

2008 ANNUAL REPORT

MISSION

To provide independent oversight of the Freedom of Information and Protection of Privacy Act and Part XX of the Municipal Government Act, to investigate requests and complaints from individuals and groups who feel that their access to information rights or their privacy rights, as provided for in both Acts, have not been respected, and to make recommendations to public bodies to rectify their processes and practices with respect to access to information requests and protection of privacy.

MAJOR DEVELOPMENTS

Release of Plain Language Guide

In last year's Annual Report we signaled our intention to release a plain language guide regarding access and privacy. In February 2008 *Respecting Your Access and Privacy Rights: A Citizen's Guide for Nova Scotians* was released and is now available in all Access Nova Scotia locations, MLA offices, public libraries, and on our website: www.foipop.ns.ca.

NEW hot off the press – get your Investigation Summaries here!

The Review Office has implemented a new practice this year. Once the investigation is complete, the Mediator/Investigator provides a copy of the Investigation Summary to all parties to the Review. The purpose of the Investigation Summary is to provide all involved parties with the same research so that everyone is on the same page going forward in the process. The Investigation Summary includes the precedents that will likely be relied upon by the Review Officer during the formal Review. It can aid the parties when it comes time to write their Representations, as they will be in a better position to understand the factors that the Review Officer will be considering. It can also aid in Mediation by giving the parties a better understanding of where they stand.

Honourable Alfie MacLeod, Speaker of the House of Assembly

In accordance with Section 33(7) of the Freedom of Information and Protection of Privacy Act, I am pleased to present to you, and through you to the Members of the House of Assembly, my second Annual Report as the Freedom of Information and Protection of Privacy Review Officer, for the period from January 1, 2008 to December 31, 2008.



Respectfully,
Dulcie McCallum
Freedom of Information and
Protection of Privacy Review Officer,
Province of Nova Scotia

A Message from the Review Officer

It has been another busy year at the Freedom of Information and Protection of Privacy Review Office. We were fortunate to be able to hire two new Case Review Analysts resulting in the Office having a full complement of staff for the first time in a long time. This has enabled the team to manage the caseload of Review Requests in a more timely fashion. For the first time since being appointed, I have a full complement of staff – four knowledgeable, astute, conscientious, fun employees. My special thanks to the team at the Review Office for their hard work.

The Office issued nine Review Reports after these Requests were sent for formal Review and one Privacy Complaint Report, all of which were released to the public and are available online. Summaries of these Reports are contained in this Annual Report. In addition to the nine formal Review Reports, the Office closed a total of 59 cases during the year; 24 at Intake, 17 at Case Review Analysis, 3 at Investigation, and 6 through Mediation. There were 115 Requests for Review received during 2008 involving access decisions of both provincial and municipal public bodies.

Despite the increasing number of users and 15 years of access to information legislation, Nova Scotia continues to see procedural issues arising in Review cases. In many of the files that we processed this year, in addition to the issues identified by applicants, the Review Office often identified procedural matters at issue. It is worthy of note that after so many years, procedural issues under the legislation are still often times misunderstood or misinterpreted by both public bodies and the public. Summaries of examples are included in this Annual Report.

I have decided to give an Annual Access Award to one review file that is worthy of special acclaim. Its star designation will mean that this case best reflects what access to information legislation was intended to embody and is consistent with the purpose section of the Act: public bodies shall assist citizens in obtaining the information to which they are entitled in a timely fashion.

This is the second year the Annual Report has been in tabloid format. The new format has been well-received. My colleague in the Yukon, who is the Ombudsman as well as the Access to Information Commissioner, gave us the greatest compliment when she asked if we would allow her to produce her Annual Report based on our model. This year fewer hard copies were printed, to be both economical and eco-friendly. The Annual Report is available in PDF printable format from our website [www.foipop.ns.ca]. Also available on that site are the Business Plan 2008-2009 and the Accountability Report 2007-2008 for the Review Office, outlining our priorities and goals.

I was pleased to see that Democracy 250 enjoyed a successful celebratory year. My mandate as the independent oversight Review Officer is to safeguard Nova Scotians' right to access information from government, a right that is heralded as one of the pillars of democracy.

MAJOR EVENTS

Crime Prevention Society of Nova Scotia Tackles Identity Theft

Do you often wonder why the grocery store asks for your phone number when you are checking out? Are you prone to say "yes" when you get an e-mail from a total stranger befriending you on Facebook? Do you think it curious that your bank would send you an e-mail? These are some of the provocative questions being answered in a new training session being held in January 2009. The Crime Prevention Society of Nova Scotia has teamed up with the Office of the Privacy Commissioner of Canada, the Freedom of Information and Privacy Review Office, the RCMP and the New Glasgow Police to provide a train-the-trainer session in Halifax in the new year. The project has been wholly funded through a \$50,000 grant from the Privacy Commissioner of Canada. The brainchild of the local Crime Prevention Society, the workshop will train and provide handout resources to over 100 community people who have committed to doing training of small business, Chambers of Commerce, youth in schools and seniors, in their home communities across the province. The training will culminate in a certificate ceremony in early spring. The Society plans to apply for a second grant next year to allow it to take the train-the-trainers program on identity theft to Atlantic Canada and to provide ongoing support to the trainers in Nova Scotia to continue the training in their communities.



Commissioners' Annual Meeting in Regina, June 2008

Every year the independent oversight bodies in access and privacy convene for one formal meeting. In 2008, Saskatchewan Commissioner Gary Dickson hosted the event in Regina. It was by all accounts a huge success with a great amount of work done and many important issues discussed. Among the events were:

- Reception at the RCMP Heritage Centre
- Luncheon hosted by the Speaker of the Legislative Assembly the Honourable Don Toth at the House

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Informal Resolution Summaries

Reading the Fine Print

A matter was settled informally after an Applicant had a chance to review the Investigation Summary, which outlined in detail the facts and the applicable legislation which helped to determine whether or not the organization named by the Applicant was a Public Body for the purposes of the access legislation. The facts pointed towards the organization not being subject to the Act. The Applicant withdrew the Request for Review.

