



ANNUAL REPORT

for the period January 1, 2004 to December 31, 2004

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



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Nova Scotia Freedom of Information and Protection of Privacy Review Office

March 30, 2005

The Honourable Murray Scott
Speaker
The Legislative Assembly
Province of Nova Scotia

Sir:

In accordance with Section 33(7) of the Nova Scotia Freedom of Information and Protection of Privacy Act, I am pleased to present to you, and through you to the Members of the Legislative Assembly, the Annual Report of the Review Office for the period from January 1, 2004 to December 31, 2004.

Respectfully submitted,

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

Darce Fardy
Review Officer

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INTRODUCTION:

The annual report of the FOIPOP Review Officer is laid before the House of Assembly in accordance with section 33(7) of the Freedom of Information and Protection of Privacy Act. The Review Officer is an independent ombudsman, appointed by Order-in-Council for a period of not less than five years and not more than seven. Effective January 24, 2000, the Review Officer was appointed to a five-year term. He has accepted a one-year extension of his appointment to January 24, 2006.

The Review Officer is not an officer of the Legislature, but can be removed from office by the Governor-in-Council only following a House of Assembly resolution with a vote of the majority of the Members of the House.

The Review Officer oversees the Freedom of Information and Protection of Privacy Act and Part XX of the Municipal Government Act.

At the request of applicants the Review Officer reviews decisions made by public bodies and municipalities in response to applications for access to records in the custody or under the control of those bodies. The Review Officer may make recommendations for the decision to be changed or adjusted, or may confirm the decision.

REVIEW OFFICER'S MESSAGE:

Increase in Requests for Review over 2003:

While my expressed and realized fear that the increase in fees, imposed two years ago, would inhibit access to information from public bodies, I am pleased to report that the number of requests for review to this office has risen from the year before. You will notice in our statistics that the number is still well below the figures before the fees were increased.

There has also been a noticeable improvement in the participation of all parties to the review, reflecting a greater understanding of the legislation and its requirements. The Review Office welcomes comprehensive representations from all parties to assist it to reach its findings.

Relationship Between the Review Office and Government:

For the first time, the Review Office has cooperated with the Department of Justice in holding information sessions around the province. The invitation of the Department to the Review Office to participate in the program and to share the modest costs was accepted with alacrity. The bulk of the organization was done by the Department. We were pleased to have the Deputy Minister of Justice take part in the sessions by introducing each of them and speaking of the importance of the FOIPOP Act to successful government. It was a welcome commitment to the success of the Act by the Department.

In my annual report for 2002 I had appealed for a more cooperative relationship between this Office and Government. Those we both serve benefit from the improved relationship demonstrated by the information sessions.

Pro-Access Departments:

More and more public bodies now regard the Review Office as a partner in making FOIPOP a success. They see their role in FOIPOP as complementary to the Review Office's. Some of them are now demonstrably pro-access in line with rulings of the Courts of Nova Scotia.

I congratulate the FOIPOP Administrators of those Departments.

A Need for Amendments to the FOIPOP Act:

I was disappointed that no amendments to the Act were passed in the Spring and Fall Sessions of the Legislative Assembly, but a Review Officer knows to live in hope. Earlier annual reports (see our website www.foipop.ns.ca) have listed many of the amendments we would like to see the legislature consider.

The government has said publicly it is going to consider changes to the Act and we hope to be consulted while any amendments are being considered.

Records Management:

It is time for Government to fulfill its responsibilities in the records management area and update NovaSource. Section 48 of the Act requires the Minister "to publish a directory to assist in identifying and locating records of public bodies". An important part of "open and accountable" government is to provide the public with information on what Department keeps what records.

Inadequate records management is a common barrier to access when:

- records can't be found;
- requesters don't know what public body to approach for certain records; and
- fees may be inflated for processing applications when they are attached to the time spent by a public body trying to find records they are not sure exist.

Records management must be seen as legitimate work attended by training and education.

The federal Information Commissioner has called for a "record-keeping law" to promote:

- top down support for information management;
- clearer strategies and roles for information management;
- better funding for information management;
- training in information management; and
- changes to the bureaucratic and political culture.

At the same time, subsection 48(7) of the FOIPOP Act appears to render the entire section meaningless because, to quote from (7): "This Section applies to such public bodies as are prescribed by the regulations". Apparently none are. I recommend the government either delete subsection 48(7) or prescribe all public bodies.

I share the view of the federal Information Commissioner that the so-called "sponsorship scandal" in Ottawa may not have happened if contracts had been properly documented and if those responsible in the civil service had recognized the need to be open and accountable to the public.

PRIVACY

The need for this Province to offer independent oversight of the personal privacy protection rules found in Section 24 to 31 of FOIPOP (Sections 484 to 486 of Part XX of the Municipal Government Act) becomes more obvious and important every day. My earlier annual reports called for changes in the legislation to provide the Review Officer with a specific mandate to investigate privacy complaints. Last year our Office logged 78 privacy complaints, some minor, others more serious, which I inquire into or investigate. But, without a legislated mandate, this can only be done if the public body, against which the complaint is lodged, participates. Most public bodies cooperate, although aware the Review Officer has no legislated authority to investigate privacy complaints. Some important public bodies, notably the Halifax Regional Police and Dalhousie University, are declining to cooperate.

I suspect, and hope, the change will come sooner than later. Although I have no figures to illustrate, I know that some members of the legislature, including some cabinet ministers, have been approached by constituents with their privacy concerns.

