



ANNUAL REPORT

for the period

January 1, 2005 to December 31, 2005

**NOVA SCOTIA
FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY
REVIEW OFFICE**



**Nova Scotia Freedom of Information and Protection of Privacy
Review Office**

January 23, 2006

Speaker
The Legislative Assembly
Province of Nova Scotia

Sir:

In accordance with Section 33(7) of the **Nova Scotia Freedom of Information and Protection of Privacy Act**, I am pleased to present to you, and through you to the Members of the Legislative Assembly, the Annual Report of the Review Office for the period from January 1, 2005 to December 31, 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Darce Fardy'. The signature is written in a cursive, flowing style with large, connected letters.

Darce Fardy
Review Officer

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INTRODUCTION:

The over arching purpose of access to information legislation is to facilitate democracy. It does so in two related ways. It helps to ensure first that citizens have the information required to participate meaningfully in the democratic process, and secondly that politicians and bureaucrats remain accountable to the citizenry. Justice G.V. LaForest [*Dagg. V. Canada (Minister of Finance) (1997) 2S.C.R. 403 paras 61/63*].

I could cite dozens of noble sentiments expressed to promote the cause of open and accountable government. On the ground, however, at the practical level, government departments, municipalities, hospitals, universities, school boards and other public bodies can sometimes find it difficult to embrace the principles found in our *FOIPOP Act*. There are times when a busy public servant facing more problems than solutions may find a *FOIPOP* request a major distraction. All the more important to have a vigorous independent well-resourced review process. Unfortunately in this province the Review Office does not have the resources required to provide the services the legislation requires.

One of the responsibilities of the Review Officer, and of all advocates of open government, is to convince politicians and public servants that transparency leads to good government. Citizens are more likely to get involved in the political process, and more likely to vote, when they know the reasons behind decisions. There is no lack of evidence of the public apathy towards the political process and public cynicism towards governments. It is in all our interests to re-engage our citizens.

I am pleased to report there are many encouraging signs from government departments and agencies and other public bodies. More than a few of those assigned to handle *FOIPOP* requests in those public bodies have become access advocates for their departments and agencies. I have noted a marked change in the eleven years that I have provided independent oversight for the *FOIPOP Act*. This change has sometimes come about despite a lack of demonstrated support from senior officials and cabinet ministers. That being said I noted in my last annual report that the Deputy Minister of Justice, the ministry which administers *FOIPOP*, had spoken out publicly and clearly on several occasions of the importance of transparency in government.

REVIEW OFFICER'S PUBLIC ROLE:

A view prevails among some in government that a Review Officer should work “under the radar,” reviewing decisions, making recommendations and providing opinions out of sight of the public eye. They believe the Review Office would be more effective if this were so. With respect I do not agree. “Going public” is unavoidable. An Ombudsman, as an example, may quietly investigate mal-administrative complaints about government. The Review Office, on the other hand, reviews decisions, which are public, and the result of the review should also be public. And, of course, citizens have the right to know what the Review Officer does and how he does it. In that way they can learn what they are paying for through their taxes. It would, I might add, appear passing strange if the Review Officer, whose responsibility it is to promote openness and transparency in government decision making, were to review government decisions behind closed doors. The Review Officer's reports, like public body decisions, must be open to public scrutiny. The Review Officer must not only be independent and fair, he must also be seen to be independent and fair.

An annual report to the legislature does not, alone, meet the requirement for public accountability.

I am convinced that the interests of the government and the other public bodies, as well as the public, are best served by an aggressive, public review process. That being said, the review office has had considerable success settling differences and resolving issues before they get to review. Mediation is, of necessity, done privately. (See our mediator's report which follows).

While the *FOIPOP Act* includes no requirement that the Review Office be proactive, though it should, the Review Officer must be seen as a public advocate for transparency in government and should speak out, even outside the review process, when it is felt to be necessary.

To demonstrate this Office's openness, setting up a website was a priority. Visitors to our site can search the Review Officer's reports and public statements and find their way to *FOIPOP* related Court cases, and to the decisions of other provincial and federal Information and Privacy Commissioners.

The Office also makes the Review Officer's reports and comments available on list serve. Anyone wishing to subscribe to the Review Office's distribution list can do so by sending a blank e-mail to subscribe@lists.gov.ns.ca.

The Review Office is doing what it can, given its resources, to encourage citizens to get engaged in keeping governments and other public bodies open and accountable. Unfortunately not enough citizens take advantage of, or are even aware of, their rights of access to information. A lot more public education is needed.

I have often expressed my regret that the media do not play a stronger role in this process. Few journalists use the *Act* and support for it in editorials and newspaper columns is rare. The *FOIPOP Act* should be seen as one of the tools for journalists to use to keep the public informed about the activities of our provincial and municipal governments, our school boards, our hospitals and our universities.

The Budget:

The Review Office operates with an inadequate budget and has done so now for a decade. Governments are badgered with demands for more money but it's worth noting that in Manitoba, a province of comparable population, ten people are employed to oversee the information and privacy legislation. Nova Scotia has three people.