When Haste Does Not Make Waste

This Review Request was fast-tracked by the Review Officer due to the Applicant's terminal illness. Throughout the earlier stages of the Review process, the Public Body argued that the information fit the definition of personal information of a third party and therefore could not be released to the Applicant. During formal Review, the Public Body offered to obtain the consent of a Third Party to release their personal information that the Applicant had requested. Once contacted, the Third Party consented and the information was released to the Applicant. The Request for a Review was withdrawn as the Applicant received the requested information.

Helping Public Bodies Understand

The Applicant requested a Review of a Public Body's decision not to grant a fee waiver on the basis of public interest. During the Case Review Analysis stage, the Public Body shared that it was concerned that granting a fee waiver would create an influx of Applications for Access to a Record and tax the Public Body's resources.

The Case Review Analyst explained that each Review is assessed on its own merits and that providing a fee waiver in this instance would not be precedent-setting.

Once the Public Body received the fee waiver research provided by the Case Review Analyst, the Public Body granted the fee waiver and the Review was successfully resolved.

Face Off Pays Off

The Applicant requested his/her personal information contained on the Public Body's electronic system for a specific date provided by the Applicant. The Public Body informed the Applicant that no such recording existed. The Applicant was not satisfied with the explanation. The Case Review Analyst attended the offices of the Public Body and observed the records staff doing numerous queries of their database. The Analyst was able to report to the Applicant that no Record resulted for that date. The Applicant was satisfied and the file was closed.

Helping Applicants Understand

Case Review Analysts are responsible to do the initial research on each file prior to the file being referred for Investigation. In this case, the Case Review Analyst did considerable research, which was shared with the Applicant. The research demonstrated that the Public Body had properly applied the exemption claimed. The matter was settled because the Applicant was able to see how the exemption did apply to the severed information.

Research Takes Time but Pays Off

Sometimes it seems that it takes a long time to complete a Review. Occasionally, the delay is because public bodies need time to compile the Record and produce an Index of Records or an applicant provides extensive background information, and arguments outlining the issues which have to be reviewed and examined. Often the delay is because of the extensive research conducted by both the Case Review Analysts and the Investigator.

Taking a Second Look

During the Investigation stage, the Review Office suggested to the Public Body that a second search be conducted as particulars of the Application for Access to a Record became apparent. The Applicant was satisfied with the results of the second search and the matter was resolved informally.

Privacy Report Summary

Privacy Report: A Matter of Balancing Privacy and Access P-07-01

This case points to the fine balance that exists under the legislation between the public's right to access information and the need to protect individuals' privacy and their personal information. The Complainants took issue with the Halifax Regional Municipality posting their personal information to its website without their knowledge. The minutes of a Dangerous & Unsightly Premises Committee meeting contained the Complainants' personal information and were posted to the Halifax Regional Municipality's website. The Review Officer found that the disclosure was in accordance with Part XX of the Municipal Government Act because the Municipality is required to keep minutes of committee meetings and is entitled to post them to their website. However, the Review Officer recommended that the Municipality put a disclaimer on all forms and correspondence. The basis of the Recommendation was to ensure that members of the public dealing with committees are made aware of how and the extent to which their personal information will be used and disclosed, a recommendation that the Municipality is in the process of acting upon. The Review Officer also recommended that in the case of this particular committee that some other identifier be used instead of individuals' names. The Municipality has yet to formalize its privacy policy, which the Review Officer encouraged it to complete.

Out and About where we were in 2008

February
Conference For Privacy Investigators hosted by the Privacy Commissioner of Canada, Ottawa, ON
Pan Canadian Privacy Forum hosted by Canada Health Infoway, Ottawa, ON
Annual Workshop for Investigators, Ottawa, ON
Annual Federal/Provincial Access and Privacy Commissioners Meeting, Victoria, BC
Review Officer Address to Nova Scotia Archives and Records Management Lunch and Learn, Halifax, NS
GoverNEXT Annual General Meeting, Halifax, NS
March
Assistant Privacy Commissioner Regional Visit, Halifax, NS, that included:
• Briefing at FOIPOP Review Office
• Media Interview with the Chronicle Herald Editorial Board
• Fraud Off! at Dalhousie University
• ITANS Membership Luncheon
• Meeting at Department of Justice to discuss privacy issues
• Meeting with the Crime Prevention Society of Nova Scotia
• Halifax Club business leaders' luncheon
• Closing debrief at FOIPOP Review Office
• Meeting with Bell Aliant
April
Department of Health Electronic Health Records presentation to independent oversight bodies, Halifax, NS
May
Moderator at the Institute of Public Administration of Canada's Freedom of Information and the Right to Know Symposium, Halifax, NS
Review Officer Meet and Greet, Deputy Ministers' Meeting, Halifax, NS
Review Officer Keynote address to the Association of Canadian College and University Ombudspersons Annual Conference, Halifax, NS
Pan Canadian Privacy Forum hosted by Canada Health Infoway, Victoria, BC
June
Visit to the Antigonish Women's Resource Centre, Antigonish, NS
Maritime Access & Privacy Workshop, Moncton, NB
Information and Privacy Commissioners' Summit, Regina, SK
Electronic Health & Medical Records Conference Keynote Panel, Halifax, NS
Review Officer Address to FOIPOP Administrators, Halifax, NS
September
Presentation to the Privacy Law in an Information Society class at Mount Saint Vincent University, Halifax, NS
Presentation to the NS Barristers Society Privacy Law Section Meeting, Halifax, NS
October
Pan Canadian Privacy Forum hosted by Canada Health Infoway, St. John's, NL

