

2011 ANNUAL REPORT

The Honourable Gordie Gosse - Speaker of the House of Assembly

In accordance with s. 33(7) of the Freedom of Information and Protection of Privacy Act and s. 4(3) of the Privacy Review Officer Act, I am pleased to present my fifth Annual Report to you and the Members of the House of Assembly. This Annual Report is filed in my capacity as both the Freedom of Information and Protection of Privacy Review Officer and the Privacy Review Officer and is to be tabled with the House of Assembly.

Mr. Speaker, further to my notice to the Members in my Annual Report last year, I am advising that this Annual Report will only be distributed electronically other than the ones provided to the House. As this Annual Report is a valuable educational tool, in addition to distribution on the Review Office's Listserv, I will specifically distribute an electronic copy to smaller municipalities.

The Report will be available in accessible and printable format on the Review Officer website. This has been done to fulfill the Review Office's commitments to readily accessible information at no cost to the public and to environmental sustainability.

All of which is respectfully submitted,

Dulcie McCallum

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

*Please consider the environment before
printing*



Message from the Review Officer

2011 has presented many challenges for the Office of the Freedom of Information and Protection of Privacy Review Officer. My team has met these challenges with respect, integrity and thoroughness. Many public bodies have demonstrated a clear and demonstrated commitment to principles of access to information and protection of privacy. Most access to information requests to public bodies are processed and responded to without the Review Officer's involvement.

Even where applicants make a Request for Review, public bodies respond professionally and appropriately, the majority of which are informally resolved. In those cases where the Review presents complicated issues or more intransigent applicants, public bodies continue to make every effort to respond appropriately. Most notably is this year is the Strait Regional School Board, whose positive efforts to meet its duty to assist an applicant have earned it this year's Gold Star Award.

There are two significant items to bring to the Legislative Assembly's attention. The first issue is about privacy protections. When it was introduced a few years ago, the *Privacy Review Officer Act* ["PRO"] failed to make provision for privacy independent oversight at the municipal level. The privacy provisions in the *Freedom of Information and Protection of Privacy Act* ["FOIPOP"] cover municipalities but the *PRO Act* does not extend independent oversight of the Privacy Review Officer to conduct privacy investigations about local governments. This means that many of the advantages of the new privacy role of the Review Officer such as public body consultations are not available to municipalities. I am optimistic this gap in privacy protection will be rectified in the near future.

The second issue is the upcoming *Personal Health Information Act* to be proclaimed in 2012. We continue our preparations for this new mandate. Our Office will have independent oversight for all access to information and protection of privacy concerns that arise in relation to all those professionals and health authorities deemed health custodians including those working in the private sector. We will be closely monitoring the workload associated with this new statutory mandate in the next few years. There are three graphics and one table in the Annual Report that outline some of the new powers given to the Review Officer. The *FOIPOP Act* is silent with respect to some of these very progressive statutory provisions. We will also be evaluating these carefully with a view to the possible necessity to make a request to the Minister of Justice for amendments to the *FOIPOP Act*. At least one of these new powers – the statutory authority to refuse to accept or to continue a Request for Review – is the subject of an article in this Report. To supplement that discussion, there is an article to help applicants understand their role and responsibilities in Requests for Review.

It is important to point out that some public bodies still resist adopting the principle of the right of the public to access information. Some small agencies have reported problems to me that are due to lack of training. The Review Office does not have responsibility for the whole of the scheme for access to information within government. As part of the bigger picture, what is important is that a government is clear about its fundamental commitment to open, transparent and accountable government through access to information. This commitment will be apparent through making information available both through open government policies - making information customarily available to the public and through the Freedom of Information statutory framework.

We are looking forward to 2012 particularly because as Nova Scotia's Review Officer, I am hosting the annual Canadian Federal/Provincial/Territorial Access and Privacy Commissioners' Summit being held in Halifax in September 2012. This will give our province the opportunity to showcase our achievements with respect to access and privacy.

In closing, preparing and tabling an annual report is one of the most important duties of an independent oversight body. The statutory duty to prepare an annual report tabled directly with the House of Assembly highlights the fact that the Review Office is impartial and non-partisan. This duty is taken very seriously as it is required by statute and because it is my opportunity to demonstrate how the independent officer is accountable to the Legislature and to the public. The Annual Report is intended to recap what the Office of the Review Officer has achieved during any one calendar year to demonstrate compliance with its statutory mandates and obligations. This is how we are held to account.

Mandate

What is the Review Officer's Mandate?

The Review Officer provides independent impartial oversight of decisions made by public bodies by receiving Requests for Review under the *Freedom of Information and Protection of Privacy Act, Part XX* of the *Municipal Government Act* and of privacy matters under the *Privacy Review Officer Act* ["Acts"].

The Review Officer investigates the requests/complaints from individuals and/or groups who feel public bodies have not respected their access to information rights or their privacy rights, as provided for in the governing Acts. After an investigation, the Review Officer may issue a public Report that will include findings and recommendations to the named provincial, municipal or local public body to reaffirm, alter or modify its decision and to rectify its processes and practices with respect to access to information requests and/or protection of privacy.

In addition, under the *Privacy Review Officer Act*, the Review Officer is empowered to monitor how privacy provisions are administered, initiate an investigation of privacy compliance, undertake research matters, inform/educate the public and, on request of a public body, provide advice and comments on privacy.

In the near future, the Review Officer's statutory mandate will be expanded to include independent oversight under the *Personal Health Information Act*. *PHIA* gives the Review Officer the statutory authority to conduct reviews of complaints arising from the access and privacy provisions, initiate an investigation of privacy compliance, undertake research matters, inform/educate the public and, on request of a public body, provide advice and comments on privacy.

A Comparison of the Review Officer's Powers - under four mandates				
Powers by Statute	<i>FOIPOP Act</i>	<i>MGA, Part XX</i>	<i>PRO Act</i>	<i>PHIA</i>
Provides independent oversight for access matters.	✓	✓	✓	✓
Provides independent oversight for privacy matters.	✓	X	✓	✓
Can initiate own complaint/investigation.	X	X	✓	✓
Can exercise discretion to refuse a Request for Review.	X	X	X	✓
Can inform the public about the Act.	X	X	✓	✓
Can consult with public bodies, or custodian, upon request.	X	X	✓	✓

Legend

Freedom of Information and Protection of Privacy Act, 1993, c. 5 [*FOIPOP Act*]

Municipal Government Act, SNS 1998, c 18 [*MGA, Part XX*]

Privacy Review Officer Act, SNS 2008, c 42 [*PRO Act*]

Personal Health Information Act, SNS 2010, c 41 [Not yet in force] [*PHIA*]

Budget - 2011

Budget History 2009 - 2011

Category	Expenditures*		
	2011	2010	2009
Salaries and Benefits	316,309	265,019	232,235
Travel	6,060	4,576	2,570
Professional / Special Services	0	4,845	11,800
Supplies and Services	3,658	3,068	7,115
Other	28,538	30,348	22,772
Reclassifications (pay adjustments)	0	(40,061)	0
Total Budget Spent	354,565	267,795	275,493
Total Budget	522,000	398,000	400,000
Budget Spent	68%	67%	69%

* Budget Reporting is on a fiscal year basis from April 01 to March 31.
The expenditures reported above represent April to December.

Living within our Means



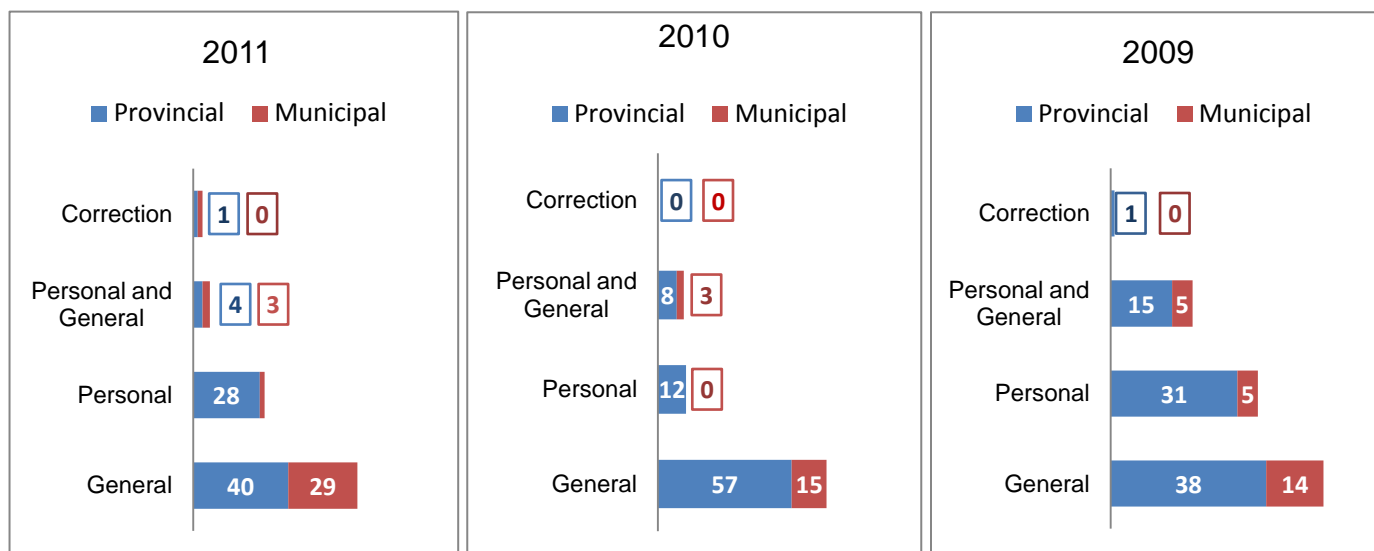
The Review Office remains committed to fiscal responsibility and to managing our mandate within our means.