From the Executive Branch to the Legislative Branch:

In all of our annual reports I have strongly recommended that the Review Office be made an Office of the legislature. This is the only province or territory in Canada where the Office charged with providing independent oversight of the access and privacy Act is administered by a government department and not the legislature. It is a true anomaly and is untenable. The independent Review Officer should not be accountable to a government department whose decisions she or he is obliged to question. The only avenue for accountability is through the legislature, which can question the Office's activities and set its budget.

As I noted earlier, a review officer must not only be independent, he must be seen to be independent. The optics can be negative when a department subject to this *Act* provides the budget for the review process.

The Nova Scotia Supreme Court has drawn attention to another anomaly in the *FOIPOP* process whereby a public body administrator who makes decisions on applications for access can be the same person authorized to overrule recommendations from the Review Officer. [*Keating v. Nova Scotia (Attorney General)* (2001) SH number 155707].

While that process appears to present the Review Officer with an insurmountable obstacle, I am bound to say that, in many cases, the system works. More and more public bodies are prepared to provide thorough submissions to support their decisions and to re-examine those decisions and sometimes change them in line with the Review Officer's recommendations.

I am not among those who believe that the review process is of little value because the Review Officer can only recommend that public bodies change their decisions. There are arguments to be made in favour of both models of oversight used by provincial and territorial Freedom of Information and Protection of Privacy Commissioners. Some have the powers to give "orders" and others to make recommendations only. In the absence of evidence that public bodies are ignoring the Review Officer's recommendations I continue to support this model.

PRIVACY

Nova Scotia remains the only jurisdiction in the country whose citizens have no recourse to an independent review of privacy complaints made against public bodies. Sections 24 to 31 of *FOIPOP* lay down the rules for the collection, use and disclosure of personal information but the *Act* allows for no independent review of complaints made under those sections. It's a baffling omission in one of the best *FOIPOP Acts* in the country. This is even more baffling given that Nova Scotians have an avenue to file privacy complaints against federal government departments and agencies and even as consumers against the private sector in this province but not against provincial public bodies.

This Office expressed regret when our recommendations to improve privacy protection made to a Review Committee appointed to re-examine the legislation came to naught. This, despite the fact that the committee was expressly tasked to look at the effectiveness of the privacy protection components of *FOIPOP*.

Despite this lack of legislated mandate the Review Officer has investigated more than a dozen privacy complaints in 2005, and has responded to dozens of privacy inquiries. Most complaints are resolved with a few phone calls while others have resulted in reports or letters. However, without the mandate to investigate, the Review Officer depends on the willing cooperation of public bodies. While I am pleased to report that all government departments and most other public bodies have cooperated in privacy complaint investigations, some haven't and the *Act* does not require them to. Nova Scotians will not enjoy the same privacy rights as other Canadians unless our *Act* is amended to give the Review Officer the necessary powers to investigate and report on privacy complaints.

Questions have been raised about whether one Review Officer should oversee both the access and privacy sections of the *FOIPOP Act* and handle both access and privacy appeals. When access and privacy legislation was being introduced in the British Columbia legislature in 1992, an *Act* quite similar to Nova Scotia's, the B.C. Attorney General at the time said

... I think it's important to recognize the significant link between the two parts: freedom of information and protection of privacy. It's important because it's essential to balance the competing rights: the public's right to know and the individual's right to have his or her privacy safeguarded.

All provincial and territorial jurisdictions in the country, with the exception of Nova Scotia, combine the oversight of those two rights. Only at the federal level is it split between two commissioners.

Over the years I have made many recommendations for changes to the *FOIPOP Act*. They are available in my annual reports which are also accessible through our website. (www.foipop.ns.ca) I have had a remarkable lack of success having those recommendations adopted. It is not easy for this Office to attract the attention of our legislators. In this annual report I will repeat some of my recommendations to which I attach some urgency.

Recommendations for changes to the *FOIPOP Act*: (Those not repeated from earlier annual reports are italicized.)

- Provide the Review Officer with the power to investigate and report on privacy complaints.
- Reduce to the fees for using the act to the level existing before 2002. *While I agree some costs can be attached to searching and copying records, in my view no case can be made for having the highest fees in the country for applications and requests for reviews. Applicants have offered their comments that they already pay for a transparent government through their taxes and should not be charged again. There is little evidence of the kind of frivolous application that was said to be the reason for hiking the fees.*
- Make the Review Office a Commission reporting to the Legislature. *This will bring the office in line with similar offices in all other provinces and territories, and strengthen its independence.*
- Provide the Review Office with the resources to allow for more public education on citizens' rights under *FOIPOP*.

TRIBUTE TO STAFF:

The Review Office has a staff of two who work hard in support of the Review Officer's mandated responsibilities. The Mediator, Susan Woolway and Case Review Analyst, Wendy Johnson, have approached their work with enthusiasm, common sense and a dedication to the principles of the *FOIPOP Act*. They have been willing to take on additional chores, outside of their main responsibilities and our website demonstrates that.