MAJOR EVENTS continued

- Dinner with the Lieutenant Governor His Honour the Honourable Dr. Gordon Barnhart at Government House
- Joint Luncheon with the Canadian Bar Association

Among the issues discussed were:

- Children and Youth On-line Privacy Program including a press conference with youth participation
- enhanced driver's licenses
- personal health information electronic health records
- Right to Know Week and International Data Protection [Privacy] Day
- breach notification
- dispute resolution developments



Review Office Staff Training

- Conducting Complex Investigations
- Information Access and Protection of Privacy Program Certificate
- Information Access and Protection of Privacy Foundations
- Leading a Respectful Workplace
- Mechanics of Writing
- Negotiation, Mediation and Conflict Resolution Certificate
- Organizational Behaviour
- Respectful Workplace Mediation Program Basic Training
- Respectful Workplace Mediation Program Advanced Training

Committee Memberships

- Crime Prevention Society of Nova Scotia/Office of the Privacy Commissioner of Canada Identity Theft Project
- GoverNEXT Steering Committee
- GoverNEXT Mentorship Pilot Project
- Healthy Workplace Initiative Committee
- Institute of Public Administration of Canada
- Maritime Access & Privacy Workshop Steering Committee
- Pan-Canadian Health Information Privacy Forum

REVIEW REPORT SUMMARIES

FI-07-59 *Policy Manuals: In the Information Age are Manuals still Secret?*

The Applicant requested a Review of a decision by Community Services not to release a copy of the Department of Community Services, Family and Children's Services Child Protection Services Policy Manual. The Manual was dated January 1996 and was in the process of being upgraded. Community Services granted access to part of the Record, but withheld portions citing that those portions of the Record were not responsive based on three exemptions: release of the records could harm the effectiveness of an investigative technique; endanger the life or physical safety of any person; and reveal plans that relate to management of the administration of a Public Body not yet implemented or made public. The Review Officer disallowed Community Services' attempt to claim a late exemption based on the health and safety exemption as it was made too late in the process with no explanation. The Review Officer found that the Manual in its entirety was responsive to the Applicant's access request, that the Public Body's reliance on the three exemptions had no merit, and recommended that the manual be released in its entirety. Community Services agreed with the recommendation of the Review Officer and released the complete Manual to the Applicant.

During the course of the formal Review, the following procedural issue surfaced: Community Services sought an extension at the time of the formal Review on the basis of the need to consult experts within its department. Community Services claimed that in preparing its Representations to the Review Officer it needed time to consult with child protection experts regarding the possible release of the child protection manual. In appropriate cases, the need to consult experts is a legitimate part of the process for FOIPOP Administrators working with those within their department in preparing their decision on an Application for Access to a Record when it is first received. It is also foreseeable at the time of the initial Application for Access to a Record and should not be delayed and done at the last moment when the matter has gone to formal Review. Community Services did not respond to this recommendation.

FI-07-55 *Complying with the Duty to Assist*

An Applicant made an Application for Access to a Record to Environment and Labour requesting information concerning the number of oil spill contaminations on residential properties reported to the Department of Environment and Labour since 1999. Environment and Labour did not provide a formal response to the Applicant. Subsequently the Applicant requested a Review and Environment and Labour provided a response 131 days after the initial access request. The issues were whether Environment and Labour failed to respond to the Applicant's Application for Access to a Record in a manner consistent with the Freedom of Information and Protection of Privacy Act and whether Environment and Labour abrogated its duty to assist contrary to the Act.

The Review Office questioned whether the response provided was accurate and complete and requested Environment and Labour to make another decision. After repeated attempts to elicit a response from Environment and Labour were unsuccessful, the file was forwarded to formal Review.

The Review Officer found that Environment and Labour had failed to respond

without delay to the Applicant contrary to s. 7(1) of the Freedom of Information and Protection of Privacy Act and had inappropriately referred the Applicant to another division of the same Department.

The Review Officer recommended that Environment and Labour provide an immediate and full explanation to the Applicant. This explanation was to include the reason for how the delay went from the Department stating they were reviewing boxes of information to indicating that there was no responsive Record. In addition it was recommended that the Department provide the Applicant with an apology for the unexplained and extensive delay when in fact there was no responsive Record and return any fees charged for the application or the handling of the request.

With respect to the information sought, the Review Officer recommended that Environment and Labour turn its attention to whether or not the information could be provided by creating a Record from an existing database. If that was found to be possible, the Record would then be considered as responsive to the Applicant's request and subject to the provisions of the Act with respect to possible exemptions, if any. There should be no fees whatsoever charged to the Applicant for providing access to this Record. The Recommendations were accepted in part by Environment and Labour.



FI-07-50(M) *Fee Waiver: What is Fair?*

The Municipality of the District of Lunenburg had exercised its discretion to

not grant a complete fee waiver. The Applicant had requested the Municipality not charge any fees based on the argument that the request was in relation to the environment and therefore fell within the test of public interest. The Municipality made a decision at the outset to waive all of the fees associated with locating, retrieving, producing and preparing the Record. The only charge levied was the fee for providing a copy of the Record at the rate set by Regulation; a maximum of twenty cents per page and the actual cost of reproducing maps. The Applicant filed a Request for Review of the Municipality's refusal to waive the cost for photocopying. The Review Officer found that the Municipality had exercised its discretion fairly when it had not charged the fees associated with preparing a response to the access request, which were substantial, and also when it did charge for the photocopying of the Record in accordance with the per page rate set by Regulation and the actual cost for reproducing maps. The recommendation was to confirm the original decision, which the Municipality accepted.

FI-07-69(M) *Waiving the Fee for Public Interest?*

The Applicant had requested a Review of the Town of Kentville's decision not to waive fees on the basis of public interest. The Town refused to waive the fees stating it had already been cooperative in supplying some information and the cost of the time involved in this request needed to be recovered.

