



## *News Release*

### **NEWS RELEASE**

**For Immediate Release**

**February 11, 2016**

#### **N.S. Information and Privacy Commissioner releases investigation report about disclosure of former cabinet minister's personal information**

**HALIFAX** – In an investigation report released today, Catherine Tully, Nova Scotia's Information and Privacy Commissioner finds that the Office of the Premier was in violation of Nova Scotia's privacy law when the former Chief of Staff publicly disclosed personal information of a former cabinet minister. The report recommends changes that will strengthen and modernize the Office of the Premier's privacy controls.

The investigation focused on statements made by Kirby McVicar while acting as the Premier's Chief of Staff. Speaking to the media on November 23, 2015, Mr. McVicar disclosed personal information of former cabinet minister Andrew Younger without authorization under the *FOIPOP Act*. Mr. McVicar was attempting to explain his comments captured on a secret audio recording.

The Commissioner finds that the intense scrutiny around the comments created a public interest in the Premier's Office providing an explanation for Mr. McVicar's comments on the recording.

"I am satisfied that there was a public interest at stake," Tully said. "However, the actual personal information disclosed was highly sensitive personal health information. In my view, providing specific medical diagnoses was more information than was strictly necessary in the circumstances. As a result I find that the disclosure of the personal information was not authorized under *FOIPOP*."

"Personal health information, particularly mental health information, is among the most sensitive personal information," said Tully. "As a society our privacy laws reflect our understanding of the sensitivity of this type of information. There are strict rules governing its disclosure by public bodies. It will be a rare circumstance when disclosure of sensitive medical information to the media is authorized under our privacy laws."

The investigation revealed shortcomings in the Office of the Premier's privacy controls. The evidence established that political staff in the Office of the Premier had received no privacy training, had not read the privacy policy and were unaware of who the privacy lead in the office

was. Tully concludes these shortcomings, combined with the public pressure to be accountable for the decisions of the office, were the cause of the breach.

Tully makes six recommendations in the report. Key among them was the appointment of a Chief Privacy Officer.

“Modern privacy controls begin with strong leadership. Appointing a Chief Privacy Officer who occupies an executive-level position provides that leadership,” said Tully. “Having a Chief Privacy Officer at a sufficiently influential level in an organization sends the message that privacy is important and is an essential consideration in all decisions involving personal information.”

During the investigation government officials advised that work is already underway to modernize and improve many aspects of the government’s privacy controls including many of the areas identified in this report.

What began as an error in judgement by one individual presents a compelling opportunity for the government to update its privacy management. This is especially important given the recent exponential growth in our abilities to collect, use, disclose and store personal information.

“Privacy won’t happen by accident: it needs strong executive leadership and clear policies,” said Tully. “Implementing the recommendations contained in this report will ensure that the government establishes the foundation for strong, modern privacy controls.”

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## **BACKGROUND**

**February 11, 2016**

### **About the Information and Privacy Commissioner for Nova Scotia**

The Information and Privacy Commissioner for Nova Scotia is also known as the Review Officer and the Privacy Review Officer and is appointed as the independent oversight authority under the *Freedom of Information and Protection of Privacy Act*, the *Privacy Review Officer Act*, the *Personal Health Information Act* and the *Municipal Government Act*.

### ***Freedom of Information and Protection of Privacy Act***

The *Freedom of Information and Protection of Privacy Act (FOIPOP)* applies to all “public bodies” as defined in *FOIPOP* s. 3(1)(j). The Office of the Premier is a public body subject to the *FOIPOP* access and privacy rules.

*FOIPOP* sets rules around the collection (s. 24(1)), use (s. 26) and disclosure (s. 27) of personal information that all public bodies must follow.

Section 24(3) says “The head of the public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.”

### **Jurisdiction to investigate**

Section 5(1)(b) of the *Privacy Review Officer Act* says “In addition to the Privacy Review Officer's duties and powers referred to in Section 6 with respect to reviews, the Privacy Review Officer may initiate an investigation of privacy compliance if there are reasonable grounds to believe that a person has contravened or is about to contravene the privacy provisions and the subject-matter of the review relates to the contravention.”

This power allows the Commissioner to launch an investigation without awaiting the completion of a public body’s privacy complaint process, and to proceed without a complaint from an individual complainant.

### ***Personal Health Information Act***

The *Personal Health Information Act (PHIA)* sets rules around the collection, use and disclosure by “custodians.” “Custodian” is defined in *PHIA* and consists of a limited group including mainly regulated health professionals. Since the disclosure in this case did not involve a custodian, *PHIA* does not apply.

