

The Nova Scotia

**Freedom of Information
and Protection of Privacy**

Review Officer



2012 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 sixth 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 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 Officer'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 Officer's commitments to readily accessible information at no cost to the public and to environmental sustainability.

All of which is respectfully submitted,

Dulcie McCallum



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



MESSAGE FROM DULCIE MCCALLUM

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY REVIEW OFFICER



In 2012 I was pleased to host the annual Federal, Provincial, and Territorial Summit of Information and Privacy Commissioners in Halifax. I extend my thanks to the Department of Justice that helped to make this possible with a small one-time financial grant. The summit enabled us to shine a spotlight on Nova Scotia's work in areas of privacy and access. I want to also thank all the staff at the Review Office for the extra time and effort they devoted to making the event a success.

Nova Scotia was the first province in Canada to enact access to information legislation. We are very proud of this fact. It has become increasingly clear, however, that the original name given to the oversight body – the Review Officer – is outmoded and confusing to the public.



There is a great deal of media attention given to the work of my Canadian colleagues all of whom are Commissioners. In Nova Scotia, the public is left with the impression that the Legislature does not give access and privacy the prominence it deserves. It is time for Nova Scotia to adopt the title of Commissioner and make it an independent Officer of the Legislature. This will clarify for the public who they can turn to hold public bodies to account in all access and privacy matters. The details are outlined in the article "**Now is the Time.**" (See p. 5)

It is time to make this change because Nova Scotia is on the threshold of gaining new access and privacy rights. The new **Personal Health Information Act** will come into force on June 1, 2013. In addition, it is anticipated that the Review Officer will be given oversight with respect to the privacy decisions made by municipalities. These will add thousands of new public and private entities to my jurisdiction as the Review Officer all of whom would benefit from the clarity a change of title to Commissioner would provide. (See p. 22)



This year we are excited to announce there are two gold star recipients. Each Review highlights important principles. The first is awarded to the Nova Scotia Utility and Review Board for its response to a complaint regarding the posting of personal data identifiers in its Assessment Appeal documents available online. For more details see the article "**Seeing Openness through a Privacy Lens!**" The second recipient is the Town of Shelburne. In this Review, a new FOIPOP Administrator took it upon himself to meet one-on-one with the Applicant to fully understand the access request. For more details see the article "**Listening Makes All the Difference!**" (See p. 17)

One of the new processes I introduced in 2012 to try to encourage public bodies to follow the Recommendations was to publish all Public Body responses to the Recommendations on our website. In former years, public bodies' responses were only recorded as accepted or not. The new practice has proved to be very effective. A few examples of the responses that have been made public are included, in this Annual Report. The quality of the responses demonstrates a respectful, improved and productive approach. (See p. 7, 9 and 11)

Building on this new practice, in 2013 we will be taking it one step further. In addition to tabling the Annual Report with the Legislative Assembly, all public Review Reports will be electronically circulated to all Members of the Legislative Assembly through their constituency offices at the time the Report is issued. This will enable all MLAs and their staff to be aware of the ongoing work in access and privacy by the Review Officer. This is our way to practice what we preach: demonstrate a Proactive Disclosure Policy. This will also allow us to change the format of the Annual Report for 2013 in which we can avoid reproducing summaries of cases that by the time the Annual Report is tabled, the reports are dated. For more detail see "**Getting Greener: Getting Information Faster!**" (See p. 4)



It is time to introduce systemic training for employees. It has become patently clear that it is not enough to train the FOIPOP Administrators. Government has introduced compulsory training for employees and managers for such things as Respectful Workplace. I recommend in the coming year that the Public Service Commission study the possibility that all employees be required to take an introductory course in the basics of access to information and privacy. The details are outlined in the article "**Getting Smarter!**" (See p. 12)

During the six years as Nova Scotia's independent access and privacy oversight, I have witnessed the public's growing awareness and understanding about their right to access information and their right to privacy. Restrictions placed on these rights by public bodies, municipalities and health custodians are becoming less tolerated particularly if the restrictions are viewed as arbitrary or unreasonable or, more importantly, are not in compliance with the law. What does a true commitment to transparency and openness look like? The details are outlined in the article "**Through the Looking Glass**" (See p. 7)



There are two kinds of independent oversight across Canada in all provinces, territories and at the federal level. One kind has order-making power such as in Ontario and British Columbia. The second kind, of which Nova Scotia is an example, is based on an Ombuds-model. This model means after a request is investigated the Commissioner or Review Officer can only make Recommendations. Both the Auditor General and the Ombudsman are based on this same model. Recently there have been some who have called out for change to our model to convert it from Recommendation to Order-Making power. There are many pros and cons to both approaches but at the end of the day it is for the Legislative Assembly to decide if this change should be made. For more details see the article "**Recommendation versus Order-Making**". (See p. 10)

FEDERAL/PROVINCIAL/TERRITORIAL INFORMATION & PRIVACY COMMISSIONERS' SUMMIT HALIFAX, NOVA SCOTIA – SEPTEMBER 4-7, 2012

I convened 2012 annual meeting of Canadian independent oversight access and privacy Commissioners and Ombudsman in Halifax, Nova Scotia. Issues discussed at the meeting included:

- Legislative reform: Bill C-12 and recent BC amendments
- MLA/MP expenses
- Electronic records: documentation and preservation
- Refusal to provide records in dispute
- Trends in biometrics
- Smart Data
- Identity management
- Open government
- Bill C-30
- Perimeter Security

Attendees also enjoyed the following networking opportunities:

- Reception hosted by the Review Officer at the Canadian Museum of Immigration, Pier 21 with guest speakers the Honourable Ross Landry, Minister of Justice and Bill Karsten; Deputy Mayor of the Halifax Regional Municipality
- Reception and tour hosted by the Speaker of the Nova Scotia House of Assembly, the Honourable Gordie Gosse at the Nova Scotia House of Assembly
- Reception hosted by His Honour Brigadier-General The Honourable J.J. Grant, CMM, ONS, CD (Ret'd) Lieutenant Governor of Nova Scotia at the Government House
- Lobster dinner hosted by the Review Officer at Murphy's Cable Wharf, Halifax Waterfront
- Reception and dinner hosted by the Office of the Privacy Commissioner of Canada at the CUT, Halifax Marriott Courtyard Downtown
- Tour of the Alexander Keith's Brewery
- Tour of the Art Gallery of Nova Scotia.



GETTING GREENER AND GETTING INFORMATION FASTER!

All Reports from the Review Officer including Access and Privacy Review Reports are available electronically on our website. At the time the Annual Report is tabled, paper copies are still required by the House of Assembly but these are the only printed copies unless a member of public makes a request. We are going to get greener! In 2013 a new practice will be introduced. An electronic copy of all public Review Reports will be sent to all Members of the House of Assembly through their constituency offices at the time the Review Report is issued. Rather than

report on the Reviews done during 2013 solely in the Annual Report [often tabled three or four months into the next year], this will allow all elected officials to receive the Review Reports immediately upon being made public by email. This will allow all our parliamentarians to become more aware of access and privacy issues as they are reported publically and thereby enable them to gain a better understanding of the work of the Review Officer.



NOW IS THE TIME!

In last year's Annual Report I outlined the discrepancies between the four governing statutes for our office. With the completion of the enactment of the additional statutes upcoming in 2013, I recommend that it is time for the House of Assembly to move forward to ensure concordance between the statutes and improvements to put our original statute into sync with other legislation across Canada. Highlights of the priorities for those improvements include:

- Change the name of the oversight body to Freedom of Information and Protection of Privacy [Access and Privacy] Commissioner for the Province of Nova Scotia. No other place in the world uses Review Officer, the title is confusing to the public and leaves the impression that Nova Scotia's oversight body is a second class Commissioner in comparison to other provinces and territories.
- Designate the Access and Privacy Commissioner an independent Officer of the Legislature equivalent to the other independent oversight bodies including the Auditor General, the Ombudsman, and the Chief Electoral Officer. It is only from the status of independent Officer can the access and privacy Commissioner be truly independent from the government of the day.
- Compassionate must be added as a discretionary ground that a Public Body can rely on in making a decision to release personal information that falls under a mandatory exemption. An example of when this would be helpful is where parents of a deceased child seek access to personal information about their child after his/her sudden death.
- Discretion must be given to the Review Officer to enable me to refuse to process a formal Review. Where an individual tries to clog up the system with a frivolous or vexatious Request for Review, everyone loses. Presently the statutes deny public bodies and the Review Officer any discretion (except under *Personal Health Information Act*) to refuse to take a request even where the motives of the applicant are blatantly clear. While this does not occur very often, when it does, it has a dramatic impact on the work of both the Public Body and the Review Officer because the individual often inundates the respective offices with multiple requests with little or no merit, simply seeking to annoy and frustrate the system. This not only wastes resources of the Review Officer but it does so to the detriment of legitimate requests that cannot be processed in a timely fashion because of the backlog the "trouble maker" is causing.



A Comparison of the Review Officer's Powers under Four Mandates

Powers by Statute	FOIPOP Act	MGA, Part XX	PRO Act	PHIA
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]

IMPORTANCE OF HAVING AN INTAKE TEAM

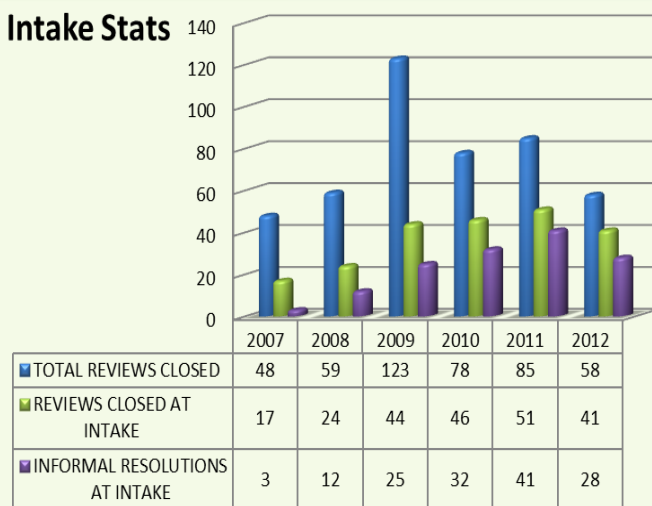
In an effort to have an initial overview of all issues and to accomplish a more streamlined approach to Reviews, since 2007 I established a vital function for the Review Office designated Intake.