The majority of the Review Office's expenditures is devoted to salaries and benefits (89%).

The Review Office Team includes: the Review Officer, the Director, three Portfolio Officers, and an Intake Analyst.

Once again this year, the Annual Report was written and produced in-house resulting in a significant cost-savings.

Reviews by Type of Information Requested by Year



General Inquiries (by phone, email, and regular mail)

Year	Re: Access Requests	Re: Review Requests	Privacy	Federal Legislation	Jurisdiction	Referred Elsewhere	Other	Total Calls
2011	331 (18%)	751 (41%)	228 (12%)	34 (2%)	25 (1%)	52 (3%)	431 (23%)	1852
2010	247 (19%)	675 (52%)	73 (6%)	28 (2%)	22 (2%)	34 (3%)	230 (18%)	1309
2009	240 (21%)	491 (42%)	136 (12%)	31 (3%)	24 (2%)	44 (4%)	197 (17%)	1163

Review Officer's Discretion



Everyone Benefits: Discretion Not to Investigate

The upcoming *Personal Health Information Act* ["PHIA"] will provide the Review Officer with the statutory discretion to refuse a Request for Review, where appropriate. Presently, under the *FOIPOP Act*, *Part XX* of the *MGA* and the *PRO Act* the Review Officer must accept all Requests for Review.

In most cases this is entirely appropriate. In a few cases each year, it would be more appropriate and reasonable for the Review Officer to have the discretion to not investigate at all or to discontinue an investigation.

Where other independent oversight bodies have this discretion, the exercise to refuse or to discontinue is not arbitrary and is restricted to cases where, for example:

- there is another available remedy that is a more appropriate avenue to deal with the matter;
- the Request for Review is trivial, frivolous, vexatious or is not made in good faith;
- the Request for Review is part of a pattern of conduct that amounts to an abuse of process;
- in particular circumstances, further investigation is not warranted;
- there is no prospect that a Review will benefit the Applicant; or
- for whatever reason the Review Officer considers reasonably appropriate.

The upcoming *Personal Health Information Act* includes this discretion for both the Review Officer and health custodians at section 95(1). ➡

Personal Health Information Act

95 (1) The Review Officer may decide not to review the subject-matter of the review pursuant to clause 92(2)(a) or (3)(a) for whatever reason the Review Officer reasonably considers appropriate (...)

Why does the Review Officer need this power and why is it important?



Like all those working within the public service, access and privacy professionals need to be accountable. An important component of that accountability is to operate in a fiscally responsible way, living within allotted budget while still serving the public well. This can be difficult to achieve if some members of the public are abusing the process.

This mechanism will give public bodies and the Review Officer one more tool to be fully accountable.

It takes a great deal of time for a public body to process an Application for Access to a Record and for the Review Office to investigate a Request for Review. The statutory discretion would enable public bodies and the Review Officer to refuse to accept the application/request when it is made in bad faith or where there is no benefit to an applicant. Too often, without this provision, applicants insist on continuing, even though they are fully aware there will not be a positive outcome. Applicants in these cases may want retribution against the public body for a reason unrelated to access to information.

We want to be able to avoid creating work for public bodies and the Review Officer where that work has no benefit. This work consumes considerable resources, resources that could be saved and devoted to the legitimate purposes of the legislation. Everyone would benefit should these amendments be implemented.

[For more on this topic please see the comparison charts on pages 9 and 10 and also the summaries of cases where I may have exercised my discretion to dismiss the Review had that option been available on pages 5 to 8]

Review Officer's Discretion



Discretion *Not to Accept* a Request for Review

The Applicant requested information relating to the death of his/her sibling who died while in police custody. While s/he was not the executor for his/her deceased family member, the Applicant was trying to pursue other remedies regarding the death in custody and thought s/he required the requested records in order to do so. Like many applicants s/he was not clear on the exact nature of the mandate of the Review Officer.

The Review Office explained to the Applicant that as the person seeking disclosure of personal information, even about a family member, s/he had the burden to prove that disclosure would not be an unreasonable invasion of the deceased person's privacy as the right to privacy prevails even after death.

After contacting the office and receiving information about what the Review Officer could and could not investigate and after a significant lapse in time, the Applicant accepted that s/he was likely not entitled to the personal information of his/her recently deceased sibling and the other remedy s/he was pursuing did not require him/her to obtain the Record like s/he thought was required.

This file took almost three years to resolve. Had the Review Officer had the discretion not to investigate, the fact that the requested Record was not necessary to achieve the stated purpose could have been determinative at the outset and the file closed at the Intake stage of the Review process. The information had in fact been provided at Intake but the Applicant wished to continue and the Review Office had no discretion to discontinue. The file could have been closed and the Applicant could have gone on to pursue another available remedy that was a more appropriate avenue in the circumstances.

What makes this situation even more unfortunate is that it took a considerable period of time after the file was referred for investigation to get to the point of ensuring the Applicant understood that s/he did not require the Record for the remedy s/he was pursuing. Once the Applicant accepted this, s/he agreed the file could be closed.

Discretion *Not to Continue* with a Request for Review



This Request for Review is almost identical to a Review Report that was included in our 2010 Annual Report because it is the same person who has made the same access to information request for the same or similar information.

In both Reviews the Applicant was seeking to understand his/her personal history as a young person. In the first case, the Review Officer found that this constitutes the Applicant's personal information, which can also be shared with family members, and therefore should be disclosed to him/her. The Public Body did not agree and rejected the Recommendation to disclose the records.

The matter is now before the courts as an appeal under the *Act*.

This summary is being included because it highlights the important issue of the discretion of the Review Officer not to investigate further. In this case, because both files involved the same information and the same issues, the Applicant eventually withdrew the second Request for Review.

Reviews Opened by Year			
	2011	2010	2009
Provincial	73	77	85
Municipal	34	18	24
Total	107	95	110

This is an example where the Applicant recognized the amount of resources and time that goes into conducting a Review and respected that pursuing the file simply so s/he could have a second Review Report issued, would not result in a different outcome and therefore would not be the best use of anyone's time. However, it took over two years for him/her to reach this decision. In this case if the Review Officer had had the discretion, the Review would have been closed early on as the same matter had previously been the subject of a Review Report.

Review Officer's Discretion

Discretion *Not to Accept* *or Not to Continue* a Review

This case involved an Applicant who had many issues with the Public Body most of which related to matters that the Review Officer has no jurisdiction to Review except for one. The one reviewable issue was deemed refusal. Deemed refusal is when a public body has failed to provide a decision to the Applicant within the allotted time provided for under the *Act*.

Along with the Request for Review, the Applicant provided the Review Office with letters s/he received from the Public Body. The letters specifically included a request for clarification about the Records sought and notice that the Application for Access to a Record would be placed on hold pending receipt of clarification from the Applicant. At the Intake stage of the Review process, it was established that the Applicant never responded to the Public Body's request for clarification and that was the reason no decision had been forthcoming resulting in the apparent deemed refusal.

Shortly after the Review was opened, the Public Body issued a decision for the majority of the requested Record but was still awaiting clarification on the outstanding portion. The Applicant refused to provide clarification but continued to take issue with the actions of the Public Body in regards to its duty to assist and his/her other non-FOIPOP related issues.

This file was resolved informally once the Applicant reluctantly agreed that without him/her providing clarification on the outstanding portion, there was no reviewable issue.

The Review Officer ought not to be constrained in managing Reviews to discontinue such a Review only when the Applicant can be convinced to let the matter go. This example shows the need for the Review Officer to be able to exercise her discretion to discontinue a Review where, having regard to all the circumstances, further investigation would be neither necessary nor of any benefit to the Applicant.

This case also highlights the Responsibilities of an Applicant during the Review process. An Applicant ought not to be able to stonewall an Application for Access or a Request for Review by not providing clarification or additional essential information that either a public body or the Review Officer deems necessary in order for an access to information request or a Review to proceed. [For more on this topic please see page 14.]