Susan Woolway has moved on to assume another role.

I know Susan will be missed by this office and many *FOIPOP* Administrators for her honesty and integrity in mediating differences between public bodies and applicants. I believe the Review Officer's reports over the past five or six years reflect the influence Susan has had at this Office.

ACTIVITIES OF THE REVIEW OFFICER IN 2005

In January the Review Officer attended the annual meeting of Privacy Commissioners in Ottawa.

- In February he attended a meeting in Toronto as a member of a committee looking at privacy and access challenges in Health Research.
- In February the Review Officer accepted an invitation to appear on a panel at the Annual Meeting of International Information Commissioners in Cancun, Mexico. Other panelists represented Peru, Mexico, and the United States. More than 50 countries sent representatives to the conference, including countries new to open government legislation: Slovenia, Latvia and Estonia.
- In March, with Mediator Susan Woolway, the Review Officer provided an information session for the University of Cape Breton administration and the Cape Breton Archivists.
- In May, the Review Officer accepted an invitation to speak to the U.S. National Freedom of Information Coalition in Santa Fe, New Mexico.
- In May he spoke to a legal aid luncheon in Halifax to promote the act and answer questions.
- In June, the Review Officer and the Mediator attended the annual meeting of Information and Privacy Commissioners in Ottawa.
- In September, the Review Officer and Mediator traveled to Bible Hill to participate in *FOIPOP* training for police officers.
- In September, the Review Officer traveled to New Minas to speak to the inaugural meeting of the Association of Nova Scotia Villages
- In October, the Review Officer attended a one-day meeting with the federal Information and Privacy Commissioners in Ottawa.
- In October, the Review Officer hosted a meeting in Halifax of the Atlantic Information and Privacy Commissioners to discuss, among other things, encouraging the provincial governments to find ways to bring the Atlantic Lotto Corporation under freedom of information and protection of privacy legislation.
- In December the Review Officer, with other Canadian commissioners, attended the annual meeting of the Council on Government Ethics and Law in Boston as a panelist on freedom of information.

MEDIATION SUMMARIES 2005

FI-05-23 Reasonable Search for Records

The applicant asked the Department of Environment and Labour (DEL) for all records relating to a possible oil spill on his property 15 years ago, before the Applicant acquired the property. He also requested copies of any records relating to a more recent oil spill on the same property.

DEL carried out a search for the records. They did not find any records relating to the alleged oil spill of 15 years ago but did find some records relevant to the second oil spill. DEL made a decision to disclose the records with some s.20 severances.

The applicant appealed the decision to the Review Office. He disputed DEL's claim that it could not find any records relevant to the earlier oil spill and questioned whether they had done a thorough search. As far as the s. 20 severances were concerned he argued that he required the personal information for his investigation into whom or what was responsible for the second oil spill on his property.

The mediator and the *FOIPOP* Administrator discussed at length how and where DEL conducted its search for records. Inquiries were made as to what the reasons might be for the absence of records and the Department was asked to conduct a second search.

The Department conducted a second search and on its own initiative expanded the search to include records on

properties adjacent to the subject property which might provide evidence of the earlier oil spill. The Department also conducted searches at its branch offices in the area.

The Department set out in a letter which was given to the applicant the parameters of the search and explaining why it was possible an oil spill may have occurred but DEL would have no records – at the time of the alleged spill there was little obligation to advise DEL of such contamination.

The applicant accepted the Department's explanation on the search issue and while the file went on to the Review Officer for a report on the s.20 severances, the issue of reasonable search was settled.

FI-05-26 Sensitive Solution

The Cape Breton Regional Police (CBRP) were instrumental in crafting a solution to an emotionally charged review request. The Review Office received a request to review a decision of the CBRP refusing family members access to records containing information pertinent to the last hours of their son's life. Their son had committed suicide.

The CBRP refused to disclose the records because they contained the personal information of the deceased and because some of the information had already been disclosed to the widow. The difficulty for the family was that the widow was unavailable to share that information with them.

The mediator wrote to the Police indicating that she agreed with their decision but given the circumstances, was there anything that could be done to satisfy the questions the family had arising from their son's death.

The Police then offered to meet with family members and to verbally share some of the details in the police report and to answer what questions they could.

The family accepted this offer and the matter settled without the need for a formal review report which undoubtedly would have agreed with the decision of the Police not to disclose the records.

FI-04-61M Solicitor/Client Privilege

The applicant represented a community group which had concerns about whether a radio communication facility was subject to municipal land use regulations. The issue involved the legality of an access road being built through the community by the radio communications company.

The group had taken their concerns to Halifax Regional Municipality City Council. They had been told that council had received legal advice and the radio communication facility was not subject to the land use regulations and could proceed to build the access road where they pleased.

The applicant requested a copy of this legal advice. HRM made a decision refusing to disclose the letter containing the legal advice citing s.16 solicitor/client privilege. After mediation discussions HRM agreed to modify its decision and sever the letter to disclose general identifying information such as the recipient of the letter, the author of the letter and the date of the letter.