Intake provides initial assessment of all Review files and issues including access and privacy Requests for Review, Privacy Consultation Requests, Time Extension Requests, Time Extension Complaints and Transfer Requests under the governing statutes. Intake includes confirming jurisdiction, identifying and clarifying issues, expediting issues, obtaining necessary records, and working with parties to attempt to informally resolve Review Requests.

Intake plays an essential role in public education by applying and interpreting legislation and precedent to advise and assist public bodies and members of the public seeking information about privacy, access and appeal processes under the *Freedom of Information and Protection of Privacy Act, Part XX* of the *Municipal Government Act* and the *Privacy Review Officer Act*. The number of inquiries at Intake and reception continues to grow with each year.

The introduction of Intake at the Review Office has proven to meet its initial goal of a more efficient Review process. Having all files and issues initially filtered through the Intake stage has resulted in an average fifty percent of files being closed at the Intake stage, the majority of which are informally resolved as illustrated in the adjacent table.

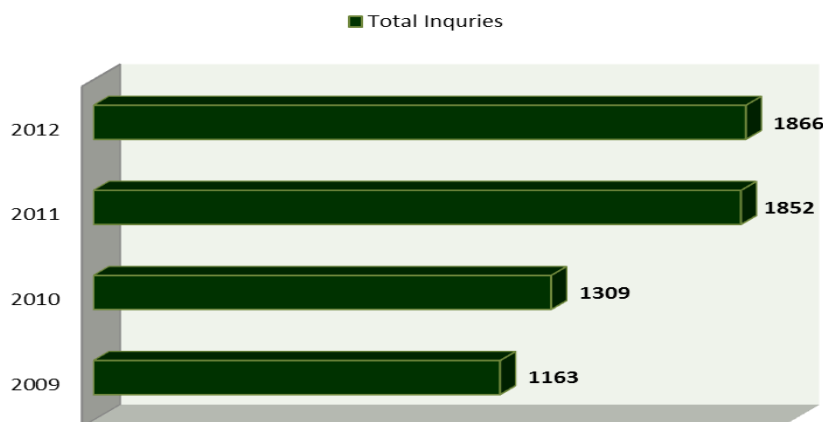
Intake Stats



GENERAL INQUIRIES (BY PHONE, EMAIL, AND REGULAR MAIL)

Year	Access Requests	Review Requests	Privacy	Federal Legislation	Jurisdiction	Referred Elsewhere	Other	Total Calls
2012	252	532	170	28	34	24	826*	1866
2011	331	751	228	34	25	52	431	1852
2010	247	675	73	28	22	34	230	1309

Total Inquiries



WHAT DOES TRANSPARENCY AND ACCOUNTABILITY REALLY LOOK LIKE?

What does a true commitment to the principles of transparency and openness look like? First and foremost, governments take a proactive approach. That means have a clear and publicized Routine Access Policy – this is the policy that the Public Body makes available without the necessity of having to make an application under freedom of information legislation. The companion piece to a Routine Access Policy is for a Public Body to have the capacity and intention to promote a proactive disclosure policy. That means that when a Public Body knows or it is reasonable to assume the public will want to see a report or want to see particular information, the Public Body has a process whereby this information is automatically “pushed out” to the public, again without the necessity of an application under a statute. The latter is particularly appropriate where the Public Body knows the information is of public interest – a matter that is topical, in the media, or a subject of public debate or concern.

Recourse to making an Application for Access to a Record is then appropriately made for other information to which an exemption may apply or where there is a competing privacy interest. This is where a Public Body will rely on the specific and limited exemptions provided for under a statute. A perfect example is where an individual wants his/her personal information, for which an application is without cost to the applicant.

There is a safeguard to ensure that Public Body decisions are reasonable and in accordance with the legislation. That safeguard is the statutory oversight role given to the FOIPOP Review Officer. Our mandate is to ensure the Public Body decision is in compliance with the law. In order to fulfill this mandate we are authorized by law to obtain a complete copy of the Record from the Public Body. It is not our job to release the

contents of the Record or to release the Record itself. Our responsibility under the statutes is to be an independent oversight body to “watchdog” how government processes citizens’ access to information requests. We achieve this by conducting thorough investigations followed by a public Review Report that documents the Findings and Recommendations. If we agree with the Public Body, we confirm their decision as being appropriate under the relevant statute. If we disagree with the Public Body, we make Recommendations as to how the decision should be changed. All the parties to a Review are provided with a copy of the publicly issued Review Report in addition to it being made available on our website. After a Review Report is issued, a Public Body must respond in writing indicating its intentions with respect to my Recommendations. This response letter is now posted on our website in its entirety. In the past we have had responses to Recommendations such as:



“We have no intention of doing what you say.”

“We are not accepting the Recommendations in your Report. We are going to do what you say but not because you told us to.”

Or sometimes the Public Body did not even do us the courtesy of responding to the Report. In these cases, their silence under the statute constitutes a deemed refusal to follow the Recommendations.

We have included portions of a few of the response letters received under the new practice. The much improved quality of the responses is a sign that the practice of posting these letters is having the desired effect. (See below, p 9 and p. 11)

CLARIFYING WHOSE CONSENT IS REQUIRED: CASE SUMMARY FI-11-43

The Record at issue in this Review was a one-page letter containing medical information about the Applicant and his/her ability to drive, a document authored by a Third Party informant. The issues in the Review were: first did Service Nova Scotia properly withhold the personal information of the Applicant under s. 20 of the Act; second had it properly considered all relevant circumstances with respect to its decision to withhold the personal information of the Third Party under s. 20 of the Act; and third had it properly interpreted and complied with the Third Party notice provisions under s. 22 of the Act? The Review Report held that the information requested was primarily the personal information of the Applicant and that Service Nova Scotia had failed to demonstrate any basis for withholding his/her information. The Public Body appropriately considered the expectation of the Third Party that the information would be held in confidence and had provided his/her consent to its release. A Recommendation was that Service Nova Scotia should provide the Applicant with a summary of the personal information in the Record thus protecting the personal information of the Third Party. Another relevant factor considered by Service Nova Scotia was the importance of receiving information from Third Parties in order to promote the public safety. The public good, however, had to be balanced with another relevant consideration: the Applicant’s right to a fair process when seeking to have his/her license reinstated. This cannot be achieved without the Applicant having some knowledge of the basis for a Public Body decision. As well, Service Nova Scotia should be accountable when it makes a decision to suspend a driving license on the basis of an unsolicited report. A person’s ability to drive, travel, and in some cases, to continue being employed may depend on having a driving license. This is the

very reason why the Applicant seeks access to his/her personal information provided to Service Nova Scotia. The Review Officer held that the Applicant is entitled to his/her personal information in order to know how s/he can get his/her license reinstated and that that could be achieved without compromising the identity of the Third Party. In addition, the Review found Service Nova Scotia misinterpreted the Third Party notice provisions in s. 22 of the Act, erred in its decision letter and misrepresented the consultation process under s. 22 of the Act by explicitly stating the decision rested with the Third Party – approval must be obtained. The Third Party, the author of the Record that contains his/her personal information as well as the Applicant’s, is given the opportunity under s. 22 of the Act to withhold his/her consent with respect to his/her own personal information. But the consent requested from the Third Party by Service Nova Scotia is only relevant with respect to his/her own personal information, not the Applicant’s personal information.

NOVASCOTIA

Service Nova Scotia
and Municipal Relations
FOIPOP Administrator

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B3J 2Y1

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Our File Number:

RECEIVED
SEP 21 2012
FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY
REVIEW OFFICE

September 21, 2012

Ms. Dulcie McCallum
Freedom of Information and Protection
of Privacy Review Office
PO Box 181, Halifax
Nova Scotia B3J 2M4

Dear Ms. McCallum:

RE: SNSMR FOIPOP Application SNS-11-4
Review Office File FI-11-43

We have received your above-noted Report. Please accept the following as our response to your recommendations.

- As recommended by the Review Officer to create a summary of the responsive record at issue in the Report, the attached summary was prepared in accordance with section 20(5) of the Freedom of Information and Protection of Privacy Act.
- We will provide the Review Office with a copy of our decision letter and summary that is sent to the Applicant.
- SNSMR will review the requirements of Section 22 to ensure its continuing compliance with FOIPOP legislation. As requested, we are enclosing a copy of our template letter used for third party personal information consultation.
- Thank you for your offer of a privacy consultation. However, we will continue to use our internal resources to ensure compliance with FOIPOP legislation.
- As requested, SNSMR has responded to your recommendations within 30 days of receipt of your review report.

Sincerely,

TIME EXTENSION

TIME EXTENSION

In Review Report FI-12-70, as the Review Officer I stated, “a critical aspect of an effective access to information process is the timeliness of the response by the Public Body to the applications received.” Despite this requirement, there has been a steady increase in recent years particularly in the number of Time Extension Requests from public bodies which may be an indication of the complexities of access requests.

Public bodies can extend the regular 30-day response time to an applicant on their own accord up to 60 days for the three reasons listed in s. 9 of the *FOIPOP Act* and s. 469 of *Part XX* of the *Municipal Government Act*. These are:

- (a) the applicant does not give enough detail to enable the Public Body to identify a requested Record;
- (b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the Public Body; or
- (c) more time is needed to consult with a third party or other Public Body before the head of the Public Body can decide whether or not to give the applicant access to a requested Record.

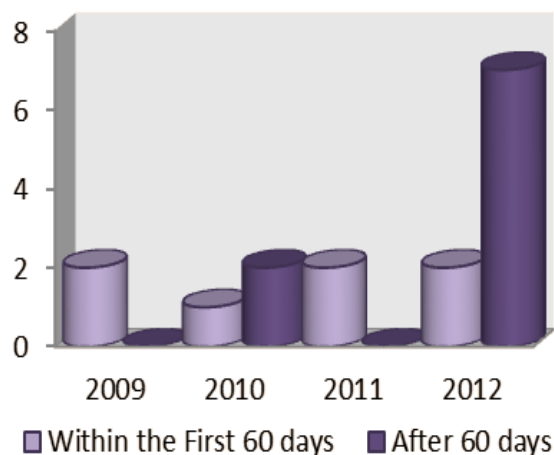
For extensions past the additional 30 days, a Public Body must send a written request to the Review Officer which includes the file number, one or more of the reason(s) from the *FOIPOP* or *MGA* for requesting the extension, and the date to which it wishes to extend the response.