Time Extension Requests – 2011	
Public Body	#
Communities, Culture and Heritage	1
Finance	1
Halifax Regional Municipality	7
Halifax Regional School Board	1
Intergovernmental Affairs	1
Kings County Municipality	1
Nova Scotia Business Inc.	3
Nova Scotia Energy	1
Nova Scotia Environment	1
Trade Centre Limited	2
Transportation and Infrastructure Renewal	4
Total	23

Time Extensions:

Municipal Government Act,
Part XX, s. 469

*Freedom of Information and
Protection of Privacy Act*, s. 9

*Personal Health Information
Act*, s. 84

Time Extension Complaints by Year		
	Within 60 days	Outside 60 days
2011	2	0
2010	1	2
2009	2	0

Deemed Refusals:

Municipal Government Act,
Part XX, s. 467(3) [30 days]

*Freedom of Information and
Protection of Privacy Act*, s.
7(2) [30 days]

*Personal Health Information
Act*, s. 86 [30 days]

Review Officer's Discretion



Discretion *Not to Continue* with a Request for Review

The Applicant requested access to all the information regarding the apprehension and subsequent adoption of his/her child. The Applicant did so in the hopes of being able to prove that the reasons for removal from his/her home were not justified and so s/he could regain custody of the child.

Originally no information was given to the Applicant by the Public Body because disclosure through the court process had already been given. The Public Body relying on the fact that disclosure through the court process is generally more comprehensive refused the Application for Access to a Record in full. The fact that information is available through other processes, however, is not an exemption a public body can rely on under the *Act* to refuse access to a record. In fact, the *Act* allows for people to get access under both processes or from more than one source if they choose to do so.

Working with the Review Office, the Applicant narrowed the scope of his/her access to information request and was provided partial disclosure by the Public Body. Subsequent to the partial release, the Review Office suggested that the matter was now resolved and the file could be closed. The Applicant wished to continue with the Review, however, in his/her words, in order to “waste the Public Body’s time.” The Applicant acknowledged that this would also result in wasting the Review Office’s time too but felt justified in proceeding because of the history s/he had with the Public Body and a desire for retribution.

This is a perfect example of why the Review Officer should have the discretion not to continue with a Review where it is clear that the Request for Review is part of a pattern of conduct that amounts to an abuse of process.

In this case, the Applicant received disclosure of the narrowed scope but wanted to continue on with the process to “waste the Public Body’s time” all the while knowing s/he would not be entitled to any more information. Had the Review Officer had discretion, this file would have been closed as the Applicant was no longer pursuing his/her Review “in good faith.” It was not until over a month later after correspondence and conversations with the Applicant about “spite not being the proper use of the process” that the Applicant agreed not to pursue the matter further. To get to this point, it took over two years.

Currently under the three access and privacy statutory mandates, the Review Officer does not have discretion to discontinue a Review. [For more on this topic please see page 4]

Recommendations:



I have recommended to the Minister of Justice making an amendment to the other *Acts* to give the Review Officer and FOIPOP Administrators the ability to exercise discretion not to accept or to discontinue a Request for Review and an Application for Access to a Record, respectively, similar to what will be available under *PHIA*.

In the case of FOIPOP Administrators, the amendment to the *Acts* could include a provision that enables applicants to seek a Review of the Administrator’s exercise of discretion not to process an Application for Access to a Record to determine whether or not it was reasonable in the circumstances to the Review Officer. The Review Officer would be compelled to process this request.

Review Officer's Discretion

Discretion *Not to Continue* with a Request for Review

The Applicant had originally requested a Report about a workplace investigation that was conducted in which s/he was the accused offending party. The Public Body issued a decision to disclose the Record in part to the Applicant. Because third parties were involved with the Record, the Public Body had to give notice of the proposed release of part of the Record.

One of the third parties filed a Request for Review to stop the disclosure from happening. Subsequently another Applicant requested the same Record. Again the Public Body issued a decision to disclose the Record in part. This time, the first Applicant who requested the Record, which was now under Review, felt that "it would only be fair" to file a Review so the second Applicant would also not get the Record. Eventually, the Applicant for the second file decided to withdraw the request for access to a record which meant that the Review Officer lost jurisdiction and that Review file was closed.

This is a perfect example of where the Review Office resources were wasted; time was spent investigating the issue when the Applicant's sole purpose for making a Request for a Review was because s/he was angry that a third party filed a Request for Review and delayed the process for him/her. This file took over two years to resolve. This example shows the need for the Review Officer to be able to exercise her discretion to discontinue a Review where in her opinion the Review Request has been made in bad faith or for an improper purpose.



Discretion – Nova Scotia

Personal Health Information Act, SNS 2010, c 41 **[Not yet in force]**

95 (1) The Review Officer may decide not to review the subject-matter of the review pursuant to clause 92(2)(a) or (3)(a) for whatever reason the Review Officer reasonably considers appropriate, including if satisfied that

- (a) the custodian has responded adequately to the concerns;
- (b) the concerns have been or could be more appropriately dealt with, initially or completely, by means of a procedure other than a request for a review under this Act;
- (c) the length of time that has elapsed between the date when the subject-matter of the review arose and the date the review was requested is such that a review under this Section would likely result in undue prejudice to any person;
- (d) the person requesting a review does not have a sufficient personal interest in the subject-matter of the review;
- (e) the request for a review is frivolous or vexatious; or
- (f) the request for review is part of a pattern of conduct that amounts to an abuse of the right of review.

(2) Where the Review Officer decides not to conduct a review under subsection (1), the Review Officer shall give written notice to the custodian and any other person the Review Officer considers appropriate.

Ombudsman Act, RSNS 1989, c 327

14 (1) The Ombudsman, in his discretion, may refuse to investigate or may cease to investigate a grievance if

- (a) an adequate remedy or right of appeal already exists whether or not the complainant has availed himself of the remedy or right of appeal;
- (b) the grievance is trivial, frivolous, vexatious or not made in good faith;
- (c) having regard to all the circumstances of the case, further investigation is unnecessary;
- (d) the grievance relates to any decision, recommendation, act or omission of which the complainant has had knowledge for more than one year before complaining;
- (e) the complainant does not have a sufficient personal interest in the subject-matter of the grievance; or
- (f) upon a balance of convenience between the public interest and the person aggrieved the Ombudsman is of the opinion that the grievance should not be investigated.

(2) Where the Ombudsman decides not to investigate or to cease to investigate a grievance he shall inform the complainant and any other interested person of his decision and may state his reasons therefor. R.S., c. 327, s. 14.

Human Rights Act, RSNS 1989, c 214

29 (4) The Commission or the Director may dismiss a complaint at any time if

- (a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;
- (b) the complaint is without merit;
- (c) the complaint raises no significant issues of discrimination;
- (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
- (e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
- (f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or
- (g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9. R.S., c. 214, s. 29; 2007, c. 41, s. 6.

Elections Act, SNS 2011, c 5

293 (1) Where the Chief Electoral Officer determines that an allegation of a contravention of this Act is frivolous or vexatious, the Chief Electoral Officer shall dismiss the matter and may refer the matter to the Director of Public Prosecutions who, subject to this Act, shall determine whether to commence a prosecution.



Discretion - Canada



CANADA

Personal Information Protection and Electronic Document Act

12.2 (1) The Commissioner may discontinue the investigation of a complaint if the Commissioner is of the opinion that

- (a) there is insufficient evidence to pursue the investigation;
- (b) the complaint is trivial, frivolous or vexatious or is made in bad faith;
- (c) the organization has provided a fair and reasonable response to the complaint;
- (d) the matter is already the object of an ongoing investigation under this Part;
- (e) the matter has already been the subject of a report by the Commissioner;
- (f) any of the circumstances mentioned in paragraph 12(1)(a), (b) or (c) apply; or
- (g) the matter is being or has already been addressed under a procedure referred to in paragraph 12(1)(a) or (b).

QUEBEC

An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information

137.2. The Commission may refuse or cease to examine a matter if it has reasonable cause to believe that the application is frivolous or made in bad faith or that its intervention would clearly serve no purpose.

NUNAVUT

Access to Information and Protection of Privacy Act

(2) The Information and Privacy Commissioner may refuse to conduct a review or may discontinue a review if, in his or her opinion, the request for a review

- (a) is frivolous or vexatious;
- (b) is not made in good faith;
- (c) concerns a trivial matter; or
- (d) amounts to an abuse of the right to access.

NORTHWEST TERRITORIES

Access to Information and Protection of Privacy Act

31(2) The Information and Privacy Commissioner may refuse to conduct a review or may discontinue a review if, in his or her opinion, the request for a review

- (a) is frivolous or vexatious;
- (b) is not made in good faith;
- (c) concerns a trivial matter; or amounts to an abuse of the right to access.

SASKATCHEWAN

Access to Information and Protection of Privacy Act

50(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 49, the commissioner shall review the matter.

(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

- (a) is frivolous or vexatious;
- (b) is not made in good faith; or
- (c) concerns a trivial matter.