In my 2003 Annual Report I expressed my confusion over recommendations made by the Review Committee with respect to the investigation of privacy complaints. I felt a submission to the Committee from the FOIPOP Administrator's Office was also unclear. I subsequently made my views known in a letter to the Minister of Justice, whose Department is responsible for the FOIPOP Act.

Again I hope this Office will be consulted when changes are being considered in the powers of the Review Officer.

Lodging a Privacy Compliant:

It's ironic that Nova Scotians can lodge privacy complaints against federal government departments and agencies and against the private sector, though they have nowhere to turn with privacy complaints against the provincial government, municipalities or local public bodies such as universities, hospitals and school boards.

I have already suggested that Nova Scotia should consider passing its own private sector legislation sensitive to the needs of all Nova Scotians to complement the Personal Information Protection and Electronic Documents Act (PIPEDA). A Nova Scotian version would bring privacy protection to those who slip through PIPEDA and FOIPOP, such as individuals whose personal information is under the custody or control of non-profit organizations. Also employees of non-federally regulated private sector businesses, do not have legal right of access to their own personnel file. There must be personal information protection and access for such individuals. Both British Columbia and Alberta have passed their own private sector legislation to address these issues.

Personal Health Information:

Alberta, Saskatchewan, Manitoba and Ontario have adopted legislation specifically designed to lay down the rules for the collection, use and disclosure of personal health information. It's apparent that this responds to citizens concerns for their personal health information.

I hope that this government is considering such legislation.

Social Insurance Numbers:

Complaints and inquiries to the Review Office about requests for Social Insurance Numbers are increasing. Individuals are becoming more wary about providing their SINs because they have learned that they can be used to steal an individual's identity and use it for bank loans and the like. I received many complaints and inquiries. Some landlords routinely ask for SINs when renting apartments. When I call them to ask why they needed the SIN, I am invariably told that it was found to be a convenient way to confirm the individuals' background. However, they admitted they could do that without the SIN and I have been assured by those I contacted that they would stop asking for it.

I received calls from people wishing to volunteer to help out in schools and were told a necessary background check required the volunteers' SINs. When they refused the schools said they had no option but to turn them away. The Review Office was following up on this as this annual report was being prepared.

While there is no law against asking for SINs the federal government and the federal Privacy Commissioner have warned people not to ask for SINs unless the law specifically allows it and not to provide the number when asked. The Privacy Commissioner's website reads:

While recognizing that some private-sector organizations are required by law to request customers' or employees' SINs, we remain opposed in principle to the practice of requesting the SIN for general purposes of identification. We recommend that no private sector organization request the SIN from a customer, and that no customer give the SIN to a private-sector organization, unless the organization is required by law to request it.

No private-sector organization is legally authorized to request customers' SINs for purposes other than income reporting.

The Media:

It is disappointing that the media use FOIPOP so infrequently. The statistics at the back of this Report will show that of 1070 applications received by public bodies in 2004 only 33 were filed by journalists, less than half the number it filed in 2002. Only 5% of the requests for review came from the media. It is somewhat surprising since the media is in the forefront, as it should be, demanding open and accountable government.

I'm aware that some newsrooms find the fees a deterrent.

The Legislature:

In all of my annual reports I have pressed to have the Review Officer appointed as an officer of the Legislature reporting to the Speaker. This is common among other information and privacy commissioners throughout the country. In my view, it's a matter of accountability. I would welcome annual opportunities to appear before a legislative committee to answer their questions. I'm grateful to this administration for requiring the Review Officer to table an Annual Report in the Legislature. The tabling should be followed by an appearance of the Review Officer before the House.

Staff Complement:

The FOIPOP Review Office has worked with minimal staff, beginning with the Review Officer alone, then gradually moving to two including the Review Officer and presently to three. This complement does not meet the requirements of the Office today. Given the size of our operating budget I would hope that citizens would conclude they are getting a bargain. But the demands of the Office cannot be met in a timely manner with the staff provided.

The Legislature should also consider providing the Review Officer with the power to delegate the writing of reviews to another member of the staff. This is the practice in other jurisdictions. In Nova Scotia no reports can be issued in the Review Officer's absence. Some unexpected absences in the past twelve months resulted in considerable delays in resolving appeals.

RECOMMENDED CHANGES TO THE LEGISLATION

In my 2002 Annual Report I offered 17 recommendations for changes in the legislation. (Our past annual reports can be found on our website at www.foipop.ns.ca). I repeated some of them in my 2003 annual report.

Privacy Mandate:

The need for a legislative mandate for the Review Office to investigate Privacy complaints is addressed above.

FEES:

I was encouraged when the government tabled in the legislature during its spring session a bill to reduce the new fees imposed in 2002, but disappointed when the bill did not proceed. I trust the legislature will follow through and approve a fee reduction.

I spoke recently to a journalism class in Halifax and encouraged students to consider FOIPOP a useful tool of their trade. But it was clear that to use it they would need the support of a profitable media organization.

Frivolous or Vexatious Applications:

There has been some discussion among Information and Privacy Commissions about the desirability of amendments to the Acts to allow for the refusal of applications which could be described as frivolous and vexatious. While such abuses are rare they can be very disruptive for government offices as well as for the Review Office. Some Provinces have already dealt with the issue. In Quebec the law allows

the Commission to authorize, on request, a public body to disregard requests that are “obviously improper because of their repetitious or systematic nature”. Other Canadian jurisdictions also have such clauses in their legislation. In all cases, any decision by a public body to declare an application frivolous and vexatious is subject to the approval of the Information and Privacy Commissioner.