As Review Officer I generally grant extensions at face value in an effort to have decisions issued to the applicants as soon as possible. An applicant may be satisfied with a Public Body's time extension and have no complaint. Any investigation would be unnecessary and would take time away from a Public Body processing the application. The Review Officer does not undertake a Time Extension Review without a complaint from an applicant.

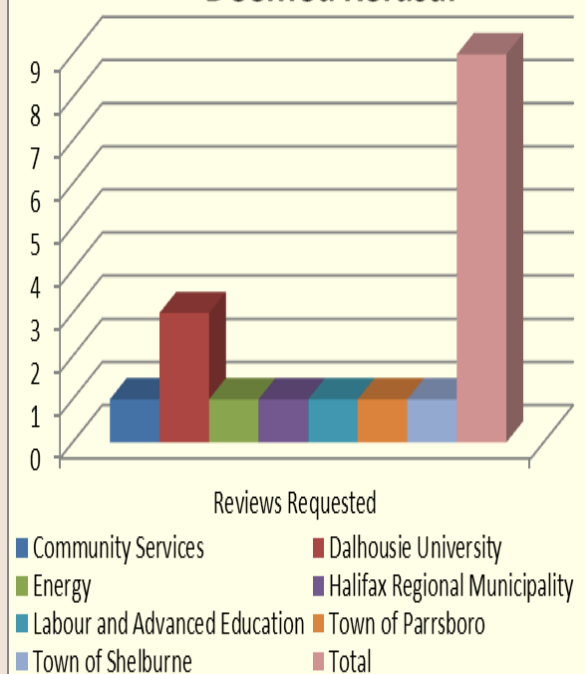
Where a time extension is taken/granted, the Public Body must advise the applicant of the reason for the delay and the applicant's right to complain about the time extension to the Review Officer, at which point it would be investigated if a complaint is filed.

Time Extension Requests for reasons falling outside the scope of s. 9 of *FOIPOP Act* or s. 469 of *Part XX* of the *MGA* (i.e. vacation time, inadequate resources/staffing) cannot be approved by the Review Officer and I will allow an applicant to file a Request for Review on the basis of a deemed refusal on the merits of the access request. As a best practice, however, the Review Officer suggests that any delay be communicated to the applicant as soon as possible in writing.

Time Extension Complaints



Deemed Refusal



STAYING ON TOP: FI-12-44/ FI-12-52



Most Applicants who file Time Extension Complaints simply want the Public Body to be on notice that they expect the legislation to be adhered to and that they will not accept unnecessary delays. By filing a Review, the Public Body will also know that it is on the Review Officer's radar. Most files of this nature are closed once the Applicant receives disclosure, which was the case for two Time Extension Complaints where the extension was taken to consult with Third Parties. As the Review Officer I obtained an explanation from the Public Body and shared it with the Applicants. The files were placed on hold until the disclosure decision was issued. The Applicants, satisfied that the extensions were in accordance with the *Act* and satisfied that they had now received a response, agreed that the issue was now resolved.

TIME EXTENSION

ADEQUATE RESOURCES KEY TO BEST PRACTICE: CASE SUMMARY FI-12-70

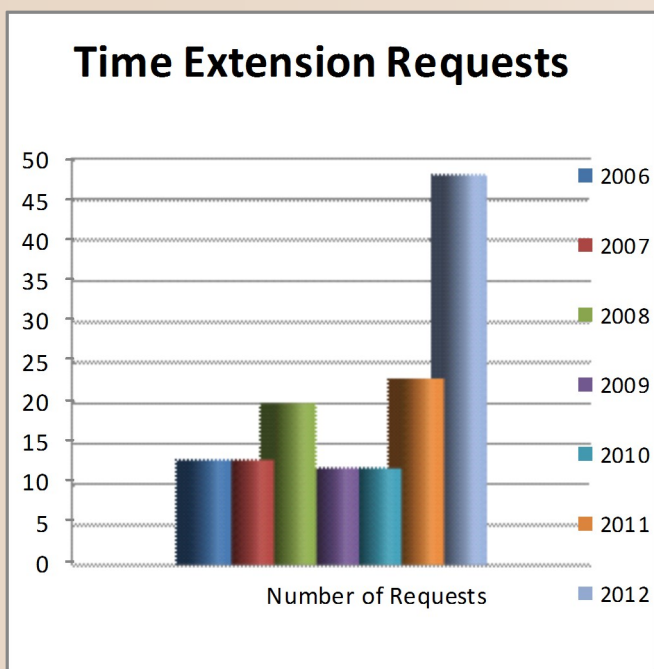
The sole issue in FI-12-70 was the time extension taken by Community Services. During the formal Review stage, as the Review Officer I decided to view the original copy of the Record on-site pursuant to s. 38 of the *Freedom of Information and Protection of Privacy Act* ["Act"] to better understand the size and complexity of the Record as the Public Body claimed that was the reason for the delay. The issues in the Review were: did Community Services extend the time in which to respond to the Applicant's Request in accordance with s. 9 of the Act and did Community Services meet its statutory duty to assist pursuant to s. 7 of the Act? The Findings included that the time extension in which to respond to the Applicant's Form 1 did not meet the requirements in the statute because legislated timelines cannot be ignored, relaxed or circumvented to manage gaps in resources but must be done in accordance with s. 9 of the Act. I found that where a Public Body is under a statutorily imposed timeline, human resources should make every effort to assist the Public Body by making provision to expedite competitions in order to prevent a gap in service that has statutorily imposed time lines. There were three Recommendations made to Community Services. The first was for Community Services to make a declaration of its unequivocal commitment to the principles underlying the *Freedom of Information and Protection of Privacy Act*, by, for example, seizing the opportunity to hire additional staff at this time given the recently held competition, staff who will be devoted to FOIPOP in order to manage the high volume of access requests Community Services receives. The second Recommendation was for Community Services to approach its human resources consultant to explore a solution to a situation where a Public Body will be in breach of FOIPOP legislation due to the length of the competition process. And finally, that Community Services follow through with its invitation to have the Review Officer set up a process to explore best practices with the FOIPOP Office staff. Community Services accepted all the Recommendations in the Review Report.

COMMUNITY SERVICES' RESPONSE FOR REVIEW REPORT: FI-12-70

In relation to your recommendations;

1. The Department of Community Services recognizes and is committed to the principles underlying FOIPOP, and has taken the lead on hiring a permanent FOIPOP Administrator who is now in place, and whom you have met. We are also in the process of interviewing for the Manager position which will also provide an additional resource for processing of FOIPOP applications.

In addition to the above, we are actively considering hiring an additional FOIPOP resource (over and above existing resources) to process applications.
2. We are working with our HR department to seek assistance on how we can ensure the process of hiring additional resources runs smoothly and efficiently.
3. Finally, we are very pleased your Department have agreed to work with us to review and possibly reinvent our current processes. Given the arrival of our new FOIPOP Administrator, a new Manager in the next while, and possibly another resource as well, it is perfect timing to review current processes and work with you to create a "gold standard" approach to FOIPOP requests. We very much appreciate the opportunity to work with you on this.



Time Extension Requests

Public Body	Number Requested
Communications Nova Scotia	1
Communities, Culture and Heritage	2
Community Services	3
Disabled Persons Commission	1
Economic and Rural Development	7
Energy	3
Environment	1
Executive Council	1
Halifax Regional Municipality	6
Halifax Regional Police	1
Halifax Regional School Board	2
Intergovernmental Affairs	2
Justice	1
Natural Resources	3
Nova Scotia Business Inc.	4
NSCAD University	1
Office of the Premier	4
Service Nova Scotia and Municipal Relations	1
Transportation and Infrastructure Renewal	3
University of King's College	1
Total	48

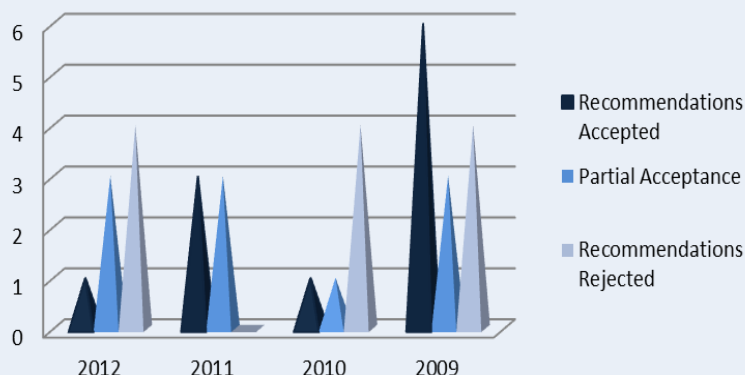
RECOMMENDATIONS VS. ORDER-MAKING POWERS

Currently in Nova Scotia, as the FOIPOP Review Officer, I am limited in my Reports to *Recommendation powers*, based on an ombuds-model of oversight. While most of the other jurisdictions in Canada, including the Federal Commissioner, follow this model, British Columbia, Alberta, Ontario and PEI have quasi-judicial Order-making powers that allow them to compel public bodies to follow the directives issued in their Reports. If the Public Body does not follow the Commissioner's Orders, the matter is resolved in Court with the Commissioner as a litigant in the proceedings which can be very costly. In those jurisdictions with an Ombuds-model, however, if the Public Body chooses not to follow the Recommendations in the Report and the applicant applies to Court for access to records, s/he proceeds to court alone; the Review Officer's involvement ends with the issuance of a Public Review Report with the Recommendations.

While the Order-making model may seem to be a more determinative approach, the Ombudsman model focuses on persuasion and informal resolution which can result in a more timely and less expensive avenue for applicants than the more formal and quasi-judicial system. This will often be the result of parties working to avoid the more adversarial and costly option of Court.