NEW BRUNSWICK

Right to Information and Protection of Privacy Act

69(1) The Commissioner may, in his or her discretion, refuse to or cease to investigate a matter in any of the following circumstances:

- (a) the complaint is trivial, frivolous, vexatious or not made in good faith;
- (b) having regard to all the circumstances of the case, further investigation is unnecessary;
- (c) the time period within which the complaint could be made is expired; or
- (d) the person who made the complaint does not have a sufficient personal interest in the matter.

BRITISH COLUMBIA

Ombudsman Act

13 The Ombudsperson may refuse to investigate or cease investigating a complaint if, in the opinion of the Ombudsperson, any of the following apply:

- (a) the complainant or person aggrieved knew or ought to have known of the decision, recommendation, act or omission to which the complaint refers more than one year before the complaint was received by the Ombudsperson;
 - (b) the subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient personal interest in it;
 - (c) the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and, if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for the failure to do so;
 - (d) the complaint is frivolous, vexatious, not made in good faith or concerns a trivial matter;
 - (e) having regard to all the circumstances, further investigation is not necessary in order to consider the complaint;
 - (f) in the circumstances, investigation would not benefit the complainant or person aggrieved;
 - (g) the complainant has abandoned the complaint
 - (i) by failing to advise the Ombudsperson of a current address or telephone number at which the Ombudsperson can contact him or her, or
 - (ii) by failing to respond after a reasonable number of attempts by the Ombudsperson to contact him or her in writing or verbally;
 - (h) the complaint is withdrawn by the complainant by notice to the Ombudsperson;
 - (i) the complaint is settled under section 14.
- telephone number at which the Ombudsperson can contact him or her, or
- (ii) by failing to respond after a reasonable number of attempts by the Ombudsperson to contact him or her in writing or verbally;
 - (h) the complaint is withdrawn by the complainant by notice to the Ombudsperson;
 - (i) the complaint is settled under section 14.

MANITOBA

Access to Information and Protection of Privacy Act

63(1) The Ombudsman may decide not to investigate a complaint if the Ombudsman is of the opinion that,

- (a) in the case of a complaint about privacy referred to in subsection 59(3), the length of time that has elapsed since the date the subject matter of the complaint arose makes an investigation no longer practicable or desirable;
- (b) the subject matter of the complaint is trivial or the complaint is not made in good faith or is frivolous, vexatious or an abuse of process; or
- (c) the circumstances of the complaint do not require investigation.

Gold Star Award – 2011



“Come and See for Yourself”
[Strait Regional School Board]



One of the issues an Applicant can raise in a Request for Review is adequacy of the search conducted by a public body. Where an applicant believes some or more records should exist and the public body claims they do not, the Review Officer's task is to collect information from the Applicant as to why they believe some or more records exist. This information must be based on factual evidence and not mere speculation.

Applicants often feel that more records should exist but those feelings are not necessarily based in fact. There could be a number of reasons why records may not have been found by the public body: the records were never created, have since been destroyed or sometimes there is the possibility they are missing due to poor records management. This case highlights how a public body goes about embracing its statutory duty to assist.

The Strait Regional School Board issued a decision. The Applicant believed additional records existed and provided some evidence to support this claim in the form of copies s/he had in his/her possession. The FOIPOP Administrator conducted additional searches by visiting various locations and physically searching for the records, in addition to contacting former employees who may have had knowledge of where additional records were located. This resulted in additional documents being found that were responsive to the Applicant's Application for Access to a Record. These were released to the Applicant along with a full explanation of how the search process was undertaken. The Applicant remained dissatisfied and was adamant that all records had not been identified.

The FOIPOP Administrator, wanting to assist the Applicant as much as possible, offered him/her the opportunity to view the actual and complete file so that s/he could satisfy him/herself that no additional documents responsive to his/her access to information request existed. The Applicant declined the offer. The Applicant wished to pursue the matter to formal Review. The Review Officer considered whether or not the search was adequate and was in accordance with the Act and best practices; which she found it was and reported her findings to the parties.

By conducting a full and comprehensive search, providing full details of the search conducted and taking the extra step to invite the Applicant to view the file in person, the Strait Regional School Board clearly met its statutory duty to assist and in doing so has earned the Review Officer's annual **Gold Star Award**. This case also highlights one of the ongoing problems the Review Officer faces due to not having discretionary power under access and privacy legislation – the discretion to not accept or discontinue a Request for Review where appropriate. [For more on this topic please see page 4.]

Reviews Opened by Applicant Group					
	Media	General Public	Political	Organizations	Other Public Bodies
2011	7 (6%)	72 (68%)	3 (3%)	25 (23%)	0
2010	15 (16%)	64 (67%)	0	16 (17%)	0
2009	7 (6%)	82 (75%)	6 (5%)	15 (14%)	0 (0.0%)

Access to Records



Procuring Confidence in the Bidding Process

The Applicant requested access to all tendering documentation, including that which was generated during the bid evaluation process. The Applicant believed that while s/he had complied with the pricing criteria, the successful bidder may have quoted a lower per unit price that did not accurately represent the true per unit cost. The Applicant was seeking confirmation that the bidding process had been fair.

The Public Body withheld the information in full based on its belief that all proponent submissions were to be treated as confidential third party information. The Applicant sought a Review of that decision.

The Review Office brought the Applicant's concerns to the Public Body. The Public Body expressed its commitment to a transparent procurement process. In order to ensure that the business owner would continue to have confidence in the integrity of the procurement process, the Public Body sought the advice of a senior procurement consultant who reviewed the tender file in light of the Applicant's concerns about the process.

The consultant wrote to the Applicant with his/her findings. The Applicant was satisfied with their findings and the file was closed.

Freedom of Information and Protection of Privacy Act

Purpose of Act

2 The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

(i) giving the public a right of access to records,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves

Fresh Eyes and Openness to Revisit a Disclosure Decision



The Applicant was involved in an employment dispute resulting in termination. At issue, was certain information that was severed from a briefing note based on s. 14 [advice to a public body or minister] and s. 16 [solicitor-client privilege].

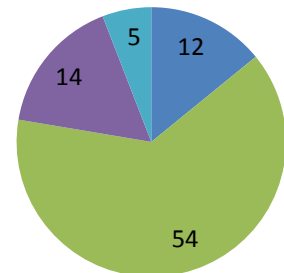
The Public Body was provided with research and case law concerning the application of relevant exemptions. Representations were then requested from the Public Body.

During the course of the Review, the Public Body reassessed the responsive Record. A new decision was issued releasing additional information to the Applicant. The Applicant communicated his/her satisfaction with the disclosure and the file was closed.

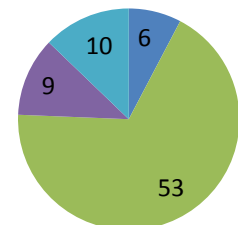
Resolution of Files Closed by Year

- Review Report
- Mediation
- Informal
- Discontinued
- Screened Out

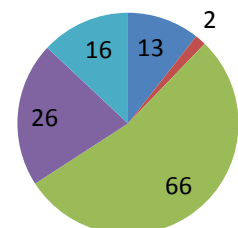
2011



2010



2009



Access to Records

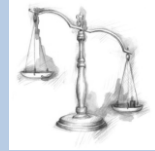
Access Request by Primary Issue by Year

2011	Provincial	Municipal	Total
Refusal to Disclose & Severing	29 (40%)	12 (35%)	41 (38%)
Search	18 (25%)	3 (9%)	21 (20%)
Fees & Waiver	5 (7%)	2 (6%)	7 (6%)
Response	4 (5%)	1 (3%)	5 (4%)
Jurisdiction	1 (1%)	1 (3%)	2 (2%)
Third Party	10 (14%)	8 (25%)	18 (17%)
Deemed Refusal	3 (4%)	4 (12%)	7 (7%)
Time Extension	0	2 (3%)	2 (2%)
Other	3 (4%)	1 (3%)	4 (4%)

2010	Provincial	Municipal	Total
Refusal to Disclose & Severing	52 (68%)	9 (50%)	61 (64%)
Search	4 (5%)	1 (6%)	5 (5%)
Fees & Waiver	3 (4%)	0	3 (3%)
Response	5 (7%)	4 (22%)	9 (10%)
Jurisdiction	1 (1%)	0	1 (1%)
Third Party	7 (9%)	3 (17%)	10 (11%)
Deemed Refusal	2 (3%)	0	2 (2%)
Time Extension	2 (3%)	1 (1%)	3 (3%)
Other	1 (1%)	0	1 (1%)

2009	Provincial	Municipal	Total
Refusal to Disclose & Severing	51 (60%)	14 (58%)	65 (60%)
Search	7 (8%)	2 (8%)	9 (8%)
Fees & Waiver	2 (2%)	0	2 (2%)
Response	7 (8%)	2 (8%)	9 (8%)
Jurisdiction	1 (1%)	0	1 (1%)
Third Party	5 (6%)	3 (13%)	8 (7%)
Deemed Refusal	3 (4%)	3 (3%)	6 (5%)
Time Extension	1 (1%)	0	1 (1%)
Other	8 (9%)	0	8 (7%)

Advice about Legal Advice



A lawyer who is versed on access and privacy law can be a valuable addition to any access and privacy team. S/he can introduce a wealth of knowledge and skills, reducing overwhelming issues and chaos to an organized approach and clarity. What s/he cannot do, is step into the shoes of the statutory decision-maker.

