OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES FOR NEW BRUNSWICK

COMMISSARIAT AUX LANGUES OFFICIELLES DU NOUVEAU-BRUNSWICK

Investigation Report

File number: 2015-2603

Institution concerned: Department of Social Development

Subject: Alleged deficiencies in the provision of services in French

Report distributed to the following persons:

Premier

Deputy Minister of Social Development

Clerk of the Executive Council Office

Complainant

January 2018

Summary

This investigation report was prepared following a complaint concerning the Department of Social Development.

The complainant, a psychologist working for a community mental health service in the Vitalité Health Network, had to review and sign an affidavit for a Department of Social Development file in the context of a legal proceeding. The complainant criticized the fact that the employee of the Department of Social Development who contacted him about the affidavit did not offer to use the official language of his choice (active offer) and that this employee proceeded unilaterally in English. The complainant also criticized the fact that he had to review and sign an affidavit written in English only whereas his preferred language is French.

After carrying out the investigation, the Office of the Commissioner concluded that the complaint is partially founded. On the one hand, the provisions of the OLA (s. 27, 28, and 28.1), which enable **the public** to use the official language of their choice in interactions with the institutions do not apply to communications between public servants. Therefore, under the OLA, the employee of the Department of Social Development was not required to make an active offer and communicate with the complainant in his preferred language. On the other hand, the provisions of the OLA in relation to the courts (s. 16, 17, and 21) set out that **any person** may use the official language of his or her choice in matters before the courts. The Office of the Commissioner considers that these sections apply to a public servant in carrying out his or her duties. In this matter, the complainant had to review and approve a document that was going to be filed in court. Thus, the Department of Social Development was responsible for seeing that this document was written in the complainant's preferred language.

The Office of the Commissioner makes the following recommendations:

THAT by February 28, 2018, the institution inform its employees of every person's right to be able to use the official language of their choice in all matters before the courts and of the institution's obligation to inform those who may be called as witnesses, either orally or in writing, of this right;

THAT by March 31, 2018, the institution report to the Office of the Commissioner on the implementation of the above recommendation.

Complaint

The complainant is a psychologist ("the complainant") working for a community mental health service in the Vitalité Health Network. The complainant had to take an oath to support an affidavit owing to his professional involvement in a case conducted by the Child Protection Unit for Region 1 of the Department of Social Development, which was soon to be before the courts.

The incident mentioned occurred in two phases. First, on April 30, 2015, the administrative assistant working in the Child Protection Unit went to the complainant's office in Richibucto to take the affidavit to him. The administrative assistant only spoke English, and the complainant had to proceed in that language in order to complete the affidavit in question. Subsequently, on October 30, 2015, the complainant received an e-mail from that administrative assistant, in English, asking him to review a second affidavit for the same case. Once again, the complainant had to use the language chosen by the person speaking to him and to proceed in English.

The complainant believes that his language rights were not respected. He notes that although he is a member of the public, he never received an active offer from the administrative assistant. He also specifies that she ignored the fact that his language of choice is French, and therefore imposed the use of English to complete the affidavits supporting the file defended by the Department of Social Development.

The investigation

On February 18, 2016, in accordance with subsection 43(13) of the *Official Languages Act* (OLA), a notice of investigation was sent to the deputy minister of the institution that is the subject of the complaint, i.e. the Department of Social Development, to inform him of the intention of the Office of the Commissioner to conduct an investigation into this matter. In this letter, the Commissioner asked the institution to answer to the allegations made by the complainant. She also asked the institution the following questions:

1. What is the procedure for active offer of service when an employee of the Child Protection Unit must communicate with a member of the public?

2. What procedure has been adopted to ensure that verbal and written communication occur in the language of choice of a member of the public when an employee of the Child Protection Unit initiates contact?

3. What is the bilingual capacity of the employees in the Child Protection Unit, Region 1, a body under the Department of Social Development?

The institution's responses

In a letter dated May 3, 2016, the institution reaffirmed its commitment to complying with the *Official Languages Act* and provided several pieces of information in response to the complainant's allegations and the questions of the Office of the Commissioner. Portions of the letter relevant to the analysis of the file appear below:

> *[TRANSLATION]*
>
> *The Department of Social Development has a policy on service delivery and the client's file. This policy stipulates:*
>
> - *a guarantee that all documentation, records etc. in a client's file are in the client's language of choice from New Brunswick's two official languages;*
> - *that the Language of Client File Policy will supersede the Language of Work Policy when it comes to client files; and*
> - *that the employees of the Department have a legal obligation under the* Official Languages Act*, which is under the Language of Service Policy to ensure the Language of Client File is adhered to.*
>
> *With respect to this complaint, the complainant's allegations are that the Region 1 Child Protection unit staff communicated with him in English, whereas his language of choice was French.*
>
> *In reply to your questions, I offer the following facts:*
>
> - *Pursuant to the Act, the active offer of service is made when a file is opened. In the protection unit, the language of choice of the client, namely, the child, determines the language of service and the language for all documents in the file. The file is then sent to employees, who will be able to deliver the services in the language of choice of the client, in this case the child.*
> - *A file was sent to a social worker and an administrative assistant who were able to offer services in the client's language of choice. The administrative assistant who is responsible for preparing documents for the courts prepared the affidavit in the client's language of choice. We recognize that the active offer was not made to our Part III partner. However, when he indicated his language of work, our employee agreed to contact the Court to ensure that translation would be available at the hearing before the Court. The necessary action was taken and confirmed with the complainant.*
> - *Among the five Child Protection teams in Region 1, there are 25 social workers, 20 of whom are bilingual, and five administrative assistants, three of whom are bilingual.*
>
> *In the circumstances related to this complaint, the Department requested services from the complainant in the client's language of choice. From our viewpoint, the complainant had the same obligation to respond to each request for service and all documents related to the file in the client's language of choice. Furthermore, our understanding of the Language of Work Policy is that an employee who requests a service of another employee becomes by definition a member of the public and must be able to expect to communicate in the official language of his or her choice. In this case, it is the employee of Social Development who would be a member of the public.*

If your review of the facts leads you to conclude that the complainant's rights were not respected, please extend my apologies. Also, I am calling upon your expertise and advice for preventive measures to reduce the risk of this type of complaint happening again.

Analysis by the Office of the Commissioner

The complainant alleges that on April 30, 2015, during a meeting with a representative of the Child Protection Unit of Region 1 of the Department of Social Development, all the interactions took place in English and he therefore had to proceed in that language. The objective of that meeting was the preparation of an affidavit by the complainant for a case to be heard by the court. On October 30, 2015, following this first meeting, the complainant received an e-mail from the Department's representative asking him to review the affidavit. Once again the language of communication during this interaction was English and the affidavit was also written in English.

The complainant believes that his language rights were not respected during his interactions with the Department's representative. He maintains that no active offer of service was made to him in the official language of his choice, and he adds that the Department's representative went ahead and prepared the affidavit without considering his preferred official language.

In its response, the Department explained that it makes sure that services and documents are offered and written in the official language chosen by the client, i.e. the child, in this case. The Department added that the client's language of service will always supersede the *Language of Work Policy* issued by the provincial government. On this point, we agree with the Department that the directives set out in the *Language of Work Policy* cannot supersede the obligations of government institutions with respect to language of service, which are specifically set out in the OLA, a quasi-constitutional act. The policy is only a directive issued by the government and is intended for its employees, and as such, has no enforceable legal value, in contrast to the OLA.

The Department also added that its employees have a legal obligation under the OLA to see that the directive on the official language of service chosen by the client is respected. However, we wish to specify that this "legal obligation" does not arise from the *Official Languages Policy – Language of Service* as the Department seems to imply in its response, but from the OLA, whose objective is to implement the language obligations set out in the *Canadian Charter of Rights and Freedoms.*

With respect to this complaint more specifically, the Department alleges that pursuant to the OLA, the active offer of service is made when a file is opened and the official language chosen by the client determines the language in which services will be offered. Once the client's choice of language has been determined, the file is then sent to the employees, who will be able to deliver services in the client's language of choice. The Department explained that of the five (5) protection teams in the area affected by this complaint, twenty (20) of the twenty-five (25) social workers and three (3) of the five (5) administrative assistants are bilingual.

In the matter the complaint is about, the file was sent to a social worker and an administrative assistant who were able to offer services in English, the official language chosen by the client, that is, the child in this case. According to the Department, the administrative assistant assigned to the file prepared the complainant's affidavit. She prepared it in the official language chosen by the client. The Department recognizes that in the interactions with the complainant, the administrative assistant did not make an active offer of service. However, the Department adds that when she was informed that the

complainant wanted to testify in French, the administrative assistant promised to contact the Court to ensure that interpretation would be available during the hearing.

In its response, the Department maintains that, regardless, by looking at the circumstances of this matter, its employee made a request to the complainant for service on behalf of the client, not the reverse. Therefore, it maintains that the complainant was required to respond to the request for service and to produce all documents related to the file in the official language chosen by the client. The Department also adds that according to its understanding of the *Language of Work Policy*, the employee requesting the service from another employee becomes by definition a "member of the public" and is entitled to expect to be able to communicate in the official language of his or her choice. In the current context, the Department maintains that the administrative assistant is the "member of the public" within the meaning of the policy, not the complainant.