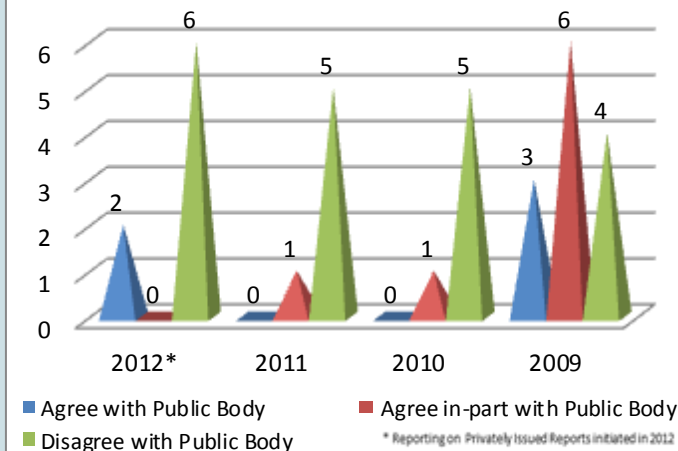
But the real power of the Ombudsman model, however, is the ability of the Review Officer to go public. My public reports on how well government is doing with respect to complying with access and privacy legislation can be found in the Review Reports on www.foipop.ca and in the Annual Reports tabled with the Legislative Assembly.

Public Body Responses to the Review Officer's Public and Private Reports' Recommendations



ACCESS TO AFRICVILLE: CASE SUMMARY FI-09-52(M)

Conclusions of the Review Officer Public and Private Reports Were Issued*




The Record at issue in this Review was an undated anonymous one-page document that was withheld in full by the Halifax Regional Municipality [HRM] under the discretionary solicitor-client privilege exemption. The Applicant had requested personal information from the HRM regarding the land and deeds in the name of his/her relatives between 1940 and 1969 and information regarding the Africville expropriation file. As the Review Officer I found that the solicitor-client exemption did not apply, the HRM failed to consider exercising its discretion to release the Record and the HRM failed to consider public interest and the historical/archival sections of the MGA in the exercise of that discretion. The HRM conducted an appropriate search and met its duty to assist the Applicant by making every reasonable effort to assist him/her by clarifying the scope of the access request. The solicitor-client exemption did not apply because, while the Record was a written communication, there was insufficient evidence that the communication was confidential or that it was between a client and a legal advisor or that it was about seeking, formulating or giving legal advice. Even if the Record was subject to solicitor-client privilege, the Review held that the HRM's position that it never releases a Record otherwise subject to the solicitor-client exemption is inconsistent with the fact that it is a discretionary exemption. The HRM practice of applying it as a blanket exemption is unreasonable. In addition, given the attention paid to the Africville residents and their property interests historically and given that the HRM negotiated a settlement agreement with the Africville Genealogy Society during the material time, the Review found that even if the solicitor-client exemption were to apply [which it did not], that for the HRM not to exercise its discretion to release an archived record to an Africville descendant, in the public interest, is unreasonable. The Review held that the only reasonable conclusion is that disclosure of the Record is clearly in the public interest. The Recommendations to the HRM were to release the Record in full to the Applicant and to discontinue the current practice of applying the solicitor-client discretionary exemption as if it were mandatory. The HRM released the Record to the Applicant.

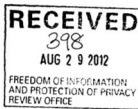
GETTING ALL THE FACTS: CASE SUMMARY FI-09-29(M)

The Applicant requested information regarding a motor vehicle accident in which s/he was involved. The Applicant may have been able to get some or all of the information through court proceedings, which is a possible factor when determining the weight to be given in deciding the issue of disclosure. The Review held, however, while it may be of interest that there are other avenues to obtain the information it can never be cited as a justification to dilute the Applicant's right to access information under access legislation. The Review found that the release of the personal information is relevant to a fair determination of the Applicant's rights, and even if s/he is able to obtain it through the Courts, this factor is to be given little weight. Such proceedings may be a hollow remedy for some individuals who cannot afford to initiate proceedings in Court. In any event, though all applicants are free to pursue other avenues to obtain information, the Review held that this does not displace or dilute the Applicant's statutory right of access to information.

The Recommendations included:

1. The Police Service release the personal information of Third Parties contained in the Record including:
 - (a) Names and addresses for all witnesses and parties to the accident and police;
 - (b) Other personal information of all witnesses and parties to the accident [phone numbers] relevant to a fair determination of the Applicant's rights;
2. The personal information of one party to the accident, the deceased, be released in full to the Applicant on the basis of two statutory provisions: name and address and all other personal information in the Record relevant to a fair determination of the Applicant's rights, including health-care history;
3. The Police Service release all parts of the Record that contain personal information of other professionals named in the Record relevant to a fair determination of the Applicant's rights;
4. The Police Service disclose all personal information about the Third Parties in the Record working as an officer or employee of the Police Service from the entire Record;
5. The Police Service should not release any personal information of the families of the Applicant and of the deceased and should be withheld as this information is not referred to in the *Motor Vehicle Act*, as they were not witnesses or parties to the accident in this case, and is not relevant to a fair determination of the Applicant's rights;
6. The Police Service is to provide the Review Officer with a copy of its decision to the Applicant, including a complete copy of what information and parts of the Record are disclosed to the Applicant, in response to these Recommendations.

 **CBRM** *A Community of Communities*
Cape Breton Regional Municipality
Office of Bernie White
Municipal Clerk
August 27th, 2012
Ms. Dulcie McCallum
Freedom of Information and Protection of Privacy Officer
Box 181
Halifax, N.S.
B3J2M4
Re: Review Officer Report # FI-09-29 (m)
Dear Ms. McCallum,
I am writing with reference to the report you released on July 19th, 2012 in case # FI-09-29 (M).
We've taken the time since the report came out to review the chronology of events and to discuss with CBRM departmental staff that our process technique and recording system need improvement.
On behalf of the municipality I acknowledge that the paper trail on this file has become quite complex and could have been simplified at the stage the applicant made the initial request for certain documents, had a proper index been created with clear, numbering of the pages in the record.
The request for information was originally received by administrators for FOIPOP at the CBRM Police Department on September 28th, 2008.
An initial attempt was made at police headquarters to satisfy the request and on October 27th, 2008 a substantial amount of documentation was forwarded to the applicant. We were advised that for purposes of this file that the solicitor acting for his client was to be considered the applicant.
The applicant subsequently asked for CBRPS to reconsider its position on the "severing" it had done on some of the reports. It was at that point the file made its way through the system to my office, and in my position as FOIPOP Administrator for the corporation delegated by the CAO (responsible officer) for the Municipality, I commenced an attempt to satisfy the request.



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Review Officer Report #FI-09-29(m)

Page 2 of 3

more formal decision letter was issued in February of 2009 with details to the applicant/solicitor on how to appeal or ask for a review of the Municipal

ant who appears quite familiar with the relevant Statutes did choose to initiate w process.

ically address your recommendations it is the intention of the CBRM to comply majority of your findings, however on the issue of a disclosure of the y report" from the Medical Examiner's Office, it is the position of the legal at at CBRM that we should uphold our original decision and that particular will not be released.
ill be releasing the names of all witnesses including phone numbers as per sons in your Recommendation #6.

BRM will review the records and provide the personal information of other sionals as recommended

ur intent to comply with recommendation #3. As noted in the Review some of ormation was provided in some of the documents and withheld in other parts.

ute that discrepancy to the severing process. In reviewing such a large number ges I suspect we inadvertently crossed off names of people who were sional police personnel or ambulance attendants or other professionals not yed by CBRM. The applicant will be provided with that information.

have recommended that we should not have provided the names of family ers of either the deceased or the applicant. Unfortunately during our initial "ing" some of those names were released to the applicant.

ollow your recommendation #4 and no further disclosures on personal on of family members (who were not witnesses to the accident) will be done.

lication" of copies of files.

recommendation we will accept, however it will be the most challenging.

lack of a proper index and numbering of the pages in the file has created some timate concerns.

I've reviewed at length a copy of the documents sent to your office in June 2009 and to the applicant October 2008 and for the most part they match.

I've proposed and have provided a copy of the document which was sent to your office. The "severed" information has now been made available to the applicant and will quickly be able to locate the information has been seeking.

Review Officer Report #FI-09-29(m)

Page 3 of 3

M will continue to sever personal information on family members as per your dation #4.

mitted to attend at the offices of the applicant to personally compare the two ge by page. Alternatively I've invited to come to CBRM to view the file (if ls that to be necessary).

line of your letter of July 19th which accompanied your report you request a n if the applicant files an appeal as per section 494. Be assured that we will th our obligation in Section 493 on the notice requirement for an appeal to the Court. I note that you have not copied anyone on your report, thus we will copy of our decision on the report to the applicant and your office.

earlier in this letter we acknowledge that there were several "process and sues" involved in our handling of this information request.

substantive principles of disclosure were the basis for the decisions we made. tely in arriving at those decisions some deadlines were missed.

ding, I make one final appeal for your advocacy to implement with some other ers in the "FOIPOP World" a round of training workshop on administrative nts for handling FOIPOP applications. CBRM will certainly be pursuing nt training opportunities with some industry professionals; however a effort through AMA, UNSM or the Privacy Officers Association(s) would eneficial to all.

ne applicant has been supplied with our decision and if an appeal is initiated I will contact your office.

Yours truly,

GETTING SMARTER

The Public Service Commission has certain training courses that are mandatory for all public servants. An example is the Respectful Workplace training. This is required for all employees and managers. It demonstrates the importance government places on promoting wellbeing in the workplace and a respect for diversity and human rights.



I recommend that a similar module be developed for access to information and privacy. This would follow the lead of some health authorities in their training response to *Personal Health Information Act*. Employees and managers would be given instruction on the basics of the *Freedom of Information and Protection of Privacy Act*, the *Privacy Review Officer Act, Part XX* of the *MGA* and the *Personal Health Information Act*. The training would give employees the basic knowledge about the rights of access and privacy, what constitutes good records management, what is the process when an application for access is made, what is their role if their records are requested, what is the process if the person seeking information appeals, and what are their obligations with respect to privacy protections. This would assist all those working for government and would support and enhance the work of the FOIPOP Administrators as the decision-makers. Knowing the basics in records management, access to information and privacy would greatly improve government's role as the keeper of information for the public and protection of personal information.

USING INTERNET RESEARCH RESOURCES

The Review Officer, as the independent statutory oversight for Nova Scotia's information access and privacy laws, is a quasi-judicial administrative body. This means the Review Officer has the responsibility and the authority to interpret the statutes and give guidance to the public and decision-makers. To ensure consistency, fairness, transparency, and independence, it is necessary that the Review Officer's decisions are grounded on sound principles and law. I elaborated on how these principles will be applied in Review Report FI-09-40, but the basic outline is that decisions by the Nova Scotia Supreme Court will be considered binding precedent, while cases that deal with similar information from Nova Scotia will be "compelling." Decisions from other jurisdictions will be evaluated on the facts to see if they have enough similarity to provide guidance.