Section 44(1) of *FOIPOP Act* and s. 496 of the *Municipal Government Act* permit the delegation of authority *within* a public body.

A lawyer can advise a public body in the same way other professionals may provide advice in relation to an access to information request or privacy complaint. S/he cannot act for that public body as a delegated authority.

The *Acts* give the head of a public body, and his or her delegates, power to make such decisions as: interpreting the scope of a request, the nature and extent of a search, any reliance on extensions, fee assessment and the application of mandatory or discretionary exemptions. All of these decisions must remain with the public body and be made by the delegated authority.

The *FOIPOP Act* and its equivalent, *Part XX* of the *Municipal Government Act*, do not allow the head of a public body to relinquish its statutory authority to delegate powers to external consultants, legal or otherwise.

In the end, legal advice can be very helpful but is only one factor for the delegated authority to consider in making his/her decision.

Access to Records

What an Applicant Needs to Know: Your Responsibilities



Government Responsibilities:

Under law, municipal and provincial government and other public bodies have a “duty to assist” you when you make an Application for Access to a Record. This means the applicable laws place a responsibility on public bodies to make every effort to assist you when you make an access to information request by providing an open and accurate decision with reasons in a timely fashion.

Your General Responsibilities as an Applicant:

Now you have made a Request for Review to the Freedom of Information and Protection of Privacy Review Officer under either the *Freedom of Information and Protection of Privacy Act* or *Part XX* of the *Municipal Government Act*. Here is some very important information about your role and responsibilities as an applicant. You will be responsible for:

- **Watching Timelines:** Be very careful to observe timelines. If you are asked to provide information within a certain period of time, please do so. If you require more time, ask your contact at the Review Office if that can be arranged. Your file will be closed if you do not provide the information relevant to move the file forward in accordance with the deadline provided by the Review Office.
- **Updating your Contact Information:** You need to keep the Review Office up to date about your contact information such as mailing address and phone number. If you cannot be contacted and deadlines are missed as a result, the file is considered “abandoned” and will be closed.
- **Discontinuing your Request for Review:** Inform the Review Office if you no longer need to continue with the Review. This may include situations where the requested information was obtained another way, the matter is now before the courts or you are no longer interested in pursuing the Request to Review. The Review Office has many files and it is important for us to know if your file can be closed.
- **Retaining the Copy of the Record you Received:** If you receive some information that you requested from the public body, please keep this Record separate from all your other documents. If the public body does not provide an index or if the Record pages are not numbered when you receive it, number it yourself in pencil. The Review Office staff may request that you provide a copy of the Record you received from the public body or Review Office staff may refer to the Record when speaking with you.
- **Retaining Copies of Communications with the Public Body:** Keep copies of any relevant documents including all types of communications, such as letters, notes made in your discussions and any information the public body provided to you.
- **Requesting Information you Provide be Kept Confidential:** Be aware that Requests for Review are shared with the public body and anything else you send to the Review Office may be shared with the public body. If you wish to provide information confidentially, you need to make a specific request to provide the information *in camera* (confidentially) but only with the prior permission from the Review Officer.
- **Additional Information:** You may need to provide additional information in certain circumstances. The Review Office staff will tell you if this applies to your Request for Review.

Access to Records

Failure to Keep the Review Office Informed

The *Act* allows a public body to extend the time to respond to an applicant past 30 days in three specific instances: where a public body needs more detail from an applicant; where the volume of the record is large and meeting the time limit would unreasonably interfere with operations; and/ or where a public body needs time to consult with a third party about the request.

The Review Officer received a Request for Review in one instance because the Applicant needed the disclosure in as timely a manner as possible. The Public Body said it needed more time.

In these instances, the Review Office obtains all the relevant information from both parties and tries to broker a commitment for the decision date. In this case, the Applicant's reason for needing a decision quickly changed but s/he failed to update the Review Office or the Public Body and did not respond to calls from the Public Body. The result was time unnecessarily spent trying to follow-up with the Applicant, which actually resulted in delaying the decision further.

This Review Request points to the fact that applicants must realize their role in the Review process and understand the impact they have on work of public bodies and the Review Office when they fail to assume responsibility for a Review they have filed. [For more on this topic please see page 14.]

Keeping the Review Office Informed

The Applicant requested access to information about the identity of an individual who had called the Department of Environment so that s/he could use that information to pursue civil legal action against the caller. In the end, the Applicant withdrew the Review as soon as the legal matter had been resolved.

This is a great example of when an applicant respected the time and resources of a public body, the Review Office and other applicants and did not pursue the Review further once s/he received the requested information through another avenue.



Public Body's Statutory Duty to Assist

Public bodies have a statutory duty to assist applicants under the governing *Acts*. This is in addition to other explicit obligations imposed by the statutes, which also must be fulfilled by public bodies. These include working within statutory timelines to make a decision; providing fee estimates of the costs; compiling the record; providing applicants with notice that a decision has been made; and including specific information in decision letters.

In order to meet the duty to assist, **a public body must make every reasonable effort to assist applicants, without delay, in a manner that is open, accurate and complete.**

A public body must determine what is appropriate to meet the duty to assist based on the circumstances of each case.

Not all applicants will need the same level of assistance, so it is best practice for a public body to contact an applicant to assess what is appropriate, unless it is absolutely clear from the wording of the Application for Access to a Record.

The obligation to assist begins with receipt of the access to information request and continues throughout the entire request process.

Public bodies need to recognize that most applicants are not in a position to understand the details about a public body's practices and will not necessarily be familiar with the types of records they are trying to access. Applicants may need some assistance and it is up to a public body to provide it.

Access to Records

What an Applicant can do if s/he thinks a Public Body *has not met* its Duty to Assist?

An applicant has the right to file a Request for Review of any decision, act or failure to act by a public body. This includes a public body's failure to fulfill its duty to assist. Where the duty to assist is at issue, here are some examples of what the Review Officer would investigate:

- **Without delay** – The *Act* stipulates that a public body has 30 days from the date it received the Application for Access to a Record to issue a decision to an applicant. There are specific situations when a public body may take a longer period of time, but in all cases, the applicant must be notified within the specified time period that there will be a delay and the reason the delay is necessary. The Review Officer would focus on whether or not a public body has responded within the legislated timelines and, if not, whether the reason for the delay met the reasons provided for under the *Act*. If a public body causes delay during the Review, this may form part of the Review.
- **How a fee was calculated** – The *Act* and *Regulations* allow a public body to charge particular amounts for specified tasks and items. An applicant can file a Request for Review if s/he believes the fee estimate is unfair or inaccurate. A Review would focus on whether or not the fees had been calculated correctly under the *Act* and *Regulations*, whether the fees were based on a public body's actual costs or inflated to create a barrier to access, and whether any request for a waiver of fees was properly considered.
- **How and why a decision was made** – When a record is withheld in full or in part, the *Act* requires a public body to provide reasons in addition to explaining what exemptions have been applied. Knowing how and why the decision was made allows an applicant the choice to appeal the decision or not: without the information, it is impossible to make an informed decision.

If adequate information is not provided in the decision letter, the Review Officer will require a public body to provide further explanation in order that it can be shared with the applicant.

During a Review, if a public body decides that an additional exemption should have been applied or if they wish to make in-camera Representations, this can form part of the Review of the public body's duty to assist.

- **How the search was conducted** – The test for search is one of reasonableness: was the search conducted by an experienced employee who made a reasonable effort to locate all responsive records?

The actual search process used by the public body will be examined including how it went about finding the record, who was asked, how they were asked and/or whether the physical location of the record was searched.

The Review would include whether or not the scope of the search was appropriate given the particulars of the access to information request and what records were actually responsive to the Application for Access to a Record.

If there were questions about the Application for Access to a Record, the Review would consider whether the public body tried to narrow or broaden the scope and/or tried to understand what the applicant was searching for by acknowledging that applicants are rarely in a position to know what actual records exist that may be responsive to their request.

Freedom of Information and Protection of Privacy Act.

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; and

(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or

(ii) transfer the request to another public body in accordance with Section 10.

Access to Records

What does the Duty to Assist mean?