The Review Officer found that since there was no evidence to support that the information sought was of public interest and the Applicant had never stated s/he could not afford to pay the fees, the fee estimate should stand. The issue of fairness to waive fees was also considered by the Review Officer. The Review Officer did, however, recommend that the Town revisit

its fee estimate to ensure that it did not include any charge for the time it took to explain the Record to the Applicant. A public body has a duty to assist an applicant including explaining the record and cannot charge fees for this time. The Town did not indicate whether they would be accepting the Recommendations.

FI-07-04 *Intergovernmental Affairs: Where's the Harm?*

The Applicant made an Application for Access to a Record to the Department of Education requesting information concerning the Applicant and/or the Applicant's businesses. Education refused the Applicant access to the Record citing two discretionary exemptions: disclosure would reasonably be expected to harm the conduct of the Government of Nova Scotia in its relations with another level of government and would reveal advice developed by or for a public body or a Minister.

The Review Officer found that Education provided sufficient evidence on a confidential basis to demonstrate that the severed portion of the Record could reasonably be expected to harm the conduct of relations between the Province of Nova Scotia and another level of government. The Review Officer also found, however, that the email discussions in the Record regarding a proposed plan fell short of what constitutes "advice."

Education agreed with the Review Officer that it should provide a copy of the Record to the Applicant including any personal information of the Applicant, severing only the portions that would harm intergovernmental affairs. Education also agreed to make every effort to inform those within its Department that it is important to avoid making unnecessary references to potential Applicants or Third Parties in e-mail exchanges that are principally about negotiations, consultations or other sensitive exchanges between different levels of government and that only remotely involve the other parties to whom they make reference.

FI-07-11 *Procurement: To Release or Not to Release, that is the Question*

The Third Party Applicant requested a Review of the decision made by Justice to provide a severed version of the responsive Record. The Original Applicant wanted access to the whole Record or major part of the Record. The Third Party Applicant requested a Review of the decision by Justice, taking the position that the entire Record should be withheld from the Original Applicant. The Record is made up of two unsuccessful proposals that were submitted to Justice in response to their Request for Proposals about the electronic supervision of offenders.

During the course of the Review process, the Third Party Applicant recognized that some of the information could be released and identified it to the Review Office. The Review Officer recommended that Justice release the information that was identified by it and the Third Party Applicant as releasable, but not any other information. In future procurement cases, public bodies should be cognizant of the important responsibility they have, at the outset when first considering the Application for Access to a Record, to examine a record in detail to identify exactly what an applicant may be entitled to access and to distinguish that from what a third party may be entitled to keep private. This would enable a public body to make some initial decisions as to what they propose to supply to an applicant

along with notice to third parties so they can know early on whether the appropriate exemption applies. Withholding a proposal in its entirety will be the exception rather than the rule under the confidential commercial exemption.

Public bodies should periodically review their procurement documents, in particular, references to the Freedom of Information and Protection of Privacy Act as to whether there should be more specific reference to the three requirements that must be met before the mandatory confidentiality exemption will apply: supplied implicitly or explicitly in confidence; information is commercial or a trade secret; and if released would reasonably be expected to harm the interests of a third party.

FI-07-38 *The Price You Pay for Being the Winner*

A Third Party Applicant requested a Review of the Nova Scotia Pension Agency's decision to grant partial release of proposals (by severing Third Party information) submitted by the Third Party Applicant who was the successful proponent on two proposals to provide services to the Pension Agency. The Third Party Applicant objected to the release of the Proposals in their entirety claiming their release would breach the privacy of individuals and would reveal trade secrets and commercial information. The Review Officer found that the Pension Agency was correct in severing out Third Party information but the confidential information exemption did not apply to this case. The Original Applicant, therefore, should be granted partial disclosure of the proposals. An important factor in coming to this conclusion is that the Request for Proposals clearly stated that the text of the proposal would become incorporated by reference into the negotiated contract between the successful proponent and the Pension Agency.

The Review Officer recommended that the Pension Agency should provide a copy of the Record to the Original Applicant with all personal information of staff severed including names and resume information. The hourly rates of service could be disclosed, but with the names of the staff for each severed. Again the Review Officer recommended that the Pension Agency should review its procurement documents to ensure prospective proponents are aware of the access to information provisions, and how to proceed with information they wish to remain confidential, particularly if they are the successful proponents. The Recommendations were accepted by the Pension Agency.

FI-07-72 *Access to Personal Information in the Child Protection Context*

Child welfare agencies are subject to access legislation in the same way as all other Public Bodies. This presents a particular challenge for many of these agencies who are given the statutory obligation to protect children at risk. Their work is highly dependent on information provided by informants or collaterals who provide the information on a confidential basis. Any hint that the identity of informants will not remain anonymous could have a detrimental impact on the foundations of the child protection system. In this case, an Applicant had requested a copy of personal information about the Applicant's own child contained in the Children's Aid Society Inverness-Richmond's child welfare file regarding an investigation of a complaint filed by a Third Party. Despite the Applicant

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2008 Request for Review Applications and Review Reports