In an effort to assist all parties to understand which prior decisions may help guide the Review Officer in making decisions, the Review Officer's staff will prepare an Investigation Summary as the final stage before Formal Review. This document will outline the results of Review Office staff research, but, since all that research is done on publicly-available materials, Applicants and Public Bodies are encouraged to investigate the relevant case law themselves as well.

The first place to start is with the Review Officer's website, at www.foipop.ns.ca. Under the link "Review Reports," you will find the most recent reports, and also a link to the "Table of Concordance" for both provincial and municipal decisions. The Table of Concordance lists every decision made by the Review Officer since 2002, indexed by the section number of the *Act*. So, if you are a Public Body choosing to apply an exemption and wondering if the Review Officer is likely to support your interpretation of the exemption, you can simply look up the decisions under that specific section. Similarly, if you are an Applicant who has received a decision with information severed under a particular section, you can get a sense of how the Review Officer will approach a review by examining my previous decisions. All parties can provide more effective Representations to the Review Officer by researching these decisions.

In cases where the Review Officer has not created a decision that is directly on point, the next step is to turn to decisions by the Nova Scotia courts, and then to decisions by other access and privacy oversight offices. The Canadian Legal Information Institute makes many of these decisions publically available for free at www.CanLII.org. There, you can search for decisions by specific province, by specific tribunal, or by keyword. Particularly valuable in the context of a review by the Review Officer are the

decisions by the British Columbia Information and Privacy Commissioner, since the *Freedom of Information and Protection of Privacy Act* in British Columbia is almost identical to Nova Scotia's. Also, many (but not all) of the exemptions in Ontario's access to information legislation are similar enough to Nova Scotia's that decisions by that province's commissioner can provide helpful guidance. Again, all parties can provide more effective Representations to the Review Officer by researching these decisions, but parties should ensure that they review the wording of the exemption before they assume a decision by a different oversight body is applicable in the Nova Scotia context.

www.foipop.ns.ca

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

FOIPOP REVIEW OFFICE

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Publicly Issued Reports

Year: Review Officer's Recommendations:

Public Body Response:

Report Number	Date Issued	Public Body	Review Officer's Recommendations	Public Body's Response	View Public Body Response
TEC-08-02	Jan 15, 2009	South Shore Health	Agree with Public Body	Accept	
FI-12-70	Nov 07, 2012	Community Services	Disagree with Public Body	Awaiting Response	
FI-11-43	Aug 28, 2012	Service Nova Scotia and Municipal Relations	Disagree with Public Body	Accept in Part	Read Full Public Body Response to Recommendations
FI-11-34 (M)	Jul 27, 2011	Halifax Regional Police	Disagree with Public Body	No Acceptance	
FI-11-23 (M)	Dec 01, 2011	Municipality of the County of Kings	Disagree with Public Body	Accept	
FI-10-49/FI-10-51	Apr 06, 2011	Labour and Advanced Education	Disagree with Public Body	Accept	
FI-10-41/FI-10-85/FI-10-86/FI-10-87	Jun 01, 2011	Transportation and Infrastructure Renewal	Disagree with Public Body	Accept in Part	
FI-10-26	Oct 28, 2010	Nova Scotia Securities Commission	Disagree with Public Body	No Acceptance	
FI-09-63	Jan 24, 2013	Community Services	Disagree with Public Body	Accept in Part	Public body response to Recommendations

IN-CAMERA REPRESENTATIONS

Pursuant to s. 37(1) of the *FOIPOP Act* and s. 490 of the *MGA*, as the Review Officer I have the discretion to conduct a Review in private (in-camera). This can occur in two situations: one, if I decide to hear a matter in private or two, if a party makes an in-camera request. Simply labeling representations as “in-camera”, “confidential”, “in confidence”, “not to be shared”, “in private”, “for Review Officer’s eyes only” or any other label **will not be sufficient** and the contents may be disclosed in a Report or to other parties as part of the Review process. In order to fairly address situations where one of the parties to a Review, requests for a portion of his/her/its representations to be heard *in-camera*, the Review Officer has developed the following procedure:

1. The request must be made prior to submitting representations, separate from the actual Review representations.
2. The request must be in writing and addressed to the Review Officer delivered in an envelope marked confidential.
3. The request must contain the rationale to support that a portion of the representation be heard in-camera.
4. The Review Officer makes a decision and will either accept or reject the request.
5. If accepted, two separate representations will be provided to the Review Officer – one that contains only that information in support of the in-camera submission and one that contains the remainder of the submission.

This process is applicable for all representations sent at any stage of the Review process including the formal Review stage. When requesting that representations be heard *in-camera*, remember:

- the determination is wholly within the discretion of the Review Officer.
- the request should be restricted to only the information that the Public Body believes should not be shared with any party to the Review.
- the Public Body must provide the Review Officer with an explanation of the circumstances surrounding the request that demonstrates in-camera representations are appropriate. The Review Officer will consider factors such as whether the disclosure of the representations will reveal any part of a record or whether disclosure will result in harm.
- a Public Body cannot compel the Review Officer to keep representations secret from an applicant.
- a Public Body should give reasons for its decision to the applicant. In-camera representations are the exception and will be used sparingly as they put the Review Officer in a position where she may not be adequately able to publicly justify her findings and Recommendations.
- The Review Officer does not require anyone’s permission to share or disclose representations once they have been submitted; it is solely within her discretion to share representations with anyone she deems appropriate.
- If a Public Body does not want to go through the process of making a request to submit in-camera representations, alternatively it can make the choice not to include the information at all.



Summary FI-11-07 / FI-11-54

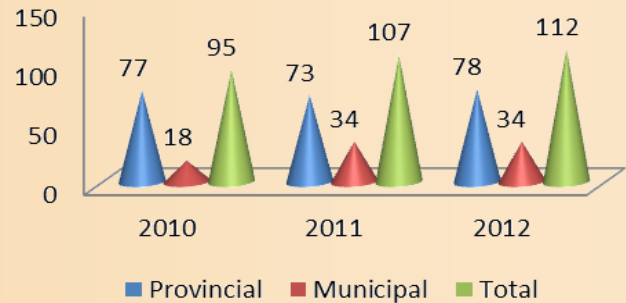
After an initial access request, the Applicant received two releases from the Public Body. The Applicant believed that the Public Body had intentionally withheld information, and filed a Review Request with the Review Officer taking issue with whether or not the Public Body had conducted an adequate search for the Record.

The Public Body detailed evidence of how it conducted its search, including: to whom the FOIPOP Administrator sent a broadcast memo, to whom she asked to provide the Record, and to whom she spoke and interviewed about the Record. Details of the Public Body's search were made known to the Applicant, who consistently responded that more Record must exist.

The Applicant provided information, particularly in his/her correspondence to the Public Body, that refuted the particulars of the search provided by the Public Body. The Applicant consistently indicated that s/he considered the efforts of the FOIPOP Administrator to have been helpful but associated the problem to be those working within the Public Body who are responsible for the Record, who had not turned them over to the FOIPOP Administrator.

After reviewing all correspondences and the Record from the FOIPOP Administrator and the Applicant, I considered the possibility that other employees who were responding to the broadcast memos from the FOIPOP Administrator either narrowly interpreted the scope in order to minimize the Record produced or vetted the Record prior to turning it over to her. I recommended that the FOIPOP Administrator, in concert with the Deputy Minister as the senior representative of the head of the Public Body, conduct a new and complete search and provide the Applicant with a new open, accurate and complete decision. The Recommendation was accepted. (See p. 12)

Reviews Opened



Summary of FI-11-27(M)

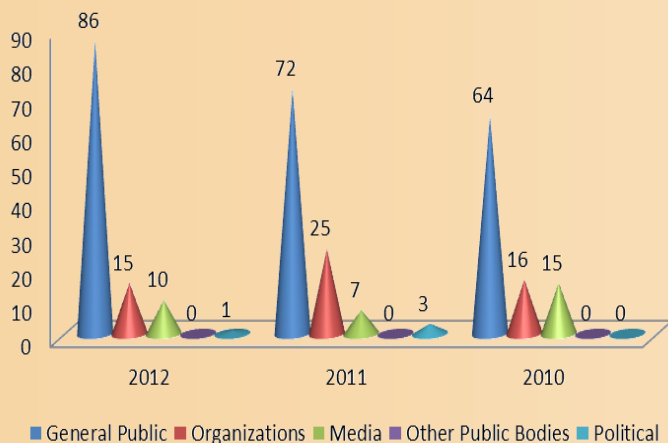
An Applicant applied for access to a Record outlining his/her coverage under a group health insurance plan that was jointly funded by the Applicant's union and a Municipality. Because the Municipality paid for part of the insurance, it had possession of the Record, and determined that, other than some personal information in the form of signatures, none of the information could be withheld. The Municipality proposed to release the Record to the Applicant, but first consulted a Third Party that had an interest in the release of the Record.

The Third Party objected to the release of the Record, arguing that disclosure of the types of coverage provided would disclose the types of injuries and illnesses the members of the group were likely to be subject to, and therefore the information might disclose the health status of individuals. The Third Party did acknowledge that the Record contained no "personal information" in the sense of identifying a specific individual. The Third Party also claimed that the Record contained business information in the form of the amount of money it was prepared to pay for group health insurance coverage.

