higher court.

Whether one files a petition with the Ombudsman, or makes a referral or appeal to a judge, easy-to-complete appeal forms are provided free of charge by the Queen's Printer.

(1) Petition to Ombudsman

In petitioning the Ombudsman, one completes the petition (Form 45-3420), affixing to it the request for information and the negative decision received from the minister (or an indication that no reply has been received). Upon receipt of the petition, the Ombudsman's Office reviews the request in accordance with the "powers, authority, privileges, rights and duties vested" under the Ombudsman Act and forwards a recommendation to the appropriate minister within 30 days of receipt of the petition. The Office's review includes a detailed examination of the information, a review of other relevant documents, the questioning of public officials and the petitioner and the completion of legal research. Apart from the cost saving and expediency of this review, it may be advantageous to pursue this avenue because: a) the Office of the Ombudsman is in a position to advise a requester whether to proceed under the provisions of the Right to Information Act or to seek information through a review under the Ombudsman Act (there are circumstances which may lead the Ombudsman to recommend a release of information under the Ombudsman Act where a requester does not have a specific right under the Right to Information Act, and b) the flexible powers afforded the Ombudsman allow him to mediate - through a process of negotiation and informal recommendation - a request for information.

Although the Ombudsman's recommendation is not a legally enforceable one, most petitioners have received some or all of the requested information as a result of the Office's review.

Up to January 1, 1990, 50 petitions to the Ombudsman arose from the refusal by a Minister to release information to a

citizen. A reasonably detailed summary of each of these petitions is contained in the Annual Reports of the Ombudsman for the period 1980-1989. Citizen recourse to the Office has resulted in the release of all or a substantial amount of the information requested by petitioners in 29 (59%) of the 50 cases. This statistic takes on an ever brighter hue when one considers that, in seven other instances, the Ombudsman was required to decline to make a recommendation because the legislation did not apply to a particular public office (e.g., the Legislative Assembly or the Lieutenant-Governor) or because the information did not exist.

The types of information released to citizens on the Ombudsman's recommendation are indeed varied. These include the Premier's expense accounts, spruce budworm investigation reports, the deliberations of the Lieutenant-Governor's Review Board, the investments of the Provincial industrial development holding company, information on federal-provincial farm loans, the confidentiality provisions pertaining to inmate and parolee files, minutes of the U.N.B. Board of Governors, the Department of Education's Holocaust teaching unit, and the cost of the Miscou Island Bridge.

The largest single number of requests acceded to at the behest of the Office are those relating to personal information, including personnel, academic, medical, license application, and security files.

(2) Referral or Appeal to the Court of Queen's Bench

A judicial review of a ministerial refusal of information may take the form of a referral (Form 45-3419) or appeal (Form 45-3421) to a judge of the Court of Queen's Bench, depending on whether the requester has completed a petition to the Ombudsman. The applicant completes the form, and presents it to a judge of the Court of Queen's Bench who sets a date for hearing the referral or appeal. Service of the appeal or referral form is completed within 14 days (per Reg. 85-86). On the hearing date, the appropriate minister or his counsel appears with the information (usually in a sealed envelope). The presentation of evidence at the hearing is similar to that in other court applications, except that it is the responsibility of the minister to establish clearly the basis on which a refusal has been made under the Act, and why such a basis is valid.

Although there is no stated time limit for a decision by a judge, (nor by a minister, on receipt of a recommendation from the Ombudsman), such decisions or orders are normally rendered in a timely fashion. Finally, it should be noted that a judge shall award court costs to a successful

applicant, and to an unsuccessful applicant, where he considers it to be in the public interest to do so.

In reviewing the 12 written judicial decisions made between 1980 and 1989, one notes the following:

a) The Court disposed of the requests by ordering a release of all information in two cases; a partial release, in six cases, and confirmed the governmental refusal in the other four appeals;

b) the Court made its rulings in a timely fashion (7 days or less - 6; 23 days or less - 5; 48 days or less - 1);

c) the Court indicated no difficulty with the procedures under the Act nor with the onus placed on the appropriate Minister to justify the information refusal;

d) the Court indicated (in Re Jathaul) that it would use its authority under the Rules of Court to require leave to make a subsequent appeal "not ... to deprive anyone of a legitimate right, but to protect ... the Government from further expense with respect to the matter.

e) the Court has ruled that, although a requester "can make whatever use he wants to" of information released under the Act (Re McKay), it has also considered it

> appropriate ... to echo the words of the Alberta Court of Appeal in Keegstra v. Canadian Braodcasting Corporation, which I have mentioned:
>
> > We wish to emphasize that this is not an order permitting publication. The Canadian Broadcasting Corporation publishes at its risk. (Re Robinson)

Parenthetically, it is noted that the Office of the Ombudsman and the Court of Queen's Bench of New Brunswick have only been called upon to rule on the same case once - in Re Dixon - and the respective decisions reflected a similar remedial interpretation.

To the present date, this Office has encountered few difficulties with the appeal procedures established under the

Right to Information Act and no major recommendations are made with respect to it.