Let's look at each part of the test to understand what is expected of a public body:

- **“Every reasonable effort”** – The test is “reasonable” effort, which is what a fair and rational person would expect to be done or would find acceptable and helpful in the circumstances. The use of “every” indicates the response must be thorough and comprehensive exploring all avenues to ensure it is complete. Applicants will often “cast a wide net” to make sure nothing is inadvertently missed. Helping them to define and narrow the scope of their access to information request will not only help them get what they are looking for, but may reduce unnecessary work for a public body. In some cases it will help to reduce costs significantly for both the applicant and a public body.

Sometimes applicants have questions. Making a reasonable effort could include providing an applicant with answers to questions when that is really all they are seeking despite the fact that the Nova Scotia *Freedom of Information and Protection of Privacy Act* is about access to records not about providing information. Those records may or may not contain the answers an applicant seeks. In cases where a public body makes the effort to answer questions or indicate to an applicant where the information is routinely available (outside the scope of the *Act*), the applicant's needs may be met without the need to pursue his/her formal Application for Access to a Record under the *Act*.

- **“Without delay”** – The *Act* recognizes that time is often of the essence in relation to an Application for Access to a Record. A public body is required to begin work upon receipt of an Application for Access to a Record and to complete processing the request within the legislated time limit. Delay is a serious issue under the *Act*, which is why if a public body has to delay its decision for a significant period of time, an applicant has a right to seek a Review of the extension of time with the Review Officer.
- **“Open”** – Open means to be honest, forthcoming and transparent. Where a decision is made not to provide an applicant with all or part of a record, a public body must provide reasons for the refusal in an upfront and informative manner. Being open would also include explaining to an applicant other things such as: how and why a decision was made; how responsive records were searched for; any additional information necessary to explain something found in the record that is believed to be confusing; how a fee is calculated; and creating a record when appropriate.
- **“Accurate”** – This means the public body must provide the applicant with sufficient and correct information about the access process and how decisions are made. This includes: understanding what the applicant is actually looking for including clarifying if there are any questions about the nature of the access to information request; understanding the nature of the records such as being aware of records that are of a particular interest to the public; searching for the record to make sure that all possible responsive documents have been located that are in the custody of or under the control of the public body; preparing a record index if this would make the public body response more accurate; and reviewing the records line-by-line before a decision is made with respect to what, if any, exemptions apply.
- **“Complete”** – This means the information from a public body must be comprehensive and not leave any gaps in its response to an applicant's access to information request. A public body must provide all the necessary details to enable an applicant to understand how a decision was reached. This will include explaining: search procedures, which are of particular importance when no records are found or where a record was destroyed, or where it would seem more records should exist; what, if any, exemptions have been applied; the reason an exemption has been applied, which is of particular importance when the exemption is discretionary; what factors were relied upon in exercising discretion to withhold a record or part of a record; informing an applicant about the outcome of the access process; and the right to file a Request for Review with the Review Officer.

Having an open, accurate and complete decision letter will help applicants understand how and why a decision was made; feel confident that all responsive records were searched for, located, examined and prepared; and allow them to make an informed decision regarding their next steps. Building a respectful and professional relationship with an applicant throughout the process can avoid situations where applicants become frustrated or angry because of how they were treated rather than what information they were or were not able to access.

2011 Review Reports

Exemptions and Issues Considered in 2011

[Complete copies of Review Reports are available online at www.canlii.org]

1. FI-08-108 [Mount Saint Vincent University]

Released March 7, 2011

Application: Review of a decision to withhold any and all incident reports involving the Applicant that would explain why s/he was banned from the University campus.

Exemptions considered: s. 18 (threat to safety or health), s. 20 (personal information).

Issues considered: personal information, third party information supplied in confidence, proper exercise of discretion, evidence of real connection between disclosure and threat to safety or health, whether exemptions were applied as a blanket exemption, statutory duty to assist an applicant.

Recommendation: Release the Record; the public body followed with renewed commitment to FOIPOP [see page 21].

2. FI-08-104 [Service Nova Scotia and Municipal Relations]

Released April 21, 2011

Application: Review of a decision to withhold part of a Record that related to a human rights complaint alleging discrimination on the basis of Acadian descent.

Exemptions considered: s. 16 (solicitor-client privilege).

Issues considered: Acadian French language, solicitor-client, litigation privilege, human rights, schools, dominant purpose test, in-camera requirements, need for public body to make representations to the Review Officer.

Recommendation: Confirm decision to withhold two pages based on litigation privilege but re-examine all remaining pages to ensure solicitor-client applies; public body followed in part.

3. FI-10-49/FI-10-51 [Department of Labour and Advanced Education]

Released April 6, 2011

Application: Review of a decision to withhold in full a draft report on gambling/gaming that had attracted much public and media interest.

Exemptions considered: s. 14 (advice, recommendation or draft regulation).

Issues considered: Expedited Review, discretion irrelevant if exemption does not apply, advice or recommendation, duty to release if falls within definition of background information, public interest, mediation within Review Officer's discretion: not compulsory under FOIPOP.

Recommendation: Release the Record; the public body followed by releasing an annotated version [with explanations from the public body] of the Record.

4. FI-10-41/FI-10-85/FI-10-86/FI-10-87 [Transportation and Infrastructure Renewal]

Released June 1, 2011

Application: Review of a decision to withhold a significant portion of the Record that was the subject of multiple access to information requests by the Applicant on behalf of a residents' group known as Protect the Bay.

Exemptions considered: s. 31 (public interest).

Issues considered: fee waiver, public interest override, inordinate delay, not responsive, exemptions cited with no explanation, statutory duty to assist.

Recommendation: Release the Record with third party personal information severed and complies with Review Officer's condition to expedite; the public body accepted in part.

5. FI-11-34 (M) [Halifax Regional Police]

Released July 27, 2011

Application: The Applicant sought a Review of the HRP's decision under *Part XX* of the *MGA* to withhold a Record based on the exemption that protects a Record, the release of which could reasonably be expected to harm the effectiveness of investigative techniques or procedures currently used in law enforcement. The HRP subsequently refused to provide the Review Officer with a copy of the Record on the basis that the matter did not fall under the jurisdiction of the Review Officer because the Record related to a prosecution.

Exemptions considered: s. 475 (harm to law enforcement and harm to investigative techniques), s. 463 (prosecution).

Issues considered: Investigation, prosecution, excluded, exemption, jurisdiction.

Recommendation: Provide the Record to the Review Officer and provide evidence that the Record relates to an ongoing prosecution; the public body did not accept the recommendations.

2011 Review Reports (cont'd)

Exemptions and Issues (cont'd)

6. FI-09-04 [Department of Labour and Advanced Education]

Released December 13, 2011

Application: A Review of a decision to withhold a large segment of the Record that related to a workplace investigation conducted by the Occupational Health and Safety Division. The investigation resulted after the Applicant complained to the Division after sustaining an illness/injury while at work. The investigation led to charges being laid against the employer that were subsequently withdrawn without the prior knowledge of the Applicant.

Exemptions considered: s. 13 (cabinet deliberations), s. 14 (advice to a Minister), s. 15 (law enforcement), s. 16 (solicitor-client privilege), s. 20 (personal information), s. 21 (commercial information of third parties).

Issues considered: Personal information, fee waiver, applicability of exemptions, discretionary exemptions, mandatory exemptions, exercise of discretion, blanket application, records management.

Recommendation: Release the Record to the Applicant of all the information previously withheld under the discretionary exemptions and provide the Applicant with copies of any missing parts of the Record; the public body accepted in part.

7. P-11-01 [Workers' Compensation Board of Nova Scotia]

Released November 18, 2011

[For details on this Review Report, please see page 23 - First Review Officer Own-motion Privacy Investigation into Workers' Compensation Privacy Practices]

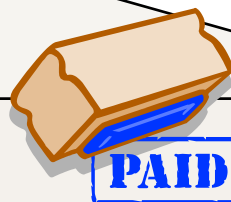
8. FI-11-23 (M) [Municipality of the County of Kings]

Released December 1, 2011

[For details on this Review Report, please see below - Fee Estimate Not a Barrier to Access]

Fee Estimate Ought Not to be a Barrier to Access Review: Report Summary FI-11-23(M)

[Municipality of the County of Kings]



A firm provided services to the Municipality. As part of the contract for services, the firm was to be provided with records relating to the work done. At the end of the service term, the firm believed that it had not received all the records relating to the work. The firm asked the Municipality to provide it with the missing records, which amounted to sorting through several thousand pages to determine what was "missing." The Municipality refused, and told the firm that it would have to make an Application for Access to a Record under *Part XX* of the *Municipal Government Act*. As a result, the firm applied for records and became an Applicant under *Part XX* of the *MGA*.

Due to an apparent miscommunication, the Municipality did not process the original access to information request, and it became a deemed refusal file at the Review Office. When notified of the deemed refusal, the Municipality responded with a decision to the Applicant that included a large fee estimate and lacked a detailed explanation of how the Municipality arrived at the estimate. The Municipality indicated it would not process the file until it received a portion of the fee. The Applicant requested that the Review Officer recommend a waiver of fees.