The applicant understood that this information was all he would likely be entitled to since solicitor client privilege would cover the actual content of the letter. However, the applicant was satisfied to receive the general identifying information since it allowed the community group to put the issue into a certain time frame. And HRM was satisfied because the actual advice was not disclosed.

FI-05-48 Media Concern

The Department of Agriculture and Fisheries received an application for copies of certain records relating to a third party marketing board. Agriculture and Fisheries consulted with the third party on the records which contained their third party information and despite the objections of the third party, made a decision to disclose the material.

The third party appealed the decision to the Review Office. Discussions with the third party revealed that while the third party wasn't very happy with the records being disclosed, what they really wanted was to have copies of all the material the applicant was receiving, not just a copy of their third party records. As a board, they wanted to

be prepared to answer any possible media questions on the issue discussed in the records should the applicant happen to be a member of the media.

Further discussions with the Department resulted in an agreement that for the cost of the photocopying the Department would disclose to the third party the same material they were disclosing to the applicant, without the necessity of a *FOIPOP* request.

SUMMARIES OF SELECTED WRITTEN REVIEWS

FI-04-67 (Education on Improvement in Medical Care or Practice)

The Applicant asked Capital Health for access to records showing a breakdown of incidents reported and the reasons for them with respect to the Transitional Care Unit 4A and 4B for 2003 and 2004 at the Queen Elizabeth II Health Science Centre. Capital Health released some records but withheld the incident reports under Section 19D (1) of the *Freedom of Information and Protection of Privacy Act*.

Certain hospital records

19D (1) The head of a local public body that is a hospital may refuse to disclose to an applicant a record of any report, statement, memorandum, recommendation, document or information that is used in the course of, or arising out of, any study, research or program carried on by or for the local public body or any committee of the local public body for the purpose of education or improvement in medical care or practice.

According to Capital Health the information is used for the purpose of quality assurance. The incidents are studied in an attempt to minimize them. Capital Health also believed that failure to protect even summary information regarding internal investigations such as occurrence reporting, will discourage 'free and frank' discussions among staff about events that occur on various units. According to Capital Health "such reporting is essential for a quality management/risk management program within a healthcare institution."

The Review Officer examined the records at issue.

In the Review Officer's opinion a reasonable person would not conclude that an incidence report, which did not contain details beyond a brief description of the occurrences, was used for the purpose of education or improvement in medical care or practice. From its submission, it is clear that Capital Health's reason for denying the record is that staff will no longer report on "harmful situations" if this occurrence report is disclosed. However, Capital Health's policy on the reporting of unusual occurrences reminds all staff that they are responsible for documenting and reporting unusual occurrences. The Review Officer concluded that no staff member can be excused from this responsibility and cannot be free to ignore it without consequence. The Review Officer was not satisfied that section 19D(1) applied to these incident reports.

Capital Health accepted the recommendations of the Review Officer.

FI-05-09 (Hospital Records)

An Applicant asked for records regarding medical services provided to an American patient. The Capital District Health Authority believed that Section 71(1) of the *Hospitals Act* in operation with Section 4(2) of *FOIPOP* excluded the records from disclosure under the *Freedom of Information and Protection of Privacy Act*. Thus access to the information was refused.

Section 71(1) of the *Hospitals Act* reads:

The records and particulars of a hospital concerning a person or patient in the hospital or a person or patient formerly in the hospital shall be confidential and shall not be made available to any person or agency except with the consent or authorization of the person or patient concerned.

Section 4A(2)(g) of *FOIPOP* is clear that Section 71 of the *Hospitals Act* "prevails" over the *FOIPOP Act*.

The applicant appealed the decision to the Review Officer. The Review Officer examined the records and concluded the exemptions were properly cited.

However, the Review Officer reasoned that s.71(1) of the *Hospitals Act* is too broad an exemption as it applies to any “person in the hospital” and makes no specific reference to “health records.” Thus, records falling under s.71(1) may not be restricted to patients’ records.

In this review report the Review Officer recommended that the legislature adopt new wording for section 71(1) of the *Hospitals Act*.

FI-05-13 (Duty to Assist)

An Applicant asked the Department of Environment and Labour for an assessment report on a piece of property owned by Nova Scotia Power (NSP) located on Main Street in Wolfville. After charging the Applicant \$225 for processing the application, the Department failed to locate the assessment report, although it confirmed that at one time it had custody of the record. The Department said the assessment report may have been forwarded to NSP without a copy being kept in the department’s records. It did not approach NSP for a copy. The Applicant asked the Review Officer to investigate whether the Department conducted an adequate search to locate the record.

The Review Officer reviewed the Department’s search procedure and concluded that since the Department should have had a copy of the assessment report, it could have asked NSP to return a copy. Therefore, the Review Officer concluded it appeared that the Department did not make “every reasonable effort” to assist the Applicant. Thus, the requirements of Section 7(1)(a) were not met.