### **Investigative process**

The Commissioner initiated an investigation into the disclosure of personal information by the former Chief of Staff to the Premier that occurred during media interviews conducted on November 23, 2015. Investigators from the Office of the Information and Privacy Commissioner interviewed 10 witnesses including Kirby McVicar and Andrew Younger.

As part of this investigation we reviewed the privacy policies, practices and procedures used by the Office of the Premier and the government generally. We obtained and reviewed copies of all of the privacy training materials used to train Office of the Premier staff, Deputy Ministers and Ministers since October, 2013. We also gathered documentary evidence in relation to the information provided by the witnesses. Finally, we conducted a review of all available media reports in relation to the disclosure of information about Andrew Younger and Katia Younger.

### **Application of *FOIPOP* to political staff**

The Office of the Premier has a wide-ranging mandate to provide policy, political, operational and communications advice to the head of government. It performs all these functions as a public body within the meaning of *FOIPOP*.

Some of the political staff in the Office of the Premier, such as the Chief of Staff, are employed under personal services contracts. *FOIPOP* defines an “employee” of a public body to include a person retained under an employment contract to perform services for the public body. As a result, the Premier’s Chief of Staff is an employee within the meaning of *FOIPOP* and his collection, use and disclosure of personal information is governed by the rules in *FOIPOP*.

### **Disclosure of personal information**

When a public body chooses to disclose personal information, it must have an authority to do so under *FOIPOP* s. 27 or *FOIPOP* s. 31. A summary of circumstances in which a public body is authorized to disclose personal information is included as an Appendix to the report.

*FOIPOP* s. 31 allows a public body to disclose information that is clearly in the public interest. The Commissioner found that an explanation for Kirby McVicar’s words on the secret recording was clearly in the public interest. However, she also found that Mr. McVicar’s explanation disclosed more than the minimum personal information necessary. As a result the Commissioner determined that the disclosure of personal health information was not authorized under *FOIPOP*.

### **What caused the unauthorized disclosure of personal information?**

The Commissioner determined that three main factors led to the breach:

- 1) Public pressure: the government was facing public and media pressure to account for Mr. McVicar’s comments on the tape;
- 2) Insufficient privacy training: the evidence establishes that political staff in the Office of the Premier had not received privacy training;
- 3) Inadequate media preparation: Mr. McVicar has not given a media interview in five years and received only 10 minutes of preparation with the Communications Director who had also not received any privacy training; therefore, the disclosure of personal information was not adequately addressed during Mr. McVicar’s preparation to speak to reporters.

## **What were the Commissioner's recommendations?**

### **Recommendation #1: Breach Notification**

That within 30 days of receipt of this report the Office of the Premier:

- provide this office with its response to the recommendations in this report, including timelines for implementation of each recommendation;
- publish its response to the recommendations in this report on its website.

### **Recommendation #2: Personal Services Contracts**

That the standard personal services contract template be updated to add provisions (privacy protection schedule) that:

- clearly state that information obtained by virtue of service to the government is subject to Nova Scotia's access and privacy laws,
- require contractors to complete privacy training within one month of signing of contract and,
- require contractors to sign confidentiality agreements that clearly reference *FOIPOP* access and privacy rules.

### **Recommendation #3: Non-Disclosure Agreements**

That the Employee Non-Disclosure Agreement template be amended to make specific reference to the requirement to protect personal information.

### **Recommendation #4: Privacy Policy**

That the Office of the Premier's privacy policy including the breach management protocol be updated to:

- more clearly identify the circumstances in which personal information is collected, used and disclosed by that Office,
- modernize any references to reasonable security standards, and
- update the privacy breach protocol to reflect modern breach management standards.

### **Recommendation #5: Privacy Training**

That basic privacy training:

- be made mandatory for all government employees and that attendance be monitored;
- be updated to include core elements such as how to identify personal information, understanding the basic privacy rules and how to recognize a potential privacy breach, and
- be periodically refreshed as a mandatory requirement that is monitored and enforced.

### **Recommendation #6: Chief Privacy Officer**

That the Office of the Premier and other government public bodies appoint an executive-level Chief Privacy Officer to provide strategic privacy leadership.

During the investigation government officials advised that work is already underway to modernize and improve many aspects of the government's privacy management program including many of the areas identified in this report.

In one month we will follow up with the Office of the Premier for an update on how it is implementing the recommendations in this report.

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