NAME OF PUBLIC BODY	REQUEST FOR REVIEW APPLICATIONS RECEIVED IN 2008	REVIEW REPORTS ISSUED IN 2008
FREEDOM OF INFORMATION LEGISLATION		
Government Departments/Agencies/Boards and Commissions		
Agriculture	3	0
Atlantic Lottery Corporation	2	0
Children's Aid Society of Cape Breton/Victoria	1	0
Children's Aid Society of Colchester County	1	0
Children's Aid Society of Inverness/Richmond	1	1
Community Services	11	1
Conflict of Interest Commission	1	0
Economic Development	3	0
Education	0	1
Energy	1	0
Environment & Labour (includes Alcohol & Gaming Authority, Occupational Health & Safety, and Fire Marshal)	4	1
Family & Children's Services of Kings County	1	0
Halifax-Dartmouth Bridge Commission	1	0
Health	4	0
Justice	4	1
Long Term Disability Plan Trust Fund	2	0
Natural Resources	2	0
Nova Scotia Legal Aid Commission	1	0
Nova Scotia Pension Agency	0	1
Office of the Police Complaints Commissioner	2	0
Office of the Premier	3	0
Public Service Commission	4	0
Service Nova Scotia & Municipal Relations	7	0
Tourism, Culture & Heritage	1	0
Transportation & Public Works	2	0
Workers' Compensation Board	3	1
Universities/School Boards		
Acadia University	1	0
Cape Breton/Victoria Regional School Board	1	0
Halifax Regional School Board	1	0
Mount Saint Vincent University	1	0
District Health Authorities		
Annapolis Valley District Health	1	0
Capital District Health Authority	10	0
South Shore District Health Authority	1	0
South West Health	2	0
MUNICIPAL GOVERNMENT LEGISLATION		
Commissions/Municipalities/Towns		
Halifax Regional Municipality	5	0
Municipality of the County of Annapolis	1	0
Municipality of the County of Kings	1	0
Municipality of the District of Hants East	1	0
Municipality of the District of Lunenburg	1	1
Town of Kentville	0	1
Town of Mahone Bay	1	0
Town of Stellarton	1	0
Town of Trenton	6	0
Town of Truro	1	0
Town of Wolfville	2	0
Police		
Cape Breton Regional Police	2	0
Halifax Regional Police	10	0
TOTAL	115	9

NOTE: The number of requests for access received by public bodies is information that is reported annually in the Annual Report from the Department of Justice on FOIPOP and is available on the Department's website: www.gov.ns.ca/just

Review Requests by Public Body

NAME OF PUBLIC BODY	REVIEW REQUESTS	PERCENTAGE OF TOTAL
Community Services	11	9.6
Capital District Health Authority	10	8.7
Halifax Regional Police	10	8.7
Service Nova Scotia and Municipal Relations	7	6.1
Town of Trenton	6	5.2
Halifax Regional Municipality	5	4.3
Environment and Labour	4	3.5
Health	4	3.5
Justice	4	3.5
Public Service Commission	4	3.5
Agriculture	3	2.6
Economic Development	3	2.6
Office of the Premier	3	2.6
Workers' Compensation Board	3	2.6
Atlantic Lottery Corporation	2	1.7
Cape Breton Regional Police	2	1.7
Long Term Disability Plan Trust Fund	2	1.7
Natural Resources	2	1.7
Police Complaints Commissioner	2	1.7
South West Health	2	1.7
Town of Wolfville	2	1.7
Transportation and Public Works	2	1.7
Town of Stellarton	1	0.9
Acadia University	1	0.9
Annapolis Valley District Health Authority	1	0.9
Cape Breton Victoria Regional School Board	1	0.9
Children's Aid Society Cape Breton-Victoria	1	0.9
Children's Aid Society of Colchester County	1	0.9
Children's Aid Society Inverness-Richmond	1	0.9
Conflict of Interest Commissioner	1	0.9
Energy	1	0.9
Family and Children's Services of Kings County	1	0.9
Halifax-Dartmouth Bridge Commission	1	0.9
Halifax Regional School Board	1	0.9
Legal Aid Commission	1	0.9
Mount Saint Vincent University	1	0.9
Municipality of the County of Annapolis	1	0.9
Municipality of the County of Kings	1	0.9
Municipality of the District of East Hants	1	0.9
Municipality of the District of Lunenburg	1	0.9
South Shore District Health Authority	1	0.9
Tourism, Culture and Heritage	1	0.9
Town of Mahone Bay	1	0.9
Town of Truro	1	0.9
TOTAL	115	

BUDGET HISTORY 2006–2008

Category	Expenditures*		
	2008	2007	2006
Salaries and Benefits**	216,732	197,139	94,529
Travel	2,704	10,725	1,968
Professional/Special Services	5,908	3,561	30,788
Supplies and Services	5,160	6,307	9,288
Other	26,029	27,947	24,712
Total Budget Spent	256,533	245,679	161,285
Total Budget	427,000	383,000	256,000
Percent of Budget Spent	60	64	63

* Budget reporting is on a fiscal year basis from April 01 to March 31, while the above-noted expenditures are from April to December.
** Salaries and Benefits for 2006 did not reflect a Review Officer's salary or a full-time Intake/Administrative Assistant while those for 2007 reflect the addition of two full-time employees – a Review Officer and an Intake/Administrative Assistant.

Ongoing Issue Update

New Privacy Oversight Bill Passes the House

On November 21, 2008 Bill #234 the “Privacy Review Officer Act” introduced into the Legislative Assembly by the Liberal Opposition Party. The Bill passed Third Reading but has yet to be proclaimed. A decision from the Minister of Justice is forthcoming as to where the independent oversight for privacy will be located.

REVIEW REPORT SUMMARIES continued
not wanting to know the identities of Third Parties, initially the Society did not provide any part of the Record to the Applicant. After receiving further information from the Review Office, the Society made two attempts to provide some information, which did not satisfy the Applicant. The Review Officer found that the information could not be withheld under the law enforcement exemption and the Applicant was entitled to a copy of the Record with the names of confidential informants and third parties’ personal information severed. The Children’s Aid Society Inverness-Richmond did not agree with the Recommendations of the Review Officer.

FI-07-32 Injuries in the Workplace: Nova Scotians’ Right to Know

The Applicant requested a Review of the Workers’ Compensation Board’s (WCB) decision to refuse access to the names of the 25 companies with the highest injury claims, types of accidents reported and the cost in claims paid out by the WCB for a specified time period. This is information that the companies are required to provide to WCB. The WCB withheld most of the information citing two exemptions: personal information and information provided in confidence (business information).

The Review Officer found that the information requested did not contain any personal information, as defined by the statute; therefore, the personal information exemption of the Freedom of Information and Protection of Privacy Act did not apply. As well, the Review Officer found that the WCB could not prove that the information sought was provided by third parties on the basis that the information was strictly confidential. The exemption must meet a three-part test in order to apply. As this was not the case, the Review Officer found it did not apply.