This complaint raises two important questions, the first being the interpretation that is to be given to the expressions "public" and "services" that we find in sections 27, 28, and 28.1 of the OLA. The second question is on the right of witnesses in a legal proceeding to testify in the official language of their choice.

The terms "public" and "services"

The OLA sets out the following in sections 27, 28, and 28.1:

27. Members of the public have the right to communicate with any institution and to receive its services in the official language of their choice.	27. Le public a le droit de communiquer avec toute institution et d'en recevoir les services dans la langue officielle de son choix.
28. An institution shall ensure that members of the public are able to communicate with and to receive its services in the official language of their choice.	28. Il incombe aux institutions de veiller à ce que le public puisse communiquer avec elles et en recevoir les services dans la langue officielle de son choix.
28.1 An institution shall ensure that appropriate measures are taken to make it known to members of the public that its services are available in the official language of their choice.	28.1 Il incombe aux institutions de veiller à ce que les mesures voulues soient prises pour informer le public que leurs services lui sont offerts dans la langue officielle de son choix.

In a context of legislative bilingualism, as is the case in New Brunswick, it is important for those who need to interpret a legislative provision to read the provision in both languages to ensure that they say the same thing, because there could be a discrepancy between the two versions. Where a discrepancy exists, it is necessary to determine which version best represents the legislator's intention. In this spirit, the Office of the Commissioner adopts the practice of reproducing both versions of the relevant provisions of the OLA and, in cases in which a discrepancy could exist between the two versions, it will interpret the provision in order to determine what it considers the legislator's intention to be.

In the French version of sections 27, 28, and 28.1, the recipient of the rights is identified as being the "public," whereas in the English version, the recipient is a "member of the public" [our emphasis]. We note, first of all, that the term "member of" in the English version does not appear in the French version. Furthermore, we note that the choice of the word "public" in the French version to designate the recipient of the rights may appear surprising since this term is not a term normally used in law.

Indeed, the concept of "public" is not a legal term and the "public" does not have the legal personality enabling it to effectively invoke rights guaranteed to it. The legislator, in using this expression probably had in mind, as is clearly indicated in the English version, all the persons who are part of the "public", and this word should therefore be given its ordinary meaning as was recognized by the Court of Queen's Bench in the decision of *Gautreau v. New Brunswick* (1989), 101 NBR (2d). 1. Recognized rights are therefore conferred upon all "members of the public" who use government services. This expression includes the individuals who are the primary beneficiaries, but it also encompasses partnerships, business corporations, associations, and incorporated or unincorporated groups, that is, all bodies or persons dealing with the government or one of its institutions.

Can this expression also include public servants and people who work for government institutions as is the case here? The response to this question depends on the distinction that can be made between the "requester" and a "government institution." If the requester of a government service acts on behalf of a government institution, we can conclude that he or she is not a member of the "public" because the objective of sections 27, 28, and 28.1 is not to attribute rights to government institutions or their representatives but rather to members of the public doing business with these institutions and representatives. However, if the requester, although a government employee, makes a request or receives a service on an individual basis, then that person is included in the expression "public."

With respect to the expression "service" also used in these provisions, note that the courts have not yet given it a definitive interpretation. It goes without saying that when a government service is intended for those outside the public service, it is a "service" within the meaning of these provisions and must therefore be offered in the language chosen by the member of the public for whom it is intended. However, we cannot say as much for communications and services between two government institutions, because those communications do not involve the public.

We believe that communications between the complainant, who was employed by a government institution, and the Department in this case, do not constitute "services" within the meaning of sections 27, 28, and 28.1. These are not communications or services intended for the "public." Rather, they are exchanges between representatives of two government institutions. An interpretation to the contrary could create a certain confusion and lead to a conflict between the right of the client of the institution to receive services in the official language of his or her choice and those of the complainant, a public-sector employee, for whom the same right would be recognized. We would find ourselves in a situation in which the State or its representatives could stack their rights up against those of a simple citizen. It should be borne in mind that for every right conferred by law, there are three separate parties: a rights holder (members of the public), a party with a relative obligation (government institutions), and a government that makes the law under which the right is granted and the obligation is imposed. Naturally, the government and its institutions cannot acquire the rights that could be set against those of a citizen.