Duty of head of public body

7 (1) Where a request is made pursuant to this *Act* for access to a record, the head of the public body to which the request is made shall

- (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.

The Review Officer recommended that the Department ask NSP if it has a copy of the assessment report and, if it does, to request a copy of it for the Applicant; and to return the processing fee paid by the Applicant.

Nova Scotia Environment and Labour did not accept the Review Officer’s recommendations.

FI-05-20 (Intergovernmental relations with First Nations)

An Applicant had asked the Office of Aboriginal Affairs (OAA) for all video lottery terminal and gaming agreements with the First Nations bands across Nova Scotia. The OAA refused the Applicant’s request after discussions with representatives of the First Nations. Among other exemptions, the OAA cited Section 12(1)(a)(iii).

Intergovernmental affairs

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

- (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:
 - (iii) an aboriginal government.

The Applicant asked the Review Officer to recommend that the OAA reverse its decision not to disclose the gaming agreements.

After examining the records, the Review Officer noted that, unlike most other government agreements, the gaming agreements with First Nations made no reference to being subject to the *FOIPOP Act*.

The Review Officer concluded that disclosing the agreements at this time could “reasonably be expected” to harm relations between the Government and First Nations. The Review Officer has accepted OAA’s view that there is a need for special sensitivity when a public body is processing an application for information regarding negotiations with First Nations. As such, the Review Officer concluded that in this instance the records should not be disclosed.

The Review Officer recommended that in the future, the OAA include in its agreements with First Nations, a notification that such agreements are subject to the *Freedom of Information and Protection of Privacy Act*.

2005 ANNUAL REPORT COURT CASES

Shannex Health Care Management Inc. V. Nova Scotia (Attorney General), 2005 NSCA 52

This was an appeal from a decision of Justice Edwards of the Nova Scotia Supreme Court reported in our 2004 Annual Report.

The appellant is an operator of several private, licensed, nursing homes. In 2003 the Department of Health received a request under the *Act* for access to financial information relevant to the determination of per diem rates for nursing homes licensed by the Province. The residents of licensed nursing homes consist of “private pay” persons and those who receive a government subsidy to offset the nursing home costs.

The Review Officer and Justice Edwards both decided that this financial information should be disclosed since there was insufficient evidence to exempt the records under s. 21.

Shannex, the operator of the nursing homes, appealed to the Nova Scotia Court of Appeal:

The Court of Appeal dismissed the appeal. The Court found that the correct standard of proof – *was there a reasonable expectation of harm to the third party should the information be disclosed* – had been applied and that the evidence presented did not show a reasonable expectation of harm.

The Appeal Court decided the references made by Justice Edwards for a need for “detailed and convincing” evidence were simply describing the quality and cogency of the evidence required to establish a reasonable expectation of harm.

Note: In Nova Scotia we now have two Court of Appeal decisions interpreting s. 21 of the *FOIPOP Act*, Shannex and Atlantic Highways.

Doctors Nova Scotia v. NS Department of Health et al, 2005 NSSC 244

The appellant, Doctors Nova Scotia, is a body representing all doctors in the province. It was formerly known as the Medical Society of Nova Scotia.

Doctors Nova Scotia appealed a decision made by the Department of Health to disclose a list containing the names of all doctors in Nova Scotia who receive funds from the Department for services provided by them to citizens of Nova Scotia under the MSI plan for the Province. That list covers the years 2002-2003 and 2003-2004 and sets out the total amount paid to each doctor during these periods of time.

The Department of Health on receipt of the *FOIPOP* request made a decision to release the information. It provided notice of its decision to Doctors Nova Scotia and they appealed the decision to the Review Officer.

The Review Officer reviewed the material and received representations from the parties. He issued a report agreeing with the Department that while the information was personal information, it was covered by s. 20(4)(f) of the *FOIPOP Act*. Section 20(4)(f) provides that this type of personal information should be disclosed if “the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body.”

In his decision Justice MacLellan quoted the Review Officer:

In my opinion what doctors are paid under MSI billings, is for a service to the Department of Health in accordance with a contract agreed to by the parties. I do not accept the argument that because the service is provided to individual patients it, therefore, is not a service to the government. The doctors have entered into a contract with the government. Monies paid to them by government will provide medical service to residents of Nova Scotia.

Justice MacLellan cited O'Connor v. Nova Scotia (2001) N.S.J. No.360 (C.A.) on the purpose of the *Act* and on the positive obligation the *Act* imposes on public bodies to *accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.*

The Court went on to agree that the information sought was personal information and that it did come under s. 20(4)(f) so that its disclosure was not an unreasonable invasion of the doctors' privacy.

The Court interpreted the contract as between the Department of Health and Doctors Nova Scotia and not between doctor and patient. The Court said the purpose of the contract was *to clearly set out the rights of doctors to bill the Province provided they provide the service to a resident of Nova Scotia who through their taxes provide the funds to pay the doctors.*

The Court rejected the appellant's argument that because the information was not released in the past that somehow that should be a significant factor at this point. The Court approved of the reply by counsel for the Department who pointed out that *"times are changing"* and that *"the Province of Nova Scotia clearly accepts its obligations to comply with the legislation passed by the Legislative Assembly"*.