The Review Officer recommended that the WCB should release the requested information in its entirety, including the names of the companies and the divisions. In other words, the Record created by the WCB that was responsive to the Application for Access to a Record should be released in full. The Review Officer provided comments on the fact that WCB could charge the Applicants a fee the amount of which is now known to them as a result of creating this Record. The WCB could give consideration to waiving the fee altogether, given the delay in providing this Record to the Applicants that could have been created when the original for Access to a Record was made.

In the information age where all public bodies operate in an electronic environment, all public bodies, as part of their duty to assist, ought to assess their ability to create a Record from their database that is responsive to an Application for Access to a Record when the request is first received. The WCB did not follow the Review Officer’s recommendations. The Applicant appealed to the Supreme Court of Nova Scotia where the case was heard as a trial *de novo*. A summary of the Judge’s decision can be found in the Court Case Summaries section on page 5.

COURT CASE SUMMARIES

The latter part of 2008 saw the release of two access to information decisions from Judges of the Nova Scotia Supreme Court. Both cases had been at the Review Office. The findings in both matters were consistent with those of the Freedom of Information and Protection of Privacy Review Officer.

Cayer v. South West Shore Development Authority: What agencies are Public Bodies under FOIPOP?

The 2006 Annual Report provided a Review Report summary on this file. In that Report the facts were that an Applicant requested information from the South West Shore Development Authority (SWSDA), which refused to process the application on the ground that it was not a public body and therefore the access legislation that applies to municipalities did not apply to it. “Municipal body” is defined in Part XX of the Municipal Government Act (MGA). The Review Officer found that the membership and control of SWSDA is strictly limited to and directly linked to the local municipalities. In conclusion, the Review Officer found that the SWSDA falls within the jurisdiction of the access legislation as it is a “municipal body.” The SWSDA did not agree with the finding and the Applicant appealed to the Supreme Court of Nova Scotia. The case was heard this year.

The decision in Cayer v. South West Shore Development Authority concerned whether the access to information provisions of the MGA applied to the respondent regional-development authority. SWSDA had asserted that it was not a “municipal body” pursuant to MGA. That position was rejected by Justice Suzanne Hood in a decision released on November 25, 2008.

After finding that the MGA applied to SWSDA, Justice Hood proceeded to consider the particulars of the disclosure request by the Appellant. The documents requested were the travel expense claims of the CEO of SWSDA. Justice Hood examined the documents and considered the concerns raised by SWSDA. She found that the information should be disclosed subject to severing information which is exempt from disclosure and the names of Third Parties where such information could disclose projects or proposals prematurely or negotiations with such Third Parties.

From the perspective of the Review Office, the decision of Justice Hood is significant for a number of reasons. First, in the case of SWSDA, its internal by-law used different language than the MGA. However, rather than the case turning on how the by-law was worded, Justice Hood looked at the reality of whether a majority of the SWSDA board members were appointed and controlled by the area municipalities.

Second, the decision confirms that Nova Scotia’s freedom of information legislation “ought to be interpreted liberally”. Justice Hood examined the term “municipal body” as defined in the MGA. She wrote: “The Legislature could not have intended that an organization like SWSDA, with the objects set out in its Memorandum of Association, with the membership it has and provided with government funding (municipal, provincial and federal), would be an organization to which freedom of information legislation would not apply.”

Third, while the decision concerned SWSDA, several passages would seem to apply to the other twelve regional

development authorities in Nova Scotia. Justice Hood noted that SWSDA is funded by and accountable to the local municipalities, and that its purpose is to carry out activities which each individual municipality could do on its own (but that are more effectively done as a joint effort). These are common features of many of the thirteen regional district associations in Nova Scotia.

Fourth, Justice Hood cited a recent Ontario court decision involving Toronto’s Economic Development Corporation (TEDCO). In that case, the Ontario Court of Appeal held that Ontario’s access to information laws applied to TEDCO. The decision of Justice Hood is consistent with the Ontario decision and one can imagine that both cases may, in turn, be applied to economic development agencies in other provinces.

Halifax Herald Ltd v. WCB: The WCB refuses to follow Review Officer’s Recommendations. The Chronicle Herald takes WCB to Court. What did the Nova Scotia Supreme Court say?

On December 8, 2008, the Honourable Justice Gregory M. Warner of the Nova Scotia Supreme Court issued a decision, *The Halifax Herald Limited v. The Workers’ Compensation Board of Nova Scotia and Canadian Manufacturers and Exporters Association of Nova Scotia, 2008 NSSC 369 (“Halifax Herald”)*.

The decision in *Halifax Herald* involved a determination as to whether the names of the 25 companies in Nova Scotia that reported the highest number of injuries over a three-year period should be released by the Workers’ Compensation Board (WCB) pursuant to the Freedom of Information and Protection of Privacy Act (“the Act”). The WCB refused to disclose the requested information on the basis that the information was exempt from disclosure as confidential information (pursuant to section 21 of the Act). An intervener in the appeal, the Canadian Manufacturers and Exporters Association of Nova Scotia (CME-NS), argued that the information sought was exempt from disclosure as it was both personal information (pursuant to section 20 of the Act) and confidential information.

After careful consideration of the issues, Justice Warner rejected the arguments of both the WCB and the CME-NS and allowed the appeal.

With respect to the argument that the information was personal information, Justice Warner held that this argument was without merit as there was insufficient evidence to conclude that the release of the information requested would lead to what might constitute an unreasonable invasion of personal privacy.

Whether the information requested by the Herald was “confidential information” pursuant to section 21 of the Act and, therefore, exempt from disclosure was also addressed in detail by Justice Warner.