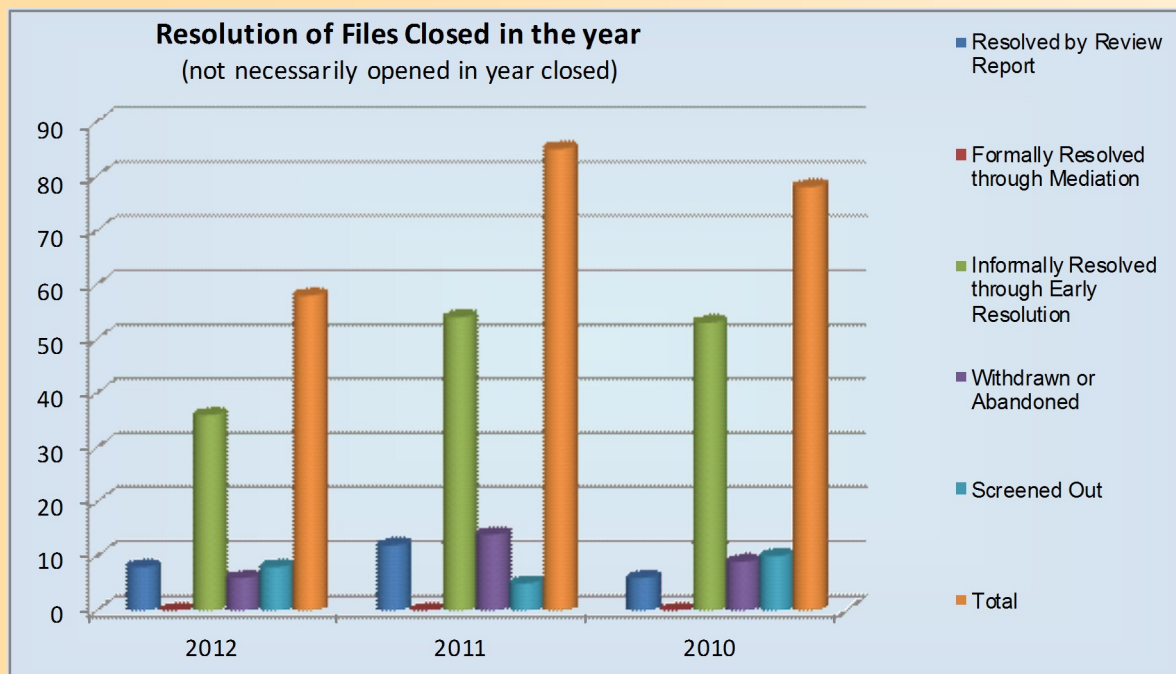
In a privately-issued Review Report, I determined that there was no personal information in the Record – other than the signatures – and that therefore the Third Party had no hope of meeting the test laid down by the Nova Scotia Supreme Court in *Re House*. In addition, I found that there might be "commercial information" in the Record, but, again the Third Party had no hope of proving that all the record met all three parts of the test required for the confidential business information exemption to apply. In particular, the Third Party would be unable to prove that the information was supplied in confidence, since it was a group health insurance plan that was expected to be shared widely, and for which the rates were negotiated, and a portion of those rates could be found in the contract between the Municipality and the union that was already public.

I, therefore, recommended release of the Record which consisted of one group insurance policy (Life and Disability Income Insurance). The Municipality accepted this Recommendation, but the Third Party appealed that decision to the Nova Scotia Supreme Court. A Court hearing is scheduled for 2013.

Reviews Opened by Applicant Group



PRIVATELY ISSUED LETTER REVIEW REPORT



Summary of FI-11-42

An Applicant applied for access to all information in the custody or control of the Public Prosecution Service [the "PPS"] relating to criminal proceedings against him/her. The Applicant believed that the Crown had improperly exercised their prosecutorial discretion. The PPS responded to the request by providing partial disclosure. The remaining information was withheld under s. 15(1)(f) of the *FOIPOP Act*, a law enforcement exemption that permits information revealing the exercise of prosecutorial discretion to be withheld and also s. 16 which deals with information withheld under solicitor-client privilege.

In a privately-issued Review Report, I determined that the severed information fell within the described categories. Further to this, the PPS exercised their discretion in a reasonable manner. Of particular note, I agreed with the Applicant's submission that the *FOIPOP Act* is not available to public bodies who wish to cover up a '*malfeasance of justice*' or some other wrongdoing and that, to do so would be contrary to the purposes of the *Act*.

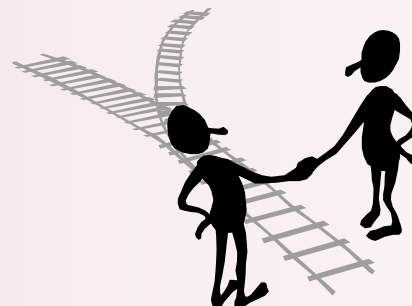
I found no evidence of the alleged wrongdoing by the PPS in relation to the Record. I did find that the withheld information fell squarely within the confines of the selected exemptions and the PPS exercised its discretion in a reasonable manner. I did not recommend release of any part of the severed Record.

Type of Review Requests										
		Refusal to Disclose/ Severing	Search	Fee/ Waiver	Response	Juris.	Third Party	Deemed Refusal	Time Extension	Other
2012	Provincial	32	13	4	7	2	1	6	9	3
	Municipal	15	1	0	3	0	12	3	0	0
	Total	47	14	4	10	2	13	9	9	3
2011	Provincial	29	18	5	4	1	10	3	0	3
	Municipal	12	3	2	1	1	8	4	2	1
	Total	41	21	7	5	2	18	7	2	4
2010	Provincial	52	4	3	5	1	7	2	2	1
	Municipal	9	1	0	4	0	3	0	1	0
	Total	61	5	3	9	1	10	2	3	1

INFORMAL RESOLUTIONS

Summary of FI-12-04

Applicants requested access to a Record and filed a Request for Review claiming a certain document was missing from the Public Body's disclosure. The Public Body claimed that the document at issue had been provided to the Applicants and offered to provide an Index of Records to the Applicants. Once the Applicants received the Index of Records, they were able to locate the missing part of the Record and the Review was informally resolved.



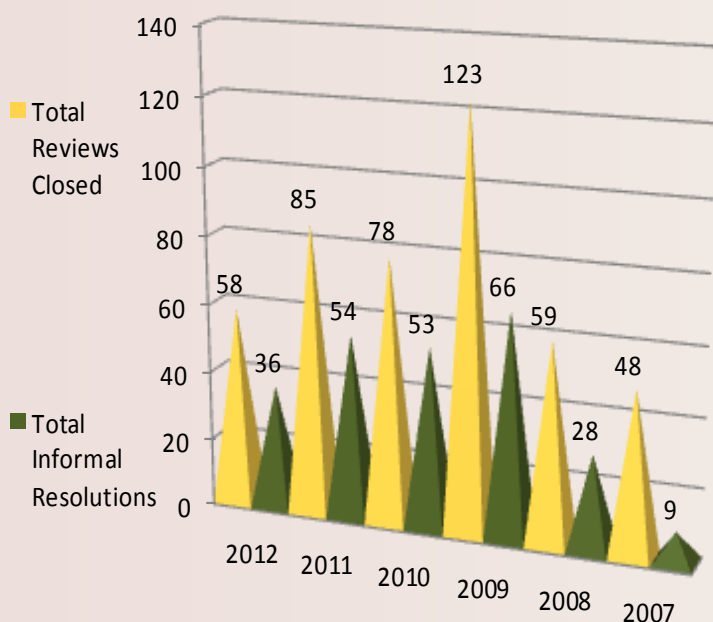
Summary of FI-12-64(M)

The Applicant, on behalf of his/her clients, was looking for 10 year old documents relating to a property transaction. The original request was made to a provincial Public Body that transferred it to a municipality. The municipality did not have the Record as they did not start receiving such documents until 7 years earlier. The Applicant filed a Review in the hopes of sorting out which body had custody and control of the Record in question. After many phone calls, it was determined that given the age of the Record, it no longer existed but some suggestions for non-FOIPOP avenues to locate the information were offered and the file was closed.

Summary of FI-12-78

The Applicant was seeking access to a large file. Upon review of the documents received, which made up a whole box, one document referenced in a document received was not included in the package. The Review Office contacted the Public Body about that one missing document. It was determined that that document was not responsive to the Form 1. However, since the Applicant had inquired about it in order for the Applicant to understand how it was not responsive, the Public Body provided the Applicant with a copy. They also provided the Applicant with a comprehensive explanation on their decision-making process in regards to that document. As this was the only issue, the file was able to be closed very early in the process.

Informal Resolutions



Summary of FI-09-09

The Applicant's original request for information related to a workplace investigation and was worded very broadly. The FOIPOP Administrator identified a number of documents as being responsive. The entire Record was withheld in full. After much back and forth with the Applicant, s/he told the Review Officer what information s/he was truly interested in. The Review Officer then worked with the Public Body to identify which parts of the Record fit the much narrower scope. The Applicant was provided with a severed copy of the two documents that were identified as containing the information that s/he sought. As part of the new disclosure decision, the Public Body gave detailed reasons for why some information, which actually was determined to fit the narrowed scope, was withheld. The disclosure and the explanation (harmful to working relationships) satisfied the Applicant and the file was informally resolved.

Listening Makes All the Difference!

The Applicant had made multiple requests for access to a Record from the Town of Shelburne [“the Town”] and was not satisfied with its response. Between the filing of the Application for Access to a Record with the Town and filing a Request for Review with the Review Officer, a new FOIPOP Administrator was employed by the Town.

In an effort to assist the Applicant, the new Administrator met with the Applicant to better understand the access request and to answer the Applicant's questions.

Although meetings with applicants and answers to questions are not strictly required by the *Act*, in this instance, the Administrator's actions were fully in line with the requirement to assist applicants by responding openly, accurately and completely.

As a result of the meeting, the Applicant felt heard, felt that his/her requests were taken seriously and was satisfied with the Town's response. On that basis the Review was informally resolved. The Town is to be commended for its exemplary approach with the Applicant and thus is the recipient of a 2012 Gold Star Award.



Seeing Openness Through a Privacy Lens: Finding the Balance!

A Privacy Review Request can be made when an Applicant believes that a provincial Public Body collected, used, or disclosed their personal information contrary to the *Freedom of Information and Protection of Privacy Act*. The authority to conduct such reviews is found in the *Privacy Review Officer Act* and is conditional upon an Applicant having first exhausted the Public Body's privacy complaint process.

The Nova Scotia Utility and Review Board [the “NSUARB”] posted the Applicant's Assessment Appeal documents online. These documents contained personal data identifiers: full names, phone numbers, email and residential addresses. The Applicant noted that posting this information online resulted in unnecessary personal and financial risk. Upon complaint, the NSUARB immediately removed the Applicant's personal information from their webpage but stood behind their practices.

The NSUARB maintained its position on Review, emphasizing that they were committed to an open and transparent decision-making process. They relied on a Model Policy published by the Canadian Judicial Council [“CJC”] in support of their approach.