Note: Doctors Nova Scotia has appealed.

Gaetz v. AGNS, 2005 NSSC 215

The appellant asked the Department of Justice for a copy of his records in the custody of Maintenance Enforcement Program, M.E.P., and for any records the Department might have with respect to his dealings with the program.

The Department disclosed some records but refused others under s.14 and s.16 and denied disclosure of the file with M.E.P. in full arguing that those records were not subject to the *Act* pursuant to s. 32 of the Maintenance Enforcement Act and s.4A(2)(j) of the FOIPOP Act.

The Review Officer agreed with the Department on the s.14 severances (advice to public body) and with the operation of s.32 of the Maintenance Enforcement Act to exclude certain program records from the operation of the FOIPOP Act.

However, the Review Officer disagreed with the Department's interpretation of the operation of s.16 (solicitor/client privilege) and recommended that general identifying information in solicitor client records which did not reveal information on the nature of the communication between the parties should be disclosed.

The Department refused to follow the Review Officer's recommendation on s. 16. The appellant was not satisfied with the Review Officer's recommendations on the other sections or with the Department's decision on s.16 recommendation and appealed.

The Court accepted the recommendation of the Review Officer with respect to the severing of the records under s.14 and with his decision on the exclusion of the records from the M.E.P. file.

The interesting part of this decision is the discussion of solicitor/client privilege. The Department argued that once a record is found to be of a type protected by solicitor/client privilege, then no severances may be made and, in effect, s.5(2) of the FOIPOP Act which gives the public a right of access to material which can be properly severed from the protected record does not apply to solicitor/client records.

The Department presented the Court with a traditional line of cases on solicitor/client privilege while the Review Officer had relied on a recent decision by the Federal Court of Appeal which dealt with solicitor/client privilege specifically in the access to information context. That case is Blank v. Canada (Minister of the Environment), 2001 F.C.A. 374. It said that solicitor/client records are subject to the severing provision, at least under the Federal Access to Information Act, and that general identifying information should be disclosed as long as it would not reveal any communication or information passing between solicitor and client.

(This approach by the Federal Court of Appeal to the handling of solicitor/client records under an access to information regime has been confirmed by them a second time, in a 2004 case involving the same applicant, Blank v. Canada (Minister of Justice), 2004 FCA 287.)

Justice Hilroy S. Nathanson of the Nova Scotia Supreme Court acknowledged the Federal Court of Appeal decision and observed that while it may be inconsistent with the Supreme Court of Canada's 1982 decision on solicitor/client privilege in Descoteaux v. Mierzwinski, (1982) 1S.C.R. 860 (S.C.C.) 860, the Supreme Court did not explicitly hold that identifying information is part of the privileged communication between the solicitor and client.

Justice Nathanson referenced the decision of the Supreme Court of Canada in Maranda v. Richer (2003) 3 S.C.R. which dealt with solicitor/client privilege as it applies to lawyers' accounts. In that case the Court decided there was a presumption that information contained in lawyers' bills of account is protected by solicitor/client privilege. However, the Supreme Court of Canada was clear that it is a rebuttable presumption and if the requestor can show that it is neutral information then the information can be disclosed.

The Ontario Court of Appeal followed the Maranda approach in Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), 2005 CanLII 6045 (ON C.A.) which also dealt with lawyers' accounts but this time in the context of an access to information request. The Ontario Court of Appeal agreed with the Ontario Information and Privacy Commissioner and decided a document which revealed specific amounts paid and the dates of those payments, but did not reveal amounts paid to specific lawyers should be disclosed.

In the present case Justice Nathanson found that the identifying information was privileged without deciding whether solicitor/client records would be subject to severing as are all other records which fall under the FOIPOP Act.

The issue of whether solicitor/client records should have a special status under the Nova Scotia FOIPOP Act was again raised by the Department of Justice in MacDonald v. AGNS, 2005 NSSC 243, a September 1 decision of Justice Douglas L. MacLellan. Despite being urged by the Department of Justice to rule on the matter, Justice MacLellan declined and said:

In light of the fact here that Mr. MacDonald is unrepresented and has not advanced significant legal argument in opposition to the position of the department, I do not feel it is appropriate to rule that severance should never be allowed in circumstances where the Court finds that a document is covered by solicitor-and-client privilege. I believe that issue should only be finally resolved after appropriate legal argument from both sides of the issue.

Unfortunately the FOIPOP Act does not make provision for the Review Officer to appear as a party before the Court to be able to present the other side as it were. Hopefully, at some point in the future, an appellant will be in a position to properly advance this argument so that the Court may benefit from a balanced playing field. Then it can rule on whether and why in Nova Scotia records protected by solicitor/client privilege should also be accorded a unique exception to the severing which applies to all other public body records covered by the Act.