I think it is essential, to preserve the integrity of the FOIPOP Act, that the Review Officer have the power to approve or reject a public body’s decision to declare an application frivolous.

Other Recommendations:

- Provide the Review Officer with the power to delegate to a staff member the power to make findings and write review reports.
- Provide the Review Officer with the power to delegate to staff the right to review all documents related to the FOIPOP. This request is provoked by a suggestion from a local public body that staff of this Office has no legislated right to review documents. Such a view would paralyze our successful mediation process.
- Require public bodies to consult with the Review Office when creating new policies related to the FOIPOP Act.
- Require those drawing up legislative changes to the Act to consult with the Review Office.
- Provide the Review Officer with a mandate to educate the public on their access and privacy rights.

ACTIVITIES OF THE REVIEW OFFICER IN 2004

In January and again in October, I spoke on privacy at the Dalhousie Law School.

In March, I spent time with King’s College Journalism students explaining the FOIPOP Act.

In May, I attended the annual meeting of the federal, provincial and territorial Information and Privacy Commissioners in Victoria.

In October and November, I and Susan Woolway, the Office’s mediator/investigator, participated in information sessions, with the Justice Department’s FOIPOP Administrator’s Office, in Port Hawkesbury, Wolfville and Halifax.

In December, along with the Information and Privacy Commissioners of British Columbia and Ontario and the federal Information Commissioner, I attended the annual meeting of the Council on Government Ethics Laws as part of the Canadian access to information contingent to the international conference in San Francisco. I took part in a panel discussion on the role of the head of a small freedom of information agency.

I am participating in a project supported by the Canadian Institute for Health Research studying the personal privacy implications in health research. The project is led by Elaine Gibson of the Health Law Institute at Dalhousie University.

MEDIATION

In the last year 43% of requests for review were settled in whole or in part through mediation and 16% were screened out during the intake process. The statistics show that alternate dispute resolution methods are working well at the Review Office.

In past year emphasis has been placed on mediation training for FOIPOP administrators. The Office was directly involved in the planning and presentation of 3 public training sessions in the Fall of 2004 which involved a number of sessions on mediation techniques and process.

Most mediations at the Review Office continue to be carried out over the phone but increasingly the office meeting room is being used for mediation talks between the parties and the mediator.

A number of requests for review have been settled by means of an advisory letter from the mediator providing an opinion on the severances made by the public body and explaining what the Review Officer had done in past similar cases.

The Office has noticed a growing trust and appreciation of the process by most public bodies. On the rare occasion when a public body does not wish to participate in the mediation process the file is investigated by the mediator and then forwarded directly to the Review Officer for a formal review. The mediation process remains a voluntary although encouraged settlement process.

SUMMARIES OF SELECTED MEDIATIONS

FI-03-56 Record Search

This review between the Human Rights Commission and the applicant settled after the mediator engaged in a number of conversations with the Commission. After making inquiries as to why there appeared to be a paucity of records on the issue which concerned the applicant, the mediator asked for a written confirmation that all records had been identified to the applicant. The Commission provided the confirmation and agreed it could be given to the applicant.

The applicant was satisfied and agreed to withdraw his request for review.

FI-04-04 Explanation of Harm

The applicant was satisfied to withdraw her request for review after a meeting was arranged between herself and officials with the NS Liquor Corporation. At the meeting the applicant received a more complete explanation of why the Liquor Corporation believed there was a reasonable possibility of harm should certain records be disclosed. The applicant was satisfied with this explanation and more fully understood the public body's position.

FI-04-05 Fee Estimate Meeting

The applicant was a member of the media and had sent in a request for a large number of records dealing with systemic issues of racial discrimination within government. The applicant wanted to know what progress had been made in the past number of years to deal with the issue.

The applicant and the FOIPOP administrator for Justice, the public body involved, managed between themselves to narrow the scope of the request. However the applicant was unhappy with the size of the fee estimate and asked for a review. The mediator set up a meeting at the Review Office between the parties and the mediator. During that meeting further focusing on the issue and on the records of most concern to the applicant resulted in the FOIPOP Administrator agreeing to conduct a second search for specific records. This was accomplished in a relatively short period of time and the records were disclosed to the applicant free of charge.

FI-04-26 Third Party Information

This review involved records containing a large amount of third party personal information. It was one of the third parties who asked for a review of the decision of the Department of Justice to disclose some of that information. The mediator had a number of telephone conversations with the applicant, the third party and the FOIPOP administrator in an attempt to understand what was at the heart of the disagreement between the applicant and the third party.

Eventually the mediator invited the third party to meet with her and review the records which contained her personal information and which the Department proposed releasing in part. The third party did that and after further discussions and with a better understanding of the process the third party withdrew her request for review.

SUMMARIES OF SELECTED WRITTEN REVIEWS

FI-04-25 (Solicitor-Client Privilege)

An Applicant wanted copies of all records concerning a dispute he was having with staff responsible for the administration of the Maintenance Enforcement Program (the MEP). The Department of Justice denied some records in part and entirely withheld others. In its decision letter the Department referred the Applicant to Section 4(A)(2) of the FOIPOP Act which lists legislation, such as the Maintenance Enforcement Act, that prevails over the FOIPOP Act.

The remainder of the records which were not in the custody or under the control of the MEP, or parts thereof, were denied under Section 14(1) (advice) and Section 16 (solicitor-client privilege).