For these reasons we believe that communications between the complainant and the Department are not covered by sections 27, 28, and 28.1 of the OLA. In our view, they should instead be governed by the right of public servants to work in the official language of their choice. However, the legislator has deliberately chosen not to specifically legislate on this issue. We recognize that certain provisions of section 5.1 of the OLA impose certain obligations on the government concerning the development of plans on the language of work, but nothing in the Act gives public servants special rights in this regard. There is an "*Official Languages - Language of Work Policy and Guidelines.*" Although this "policy" may cover relations between the complainant and the Department in question, it is not binding and does not come under the mandate of the Commissioner of Official Languages. However, we believe that, as we

have said several times, the provincial government should draw inspiration from what is done at the federal level and amend the OLA to recognize the right of provincial public servants to work in the official language of their choice. This would respect the commitment made in section 16 of the *Charter.*

In conclusion, since the complainant is not part of the "public" and he did not receive a "service" within the meaning of the OLA, we must conclude that sections 27, 28, and 28.1 have not been violated.

The right of a witness to use the language of his or her choice in a legal proceeding

As we have already mentioned, the Department asked the complainant to sign an affidavit written in English. An affidavit is a document in which a person solemnly declares or swears that the facts contained therein are true. The affidavit may be filed during a legal proceeding and in fact constitutes evidence that can replace a witness's oral testimony.

The official languages in a legal proceeding are dealt with in the following sections of the OLA:

16. English and French are the official languages of the courts.	16. Le français et l'anglais sont les langues officielles des tribunaux.
17. Every person has the right to use the official language of his or her choice in any matter before the courts, including all proceedings, or in any pleading or process issuing from a court.	17. Chacun a le droit d'employer la langue officielle de son choix dans toutes les affaires dont sont saisis les tribunaux, y compris toute procédure, pour les plaidoiries et dans les actes de procédure qui en découlent.
21. Every court has the duty to ensure that any witness appearing before it can be heard in the official language of his or her choice and upon the request of one of the parties or the witness, the court has the duty to ensure that services of simultaneous translation or consecutive interpretation are available to the person who made the request.	21. Il incombe au tribunal de veiller à ce que tout témoin qui comparaît devant lui puisse être entendu dans la langue officielle de son choix et sur demande d'une partie ou du témoin, à ce que soit offert des services de traduction simultanée ou d'interprétation consécutive, le cas échéant.

Contrary to sections 27, 28, and 28.1, section 17 does not use the expression “the public”; instead, it uses the terms “chacun” in French and “every person” in English. The *Le Petit Robert* dictionary defines the expression “chacun” as meaning “toute personne,” which is the equivalent of the English expression “every person.” English and French are thus the official languages of the courts, and every person has the right to use the official language of his or her choice in matters before the courts. The expression “every person” is, in our view, broad enough to include not only the “public,” but also people such as the complainant, that is, public-sector employees who are called to testify in a legal proceeding.

In this case, the complainant as a witness who was filing an affidavit had the right to use the official language of his choice. The Department therefore had the obligation to find out from the outset about the complainant’s choice of language in order to determine in what language the affidavit should be written. Obviously that was not done. The Department indicated that it assumed that the client’s language would determine the language in which the affidavit should be written. We wish to point out that in a legal proceeding it is up to the witness to decide in which language he or she wants to testify. If the witness’s official language is different from the one chosen by the client of the institution, the institution is obligated to provide the client, as the case may be, with a translation of the testimony, but it does not require a witness to testify in that language if he or she has chosen the other official language.

Conclusion and recommendations

Based on this investigation, the Office of the Commissioner concludes that the complaint is partially founded. The complainant's rights under section 17 of the OLA were not respected. The Department did not inquire ahead of time about the language the complainant wanted to proceed in to write his affidavit, and in so doing violated his right to use the official language of his choice in a legal proceeding.

To prevent such a situation from happening again, the Office of the Commissioner makes the following recommendations:

THAT by February 28, 2018, the institution inform its employees of every person's right to be able to use the official language of their choice in all matters before the courts and of the institution's obligation to inform those who may be called as witnesses, either orally or in writing, of this right;

THAT by March 31, 2018, the institution report to the Office of the Commissioner on the implementation of the above recommendation.

Pursuant to subsection 43(16) of the OLA, we respectfully submit this report to the Premier, to the Deputy Minister of Social Development, the Clerk of the Executive Council Office, and the complainant.

Pursuant to subsection 43(18) of the OLA, if a complainant is dissatisfied with the conclusions presented following this investigation, he or she may apply to the Court of Queen's Bench of New Brunswick for a remedy.

Katherine d'Entremont, M.P.A.
Commissioner of Official Languages for New Brunswick

Dated at Fredericton,
Province of New Brunswick,
January 3, 2018