The Review Officer found that the Municipality did not provide an estimate that was proportionate to the actual work involved, and that the Applicant, by essentially demanding the Municipality answer questions and "fill in the blanks" of a massive volume was not helpful either. The Review Officer recommended that the two parties sit down together to review the electronic file, and that the Municipality could charge for the actual time involved, and the paper copies for which the Applicant wanted copies.

Fees should not be a barrier to access.

2011 Review Report Summaries



Public Interest: Review Report Summary

FI-10-49/FI-10-50

[Labour and Advanced Education]

A previous government commissioned a study of the “socio-economic impacts” of gambling in Nova Scotia, in response to public pressure over the issue of Video Lottery Terminal usage. Media reporting at the time indicated that a “socio-economic study” would be distinct from a standard economic study, and would consider costs and benefits other than the usual dollars and cents. The study was to be made public when it was completed.

After the study had been partly drafted, and fallen behind schedule, the new government determined that the existing study was not meeting its needs and cancelled the study. It indicated that it would not be releasing the study, saying that it was a draft document and it came to inaccurate conclusions based on a flawed methodology. Subsequently, a number of organizations applied for access to the study. The Department of Labour and Advanced Education (at the time Labour and Workforce Development) denied access to the record, claiming that the entire document was “advice to the minister.”

Two organizations filed Requests for Review with the Review Office. The Review Officer determined that the public interest in the file was sufficient to expedite the Review. Upon examining the record, the Review Officer found that there was no advice or recommendation contained in the record, and so the exemption claimed could not apply. The Review Officer recommended Labour release the record in full. The department complied with the recommendation by issuing an annotated version of the full report, highlighting the department’s areas of concern with the study.

Although it was not explored in detail in the Review Report, the public interest override might have been given consideration by the public body early in this process.

Review Officer Recommendations Prevalence of Agreement with Public Body

	Accepted	Partially Accepted	Rejected	Response Outstanding
2011	3 (50%)	3 (50%)	0	0
2010	1 (17%)	1 (17%)	4 (83%)	0
2009	6 (46%)	3 (23%)	4 (31%)	0

Review Officer Reports Prevalence of Agreement between Review Officer and Public Body Positions

	Agreed	Agreed in-part	Disagreed
2011	0	1 (17%)	5 (83%)
2010	0	1 (17%)	5 (83%)
2009	3 (23%)	6 (46%)	4 (31%)

RESPONSE FROM APPLICANT:

“Thank you for your work and objectivity.”

There had been considerable public debate before the launch of the study and public pressure on the previous government to launch the study in the first place. The decision to cancel the study received media attention. At least two applicants applied to Labour seeking access to the Record, and two applicants applied to the Review Office for a Review of the department’s decision. All of these factors supported the Review Officer’s decision to expedite the file in the public interest. These same factors could have been used by Labour in the first instance to support full disclosure, or an annotated version of the fully released Record.

In the end, the department’s decision to disclose an annotated version of the study did appear to give fuller context to the debate, according to media reports. This expanded discussion included looking at new ways to collect information about the negative outcomes for those with gambling problems, which greatly enhanced the Applicant’s goals.

Review Reports

New Best Practice Process to be Implemented in 2012:

Review Officer to Publish Public Body Responses to Review Reports

Beginning in 2012, I will be posting a copy of all public body responses to publicly issued Review Reports on the Review Office website, www.foipop.ns.ca. The posting will be a copy of what the public body provided to either an applicant or the Review Officer or both in response to the findings and recommendations in a Review Report.

The posting will sever all personal information contained in the response to continue our practice of protecting applicants' and third parties' identities.

The Review Office previously posted on the website only whether or not the recommendations had been accepted, accepted in part or rejected. This did not provide members of the public with a complete picture of the outcome of the Review, especially when more than one Recommendation was made. Public bodies will be reminded of this change in all cover letters that accompany future Review Reports.

One of the principal reasons for this move is to provide the public with a more comprehensive view of the Review in its entirety from start to finish, in keeping with the importance of citizens' right to access information and well as accountability and transparency in government decision making.

As I presently do not have order-making power that would require public bodies to comply with my decisions, the details of how public bodies respond to my recommendations is an essential component of ensuring accountability and transparency in an ombudsman oversight model. Were the governing legislation amended to include order-making power, this step would not be necessary.

Recently some public bodies have been responding to Review Reports with quite unusual decisions that are not fully captured by simply reporting "accepted", "accepted in part", or "rejected". The thrust of these unique responses is that public bodies begin by stating that they do not accept the Review Officer's findings and/or recommendations but go on to say in the same breath that they have decided to do exactly what I recommended, claiming it as their decision.

The public is entitled to the complete picture of how a Review has been concluded.

Ms. Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer
PO Box 181
Halifax, NS B3J 2M4

Dear Ms. McCallum:

Re: MSVU FOIPOP Application 2008-02; Review Officer File FI-08-108

We have reviewed your above noted Report and Recommendations and have made our decision on disclosure. We will be following your recommendations in full and will be providing the records recommended for disclosure to the applicant. (Please see copy, attached)

I would like to take this opportunity to thank you and your team for your work on this particular application in which both aspects of the Act (*Freedom of Information* as well as *Protection of Privacy*) were considered. Please be assured that Mount Saint Vincent University is indeed committed to FOIPOP and will continue to work to balance these two responsibilities.

We also continue to support the Mount's FOIPOP Administrator in pursuit of further FOIPOP training through the Office of the Chief Information Access and Privacy Officer.

Yours truly,

Ramona Lumpkin, PhD
President
Mount Saint Vincent University

Privacy

So You Think You May Have a Privacy Complaint. Well, Let's See...



We all want to be satisfied that those who have access to and use of our personal information are treating it properly and legally. But not every instance where we aren't satisfied about how our personal information is used is a privacy breach that the Privacy Review Officer can investigate. Here are some questions to help you determine whether or not you have a privacy complaint the Privacy Review Officer can investigate:

Who was it?

- The Privacy Review Officer only has jurisdiction over “public bodies” as defined in the *Freedom of Information and Protection of Privacy Act (FOIPOP Act)*. This includes provincial government departments, boards, agencies, commissions, Crown corporations, and other organizations that are primarily funded by the provincial government. It does not include municipalities, so if a municipal employee breaches your privacy, the Privacy Review Officer **cannot** investigate. The Review Officer's jurisdiction does not include private sector companies and not-for-profit organizations. [**Correction to text made on November 22, 2013**]

Was it “personal information”?

- The information that has been collected, used or disclosed by the public body has to be “about an identifiable individual,” which is pretty broad: as long as the information identifies you and only you, it's probably personal information. But it also has to be “recorded” information – meaning that if someone you know works for a public body and gossips about something she or he learned on your Facebook page, you probably don't have a privacy complaint the Privacy Review Officer can investigate: the information about you has to have been recorded in a public body's records.

Was it “authorized”?

- The *FOIPOP Act* sets out requirements for what public bodies can do with your personal information. There are three broad categories of what public bodies can do with personal information: they can collect it, use it and/or disclose it, but they must be “authorized by law” to do so.
- An authorized collection might be, for example, if the department of energy decides to grant energy efficiency loans, it will need to collect financial information to ensure that the loans will be repaid. An unauthorized collection means the public body has no reason under another act or program to collect personal information about you.
- An example of an authorized use might be the Department of Community Services using income data to determine if income assistance payments are at the right level according to the program. An example of an unauthorized use of personal information held by a public body might be if a public body employee read your file simply out of curiosity.
- Disclosure can be authorized where the information is necessary to perform the requirements of a program. A 2011 Review Report about the Workers' Compensation Board [WCB] discussed authorized and unauthorized disclosure in detail. In that report, WCB was authorized to disclose a worker's personal information when it informed a worker's employer about the worker's requirements for a safe return to work, and it was not authorized to disclose the personal information when it sent worker's personal information to other workers without their consent. [For more on this topic please see page 23 - Summary of WCB Investigation P-11-01]

Was your complaint brought to the Public Body's attention?

- The *PRO Act* requires that, before the Privacy Review Officer can investigate a privacy complaint you must first provide the public body with your complaint in writing so the public body can complete its internal privacy complaint process. When this step is complete, you can file a privacy complaint with the Privacy Review Officer.

Privacy Investigation – Resolution and Closure Statistics

	Public Report	Private Report	Informal Resolution	Withdrawn/ Abandoned	Screened Out
2011	1	0	0	0	2
2010	0	0	4	0	2
2009	0	0	0	0	5

First Review Officer Own-motion Privacy Investigation into Workers' Compensation Privacy Practices



In 2011, the Review Office completed its first “own-motion” investigation into a Public Body’s compliance with the privacy provisions of the *FOIPOP Act*, when it issued Review Report P-11-01.

The investigation was initiated early in 2011, after media reports claimed that two separate clients of the Workers’ Compensation Board of Nova Scotia [“WCB”] had requested copies of their own file and each had received a different, incorrect file.