On records where section 16 was cited the Department of Justice withheld the entire record. The Department stated that such a record cannot be severed because to do so would mean privilege is waived on the entire record.

The Review Officer was satisfied that section 4(A)(2)(j) makes clear that the maintenance enforcement files in the custody of the MEP are not subject to the FOIPOP Act. He also concluded that the records and parts denied under s.14(1) did contain advice to a public body.

However, after considering recent Federal Court of Appeal cases* on the interpretation of solicitor-client privilege in access to information requests, the Review Officer recommended that the Department of Justice sever the records and provide general identifying information to the Applicant for each record denied in its entirety under section 16. The Review Officer reasoned that a public body cannot be said to have waived solicitor-client privilege on an entire record if it disclosed a part on which privilege did not apply or did not need to apply. In other words, severing records which may be protected under section 16 does not amount to a waiver of that privilege.

The Department of Justice did not accept the Review Officer's recommendations.

* *Sheldon Blank & Gateway Industries Ltd. v Canada (Minister of the Environment)* 2001 FCA 374; *Stevens v. Canada (Privy Council)*, FCA 161 D.L.R. (4th)

FI-04-15 (Unreasonable Invasion of Privacy)

An Applicant asked for the names of those on the current list of people who have certificates of qualification for the construction electrician trade in Nova Scotia. The Department of Education claimed the records contained personal information and were exempt from disclosure under section 20(1). According to section 45(2) the burden of proof is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

The Applicant argued that the requested information fell under section 20(4)(h) and that disclosing the names would not be an unreasonable invasion of privacy. Section 20(4)(h) reads:

20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(h) the disclosure reveals details of a licence, permit, or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit.

The Applicant also cited sections of the Apprenticeship and Trades Qualifications Act (Apprenticeship Act) to support his assertion that "certificates of qualification" are discretionary benefits.

The Review Officer followed the steps set out by Mr. Justice Moir to determine if s.20 and any of its sub-sections apply (*Cyril House and 1444900 Canada Inc. (Abacus Security Consultants and Investigators)* [2000] unreported S.H. 160555 (N.S.S.C.)).

The Review Officer concluded that a certificate of qualification is a licence because it grants individuals permission to engage in electrical construction. The Review Officer was satisfied that disclosing the names of the certificate holders would not be an unreasonable invasion of their privacy in accordance with s.20(4)(h).

The Review Officer recommended that the Department disclose to the Applicant the names of the current certificate holders.

Note: Department of Education did not accept the Review Officer's recommendations. The Applicant has appealed to the Nova Scotia Supreme Court and in an oral decision the Court confirmed the list of names should be released. (Written decision to follow.)

FI-03-50 (Peer Review)

The Applicant, the parent of a child who died at the IWK, asked for copies of records related to the death. The IWK provided the Applicant with some records but denied the Mortality and Nursing Review forms and the minutes of the "Children's Services Mortality Committee" under section 19(D) (peer review).

The Review Officer stated that there are a number of constituent parts to section 19(D) which must be met in order for a hospital to successfully claim an exemption:

The documents in dispute must:

- be a record of information;
- that was used in the course of;
- any study, research or program carried on by or for the hospital or any committee of the hospital;
- for the purpose of education or improvement in medical care or practice.

In this case the Review Officer was satisfied that the evidence showed that the documents were records of information used by a committee for the purpose of improving medical care or practice. The Terms of Reference of the "Children's Services Mortality Committee" stated that "this is a medical committee with nursing representation, which provides a mechanism for detailed review of events leading up to and associated with deaths occurring at the IWK, brought to the IWK, or of patients recently discharged by the IWK." The committee is described as "a health centre committee established for the purpose of quality assurance and specifically for the purpose of studying or evaluating the process of medical or hospital care or practice at the IWK Health Centre." The Review Officer concluded that the committee meetings are part of a "program" established by the IWK to review medical care on a regular basis.

The Review Officer was satisfied that the records met the requirements of section 19(D) and that the IWK had properly used its discretion to withhold them.

FI-04-02 (Harm to a Third Party)

The Applicant asked the Nova Scotia Gaming Corporation (NSGC) for:

- a list of every business in Nova Scotia licensed to operate a VLT during the year ended March 31, 2003;
- the number of VLTs operated by each business in that year; and
- the VLT revenues earned per business during that fiscal year.

The NSGC provided the Applicant with the list of businesses operating VLTs and the number of VLTs in each business, but withheld the individual VLT revenues. NSGC stated that disclosing individual VLT revenues would be an unreasonable invasion of the personal privacy of the third parties as cited in section 20 of the Act.

During the review process, the Review Officer advised the NSGC that it should have considered section 21, a mandatory exemption, which protects third parties from the disclosure of their confidential financial information under specific circumstances. The Review Officer decided that the financial information of the retail outlets that have VLTs, does not reveal the personal information of an identifiable individual. Thus, section 20 does not apply.

Section 21 is designed specifically to protect third parties (businesses) from the disclosure of their financial information if:

- the information contains financial or commercial information of the third party;
- the information was supplied by the third party to the public body, implicitly or explicitly, in confidence;
- and

- the disclosure could “reasonably be expected” to “harm significantly” the competitive position of the third party or result in “undue financial loss or gain to any person or organization.”

If one of these conditions does not apply the exemption cannot stand.

The NSGC argued that the individual revenues were provided in confidence and disclosing them would do significant harm to the interests of those whose revenues were disclosed.