As counsel for the government observed in the Doctors Nova Scotia case, "times are changing".

FINANCIAL INFORMATION DISCLOSURE:

TRAVEL COSTS:

The Review Officer:

• Meeting of Privacy Commissioners meeting in Ottawa Jan. 26-28:	
Air fare	\$275.05
Hotel	\$292.10
Meals & other expenses	\$271.70
• International Information Commissioners meeting in Can Cun, Mexico. February 20/24, as a guest:	
Incidental expenses only	\$162.82
• FOIPOP Training in Sydney. March 22/23	
Air Fare	\$446.45
Hotel	\$111.55
Meals & other expenses	\$306.13
• Meeting of U.S. Coalition for Open Government in Santa Fe, N.M. May 12-15 as a guest:	
Incidental expenses only	\$ 86.00
• Annual Meeting - Information & Privacy Commissioners, Ottawa June 7-10:	
Air fare	\$359.00
Hotel	\$635.62
Registration	\$175.00
Meals & other expenses	\$215.95
• FOIPOP Information Session, Bible Hill September 15:	
Kms claimed	\$ 84.32
• Luncheon speaker - Association of Nova Scotia Villages, October 29:	
Kms claimed	\$ 71.06
• Separate meetings, Privacy and Information Commissions, October 14:	
Air fare	\$452.30
Meals & other expenses	\$ 69.48
• Annual meeting - Council on Government Ethics & Law, Boston December 4-7	
Air fare	\$403.13
Registration	\$495.00

The annual budget for the Review Office is \$239,000.00

Staff salaries can be found through the Government's website.

The Review Officer's compensation - \$150.00 a day.

STATISTICS:**TABLE 1: REVIEWS OPENED BETWEEN JANUARY 1, 2005 AND DECEMBER 31, 2005**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Provincial	54	86	102	122	112	111	136	99	53	60	72
Municipal	0	0	0	0	4	14	18	14	14	16	13
Total	54	86	102	122	116	125	154	113	67	76	85

NOTE: Local public bodies such as hospitals, universities and school boards were not subject to the Act before 2001 and municipal bodies were not subject to the Act before 1999.

TABLE 2: 2005 REVIEWS BY TYPE OF INFORMATION REQUESTED

	General	Personal	Personal/General	Correction
Provincial	46	19	7	0
Municipal	6	6	0	1

TABLE 3: 2005 REVIEWS OPENED BY APPLICANT GROUP

Media	General Public	Political	Interest Groups	Organizations	Other Public Body	Total
7	52	5	0	21	0	85

TABLE 4: RESOLUTION OF FILES CLOSED IN 2005 (NOT NECESSARILY OPENED IN 2005)

Resolved by Review Report	Resolved through Mediation	Resolved through Partial Mediation and by Review Report	Withdrawn or Abandoned	Screened Out
34	31	6	3	3

NOTE: The Review Office closed 77 files in 2005. 13 files opened in 2004 were resolved in 2005 and included in the total. (15 files opened in 2005 have been carried over into 2006.)

TABLE 5: 2004 CONCLUSIONS OF THE REVIEW OFFICER WHERE A REPORT WAS ISSUED

Agree with Public Body	Agree in-part with Public Body	Disagree with Public Body
20	9	5

TABLE 6: 2005 PUBLIC BODY RESPONSES TO THE REVIEW OFFICER'S RECOMMENDATIONS

Recommendations Accepted	Partial Acceptance	Recommendations Rejected	Response Outstanding
29	2	2	1

TABLE 7: 2005 PUBLIC BODY APPLICATIONS AND REVIEWS

<i>Provincial Act - Government Departments/Agencies/Boards and Commissions</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Aboriginal Affairs	1	1
Acadian Affairs	0	0
Agriculture & Fisheries	14	1
Archives & Records Management	0	0
Communications Nova Scotia	4	0
Community Services	156	6
Department of Energy	2	0
Economic Development	14	1
Education	34	1
Emergency Measures Organization	0	0
Environment & Labour (Includes Alcohol and Gaming Authority, Fire Marshal, Occupational Health and Safety)	317	13
Executive Council	1	0
Finance	8	0
Halifax-Dartmouth Bridge Commission	0	0
Health	59	3
Human Rights Commission	6	0
Immigration	0	2 *** see below
InNOVACorp	1	0
Intergovernmental Affairs	1	0
Justice	41	5
Natural Resources	12	3
Nova Scotia Business Inc.	8	0
Nova Scotia Gaming Corporation	NR	0
Nova Scotia Legal Aid	1	0
Nova Scotia Community College	NR	0
Nova Scotia Film Development Corporation	0	0
Nova Scotia Insurance Review Board	1	0
Nova Scotia Liquor Corporation	NR	1
Nova Scotia Public Services LTD Plan	3	3
Office of Health Promotion	4	1
Police Commission	0	0
Premier's Office	3	0
Public Service Commission	5	0
Public Prosecution Service	21	3
Securities Commission	0	0
Service Nova Scotia & Municipal Relations	12	0
Sport & Recreation Commission	0	0
Tourism, Culture and Heritage	7	1