In order to be considered “confidential information” the WCB must prove that (1) the information was of a certain type enumerated in section 21 of the Act; (2) the information was supplied in confidence, and (3) the release of the information could reasonably be expected to harm significantly the employers’ competitive advantage or result in similar information no longer being supplied to the WCB. All three stages of the test must be established for the information to be considered “confidential information”.

The WCB and CME-NS argued that the information in question was labour relations information. Justice Warner agreed and moved on to determine the second stage of the three-part test – whether the information was supplied in confidence. In finding that the information in question was not supplied in confidence Justice Warner held that the information itself was “tabulated by WCB and is not supplied by the employers” and that although:

... the supply of Accident Reports by employers to WCB may properly be considered to have been supplied in confidence with respect to some of their contents, but not with respect to the name of the employer and the fact that an accident occurred or the type of injury occurred.

Although the WCB and the CME-NS failed to establish the second stage of the three-part test, Justice Warner did consider the third stage: whether the release of the information could reasonably be expected to harm significantly the employers’ competitive advantage or result in similar information no longer being supplied.

Justice Warner held that there was insufficient evidence to meet the threshold of “speculative proof” of significant harm to prove that the release of the information could reasonably be expected to significantly harm the employers’ competitive advantage. Although the disclosure of the names of the 25 companies with the most workplace accidents could embarrass the companies in question, there was insufficient evidence to find that significant harm would occur.

Justice Warner also dismissed the argument of the WCB and CME-NS that the release of the information would result in similar information no longer being supplied to the WCB. In so finding, Justice Warner commented that the “vast majority” of employers are obligated to

provide the information in question. Of the participants in the WCB scheme that are not compulsory participants, there was insufficient evidence to conclude that these voluntary participants would refuse to provide the information in question should the information in question be released.

Having found that the information requested was not exempt from disclosure pursuant to either Section 20 or 21 of the Act, Justice Warner allowed the appeal. WCB is not appealing the decision.

LOOKING AHEAD TO 2009 Power of Review Officer to Require Production of a Record

During 2008 the Legal Aid Commission of Nova Scotia refused to provide the Review Officer with a copy of the Record that was at issue in a Request for Review. The Record at issue involved documents over which the public body claimed solicitor-client privilege applied. The Review Office staff met with the Legal Aid Commission in order to explain that notwithstanding what exemptions may apply to a particular Record that would allow them to refuse access to a Record to an Applicant, such exemptions did not allow them to refuse access to the Review Officer. The access legislation clearly provides the Review Officer with the statutory power to have access to all records including those that may be protected by the cabinet confidence and solicitor-client privilege exemptions. Once I review a Record to determine the applicability of any exemption, as Review Officer, I never release or reveal the content of a Record to an applicant or any other person but rather make findings and recommendations to the public body, which they may or may not choose to follow. The case will be heard in the Nova Scotia Supreme Court in 2009.

Mediation Summaries

Covering All the Bases • The parties were able to come to an agreement in which the Applicant would receive only a key portion of the Record and where the information did not exist, this would be confirmed. All parties agreed to and signed a Memorandum of Understanding [MOU]. A problem arose when the terms of the MOU were not followed as indicated. Unfortunately, the MOU did not contain wording about what would happen if one of the parties did not abide by the agreement. The Mediator learned that it was imperative to cover all the bases in a MOU so that all parties are clear about what has been agreed to and what will happen if it is breached.

What’s at the Heart of the Matter • The Mediator assisted the parties to narrow the scope of the Review which resulted in the Public Body issuing a revised, lower fee estimate. This satisfied the Applicant, the fee was paid and the Record was released.

Saying Sorry • This case illustrates three important issues. The first is how important it is that all information that forms the Record being requested is given to the FOIPOP Administrator. In this case an employee failed to turn over a document to the FOIPOP Administrator and when it was discovered, the employee claimed s/he did not know the Record was within the requested date range. As a result the decision letter contained false information because other records were given for the time period, but not the sensitive document. During the Case Review Analysis stage at the Review Office, evidence surfaced about the false information in the Public Body’s decision letter.

The second issue is when an apology is important. The Applicant wanted an apology for being given a decision letter that contained false information. The Public Body provided that apology.

The third issue is the need for all public body employees to be educated in the access to information process. In this case, the FOIPOP Administrator agreed to do annual training at staff meetings. On this basis, the case was settled through mediation.

2008 STATISTICS

for the Freedom of Information and Protection of Privacy Review Office

TABLE 1: Reviews Opened between January 1 and December 31, 2008

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Provincial	54	86	102	122	112 (97%)	111 (89%)	136 (88%)	99 (88%)	53 (79%)	60 (79%)	72 (85%)	61 (75%)	60 (70%)	91 (79.1%)
Municipal	N/A	N/A	N/A	N/A	4 (3%)	14 (11%)	18 (12%)	14 (12%)	14 (21%)	16 (21%)	13 (15%)	20 (25%)	17 (22%)	24 (20.9%)
Total	54	86	102	122	116	125	154	113	67	76	85	81	77	115

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 3: Privacy Complaints

	Primary Issue Disclosure	Primary Issue Use	Primary Issue Collection	Public Body Response Outstanding	No Public Body Participation	Total Received
2008	0	0	2 (100%)	0	1	2
2007	4 (80%)	1 (20%)	0	2	0	5
2006	6 (100%)	0	0	0	1	6

TABLE 6: Resolution of Files Closed in the Year (not necessarily opened in year)

	Resolved by Review Report	Formally Resolved through Mediation	Resolved through Partial Mediation and	Informally Resolved through Early Resolution by Review Report	Withdrawn or Abandoned	Screened Out
2008	9 (15.3%)	6 (10.2%)	0	28 (47.5%)	4 (6.8%)	12 (20.3%)
2007	6 (12.5%)	22 (46%)	0	9 (19%)	4 (8%)	7 (14.5%)
2006	15 (19%)	50 (62.5%)	6 (7.5%)	reported in mediation numbers	6 (7.5%)	3 (3.5%)

NOTE: The Review Office closed 59 files in 2008. 33 files opened in 2007 were resolved in 2008 and included in the total. (Eleven files opened in 2007 and 92 files opened in 2008 have been carried over into 2009).