The Review Officer was satisfied that the information in dispute contained the financial information of the third parties which was provided in confidence. However, he concluded that NSGC had not provided evidence of a “reasonable expectation” that disclosure would result in “undue financial loss or gain to any person or organization.” He indicated that a public body can provide examples to the Review Officer, based on the facts, of the harm that could reasonably be expected to occur if a specific piece of information is disclosed. The only example provided was that the third parties might experience financial loss if competitors were able to determine the amount of their VLT revenue and set up shop in the vicinity. However, the Review Officer was of the opinion that this possibility could be managed since would-be VLT operators would need authorization in order to do so.

The Review Officer concluded that since the third requirement of section 21 had not been met, section 21 did not apply.

The Review Officer recommended that the NSGC disclose the individual revenues. The public body did not accept the recommendation. The Applicant appealed to the Nova Scotia Supreme Court. The matter was settled before trial.

FI-04-65 (Request for Applicant's Own Personal Information)

The Applicant applied to the Halifax Regional Police (HRP) for access to an “Incident Report” about himself. The Halifax Regional Police said they would only process the application once the Applicant paid a \$25 application fee. The Applicant contended that the Incident Report contained his own personal information and that the Halifax Regional Police should provide him with a copy without an application fee. He stated that in accordance with section 471(4) of Part XX of the Municipal Government Act (the MGA) the HRP must provide him with a copy of his own personal information without an application fee.

471(4) No fee shall be charged for a request for an applicant's own personal information.

The Review Officer examined the record and concluded that since the Incident Report is a narrative about an incident which centers on the applicant and identifies the applicant, the information is clearly about him. Thus, that particular report did contain the Applicant's personal information. As such the HRP cannot charge an application fee for the disclosure of this report to the Applicant.

The Review Officer recommended that the Halifax Regional Police disclose a copy of the Incident Report to the Applicant without the necessity of an application fee. The Review Officer recommended that the Report be severed of the names of those who provided witness statements.

The HRP did not follow the Review Officer's recommendations.

SUMMARIES OF 2004 NOVA SCOTIA FOIPOP COURT CASES

There were two Supreme Court of Nova Scotia decisions this year which considered appeals under the FOIPOP Act. Both decisions analyzed section 21 - the third party business information exemption. These decisions mark the first time section 21 has been considered in detail by the Nova Scotia Courts since the 1997 decision of Atlantic Highways Corp. (Re) N.S.J. No. 238 (N.S.S.C.).

With this trio of section 21 decisions it is now clear what our courts expect for a section 21 exemption to stand. The emphasis is on the evidence the third party or the government must present to meet the harm test contained in the third part of the three part test set out in section 21.

The new section 21 decisions are:

Fuller v. R. et al. v. Sobeys, 2004 NSSC 86

In a decision released April 29, 2004 the Supreme Court of Nova Scotia concluded that gross and incremental payroll information supplied by third party Sobeys to the NS Office of Economic Development (OED) had to be disclosed. The case arose out of a request by the applicant for all records relating to a payroll rebate granted to Sobeys Group Inc. for the period August 2001 to the date of the application.

As background the Province of Nova Scotia provided Sobeys with a performance-based incentive in the form of a payroll rebate. The Province offered these payroll rebates to attract new businesses to the Province and to help grow existing businesses.

While the case is important for its section 21 analysis, it also dealt with whether a verification audit done for the Province should be considered advice and therefore exempt under section 14. (Court agreed with the Review Officer and found that it was advice) And whether the disclosure of the names of company officers who had signed letters would be an unreasonable invasion of privacy under section 20. (Court again agreed with Review Officer and said that it would be.) However, it is the decision on the s. 21 payroll records which offers the most guidance for handling applications for disclosure of third party business records in the custody of a public body.

Section 21 is a three part test. Mr. Justice Pickup found that OED had established that the records contained commercial or financial information that had been supplied in confidence. Thus parts one and two of the test had been met. However Mr. Justice Pickup also concluded there was insufficient evidence that disclosure would harm the competitive position of Sobey's. Harm to the third party is a component of the third part of the section 21 test.

The Court quoted from *Atlantic Highways* and noted that the evidence required to prove harm has to be "more than the possibility of some loss" and from *Lavigne vs. Canada (Commissioner of Official Languages)* 2002 S.C.C. 53 quoted "there must be a clear and direct connection between the disclosure of specific information and the injury that is alleged".

In reviewing these principles, Mr. Justice Pickup noted that the following factors influenced his decision:

- The only evidence of any harm that might come to the third party, Sobeys, came from the NS government.
- In assessing that evidence the Court observed that a provincial official did not have the "necessary corporate knowledge" to claim that disclosure of the information would allow for the average salary calculation for Sobey's Head Office employees and the potential recruitment of them.
- The government had asked the court to "infer" that disclosure could cause harm, but it could supply no direct evidence to support that contention.
- Sobey's did not provide any evidence of harm.

The Court confirmed the conclusions reached by the Review Officer. The decision points out the importance of having evidence which clearly and directly addresses the "harm" that a third party could reasonably expect should its business information be disclosed. If the evidence does not support the third party's claim of harm then the exemption will not stand.

In this case the Court was clear that the evidence did not support the third part of section 21 and the exemption failed.

Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health, 2004 NSSC 054

This decision was released March 23, 2004. This case is different from Fuller in that here it was the third party who appealed the decision of the Department of Health (DOH) to disclose to an applicant information which the third party believed should be protected under section 21.