This media coverage sparked a number of calls to the Review Office with WCB clients reporting similar instances, and so the Review Officer determined to initiate an investigation under section 5(1)(b) of the *Privacy Review Officer Act*.

During the investigation the Review Office examined the WCB’s records related to privacy breaches dating back to 2008, and found that, despite a solid and evolving privacy policy and process the WCB had failed to meet some of the key criteria described in its own policy.

The records showed that WCB had, on many occasions, disclosed personal information – including personal health information – of its clients to other clients from whom it did not have consent to disclose the information.

In determining the status of a privacy breach, WCB too often failed to focus on the actual information that was disclosed, and instead made determinations about the severity of a breach by how “sensitive” the information was, who received the information, or by mis-characterizing the type of information disclosed. Most of the Review Officer’s 21 recommendations focused on improving the implementation of WCB’s existing privacy policy.

WCB also had in place a plan to provide direction and leadership from senior management, including the creative idea of having a cross-departmental committee meeting quarterly to discuss privacy issues. However, the plan was not being acted on. This area was the second major focus of the Review Officer’s recommendations.

In the end, the Review Officer found that because injured workers in Nova Scotia are required to share details of their personal injury history with the WCB if they are injured on the job and need compensation, the WCB needed to approach its clients’ personal information with a high degree of sensitivity. The Review Officer made 21 recommendations that focused on improving the WCB’s privacy culture.

WCB cooperated fully throughout the investigation, and agreed to implement all 21 recommendations, many of which will be implemented over time. During 2012, the Review Office will monitor the WCB’s efforts to implement the recommendations.

Privacy Review Officer Act

Powers of Privacy Review Officer

5 (1) In addition to the Privacy Review Officer’s duties and powers referred to in Section 6 with respect to reviews, the Privacy Review Officer may

(b) initiate an investigation of privacy compliance if there are reasonable grounds to believe that a person has contravened or is about to contravene the privacy provisions and the subject-matter of the review relates to the contravention;

Privacy

Public Body Privacy Consultation Requests

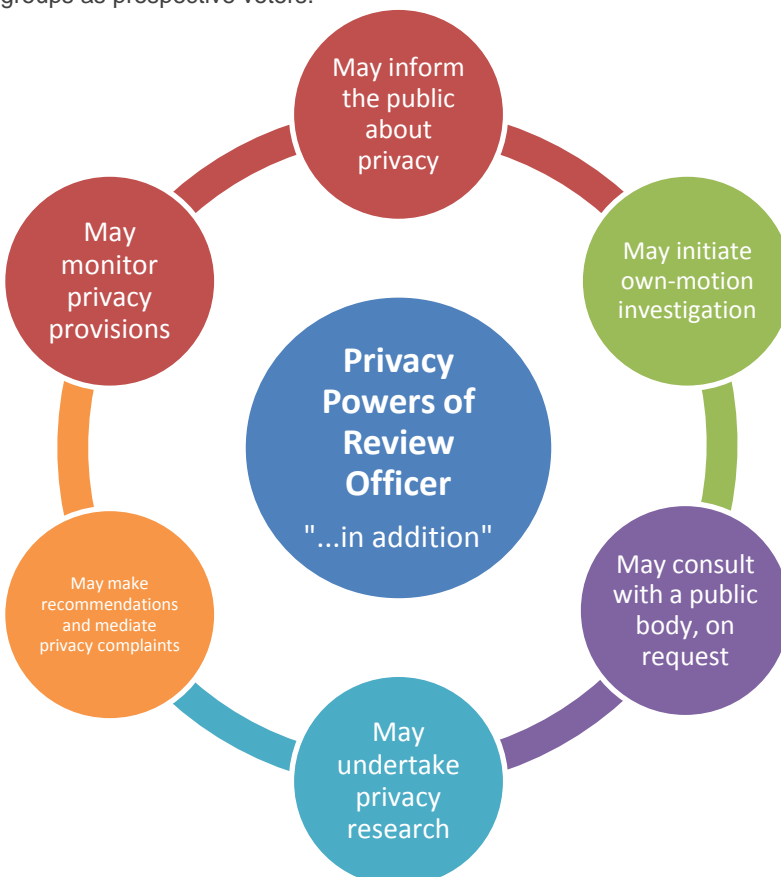
The *Privacy Review Officer Act* enables the Review Officer to provide advice and comment on privacy upon request of a public body. As an independent arm's length oversight body, this provision is extremely important. Were the statute silent on the ability to consult, and the Review Officer to agreed to do so, the public may consider such discussion inconsistent with the principle of independence from government.

In 2011, two requests from public bodies to consult were received by the Review Officer.

Office of the Premier - New *Elections Act*

Under the new *Elections Act* introduced in the spring of 2011 government included a provision that would require the Chief Electoral Officer to release an elector's year of birth to political parties. The Office of the Premier requested a consultation after members of the public raised privacy concerns including fear of identity theft, some of whom indicated their intention to have their name removed from the voters' list. The goal of the provision was a laudable one: to be able to target electors of a particular age to encourage and improve voter participation.

After providing the Office of the Premier with a brief and research, an amendment was made to remove the requirement to collect and share an elector's personal information [age] and replace it with a requirement that the Chief Electoral Officer put each elector into an age cohort [range] and provide this information to political parties. This change meant the new *Elections Act* no longer required the collection and sharing of personal information contrary to the privacy provisions of the *Freedom of Information and Protection of Privacy Act* while still enabling parties to target age groups as prospective voters.



Freedom of Information and Protection of Privacy Act.

Powers of Privacy Review Officer

5 (1) In addition to the Privacy Review Officer's duties and powers referred to in Section 6 with respect to reviews, the Privacy Review Officer may

(f) on the request of a public body, provide advice and comments on privacy.

Capital Health District Authority - Information Sharing Guidelines

The Capital District Health Authority's Mental Health Program had developed Guidelines for information sharing within the Triangle of Care as part of its commitment to a collaborative approach to the care and recovery of persons living with mental illness.

The feedback provided to the CDHA acknowledged its legal framework of the *UN Convention on the Rights of Persons with Disabilities*, discussed clarity around the definition of personal information, and consent being obtained by health care providers from persons with a mental illness.

Out and About - 2011

Events

Dalhousie Data Privacy Day, Halifax
 12th Annual Privacy and Security Conference, Victoria
 Information Management, Access and Privacy Symposium, Toronto
 Third Session of the Sixty-First General Assembly of Nova Scotia – Throne Speech and Opening of the House of Assembly, Halifax
 Law Day - Exhibitor, Halifax
 Access and Privacy Conference, Edmonton
 Maritime Access and Privacy Conference, Halifax
 2nd Annual Access and Privacy Conference, Canadian Bar Association, Ottawa
 7th International Conference of Access to Information Commissioners, Ottawa
 Canadian Access and Privacy Commissioners mid-winter meeting, Ottawa
 Canadian Access and Privacy Association [CAPA] Conference, Ottawa
 Canadian Access and Privacy Commissioner's Annual Summit, Quebec City
 GoverNext Annual General Meeting, Halifax

Committees

GoverNEXT
 French-language Services Coordinating Committee
 Atlantic Access & Privacy Workshop Planning Committee

Consultations

Canada Health Infoway Privacy Forum
 [Electronic Health Record]
 Office of the Premier – Elections Act – collection of personal information
 [voter age]
 Capital District Health Authority
 [Mental Health Information Sharing Guidelines]

Presentations

A Proactive Approach to Issuing an Access to Information Decision, Maritime Access and Privacy Workshop, Halifax.
Exercise of Discretion - 7th International Conference of Access to Information, Ottawa.
Public Body Decision-making: Exercise of Discretion & Providing Reasons - Canadian Access and Privacy Association [CAPA], Ottawa.

Training

Acadie at a Glance, sponsored and presented by Acadian Affairs
Employment Equity Partnership Symposium, sponsored and presented by the Human Rights Commission
French Language Courses, Public Service Commission in collaboration with Université Ste-Anne

Information and Privacy Commissioners' Annual Meeting Quebec City, Quebec – August 31 – September 2, 2011

All Canadian independent oversight Commissioners for Access to Information and Protection of Privacy meet annually. In 2011 the formal summit was convened by the Quebec Access and Privacy Commissioners in Quebec City. Among the issues discussed at the 2011 meeting were:

- Legislative reform presentation : Advantages and Disadvantages of Order-making Power versus Recommendation Ombuds-model
- Michael Geist presentation: Emerging Trends in use of Technology in the Public Sector
- Alternatives to formal gearings: informal resolutions and mediation
- Identity management systems for government on-line services
- Working with the media and civil society
- Access to ministerial records and expenses
- Adequately resourcing Independent oversight offices
- Bureaucratic and political interference with oversight offices
- Statistics Canada presentation
- RCMP legislative access to victims' personal information
- Upcoming International Information Commissioners' Annual Conference in Ottawa
- Launch of the annual Grace Pépin Award