On the other hand, the Office has recommended that the Ombudsman be afforded the opportunity to intervene in an application before the Court of Queen's Bench. Specifically, the recommendations notes that:

> Section 42 of the Federal Access to Information Act provides that the Federal Information Commissioner may appear as a party to judicial proceedings under the Access to Information Act. Given the special knowledge of the legislation stemming from the Ombudsman's experience with it, and the potential usefulness of the Office in the discussion of legal issues before a Court in an application under the Right to Information Act, it is recommended that the following provisions be incorporated in the Right to Information Act, namely:
>
> > 8(4) Notice of an application under paragraph 7(1)(a) shall be served upon the Ombudsman who is entitled as of right to be heard in person or by counsel on the application.

The conferral of such status would enable the Office to intervene pursuant to rule 15.02 of the rules of Court. Rule 15.02 provides that:

> With leave of the Court and on such terms as the Court may impose, a person may, without becoming a party to the proceeding, intervene therein as a friend of the Court for the purpose of rendering assistance to the Court by way of argument.

RECOMMENDATION:

19 It is recommended that the Act provide that the Ombudsman be entitled as of right to be heard in person or by counsel on an application to the Court of Queen's Bench of New Brunswick.

H. Archives Act Regulations

Generally, the regulations under the Archives Act are in conformity with the regulations under the Right to Information Act. In any reconsideration of the regulations, the following comments may be noted: 1) section 3 of the

proposed regulations seems to worded somewhat awkwardly; 2) consideration should be given to requiring the attaching, as an appendix, the decision of the Provincial Archivist to the Referral, Petition and the Appeal forms; 3) As there is no "Part B" to the form, the words "Part A" should be eliminated from the form that is a Petition to the Ombudsman; and 4) in paragraph (c) of Form 4, the Undertaking, the phrase "pursuant to subsection 10.1(6)" should be added after the words "Public Records Committee".

RECOMMENDATION:

20 It is recommended that the regulation made pursuant to the Archives Act be amended by: a) clarifying the wording of section 3; b) requiring the attaching, as an appendix, the decision of the Provincial Archivist to the referral, petition and appeal forms; c) deleting the title "Part A" from the Form of Petition to the Ombudsman; and d) adding the words "pursuant to subsection 10.1(6)" after the words "Public Records Committee" in Form 4, paragraph (c).

I. Legislative Review

The question of periodic review or monitoring of the legislation is quite fully addressed under the federal statute. It requires the administration of the Act to be reviewed on a permanent basis by a parliamentary committee, and further requires that this committee undertake a comprehensive review of the legislation within three years and submit a report to Parliament within a year of the completion of such review. The New Brunswick Act provides only that it is "subject to review by the Legislative Assembly after thirty months following the coming into force of the Act". Although the Legislature's Law Amendments Committee was requested to complete such a task in 1983, neither a review, nor a report based on such a review, was commenced until 1990.

As stated above, it is concluded that a committee of the Legislative Assembly and/or the Executive Council ought to be charged with periodic review of New Brunswick's Freedom of Information legislation, including the scrutiny of legislative confidentiality provisions in public and private acts.

J. Conclusion

The Right to Information Act is sound legislation. Its successful incorporation in the public administration of New Brunswick is a function of its broad remedial purpose and application and the independent appeal processes it establishes. Perhaps most importantly, it confirms the best aspect of the spirit of openness of the public service.

The success of the legislation forms the fundamental rationale for its extension. It is appropriate that the scope of the legislation be extended to the whole sphere of provincial public administration. This would be both a logical and principled step - a reaffirmation of the Government's commitment to 'openness'.

More pratical considerations motivate one to recommend the incorporation of the functions of records management, information access and privacy protection in a single enactment. The small size and limited resources of the Province require that our information regime be as rational, disciplined and efficient as possible. A single information statute would achieve this administrative objective, would underscore the unity of the information dynamic and would facilitate the public educative function that must be part of its administration.

It is unfortunate and unnecessary that New Brunswick's records system lacks coherency and that we lack positive privacy protection legislation. Such shortcomings necessarily impact on the credibility and effectiveness of the Right to Information Act itself. While the sum total of our piecemeal legislative information management and privacy protection provisions may amount to a fair measure of records management and privacy protection, this is not self-evident. Moreover, it provides an unfair and inadequate legislative foundation for the public servants who are required to manage information. Legislative coherency does not guarantee good public administration; however, it would serve to clearly define public information policy and provide a much clearer directive to the public service than presently obtains.

Such a reform would contemplate the extension of the remedial effect of our information legislation. This Office's support for such an extension has been enunciated throughout this submission. Moreover, it has recently been echoed by the Court of Appeal of New Brunswick in McInerney v. MacDonald (February, 1990):

> We live in a mobile society with a growing emphasis on access to information. This claim to information

is simply one facet of a many sided repository of rights aimed at self-determination insisted upon by Canadians to-day. To hold otherwise would plunge the judgment making power of whether or not to grant access into a sea of subjective decisions.

RECOMMENDATION:

21 It is recommended that the Province of New Brunswick incorporate its records management, information access and privacy protection functions in a single enactment.

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D-3 C. Ferris, "The Right to Information Act - A Practitioner's Note" (1986) 3 Solicitor's Journal, Issue 1, p. 14

D-4 C. Ferris, "Freedom of Information in Atlantic Canada" (1988), 5 Government Information Quarterly, p. 341