As a part of the Review, the NSUARB was asked to also consider the CJC's *Model Policy for Access to Court Records* [2005] which warned against online posting of Personal Data Identifiers. The USUARB reconsidered its practices and responded with a detailed response which included: interim and long-term measures designed to protect personal privacy. Also included was a projected timeline for implementation. Significantly, implementation was in no way conditional upon the outcome of the Review, they were already committed to making the improvements.

This particularly forward-looking Applicant was open to informal resolution. While disappointed with the NSUARB's initial response, s/he was heartened with the NSUARB's response to the Review Officer. The Applicant was hopeful that in accepting an informal resolution, other public bodies will see the benefits of taking a similarly proactive and privacy-focused view of privacy complaints and Reviews. The NSUARB is to be commended for the initiative it took and is thus recipient of a 2012 Gold Star Award.



NOVA SCOTIA SUPREME COURT CASE SUMMARY

Sutherland v. Nova Scotia (Community Services), 2013 NSSC 1 (CanLII).

Related Review Report:
FI-08-107

Background: The appellant sought disclosure of her entire child in care file from Community Services. Community Services released the majority of the information, withholding personal information about her foster parents and biological family.

Ms. Sutherland's appeal was refused with the Court finding that her evidence of compelling circumstances did not overcome the privacy interests of the affected third parties. Moreover, the practice of disclosing the personal information of foster parents was contrary to the public interest. The decision offers an interpretive approach to the phrase "compelling circumstances" while emphasizing it must be assessed on a case-by-case basis. Notably, the Court accepted evidence of potential harm to the foster care system should foster children be given any personal information about the foster parents with whom they once resided. In rejecting the argument that foster parents were acting as public services for the purposes of access to information, the Court relied on the reasoning in *K.L.B. v. British Columbia*, 2003 SCC 51.

In considering whether certain information was properly withheld pursuant to solicitor/client privilege as set out in s. 16 of the *FOIPOP Act*, the Court answered in the affirmative. The Court noted that in protection proceedings, the Minister's lawyer is not the lawyer for the child and the Record is correspondence between the DCS and its lawyer. Children who are the subject of such proceedings will normally have legal counsel of their own, or by virtue of their *guardian ad litem*.

This Appeal was heard on a *trial de novo* basis. This statutory provision enables the Court to allow parties to raise fresh legal arguments, introduce new or different evidence, and to supply detailed and considered representations, as was the case here. It is notable that, upon appeal, it is not the decision of the Review Officer that is being challenged, but rather, that of the Public Body. As such, the Review Officer is not a party by statutory prohibition. The FOIPOP legislation specifically prohibits the Review Officer from participating in Court as a party. As more and more underrepresented appellants are appearing before the Courts, it may be time to consider a different approach, one which would allow the Court to grant intervener status to the Review Officer pursuant to *Civil Procedure Rule 3.03(1)*. This would allow the Review Officer to be a friend to the Court and provide expert evidence about access and privacy issues.

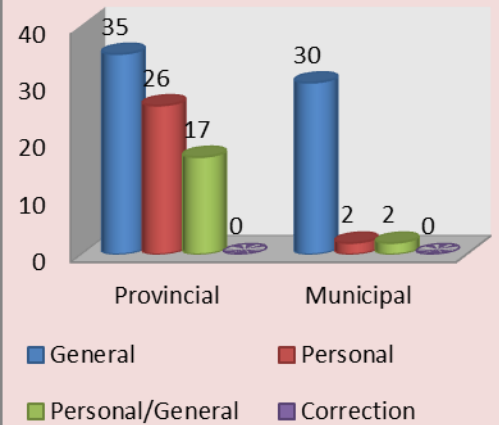
STOP

**Ask yourself the question-
Does a Third Party need to receive Notice?**

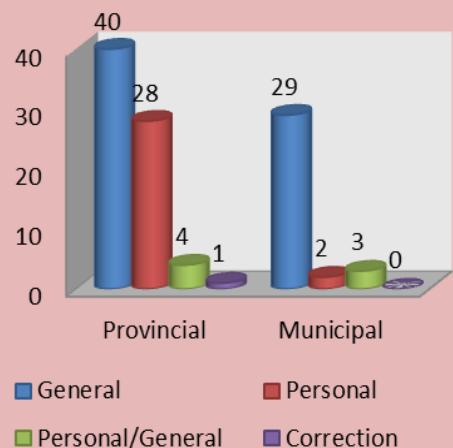
Public Bodies only need to give Notice to Third Parties when either the personal information exemption or the confidential business information exemption applies. This means that a Public Body must first stop and assess for itself if either of the exemptions apply. If the answer is no, then the Public Body does not need to give Notice to the Third Party. Just because a Record contains a person's name or other personal information, or a business name, does not invoke the Notice requirement. The purpose of Notice is to let the Third Party know that there is information that should likely be severed. This gives them the opportunity to either consent to it being disclosed or to provide more information demonstrating how the exemption applies. The Review Officer regularly encounters situations where the Third Parties are given Notice unnecessarily – because neither of the exemptions could apply. This causes unnecessary delay to the Review process. The Review Officer is in the process of developing a tool for Public Bodies to assist in deciding if Notice is necessary and what process should be followed.

REVIEWS BY TYPE OF INFORMATION REQUESTED

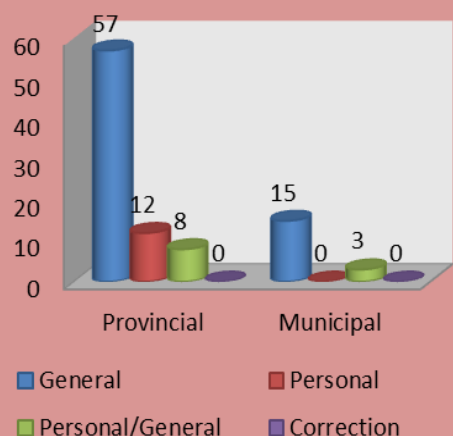
2012



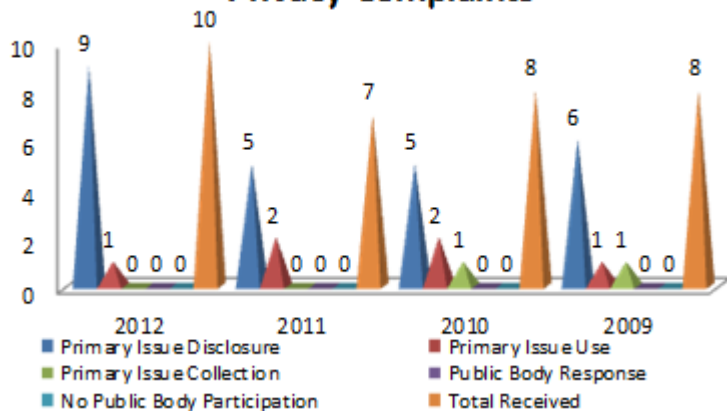
2011



2010



Privacy Complaints



GroupWise Leave Calendars: P-11-05

This alleged privacy breach concerned the collection, use and disclosure of Personal Leave Identifiers in conjunction with departmental GroupWise Calendars. The Public Body relied on GroupWise calendars to track and monitor employee leave. Leave requests populated calendars that could be viewed by select managers and administrative staff. A second email populated a department-wide calendar, without the associated leave identifier. Some employees were sending a single email to both calendars which included a personal leave identifier. Ultimately, the complaint was withdrawn. Jurisdictional issue remains unresolved: whether s. 6(1) of the *Privacy Act* permits Shop Stewards to file privacy complaint in a representative capacity.

Don't cry privacy to try to hide something: P-11-07

An individual contacted the Review Officer with a privacy complaint as they were not satisfied with the response that they received from the Public Body regarding the disclosure of information by one Public Body with another. Upon investigation, it was clear that the information was disclosed in accordance with the *FOIPOP Act* and the real concern was that the Public Body who received the information used it to make a decision that negatively impacted the complainant. The person was not happy with the fact that the Public Body got the information that the person had been trying to keep from them.

No reasonable grounds found: P-12-01

The Review Officer received a call advising of a privacy breach that involved credit card information, that has the potential to affect many people. The caller was advised how to file a privacy complaint but the Review Officer also opened a file to assess whether or not to launch an own-motion investigation. There was no evidence to suggest that the Public Body had contravened the privacy provisions so a full investigation was not launched.

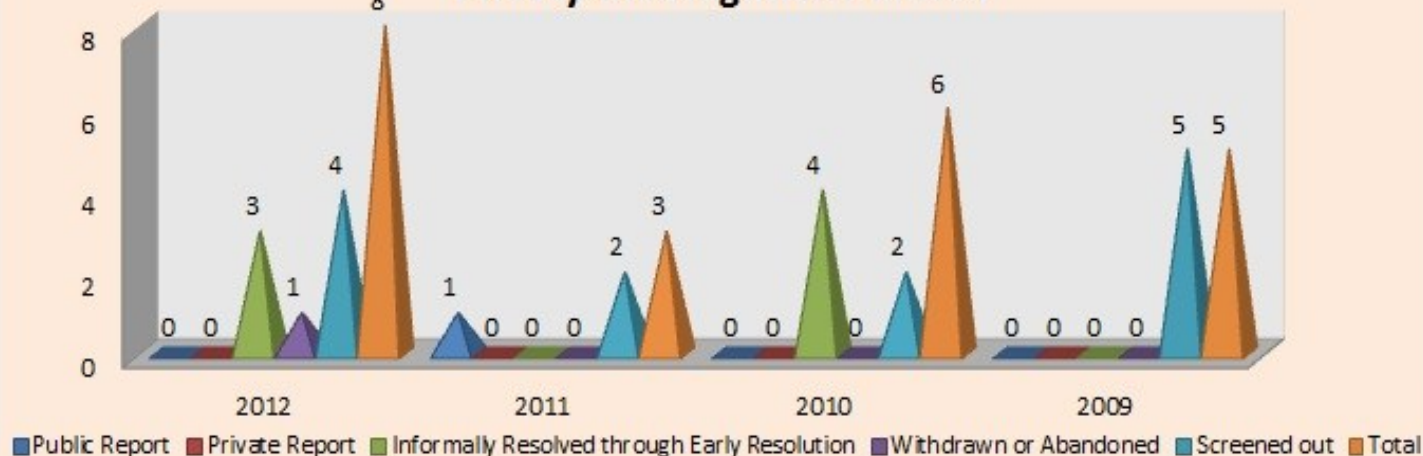
Complain in order: P-12-02 & P-12-09

Under the *PRO Act*, someone who has a privacy complaint must first file their complaint with the Public Body who they believe breached their privacy. Only after that has been completed, can a complaint be filed with the Review Officer. If a person comes to the Review Officer first, they are informed that they are required under the statute to file their privacy complaint with the Public Body first and they are given the contact information of the FOIPOP Administrator at the Public Body.