The third party was Shannex Health Care Management. Shannex is in the business of operating nursing homes in the province. It operates 5 nursing homes and receives funding from DOH based on budget requirements and a per diem rate for beds. The FOIPOP applicant applied to DOH for records consisting of budgets, plans, and materials used in determining per diem rates for all provincial nursing homes in the previous year.

Shannex objected to the disclosure of any financial information in respect to the 5 nursing homes it operates.

Notwithstanding the objections from Shannex, DOH made a decision to disclose the requested information. Shannex appealed this decision to the Review Office. The Review Office agreed with the decision made by DOH and recommended the records be disclosed. Shannex appealed to the Nova Scotia Supreme Court.

The issue was whether section 21 applies to the records or not. If it does apply the records cannot be released. Once again the Court set out the three part test in section 21 and analyzed each branch. The Court found that the information sought was financial and commercial information belonging to the appellant, the third party. Therefore the first part of the test was met.

The Court considered the evidence and found that the second part of the test had been met, the financial information had been supplied to DOH by the appellant implicitly in confidence.

In describing what is needed to meet the third part of the test the Court said:

“The threshold to meet the degree of probability of the categories of harm under Section 21(1)(c) is not low and must be at least a ‘logically and rationally based threshold of speculative proof,’ not based on mere speculation without basis.”

DOH took the position the Appellant’s evidence as to “harm” contemplated by section 21 was merely speculative and did not meet the required burden. The Court agreed. It found that the Shannex had not put forward any “detailed and convincing “ evidence as to the harm it would suffer should the information be disclosed.

In a strong endorsement of the purpose of the FOIPOP Act, Mr. Justice Edwards said:

“Furthermore, in the context of a business heavily subsidized by public tax dollars, the public has the right to know how those dollars are being spent. Is the public getting value for the dollar? Who is benefitting and to what extent? The answers to these questions are the essence of accountability. The recipients of such subsidies should not expect the same degree of confidentiality that pertains in a competitive unsubsidized market. There must be detailed and convincing evidence to justify non disclosure. In this case, the Department of Health cannot be ‘fully accountable to the public’ unless the budget summaries are disclosed.”

REVIEW OFFICE FINANCIAL INFORMATION

TRAVEL COSTS

The Review Officer

- Annual Meeting of federal, provincial and territorial information & privacy commissioners - Victoria, B.C. - May/04:

Air fare:	\$962.80
Registration fee:	\$275.00
Hotel:	\$487.89
Meals & airport transportation:	\$247.00

- Information & Privacy Conference – University of Alberta, Edmonton – June/04

Air fare:	\$840.00
Conference fee:	\$435.00
Hotel:	\$436.80
Meals & airport transportation:	\$254.50

- Access & privacy information session for FOIPOP Administrators – Port Hawkesbury – Oct./04

Mileage – use of own car:	\$200.64
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- Access & privacy information session for FOIPOP Administrators – Wolfville – Nov./04
 Car rental: \$242.65
- Annual meeting of Council on Government Ethics Law – San Francisco – Dec./04
 Air fare: \$493.98
 Hotel (4 nights): \$497.24
 Meals & airport transportation: \$310.61
 Registration fee: \$616.28

Mediator/Investigator

- Information and Privacy Conference – University of Alberta, - Edmonton – June/04
 Air fare: \$840.00
 Conference fee: \$435.00
 Hotel: \$436.80
 Meals and Airport transportation \$254.50
- Access and Privacy Information Session for FOIPOP Administrators Port Hawkesbury - Oct./04
 Travel: \$249.90
 Accommodation: \$ 82.00
 Meals: \$ 30.50

Case Review Analyst.

- Access & privacy information session for FOIPOP Administrators – Wolfville – Nov./04
 Mileage – use of own car: \$ 53.04

The FOIPOP Review Office operates on a budget of \$239,000.00.

A staff of two permanent employees, a mediator/investigator and a Case Review Analyst, work with the Review Officer, an order-in-council appointment compensated at a rate of \$150.00 a day for days worked.

STAFF:

Reviews require the skillful input of the two permanent staff members. Many Review reports benefit from energetic and often lively discussions within the Office. The Office could not function successfully, as it does, without the active interest and participation of everyone in support of the purposes of the FOIPOP Act.

Review Officer	Darce Fardy
Mediator/Investigator	Susan Woolway
Case Review Analyst*	Wendy Johnson

** For the last part of 2003 and most of 2004 Crystal Taylor was seconded from the FOIPOP Co-ordinator's office at the Department of Justice to act as Case Review Analyst. The Review Office is grateful to the Co-ordinator for allowing the secondment and to Crystal for her energetic and cheerful contribution to the Review Office.*

STATISTICS:

TABLE 1: ANNUAL REQUESTS FOR REVIEW OPENED

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

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

CHART 1: Annual Reviews

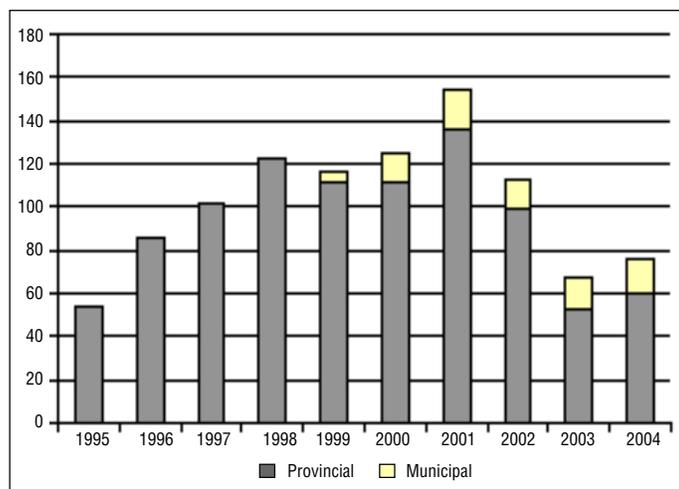


TABLE 2: 2004 REVIEWS OPENED BY APPLICANT GROUP

Media	General Public	Political	Interest Groups	Organizations	Other Public Body	Total
4	45	9	0	18	0	76