TABLE 7: Deemed Refusals

Public Body	Reviews Requested
Cape Breton Regional Police	1 (11.1%)
Cape Breton-Victoria Regional School Board	1 (11.1%)
Capital District Health Authority	2 (22.2%)
Children's Aid Society Cape Breton-Victoria	1 (11.1%)
Environment and Labour	1 (11.1%)
Halifax Regional Police	3 (33.3%)
Halifax Regional School Board	1 (11.1%)
Town of Wolfville	1 (11.1%)
Total	11

TABLE 8: Privacy Investigations, means closed

	Public Report	Private Report	Informally Resolved through Early Resolution	Withdrawn or Abandoned	Screened Out
2008	1 (20%)	1 (20%)	0	3 (60%)	0

Four Privacy complaint files were carried forward from 2007. Three of those were closed in 2008.

TABLE 9: General Inquiries

	Access Request Process	Review Request Process	Privacy	Federal Legislation	Jurisdiction	Referred to Other Department	Other	Total Calls
2008	225 (30.4%)	217 (29.3%)	95 (12.8%)	35 (4.7%)	19 (2.6%)	46 (6.2%)	104 (14.0%)	741
2007	368 (46.5%)	144 (18%)	49 (6%)	102 (13%)	**	37 (4.5%)	92 (12%)	792
2006	106 (27%)	77 (19.5%)	89* (22.5%)	28 (7%)	44 (11%)	49 (13%)	**	393

NOTES: * This number includes Federal Privacy Inquiries, in 2007 Privacy is for Provincial only and Federal numbers are included in the Federal Legislation numbers.

** Reported on other Categories.

TABLE 10: Reviews Opened (by applicant group)

	Media	General Public	Political	Organizations	Other Public Bodies
2008	8 (7.0%)	90 (787.3%)	3 (2.6%)	13 (11.3%)	0 (0.0%)
2007	6 (8%)	53 (69%)	2 (2.5%)	15 (19.5%)	1 (1%)
2006	9 (11%)	49 (60.5%)	6 (7.5%)	16 (20%)	1 (1%)

TABLE 12: Conclusions of the Review Officer (where a report was issued)

	Agreed with Public Body	Agreed In-part with Public Body	Disagreed with Public Body
2008	1 (11.1%)	2 (22.2%)	6 (66.7%)
2007	3 (50%)	2 (33.3%)	4 (66.6%)
2006	6 (29%)	3 (14%)	12 (57%)

TABLE 13: Public Body's responses to Review Officer's recommendations

	Recommendations Accepted	Partial Acceptance	Recommendations Rejected	Response Outstanding
2008	4 (44.4%)	2 (22.2%)	2 (22.2%)	0
2007	3 (50%)	2 (33.3%)	1 (16.6%)	0
2006	13 (62%)	5 (20%)	3 (14%)	0

NOTE: In one 2008 Report, the Review Officer agreed with the Public Body in deciding a fee waiver.

TABLE 2: Privacy Investigation Findings

	Well-founded	Not Well-founded	No Jurisdiction	Outstanding
2008	0	1	0	0
2007	0	0	1 (20%)	4 (80%)
2006	2 (33.3%)	1 (16.6%)	1 (16.6%)	2 (33.3%)

TABLE 4: Time Extension Complaints

	Within the first 60 Days	After 60 Days
2008	4	0
2007	3	0

TABLE 5: Time Extension Requests

Public Body	Number Requested
Atlantic Lottery Corporation	3 (15%)
Capital District Health Authority	1 (5%)
Community Services	1 (5%)
Economic Development	3 (15%)
Immigration	1 (5%)
Natural Resources	1 (5%)
Nova Scotia Business Inc.	3 (15%)
Office of the Premier	1 (5%)
Tourism, Culture and Heritage	6 (30%)
Total Requested	20 (100%)

TABLE 11: Access Request (by primary issue)

		Refusal to Disclose/Severing	Search	Fee/Waiver	Response	Jurisdiction	Third Party	Other
2008	Provincial	52 (57.1%)	8 (8.8%)	3 (3.3%)	8 (8.8%)	1 (1.1%)	9 (9.9%)	8 (8.8%)
	Municipal	16 (66.7%)	0 (0.0%)	0 (0.0%)	4 (16.7%)	0 (0.0%)	1 (4.2%)	3 (12.5%)
	Total (% of total)	67 (58.8%)	8 (7.0%)	3 (2.6%)	12 (10.5%)	1 (0.9%)	10 (8.8%)	11 (9.6%)
2007	Provincial	35	7	5	7	1	3	2
	Municipal	9	1	3	2	1	0	1
	Total	44 (57%)	8 (10%)	8 (10%)	9 (12%)	2 (3%)	3 (4%)	3 (4%)
2006	Provincial	37	9	5	6	0	3	1
	Municipal	10	2	0	2	2	3	1
	Total	47 (58%)	11 (13.5%)	5 (6%)	8 (10%)	2 (2.5%)	6 (7.5%)	2 (2.5%)

TABLE 14: Reviews (by type of information requested)

	Act	General	Personal	Personal/General	Correction
2008	Provincial	31 (34.1%)	47 (51.6%)	9 (9.9%)	3 (3.3%)
	Municipal	12 (50%)	6 (25.0%)	5 (20.8%)	0 (0.0%)
2007	Provincial	35 (58.3%)	20 (33.3%)	5 (8.3%)	0
	Municipal	13 (76%)	2 (12%)	2 (12%)	0
2006	Provincial	28 (46%)	28 (46%)	5 (8%)	0
	Municipal	13 (65%)	5 (25%)	2 (10%)	0