Coming soon: P-12-02

Some of the privacy calls and written privacy complaints that the Review Officer receives are against private practice physicians. Currently in Nova Scotia this falls under the jurisdiction of the Privacy Commissioner of Canada under the *PIPEDA*, hence the Review Officer cannot investigate these types of complaints. In June 2013 the new *Personal Health Information Act [PHIA]* will apply and will give the Review Officer jurisdiction to investigate.

Privacy Investigations Closed



NEW PRIVACY POWERS

Health Authorities: Prompt Response!

In 2012, the Review Officer investigated two privacy breaches at two separate district health authorities. In each case, a member of the health authority's staff used his/her authorized access to medical records to look at records the staff member had no authorization or need to look at. Both incidents came to the attention of the Review Officer after they were made public. As the Review Officer I initiated own-motion investigations under section 5(1)(b) of the *Privacy Review Officer Act*.



The public reports of the breaches contained a great deal of information with respect to how the health authorities had managed the breaches. In each case, the health authority took disciplinary action against the staff member, and immediately stopped his/her access to medical records after learning of the breach. The health authorities then conducted an audit of the staff members' record searches and contacted each individual whose records were accessed without authorization.

The Review Officer sent a letter to each health authority confirming the details of the steps the health authorities took to contain the breach. To their credit, each health authority had effective responses in place to manage privacy breaches and took these steps before the Review Officer became involved. Since the breach was contained and the issue resolved very much in line with the Recommendations the Review Officer would likely make, these investigations were closed following some early correspondence. The Review Officer commended both the health authorities for establishing reasonable protocols to deal with privacy breaches.

PRIVACY CONSULTATIONS

File Number	Public Body	Stage
PC-12-01	Economic and Rural Development and Tourism	Advice Sought and Given. Consult Complete.
PC-12-02	Dalhousie University	Advice Sought. Consul Request Withdrawn.
PC-12-03	Service Nova Scotia and Municipal Relations	Advice Sought and Given. Consult Complete.
PC-12-04	Utility Review Board	Ongoing.
PC-12-05	Justice	Advice Sought and Given. Consult Complete.
PC-12-06	Property Valuation Services Corporation	Non-Jurisdictional. No Advice Given.
PC-12-07	Health and Wellness	Advice Sought and Given. Consult Complete .
PC-12-08	Office of Privacy Commissioner of Canada	Ongoing.
PC-12-09	Office of the Chief Information Officer	Ongoing.
PC-12-10	Health and Wellness	Ongoing.
PC-12-11	Service Nova Scotia and Municipal Relations	Ongoing.
PC-12-12	Canadian Institute for Health Information	Ongoing.

Privacy Consultations - 2012



Budget History 2010-2012

Category	Expenditures*		
	2012	2011	2010
Salaries and Benefits	329,686	316,309	265,019
Travel	2,905	6,060	4,576
Professional / Special Services	24,047 [#]	0	4,845
Supplies and Services	7,854	3,658	3,068
Other	44,322	28,538	30,348
Reclassifications (pay adjustments)	0	0	(40,061)
Transfer of Funds	(65,000)	0	0
Total Budget Spent	343,815	354,565	267,795
Total Budget	543,000 [^]	522,000	398,000
Budget Spent	63%	68%	67%

* Budget Reporting is on a fiscal year basis from April 01 to March 31. The expenditures reported above represent April 2012 to December 2012.

[#]This includes funding a temporary employee to address our staffing issues.

[^] This includes a one time payment of \$ 25,000 to host the Federal/ Provincial/ Territorial Commissioners Summit .

LIVING WITHIN OUR MEANS

The Review Officer remains committed to fiscal responsibility and to managing our mandate within the funds allocated to us by government: living within means.

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

Once again this year, the Annual Report was written and produced entirely in-house (other than the French translation) resulting in significant cost-savings. In addition while a paper copy is provided to the Members of the House of Assembly, otherwise the Annual Report is only available electronically unless requested specifically by a member of public.



What is “Harm or Embarrassment”?

In December of 2012, the government proclaimed the *Personal Health Information Act (PHIA)* into law, with an in-force date of June 1, 2013. This new law gives the Review Officer oversight of “custodians” of “personal health information,” which is to say virtually all individuals, businesses, and organizations that provide health care services to Nova Scotians. Most of these custodians have never been subject to this kind of oversight of their information access and privacy practices.

One of the responsibilities that *PHIA* imposes on custodians is a requirement to notify when the privacy of an individual’s personal health information has been breached. *PHIA* does allow custodians the opportunity to make a determination as to whether or not they will notify the individual or the Review Officer. Pursuant to sections 69 and 70 of *PHIA*, if there is a privacy breach and there is the potential for harm or embarrassment to the individual whose personal health information has been breached, then the custodian must notify the individual. However, if the custodian does not believe that a breach occurred, or that the individual is subject to harm or embarrassment, s/he can choose to notify the Review Officer rather than the individual.

This choice in who to notify poses a unique problem, particularly since the terms “harm or embarrassment” are not defined anywhere in *PHIA*. To confront this problem, the Department of Health and Wellness struck a working group that includes representatives of a number of custodians, the department, and the public. As part of my consultation mandate under *PHIA*, by invitation, as the Review Officer I agreed to send representatives to this committee. The committee has met once a month since the fall of 2012, with a goal of producing guidance to custodians as to how to interpret the risk of “harm or embarrassment.” In future we will review any complaints under *PHIA* on a case-by-case basis, and this disclaimer is made clear to Health and Wellness as a pre-condition of the agreement to sit on the working group.



Welcoming Newcomers

Immigrant Settlement and Immigration Services [“ISIS”] offers services and creates opportunities to help new immigrants to participate fully in Canadian life.

Upon request, Review Officer staff presented to the ISIS community in Halifax where attendees learned about their access rights under the *Freedom of Information and Protection of Privacy Act*. The event included an interactive discussion about access to information in Nova Scotia and Canada. As the Review Officer I also provided library resources to ISIS for its members’ continued use. I hope that this kind of event at ISIS will become an annual one.

Privacy Closer to Home

In previous public reports and communications with government, the Review Officer has commented on several gaps concerning municipal bodies covered under *Part XX of the Municipal Government Act*: a lack of training and guidance regarding access and the absence of independent oversight of the *MGA*’s privacy provisions.

In 2012, municipalities were notified of changes to legislation concerning privacy that would extend the *Privacy Review Officer Act* provisions to municipalities including the Review Officer’s oversight powers to investigate privacy complaints, initiate investigations, monitor privacy provisions, undertake research, consult with a municipality at its request and inform and educate the public about privacy.

In November 2012, I happily responded to an invitation from the Association of Municipal Administrators Nova Scotia to attend its Fall Convention, hosting the workshop *If Privacy Comes to Municipal Government What Will it Mean to You?*

The result was a successful educational forum with an exchange of questions, answers, concerns and ideas concerning both access and privacy obligations under the governing statutes.



Presentations

- Opening Plenary Maritime Access and Privacy Conference, Halifax
- AMA Annual Conference November 2012
- ISIS Access presentation September 27th 2012
- FOIPOP Administrator Training, Halifax, NS
- Lancaster House – Halifax Labour Law Conference October 2012
- Right to Know Week – Dalhousie University Schulich School of Law – September 27, 2012
- “Your Right to Know” – Halifax Regional Libraries – November 16 & 28, 2012
- Presentations marking Right to Know Week to Dalhousie’s School of Business Administration and School of Public Administration, October 11 and 22, 2012



- The Institute of Public Administration of Canada (IPAC) Deputy Premier Speech – Making the Most of your Career as a Public Servant
- Maritime Access and Privacy Conference, Halifax June 6, 2012
- His Honour Brigadier-General The Honourable J.J. Grant, CMM, ONS, CD(Ret’d) Lieutenant Governor of Nova Scotia’s Christmas reception Halifax, December 11, 2012

Committees

- GoverNEXT
- French-language Services Coordinating Committee
- Atlantic Access & Privacy Workshop Planning Committee
- Annual Federal/ Provincial/ Territorial Access and Privacy Commissioners’ Summit Agenda Committee, Halifax
- Federal Investigators’ Workshop Planning Committee
- Member of Grace-Pepin Selection Committee for Office of Information Commissioner of Canada



Events

- Dalhousie Data Privacy Day, Halifax
- 13th Annual Privacy and Security Conference, Victoria
- Access and Privacy Conference, Edmonton
- GoverNext Annual General Meeting, Halifax
- Speech from the Throne for Opening of the Legislature and Speaker’s Reception for the 4th Session of the 61st General Assembly, March 29, 2012.
- Western Canada Health Information and Privacy Symposium, Calgary, April 29 – May 2, 2012



Review Officer Staff Training

- French Language
- Gaelic Language
- University of Alberta’s IAPP course “Health information Access and Privacy”
- Certificate in Business Communications through Saint Mary’s University Executive and Professional Development



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December 12, 2012

Jason Mighton
Portfolio Officer
Nova Scotia Freedom of Information and Protection of Privacy Review Office
Box 181
Halifax NS B3J 2M4

Dear Jason,

Thank you very much for presenting the Your Right to Know session at the Spring Garden Road Memorial Public Library on November 16th. As we agreed the attendance of fourteen engaged patrons was heartening as was their obvious interest and prior knowledge about FOIPOP.

Most everyone rated the program and you as speaker as excellent on program evaluation forms; we also received these comments, "Very informative public awareness program. Very good. Thank you" and "Guide to FOIPOP - good to have on file". I heard many positive verbal comments as well. I have recommended the program to other branches and hope the program at the Captain William Spry branch goes well.

Thanks once again for your involvement with Halifax Public Libraries. It was a pleasure hosting the program and working with you & I would look forward for the opportunity to do so in the future.

Sincerely,

Cheryl Black
Regional Adult Programming Facilitator
Halifax Public Libraries

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"]. *PHIA* gives the Review Officer the statutory authority over personal health information custodians 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.

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