PUBLIC BODY	APPLICATIONS	REVIEWS
Trade Centre Ltd.	0	0
Transportation & Public Works	23	3
Treasury & Policy Board	5	0
Utility & Review Board	0	0
Waterfront Development	0	0
Workers' Compensation Board	7	1
Workers' Compensation Appeals Tribunal	0	0
<i>Provincial Act - Universities/School Boards</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Acadia University	8	2
Annapolis Valley Regional School Board	1	0
Atlantic School of Theology	0	0
Cape Breton-Victoria Regional School Board	3	1
Chignecto-Central Regional School Board	2	1
Conseil Scolaire Acadien Provincial	1	1
Dalhousie University	4	0
Halifax Regional School Board	8	4
Mount Saint Vincent University	5	0
Nova Scotia Agricultural College	0	0
Nova Scotia College of Art & Design	0	0
Saint Mary's University	2	0
South Shore District School Board	8	2
St. Francis Xavier University	2	0
Strait Regional School Board	1	1
Tri-County School Board	2	2
Universite Sainte-Anne	NR	1
University College of Cape Breton	5	0
University of King's College	0	0
<i>Provincial Act - District Health Authorities</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Annapolis Valley District Health Authority	NR	0
Cape Breton District Health Authority	1	1
Capital District Health Authority	16	4
Colchester East Hants Health Authority	0	0
Cumberland Health Authority	0	0
Guysborough Antigonish Strait Health Authority	0	0
IWK Health Centre	1	0
Pictou County District Health Authority	NR	0
South Shore District Health Authority	0	0
South West Health	0	0

<i>Municipal Act - Commissions/Municipalities/Towns</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Cape Breton Regional Municipality	4	0
Digby Area Recreation Commission	0	0
Digby Water Commission	0	0
Halifax Public Libraries	0	0
Halifax Regional Municipality	39	3
Halifax Regional Water Commission	0	0
Lunenburg/Queens Regional Development Agency	NR	0
Municipality of the County of Annapolis	2	0
Municipality of the County of Antigonish	0	0
Municipality of the District of Argyle	0	0
Municipality of the District of Barrington	0	0
Municipality of the District of Chester	0	0
Municipality of the County of Inverness	1	0
Municipality of the County of Kings	0	0
Municipality of the County of Pictou	0	0
Municipality of the County of Richmond	3	2
Municipality of the County of Victoria	0	0
Municipality of the District of Clare	NR	0
Municipality of the District of Colchester	0	0
Municipality of the District of Cumberland	0	0
Municipality of the District of Digby	0	0
Municipality of the District of Guysborough	0	0
Municipality of the District of Hants East	NR	0
Municipality of the District of Lunenburg	3	1
Municipality of the District of Shelburne	NR	0
Municipality of the District of St. Mary's	0	0
Municipality of the District of West Hants	6	1
Municipality of the District of Yarmouth	0	0
Region of Queens Municipality	0	0
South Shore Regional Library	0	0
Town of Amherst	2	0
Town of Annapolis Royal	0	0
Town of Antigonish	0	0
Town of Berwick	NR	0
Town of Bridgetown	0	0
Town of Bridgewater	0	0
Town of Canso	0	0
Town of Clark's Harbour	0	0
Town of Digby	0	0
Town of Hantsport	0	0

PUBLIC BODY	APPLICATIONS	REVIEWS
Town of Kentville	0	0
Town of Lockeport	0	0
Town of Lunenburg	0	0
Town of Mahone Bay	0	0
Town of Middleton	0	0
Town of Mulgrave	0	0
Town of New Glasgow	0	0
Town of Oxford	0	0
Town of Parrsboro	NR	0
Town of Pictou	0	0
Town of Port Hawkesbury	0	0
Town of Shelburne	0	0
Town of Springhill	0	0
Town of Stellarton	0	0
Town of Stewiacke	0	0
Town of Trenton	0	0
Town of Truro	0	0
Town of Westville	0	0
Town of Windsor	0	0
Town of Wolfville	0	0
Town of Yarmouth	NR	0
<i>Municipal Act - Police</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Amherst Police	1	0
Annapolis Royal Police	0	0
Bridgewater Police	0	0
Cape Breton Regional Police	84	3
Halifax Regional Police	48	3
Kentville Police	0	0
New Glasgow	1	0
Springhill Police	0	0
Stellarton Police	0	0
Trenton Police	0	0
Truro Police	2	0
Westville Police	1	0

We also had Requests for Review from the following:

- Deemed not to be a Public Body and therefore not under FOIPOP = 1
- Family and Children's Services of Kings County = 1
- Family and Children's Services of Yarmouth County = 1

*** RE: Immigration not reporting any Applications and having Two Reviews:

- all requests for information received by Immigration last year were processed by Economic Development and rolled into their numbers.

NR = No Response Received as of March 21, 2006