CHART 2: 2004 Reviews Opened by Applicant Group

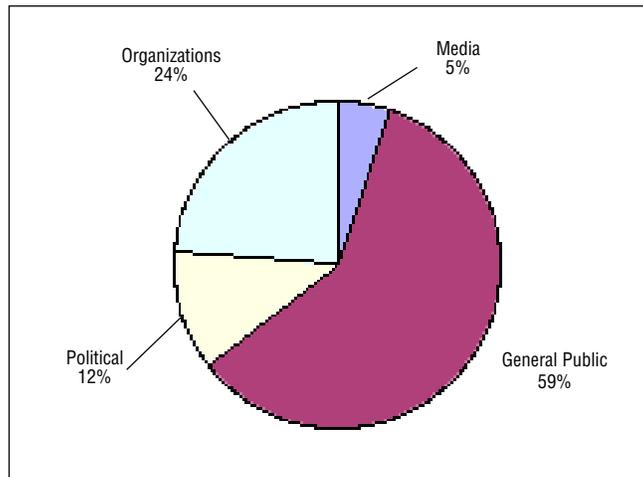


CHART 3: 2004 Reviews by Act

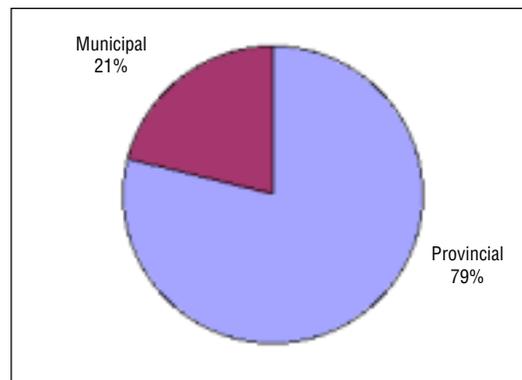


CHART 4: 2004 Reviews by Information Requested

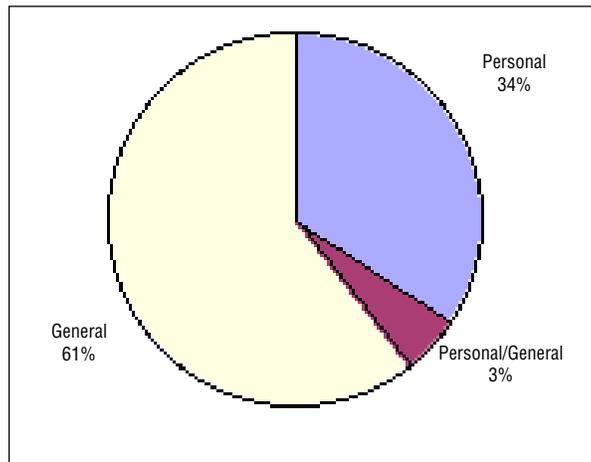


TABLE 3: RESOLUTION OF FILES CLOSED IN 2004

Resolved by Review Report	Resolved through Mediation	Resolved through Partial Mediation and by Review Report	Withdrawn or Closed	Screened Out
41% (31)	29% (22)	14% (11)	4% (3)	12% (9)

NOTE: In total, the Review Officer resolved 55% (42) of requests for Review in writing a Review Report. The Review Office closed 76 files in 2004. 14 files opened in 2004 have been carried over into 2005. 14 files opened in 2003 were resolved in 2004.

TABLE 4: 2004 CONCLUSIONS OF THE REVIEW OFFICER

Agree with Public Body	Agree in-part with Public Body	Disagree with Public Body
46% (35)	20% (15)	34% (26)

TABLE 5: 2004 PUBLIC BODY RESPONSES TO THE REVIEW OFFICER'S RECOMMENDATIONS

Recommendations Accepted	Partial Acceptance	Recommendations Rejected	Response Outstanding
56% (42)	13% (10)	27% (21)	4% (3)

TABLE 6: PUBLIC BODY FOIPOP APPLICATIONS

Year	Academia	Media	General Public	Political	Interest Groups	Organizations	Other Public Body	Total
2002	8	105	485	272	27	60	38	995
2003	6	55	338	139	6	160	23	727
2004	2	33	470	256	27	252	30	1070

NOTE: Table 6 statistics were compiled by the Department of Justice. For 2002-2003, the total number of applications received includes departments, agencies, boards, commissions, universities and school boards. Statistics from the municipalities and district health authorities are not included. For 2004, the total number of applications received includes departments, agencies, boards, commissions, universities, school boards, municipalities, district health authorities and police.

TABLE 7: 2004 PUBLIC BODY APPLICATIONS AND REVIEWS

<i>Provincial Act - Government Departments/Agencies/Boards and Commissions</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Aboriginal Affairs	0	0
Agriculture & Fisheries	6	0
Archives & Records Management	0	0
Colchester County Children's Aid Society	1	1
Communications Nova Scotia	1	0
Community Services	122	6
Department of Energy	5	0
Economic Development	22	1
Education	31	3
Emergency Measures Organization	0	0
Environment & Labour (Includes Alcohol and Gaming Authority, Fire Marshall, Occupational Health and Safety)	325	9
Executive Council	7	0
Finance	15	3
Halifax-Dartmouth Bridge Commission	0	0
Health	71	7
Human Rights Commission	4	0
InNOVACorp	0	0
Insurance Review Board	1	0
Intergovernmental Affairs	3	1
Justice	45	7
Natural Resources	21	3
Nova Scotia Business Inc.	17	0
Nova Scotia Gaming Corporation	6	1
Nova Scotia Legal Aid	0	0
Nova Scotia Community College	0	0
Nova Scotia Film Development Corporation	1	0
Nova Scotia Liquor Corporation	18	2
Nova Scotia Resources	0	0
Office of Health Promotion	9	1
Police Commission	1	0
Premier's Office	3	0
Public Service Commission	6	1
Public Prosecution Service	14	2
Securities Commission	0	0
Service Nova Scotia & Municipal Relations	20	2
Sport & Recreation Commission	1	0
Tourism & Culture	6	0

Trade Centre Ltd.	4	0
Transportation & Public Works	19	0
Treasury & Policy Board	4	0
Utility & Review Board	0	0
Waterfront Development	3	0
Workers' Compensation Board	9	1
Workers' Compensation Appeals Tribunal	0	0
<i>Provincial Act - Universities/School Boards</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Acadia University	0	1
Annapolis Valley Regional School Board	2	0
Atlantic School of Theology	0	0
Cape Breton-Victoria Regional School Board	0	0
Chignecto-Central Regional School Board	3	0
Conseil Scolaire Acadien Provincial	0	0
Dalhousie University	10	1
Halifax Regional School Board	4	2
Mount Saint Vincent University	8	0
Nova Scotia Agricultural College	0	0
Nova Scotia College of Art & Design	0	0
Saint Mary's University	1	0
South Shore District School Board	1	0
Southwest Regional School Board	0	1
St. Francis Xavier University	2	0
Strait Regional School Board	1	0
Tri-County School Board	0	0
Universite Sainte-Anne	0	0
University College of Cape Breton	3	0
University of King's College	0	0
<i>Provincial Act - District Health Authorities</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Annapolis Valley District Health Authority	0	0
Cape Breton District Health Authority	2	0
Capital District Health Authority	12	4
Colchester East Hants Health Authority	0	0
Cumberland Health Authority	2	0
Guysborough Antigonish Strait Health Authority	0	0
IWK Health Centre	1	0
Pictou County District Health Authority	0	0

PUBLIC BODY	APPLICATIONS	REVIEWS
South Shore District Health Authority	1	0
Southwest Nova District Health Authority	2	0
<i>Municipal Act - Commissions/Municipalities/Towns</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Cape Breton Regional Municipality	1	1
Halifax Regional Municipality	30	5
Municipality of the County of Annapolis	1	0
Municipality of the County of Antigonish	0	0
Municipality of the District of Argyle	0	0
Municipality of the District of Barrington	0	0
Municipality of the District of Chester	0	0
Municipality of the County of Inverness	4	0
Municipality of the County of Kings	1	0
Municipality of the County of Pictou	0	0
Municipality of the County of Richmond	1	1
Municipality of the County of Victoria	0	0
Municipality of the District of Clare	0	0
Municipality of the District of Colchester	0	0
Municipality of the District of Cumberland	0	0
Municipality of the District of Digby	0	0
Municipality of the District of Guysborough	0	0
Municipality of the District of Hants East	1	1
Municipality of the District of Lunenburg	4	0
Municipality of the District of Shelburne	0	0
Municipality of the District of St. Mary's	0	0
Municipality of the District of West Hants	0	0
Municipality of the District of Yarmouth	0	0
Region of Queens Municipality	0	0
Town of Amherst	2	0
Town of Annapolis Royal	0	0
Town of Antigonish	0	0
Town of Berwick	0	0
Town of Bridgetown	0	0
Town of Bridgewater	0	0
Town of Canso	1	0
Town of Clark's Harbour	0	0
Town of Digby	0	0
Town of Hantsport	0	0
Town of Kentville	1	0
Town of Lockeport	0	0

PUBLIC BODY	APPLICATIONS	REVIEWS
Town of Lunenburg	0	0
Town of Mahone Bay	0	0
Town of Middleton	0	0
Town of Mulgrave	0	0
Town of New Glasgow	0	0
Town of Oxford	0	0
Town of Parrsboro	0	0
Town of Pictou	0	0
Town of Port Hawkesbury	0	0
Town of Shelburne	0	0
Town of Springhill	1	0
Town of Stellarton	0	0
Town of Stewiacke	0	0
Town of Trenton	1	0
Town of Truro	0	0
Town of Westville	0	0
Town of Windsor	0	0
Town of Wolfville	1	0
Town of Yarmouth	1	0
<i>Municipal Act - Police</i>		
PUBLIC BODY	APPLICATIONS	REVIEWS
Amherst Police	2	0
Annapolis Royal Police	0	0
Bridgewater Police	0	0
Cape Breton Regional Police	90	1
Halifax Regional Police	42	2
Kentville Police	0	0
Middleton Police	0	0
New Glasgow	4	2
Springhill Police	1	1
Stellarton Police	0	0
Trenton Police	0	0
Truro Police	4	1
Westville Police	0	0